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UNITED STATES FEDERAL DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Plaintiffs,

vs.

RYAN ZINKE, Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants.

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

Hon. William B. Shubb

Hearing Date: May 30, 2017
Time: 1:30 p.m.
Courtroom: No. 5, 14th Floor

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I. INTRODUCTION

The issue before the Court is whether the Assistant Secretary's December 2015 Decision finding that (1) the California Valley Miwok Tribe's ("CVMT" or "Tribe") membership consists of more than five people and (2) a 1998 General Council is not the Tribe's valid representative is arbitrary and capricious under the Administrative Procedure Act. In their opposition, Plaintiffs fail to demonstrate that the decision is arbitrary and capricious or otherwise not in accordance with law. Plaintiffs focus their argument on allegations of time-barred claims and fraud committed by third parties and Mr. Yakima Dixie, but none of these matters have any relevance to the decision they challenge today. Rather, the Assistant Secretary, after careful review of the record before him, offered a reasoned explanation for the findings that CVMT's membership consists of more than five people and that a 1998 General Council is not the Tribe's valid representative. Plaintiffs make no clear attempt to explain why the Assistant Secretary's determinations violate the APA. Instead, Plaintiffs' opposition misrepresents the record, misstates principles of law, and raises inappropriate and irrelevant issues. As the administrative record proves, the Assistant Secretary's December 2015 Decision was made after consideration of all the relevant factors. It is, therefore, entitled to substantial deference. The Court should uphold the decision and grant Federal Defendants' Cross-Motion for Summary Judgment.

In addition, Plaintiffs submitted a Supplemental Request for Judicial Notice of an extra-record document in conjunction with their opposition. ECF No. 48-1. In light of the Court's order requiring the parties to file any motions to supplement the record by February 6, 2017, Plaintiffs' belated attempt should be denied.

II. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS AND ARGUMENT

In their Statement of Facts and Argument, Plaintiffs again cite to and rely upon many documents that are not part of the certified administrative record and that were not directly or indirectly considered by the Assistant Secretary. *See* ECF No. 48 at 11-12, 17, 21, 25, 37-40, 42-43, 46, 48, 57-60, 63-67, 74 (Pls.' Opp. to Fed. Defs.' Mot. for Summ. J. ("Pls.' Opp.")) citing to documents attached to Pls.' Request for Judicial Notice (ECF No. 45) and Pls.' Supplemental Request for Judicial Notice (ECF No. 48-1). Plaintiffs, however, cannot rely on these documents to serve as the basis for any facts in this case. The Court reviews Plaintiffs' challenge to the December 2015 Decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et. seq. Under the APA, a "reviewing court shall hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final agency action; rather, the full administrative record that is compiled by the agency delineates the scope of judicial review. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate standard of APA review . . . to the agency decision based on the record the agency presents to the reviewing court."). The [APA] directs the Court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Review of the whole record is based on the full administrative record that was before the agency decisionmakers at the time they made their decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

On January 7, 2017, Federal Defendants lodged the certified administrative record for the December 2015 Decision. ECF No. 43. Although the Court provided Plaintiffs the opportunity

to file a motion to supplement the administrative record, Plaintiffs did not do so. *See* ECF No. 41. Plaintiffs cannot now seek to supplement the record by citing to extra-record documents attached to a separate Request for Judicial Notice and Supplemental Request for Judicial Notice. The agency's decision is based on the administrative record lodged with the Court and the Court's review is limited to that record. Therefore, this Court should disregard Plaintiffs' statements based on extra-record documents. Additionally, Plaintiffs assert several statements as fact supported by the administrative record with which Federal Defendants disagree and discuss below.

A. The 1998 Resolution

On September 24, 1998, the Superintendent stated that "for purposes of determining the initial members of the Tribe," the BIA must include Mr. Dixie and his brother Melvin, as the remaining heirs of Mabel Hodge. 2011AR000173. In addition, to Mr. Dixie and Melvin, the BIA recognized that Mr. Dixie had adopted Ms. Burley, her two daughters, and her granddaughter into the Tribe, and therefore, those adoptees who were of majority age also had "the right to participate in the initial organization of the Tribe." *Id.* The Superintendent did not find that these individuals made up the Tribe's initial members. Rather, he stated:

> At the conclusion of [the meeting with the BIA staff], you were going to consider what enrollment criteria should be applied to future perspective members. Our understanding is that *such criteria will be used to identify other persons eligible to participate in the initial organization of the Tribe*. Eventually, such criteria would be included in the Tribe's constitution.

