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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

CALIFORNIA VALLEY MIWOK TRIBE, a federally-recognized Indian tribe, THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR, ANGELICA PAULK, and TRISTIAN WALLACE,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as U.S. Secretary of Interior, et al.,

Defendants

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants

Case No. 2:16-01345 WBS CKD

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Judge: Hon. William B. Shubb
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In his December 30, 2015 decision (2015 Decision), Assistant Secretary – Indian Affairs Kevin Washburn determined that the United States Bureau of Indian Affairs (BIA) does not recognize a government for the California Valley Miwok Tribe (Tribe) based on Resolution #GC-98-01 (the 1998 Resolution), which was signed by just two people. The 2015 Decision found that Silvia Burley and her three family members — who claim to lead a tribal council established under the 1998 Resolution — do not represent the Tribe. Just like BIA decisions issued in 2004 and 2005, the 2015 Decision informed the Burleys that the BIA could only recognize a Tribal government established through a process that reflected the involvement of the whole Tribal community. The 2015 Decision reasonably identified that community as the lineal descendants of the Miwok Indians for whom the Sheep Ranch Rancheria was established in 1916 (the Eligible Groups).[1]

In their motion for summary judgment, the Burleys do not show that the Assistant Secretary's identification of the Eligible Groups was arbitrary or capricious. They do not dispute the evidence in the record proving there are several hundred members of the Tribal community who meet the Eligible Group criteria. They do not claim those Eligible Group members participated in adopting the 1998 Resolution. Instead, the Burleys argue that the BIA once recognized a tribal council based on the 1998 Resolution and is now barred from ever changing that position.

The Burleys' arguments all fail. *First*, the BIA dealt with the Burleys' tribal council, which is based on the 1998 Resolution, for several years, but it denied recognition of the council in 2004 and reaffirmed its position in 2005. The Burleys unsuccessfully challenged the BIA's 2004 and 2005 decisions in *Miwok I* and *Miwok II*. *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. Mar. 31, 2006) (*Miwok I*), *affirmed, California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (*Miwok II*). The Burleys are precluded from relitigating in this court their failed challenge to the BIA's denial of recognition, which occurred

[1] The Tribe was formerly known as the Sheep Ranch Rancheria of Me-wuk Indians.

more than a decade ago. Even if the issue were not already decided, the BIA is free to deny recognition of a tribal government at any time it discovers the government does not reflect the will of the tribal community.

Second, the six-year statute of limitations for claims against the United States did not bar the 2015 Decision from determining that the 1998 Resolution is an insufficient basis for a Tribal government. The statute of limitations applies to *claims* filed in federal court, not to arguments presented to federal agency officials or decisions made by those officials. The statute of limitations also did not bar the court's decision in *Miwok III*, which led to the 2015 Decision. *Miwok III* correctly ruled that the Tribe's lawsuit in that case challenged an entirely new decision issued in August 2011, not the BIA's decision to deal with the Burleys prior to 2004. In any case, the Burleys cannot attack the *Miwok III* decision in this court.

Third, the findings in the 2015 Decision did not exceed the Assistant Secretary's jurisdiction, as the Burleys claim. By identifying the Eligible Groups, the 2015 Decision defined the "greater tribal community" that is entitled to participate in Tribal organization, and thus resolved the central issue raised by the Burleys' appeal to the Interior Board of Indian Appeals (IBIA), which the IBIA referred to the Assistant Secretary for resolution in 2010. Because the Eligible Groups did not participate in adopting the 1998 Resolution, the 2015 Decision also concluded that the BIA would not recognize a government based on the 1998 Resolution. This finding was well within the Assistant Secretary's plenary authority over Indian affairs and was consistent with the BIA's 2004 and 2005 decisions, which the IBIA recognized as having already finally decided that the BIA did not recognize the Burleys' Tribal government.

Fourth, the Burleys' sole effort to explain why participation in Tribal organization should be limited to five people relies on the *Tillie Hardwick* settlement agreement, which applies only to terminated tribes that participated in the *Hardwick* case and chose to settle on those terms. This Tribe has never been terminated and was not a party to the *Hardwick* case or the settlement.

Fifth, the Burleys' argument that the 1998 Resolution was intended to establish a full-fledged Tribal government, rather than an interim government to manage Tribal organization, is irrelevant. Also irrelevant are the Burleys' claims about the alleged motives of Mr. Dixie and his

supporters in opposing the Burleys' government. Whatever the purpose of the 1998 Resolution, and whatever the parties' motives, the 1998 Resolution was adopted without the participation of nearly the entire Tribal community. The BIA correctly revoked any recognition of that government in 2004, and correctly maintained its position in the 2015 Decision.

