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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

CALIFORNIA GAMBLING CONTROL COMMISSION, et al.,

Defendants.

CALIFORNIA VALLEY MIWOK TRIBE, CALIFORNIA (a.k.a. SHEEP RANCH RANCHERIA OF ME-WUK INDIANS, CALIFORNIA), YAKIMA K. DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, ANTONE AZEVEDO, MICHAEL MENDIBLES, AND EVELYN WILSON,

Intervenors.

No: 37-2008-00075326-CU-CO-CTL

NOTICE OF LODGMENT OF EXHIBITS IN SUPPORT OF INTERVENORS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR ORDER LIFTING EFFECT OF MARCH 11, 2011 ORDER

Date: April 26, 2013
Time: 2:00 p.m.
Dept.: C-62
Judge: The Hon. Ronald L. Styn

Intervenors hereby lodge the following joint set of exhibits in support of their oppositions to Plaintiff's motion for judgment on the pleadings and Plaintiff's motion for order lifting effect of March 11, 2011 order.

Exhibit	Description
1.	March 11, 2011 Order granting reconsideration and denying intervention
2.	April 1, 2011 Letter from AS-IA Larry Echo Hawk to Yakima Dixie
3.	April 20, 2011 Order re Ex Parte Hearing
4.	Plaintiff's Motion for Entry of Judgment
5.	Plaintiff's Reply in Support of Motion for Entry of Judgment
6.	October 21, 2011 Tentative Order Denying Plaintiff's Motion for Entry of Judgment
7.	August 31, 2011 Letter from AS-IA Larry Echo Hawk to Yakima Dixie
8.	Joint Status Report in *California Valley Miwok Tribe v. Salazar*, No. 1:11-cv-00160-RWR (D.D.C.)
9.	Memorandum Opinion and Order in *California Valley Miwok Tribe v. Salazar*, No. 1:11-cv-00160-RWR (D.D.C.)
10.	Intervenors' Administrative Appeal of Burdick letter dated January 12, 2011
11.	Feb. 11, 2005 Letter from AS-IA Michael Olsen to Yakima Dixie
12.	November 6, 2006 Letter from BIA Superintendent Troy Burdick to Silvia Burley and Yakima Dixie
13.	April 2, 2007 Letter from BIA Regional Director to Silvia Burley
14.	Portions of the Deposition Transcript for Yakima Dixie, Vol. 1
15.	Portions of the Deposition Transcript for Yakima Dixie, Vol. 2
16.	Memorandum of Points and Authorities in Support of Motion for Summary Judgment in *California Valley Miwok Tribe v. Salazar*, No. 1:11-cv-00160-RWR (D.D.C.)

17.	Intervenors' Opposition to Plaintiff's Motion to Compel Further Deposition of Yakima Dixie
18.	August 4, 2005 Letter from California Gambling Control Commission to Silvia Burley
19.	July 19, 2005 Letter from BIA Awarding Official Janice Whipple-DePina to Silvia Burley
20.	Dec. 14, 2007 Letter from BIA Superintendent Troy Burdick to Silvia Burley
21.	December 12, 2008 Letter from Associate Solicitor of Indian Affairs Edith Blackwell to California Deputy Attorney General Peter Kaufman
22.	January 14, 2009 Letter from Associate Solicitor of Indian Affairs Edith Blackwell to California Deputy Attorney General Peter Kaufman
23.	First Amended Complaint in *California Gambling Control Commission v. Sylvia Burley, et al.*, No. 05AS05386 (Sac. Cnty Sup. Ct.)
24.	Silvia Burley's Demurrer in *California Gambling Control Commission v. Sylvia Burley, et al.*, No. 05AS05386 (Sac. Cnty Sup. Ct.)
25.	Order Sustaining Demurrer in *California Gambling Control Commission v. Sylvia Burley, et al.*, No. 05AS05386 (Sac. Cnty Sup. Ct.)
26.	Minute Order dated October 1, 2010
27.	Plaintiff's Objections to Intervenors' Request for Judicial Notice in Support of Intervenors' Supplemental Brief in Opposition to Plaintiff's Motion for Reconsideration
28.	Plaintiff's September 6, 2011 Ex Parte Application
29.	June 27, 2006 Letter from the Commission to Silvia Burley
30.	June 26, 2007 Letter from the Commission to Karla Bell
31.	January 3, 2008 Letter from the Commission to Manuel Corrales

Dated: March 27, 2013

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
MATTHEW S. McCONNELL
Attorneys for Intervenors

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/11/2011 TIME: 02:00:00 PM DEPT: C-62

JUDICIAL OFFICER PRESIDING: Ronald L. Styn
CLERK: Kim Mulligan
REPORTER/ERM: Susan Holthaus CSR# 6959
BAILIFF/COURT ATTENDANT: M. Chadwell

CASE NO: **37-2008-00075326-CU-CO-CTL** CASE INIT.DATE: 01/08/2008
CASE TITLE: **California Valley Miwok Tribe vs. The California Gambling Control Commission**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT TYPE: Motion Hearing (Civil)
MOVING PARTY: California Valley Miwok Tribe
CAUSAL DOCUMENT/DATE FILED: Motion for Reconsideration, 12/30/2010

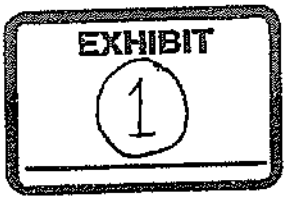
APPEARANCES

SEE SIGN-IN SHEET FOR APPEARANCES.

The Court hears oral argument and CONFIRMS the tentative ruling as follows:

The court addresses the evidentiary issues. Plaintiff California Valley Miwok Tribe's request for judicial notice is granted as to 1 and denied as to 2. Intervenors' request for judicial notice is granted. Plaintiff's supplemental request for judicial notice is granted. Intervenors' supplemental request for judicial notice is granted. Plaintiff's combined request for judicial notice is granted. Intervenors' objection 4 is sustained; objections 1-3 are overruled; the court does not reach Intervenors' objection 5 because the court does not reach Plaintiff's demurrer. Plaintiff's objections to Intervenors' request for judicial notice are overruled. Plaintiff's objections to Defendant California Gambling Control Commission's request for judicial notice are overruled. Plaintiff's objections to Intervenors' supplemental request for judicial notice are overruled. The Commission's objections to Plaintiff's evidence submitted in reply are all overruled. Plaintiff's objections to Intervenors' request for judicial notice in support of Intervenors' supplemental brief in opposition to Plaintiff's motion for reconsideration are overruled. Intervenors' objections to Plaintiff's evidence in reply re motion for reconsideration are overruled. The Commission's objections to Plaintiff's evidence in reply in support of motion for reconsideration are overruled. The Commission's objections to Plaintiff's supplemental combined request for judicial notice are overruled.

The court then rules as follows. Plaintiff California Valley Miwok Tribe's motion for reconsideration is granted. The court finds Plaintiff establishes that the December 22, 2010, decision by Assistant Secretary Larry Echo Hawk of the United States Department of the Interior –Indian Affairs as "new or different facts, circumstances or law" supporting reconsideration under CCP §1008(a).



Upon reconsideration, Intervenors' motion for leave to intervene is denied.

The court previously found Intervenors established their "interest" in this matter, under CCP § 387(a), based on "evidence of the on-going Tribal leadership dispute, both Dixie and Burley's failure to involve the whole tribal community in the formation of a constitution and governing body for the Tribe, [see, *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIS 103 (1/28/10)] and the Bureau of Indian Affairs requirement of adoption of a Tribal government that "reflect[s] the involvement of the whole tribal community" [see, *California Valley Miwok Tribe v. U.S.* (D.C. Cir. 2008) 515 F.3d 1262, 1266] . . . ."

Via his December 22, 2010 decision the Assistant Secretary rescinded the BIA's public notice to "assist the California Valley Miwok Tribe, aka Sheep Ranch Rancheria (Tribe) in its efforts to organize a formal governmental structure that is acceptable to all members;" rescinded the BIA's "letters stating that the BIA will initiate the reorganization process for the California Valley Miwok Tribe;" rescinded the letter "stating that the BIA does not recognize any government of the California Valley Miwok Tribe;" rescinded the BIA's letter to Sylvia Burley "stating that it 'does not view your tribe to be an 'organized' Indian Tribe,' and indicating that Ms. Burley is merely a 'person of authority' within the Tribe;" and stated that "[b]oth my office and the BIA will work with the Tribe's existing governing body – its General Council, as established by Resolution # GC-98-01 – to fulfill the government-to-government relationship between the United States and the California Valley Miwok Tribe."

