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CALIFORNIA VALLEY MIWOK TRIBE,
THE GENERAL COUNCIL, SILVIA BURLEY,
RASHEL REZNOR, ANJELICA PAULK and
TRISTIAN WALLACE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

SALLY JEWELL, in her official capacity as U.S. Secretary of Interior, et al.,

Defendants

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.

Intervenor-Defendants.

Case No.: 2:16-cv-01345-WBS-CKD

PLAINTIFFS' REPLY TO INTERVENORS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Date: May 30, 2017
Time: 1:30 p.m.

Judge: Hon. William B. Shubb
Courtroom 5

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Plaintiffs CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or "the Miwok Tribe"), THE GENERAL COUNCIL, SILVIA BURLEY ("Burley"), RASHEL REZNOR ("Rashel"), ANJELICA PAULK ("Angelica"), and TRISTIAN WALLACE ("Tristian") (collectively "the Burley Faction"), submit the following Memorandum of Points and Authorities in **Reply** to the Intervenor-Defendants' ("Dixie Faction) Opposition to Plaintiffs' Motion for Summary Judgment.

I.

THE THREE CRITICAL DOCUMENTS

Plaintiffs' arguments center around the following three critical documents that the Court should review and refer to in connection with these motions. They are as follows:

1. The AS-IA Larry Echo Hawk's August 31, 2011 Decision (CVMT-2011-002049-2057);

2. The U.S. District Court's Order granting the Dixie Faction's motion for summary judgment and remanding to the AS-IA for reconsideration of his August 31, 2011 Decision (CVMT v. Jewell (D.D.C.2013) 5 F.Supp.3d 86); and

3. The AS-IA Kevin Washburn's December 30, 2015 Decision (CVMT-2017-001397-1403).

II.

THE AS-IA'S 2015 DECISION REMAINS ERRONEOUS AS A MATTER OF LAW, BECAUSE IT IS BASED ON DIXIE'S TIME-BARRED CHALLENGE OF THE 1998 RESOLUTION

The fundamental flaw in the AS-IA's 2015 Decision is that it is based on Dixie's untimely challenge of the validity of the 1998 Resolution establishing the Tribe's General Council. The Dixie Faction's only response to this glaring error is that the six-year statute of limitations under 28 U.S.C. §2401(a) only applies to "claims" made against the U.S. government and does not apply to "arguments made to federal agency officials or to decisions made to those officials." (Page 9, Dixie Faction

Opposition, lines 8-9). This contention is without merit and is not supported by any authority.

As pointed out in Plaintiffs' motion papers, actions for review of final agency actions brought under the Administrative Procedure Act ("APA") are in fact subject to a **six-year** statute of limitations. Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713; see Muwekma Ohlone Tribe v. Salazar (D.D.C.2011) 813 F.Supp.2d 170, 191 (holding that the Tribe's claims under the APA against the Department of Interior for terminating its tribal status was barred by the six-year statute of limitations under 28 U.S.C. §24019(a)); see also Hardwick v. U.S. (N.D.Cal.2012) 2012 WL 6524600 (Plaintiff's challenge of the legitimacy and **validity** of the **Tribe's governing body** was held barred by the six-year statute of limitations).

As stated, the issue of the validity of the 1998 Resolution was only first raised and tendered by the Dixie Faction on January 24, 2011, when they filed a lawsuit in federal court challenging the AS-IA's December 2010 Decision which was vacated sua sponte and reaffirmed by the AS-IA's August 2011 Decision. When that occurred, the Dixie Faction amended their complaint on October 17, 2011, re-alleging the same claims that the 1998 Resolution establishing the General Council was invalid, because potential members in the surrounding community (i.e., the descendants of the 12 or 13 Indians identified in the 1915 census who lived in the Sheepranch area) did not participate in its organization. (AR-CVMT-2017-000023). Over the Burley Faction's objection (Plaintiff's RJN No. "8," AR-CVMT-2017-000762), the U.S. District Court entertained and ruled on this untimely challenge, and ultimately concluded that the AS-IA's 2011 Decision was "remiss" in "assuming that the General Council" established under then 1998 Resolution "is a duly constituted government" "without addressing the validity of the

General Council." CVMT v. Jewell (D.D.C.2013) 5 F.Supp.3d 86, 96, 99. Upon remand, the AS-IA then, "reconsidered" its Decision "consistent with the terms of [the Court's Order]" (CVMT v. Jewell, supra at 101), and concluded that the 1998 Resolution was invalid, because it did not consist of "valid" representatives of the Tribe. He stated:

> "[T]he people who approved the 1998 Resolution (Mr. Dixie, Ms. Burley, and possibly Ms. Burley's daughter Rashel Reznor) are not a majority of those eligible to take part in the reorganization of the Tribe. Accordingly, I cannot recognize the **actions** to establish a tribal governing structure taken pursuant to the 1998 Resolution..." (Emphasis added).

(CVMT-2017-001401, AS-IA 2015 Decision, page 5). By not recognizing the "actions" taken by Dixie, Burley and Reznor in drafting and adopting the 1998 Resolution, the AS-IA was making a determination that those actions were invalid and thus the 1998 Resolution was invalid.