Id. (emphasis added). The Superintendent then recommended that the Tribe, for the time being, operate as a General Council and provided a draft resolution for the Tribe to use. *Id.* In November of 1998, Silvia Burley and Yakima Dixie signed Resolution #GC-98-01 ("1998 Resolution"), which established the adults of the Tribe as the General Council ("1998 General Council"). 2011AR001401. The 1998 Resolution states that membership of the Tribe consists

of at least Yakima Dixie, Silvia Burley, Silvia Burley's daughters and grandchild, and that membership may change in the future consistent with the Tribe's ratified constitution and any duly enacted tribal membership statutes. *Id.* Thus, the plain language of the 1998 Resolution belies Plaintiffs' assertions that it was intended to, and did, effect the Tribe's organization.

B. Dixie's Fraud and Tribal Leadership Dispute

Plaintiffs include as part of their Statement of Facts a recitation about the Tribe's leadership dispute and alleged fraud committed by Mr. Yakima Dixie in allowing a third party to attempt to take over the Tribe. Pls.' Opp. 11-12, 57-74. Plaintiffs devote a good portion of their brief to discuss allegations that rely on documents not included within the administrative record. The Court should disregard these arguments. Further, Plaintiffs' assertions have no bearing on the Assistant Secretary's decision. The Assistant Secretary's decision does not turn on the reliability and relevance of Mr. Yakima Dixie's alleged admission of fraud as Plaintiffs suggest. *See* Pls.' Opp. at 66. Instead, the Assistant Secretary's decision examined the two issues of whether the Tribe's membership was limited to five individuals and whether the 1998 General Council was the Tribe's valid representative. The Assistant Secretary looked at the historical record of the tribe, previous Departmental dealings and understandings, previous Assistant Secretary decisions, and the parties' representations as to the Tribe's membership composition. It was this careful consideration of all the relevant factors that support the December 2015 Decision, not the threatened fisticuffs in a 2012 deposition that Plaintiffs discuss in detail in their opposition. As all parties have stated, disputes developed over who was the Tribe's valid representative. 2017AR001399, 1401-02. The groups have brought multiple lawsuits against the BIA, the State of California Gaming Commission, and each other in various courts, including this one. But the Assistant Secretary considered the total record before him, which clearly supports his decision.

C. U.S. District Court's December 2013 Order (*Miwok III*)

Plaintiffs allege that the district court's decision in *Miwok III* is fundamentally flawed for two reasons: (1) they assert that because the court did not have the benefit of reviewing the deposition transcript of Mr. Yakima Dixie taken in a California State case, it could not consider his alleged statements that he did resign as Tribal Chairman; and (2) they assert that the decision is largely based on a time-barred claim that the 1998 Resolution was invalid at the outset. Pls.' Opp. at 16. First, Plaintiffs allege that during a 2012 deposition, Mr. Yakima Dixie admitted to resigning as Tribal Chairman and that not having this information before it mislead the district court into basing its decision on the erroneous presumption that Mr. Yakima Dixie never resigned. *Id.* The court in *Miwok III*, however, did not premise its decision on Mr. Yakima Dixie's alleged resignation. Rather, it noted that the 2011 Decision "fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council." *Miwok III*, 5 F. Supp. 3d at 100 (emphasis in original). On remand, the administrative record contained the deposition transcript. AR2017000137-62. The transcript's inclusion, however, does not change the fact that the Tribe consists of more than five individuals and that the 1998 General Council is not the Tribe's valid representative.

Nor was *Miwok III* largely based on a time-barred claim that the 1998 Resolution was invalid at the outset.[1] Rather, the district court found that it was unreasonable for the Assistant Secretary to assume that the 1998 General Council represented the duly constituted government of the Tribe. *Miwok III*, 5 F. Supp. 3d at 99. The district court discussed the fact that the 2011

[1] Throughout their response in opposition, Plaintiffs consistently mischaracterize the December 2015 Decision as finding that the 1998 Resolution was "invalid at the outset." The Assistant Secretary made no such finding. The Assistant Secretary made no ruling on the initial validity of the 1998 Resolution, rather he found that he could not now accept the validity of actions taken pursuant to the authority of that document in light of the rulings by the courts and the administrative record.