Sixth, estoppel does not bar Mr. Dixie from objecting to the 1998 Resolution on the grounds that Melvin Dixie was excluded; Mr. Dixie correctly informed the BIA in 1998 that Melvin was living in Sacramento and could be contacted through Velma WhiteBear. Regardless, the 2015 Decision did not rely on Melvin's exclusion to find the 1998 Resolution invalid; it denied recognition of the 1998 Resolution because the Eligible Groups as a whole — not just Melvin — were excluded from its adoption.

The Burleys have failed to show that the 2015 Decision was arbitrary, capricious, or an abuse of discretion. Intervenors request the Court deny the Burleys' motion for summary judgment in its entirety and grant summary judgment on all claims to federal defendants and Intervenors.

II. FACTUAL AND PROCEDURAL BACKGROUND

Intervenors' motion for summary judgment (ECF No. 47) details the factual and procedural history of this case. Additional facts relevant to the arguments raised in Plaintiffs' motion for summary judgment are presented in the Argument sections below.

III. ARGUMENT

The Court reviews the Burleys' claims under the Administrative Procedure Act's deferential "arbitrary and capricious" standard of review. 5 U.S.C. § 706(2)(A). Under this standard, courts "must not substitute [their] judgment for that of the agency's, but instead must uphold the agency decision so long as the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-954 (9th Cir. 2003) (citation omitted). Deference is particularly important where (as here) the agency was exercising its judgment within

an area of specialized expertise. *See id.* at 954; *Aguayo v. Jewell*, 827 F.3d 1213, 1227 (9th Cir. 2016) (court's review of BIA decision must be "highly deferential").

A. The BIA's decision to *not* recognize the Burleys' government under the 1998 Resolution is beyond further challenge.

The Burleys' challenge to the 2015 Decision relies primarily on their claim that the BIA may not withdraw recognition of the Tribal government they purportedly established under the 1998 Resolution. But the BIA did just that in 2004. The Burleys unsuccessfully challenged the BIA's decision in *Miwok I*, and that court's final judgment precludes them from relitigating the issue here.

1. The BIA decided in 2004 to *not* recognize the Burley tribal government that was based on the 1998 Resolution.

In 1998, Yakima Dixie and Silvia Burley signed the 1998 Resolution, which purported to establish a "general council" governing body of the Tribe (General Council) and provided for appointment of a Chairperson to head that body. (2011-177.) The BIA apparently recognized Yakima Dixie as the initial Chairperson, but in April and May of 1999 Silvia Burley submitted documents to the BIA claiming she had replaced Dixie as the Chairperson of the General Council. (2011-180-181, 183.) On September 24, 1999, Burley and her daughter Rashel Reznor signed a resolution by which the General Council purportedly established, and transferred governance of the Tribe to, a "Tribal Council" (the Burley Tribal Council) with the same members and the same Chairperson as the General Council. (2011-199.) Thus, both the General Council and the Burley Tribal Council were based on the authority of the 1998 Resolution. (2011-199, 202.)

The BIA initially accepted Silvia Burley as the Chairperson of the Burley Tribal Council, which it regarded as an "interim Tribal Council" (2011-262, 356), and from 1999 through 2004 the BIA provided that Council with federal funds under the Indian Self Determination Act, Public Law 638, for the purpose of organizing the Tribe.[2] (2011-198, 289-292, 612.) *See Miwok I*, 424 F.Supp.2d at 200; *Miwok II*, 515 F.3d at 1265 n.6; *California Valley Miwok Tribe v. Jewell*,

[2] Organizing the Tribe through adoption of a written constitution was the purpose for which the Tribal Council, like the General Council, was purportedly established. (2011-202.)

5 F.Supp.3d 86, 91, 93 n.10 (D.D.C. 2013) (*Miwok III*). Burley submitted a series of proposed Tribal constitutions to the BIA, seeking to demonstrate that the Burleys had organized the Tribe. (2011-255, 261.) But the constitutions reflected the involvement of only Burley and her two adult daughters and would have limited Tribal membership to only them and their descendants (2011-261, 499-500). *See Miwok II*, 515 F.3d at 1265-1266.

The BIA rejected the Burley constitutions and, in a decision dated March 26, 2004 (2004 Decision), stated that it did not regard the Tribe as organized and only viewed Ms. Burley as a "person of authority." (2011-499.) In a separate decision dated February 11, 2005 (2005 Decision), the acting Assistant Secretary clarified that this meant the BIA "did not recognize Ms. Burley as the tribal Chairman" and "does not recognize any tribal government" for the Tribe — including, necessarily, the Burley Tribal Council or the General Council. (2011-610 – 611.) [3]

2. The Burleys' claim that the BIA must recognize the 1998 General Council is precluded by *Miwok I* and *II*.

The Burley Faction challenged the BIA's actions in federal court, claiming that, "at least since June 25, 1999, the BIA ha[d] recognized its government, its documents, and its chairperson, Silvia Burley, and that the BIA [was] now trying to reverse its position." *Miwok I*, 424 F.Supp.2d at 201. The district court dismissed the Burleys' claims and upheld the BIA's decisions. *Id.* at 203. The D.C. Circuit affirmed in *Miwok II*, 515 F.3d 1262.