While it is true that the Bureau of Indian Affairs ("BIA") and the Department of Interior ("DOI") went back and forth over the years in recognizing Burley as Chairperson of the Tribe (at one time calling her a "person of authority," CVMT-2011-001691), they never ruled or determined that the General Council was invalid, because it purportedly did not involve potential members in the surrounding community (i.e., the descendants of the 12 or 13 Indians identified in the 1915 census who lived in the Sheepranch area), or was invalid for any reason. It simply suspended the award of federal contract funding in 2005, because the Tribe refused to "re-organize" under the Indian Reorganization Act of 1934 ("IRA"), and because of the ongoing Tribal leadership dispute. (CVMT-2011-000801-802; CVMT-2011-001684-1685). This is a far cry from refusing to recognize a

tribal government because its initial organization was invalid at the outset in 1998.

Historically, the BIA simply lost its patience in hoping that the Tribe under Burley's leadership would "re-organize" under the IRA, and withheld federal benefits from the Tribe based on the erroneous belief that those benefits were tied to the Tribe having an IRA governing body. (CVMT-2011-002054, page 6 of 1011 Decision; CVMT-2011-000801-802 [suspension of federal contract funding because the Tribe was not re-organized under the IRA]). However, as time passed the Tribe simply changed its mind when the IRA was amended to allow tribes to organize outside the IRA, and chose instead to allow the General Council established under the 1998 Resolution to be its governing document, as it had the legal right to do. As observed by the AS-IA in its 2011 Decision:

> "Related to this issue is the Tribe's current reluctance to 'organize' itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. §476(h), first enacted in 2004, which recognizes the inherent sovereign powers of tribes 'to adopt governing documents under procedures other than those specified...[in the IRA.]""

(CVMT-2011-002053). The AS-IA 2011 Decision correctly concluded that the Tribe could not be compelled to re-organize its governing body under the IRA, and that its failure to do so cannot result in federal benefits being withheld. (CVMT-2011-002054: "I reject as contrary to §476(h) the notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant federal benefits' withheld from it. Either would be a clear violation of 25 U.S.C. §476(f)"). Thus, there was never a time prior to the AS-IA's 2015 Decision when the BIA or DOI refused to recognize the Tribe's governing body, i.e., the General Council established under the 1998 Resolution, because it was purportedly invalid.

Even the AS-IA's 2015 Decision observed 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..." (CVMT-2017-001401, page 5 of AS-IA 2015 Decision). Despite this observation, the AS-IA 2015 Decision erroneously concluded that the 1998 Resolution establishing the General Council was invalid, because it did not involve potential members in the surrounding community (i.e., the descendants of the Indians identified in the 1915 census who lived in the Sheepranch area) who the AS-IA determined were purportedly "eligible" to participate in the organization of the Tribe. In short, the U.S. District Court and the AS-IA on remand both ruled on the Dixie Faction's challenge to the validity of the 1998 Resolution, which, as shown, was barred by the six-year statute of limitations. Because that claim was time-barred, the foundation upon which the AS-IA's 2015 decision stands collapses. There was no legal basis for the U.S. District Court or the AS-IA to address this claim, let alone accept it as grounds to vacate the AS-IA's 2011 Decision.

The Dixie Faction, however, argues that the Plaintiff still cannot challenge the AS-IA 2015 Decision, because, in essence, it is a challenge of the U.S. District Court's 2013 Order (CVMT v. Jewell, supra), and Plaintiffs purportedly "cannot challenge the *Miwok III* decision in this Court.". (Dixie Faction PAs, page 9, lines 12-13). This contention is equally meritless, since the record is undisputed that Plaintiffs were unable to appeal that order, because it was not final under 28 U.S.C. §1291. (RJN No. "1," Motion to Dismiss Appeal for Lack of Jurisdiction). If one were to accept the Dixie Faction's argument in this regard, Plaintiffs would be in "black hole" and have no avenue of relief in challenging the AS-IA's 2015 Decision at all.

III.

THE AS-IA 2011 DECISION DID NOT DECIDE ANY ISSUE RELATIVE TO THE VALIDITY OF THE 1998 RESOLUTION

As pointed out in Plaintiffs' moving papers, the Interior Board of Indian Appeals ("IBIA") never actually referred to the AS-IA the issue of the validity of the 1998 Resolution, largely because the Tribe (under Burley's leadership) never raised that as an issue to be decided on appeal. It is also inconceivable that the Tribe would have done so, since to do so would be contrary to the position it was taking with respect to its right not to be compelled to "re-organize" under the IRA and its right not to be compelled to admit additional persons as Tribal members against its will. Nevertheless, the Dixie Faction argues that the reason the IBIA did not specifically refer the validity of the General Council to the AS-IA was because the BIA had already decided it did not "recognize" any Tribal government in 2004 and 2005. (Dixie Faction PAs, page 13). This contention is without merit and misleading.

The two BIA decisions the IBIA decision references, the 2004 and the 2005 decisions, stated only that "the Department does not recognize the Tribe as being organized or having any tribal government that represents the Tribe..." (Page 13 of Dixie Faction's PAs). However, neither of those BIA decisions made any determination on whether the Tribe's General Council established under the 1998 Resolution was invalid at the outset, or invalid for any reason. The BIA's refusal to "recognize" the Tribe's governing body at that time was because the Tribe was not willing to "re-organize" under the IRA, and, in response to that refusal, the BIA had erroneously concluded, despite 25 U.S.C. §476(h) to the contrary, that the Tribe was required to do so in order for the Tribe to be eligible to receive federal contract funding. (CVMT-2011-002054: "I reject as contrary to

§476(h) the notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant federal benefits' withheld from it"). As stated, there is a distinct difference between not recognizing the Tribe's governing body because the Tribe refuses to "re-organize" under the IRA and because of an ongoing leadership dispute, on the one hand, and not recognizing the Tribe's governing body because it was invalidly established at the outset, on the other hand. The BIA was clearly refusing to recognize the Tribe merely because it was refusing to re-organize under the IRA and because of the ongoing leadership dispute. See CVMT v. Pacific Regional Director (2010) 51 IBIA 103, 103-104 (noting that the BIA's actions in attempting to force the Tribe to re-organize under the IRA were because the "BIA [had] concluded that these actions were necessary because until the tribal organization and membership issues were resolved, a leadership dispute between Burley and Yakima...could not be resolved, and resolution of that dispute was necessary for a functioning government-to-government relationship with the Tribe").