Decision declared that the 1998 Resolution established a General Council form of government without actually addressing the validity of the General Council and whether a duly constituted government actually exists. *Id.* at 99-100. Accordingly, the district court remanded the 2011 Decision to the Assistant Secretary to consider the issues raised.

III. ARGUMENT

In their opposition, Plaintiffs ignore the very issues they challenge in this suit: the two findings in the December 2015 Decision that (1) the Tribe consists of more than five individuals and (2) the 1998 General Council is not the Tribe's valid representative. Plaintiffs vigorously assert that statute of limitations bars arguments made by other parties in other forums, that third parties conspired to take over the Tribe with the aim of asserting control over its potential gaming possibilities, and that Mr. Yakima Dixie has committed fraud. Plaintiffs seek to interject extra-record documents and circular, irrelevant reasoning to obfuscate the facts. Nevertheless, it is the facts in the administrative record that form the basis for the Assistant Secretary's determination. Considered within that record are the decisions of federal courts finding that Plaintiffs are not the Tribe's valid representative and that the Tribe consists of more than five people. *See Miwok I*, *Miwok II*, and *Miwok III*. Also included in the record are many decisions and letters of Federal Defendants addressing the history of the Tribe and the issues before the Assistant Secretary. *See* 2017AR001397-402. Reviewing the record as a whole, the Assistant Secretary articulated a rational connection between the facts found and the choices made and his decision is entitled to substantial deference. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 675 (9th Cir. 2016). Plaintiffs fail to demonstrate otherwise and Federal Defendants' motion for summary judgment should be granted.

A. Plaintiffs' Challenge to the December 2015 Decision is Barred by Issue Preclusion and Claim Preclusion

Plaintiffs again cite to the district court's statement in footnote 15 of *Miwok III*, to support their argument that *Miwok I* and *II* did not address tribal membership and the validity of the 1998 General Council, but fail to rebut Federal Defendants' arguments as to why the district

court was wrong. Pls.' Opp. at 20. As Federal Defendants explained in their memorandum in support of their cross-motion for summary judgment, ECF No. 46 at 17-22, and opposition to Plaintiffs' cross-motion for summary judgment, ECF No. 50 at 7, the district court plainly erred in making that statement.[2] The courts in *Miwok I* and *II* did not just determine "whether the Secretary had the authority to refuse to approve a constitution." *Miwok III*, 5 F. Supp. 3d at 101 n.15. The courts addressed more. They found not only that the Assistant Secretary had the authority to disapprove the constitution submitted by Ms. Silvia Burley, but that he was correct in doing so.

At issue in those cases was a complaint filed by Plaintiffs in 2005 that included among its requests for relief a declaration that "the Constitution of the California Valley Miwok Tribe, adopted by the Tribe in September 2001 is a valid governing document for the Tribe." 2011AR000709. The Assistant Secretary had disapproved the constitution on the grounds that it did not involve the greater tribal community and that the Tribe's leadership was not established. As the district court stated, "BIA thus defends its refusal to recognize the California Valley Miwok Tribe as an organized tribe on the ground that the Tribe has failed to take necessary steps to protect the interests of its potential members." *Miwok I*, 424 F. Supp. 2d at 202.

In affirming the district court's dismissal of Burley's complaint, the circuit court explained:

> This case involves an attempt by a small cluster of people within the California Valley Miwok Tribe to organize a tribal government under the [IRA]. [CVMT's] chairwoman, Silvia Burley, and a group of her supporters adopted a constitution to govern the tribe without so much as consulting its membership. *The Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe.* Burley and her supporters – in [CVMT's] name – then sued the United States claiming that the Secretary's refusal was unlawful and seeking a declaration that [CVMT] is organized pursuant to 25 U.S.C. §476.

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[2] In addition to being wrong, the discussion in footnote 15 is also dicta and not binding precedent to which the Court should grant any weight because the *Miwok III* court granted plaintiffs' relief on other grounds. *See generally Powell v. Thomas*, 643 F.3d 1300, 1304-05 (11th Cir. 2011) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us.") (internal quotations and citations omitted).