a. Issue preclusion

The doctrine of issue preclusion bars a party from relitigating an issue that was finally resolved by a court of competent jurisdiction in a previous lawsuit involving the same parties, even if brought in connection with a different claim. *Montana v. United States*, 440 U.S. 147, 153 (1979); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980). In *Miwok I*, the Burleys claimed the BIA's actions were unlawful because the Burleys had already adopted a

[3] The 2005 Decision addressed Mr. Dixie's 2003 challenge to the BIA's recognition of Ms. Burley as Chairperson, finding that the 2004 Decision had rendered Mr. Dixie's challenge moot. (2011-610.) The 2005 Decision made clear that the BIA's concern lay not in choosing between Mr. Dixie and Ms. Burley as the "leader" of the Tribe under the 1998 Resolution, but in ensuring that the entire Tribal community had the opportunity to participate in Tribal organization. (2011-610.)

Tribal government, the BIA had previously recognized that government, and it could not "reverse" its position.[4] 424 F.Supp.2d at 201. The Burleys' claim necessarily relied on the 1998 Resolution, since (i) the General Council and the Burley Tribal Council were created under the authority of the 1998 Resolution (2011-178, 199), and (ii) the BIA had never recognized any *other* Tribal governing document submitted by the Burleys.

The court acknowledged that the BIA had previously dealt with the General Council and the Burley Tribal Council. *Id.* at 198-199. The court nonetheless ruled that, even when a tribe chooses to organize outside the Indian Reorganization Act procedures for Secretarial elections, its governing documents still must be "ratified by a majority vote of [the tribe's] adult members." *Id.* at 202 (quoting 25 U.S.C. § 476(a), *transferred to* 25 U.S.C. § 5123(a)). Because the Burleys could not meet that test, the court dismissed their claims. *Id.* at 203.

By upholding the 2004 and 2005 Decisions, which stated that the BIA did not recognize *any* government for the Tribe, *Miwok I* necessarily decided that the BIA was not required to recognize any Tribal government established under the 1998 Resolution, including the Burley Tribal Council and the General Council.[5] The Burleys now seek to relitigate that issue, alleging that the 2015 Decision "illegally disavowed recognition of the existing governing body of the [Tribe] that was established in 1998" and asking the Court to require recognition of the General

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[4] The *Miwok I* opinion treated the Burleys' complaint as asking the court to find both the 2004 Decision and the 2005 Decision invalid. *See* 424 F.Supp.2d at 201 n.5 (accepting, for purposes of the Burleys' challenge, that the 2004 Decision and 2005 Decision were "final agency actions" subject to challenge under the APA). If the Burleys had *not* challenged both decisions in *Miwok I*, it would be too late to do so now through a challenge to the 2015 Decision. The Burleys' failure to administratively appeal the 2004 Decision within 30 days (*see* 2011-501 – 502) rendered the Decision final for the Department of Interior, 25 C.F.R. 2.7(c), and precluded the Burleys from obtaining judicial review of the Decision. *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393-1394 (9th Cir. 1993) (citations omitted). Even if judicial review were available, challenges to federal agency action under the Administrative Procedure Act are subject to the six-year statute of limitations found in 28 U.S.C. § 2401(a). *Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 713 (9th Cir. 1991). The statute of limitations began to run on April 25, 2004, when the 2004 Decision became final (2011-499 – 501), and would have expired on April 25, 2010. *Aguayo*, *supra*, 827 F.3d at 1217.

[5] Although the *Miwok I* opinion largely focused on the Burleys' constitutions, the federal government stated in that case that its "refusal to recognize the [Burleys'] tribal constitution implicitly encompasses any and all tribal governing documents." (2011-826).

Council.[6] (First Amended Complaint, ECF No. 4, para. 1, Prayer for Relief para. 2.) But, as federal defendants explained in their motion for summary judgment before this Court (ECF No. 46, pp. 12-14), the Burleys are bound by the earlier court's decision. *United States v. Mendoza*, 464 U.S. 154, 158 (1984).

It does not matter whether the Burleys argued in *Miwok I* that the 1998 Resolution was valid, because that argument is subsumed in the issue of whether the BIA was required to recognize the Burleys' Tribal government: "[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995), *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996) (italics in original) (quoting *Yamaha Corp. of America v. United States,* 961 F.2d 245, 254 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 1078 (1993)). Moreover, this court has previously relied on *Miwok I* and *II* to determine that the Tribe did not have a recognizable governing body. *California Valley Miwok Tribe v. Kempthorne*, No. S-08-3164, *23-24 (E.D. Cal. 2009) (*in the record at* 2011-1599-1600) (dismissing action brought by Burley in the name of the Tribe).

b. Claim preclusion

Even if *Miwok I* had *not* necessarily determined the issue of whether the 1998 Resolution established a valid Tribal government, claim preclusion would prevent the Burleys from bringing a claim against the BIA in this case for denying recognition of the General Council. Claim preclusion prevents parties from raising claims that *were, or could have been*, raised in a prior action in which a court rendered a final judgment on the merits. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987).

