SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
ROBERT J. URAM, Cal. Bar No. 122956
ruram@sheppardmullin.com
JAMES F. RUSK, Cal. Bar No. 253976
jrusk@sheppardmullin.com
ZACHARY D. WELSH, Cal. Bar No. 307340
zwelsh@sheppardmullin.com
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415.434.9100
Facsimile: 415.434.3947

Attorneys for THE CALIFORNIA VALLEY MIWOK TRIBE, THE TRIBAL COUNCIL, YAKIMA DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, MICHAEL MENDIBLES, GILBERT RAMIREZ, JR., ANTOINETTE LOPEZ, and IVA SANDOVAL

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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Judge: Hon. William B. Shubb
Date: May 30, 2017
Time: 1:30 p.m.
Courtroom 5

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Burleys' 73-page opposition brief largely repeats, verbatim, arguments made in their motion for summary judgment. Like their summary judgment brief, their opposition brief fails to dispute the key factual findings of the Bureau of Indian Affairs' (BIA) December 30, 2015 decision (2015 Decision) under review in this case, and fails to acknowledge the prior administrative decisions and published federal court opinions that establish the legal principles applicable to organization of this Tribe. Instead, it merely recycles the Burleys' claim — rejected a decade ago — that they adopted a government for the Tribe "without so much as consulting its membership," and that the BIA must defer to that naked power grab in the name of respect for tribal sovereignty. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (*Miwok II*).

The Burleys do not challenge the 2015 Decision's conclusion that the Sheepranch Rancheria was established for the benefit of the 12 Indians identified in the 1915 Sheep Ranch census, or its conclusion that the Eligible Groups — the lineal descendants of those 12 Indians — include far more members than the four Burleys and Yakima Dixie. They do not dispute that only the Burleys and Mr. Dixie had the opportunity to participate in drafting or approving the 1998 resolution they rely on, or that the rest of the Eligible Group members were excluded. Their pretensions to Tribal authority rest on two fatally flawed premises: (i) that Yakima Dixie, because he happened to be the only Tribal member living on the 0.92-acre Sheep Ranch Rancheria in 1998, had the sole authority to decide who was a Tribal member and who could participate in Tribal organization; and (ii) that because the BIA dealt with the Burleys' tribal council between 1998 and 2004, it must continue to do so. Both premises are refuted by the record and by long-settled precedent.

The BIA must ensure that it deals with a Tribal government that reflects the will of a majority of *all* the Tribe's members. The record demonstrates that the Tribe's members have never been limited to those living on the Sheep Ranch Rancheria, and Intervenors have shown that the BIA lacks the authority to impose any such limitation on Tribal membership. The Burleys' brief recites, like an article of faith, that "whoever resided on the 0.92 parcel of land had the

authority to enroll Indians as members and organize the Tribe," but they cannot point to a single historical example or legal authority showing that to be true. Burley Opp. to Int. MSJ, ECF No. 49, p. 5.

The Burleys fall back on their well-worn argument that the BIA once recognized their tribal government and cannot now change its mind — ignoring that the BIA changed its mind more than a decade ago, and the federal courts affirmed. The BIA's decisions in 2004 and 2005 made it clear that this is not a "leadership dispute" between Mr. Dixie and Ms. Burley over control of a five-person general council. The BIA cannot recognize *any* Tribal leader until the entire Tribal community — more than 200 adults — has an opportunity to participate in creating a Tribal government.

The 2015 Decision followed well-settled principles of Indian law that have been affirmed in four published federal court opinions rejecting the Burleys' views. The Decision is rational, supported by the record, and should be upheld.

II. ARGUMENT

The record and applicable law support the 2015 Decision's conclusion that more than five people are entitled to participate in Tribal organization. Neither the 1935 Indian Reorganization Act referendum, nor the 1966 Rancheria distribution plan, nor the wholly unrelated *Tillie Hardwick* settlement, provides any basis to limit participation to the four Burleys and Yakima Dixie. The failure to involve the whole Tribal community in adopting Resolution No. GC-98-01 (1998 Resolution) — and not any conclusion about the purpose for which the 1998 Resolution was originally adopted —forms the basis for the 2015 Decision's rejection of the Burleys' purported Tribal government.

The BIA's decision to *not* recognize the five-person general council established under the 1998 Resolution (the 1998 General Council) renders irrelevant the Burleys' other arguments about whether Mr. Dixie or Ms. Burley should be the chairperson of the 1998 General Council, or about Mr. Dixie's alleged motives for contesting the validity of that Council. This is not a contest between Mr. Dixie and Ms. Burley, but a conflict between majoritarian rule and rule by exclusion.