The December 22, 2010 decision removes the bases for the court's finding that Intervenors have an interest in this action under CCP § 387(a). Pursuant to the December 22, 2010 decision, the subsequent Special General Council meeting of the Tribe electing Burley as the Tribe's Chairperson, and the January 12, 2011, letter from Superintendent Burdick, the "on-going Tribal leadership" dispute has been resolved. The actions of the BIA disputing the formation of the Tribal government and leadership were rescinded. The BIA recognizes Burley as a representative of the Tribe. It is the Tribe that has standing to assert its claim to the RSTF monies, not the individual members. See, *Canadian St. Regis Band of Mohawk Indians v. State of New York* (N.D. N.Y. 1983) 573 F.Supp. 1530, 1537. To the extent Intervenors are members of the Tribe, their rights are "adequately represented" by the Tribe thereby precluding intervention under CCP § 387(b). Intervenors' remedies with respect to Tribal membership and Tribal use of the RSTF monies are via Tribal procedure.

Pursuant to 25 C.F.R. §2.6(c) the December 22, 2010, decision by the Assistant Superintendent is final and "effective immediately." Intervenors submit evidence of the filing of suit in the United States District Court for the District of Columbia seeking judicial review of the December 22, 2010 decision. However, Intervenors provide no authority holding that the filing of the federal court action vitiates the finality or immediate effectiveness of the decision of the Assistant Superintendent. Intervenors in essence are asking this court to stay the effect of the December 22, 2010, decision. This court is without jurisdiction to do so.

The court recognizes the long history of this dispute and that Intervenors continue to dispute whether the Miwok Tribe and its members have been organized and legally recognized, and whether Burley is the representative of the Tribe with standing to assert the Tribe's claim to the RSTF monies. The court also recognizes that even though the December 22, 2010 decision is a "final agency action" it is still subject to judicial review. 5 U.S.C. §704. See, e.g., *Bennett v. Spear* (1997) 520 U.S. 154, 175. However, the court finds such a right to judicial review is insufficient to establish Intervenors "interest" in this matter. To adopt Intervenors' position would mean that any party who challenges a decision made by the

Assistant Secretary--Indian Affairs could continuously file writs and appeals, effectively nullifying the finality provision of 25 C.F.R. § 2.6(c).

The court is not persuaded by Intervenors' argument that the subsequent Burdick January 12, 2011 letter is a non-final appealable decision which keeps open issues of Tribal government, membership and leadership. This letter simply reflects Burdick's acknowledgement of the December 22, 2010, decision and sets forth steps taken by Burdick to implement the December 22, 2010 decision. Moreover, even absent the subsequent January 12, 2011, Burdick letter and the subsequent Special General Council meeting of the Tribe electing Burley as the Tribe's Chairperson, the effect of the December 22, 2010, decision alone removes Intervenors' "interest" in this matter. The December 22, 2010, decision specifically rescinds action taken by the BIA requiring the Tribe "to organize in a formal governmental structure," rescinds action taken by the BIA in not recognizing any government for the Tribe, rescinds action taken by the BIA in not recognizing Sylvia Burley as Chairperson of the Tribe, and specifically recognizes the validity of Resolution GC 98-01 (which identifies the members of the Tribe as Yakima Dixie, Silvia Fawn Burley, Rashel Kawehilani Reznor, Anjelica Josett Paulk and Tristian Shawnee Wallace. Via such rescission, the BIA impliedly recognizes the Tribe's existing government, recognizes Burley as Chairperson and recognizes the validity of GC 98-01 – precisely the issues acknowledged by Burdick in his January 12, 2011 letter.

Nor is the court persuaded by the Commission's argument that Intervenors are subject to mandatory joinder under CCP §389(a)(ii). As discussed above, it is the Tribe that has standing to assert a claim to the RSTF monies, not the individual members. Thus, Intervenors, even if members of the Tribe, lack standing to assert individual claims to the RSTF monies both in this court and to the Commission. Intervenors claims are dependent on both their membership in the Tribe and the BIA's recognition of Tribal government and leadership – both issues the parties agree the court is without jurisdiction to decide. Again, the court recognizes that the December 22, 2010 decision is subject to writ review in Federal court. However, the court finds the outcome of such review is speculative and does not create a ""substantial risk of double, multiple, or otherwise inconsistent obligations" as required for compulsory joinder under CCP §389(a)(ii). The December 22, 2010 decision definitively establishes the Tribe's membership, governing body and leadership. In light of this decision, and the fact that Intervenors lack standing to assert individual claims to RSTF monies, Intervenors' remedy following disbursement of RSTF monies by the Commission to the Tribe, is not against the Commission, but against the Tribe. The Commission is protected by December 22, 2010 decision.

Judge Ronald L. Styn

EXHIBIT 2

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 01 2011

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95205

Dear Mr. Dixie:

On December 22, 2010, my office issued a letter setting out the Department of the Interior's decision on a question respecting the composition of the California Valley Miwok Tribe. The question had been referred to my office by the Interior Board of Indian Appeals. On January 24, 2011, you filed suit in Federal district court seeking to have the Department's decision vacated.

Subsequent actions by the parties involved in this dispute have led me to reconsider the matters addressed in the December 22, 2010, decision letter. By means of today's letter, the December 22 decision is set aside.

I believe that the longstanding problems within the Tribe need prompt resolution, and I remain committed to the timely issuance of my reconsidered decision. I am mindful, however, that additional briefing may inform my analysis of the problems presented in this dispute. To that end, I will issue a briefing schedule in the coming week, requesting submissions from you and from Ms. Silvia Burley on specific questions of fact and law relevant to the referred question.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Ms. Silvia Burley
10601 Escondido Place
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EXHIBIT 3

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - CENTRAL DISTRICT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant.

Case No.37-2008-00075326-CU-CO-CTL

ORDER GRANTING IN PART EX PARTE APPLICATIONS FOR STAY OF ENTRY OF JUDGMENT

Date: April 6, 2011
Time: 9:00 a.m.
Dept: 62
Judge: Hon. Ronald Styn
Trial Date: May 13, 2011

This cause came on for hearing before the undersigned on April 6, 2011, at 9:00 a.m., upon the ex parte applications of Defendant CALIFORNIA GAMBLING CONTROL COMMISSION ("the Commission") and Intervenors CALIFORNIA VALLEY MIWOK TRIBE, CALIFORNIA (a.k.a. SHEEP RANCH RANCHERIA OF ME-WUK INDIANS, CALIFORNIA), YAKIMA DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, ANTONE AZAVEDO, MICHAEL MENDIBLES, and EVELYN WILSON ("Intervenors"), seeking an

order staying entry of judgment against the Commission with respect to this Court's previous Order of March 11, 2011 granting judgment on the pleadings, and other relief, in light of a letter dated April 1, 2011 from the Assistant Secretary, Larry Echo Hawk, of the U.S. Department of the Interior ("Assistant Secretary"), setting aside his previous December 22, 2010 decision letter, and stating that a reconsidered decision will be issued; Randall Pinal, Deputy Attorney General, appearing for the Commission; Matthew McConnell, Esq., appearing for the Intervenors; Terry Singleton, Esq., and Manuel Corrales, Jr., Esq., appearing for Plaintiff CALIFORNIA VALLEY MIWOK TRIBE; and due notice having been given to all interested parties; the Court having read and considered the papers submitted; the Court having heard and considered the argument of counsel; and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The ex parte applications of Defendant and Intervenors are granted in part, as set forth herein.

2. The entry of judgment against the Commission shall be stayed pending further order of this Court;

3. The effect of the Court's prior rulings shall likewise be stayed pending further order of this Court. These rulings include: (1) Order of March 11, 2011, granting reconsideration and denying intervention; (2) Order of March 11, 2011, granting judgment on the pleadings as against the Commission; and (3) Order ruling Plaintiff's demurrer to the Complaint in Intervention is moot, in light

of the Court's ruling denying intervention. As a result of these rulings being stayed, Intervenors are reinstated as fully participating parties to this case.

4. The parties (which includes Intervenors) may conduct discovery, unless and until otherwise ordered by the Court.

5. Except for discovery related motions, no dispositive motions are permitted, unless or until otherwise ordered by the Court.

6. Plaintiff's motion for an award for pre-judgment interest, set for April 22, 2011, is off calendar, without prejudice to re-file, pending entry of judgment.

7. The Intervenors' motion for reconsideration, set for May 13, 2011, is off calendar, without prejudice.

8. The Court sets a Case Management Conference for July 15, 2011, at 10:00 a.m., in Department 62. The present trial date of May 13, 2011, and the pre-trial conference, along with other previously set dates, are all vacated.

9. Should the Assistant Secretary issue his reconsidered decision before the Case Management Conference of July 15, 2011, the parties shall immediately notify the Court.

IT IS SO ORDERED.