The Burleys brought an action against the BIA in *Miwok I* for denying recognition of their Tribal government. *Miwok I*, 424 F.Supp.2d at 201 (summarizing the Burleys' complaint). The Burleys were on notice at that time that the BIA "d[id] not recognize *any* Tribal government,"

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[6] Intervenors regard the Burley Tribal Council and the General Council as equivalent for purposes of the Burleys' claims, since both councils include the same members and both depend on the 1998 Resolution for their authority. (*See* 2011-199, 202.)

necessarily including the General Council. (2005-611 (italics added).) The actions challenged in their suit included the 2004 Decision and the 2005 Decision. *See Miwok I*, 424 F.Supp.2d at 200, 201 n.5. The Burleys sought a judgment declaring that "the documents the Tribe has adopted are valid, governing documents, and that the Tribe has lawfully organized." *Id.* at 201.

Thus, the Burleys have already litigated their claim against the United States for denying recognition of their government. To the extent their complaint in *Miwok I* did not explicitly challenge the BIA's denial of recognition for the General Council, it could have done so — and that is enough. *Allen*, 449 U.S. at 94*; C.D. Anderson & Co.*, *supra*, 832 F.2d at 1100 (claim preclusion "bars all grounds for recovery which could have been asserted, *whether they were or not*") (italics added; quotation marks and citations omitted). The Burleys cannot raise a new claim now arising out of the same nucleus of common facts as their lawsuit in *Miwok I*, even if they style it as a challenge to a new federal action. *See id.* (*See* Fed. Def. MSJ, ECF No. 46, p. 15.)

B. The BIA is free to deny recognition of a Tribal government at any time.

Even if the Burleys were not precluded from relitigating the BIA's authority to deny recognition of their Tribal government, they are wrong as a matter of law. The BIA not only can, but must, withdraw recognition of a tribal government if it determines that the government was not adopted by those with a right to do so. *See Alan-Wilson v. Bureau of Indian Affairs*, 30 IBIA 241, 247-248, 1997 WL 215308 (1997) ("By letter dated August 19, 1994, the [BIA] Superintendent withdrew his recognition of Wilson's government," stating that the recognition had been "administratively in error…."). *See also Timbisha Shoshone Tribe v. U.S. Department of Interior*, 824 F.3d 807, 809-810 (9th Cir. 2016) (summarizing BIA's recognition and subsequent repudiation of several governments for the Timbisha Shoshone tribe). Recognition of a Tribal government in error, regardless of the justification, cannot convert an illegitimate power grab into a valid government. *Ransom v. Babbitt*, 69 F.Supp.2d 141, 143-45, 151-53 (D.D.C. 1999) (tribal constitution, though recognized for a time by the BIA, never established a valid tribal government because it was not ratified by a majority of the tribe's members).

C. The six-year statute of limitations for claims against the United States did not bar the 2015 Decision or the *Miwok III* decision.

The Burleys argue the 2015 Decision was arbitrary and capricious because it, and the *Miwok III* decision that led to it, were based on a "time-barred claim" that the 1998 Resolution was invalid as an organizing document.[7] (Burley MSJ, ECF No. 44-1, pp. 16, 27.) They rely on the six-year statute of limitations for claims against the United States, found at 28 U.S.C. § 2401(a). This argument fails because the statute of limitations does not apply here.

First, the statute of limitations does not apply to the 2015 Decision. It applies to "civil action[s] commenced against the United States," not to arguments made to federal agency officials or to decisions made by those officials. 28 U.S.C. § 2401(a).

Second, the Tribe's claim in *Miwok III* was not barred by the statute of limitations because that claim challenged the 2011 Decision — not the BIA's decision to deal with the General Council or the Burley Tribal Council prior to 2004. Moreover, the Burleys cannot challenge the *Miwok III* decision in this Court.

1. The statute of limitations does not apply to the 2015 Decision.

28 U.S.C. § 2401(a) provides in relevant part: "[E]very *civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Italics added.) The statute imposes a procedural requirement on claims brought *in the federal courts*. *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). On its face, the statute does not apply to decisions by federal agency officials, and the Burleys have offered no authority and no argument to explain why it would apply to the 2015 Decision. (*See* Burley MSJ at 16-27.)