In his 2011 decision, the AS-IA merely observed as an undisputed fact as follows with respect to the Tribe's governing body:

> "The CVMT today operates under a General Council form of government, pursuant to Resolution #CG-98-01, which the CVMT passed in 1998, facilitated by representatives of the Bureau of Indian Affairs..."

(CVMT-2011-002050). It did not rule on or resolve any dispute concerning the validity of the resolution establishing the General Council. It did the same with respect to the Tribe's status as a federally-recognized tribe. (CVMT-2011-002049: "I now find the following: (1) The California Valley Miwok Tribe

(CVMT) is a federally recognized tribe, and has been continuously recognized by the United States since at least 1916...”). Neither of these issues of fact could have been challenged at that time, based on the six-year statute of limitations. Yet, the Dixie Faction attempted to do so with respect to the validity of the 1998 Resolution when they filed suit in federal court in 2011 challenging the AS-IA’s 2010 and 2011 Decisions.

IV.

THERE IS NO BASIS TO CONCLUDE THAT THE 1998 RESOLUTION WAS INVALID AT THE TIME IT WAS ADOPTED

A. THE 1971 PROBATE ORDER LIMITED MEMBERSHIP TO THOSE RESIDING ON THE SHEEPRANCH RANCHERIA CONSISTENT WITH BIA POLICY

Both the Federal Defendants and the Dixie Faction in their opposition papers ignore the significance of the 1971 Probate Order that reaffirmed the BIA’s policy that only those individuals who actually resided on the Sheepranch Rancheria were members of the Tribe who had the sole authority to organize the Tribe as Dixie did in 1998. The AS-IA 2015 Decision ignoring this material fact in the administrative record was arbitrary and capricious.

In concluding that the 1998 Resolution establishing the Tribe’s General Council was invalid when adopted, the AS-IA’s 2015 Decision misconstrued the historical background of the Tribe that led to Yakima Dixie being the last remaining Tribal member residing on the Sheepranch. Significantly, it ignored the impact of the 1971 Probate Order issued by the Department of Interior pertaining to the death of Mabel Dixie, Yakima’s mother, and the policy the BIA had over the years in treating actual residency on the California Rancherias as tantamount to tribal membership. The Decision erroneously concluded that descendants of the 12 or 13 Indians identified by the 1915

Indian Agent, for whom the 0.92 acre parcel was given, had the right to participate in the 1998 organization of the Tribe. They did not.

In Alan-Wilson v. Sacramento Area Director (1997) 30 IBIA 241, cited by the Dixie Faction in their opposition papers, the IBIA noted that the BIA had a policy of limiting membership on the California Rancherias to those Indians who actually resided on the Rancherias. The BIA revoked assignments given to various individuals when those individuals failed to use their assigned portion of the Rancheria, and equated that lack of residence with non-membership in the Tribe. The IBIA then quoted a 1959 letter from the BIA to one of these individuals, which stated:

> "Our records are not definite as to whether or not you ever lived on the lot or used it. However, it appears that **you did not occupy or use the lot** for many years; consequently, you **lost your rights to the assignment**. We believe **your reinstatement as a member of the Cloverdale group can only be acquired by a consent of the majority of the adult residents presently living on the Rancheria**." (Emphasis added).

30 IBIA at 243. The IBIA then further observed that the BIA considered only those individuals who actually resided on the Rancheria as Tribal members, and stated:

> "The Cloverdale Rancheria voted on the question of whether to organize under the Indian Reorganization Act (IRA), 25 U.S.C. §476 (1994). The record shows that the Department determined that only adult residents of the Cloverdale Rancheria at the time of the election would be allowed to vote in that election, **a fact which suggests that the Department viewed the Rancheria as a group of 'adult Indians residing on such reservation'** within the meaning of 25 U.S.C. §476..."

30 IBIA at 243. This is consistent with what occurred with Jeff Davis in this case with respect to the Sheepranch Rancheria, who was the "only single eligible voter" "who voted in favor of the IRA" in 1935. CVMT v. Pacific Regional Director (2010) 51 IBIA

103, 106 [also found at CVMT-2011-001687]; (CVMT-2011-002051). Significantly, the IBIA in CVMT, supra, then noted:

> Neither Davis, nor any subsequent **residents** of the **Rancheria**, organized a tribal government pursuant to the IRA. (Emphasis added).

51 IBIA at 106. Thus, even the IBIA correctly assumed, based on the BIA's consistent policy, that only actual residents of the Sheepranch Rancheria would have the right to organize the Tribe. And those actual residents were considered to be the members of the Tribe, not those in the surrounding community who claimed to be descendants of the 12 or 13 Indians identified in the 1915 census, and who did not reside on the Sheepranch.