Dated: 9-20-11

Hon. Ronald L. Styn
Superior Court Judge

APPROVED AS TO FORM:

Date:

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Asst. Attorney General
RANDALL A. PINAL
Deputy Attorney General

_____
RANDALL A. PINAL, Esq.
Deputy Attorney General
Attorneys for Defendant
CALIFORNIA GAMBLING CONTROL
COMMISSION

Date:

_____
Manuel Corrales, Jr., Esq.
Attorney for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

Date:

SINGLETON & ASSOCIATES

_____
Terry Singleton, Esq.
Attorneys for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

Date: SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

Matthew S. McConnell, Esq.
Attorneys for Intervenors

Date: THOMAS W. WOLFRUM

Attorney for Intervenors

EXHIBIT 4

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Attorneys for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO - CENTRAL DISTRICT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant.

Case No.37-2008-00075326-CU-CO-CTL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT AGAINST DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION

Date: October 21, 2011
Time: 8:30 a.m.
Dept: 62
Judge: Hon. Ronald Styn

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or Plaintiff) submits the following Memorandum of Points and Authorities in Support of Plaintiff's Motion for Entry of Judgment Against Defendant CALIFORNIA GAMBLING CONTROL COMMISSION ("the Commission").

I.

INTRODUCTION

On March 11, 2011, Plaintiff successfully sought and obtained an order granting judgment on the pleadings as against the Commission on the grounds that the Commission's Answer does not state facts sufficient to constitute a defense to the Complaint seeking declaratory and injunctive relief for the release of Revenue Sharing Trust Fund ("RSTF") money belonging to Plaintiff. The Commission's sole defense in withholding RSTF money from the Tribe since 2005 was that the Tribe purportedly did not have a governing body recognized by the U.S. Government, that a leadership dispute called into question Silvia Burley's right to act as Chairperson for the Tribe, and that the Tribe was required to be organized under the Indian Reorganization Act of 1934 ("IRA"). Although the motion was based on numerous, independent grounds, the Court granted the motion, based largely on the judicially noticed December 22, 2010, letter from the Assistant Secretary of the U.S. Department of Interior—Indian Affairs ("ASI") refuting each one of the Commission's defenses. This letter was one of many official records, Tribal

Resolutions, and letters from the BIA that the Court took judicial notice of.

In accordance with the Court's instructions, Plaintiff's counsel prepared a proposed judgment and an order staying execution of the judgment, and sent it to the Commission's attorney for approval. When the parties could not agree on the language of the order and proposed judgment, the parties submitted their own versions to the Court. The Court signed Plaintiff's version of the stay order, and directed Plaintiff's counsel to modify the Plaintiff's proposed judgment for final signature. Plaintiff's counsel did so, and submitted the judgment to the Court on March 25, 2011. (Exhibit "1"). Before the Court was able to enter judgment, the ASI set aside his December 22, 2010 decision, and indicated it would be issuing a reconsidered decision. (Exhibit "3"). The ASI explained that he wanted to give the parties an opportunity to more fully brief the issues. At the Commission's request, this Court stayed entry of judgment until the ASI issued its reconsidered decision, and stayed the effect of its prior order denying intervention. (Exhibit "4").

On August 31, 2011, the ASI issued his reconsidered decision. In it, he reaffirmed his December 22, 2010 decision letter that stated the Tribe is a federal-recognized tribe consisting of five (5) members operating under a General Council form of government pursuant to Resolution #CG-98-01, which effectively recognized Silvia Burley as the Chairperson of the Tribe. The ASI further

reaffirmed that the Tribe is not required to expand its five (5) adult membership to so-called "potential citizens," and that it is further not required to organize its present form of government under the Indian Reorganization Act of 1934 ("IRA").

Although the ASI stayed the implementation of his August 31, 2011 decision, that alone does not prevent this Court from entering judgment against the Commission for a number of reasons. First and foremost, the order granting judgment on the pleadings is supported by other independent grounds which were presented to the Court at the time the motion was made, and which the Court specifically took judicial notice of. These include two letters written by the BIA to the Tribe in January 2011 which recognized and acknowledged the Tribe's election of Burley as its Chairperson, and confirmed the Tribe's existing governing body under Resolution #CG-98-01. The Court also took judicial notice of Resolution #CG-98-01, which establishes the five (5) members of the Tribe, as well as the governmental authority to operate the Tribe and conduct governmental relations with the U.S. The August 31, 2011 decision does not rescind these letters or stay them.

Second, there is no language in the August 31, 2011 decision staying or nullifying the December 22, 2010 decision. The stay is limited to implementation of the August 31, 2011 decision. Rather than staying the December 22, 2010 decision, the ASI specifically reaffirms it.

Third, the ASI's stay applies only to implementing federal contract funding between the Tribe and the BIA, and does not apply to the Commission's obligations to distribute California State RSTF money. Neither the ASI nor the federal district court in Washington, D.C., hearing the Intervenors' challenge to the December 22, 2010 decision has any jurisdiction to stay these California State Court proceedings, especially since the Commission is not a party to the federal court proceedings, and the Tribe has yet to intervene in the federal court action.

Fourth, Plaintiff's suit against the Commission is not hinged on the ASI's December 22, 2010 decision letter, even though the ASI has reaffirmed it. Plaintiff has alleged the Compact only requires Non-Compact tribes to be federal-recognized. The Compact does not require that a Non-Compact tribe have a specific form of government, such as being organized under the IRA, and further does not require that a Non-Compact tribe satisfy certain membership criteria as a condition of receipt of RSTF money. Plaintiff's motion for judgment on the pleadings attacked the Commission's defenses that it could not pay RSTF to the Tribe based upon reasons that are not called for under the Compact. While the ASI's December 22, 2010 decision refutes these "non-compact" defenses, other independent judicially noticeable facts supported the motion.

II.

ARGUMENT

A. ALTHOUGH IMPLEMENTATION OF THE ASSISTANT SECRETARY'S AUGUST 31, 2011 DECISION IS STAYED, OTHER INDEPENDENT GROUNDS SUPPORT THE JUDGMENT RENDERED AGAINST THE COMMISSION

The Commission argues that because the order granting judgment on the pleadings against it was purportedly based solely on the ASI's December 22, 2010 decision, and the ASI stayed implementation of his August 31, 2011 decision affirming that decision, entry of judgment should continue to be stayed pending final resolution of the federal litigation challenging the ASI's decisions. (The Intervenors have no standing to object to entry of judgment). This contention is without merit, largely because the rendered, unsigned judgment is based on other independent grounds.

A ruling or decision of the lower court will be affirmed on any good ground set forth in the motion and supported by the record, even though the judge relied on and specified a different ground. Witkin, California Procedure, Appeal, Section 346, page 397-400; Western Mut. Ins. Co. v. Yamamoto (1994) 29 CA4th 1474, 1481(judgment should be affirmed if correct on any theory of law applicable to case). This same rule applies in connection with review of orders sustaining a demurrer. Koch v. Speedwell Motor Car Co. (1914) 24 CA 123, 126 (holding that a Defendant cannot be deprived of the right to be heard on review upon any or all of the grounds of his demurrer

merely because the court below designated a single ground as the reason for its order sustaining the demurrer). A motion for judgment on the pleadings is akin to a demurrer, and the rules governing demurred apply. Cloud v. Northrop Grumman Corp (1998) 67 CA4th 995, 999. A review of Plaintiff's motion shows that it was not based exclusively on the December 22, 2010 decision, but other additional, independent grounds.

1. The two January 12, 2011 letters from the BIA.

In the court's order granting judgment on the pleadings, it granted Plaintiff's requests for judicial notice, which included two letters from Mr. Troy Burdick of the BIA dated January 12, 2011, to Silvia Burley, Chairperson of the Tribe. Indeed, the court mentioned these letters in its order. In the first letter, Burdick stated that as a result of the ASI's December 22, 2010 decision, he is "committed to working with the Tribe's existing governing body --- its General Council, as established by Resolution #GC-98-01 --- to fulfill the government-to-government relationship between the United States and the [Tribe]..." In the second letter, Burdick acknowledged the Tribe's recent election results electing Burley as the Chairperson of the Tribe. These two letters independently support the court's ruling granting judgment on the pleadings against the Commission. They are the product of the BIA having implemented the now affirmed December 22, 2010 decision.

2. Resolution #GC-98-01

The court also took judicial notice of Resolution #GC-98-01, which, since 1998, has established the governing body of the Tribe. Significantly, the ASI in both of his decision letters did not decide the validity of Resolution #GC-98-01, because obviously the time to challenge that resolution has passed. The ASI simply observed the Tribe's governing form of government has been undisputed since 1998, something which this Court may independently find for purposes of ruling on Plaintiff's motion for judgment on the pleadings. Resolution #GC-98-01 also confirmed that there were only five (5) members of the Tribe, which included (1) Yakima Dixie; (2) Silvia Burley; (3) Rashel Reznor; (4) Anjelica Paulk; and (5) Tristian Wallace. The ASI's August 31, 2011 decision did not stay or nullify Resolution #GC-98-01.