The Burleys argue the 2015 Decision was "erroneous as a matter of law" because it was "based upon" the Tribe's challenge in *Miwok III* — which they also argue was time-barred. (Burley MSJ at 17.) But the 2015 Decision was not based on the Tribe's claim in *Miwok III*; it

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[7] As a threshold issue, the Burleys' argument fails because it ignores that the BIA's decisions upheld in *Miwok I* and *II* necessarily determined that the 1998 Resolution was invalid as an organizing document. *See* Part III.A.2, *ante*.

was based on the Assistant Secretary's reconsideration of all the evidence in the record in light of the court's remand order.[8] (2017-1397, 1401.) More specifically, the Assistant Secretary's conclusion that the 1998 Resolution did not create a valid Tribal government was based on his finding that it had not been adopted by a majority of the Eligible Groups: "[T]he people who approved the 1998 Resolution … are not a majority of those eligible to take part in the reorganization of the Tribe." (2017-1401.)

2. The statute of limitations did not bar the Tribe's claims in Miwok III.

Even if the 2015 Decision had been based on the Tribe's claim in *Miwok III*, it would not matter. The *Miwok III* court correctly found that the Tribe's claim in that case was *not* barred by the statute of limitations, and the Burleys cannot challenge that ruling in this Court.

The Burleys were a party to *Miwok III* and sought to dismiss the Tribe's challenge to the 2011 Decision on statute of limitations grounds, among other arguments. (2017-117.) They argued that the Tribe had challenged not the determinations made in the 2011 Decision, but other, "long-standing BIA determinations" including the BIA's recognition, in 2000, of the 1998 Resolution and General Council. (2017-118 – 119.)

The *Miwok III* court stated that the BIA had accepted the General Council in 2000 and that the Dixie faction could have challenged that decision, but that "[a]ny such challenge would have been mooted … by the Secretary's reversal in February 2005, when he held 'the [Bureau] does not recognize any tribal government.'" *California Valley Miwok Tribe v. Jewell*, 967 F.Supp.2d 84, 93 (D.D.C. Sept. 6, 2013) (*in the record at* 2017-774). The 2011 Decision "mark[ed] a 180-degree change of course [from the 2005 Decision] by once again recognizing the General Council as the Tribe's government." *Id.* Because the Tribe's challenge in *Miwok III* was to the 2011 Decision, the court ruled that the Tribe's lawsuit was timely. *Id.*

[8] *Miwok III* did not rule that the 1998 Resolution was invalid; it ruled that the 2011 Decision had improperly *assumed* that the 1998 Resolution had established a valid government and directed the Secretary to reconsider that decision in light of evidence that the 2011 Decision had ignored. 5 F.Supp.3d at 99-100.

The court's ruling was correct. The six-year statute of limitations for the Tribe's claim challenging the 2011 Decision began to run when that Decision became final for the Department of Interior — on August 31, 2011. *Aguayo, supra,* 827 F.3d at 1217. The Tribe filed its first amended complaint in *Miwok III* on October 17, 2011, less than two months later.[9] (2017-53.)

The Burleys argue the *Miwok III* decision was "erroneous" in failing to apply the statute of limitations to the Tribe's claim (Burley MSJ at 27), and that their motion to dismiss should have been granted (Burley MSJ at 31). They claim the 2005 Decision did not specifically state that the 1998 Resolution and General Council were invalid. (Burley MSJ at 30.) But, as the *Miwok III* court noted, the 2005 Decision said that the BIA "does not recognize *any* tribal government." (2017-774 (italics added.) That necessarily included the General Council.

The Burleys argue the 2011 Decision was not really a "180-degree change of course" from prior decisions in its recognition of the General Council, but this just restates their first argument, with the same result. (Burley MSJ at 30.) It is beyond dispute that, in 2005, the BIA "d[id] not recognize any tribal government," including the General Council. (2011-611.) The 2011 Decision recognized the General Council as the Tribe's government. (2011-2050.) In any case, this Court is not the proper forum for review of the *Miwok III* decision — that is the exclusive province of the D.C. Circuit Court of Appeals. 28 U.S.C. § 1294(1).

The Burleys claim they are "not 're-litigating' issues decided by the [*Miwok III* court]" because their suit "is against the AS-IA relative to his December 30, 2015 Decision." They also claim the remand order in *Miwok III* was "not final" because they were unable to appeal it to the D.C. Circuit. (Burley MSJ at 15.) Intervenors agree that the 2015 Decision is the final agency action challenged in the Burleys' current lawsuit, and that neither the 2011 Decision nor the Tribe's challenge to that decision is before this Court. As explained in Part III.C.1, *ante*, the validity of the 2015 Decision does not depend on the statute of limitations issue.

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[9] The Tribe's original complaint in *Miwok III* challenged a December 2010 decision by the Assistant Secretary that was substantially the same as the 2011 Decision. The Assistant Secretary withdrew the December 2010 decision in April 2011 (2011-1998) and replaced it with the 2011 Decision in August 2011 (2011-2049). The Tribe amended its complaint to challenge the 2011 Decision. (2017-23.)