B. THE 1971 PROBATE ORDER VESTED MABEL DIXIE AND HER HEIRS THAT RESIDED ON THE SHEEPRANCH WITH THE SOLE AUTHORITY TO ORGANIZE THE TRIBE AND ENROLL MEMBERS

When the BIA met with Yakima Dixie and Burley in 1998 to assist them in organizing the Tribe, there was no obligation to reach out to the descendants of the 12 or 13 Indians identified in the 1915 census to allow them to participate in the organization process. Only Yakima Dixie had that right, since he was the only one residing on the 0.92 acre Sheepranch property at the time. He exercised that right by first enrolling Burley and her family as members, and then, together with Burley and Reznor, they adopted the 1998 Resolution establishing the General Council.

Dixie's sole right to enroll Burley and her family and organize the Tribe in 1998 was solidified by the 1971 Probate Order. That Probate Order must be viewed as limiting the right to organize the Sheepranch Rancheria to persons living on the property who are listed as "distributees or dependent members on the federally approved Distribution Plan." (CVMT-2011-000172). Because Mabel Dixie acquired a vested interest in the property

when she was listed as the sole distributee preparatory to termination (which never occurred), that vested interest passed to her heirs under the 1971 Probate Order, at the exclusion of all other descendants of the 12 or 13 Indians identified in the 1915 census. As stated in Alan-Wilson, supra, with respect to the effect of the Distribution Plan creating vested interests in those listed therein in having the right to reorganize the Tribe after termination:

> The basic question presented in this appeal is: Who can reorganize the Cloverdale Rancheria's tribal government? The Area Director based his answer to this question on the stipulated judgment in Hardwick, concluding that the **Department has consistently interpreted that judgment as limiting the right to reorganize the tribal government of a Rancheria restored under Hardwick to that rancheria's distributees, dependent members, and lineal descendants**...[T]he Area Director argues: The "decision in Smith v. U.S. [, No. C 74 1016 WTS (N.D. Cal. Mar. 28, 1978)], determined that the **distribution plans created vested interests in the Distributee**. This case established the **standard to be utilized in the organization of all the previously terminated Rancherias** as those parties with vested rights and this standard was confirmed in the stipulated judgment in the Tillie Hardwick case."

30 IBIA at 254. In Smith v. U.S. (N.D.Cal.1978) 515 F.Supp. 56, the federal government conceded, and based upon this concession and its own review of the evidence the court concluded, that the Hopland Rancheria was unlawfully terminated and should not be treated as terminated. 515 F.Supp. at 60. Accordingly, the Court held that the Plaintiff distributees or heirs of distributees were entitled to recover damages from the federal government as a result of the federal government's failure to provide statutorily required water and sewer systems prior to termination. Accordingly, even though the Hopland Rancheria was to be treated as "unterminated," the Court still looked to the Distribution plan to afford relief to the individual

"distributees," given the fact that the Distribution Plan gave them a vested interest in the Rancheria.

Also, in Duncan v. Andrus (N.D.Cal.1977) 517 F.Supp. 1, Plaintiffs sued the federal government as Indian distributees who were on the distribution plan for termination of the Robinson Rancheria. They claimed the Tribe was unlawfully and prematurely terminated before sanitation and water facilities were installed, thereby depriving them of federal Indian benefits and subjecting them to state and local taxes. 517 F.Supp. at 3-4. The Court held that the Tribe must be "unterminated," "and its distributees and their families must be given the opportunity to regain federal benefits lost through termination." 517 F.Supp. at 6. The Court then held:

> [T]he Indian distributees are entitled to prompt relief restoring their federal benefits, but respecting the vested rights in the Rancheria land which they have acquired through the operation of federal regulations. See 25 C.F.R. §242.7 (1960); 24 F.R. 4652-4654 (June 9, 1959). (Emphasis added).

517 F.Supp. at 6. Both Smith, supra, and Duncan, supra, preceded the Hardwick 1983 stipulated judgment and shed light on the policy of the BIA in treating distributees under the Distribution Plan preparatory to termination has having vested rights in their respective Rancherias, to the exclusion of any descendants not listed in the Distribution Plan, notwithstanding the fact that "termination" either did not occur or was rescinded.

For the same reasons, Mabel Dixie acquired a vested interest in the Sheepranch Rancheria in 1966, to the exclusion of the descendants of the 12 or 13 Indians identified in the 1915 census, when she was placed on the Distribution Plan and voted for termination as the sole resident on the property. She alone had a vested interest in the property by virtue of her

being the only one on the list of the Distribution Plan preparatory to termination. While the Sheepranch was never lawfully terminated, her vested interest as the sole distributee never changed. She did not lose that interest when termination did not occur. The fact that the Sheepranch was not part of the Hardwick stipulated judgment did not change her sole, vested right as the only member of the Tribe when she was made a distributee under the Distribution Plan in 1966, as the foregoing cases demonstrate.

Mabel Dixie's sole vested rights in the Sheepranch Rancheria, to the exclusion of all other descendants of the 12 or 13 Indians identified in the 1915 census, were passed on to her heirs and confirmed by the Probate Order issued by the U.S. Department of Interior on November 1, 1971. (CVMT-2011-0000061). These were her children and her husband at that time. As shown, Yakima Dixie was the sole remaining heir under this Probate Order who was living on the Sheepranch in 1998 when he enrolled the Burley family as members and organized the Tribe under the 1998 Resolution. Based upon the foregoing history and case law, Dixie had the sole right and the authority to do so, to the exclusion of any descendants of the 12 or 13 Indians identified in the 1915 census.