3. Name Change Resolution and FEDERAL REGISTER.

The Court also took judicial notice of the Tribe's Resolution (R-1-5-07-2001) of May 7, 2001, and the BIA's acceptance of that Resolution on June 7, 2001, changing the Tribe's name from the "Sheep Ranch Rancheria of Me-Wuk Indians of California" to the "California Valley Miwok Tribe." (Plaintiff's Exhibit "7"). As a result of that action, the Tribe's new name has been placed in the FEDERAL REGISTER each year since then. Tribes whose names appear in the FEDERAL REGISTER are federal-recognized tribes eligible to receive services from the BIA.

The Court also took judicial notice of the August 11, 2009 FEDERAL REGISTER, listing the "California Valley Miwok Tribe" as a federally-recognized tribe, with the following statement from ASI, Larry Echo Hawk:

> "The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."

(Exhibit "16", Plaintiff's RJN, filed March 4, 2011, contained in Plaintiff's Exhibit "7"). These actions by the BIA changing the Tribe's name were never challenged by Dixie or anyone, and they stand as undisputed BIA recognition of the Tribe's power and authority to pass resolutions. Moreover, although cognizant of the ASI's published statement in the August 11, 2009 FEDERAL REGISTER, neither Dixie nor any of his co-intervenors ever filed a federal action challenging the ASI's published statement in the FEDERAL REGISTER, thereby making that statement final and uncontested. Nowhere in the ASI's August 31, 2011 letter does he amend, alter, nullify or stay the effectiveness of his statement in the FEDERAL REGISTER with respect to acknowledging a government-to-government relationship with the Tribe. These judicially noticeable facts provide additional, independent support of the rendered, unsigned judgment.

B. THE AUGUST 31, 2011 DECISION DID NOT STAY, RESCIND OR NULLIFY THE DECEMBER 22, 2010 DECISION, OR ACTIONS TAKEN IMPLEMENTING THE DECEMBER 22, 2010 DECISION, OR PRIOR BIA ACTIONS ACKNOWLEDGING THE GOVERNING BODY OF THE TRIBE

The Commission argues that the ASI's August 31, 2011 decision "replaces" the December 22, 2010 decision and its stay further makes the December 22, 2010 decision "of no force and effect." These contentions are without merit.

Nowhere in the August 31, 2011 decision does it specifically state that it is "replacing" the December 22, 2010 decision. To the contrary, the August 31, 2011 decision explicitly states that it is reaffirming the December 22, 2010 decision. ("Obviously, the December 2010 decision, and today's reaffirmation of that decision..."[page 2]). Indeed, the ASI only stayed the implementation of his August 31, 2011 decision, but he said nothing about staying the effect of the December 22, 2010 decision, or staying and/or rescinding the BIA's January 12, 2011 letters acknowledging the Tribe's existing governing body, and Burley as the Chairperson of the Tribe.

Moreover, the ASI did not state that he was staying his findings, which included reaffirming recognition of the Tribal Council and Burley as Chairperson. Staying "implementation" simply means that the parties are refrained from giving practical effect to the decision, or are refrained from carrying out its terms by concrete measures. Since the dispute giving rise to the ASI's decision involved the Tribe's right to federal contract

funding, and the BIA's erroneous decision not to renew federal contract funding with the Tribe, unless it organized under the IRA and admit "potential" members, the ASI's directive that implementation of his decision is stayed can only mean the parties are refrained from entering into further contract funding, pending resolution of the federal litigation. Indeed, neither the ASI nor the federal court has jurisdiction over the subject RSTF money the Commission is presently withholding.

Since the August 31, 2011 decision is "effective immediately" for purposes of an appeal, it should likewise be effective immediately for purposes of taking judicial notice of its findings. The Commission's characterization of the August 31, 2011 decision to read having "no force and effect" would necessarily bar judicial review of that decision even in the pending federal litigation, something the ASI clearly did not intend. Indeed, the federal district court in Washington, D.C., recently declined to sign a proposed order (submitted without the Tribe's input) that would characterize the August 31, 2011 decision as having "of no force and effect." (Exhibit "11").

Accordingly, the ASI's stay of the implementation of his August 31, 2011 decision does not preclude this Court from taking judicial notice of that decision in this case.

C. THE INTERVENORS HAVE NO STANDING TO OBJECT TO THE ENTRY OF JUDGMENT AGAINST THE COMMISSION

As soon as the August 31, 2011 decision was issued, the Tribe appeared ex parte on September 7, 2011, requesting

entry of judgment. The Intervenors filed written objections to this request and appeared at the hearing to orally argue against the request. Plaintiff anticipates the Intervenors will attempt to do the same in connection with this motion. However, they have no standing to object or oppose the motion.

The Intevenors have no right to appeal the judgment. They were denied intervention. Judgment was entered against the Commission only. The Intervenors are not a party to the judgment. Once entered, they do not become judgment debtors. Their right to appeal is limited to the order denying intervention. Bame v. Del Mar (2001) 86 CA4th 1346, 1363 (order denying intervention is appealable). The order staying the effect of the order denying intervention only permits the Intervenors to participate in discovery, pending the issuance of the ASI's reconsidered decision. Accordingly, in the event the Intervenors file any opposition to this motion, it should be rejected or otherwise not considered.

D. THE ATTORNEYS REPRESENTING BOTH DIXIE AND THE INTERVENORS ARE IN A CONFLICT OF INTEREST

Dixie and the other Intervenors are represented by the same attorneys in opposing the Tribe's suit against the Commission for the release of RSTF money. However, Dixie is a member of the Tribe and his interest is clearly to have the RSTF money released, so that he can receive his share of those proceeds as a member of the Tribe. It is

not in his best interest to oppose the release of those funds or to delay entry of judgment.

In contrast, the other Intervenors are not, and never have been, members of the Tribe. Even if they were to ever become members in the future, a decision that rests exclusively with the Tribe under well-settled Indian law, they would have no retroactive claim to the RSTF that has been paid out and withheld since 2005. Since the RSTF money is paid out quarterly, these other non-member Intervenors would only have a prospective interest in RSTF money paid out in the future, should they ever become members of the tribe. Since they never were members of the Tribe during the time that the accumulated RSTF money was paid out (but withheld) since 2005, they have no interest in those funds. As a result, Sheppard, Mullin, Richter & Hampton, LLP, and Thomas Wolfrum, Esq., the two attorneys representing both the Intervenors and Dixie, have a conflict of interest. Dixie needs to have separate, independent counsel. His independent counsel would obviously seek to have the Commission release the RSTF and not hold up and delay these proceedings.

It is not in Dixie's interest to dilute his share of RSTF money by seeking to have other non-members share in those proceeds.

E. PLAINTIFF IS ENTITLED TO ENTRY OF JUDGMENT WITHOUT FURTHER DELAY, *NUNC PRO TUNC*, AS OF MARCH 25, 2011

As stated, the Court has signed an order granting judgment on the pleadings against the Commission. A

proposed judgment has been prepared and approved by the Court for signature. The Court has been holding the proposed judgment since March 25, 2011. But for the ASI having set aside his December 22, 2010 decision for reconsideration, the Court would have entered the judgment in March of 2011. Now that the December 22, 2011 decision has been reaffirmed by the ASI in a final agency action that is effective immediately, there is no further basis for the Court to delay in entering judgment. Moreover, as stated, there are independent grounds to support the judgment, other than the December 22, 2010 decision alone.

By delaying entry of judgment, the Court is effectively providing the Commission with a stay in excess of that authorized by statute. For example, on March 25, 2011, the Court entered an order staying execution of the judgment until ten (10) days after the deadline for filing a notice of appeal. (Exhibit "2"). The order thus provides the Commission with a seventy (70) day stay of execution, which, since March 25, 2011, has amounted to six (6) months plus 70 days, or more than 8 months of a stay, and continuing. During this period of time, Plaintiff is being deprived of the fruits of its litigation, which include the right to draw interest on the judgment until satisfied, and the benefit of a lien upon the property of the Commission for Plaintiff's security. Accordingly, judgment should be entered *nunc pro tunc* as of March 25, 2011, the date the judgment was submitted for signature with the modifications

the Court had requested. Woods v. Rechenmacher (1942) 53 CA2d 294, 299-301.

As stated in Witkin, California Procedure, Judgment, Section 60, page 595:

> "A nunc pro tunc order or judgment is one entered as of a time prior to the actual entry, so that it is treated as effective at the earlier date. This retroactive entry is an exercise of the inherent power of the court, the object being to do justice to a litigant whose rights are threatened by a delay that is not the litigant's fault."