> Because we conclude that the Secretary lawfully refused to approve the proposed constitution, we affirm the district court's dismissal of Burley's claim.

Miwok II, 515 F.3d at 1263 (emphasis added). The court further stated that

> *Although [CVMT] by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting the proposed constitution.* This antimajoritarian gambit deserves no stamp of approval from the Secretary. As Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values.

Id. at 1267-68 (emphasis added).[3] On those grounds, the circuit court affirmed the Assistant Secretary's decision not to approve the Burley faction's constitution, which did not have the support of the Tribe's majority, was permissible. *Id.* at 1268. Therefore, the courts did not just determine that the Assistant Secretary had authority to not accept the constitution, but that his very reason for doing so – the fact that the Tribe's membership was larger than Ms. Silvia Burley and her supporters – was correct. The courts had to consider the very issue of the Tribe's membership in order to uphold the Assistant Secretary's decision. And it is this very issue, the membership of the Tribe, that is challenged in this Court. Issues that were necessarily decided by the courts in *Miwok I* and *II* have now been raised by the same plaintiffs before this Court.[4] All the well-established principles supporting the preclusive effect of prior litigation mitigate for dismissal of this complaint.

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[3] In discussing the 250 number, the court stated, "[t]his figure was offered by the tribe itself in separate litigation. *See* Complaint for Injunctive and Declaratory Relief at 1, *California Valley Miwok Tribe v. United States*, No. 02-0912 (E.D. Cal. Apr. 29, 2002). We take judicial notice of that document." *Miwok II*, 515 F.3d at 1265 n.5.

[4] Plaintiffs state that the court's decision in *Miwok III* did not involve a final judgment on the merits as to them because they did not have the ability to appeal the court's decision. Federal Defendants agree that Plaintiffs did not have the opportunity to appeal that decision but note that their inability to appeal *Miwok III* has no bearing on either the controlling authority of, or the preclusive effects of, *Miwok I* and *II*, which clearly addressed and resolved the Tribe's membership issue.

B. The Record Supports the Assistant Secretary's Determination that the Tribe's Membership is more than Five Individuals

Even if the issue of whether the Tribe's membership consists of more than five individuals is not precluded by *res judicata* and collateral estoppel principles, Plaintiffs fail to demonstrate how the Assistant Secretary's decision is not fully supported by the administrative record. All the elements of the record on which the Federal Defendants and the courts relied on in the previous litigations were before the Assistant Secretary, including Plaintiffs' previous statements that the Tribe consisted of more than 250 people; the Superintendent's 1998 letter noting that other persons were eligible to participate in the initial organization of the Tribe, 2011AR000172-76; the Superintendent's 2005 letter finding that the Tribe consisted of more than five individuals, 2011AR000610; and the agency decisions challenged in *Miwok I*, *II*, and *III*. Plaintiffs fail to offer any reason why the Assistant Secretary's decision is not entitled to deference, and more importantly, why is incorrect. *See also* ECF No. 46 19-20.

C. Plaintiffs Remaining Arguments in Opposition

In addition to the specific arguments addressed above, Plaintiffs repeat previous arguments and make many distorted contentions that seek to confuse the basic issues before the Court. While disputing the relevance of the arguments, and asserting that none of them overcome the preclusive effect of *Miwok II*, Federal Defendants discuss the remaining claims below:

1. Membership in Unorganized Tribes and Rancherias

Plaintiffs again argue that the December 2015 Decision, in determining that the Tribe consists of more than five individuals, incorrectly includes Eligible Groups[5] as part of the Tribe's potential members and thus is arbitrary and capricious on those grounds. Plaintiffs assert that the federal distribution regulations for terminated Rancherias confirm that residence on the

[5] Plaintiffs use the term "unenrolled potential Tribal members" to describe the individuals who may be eligible to take part in the organization of the Tribe. The December 2015 Decision defines these individuals collectively as the "Eligible Groups."