D. The 2015 Decision was within the Assistant Secretary's authority.

The Burleys claim it was "improper and erroneous" for the 2015 Decision to decide that the General Council was "invalid at the outset," because the IBIA did not refer that issue to him. (Burley MSJ at 33.) This argument attacks a straw man. The 2015 Decision did not conclude that the General Council was invalid at the outset — in fact, it stated that, "[a]t the time of its enactment, the 1998 Resolution undoubtedly seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of reorganizing the Tribe. (2017-1401 (italics in original).) The 2015 Decision decided that the BIA will not recognize the General Council as the Tribe's government *now*. (2017-1401.)

Regardless, the 2015 Decision was correct and well within the Assistant Secretary's authority, for three reasons: (i) The Assistant Secretary exercises plenary authority over Indian affairs and was free to consider whatever issues he chose, including those outside the scope of the IBIA's referral; (ii) the IBIA did not refer the issue of the General Council's validity to the Assistant Secretary because it regarded the issue as already finally decided; and (iii) the Assistant Secretary's determination that he would not recognize the General Council followed directly from his identification of the Eligible Groups.

1. The Assistant Secretary exercises plenary authority over Indian affairs.

Congress has charged the Secretary of the Interior with comprehensive authority over Indian affairs, 43 U.S.C. § 1457, and the Secretary has delegated this responsibility to the BIA, which is headed by the Assistant Secretary – Indian Affairs. *See Miwok I*, 424 F.Supp.2d at 201 n.6. The Assistant Secretary is the final decision maker for the Department of Interior, 25 C.F.R. § 2.6(c), with authority to review or take jurisdiction over any decision made by any official within the BIA, including appeals directed to the IBIA, 25 C.F.R. §§ 2.4(c), 2.20. His responsibilities under the Indian Reorganization Act include "supervising tribal elections and ensuring their fundamental integrity." *Miwok I*, 424 F.Supp.2d at 202 (citation omitted).

The court in *Miwok III* rejected the argument that the Assistant Secretary lacked jurisdiction to address issues in the 2011 Decision that were not referred to him by the IBIA, including whether to recognize the General Council. 5 F.Supp.3d at 101 n.5. The court ruled that

a "wealth of authority … establishes the Secretary's 'plenary administrative authority in discharging the federal government's trust obligations to Indians.'" *Id.* (quoting *Udall v. Littell,* 366 F.2d 668, 672 (D.C.Cir.1966)). The Burleys' motion for summary judgment offers no reason and no authority for the conclusory claim that the Assistant Secretary's exercise of authority was improper. They have waived any argument on the issue. *See Ojo v. Farmers Group, Inc.*, 565 F.3d 1175, 1185 n.13 (9th Cir. 2009).

2. The IBIA regarded the 2004 and 2005 Decisions as having *finally* decided that the BIA did not recognize the Burleys' Tribal government.

After the *Miwok I* and *II* litigation, the BIA sought to assist the Tribe in organizing (*see* 2011-1501), and the Burleys filed administrative challenges that culminated in an appeal to the IBIA. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 2010 WL 415327 (2010). The Burleys argued before the IBIA that the BIA's assistance was improper because the Burleys had already established a valid Tribal government to which the BIA must defer. 51 IBIA at 104, 116-117. The IBIA held,

> **based on the Assistant Secretary's 2005 Decision**, which included his acceptance of the Superintendent's 2004 Decision as final for the Department, that **the following determinations are not subject to further review by the Board in this appeal: (1) the Department does not recognize the Tribe as being organized or having any tribal government that represents the Tribe**; (2) the Department does not recognize the Tribe as necessarily limited to Yakima, Melvin, Burley, her two daughters, and her granddaughter, for purposes of who is entitled to organize the Tribe and determine membership criteria; and (3) the Department has determined that it has an obligation to ensure that a "greater tribal community" be allowed to participate in organizing the Tribe.

51 IBIA at 120 (emphasis added). Because the 2004 and 2005 Decisions, affirmed in *Miwok I* and *II*, had already finally decided that the BIA did not recognize any Tribal government, the IBIA did not refer that issue to the Assistant Secretary. 51 IBIA at 112-113, 123. Instead, it dismissed the Burleys' claim to the extent it sought to relitigate that issue, and referred their claim to the Assistant Secretary to the extent it raised a *different* issue: the identity of the "greater tribal community" that must be involved in Tribal organization. *Id.* at 123. Thus, the fact that the IBIA did not refer the validity of the General Council to the Assistant Secretary for resolution simply confirms that the BIA had already decided it did not recognize the General Council.

3. The 2015 Decision properly decided the issues raised by the IBIA's referral and the *Miwok III* remand.

The IBIA's referral led to the Assistant Secretary's August 31, 2011 decision (2011-2049), which the court found unlawful in *Miwok III* and remanded for reconsideration. 5 F.Supp.3d at 101. The Assistant Secretary issued the 2015 Decision on remand. The 2015 Decision squarely addressed the issue referred by the IBIA, by identifying the greater tribal community entitled to participate in Tribal organization. (2017-1400.) The 2015 Decision reasonably identified that community as consisting of the Eligible Groups – lineal descendants of the Tribal members for whom the Rancheria was established. (2017-1400.)