See Scalice v. Performance Cleaning Systems (1996) 50 CA4th 221, 238. However, there must be a good reason for the exercise of this "unusual" power, and in the absence of a good reason, the trial court's retroactive order will be reversed. In re Marriage of Padgett (2009) 172 CA4th 830, 851 (*nunc pro tunc* order dividing pension benefits 20 years after original dissolution held improper). Thus, the only grounds for antedating are "the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party or the correction of a deficiency in the recordation of a previous decision so as to express the true intention of the court as of the earlier date and thus conform to verify." Mather v. Mather (1943) 22 C.2d 713, 719. Accordingly, so long as the Court finds that the Plaintiff has been denied the fruits of its litigation because of the stay of entry of judgment, it should enter judgment *nunc pro tunc*. Otherwise, it should not do so.

Once entered, the Clerk or the Plaintiff can provide notice of entry of judgment, which will start the time for the Commission to appeal if it chooses. However, the Commission will have a seventy (70) day stay of execution as provided by the Court's March 25, 2011 order, which will allow it to post a bond or take other actions to obtain a further stay.

III.

CONCLUSION

For the foregoing reasons, Plaintiff requests the Court sign and file the judgment submitted on March 25, 2011. The Court granted Plaintiff's motion for judgment on the pleadings against the Commission, and Plaintiff is therefore entitled to have judgment entered in accordance with that order. Independent grounds support the judgment, other than the December 22, 2010 decision from the ASI. The order staying entry of the judgment and staying the effect of the Court prior order denying intervention should be modified accordingly.

Dated: September 14, 2011

Manuel Corrales, Jr., Esq.
Attorney for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

EXHIBIT 5

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Attorneys for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DISTRICT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant.

Case No.37-2008-00075326-CU-CO-CTL

PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR ENTRY OF JUDGMENT; MANUEL CORRALES, JR.

Date: October 21, 2011
Time: 8:30 a.m.
Dept: 62
Judge: Hon. Ronald Styn

Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or Plaintiff) submits the following in reply to the opposition to its motion for entry of judgment against Defendant CALIFORNIA GAMBLING CONTROL COMMISSION ("the Commission").

I.

THE TEMPORARY STAY PROVISION OF THE AUGUST 31, 2011 DECISION HAS NO COLLATERAL ESTOPPEL EFFECT IN THIS PROCEEDING TO PRECLUDE ENTRY OF JUDGMENT AGAINST THE COMMISSION

The Commission essentially argues that the provision in the August 31, 2011 decision "staying implementation" is somehow binding in this proceeding to preclude this Court from entering judgment against it for release of the Revenue Sharing Trust Fund ("RSTF") money it is currently withholding from the Tribe. This contention is without merit, and is based on a misunderstanding of the doctrine of collateral estoppel.

Collateral estoppel precludes the re-litigation of an issue only if: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. Lucido v. Superior Court (1990) 51 Cal.3d 335, 341.

The Assistant Secretary's ("ASI") stay clearly states that it is "pending resolution of the [federal

litigation]", and thus is simply a "temporary injunction." As such, it is not a final decision on the merits. California case law holds that a temporary injunction is simply a provisional remedy and, therefore, not an adjudication of the ultimate rights in controversy (not an adjudication on the merits). Cohen v. Board of Supervisors (1985) 40 C.3d 277, 286. As a result, provisional remedies have no collateral estoppel effect. See Huntington Life Sciences v. Stop Huntington (2005) 129 CA4th 1228, 1248-1249("Further, the finality requirement of collateral estoppel is unmet. A preliminary injunction is a *provisional* remedy, and the trial court 'possesses the inherent power to modify its preliminary injunction which is of a continuing or executor nature.") Thus, there can be no collateral estoppel effect of the ASI's stay to preclude this Court from entering judgment against the Commission. Moreover, as pointed out in Plaintiff's motion papers, the stay is solely for purposes of implementation with respect to the BIA awarding federal contract funding to the Tribe.

Indeed, the stay provision is subject to modification, should either the ASI or the federal court decide to lift the stay for purposes of allowing the Tribe to continue receiving federal contract funding pending resolution of the federal litigation. See Goodface v. Grassrope (8th Cir. 1983) 708 F.2d 335, 338-339("We commend the BIA for its reluctance to intervene in the election dispute, but it was an abuse of discretion for the BIA to refuse to recognize

one council or the other until such time as Indian contestants could resolve the dispute themselves. We conclude that, for the time being, the BIA should be required to deal with the 1982 council as the certified and sworn winners of the tribal election.") Similarly, either the ASI or the U.S. District Court may decide, upon a motion or request from the Tribe, to lift or vacate the stay, so as to allow the Tribe to continue receiving federal contract funding on an interim basis, until the federal litigation is resolved. Once the Tribe intervenes in the federal litigation, it may make such a request.

However, even if the stay of implementation remains, it still does not preclude this Court from entering judgment against the Commission, especially since the ASI's stay has nothing to do with the Tribe's right to receive, and the Commission's obligation to pay, RSTF money held in the California State Treasury.

II.

THE LANGUAGE IN THE AUGUST 31, 2011 DECISION ITSELF SHOWS THAT THE ASSISTANT SECRETARY DID NOT INTEND HIS STAY TO BE "ALL ENCOMPASSING" OR TO VOID THE SUBSTANCE OF HIS FINDINGS

A. STAY NOT ALL ENCOMPASSING

The Commission's interpretation of the phrase "implementation shall be stayed pending resolution of the litigation in the District Court for the District of Columbia" makes no sense. The Commission would have that stay provision to be all encompassing, and apply to stay the proceedings in this case, including precluding entry of judgment. Such an interpretation is inconsistent with

other language in the decision that make it clear that "implementation" is limited to action taken by the BIA in awarding federal contract funding under P.L. 638. It does not mean that the Tribe's governing body is not functionally recognized.

For example, immediately after the stay provision is the following concluding sentence in the August 31, 2011 decision:

> "Finally, I strongly encourage the parties to work within the Tribe's existing government structure to resolve this longstanding dispute and bring this contentious period in the Tribe's history to a close." (Emphasis added).

(August 31, 2011 Decision, Page 8). The parties, i.e., Burley and Dixie, could not "work within the Tribe's existing government structure" if the stay were read to be global and all encompassing. If "implementation" of the decision is stayed, then what did the ASI mean that the parties nevertheless should still try and work out their differences "within the Tribe's existing government structure"? Despite the stay of implementation, the August 31, 2011 decision is acknowledging that the Tribe's existing government structure is still a functionally recognized form of authority, at least for purposes of resolving the ongoing dispute between Burley and Dixie. What would happen if Dixie submitted part of his dispute now to the Tribe's existing government structure, and the Tribe decided that issue? Would the ASI nevertheless say that such actions were void, because he stayed

implementation of his August 31, 2011 decision? Hardly not.

It would likewise be ludicrous to argue that the Tribe must wait until the pending federal litigation is over, before trying to resolve their ongoing differences within the Tribe's existing governing structure. Given Dixie's history, he will continue to challenge the ASI's decision by multiple, serial appeals and collateral attacks for years to come. Indeed, the Intervenors' counsel of record stated as much in open court and in various pleadings in this case.

The existing government structure is clearly the Tribal Council as established by Resolution #CG-98-01. The stay cannot be read, therefore, to preclude the parties now from going to the existing government structure to resolve their ongoing dispute, any more than the stay must be read to prevent this Court now from entering judgment against the Commission. This Court has already ruled that the Commission's defenses are refuted by the Tribe's existing government structure, as established by Resolution #CG-98-01. Despite the stay language in the August 31, 2011 decision, the Tribe's governing body is still functionally recognized.

B. FINDINGS ARE NOT VOIDED BY STAY

The Commission also argues that the stay somehow voids the specific findings made by the ASI with respect to the validity of the Tribe's existing government. This is what the Intervenors unsuccessfully attempted to do in the

federal court. They sought to stipulate, without the Plaintiff's participation, that the August 31, 2011 decision is "of no force and effect", so that they could use that in this case to argue, as the Commission is now arguing, that the August 31, 2011 decision cannot be used for anything. The federal court rejected those attempts and refused to sign the Intervenors' proposed order. Instead, the federal court wrote and signed the attached order (Exhibit "12"), which does not contain the offending language proposed by the Intervenors.

There is nothing in the August 31, 2011 decision that says that as a result of the stay provision, the ASDI's finding are of "no force and effect" or otherwise void.

C. THE FEDERAL JOINT STATUS REPORT SIGNED BY THE ATTORNEYS OF RECORD FOR THE ASSISTANT SECRETARY DOES NOT CONSTITUE A MODIFICATION OF THE AUGUST 31, 2011 DECISION

The Commission argues that when the ASI's attorney of record in the federal case signed the joint status report containing language that the August 31, 2011 decision is "of no force and effect", that was as if the ASI made that statement himself. As a result, it contends it is binding on this Court for purposes of preventing entry of judgment. This contention is without merit and is flawed in several ways.