Rancheria equates to actual membership and is the only way a person may be an eligible member. Plaintiffs are wrong and the cited regulations do not apply. As Federal Defendants discussed in their Opposition to Plaintiffs' Cross-Motion for Summary Judgement, ECF No. 50 at 13-16, the Tribe was never terminated and, therefore, those regulations have no bearing.

Plaintiffs ignore the fact that such restorations were premised on an *illegal termination* under the Rancheria Act: on that premises, "restoration" was limited to *undoing* the illegal acts of the Secretary. Under the Rancheria Act, the distributes of the assets of a terminated Rancheria lost their Federal status as Indians and the Rancheria ceased to be a Reservation. 72 Stat. 619 (1958). As spelled out in detail in *Alan-Wilson v. Acting Sacramento Area Director*, 1998 I.D. LEXIS 85; 33 IBIA 55 (IBIA 1998), in response to a remand from the IBIA, the BIA undertook a survey of restored Rancherias, and reached the following conclusion:

> The record reflects that BIA established two variables in its interpretation of *Hardwick* when aiding in the organization or reorganization of the 17 terminated tribes. One variable was whether a rancheria had a pre-termination governing document, in which case the BIA recognized the membership criteria set forth in that document. The Bureau utilized the pre-termination governing document because paragraph 4 of the *Hardwick* decision restored each rancheria to the same status it had prior to termination by requiring the Secretary of the Interior to recognize them ". . . as Indian entities with the same status as they possessed prior to distributions of the assets of these Rancherias . . . ." However, where there was no pre-termination governing document, the BIA used the distribution plans for the respective rancherias by instructing the Indians thereof that the rightful parties to organization of the rancheria were the distributees, dependent members and lineal descendants thereof.

Alan-Wilson, 1998 I.D. LEXIS 85 at *8. No such considerations apply to the initial organization of a tribe or Rancheria that was not terminated. Plaintiffs, therefore, fail to demonstrate that the December 2015 Decision is arbitrary and capricious on these grounds.

2. The 1998 Resolution

Plaintiffs assert variations of a theme regarding the 1998 Resolution: in essence, Plaintiffs argue that the Assistant Secretary determined in his decision that the 1998 Resolution was invalid, invalid at the outset, was a time-barred issue, or could not be considered because it

was never referred to the Assistant Secretary by the IBIA. These assertions misstate the December 2015 Decision and are premised on meritless arguments.

First, the December 2015 Decision made no findings as to the validity of the 1998 Resolution "at the outset." To the contrary, the December 2015 Decision, in considering the issue of the Tribe's valid representatives, found that the 1998 Resolution "seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of organizing the Tribe," but that the actual reorganization could be accomplished only by a process open to the whole tribal community. 2017AR001401. (emphasis added). The December 2015 Decision further found that, as the courts in *Miwok I* and *Miwok II* had established, and the administrative record had confirmed, because the 1998 Resolution was approved by only Mr. Dixie and Ms. Burley, it could not serve as the actual reorganization of the whole tribal community, which includes the Eligible Groups. *Id.* The Assistant Secretary stated that "Federal courts have established, and my review of the record confirms, the people who approved the 1998 Resolution . . . are not a majority of those eligible to take part in the reorganization of the Tribe." *Id.*

Even if the December 2015 Decision can be read as finding the 1998 Resolution invalid at the outset —which it cannot—the statute of limitations does not apply to the Assistant Secretary's decision. The statute of limitations applicable to an APA claim, 28 U.S.C. § 2401(a), speaks to limits on filing an action *against the United States in federal court*. It does not bar the Assistant Secretary from addressing the issues raised in the administrative process for the challenged decision. Plaintiffs, therefore, rely on an unquestionably flawed statute of limitations argument in their opposition. Plaintiffs' argument that the statute of limitations applies here because Mr. Dixie's argument is time-barred is simply wrong. This lawsuit is an APA challenge to the December 2015 Decision. It is timely. Nothing else related to this case could possibly implicate the six year limitation of section 2401(a).