The Burleys' procedural arguments also lack merit. The *Miwok III* litigation, from which the 2015 Decision arose on remand, involved a new challenge to a new, August 2011 BIA decision (2011 Decision) that represented a radical change of course from the BIA's previous decisions. *See California Valley Miwok Tribe v. Jewell*, 5 F.Supp.3d 86 (D.D.C. 2013) (*Miwok III*). The Tribe's claim in that case was not barred by any statute of limitations, nor was the Tribe "estopped" from contesting the validity of the 1998 Resolution. In any case, the Burleys cannot relitigate *Miwok III* in this court, or seek reinstatement of the 2011 Decision; they can only challenge the 2015 Decision.

The 2015 Decision was well within the scope of the Assistant Secretary's authority; it does not matter whether the Interior Board of Indian Appeals specifically referred to him the issue of whether the 1998 Resolution created a valid government. The 2015 Decision does not improperly force the Tribe to reorganize; it applies well-settled law to state the conditions under which the United States is prepared to recognize the results of any Tribal reorganization process.

A. The record supports the AS-IA's conclusion that more than five people are entitled to participate in Tribal organization.

The 2015 Decision finds (2017-1398[1]), and Plaintiffs concede, Burley Opp. to Int. MSJ at 21, that the Sheep Ranch Rancheria was established for the benefit of the 12 named Indians identified in the 1915 BIA census of Sheepranch Indians.[2] The 2015 Decision reasonably finds that the descendants of those 12 Indians — the Eligible Groups — are the persons eligible to participate in Tribal organization. (2017-1402.) The record contains undisputed evidence that the Eligible Groups include more than 200 adults, many of whom were at least 18 years old in 1998. (2011-40 – 46, 500 – 501, 2105, 2196, 2204, 2218, 2224, 2231, 2238, 2268, 2279, 2285, 2291; 2017-167 Exh. 2[3].) Because those Eligible Group members did not participate in, or consent to,

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[1] Citations to the administrative record begin with a year — 2011 or 2017 — followed by page numbers.

[2] The 1915 census refers to Indians "13 in number," but names only 12 Indians.

[3] The evidence found at 2017-167 Exh. 2 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.

adoption of the 1998 Resolution, the 2015 Decision reasonably finds that the United States will not conduct government-to-government relations with the Tribe based on the 1998 Resolution.

The Burleys claim that the rights of the Eligible Group members exist only at the whim of whoever happens to reside on the Sheep Ranch Rancheria at any given time. They argue the "administrative record shows, historically … that whoever actually resided on the property would alone have the authority to enroll Indians as members and organize the Tribe." Burley Opp. to Int. MSJ at 21. Their arguments fail, and the 2015 Decision properly rejected them.

1. The 1935 IRA referendum did not give Jeff Davis sole authority to determine Tribal membership or organization.

The record shows that Jeff Davis was the only eligible voter in the 1935 referendum to accept or reject application of the Indian Reorganization Act to the Tribe. (2011-16.) It also shows that his vote neither "enroll[ed] Indians as members" nor "organize[d] the Tribe," as the Burleys claim, Burley Opp. to Int. MSJ at 21. The 1935 referendum was held for the purpose of determining whether tribes would "exclude themselves from the application of the Indian Reorganization Act" (2011-10), and participants voted either "for" or "against" (2011-21). The vote had nothing to do with determining membership, *see* 25 U.S.C. § 2125 (requiring referenda), and the Burleys concede that it did not have the effect of organizing the Tribe. Burley Opp. to Int. MSJ at 6, 19, 22-23.

Nor did his participation in the referendum indicate that Jeff Davis was the only member of the Tribe; it merely showed only that he was the only adult Indian the BIA identified as actually residing on the reservation at that particular time and eligible to vote under the standard prescribed by the Indian Reorganization Act. *See* 25 U.S.C. § 2125 (limiting voting to adults on the reservation); 2011-16 (identifying Davis as "living on" the Rancheria). However, the BIA identified the "total population" of the Tribe just a few months earlier as 16 people. (2011-2062.) The 1935 referendum did not affect the status of these historical tribal members.