C. WHEN THE 0.92 ACRE LOT WAS PURCHASED FOR THE 12 OR 13 SHEEPRANCH INDIANS, THE BAND BECAME A "TRIBE" AND HAD THE RIGHT TO ORGANIZE AND DEFINE ITS MEMBERS TO INCLUDE "NON-RESIDENTS"

The AS-IA's 2015 Decision focused on the "size" of the lot purchased for the 12 or 13 Indians identified in the 1915 census to conclude that it "was not large enough for all members of the band to take up residence," and therefore those Indians who were associated with the band but chose not to reside on the Sheepranch were still considered members because they were

"potential residents." (CVMT-2017-001400). This conclusion is without merit and flies in the face of established BIA policy and practice toward this early band as shown in the historical timeline.

First of all, the AS-IA's 2015 Decision's comment that the 0.92-acre lot was not large enough for the 12 or 13 band members is misleading and not supported in the administrative record. In fact, the Indian Agent taking the census in 1915 found only three (3) "old little Indian cabins" in the Sheepranch area. The 12 or 13 Indians he identified were actually comprised of three or four families (CVMT-2011-000002), with Peter Hodges as the band's leader. (CVMT-2011-CVMT-2011-000001). This would mean there were about four (4) people in each cabin. Under the circumstances, the 0.92-acre plot of land was large enough to accommodate these 12 or 13 band of Indians, i.e., three or four small families, given their custom of living in "little Indian cabins" and spending their time usually "in the nearby streams panning for gold." (CVMT-2011-000001).

Second, once the 0.92 acre land became available in 1916, these 12 or 13 band members had the right to take up residence on the property and become members of the Sheepranch. Once they did, they became a "tribe" and no longer a "band" of Indians. As a tribe, they then had they right to organize, but initial membership in the Sheepranch "tribe" was necessarily tied to first residing on the Rancheria.

In Montoya v. United States (1901) 180 U.S. 261, the Supreme Court adopted a common-law test to determine whether a group constituted a tribe for purposes of the Indian Depredation Act of 1891. The federal statute allowed U.S. citizens to bring suit in the Court of Claims for property "taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States." Under the statute it became necessary, in

each case, to determine whether the offender belonged to a band, tribe, or nation in amity with the United States. The Court then established the following definition of the terms "tribe" and "band" which was in effect at the time the 0.92-acre plot was purchased for the 12 or 13 Indians living in the Sheepranch area in 1916:

> By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. (Emphasis added).

180 U.S. at 266. Federal courts have applied this common-law definition of a "tribe" in recent years. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton (1st Cir. 1975) 528 F.2d 370, 376; Mashpee Tribe v. New Seabury Corp (1st Cir. 1979) 592 F.2d 575; Wolfchild v. U.S. (2011) 101 Fed.Cl. 54, 68; New York v. Shinnecock Indian Nation (E.D.N.Y.2005) 400 F.Supp.2d 486, 487-90 (Indian band constituted a "tribe" under Montoya because, among other things, it had offices and was located on a reservation); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §3.02[6][b], pp. 142-144 (Nell Jessup Newton ed., 2012).

The 12 or 13 Indians identified in the 1915 census who lived in the Sheepranch area, together with most of the Indian population in California at the beginning of the twentieth century, were described as "scattered" and "landless." Alan-Wilson, supra at 242. As observed in Alan-Wilson, supra:

> At the beginning of the twentieth century, most of the Indian population of California was **scattered** and **homeless**. In recognition of the plight of these Indians, Congress began appropriating funds to purchase land for them. As relevant to this case, the Federal government purchased 27.5 acres of land near Cloverdale, California, for the use of **homeless Indians** in that area...

* * *

> The record shows that the Cloverdale Rancheria was initially divided into 12 lots, which the Department assigned to various **homeless Indians**...(Emphasis added).

30 IBIA at 242. Thus, the government's purchase of the 0.92 acre plot for this 12 or 13 band of "homeless" Indians on Sheepranch created for them a residence or reservation. Under Montoya, supra, therefore, the band became a "tribe" to the extent any of them moved onto and took up residence on the 0.92 acre plot. As noted by the AS-IA's 2015 Decision, even the IRA, when passed in 1935, recognized a "tribe" as "Indians residing on one reservation." 25 U.S.C. §479; (CVMT-2017-001400). Those other 12 or 13 Indians who chose not to reside on the 0.92 plot were not members of the Tribe. However, as explained, they could have become members while still residing off the property had those Indians who took up residence on the 0.92 acre plot enrolled them, after organizing the Tribe.

Third, the timeline for the Sheepranch Tribe after the 0.92 acre plot was purchased establishes that only those individuals who actually resided on the property were considered members of the Tribe with sole authority to organize the Tribe's governing body. For example, in 1935, Jeff Davis who, by virtue of being the sole resident on the property, voted for an IRA government, and was the one the BIA recognized as having the sole authority to organize the Tribe under the IRA, which for some unknown reason never took place. (CVMT-2011-001687). Notably, none of the descendants of the 12 or 13 Indians identified in the 1915 census who lived in the Sheepranch area were allowed to participate in this vote. This was also the case with Mabel Dixie who, being the sole adult resident on the property in 1966, voted for termination and, as a result, the BIA gave her alone the deed to the property as a prelude to termination,

which administratively never occurred. (CVMT-2011-001687-1688). None of the descendants of the 1915 census who lived in the Sheepranch area were allowed to vote for termination. Nor were they on the Distribution Plan list. When Mabel died, the interest to the property went to her heirs, including Yakima Dixie and his brother, Melvin. (CVMT-2011-000173). Significantly, it was the "Department of Interior" who "probated the property." (CVMT-2011-001688). However, because Melvin left the property and Yakima was the only resident on the property in 1998, Yakima Dixie alone had the authority to enroll Burley and her family as adopted members of the Tribe and organize the Tribe. In 1998, Yakima and Melvin were the only surviving heirs of Mabel Dixie. (CVMT-2011-000173).