Nor was the Assistant Secretary somehow barred from considering whether a valid government structure was established by the 1998 Resolution on the grounds that it was not an issue referred to him by the IBIA. Plaintiffs allege that in its 2010 decision, 2011AR001683-705, the IBIA limited its referral to the Assistant Secretary to only an enrollment dispute. Pls.' Opp. at 48. As such, Plaintiffs argue that the December 2015 Decision exceeded the Assistant Secretary's authority by deciding whether the 1998 General Council was the Tribe's valid representative. *Id.* Plaintiffs' argument is undermined by the wealth of authority that establishes the Assistant Secretary's "plenary administrative authority in discharging the federal government's trust obligations to Indians." *Miwok III*, 5 Supp. 3d at 101 n.15 (quoting *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1996)); *see also* 43 U.S.C. § 1457; *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (noting that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole."). Thus, the Assistant Secretary was not limited in his decision to consider only issues referred by the IBIA and could consider the matter of whether the 1998 General Council is the Tribe's valid representative.

3. The Tribe is Not Being Forced to Reorganize

Plaintiffs assert that the Assistant Secretary's decision is forcing them to reorganize and is therefore improper. Pls.' Opp. at 54. Plaintiffs ignore the fact that since 1998, the Tribe has been pursuing reorganization and the genesis of much of this litigation is the Tribal factions' efforts to have the Tribe organized based on their proffered constitutions. As discussed in this brief, in reviewing the latest submissions, the Assistant Secretary determined that the record did not support a finding that those eligible to participate in the organization were limited to five individuals. Rather, the Assistant Secretary identified the groups of individuals who may be eligible to participate in Tribe's organization. He did not force the Tribe to organize nor does the existence of the Eligible Groups place any burdens on the Tribe.

4. Third Party Scheme to Take Control of the Tribe and Mr. Yakima Dixie's Alleged Fraud

Throughout their brief, Plaintiffs devote considerable time asserting that the current Tribal dispute is the result of interference by a third party individual, Mr. Chad Everone, who they allege is attempting to take over the Tribe through Mr. Dixie, who they allege is committing fraud. Pls.' Opp. 57-71. Plaintiffs cite numerous extra-record documents and assert unsupported allegations. These arguments, however, fail to demonstrate that the December 2015 Decision was arbitrary and capricious. The cause of the Tribe's internal dispute is not at issue nor did it play any part in the Assistant Secretary's decision. It is utterly undeniable that the dispute itself exists and that the parties have devoted significant time and resources toward pursuing their claims in federal courts, state courts, and administrative tribunals. The December 2015 Decision, however, is premised on the well-established law of the case that the Tribe consists of more than five people. Allegations of fraud, greed, and general skullduggery played no role in the Assistant Secretary's decision and Plaintiffs fail to demonstrate that the December 2015 Decision is arbitrary and capricious on these grounds.

5. Reinstatement of 2011 Decision

Finally, this Court should not reinstate the 2011 Decision. That decision, the subject of *Miwok III*, was remanded to the Assistant Secretary for reconsideration. As such, where, as here, the Court's jurisdiction is based on the APA, vacatur is the presumptive remedy. *See* 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency . . . action found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case."); *Vt. Yankee Nuclear Power Corp.* 435 U.S. at 549 ("[W]hen there is a contemporaneous explanation of the [challenged] agency decision, the validity of that action must stand and fall on the propriety of that finding . . . . If that finding is not sustainable on the administrative record made,

then the [agency's] decision must be vacated, and the matter remanded to [it] for further consideration."). Here, should the Court find that the December 2015 Decision was arbitrary and capricious, the proper remedy would be to set aside the decision and remand the case, not reinstate the 2011 Decision.

IV. OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE AND TO INTRODUCE ADDITIONAL DOCUMENTS

On November 15, the Court entered its Status (Pretrial Scheduling) Order ("Status Order") setting forth the schedule for this case, including lodging of the administrative record, filing motions to augment the administrative record, and filing motions for summary judgment. Pls.' Mem. 2-3. On January 13, 2017, Federal Defendants lodged an electronic, word-searchable version of the record in PDF format and served copies of the record on Plaintiffs' counsel and Defendant-Intervenors' counsel. Pursuant to the Status Order, Plaintiffs had until February 6, 2017, to file any motion to augment the administrative record. *Id.* at 2-3. Plaintiffs did not file a motion to augment. Instead, on March 3, 2017, when they filed their cross-motion for summary judgment, Plaintiffs filed a separate Request for Judicial Notice under Federal Rule of Evidence 201 ("FRE 201") of 33 extra-record documents totaling over 200 pages. ECF No. 45. Plaintiffs have now filed an additional request. ECF No. 48-1. In their request, Plaintiffs seek to have the Court take judicial notice of a February 21, 1978, Report of Probation, asserting that the document is relevant

> on the issue of whether Dixie was coerced in his deposition testimony, why counsel reacted to Dixie's physical threats at a deposition, and the issue of Plaintiffs' claim that Dixie and Everone fabricated the Tribal leadership dispute in order to steal control of the Tribe from Burley's leadership in order to build a casino.