2. The 1966 distribution plan did not give Mabel Dixie sole authority to determine Tribal membership or organization.

The record shows that Mabel Dixie was listed as the only distributee of the Sheep Ranch Rancheria assets on the 1966 distribution plan. (2011-49.) It also shows that the 1966 distribution

plan was explicitly *not* based on Tribal membership. *Compare* 25 C.F.R. § 242.3(a) (1965) *with* 25 C.F.R. § 242.3(b) (1965) (*in the record at* 2011-35). The fact that Ms. Dixie was the only listed distributee reflected that she was the only Indian residing on the Rancheria at that time — nothing more. *See id.*[4]

Being named on the distribution plan did not give Ms. Dixie any power to determine Tribal membership or to organize the Tribe, as the Burleys claim. *See* Burley Opp. to Int. MSJ at 23. The plan identifies Ms. Dixie as "the only Indian entitled to participate in the distribution of the assets of the Sheep Ranch Rancheria" (2011-49); it does not purport to confer any other rights or powers. The Burleys cannot identify anything in the record that even suggests Ms. Dixie ever exercised any authority to determine the Tribe's membership or to organize the Tribe.

The 1971 probate order determining Mabel Dixie's heirs likewise proves nothing. The order only identifies the heirs to Ms. Dixie's estate (2011-61); it says nothing about Tribal membership or organization — nor could it. Because Mabel Dixie never had the sole power to determine Tribal membership and governance, her sons could not inherit that power from her, regardless of what the probate order said. The Burleys' claim that the probate order "solidified" Mabel Dixie and her family as the sole members of the Tribe lacks any foundation. *See* Burley Opp. to Int. MSJ at 23.

3. The *Tillie Hardwick* settlement does not limit this Tribe's membership.

The Burleys claim that *if* the Tribe had actually been terminated, and *if* it had been subsequently restored under the *Tillie Hardwick* settlement, then Ms. Dixie and her heirs *would* have had the right to organize the Tribe because of Ms. Dixie's status as the sole distributee. Burley Opp. to Int. MSJ at 28. But "[s]aying so doesn't make it so, neither does wishful thinking." *United States v. Kloehn*, 620 F.3d 1122, 1132 (9th Cir. 2010) (Trott, S.C.J., dissenting). The Burleys' argument is wishful thinking because this Tribe was *not* terminated, and it was *not* a party to the *Tillie Hardwick* settlement, as the Burleys concede. Burley Opp. to Int. MSJ at 25, 29.

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[4] The Burleys acknowledge that the list of distributees could not have reflected Tribal membership, yet claim that this, in itself, proves that those named as distributees were the only members. *See* Burley Opp. to Int. MSJ at 26. This tortured argument refutes itself.

The Burleys cite *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007), in an attempt to show that the approach voluntarily adopted by some of the settling parties in *Hardwick* should be applied to this Tribe. *Williams* refutes their argument. In *Williams*, the plaintiffs alleged that the BIA had a "policy amounting to a rule" limiting membership in restored rancheria tribes to the named distributees and their descendants, and that it unlawfully applied that rule to exclude plaintiffs from membership in the Mooretown Rancheria tribe, which was a party to the *Hardwick* settlement. *Id.* at 788 n.5, 790. The Ninth Circuit held that the BIA does not have such a rule and that it lacks the authority to impose such a policy even if it tried. *Id.* at 790.

The BIA did not attempt to limit the membership or organization of the Mooretown Rancheria to distributees and their descendants. The BIA merely invited all *Hardwick* class members affiliated with that tribe to a meeting, at which the BIA offered its help in forming a tribal government "if they chose to do so." *Id*. at 789-790. "The BIA provided neither a membership list nor membership criteria." *Id.* at 790. The tribal community subsequently organized itself, at a meeting that was not limited to distributees, and at which "anyone interested in attending [wa]s welcome." *Id.* at 790. *Eleven years later*, the tribe revised its own membership criteria to "squeeze[] out" the plaintiffs, giving rise to the *Williams* lawsuit. *Id.*

Williams establishes no rule or policy governing membership or organization even for tribes that were parties to the Hardwick settlement — much less for other tribes. The general practice for tribes like this one that were *not* terminated and were *not* parties to *Hardwick* is described not in *Williams* but in *Alan–Wilson v. Bureau of Indian Affairs*, 30 IBIA 241, 249-250, 1997 WL 215308 (1997): "Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership for organizational purposes."[5] The Assistant Secretary properly followed that practice by using historical records to identify the Indians for whom the Sheep Ranch Rancheria was established and to define the Eligible Groups.