The probate order listed Mabel's husband and her children, including Yakima Dixie and his brother, Melvin Dixie, as the only surviving heirs of Mabel Dixie, and awarded them their respective interest in the land. (CVMT-2011-000172-173). The probate order had the effect of confirming and ratifying the BIA's longstanding policy that whoever resided on the land had the authority to enroll Indians as members of the Tribe and organize the Tribe. It had the effect of excluding any claim of any other Indians who may have lived in the area, and who did not reside on the land, as having any interest or authority over the land, including the descendants of the 12 or 13 Indians identified in the 1915 census. It solidified Mabel Dixie and her family as the sole members of the Sheepranch band of Indians. When Melvin left and Dixie remained on the property, the probate order solidified Dixie's sole authority, like what the BIA extended to Jeff Davis back in 1935, as the sole member of the Sheepranch band who, because he alone resided on the property, had the authority to enroll Indians as members and organize the Tribe.

Accordingly, the AS-IA 2015 Decision's conclusion that the descendants of the 1915 census who did not reside on the Sheepranch when Dixie adopted the 1998 Resolution were "potential residents" with membership rights (CVMT-2017-001400) is wrong, arbitrary and capricious, and contrary to established BIA policy toward this and other Rancherias since the beginning of the twentieth century.

D. WHETHER THE GENERAL COUNCIL ESTABLISHED UNDER THE 1998 RESOLUTION WAS "PREPARATORY" TO "RE-ORGANIZING" AN IRA GOVERNMENT IS IRRELEVANT, IN LIGHT OF 25 U.S.C. §476(h)

Although it rejected the 1998 Resolution establishing the General Council as invalid, the AS-IA 2015 Decision nevertheless concludes that the Resolution initially "seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of re-organizing the Tribe." (CVMTY-2017-001401). It then asserts that the subsequently anticipated re-organization process could only be accomplished with the participation of the descendants of the 1915 census. (CVMT-2017-001401). The Dixie Faction reasserts this reasoning as correct in their opposition papers. It is not. It is contradictory and simply wrong under the law.

First of all, the 1998 Resolution cannot, under the AS-IA's 2015 Decision's reasoning, be valid to "manage the process of re-organizing the Tribe" into an IRA government, but yet invalid later on because when adopted it did not involve the participation of the descendants of the 1915 census. If it was valid enough to "manage" that process when first adopted, then logically it must still be valid later on. In other words, if the AS-IA's 2015 Decision concludes that the 1998 Resolution is invalid because it did not allow the descendants of the 1915 census to participate in its adoption, it cannot be valid at the

outset to "manage the process of organizing the Tribe." (CVMT-2017-001401). The contradiction is obvious.

The administrative record shows that the BIA was expecting the Tribe's newly formed General Council established under the 1998 Resolution to be a means of later "re-organizing" the Tribe under the IRA. (CVMT-2011-000173 [Letter of 9/24/1998 from BIA to Dixie: "Tribes that are in the process of initially organizing usually consider how they will govern themselves until such time as the Tribe adopts a Constitution [under the IRA]"]). The BIA may have expected this to occur, because Jeff Davis had voted for an IRA governing body in 1935. (CVMT-2011-001687). However, the IRA was amended in 2004, which effectively allowed tribes "to adopt governing documents under procedures other than those specified...[in the IRA.]" 25 U.S.C. §476(h); (CVMT-2011-002053). In other words, the Tribe could reject an IRA governing body and simply rely upon its General Council established under the 1998 Resolution as its governing body. As stated in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW:

> "No federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution. The decision whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative."

COHEN'S HANDBOOK OF FEDRAL INDIAN LAW, §4.05[3], PAGE 271 (Nell Jessup Newton ed., 2012).

The passing of 25 U.S.C. §476(h) in 2004 clarifying that tribes may organize their tribal governments outside the IRA coincides with the BIA's actions in 2005 suddenly suspending federal contract funding to the Tribe and in 2004 and 2005 taking the position that it did not recognize its General Council as the Tribe's governing body. At that time, the Tribe had told the BIA that it no longer wished to "re-organize" under the IRA (CVMT-2011-002053 ["the Tribe current reluctance to

'organize' itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. §476(h), first enacted in 2004...]) and would instead use its General Council as its governing body, thereby prompting the BIA to suspend federal contract funding and going so far as to force the "re-organization" process with descendants of the 1915 census in 2007. (CVMT-2011-001696).

Accordingly, although the BIA expected the Tribe's General Council established under the 1998 Resolution to be a precursor to organizing under the IRA, 25 U.S.C. §476(h) was enacted by Congress to clarify that tribes need not be compelled to organize under the IRA, thereby trumping as irrelevant the AS-IA 2015 Decision's conclusion that the 1998 Resolution was simply a means to "manage the process of reorganizing the Tribe [under the IRA]." The Tribe simply changed its mind, and has every right to keep its General Council as its governing body, which the DOI is required to accept and with whom the DOI is required to conduct government-to-government relations. (CVMT-2011-002056).