Because the Eligible Groups did not participate in the adoption of the 1998 Resolution, the 2015 Decision determined the BIA would not recognize the General Council established under the 1998 Resolution and that, as a result, the Burleys do not represent the Tribe. (2017-1401.) This second conclusion followed directly from the first and was consistent with the 2004 and 2005 Decisions that the IBIA identified as having already decided the Burleys' claim to recognition. It also responded to the *Miwok III* remand order, which ruled that the 2011 Decision had improperly "assume[d], without addressing, the validity of the General Council" and directed reconsideration consistent with the court's opinion. *Miwok III*, 5 F.Supp.3d at 99.

The Burleys have identified no reason why the Assistant Secretary would have been prohibited from addressing the issue on remand. The parties extensively briefed the issues; there was no chance of unfairness or surprise. (2017-898, 954, 977, 997, 1002, 1025, 1028, 1034, 1044, 1099, 1115, 1298, 1344.)

E. The Burleys cannot show that the BIA was required—or even authorized—to limit participation in Tribal organization to five people.

Although the key premise of the Burleys' argument is that participation in Tribal organization must be limited to five people, they make only one argument in support of that position. Relying on the *Tillie Hardwick* settlement, they argue the Tribe's membership was defined by the distribution plan that the BIA prepared in 1966 for the Sheep Ranch Rancheria assets (2011-48), and that all other members of the Tribal community not named in the

distribution plan were merely "potential members." (Burley MSJ at 36-37.)[10] Neither the record nor the law supports their argument.

As explained in Intervenors' motion for summary judgment (ECF No. 47, pp. 18-20):

- The *Hardwick* case involved terminated tribes that agreed to be restored to federal recognition under the terms of a settlement with the United States. *This* Tribe was never terminated and was not a party to the *Hardwick* case; thus, the terms of that settlement do not apply.

- The BIA not only has no policy applying the *Hardwick* settlement to other rancheria tribes; it lacks the authority to establish such a policy. *Williams v. Gover*, 490 F.3d 785, 789-790 (9th Cir. 2007).

- Attempting to limit the Tribe's membership based on the distribution plan would violate the Indian Reorganization Act. 25 U.S.C. §5123(f); *Rosales v. Sacramento Area Dir., Bureau of Indian Affairs,* 32 IBIA 158, 164-165, 1998 WL 233748 (1998).[11]

- Distribution plans for unorganized tribes such as this one were never intended to reflect membership in those tribes. *Compare* 25 C.F.R. § 242.3(a) (1965) *with* 25 C.F.R. § 242.3(b) (1965) (*in the record at* 2011-000035).

The 2015 Decision relied on an extensive record that shows the Tribe includes far more than five members. (2017-1401 ("my review of the record confirms…").) The record evidence includes BIA communications with Tribal members who were descended from one or more of the 13 Miwok Indians for whom the Sheep Ranch Rancheria was acquired (2011-40 – 46); historical census rolls and other documents identified in prior BIA decisions (2011-500 – 501); the 503 genealogies of Tribal members the BIA received in response to its 2007 public notice (2011-2105 (Burdick declaration)), the Tribal roster provided to the BIA in 2011 (2011-2268); evidence that at least 83 of the members on the Tribe's 2011 roster were alive and over the age of 18 in 1998 (2017-167 Exh. 2);[12] and genealogical information for Tribal Council members and their relatives provided to the BIA in 2011 (2011-2196, 2204, 2218, 2224, 2231, 2238, 2279, 2285, 2291). The

[10] Mabel Hodge Dixie was the sole distributee named in the distribution plan. (2011-48.) A further unstated premise of the Burleys' argument is that Yakima Dixie — just one of several descendants of Ms. Dixie — had the authority to involve the Burleys in the organization process and "enroll" them as Tribal members, while excluding the rest of the Tribal community.

[11] 25 U.S.C. § 5123 was formerly codified at 25 U.S.C. § 476.

[12] The evidence found at testimony referred to is an affidavit by Tribal Council member Velma WhiteBear, which is Exhibit 2 to a document found in the record at 2017-167. The affidavit is not separately Bates-numbered.

Burleys have not attempted to refute that evidence and have not shown that the Assistant Secretary's understanding of Tribal history, as described in the 2015 Decision, was inconsistent with the record. Their argument fails.

F. The Eligible Group "system" does not force the Tribe to reorganize.

The Burleys claim the 2015 Decision improperly forces the Tribe to reorganize, with the participation of "potential" members, in order to receive federal benefits. This claim repeats the Burleys' circular arguments that the BIA's actions are improper because the Tribe is already organized, and that the Burleys can brand everyone but themselves as "non-members" — arguments already rejected by the BIA, the IBIA and multiple courts. *See* 51 IBIA at 123; *Miwok III*, 5 F.Supp.3d at 98 n.4 (citation omitted).