[5] *Alan-Wilson* also involved a rancheria tribe that was terminated and later restored to federal recognition under the *Hardwick* settlement. *Alan-Wilson* makes clear that the stipulated judgment agreed to by the parties — not any rule or determination by the BIA — determined who would have rights under that settlement. 30 IBIA at 245 (stipulated judgment providing for a class of persons who received assets in the terminated rancherias).

Finally, even if the Burleys' argument had merit, it would prove too much. If residents of the Sheep Ranch Rancheria had the sole authority to determine Tribal membership and organization, as the Burleys claim (a claim we reject), then that power would continue to belong to Yakima Dixie, who is still the Rancheria's only resident. Since Mr. Dixie supported the Tribe's inclusive organization process that led to adoption of a Tribal constitution in the Tribe's July 2013 election, the Burleys' reasoning would confirm the conclusion that all those who voted in the 2013 election were entitled to do so and that all those who meet the criteria in the 2013 constitution are members — further dooming the Burleys' claims.

B. This is not a dispute between Ms. Burley and Mr. Dixie.

The Burleys continue to portray this as a dispute between Ms. Burley and Mr. Dixie over who should lead the five-person 1998 General Council — focusing on claims that Mr. Dixie resigned as leader of that Council, that he previously accepted the validity of the Council, and that his motives for disputing the Council's validity now are flawed. None of those arguments has any bearing on the real issue in this case, which is that "tribal organization … must reflect majoritarian values." *Miwok II*, *supra*, 515 F.3d at 1267-1268. The 1998 General Council, and the 1998 Resolution it is based on, fail that litmus test because the two people (or even five) involved in their adoption are not a majority of 200. No act or omission by Mr. Dixie can validate them.

As a result, it does not matter whether Mr. Dixie said during a deposition in another case that he resigned as chairman of the 1998 General Council, Burley Opp. to Int. MSJ at 63; whether the Burleys' counsel felt justified in threatening Mr. Dixie's life at that deposition, Burley Opp. to Int. MSJ at 65; whether Mr. Dixie has any interest in building a casino, Burley Opp. to Int. MSJ at 55; or whether Mr. Dixie initially accepted the 1998 Resolution, Burley Opp. to Int. MSJ at 54.

Intervenors have already provided detailed responses to those arguments in their opposition to the Burleys' motion for summary judgment. The Burleys' opposition brief raises no new points except to claim that Mr. Dixie's objections to Ms. Burley's control of the 1998 General Council caused the Tribe's lack of a federally recognized government. But BIA decisions since 2004 have made it clear that the BIA suspended government-to-government relations with the Tribe not because the BIA believed Ms. Burley improperly ousted Mr. Dixie from the 1998

General Council, but because "organizational efforts [must] reflect the involvement of the whole tribal community." (2011-499.) Likewise, the 2015 Decision does not rely on claims of fraud or impropriety to deny recognition of the 1998 Resolution; it relies on the simple fact that "the people who approved the 1998 Resolution … are not a majority of those eligible to take part in the reorganization of the Tribe." (2017-1401.)

C. The Tribe's challenge to the 2011 Decision in *Miwok III* was not time-barred.

The Burleys' opposition brief repeats their argument that the 2015 Decision is invalid because it was issued on remand from the *Miwok III* decision, which accepted a "time-barred claim" that the 1998 Resolution was invalid. Burley Opp. to Int. MSJ at 32. As Intervenors explained in their opposition brief, the Burleys' argument impermissibly seeks to collaterally attack the *Miwok III* decision and to reinstate the BIA's August 2011 Decision, neither of which is before this Court. The Burleys' argument should be dismissed on that basis alone. *See California Valley Miwok Tribe v. Jewell*, 967 F.Supp.2d 84, 93 (D.D.C. Sept. 6, 2013) (*in the record at* 2017-774) (denying Burley motion to dismiss suit on statute of limitations grounds).

The Burleys' argument also fails on the merits because the complaint in *Miwok III* did not challenge the 1998 Resolution, or any of the BIA's long-past actions dealing with the 1998 General Council. The *Miwok III* complaint timely challenged the 2011 Decision for arbitrarily and capriciously recognizing a Tribal government, *in 2011*, based on the 1998 Resolution that the Department had expressly rejected in 2004 and 2005. (2017-27 – 28.) The applicable statute of limitations for that claim began to run when the 2011 Decision was issued, on August 30, 2011, reversing seven years of precedent that the Tribe had no reason to challenge. By the same token, the 2015 Decision does not find that the BIA was wrong to deal with the 1998 General Council between 1998 and 2004; it only finds that the BIA cannot recognize that Council in light of the record before it *today*. (2017-1401.)