E. THE ELIGIBLE GROUP SYSTEM IS UNLAWFUL

For the same reasons expressed above, the Eligible Group system advocated by the AS-IA 2015 Decision, and as argued by the Dixie Faction in their opposition papers, is unlawful. It wrongfully allows the descendants of the 1915 census who were living in the Sheepranch area to participate in "re-organizing" the Tribe. First of all, the Tribe need not re-organize under the IRA. Secondly, Yakima Dixie was the only remaining Tribal member living on the Sheepranch Rancheria in 1998 who had the authority to enroll the Burley family as members and to organize the Tribe. The descendants of the 1915 census had no right to participate in the original organization of the Tribe, and

presently have no rights with respect to the Tribe, for the reasons explained above.

F. THERE IS NO ISSUE OR CLAIM PRECLUSION BARRING PLAINTIFFS' CLAIMS

1. The issues are not identical.

The Dixie Faction argues that based on the rulings in *Miwok I and II* (i.e., *CVMT I* and *CVMT II*) Plaintiffs are barred by the doctrine of issue preclusion, i.e., collaterally estoppel, from challenging the AS-IA December 2015 Decision concluding that the 1998 Resolution establishing the General Council is invalid and that the Tribe's membership is presently limited to five (5) enrolled members. This contention was expressly rejected by the U.S. District Court, and the same reasoning applies here. Significantly, the Federal Defendants have abandoned this same argument raised in their moving papers, and makes no mention of it in their opposition papers. It would appear the Federal Defendants concede their issue and claim preclusion arguments lack merit.

In footnote 15 of the U.S. District Court Order remanding to the AS-IA for reconsideration, the Court stated:

> Plaintiffs [the Dixie Faction] challenge the August 2011 Decision on several other legal grounds. However, each of these arguments fails. First, relying on the *CVMT I* and *CVMT II* decisions, Plaintiffs [the Dixie Faction] argue that the Secretary is barred by the doctrine of issue preclusion and/or judicial estoppel from recognizing the General Council as the governing body of the Tribe. [Citation]. This argument is without merit because *CVMT I* and *CVMT II* do not share the same contested issue with this case. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). **The only issue before the courts *CVMT I* and *CVMT II* was whether the Secretary had the authority to refuse to approve a constitution submitted under IRA §476(h)(1). The courts did not directly address the issues raised here, namely whether the Tribe's membership consists of five members and whether the General**

> **Council is the duly constituted government of the Tribe...**(Emphasis added).

5 F.Supp.3d at 101, fn. 15. The issues have not changed, since the U.S. District Court ruling. Plaintiffs here have likewise challenged the same issues, but in reverse, i.e., whether the AS-IA's December 2015 decision is correct in concluding that the Tribe does not consist of five members and also concluding that the 1998 Resolution establishing the General Council was invalid at the outset. Those issue were never decided in the prior *CVMT I* and *CVMT II* cases. As a result, Plaintiff is not barred from litigating them here. Dodd v. Hood River County (9th Cir. 1998) 136 F.3d 1219, 1224-1225; Allen v. McCurry, supra.

2. No final judgment as to *Miwok III*.

Collateral estoppel or "issue preclusion" under federal law requires that there be a final judgment before it can apply. In re Palmer (9th Cir. 2000) 207 F.3d 566, 568. Since the Federal Defendants have conceded that, when they chose not to appeal the U.S. District Court Order, the Burley Faction could not appeal it as a "private party," because the order remanding to an agency "was not final within the meaning of 28 U.S.C. §1291." (Ex. "1," Motion to Dismiss Appeal for Lack of Jurisdiction, RJN "1"). As a result, collateral estoppel or "issue preclusion" does not apply to *Miwok III*.

3. There is no res judicata, because the prior litigation did not involve the same claims.

Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties. Owens v. Kaiser Found. Health Plan, Inc. (9th Cir. 2001) 244 F.3d 708, 713. As stated, the claims raised in *Miwok I* and *II* are not identical to the claims being litigated here. As a result, res judicata does bar the litigation of the claims in this action. See Stanton v. D.C.

Court of Appeals (D.C. Cir. 1997) 127 F.3d 72, 78 (two cases must share the same nucleus of facts for res judicata to apply).

4. No final judgment as to *Miwok III*.

Because the order in *Miwok III* does not involve a final judgment on the merits, there can be no res judicata effect of that case on the present claims being made in this case. Owens, supra.

G. DIXIE AND EVERONE'S FRAUD RELATIVE TO THE FABRICATED LEADERSHIP DISPUTE IS HIGHLY RELEVANT

The Dixie Faction argues that the issue of Dixie and Everone fabricating the 16-year Tribal leadership dispute is irrelevant with respect to this case. No so.

Fraud on the Court and upon the federal judicial administrative system is never "irrelevant." Dixie has admitted he in fact resigned from being Chairman of the Tribe and admitted his written resignation was never forged as he maintained throughout the years. But for this fraud perpetrated upon the system, the Tribe's governing body would not have been disturbed and the Tribe would be enjoying the benefits it is entitled to receive, with Dixie as a member of the Tribe.

The fact that the Tribe remained at five (5) people is a product of this fraud. With the leadership dispute bringing chaos in conducting Tribal business, the Tribe's membership roll could not expand as it was designed to do.