First, the federal court just recently rejected the proposed order containing that language. Second, there is no evidence that the ASI has ever adopted or ratified that language as a modification of his August 31, 2011 decision.

Third, the Commission has not shown that the ASI's attorneys of record were ever authorized to attempt to modify the August 31, 2011 decision with that language. Indeed, to allow such a modification without the ASI's authorization and consent would be contrary to law and public policy, since the ASI alone is charged with making the decision he made, not his attorneys of record in a subsequent case challenging the substance of that decision. See Mary R. B. & R. Corp (1983) 149 CA3d 308, 316 (stipulation in settlement of minor's claim against doctor to seal court records had the effect of preventing a state licensing investigation in doctor's conduct, and thus was stricken as contrary to public policy).

In the absence of evidence that the ASI was aware of the attempted, failed stipulation, and authorized it as an express modification of his decision, the Commission argument should be rejected.

III.

OTHER INDEPENDENT GROUNDS SUPPORT THE JUDGMENT RENDERED AGAINST THE COMMISSION

The Court's order granting judgment on the pleadings is not supported solely on the December 22, 2010 decision of the ASI, any more than Plaintiff's case stands or falls on that decision. The December 22, 2010 decision simply refuted the Commission's admitted sole defense as to why it was withholding RSTF from the Tribe. The general prevailing rule of law is that a ruling or decision of the lower court will be affirmed on any grounds or theory

supported by the record, even though the judge specified only one of them. Western Mut. Ins. Co. v. Yamamoto (1994) 29 CA4th 1474, 1481(judgment should be affirmed if correct on any theory of law applicable to case).

As pointed out in Plaintiff's motion papers, in addition to the December 22, 2010 decision, other independent grounds set forth in the record support the Court's order granting Plaintiff's motion for judgment on the pleadings. They include: (1) the two January 12, 2011 letters from the BIA acknowledging the elections results of the Tribe naming Silvia Burley as the Chairperson of the Tribe, and acknowledging the Tribe's existing governing body (These letters were sent as a result of the December 22, 2010 decision, and they have never been rescinded, set aside or stayed, by the August 31, 2011 decision, or otherwise); (2) Resolution #GC-98-01, which establishes the governing body of the Tribe presently under Burley's leadership, and recognizes only five (5) member of the Tribe (This 1998 Tribal Resolution has never been challenged by anyone, and stands as uncontested proof of the Tribe's recognized, existing government structure); and (3) the Name Change Resolution and the FEDERAL REGISTER (The Tribe passed a Resolution in 2001 changing its name, and the BIA accepted that Resolution as authority for the Tribe to do so, and then placed the new name in the FEDERAL REGISTER of federally-recognized tribes. In addition the ASI, Larry Echo Hawk, states in the 2009 FEDERAL REGISTER

that the federal government has a government-to-government relationship with the Plaintiff).

The August 31, 2011 decision did not overturn, discredit, rescind, overrule, or stay the effect of these BIA actions and letters, and prior, unchallenged Tribal Resolutions. The only stay mentioned in the August 31, 2011 decision is the "implementation" of the August 31, 2011 decision itself. Indeed, the August 31, 2011 decision, with minor modifications, reaffirms the substance of the December 22, 2011 decision, i.e., (1) that federal government recognizes the Tribe's existing governing structure, which was established under Resolution #GC-98-01; (2) that the Tribe need not organize under the IRA, if it chooses not to, in order to qualify for federal contract funding; (3) that the Tribe's membership consists of five individuals; and (4) that the Tribe is not required to expand its membership to anyone else, if it chooses not to, and the BIA cannot interfere with the Tribe's decision not to do so. The stay provision in the August 31, 2011 decision does not impact these critical, substantive points.

IV.

CONFLICT OF INTEREST RELATIVE TO DIXIE

As stated, the attorneys representing Dixie have a conflict of interest. On the one hand, they are advocating for the other Intervenors who are not members of the Tribe, seeking to have the RSTF money withheld and not paid to the Tribe. On the other hand, Dixie is a member of the Tribe,

and it is in his best interest for those funds to be released, so that he may receive his share now as a member of the Tribe. Even if the other Intervenors were to prevail in having the August 31, 2011 decision modified to require them to be members of the Tribe (unlikely, since federal Indian law overwhelmingly does not support that proposition), their interest in the RSTF money is prospective only. They would only have an interest in RSTF money paid out during the time they are members of the Tribe. Thus, the RSTF money the Commission has paid out but has deposited in an interest-bearing account under its exclusive control, does not belong to them in any way. Should they ever become members in the future, they would not have any retroactive claim to those accumulated, withheld funds.

V.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiff's motion papers, judgment against the Commission should be entered. Plaintiff prevailed on a motion for judgment on the pleadings, and all that is left for the court to do is to sign the judgment. There should be no further delay.

Dated: October 11, 2011

Manuel Corrales, Jr., Esq.
Attorney for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

EXHIBIT 6

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - October 20, 2011

EVENT DATE: 10/21/2011 EVENT TIME: 08:30:00 AM DEPT.: C-62

JUDICIAL OFFICER:Ronald L. Styn

CASE NO.: 37-2008-00075326-CU-CO-CTL

CASE TITLE: CALIFORNIA VALLEY MIWOK TRIBE VS. THE CALIFORNIA GAMBLING CONTROL COMMISSION

CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Motion - Other, 09/15/2011

Plaintiff California Valley Miwok Tribe's motion for entry of judgment against Defendant California Gambling Control Commission is denied.

The court finds Plaintiff's motion is jurisdictionally barred as an improper motion for reconsideration of this court's September 7, 2011, ex parte ruling via Minute Order. See, *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500. ["According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon "new or different facts, circumstances, or law."] Although Intervenors raise this issue, Plaintiff fails to respond to this argument or to initially provide any "new or different facts, circumstances, or law" as required to support a motion for reconsideration under CCP § 1008(b).

Even if Plaintiff was able to overcome this jurisdictional hurdle, Plaintiff's motion would still be denied. On the merits, the court is not persuaded by Plaintiff's "independent grounds" argument. While the court took judicial notice of several other documents in its ruling, the March 11, 2011, Minute Order reflects that the court granted Plaintiff's motion for judgment on the pleadings based exclusively on the December 22, 2010, decision by Assistant Secretary Larry Echo Hawk. ["The court also finds that, in light of the December 22, 2010 decision by Assistant Secretary Larry Echo Hawk of the United States Department of the Interior –Indian Affairs, of which this court takes judicial notice, [Evidence Code § 452(c)], the Commission's answer does not state facts sufficient to constitute a defense to the complaint. CCP §438(c)(1)(A)."] There is no other basis stated for the court's ruling. The court's reference to the January 12, 2011, letter Troy Burdick letter is only to demonstrate that it had no effect on the court's ruling.

The stay subsequently issued by this court, and still in effect, is based on the April 1, 2011, decision of Assistant Secretary Hawk rescinding the December 22, 2010, decision.

The August 31, 2011, decision by Assistant Secretary Hawk re-affirms certain portions of the December 22, 2010, decision but specifically provides that:

This decision is final for the Department and effective immediately, but implementation shall be stayed pending resolution of the litigation in the District court for the District of Columbia. *California Valley Miwok Tribe v. Salazar*, C.A. No. 1:11-cv-00160-RWR (filed 03/16/11)."

Implementation of the August 31, 2011, decision is stayed pending resolution of the pending federal action brought by Intervenors. The Assistant Secretary also stipulated in *California Valley Miwok Tribe v.*

Salazar that: "the August 31, 2011 decision will have no force and effect until such time as this court renders a decision on the merits of plaintiffs' claims or grants a dispositive motion of the Federal Defendants." Both the December 20, 2010 decision and the August 31, 2011, decision are under judicial review in the federal action. This court's ruling on Plaintiff's motion for judgment on the pleadings is dependent on the final outcome of the judicial review of the decisions by Assistant Secretary Hawk. Therefore, the court orders that this matter remain stayed, with all previous orders remaining in effect, pending final resolution of *California Valley Miwok Tribe v. Salazar*.

For these same reasons the court denies the Commission and the Intervenors' requests to vacate the court's previous rulings. Intervenors' request that the court ordered stay extend to discovery is denied. The court's order of April 20, 2011, allowing the parties to conduct discovery "unless and until otherwise ordered by the Court" remains in effect.

The court rejects Plaintiff's standing argument with respect to Intervenors. This court's April 20, 2011, order clearly provides that "Intervenors are reinstated as fully participating parties to this case."

Plaintiff fails to establish how the Intervenors attorney's purported conflict of interest warrants the relief Plaintiff seeks via this motion – entry of judgment.