The BIA not only can, but must, withdraw recognition of a Tribal government at any time if it determines that the government does not reflect the will of a majority of a tribe's members. *See Timbisha Shoshone Tribe v. U.S. Department of Interior*, 824 F.3d 807, 809-810 (9th Cir. 2016); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 143-45, 151-53 (D.D.C. 1999); *Alan-Wilson*, *supra*,

30 IBIA at 247-248. That is exactly what happened with this Tribe when the BIA determined in 2004 and 2005 that it did not recognize any Tribal government. (2011-611.) The 2015 Decision, reaffirming those decisions, was neither arbitrary nor time-barred.

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

As explained in Intervenors' opposition brief, the determination in the 2015 Decision to not recognize a Tribal government based on the 1998 Resolution was well within the Assistant Secretary – Indian Affairs' plenary authority over Indian affairs. *See* 43 U.S.C. § 1457; 25 C.F.R. §§ 2.4(c), 2.6(c), 2.20. *See also California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 201 n.6, 202 (*Miwok I*); *Miwok III*, 5 F.Supp.3d at 101 n.5. The 2015 Decision properly addressed the issues raised by the *Miwok III* remand, including "the validity of the General Council." *Miwok III*, 5 F.Supp.3d at 99. The Burleys' opposition brief offers no new arguments on this issue.

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

The Burleys argue, again, that the 2015 Decision erroneously concluded the 1998 Resolution was enacted only to manage the process of reorganizing the Tribe. As explained in Intervenors' opposition brief, the 2015 Decision did not make that finding — it simply observed that the 1998 Resolution "undoubtedly seemed" a reasonable mechanism for that purpose. (2017-1401.) The 2015 Decision's actual conclusion — that the United States will not recognize the 1998 Resolution — was based on the undisputed fact that the Resolution was adopted without the participation of the Eligible Groups, not on the Resolution's intended purpose. (2017-1401.)

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

As before, the Burleys claim the 2015 Decision improperly forces the Tribe to reorganize in order to receive federal benefits and places "potential" members on equal footing with "enrolled" members. The courts have already rejected this circular argument, which assumes the truth of the Burleys' claims to be the Tribe's only members. *Miwok III*, 5 F.Supp.3d at 98 n.4 (citation omitted); *see also California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 123, 2010 WL 415327 (2010).

The Burleys also suggest the 2015 Decision unlawfully requires the Tribe to organize through Indian Reorganization Act procedures, in violation of former IRA sections 476(f) and (h) (now codified at 25 U.S.C. §§ 5123(f) and (h)). This claim fails because the 2015 Decision does not require the Tribe to reorganize at all; it merely affirms that reorganization must respect majoritarian principles, whether it occurs under IRA procedures or not (2017-1399 – 1400) — an issue already finally determined in *Miwok I*, *supra*, 424 F.Supp.2d at 202.[6]

G. Estoppel does not apply.

The Burleys again claim 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. Not only does this claim misrepresent the record (2011-127, 131), it is also irrelevant. As stated above, this dispute is not between Yakima Dixie and Silvia Burley. It is between the entire Tribal Council, the Tribe itself, and the Tribe's several hundred members, on one hand, and the four Burleys on the other hand. Hundreds of individuals who were denied the opportunity to participate in the consideration of the 1998 Resolution cannot be "estopped" from disputing the validity of that document by the actions of one person who never consulted with them.

III. Conclusion

The Burleys' opposition brief, though extraordinarily lengthy, fails to raise a single new argument in support of the Burleys' position or to offer any reason why this Court should find the 2015 Decision arbitrary or capricious. Intervenors request that the Court uphold the 2015 Decision in its entirety and grant summary judgment in favor of Intervenors and Federal Defendants on all claims.

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[6] By suggesting that the Tribe cannot be "forced to reorganize," the Burleys suggest that (re)organization means something different from the adoption of a valid tribal government. It does not. The BIA "define[s] organization to mean the adoption by all members of the tribe of a formal governing document which describes the full manner in which the tribe governs itself and includes a full definition of who its members are." (2011-66 (underlining in original).)

Dated: May 8, 2017

ROBERT J. URAM
JAMES F. RUSK
ZACHARY D. WELSH

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Attorneys for Intervenor-Defendants

By /s/ James F. Rusk
JAMES F. RUSK

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing Intervenor-Defendants' Reply in Support of 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,

/s/ James F. Rusk
JAMES F. RUSK

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Attorneys for Intervenor-Defendants