Dixie and Everone's fraud in fabricating the leadership dispute is also relevant to show that Dixie considered the 1998 Resolution valid for several years after he resigned. By challenging his resignation as purportedly forged, Dixie was confirming the validity of the 1998 Resolution establishing the General Council, and rejecting the notion that descendants of the 1915 census identifying 12 or 13 Indians living in the Sheepranch were required to participate in 1998 organization of

the Tribe. Because Dixie is a party to this lawsuit, such evidence is admissible against him as an admission under the Federal Rules of Evidence. FRE 801(d)(2)(A).

H. IN 1998, INDIAN LAW DID NOT REQUIRE DIXIE TO ORGANIZE THE TRIBE IN ANY PARTICULAR MANNER

The above-referenced history of the Tribe demonstrates that Yakima Dixie alone had the authority to enroll Burley and her family as members and organize the Tribe when he did in 1998. The Tribe was not organized under the IRA at that time, nor did it need to be. As stated in Cohen's Handbook of Federal Indian Law:

> "Today, at least 160 Indian nations have constitutions adopted pursuant to the IRA, more than 75 have established constitutions outside its framework, and still others remain without written constitutions, either because they continue to be governed by customs and traditions, or because their basic laws are in the form of statutes. **No federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution**. The decision whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative." (Emphasis added).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2012 ed., §405[3], page 271.

Accordingly, based on recognized Indian law, Dixie could have organized the Tribe orally and outside the IRA framework. As further stated in Cohen's Handbook of Federal Indian Law:

> "Tribes may thus adopt constitutions outside the IRA process.
>
> * * *
>
> "...Some tribes operate without a written constitution. **The absence of a written constitution does not affect the self-governing powers of Indian nations under federal law**." (Emphasis added).

Id. at §4.04[3][b], page 260.

However, even though he chose to organize the Tribe in a written document, Indian law did not require it to be in any particular form. Thus, the Dixie Faction's attack of Dixie's own written constitution as "invalid," because one signature is missing or that it does not contain places for other adult members to sign who are descendants of the 12 or 13 Indians identified in the 1915 census lacks merit. (See the Dixie Faction's motion for summary judgment, filed March 2, 2012, in CVMT v. Salazar (Jewell), Case No. 1:11-cv-00160-RWR, with respect to the AS-IA's 2011 Decision: "Only two persons signed: Yakima Dixie and Silvia Burley...As the Government admits in its answer, two is not a majority of four. As a result, the 1998 Resolution is invalid on its face." Page 36).

Factually, the 1998 Resolution establishing the General Council was outside the IRA framework. The BIA could not later force the Tribe to "re-organize" under the IRA, or in any fashion, as the AS-IA's 2015 Decision dictates. (CVMT-2011-002054); see COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, supra at §4.04[3][b], page 260 ("tribes today may revoke their IRA constitutions," citing 25 U.S.C. §476(b)).

However, the AS-IA's 2015 Decision ignores the Dixie Faction's criticism of the 1998 Resolution as a document, and focuses instead on the assertion that the descendants of the 12 or 13 Indians identified in the 1915 census were purportedly "members" of the Tribe in 1998 and therefore were entitled to participate in the "re-organization" of the Tribe. For the reasons stated above, this conclusion is historically wrong and contrary to the policy the BIA was adhering to over the years with respect to this and other Rancherias since 1915. Over the years, the BIA treated only those individuals who actually resided on the Rancherias as members of the Tribe and having

sole authority to organize their respect bands and enroll members. This policy was manifested in the Distribution Plan procedure in listing only those individuals who residing on the Rancherias with the authority to vote for termination. It was previously manifested in the BIA's policy and practice in choosing Jeff Davis as the only person eligible to vote for an IRA government in 1935, because he was the only one residing on the Sheepranch at that time, and was therefore the only recognized member of the Tribe.

V.

JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Dixie Faction's judicial review section in their opposition papers is contrary to what it asserted previously in its own summary judgment motion attacking the AS-IA 2011 Decision. It applies to a review of the AS-IA 2015 Decision. It stated previously as follows:

The Administrative Procedure Act, 5 U.S.C §706 ("APA"), provides that a court must hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C §706(2)(A). "To make this finding the court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although the court should not substitute its judgment for that of the agency, its review must be "searching and careful." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (citation omitted). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." Ransom v. Babbitt, 69 F.Supp.2d 141, 149 (D.D.C. 1999) (quoting Petroleum

Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

Whenever an agency changes its course it must "supply a reasoned analysis for the change." Jicarilla Apache Nation v. DOI, 613 F.3d 1112, 1119 (D.C. Cir. 2010)(citation and internal quotation marks omitted). "Reasoned decision making…necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do so acts arbitrarily and capriciously." Id. (citations and internal quotation marks omitted). An agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." Id. At 1120 (citations and internal quotation marks omitted); *see also* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute").

"[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of [APA] §706." Butte County, Cal. V. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010)(citing Motor Vehicles Mfrs. Assn., 463 U.S. at 43). See also Fallon Pauite-Shoshone Tribe v. U.S. Bureau of Land Management, 455 F.Supp.2d 1207, 1223-1224 (D. Nev. 2006)(arbitrary and capricious for Bureau of Land Management to ignore scientific evidence in the agency record that ancient human remains were affiliated with modern-day Native American tribe).

The APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicles Mfrs. Assn., 463 U.S. at 43. If

the agency itself does not supply a reasoned basis for its decision, the court cannot make up for that deficiency. Id. (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

VI.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in Plaintiffs' moving papers, summary judgment should be granted in favor of Plaintiffs.

DATED: April 28, 2017

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