48-1 at 2. Plaintiffs provide no other support for their request.

Setting aside the fact that the document is completely irrelevant and has absolutely no bearing on the decision they challenge, Plaintiffs' request for judicial notice is an invalid and untimely end-run around the Status Order's schedule and the requirements for supplementing the administrative record. The Court should not consider the extra-record document because

Plaintiffs have failed to carry—nor have they even tried to carry—their heavy burden of establishing an exception to APA's limit on judicial review. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). In cases that are brought under the APA, unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final agency action; rather the full administrative record that is compiled by the agency delineates the scope of judicial review. *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 549. Judicial notice is usually inappropriate under the APA because "[t]he fact finding capacity of the district court . . . is typically unnecessary to judicial review of agency decisionmaking." *Fla. Power & Light Co.*, 470 U.S. at 744. Instead, "courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.*

The United States Court of Appeals for the Ninth Circuit narrowly allows judicial notice of documents in APA cases only when the documents otherwise meet one of the record-review exceptions. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 975-76 (9th Cir. 2006); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (construing a motion for judicial notice as a motion to supplement the agency's administrative record). Put simply, "a party cannot circumvent the rules governing record supplementation by asking for judicial notice instead of supplementation . . . ." *Native Ecosys. Council v. Weldon*, 848 F. Supp. 2d 1207, 1228 (D. Mont. 2012), *vacated as moot*, No. CV-11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov. 20, 2012).

Plaintiffs provide no basis for supplementing the administrative record. Plaintiffs had ample opportunity to seek to supplement the administrative record, but chose not to do so. They cannot now seek to supplement the record under the guise of an FRE 201 request. Although Plaintiffs assert that the document is relevant to issues concerning the Tribal leadership dispute, ECF No. 48-1, Plaintiffs make no attempt to explain how the document is actually relevant to the decision they challenge or refutes any arguments Federal Defendants assert on their motion for summary judgment, or even, as an initial matter, how their request meets any of the record-review exceptions. To the extent Plaintiffs attempt to argue that the extra-record document is

needed to correct the administrative record, the APA prohibits this. "Consideration of the evidence to determine the correctness . . . of the agency's decision is not permitted . . ." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Ctr. for Biological Diversity v. Fish & Wildlife Serv.*, 450 F.3d 930, 944 (9th Cir. 2006) (rejecting extra-record evidence because it was offered to advance "'a new rationalization . . . for attacking an agency's decision.'"); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (same). Plaintiffs' request for judicial review should therefore be denied.

V. CONCLUSION

That the Tribe has many more than five members was decided by the D.C. district court and affirmed by the D.C. circuit court. That fact is the law of the case, and Plaintiffs are barred by preclusion principles from relitigating it. The December 2015 Decision is the result of the Assistant Secretary's careful and thorough analysis of the history of the Tribe, the administrative record, and the applicable law. The Assistant Secretary was guided by court decisions that have addressed the challenges Plaintiffs raise and also by the administrative record before him. The Assistant Secretary considered the relevant factors and articulated a rational connection between the facts found and the choices made. After his careful consideration, the Assistant Secretary properly found that the Tribe consists of more than five people and that the 1998 General Council is not the Tribe's valid representative. The December 2015 Decision is presumed to be valid, and Plaintiffs have shown no reason for the Court to deviate from this presumption. Rather, the Court should uphold the decision and find that it was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Court should grant summary judgment in favor of Federal Defendants.

Respectfully submitted May 8, 2017

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/s/ Jody H. Schwarz
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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing Federal Defendants' Reply in Support of Their Cross-Motion for Summary Judgment and Opposition to Supplemental Request for Judicial Notice by using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz
Jody H. Schwarz