Plaintiff's request for judicial notice is granted. The Commission's request for judicial notice is granted. Intervenors' request for judicial notice is granted.

EXHIBIT 7

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 31 2011

Ms. Silvia Burley
10601 N. Escondido Place
Stockton, California 95212

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95295

Dear Ms. Burley and Mr. Dixie:

Introduction and Decision

On December 22, 2010, I sent you a letter setting out my decision in response to a question referred to me by the Interior Board of Indian Appeals (IBIA) in *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIA 103 (January 28, 2010) (IBIA decision). I determined that there was "no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is organized as a General Council, pursuant to the [1998 General Council Resolution] it adopted at the suggestion of the BIA." I concluded further that there was "no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area."

I issued my December decision without providing the parties a formal opportunity to brief me on the facts and issues as they saw them. As a result of subsequent actions by both parties, I determined to withdraw the December decision, and, on April 8, 2011, I requested briefing from the parties. Counsel for the parties provided detailed responses with numerous exhibits. I appreciate the time and effort that went into providing these responses. I have considered them carefully.

Based on the litigation records in the prior Federal court actions in both California and Washington, D.C., the proceedings before the Department's Interior Board of Indian Appeals, and the material submitted in response to my April 8 letter, 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;

(2) At the present date, the citizenship of the CVMT consists solely of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace;

(3) 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 (Bureau or BIA)(1998 General Council Resolution);

(4) Pursuant to the 1998 General Council Resolution, the CVMT's General Council is vested with the governmental authority of the Tribe, and may conduct the full range of government-to-government relations with the United States;

(5) Although this current General Council form of government does not render CVMT an "organized" tribe under the Indian Reorganization Act (IRA) (*see e.g.*, 25 U.S.C. 476(a) and (d)), as a federally recognized tribe it is not required "to organize" in accord with the procedures of the IRA (25 U.S.C. § 476(h));

(6) Under the IRA, as amended, it is impermissible for the Federal government to treat tribes not "organized" under the IRA differently from those "organized" under the IRA (25 U.S.C. §§ 476(f)-(h)); and

(7) As discussed in more detail below, with respect to finding (6), on this particular legal point, I specifically diverge with a key underlying rationale of past decisions by Department of the Interior (Department) officials dealing with CVMT matters, apparently beginning around 2004, and decide to pursue a different policy direction.[1] Under the circumstances of this case, it is inappropriate to invoke the Secretary's broad authority to manage "all Indian affairs and [] all matters arising out of Indian relations," 25 U.S.C. § 2, or any other broad-based authority, to justify interfering with the CVMT's internal governance. Such interference would run counter to the bedrock Federal Indian law principles of tribal sovereignty and tribal self-government, according to which the tribe, as a distinct political entity, may "manag[e] its own affairs and govern[] itself," *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1832); and would conflict with this Administration's clear commitment to protect and honor tribal sovereignty.

Obviously, the December 2010 decision, and today's reaffirmation of that decision, mark a 180-degree change of course from positions defended by this Department in administrative and judicial proceedings over the past seven years. This change is driven by a straightforward correction in the Department's understanding of the California Valley Miwok Tribe's citizenship and a different policy perspective on the Department's legal obligations in light of those facts.

As discussed below, the BIA clearly understood in 1998 that the acknowledged CVMT citizens had the right to exercise the Tribe's inherent sovereign power in a manner they chose. It is unfortunate that soon after the 1998 General Council Resolution was enacted, an intra-tribal leadership dispute erupted, and both sides of the dispute found, at various points in time in the intervening years, that it served their respective interests to raise the theory that the BIA had a duty to protect the rights of approximately 250 "potential citizens" of the Tribe. A focus on that theory has shaped the BIA's and the Department's position on the citizenship question ever

[1] I recognize that the D.C. Circuit Court of Appeals' 2008 opinion upholding prior Department efforts to organize the CVMT pursuant to the IRA afforded broad deference to the Department's prior decisions and interpretations of the law. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1264-68 (D.C. Cir. 2008).

since. By contrast, today's decision clears away the misconceptions that these individuals have inchoate citizenship rights that the Secretary has a duty to protect. They do not. The Tribe is not comprised of both citizens and potential citizens. Rather, the five acknowledged citizens are the only citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). I believe this change in the Department's position is the most suitable means of resolving this decade-long dispute and is in accord with principles of administrative law. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Background

This decision is necessitated by a long and complex tribal leadership dispute that resulted in extensive administrative and judicial litigation. Much of the factual background is set out in the prior decisions, so it is not necessary to repeat or even summarize all of it here.

The history of this Tribe, and the record of this case to date, demonstrates the following:

- The CVMT is a federally recognized tribe, 74 Fed. Reg. 40,218, 40,219 (Aug. 11, 2009);
- In 1916, the United States purchased approximately 0.92 acres in Calaveras County, California, for the benefit of 12 named Indians living on the Sheepranch Rancheria (now Sheep Ranch)(Rancheria) (51 IBIA at 106);
- The Indian Agent, who in 1915 recommended the purchase of the 0.92 acres, described the group of 12 named individuals as "the remnant of once quite a large band of Indians in former years living in and near the old decaying mining town known and designated on the map as 'Sheepranch.'" *Id.*;
- The record shows only one adult Indian lived on the Rancheria in 1935, a Jeff Davis, who voted "in favor of the IRA" *Id.*;
- In 1966, the record shows only one adult Indian, Mabel Hodge Dixie, Yakima Dixie's mother, lived on the Rancheria, when the BIA crafted a plan for distribution of tribal assets pursuant to the California Rancheria Act of 1958, Pub. L. No. 85-671, 72 Stat. 619, *as amended by* Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390;
- Mabel Hodge Dixie was to be the sole distributee of tribal assets under the 1966 Rancheria distribution plan;
- While the Bureau initiated the process to terminate the Tribe, it never declared the Tribe terminated and has never treated the Tribe as if it had been terminated;
- In 1994, Yakima Dixie wrote the BIA asking for assistance with home repairs and describing himself as "the only descendant and recognized . . . member of the Tribe." (51 IBIA at 107);
- At some point during the 1990s, Silvia Burley "contacted BIA for information related to her Indian heritage, which BIA provided, and by 1998—at BIA's suggestion—Burley had contacted Yakima[]" Dixie (as the IBIA has noted, "it appears that Burley may trace her ancestry to a 'Jeff Davis' who was listed on the 1913 census. . . .") 51 IBIA at 107, including footnote 7;
- On August 5, 1998, Mr. Dixie "signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolling Burley's two daughters and her granddaughter." *Id.*;

- The Tribe was not organized pursuant to the IRA prior to 1998 and did not have organic documents setting out its form of government or criteria for tribal citizenship;
- In September of 1998, BIA staff met with Mr. Dixie and Ms. Burley "to discuss organizing the Tribe," and on September 24, 1998 sent follow-up correspondence recommending that, "given the small size of the Tribe, we recommend that the Tribe operate as a General Council," which could elect or appoint a chairperson and conduct business. *Id.* at 108;
- On November 5, 1998, Mr. Dixie and Ms. Burley signed a resolution establishing a General Council, which consisted of all adult citizens of the Tribe, to serve as the governing body of the Tribe. *Id.* at 109;
- Less than five months later, leadership disputes arose between Mr. Dixie and Ms. Burley—and those conflicts have continued to the present day;[2]
- Initially the BIA recognized Mr. Dixie as Chairman, but later recognized Ms. Burley as Chairperson based primarily upon the April 1999 General Council action appointing Ms. Burley as Chairperson - an action concurred in by Mr. Dixie. *Id.*;
- Mr. Dixie later challenged Ms. Burley's 1999 appointment;
- In 2002, Ms. Burley filed suit in the name of the Tribe alleging that the Department had breached its trust responsibility to the Tribe by distributing the assets of the Rancheria to a single individual, Mabel Dixie, when the Tribe had a potential citizenship of "nearly 250 people[.]" *See* Complaint for Injunctive and Declaratory Relief at 1, *Cal. Valley Miwok Tribe v. United States*, No. 02-0912 (E.D. Cal. Apr. 29, 2002);
- In March, 2004, the BIA Superintendent rejected a proposed constitution from Ms. Burley because she had not involved the "whole tribal community" in the governmental organization process;
- On February 11, 2005, the Acting Assistant Secretary – Indian Affairs issued a decision on Mr. Dixie's 1999 appeal, ruling that the appeal of the Bureau's 1999 decision to recognize Ms. Burley as Chairperson was moot and that the BIA would recognize Ms. Burley only as a person of authority within the Tribe;
- Ms. Burley sued in D.C. District Court challenging the February 2005 decision;
- After the District Court dismissed her challenge, *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp. 2d 197 (D.D.C. 2006), the D. C. Circuit Court of Appeals affirmed, *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008);
- In January 2010, the IBIA rejected Ms. Burley's appeal objecting to, among other matters, the Superintendent's decision to continue to assist the Tribe in organizing its government according to the IRA because it viewed the matter as "effectively and functionally a tribal enrollment dispute," and then referred the matter to me on jurisdictional grounds.