In any case, the 2015 Decision does not force the Tribe to reorganize; it states that any reorganization must involve the whole Tribal community — reiterating and applying well-established majoritarian principles that apply to the United States' relationship with this and other tribes. (2017-1399 – 1400.) *Miwok II*, 515 F.3d at 1266-1268.

G. The validity of the 2015 Decision does not depend on the purpose for which the 1998 Resolution was adopted.

The 2015 Decision stated that the 1998 Resolution undoubtedly seemed, at the time of its enactment, a reasonable mechanism "for establishing a tribal body to manage the process of reorganizing the Tribe." (2017-1401.) The Burleys claim this statement was inaccurate and that the 1998 Resolution was intended to establish a full-fledged government, not an interim body. (Burley MSJ at 34-35.) The Burleys are wrong — documents drafted and signed by the Burleys prove that the 1998 Resolution was intended to establish a "provisional government" (2011-183), "in order to pursue the formal organization of the Tribe" through adoption of a written constitution that would be approved by the BIA (2011-202).

But the characterization of the 1998 Resolution makes no difference to the validity of the 2015 Decision. The 2015 Decision found, based on the current record, that the United States will not recognize the General Council because the 1998 Resolution was adopted without the participation of the Eligible Groups. (2017-1401.) The 2015 Decision did not base its finding on

the purpose for which the 1998 Resolution was adopted. (2017-1401.) Whether or not the 1998 Resolution was *intended* to establish a permanent Tribal government, it failed to do so because "those who approved the 1998 Resolution … are not a majority of those eligible to take part in the reorganization of the Tribe." (2017-1401.)

H. The alleged motives of Yakima Dixie or Chadd Everone are irrelevant to the validity of the 2015 Decision.

The Burleys spend much of their brief attempting to show that Yakima Dixie's challenges to the validity of the Burley government were motivated by a desire to "hijack" the Tribe so that Dixie and Chadd Everone could build a casino. (Burley MSJ at 40-47.) This smear campaign is baseless, and Intervenors note that the Burleys have filed two separate lawsuits accusing Chadd Everone of conspiring to "steal" the Tribe from them; their claims were dismissed in both cases. *California Valley Miwok Tribe v. The California Gambling Control Comm'n*, No. 3:15-cv-00622 (S.D. Cal. Sept. 11, 2015); *California Valley Miwok Tribe v. California Gambling Control Commission*, San Diego Sup. Case No. 37-2015-00031738 (Jan. 27, 2017).

Regardless, the alleged motivations of Mr. Dixie and his supporters are no more relevant to the validity of the 2015 Decision than are the Burleys' relationships with casino developers (2017-1116 – 1117). Neither the 2004 and 2005 Decisions, nor the 2015 Decision based their findings on Mr. Dixie's motives, or on his statements that he did not resign as Chairperson of the General Council. None of the Decisions chose Mr. Dixie over Ms. Burley as the "leader" of the Tribe. Each of the Decisions rejected the Burleys' purported Tribal government because it was adopted without the participation or consent of the whole Tribal community. (2011-499, 2011-610, 2017-1401.) Each Decision was reasonable and supported by the record.

I. Estoppel does not apply.

The Burleys argue that Yakima Dixie is estopped from attacking the 1998 Resolution on the grounds that his brother Melvin did not sign the Resolution, because Yakima allegedly "misled" the BIA into believing that Melvin's whereabouts were unknown. The record refutes

this claim.[13] Yakima told the BIA in 1998 that Melvin was "living in Sacramento somewhere"—not that his whereabouts were unknown. (2011-127.) Yakima told the BIA that Velma WhiteBear "might know his address" and suggested the BIA "get in touch with her." (2011-131.)

In addition to being false, the Burleys' argument has no bearing on the validity of the 2015 Decision. The Decision did not rely on the claim that Melvin Dixie was excluded from the adoption of the 1998 Resolution — in fact, it found that the BIA's actions in 1998 were "an appropriate step to the benefit of … Melvin," and it noted that Melvin died in 2009. (2017-1400 n.20). The 2015 Decision rejected the 1998 Resolution because it was adopted without the participation of the Eligible Groups (2017-1401), which include hundreds of individuals aside from Melvin Dixie (2011-2268).

IV. Conclusion

The Burleys have not met their heavy burden of proving the 2015 Decision was arbitrary or capricious. The court should uphold the 2015 Decision under the Administrative Procedure Act's deferential standard of review and deny the Burleys' motion for summary judgment in its entirety.

Dated: April 3, 2017

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[13] The Burleys offer no record citation or other support for their bald assertion that Yakima Dixie "lied about" Melvin's whereabouts and "misled" the BIA. (Burley MSJ at 38-39.)

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I electronically filed the foregoing Intervenor-Defendants' Opposition to Plaintiffs' Motion for Summary Judgment with the Clerk of the Court by using the CM/ECF system, which will provide service to all counsel of record.

Respectfully submitted,

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