In response to the Board's referral, I issued my December 22, 2010 decision letter. I intended that decision to resolve the citizenship question referred to me by the IBIA by finding that the current Tribe's citizenship consisted of the five acknowledged citizens noted above and recognizing the Tribe's General Council as a tribal government with which the United States may

[2] I note that the Department repeatedly has offered to assist in mediating this dispute—to no avail. The amount of time and resources focused on these disputes reflects poorly on all the parties, and they must be mindful that continuing this imprudent dispute risks potential adverse consequences well beyond the Tribe and its citizens.

conduct government-to-government relations. Almost immediately, Mr. Dixie filed suit in the D.C. District Court challenging that decision. Recognizing the complex and fundamental nature of the underlying issues, and because I desired the benefit of submissions from the interested parties, I set aside that decision and requested formal briefing.

The submissions by the parties in response to my request were thorough. I have carefully reviewed the submissions and find they were most helpful in enhancing my understanding of the parties' positions.

Analysis

It is clear to me that the heart of this matter is a misapprehension about the nature and extent of the Secretary's role, if any, in determining tribal citizenship of a very small, uniquely situated tribe. 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.]"

Applicability of General Legal Authorities of the Secretary of the Interior in Indian Affairs

The D.C. Circuit viewed § 476(h) as ambiguous, and then granted *Chevron* deference to the then-Secretary's interpretation of that provision. 513 F.3d at 1266-68. The D.C Circuit put great weight on the Secretary's broad authority over Indian affairs under 25 U.S.C. § 2, writing that "[w]e have previously held that this extensive grant of authority gives the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians." *Id.* at 1267, *citations omitted.* In addition to § 2, 25 U.S.C. §§ 9, and 13, and 43 U.S.C. § 1457, are often cited as the main statutory bases for the Department's general authority in Indian affairs. *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp. 2d 197, 201 (D.D.C. 2006); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.03[2] at 405 (2005 ed.) [hereinafter COHEN]. The D.C. Circuit also cited two cases involving separate bands of the Seminole Nation for the general propositions that the United States has an "obligation" "to promote a tribe's political integrity" as well as "the responsibility to ensure that [a tribe's] representatives, with whom [it] must conduct government-to-government relations, are valid representatives of the [tribe] *as a whole.*" 513 F.3d at 1267(*emphasis added by the Court), citing, Seminole Nation v. United States*, 313 U.S. 286, 296 (1942), and *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp. 2d 122, 140 (D.D.C. 2002).

In my view, prior Department officials misapprehended their responsibility when they: (1) took their focus off the fact that the CVMT was comprised a five individuals, and (2) mistakenly viewed the Federal government as having particular duties relating to individuals who were not citizens of the tribe. I decline to invoke the broad legal authorities cited above to further intrude into internal tribal citizenship and governance issues in the instant case. In making this decision, I also am mindful of the Supreme Court's recent guidance concerning: (1) the importance of identifying "specific rights creating or duty-imposing statutory or regulatory prescriptions" before concluding the United States is obligated to act in a particular manner in Indian affairs,

and (2) the central role Federal policy plays in administering Indian affairs. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24, 2326-27 (June 13, 2011).

Application of Specific Legal Authorities

In my view, prior Department officials (from 2003 to the present) fundamentally misunderstood the role of the Federal government in addressing the CVMT citizenship and governance issues: (1) they misunderstood and ignored the legal authority of CVMT to govern itself through its General Council structure without being compelled to "organize" under the IRA; and (2) they confused the Federal government's obligations to *possible* tribal citizens with those owed to *actual* tribal citizens.

The February 11, 2005, decision of Acting Assistant Secretary – Indian Affairs Michael D. Olsen stated that, until the Tribe organized itself, the Department could not recognize anyone as the Tribe's Chairperson, and that the "first step in organizing the Tribe is identifying the putative tribal members." (2005 Decision at 1-2, *discussed in* 51 IBIA at 112). The D.C. Circuit, after citing the Secretary's broad authority under 25 U.S.C. § 2, endorsed this approach as a reasonable interpretation of 25 U.S.C. § 476(h) because "[t]he exercise of this authority is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision." 515 F.3d at 1267. As I have stated above, 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).

The CVMT currently consists of the five citizens identified above. Under the current facts, the Department does not have a legitimate role in attempting to force the Tribe to expand its citizenship.[3] Department officials previously referred to "the importance of participation of a greater tribal community in determining citizenship criteria." (Superintendent's 2004 Decision at 3, *discussed in* 51 IBIA at 111-112). The D.C. Circuit, referring to the Tribe's governance structure that arguably would maintain a limited citizenship, stated "[t]his antimajoritarian gambit deserves no stamp of approval from the Secretary." 515 F.3d at 1267. However, I know of no *specific statutory or regulatory authority* that warrants such intrusion into a federally recognized tribe's internal affairs. (As to the more general sources of authority cited in support of Federal oversight of tribal matters, I have explained my views on the proper scope of those authorities above). "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57, 72 n.32 (1978); *United States v. Wheeler*, 435 U.S., 313, 322 n.18 (1978); COHEN § 3.03[3] at 176, *citations omitted*. "[I]f the issue for which the determination is important involves internal affairs of the Indian nation, it is more consistent with principles of tribal sovereignty to defer to that nation's definition." *Id.* at 180. As discussed in the previous paragraph, I also believe that, based on an incorrect interpretation of § 476(h), the previous Administration's views on the IRA's application to this case were erroneous and led to an improper focus on expanding the size of the Tribe and altering the form of its government.

[3] While I believe that it is *equitably* appropriate for the CVMT General Council to reach out to potential citizens of the Tribe, I do not believe it is proper, *as a matter of law*, for the Federal government to attempt to impose such a requirement on a federally recognized tribe.

Mr. Dixie invokes the *Alan-Wilson* IBIA cases to support the theory that the Secretary has a duty to ensure that the potential citizens are involved in the organization of an unorganized, but federally recognized tribe.[4] 30 IBIA 241. But, in fact, *Alan-Wilson* works directly against Mr. Dixie's position, and this distinction provides additional support for my decision. Unlike CVMT, the Cloverdale Rancheria was a federally recognized tribe terminated under the California Rancheria Act. It was later restored pursuant to the *Tillie Hardwick* litigation and settlement, which required the Rancheria to organize its tribal government under the IRA.

30 IBIA 241, 248.

My review of the history of the CVMT compels the conclusion set out in the December decision and reaffirmed here: the CVMT has been continuously recognized, and its political relationship with the Federal government has not been terminated. The five acknowledged citizens are the only current citizens of the Tribe, and the Tribe's General Council is authorized to exercise the Tribe's governmental authority. In this case, again, the factual record is clear: there are only five citizens of CVMT. The Federal government is under no duty or obligation to "potential citizens" of the CVMT. Those potential citizens, if they so desire, should take up their cause with the CVMT General Council directly.

Given both parties' acknowledgment of the existence of other individuals who could potentially become tribal citizens, the Department's prior positions are understandable. The Department endeavored to engage both parties in a resolution of the tribal citizenship issues, including offers of assistance from the Department's Office of Collaborative Action and Dispute Resolution (CADR) – to no avail. By the time this matter was referred to me by the IBIA in January 2010, serious doubts existed about the likelihood of the parties ever being able to work together to resolve the issues involving the citizenship and governance of the Tribe.

Absent an express commitment from the parties to formally define tribal citizenship criteria, any further effort by the Department to do so would result in an unwarranted intrusion into the internal affairs of the Tribe. Moreover, given the unfortunate history of this case, most likely such efforts would not succeed in accomplishing this objective. While there may be rare circumstances in which such an intrusion would be warranted in order for the Secretary to discharge specific responsibilities, no such specific law or circumstances exist here.

Accordingly, unless asked by the CVMT General Council, the Department will make no further efforts to assist the Tribe to organize and define its citizenship. I accept the Resolution #GC-98-01 as the interim governing document of the Tribe, and as the basis for resuming government-to-government relations between the United States and the Tribe.

While I appreciate that the General Council Resolution may prove lacking as to certain aspects of tribal governance, I also recognize that this tribe is very small and uniquely situated. Many tribes have been able to govern effectively with limited or no written governing documents.

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[4] Mr. Dixie also invokes the case of *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002) in support of his position. *Seminole Nation* involved a dispute where a particular faction of the Tribe asserted rights to tribal citizenship under an 1866 treaty. *Id.* at 138. There is no overriding treaty or congressional enactment governing tribal citizenship at issue in this dispute.

Conclusion

Based upon the foregoing analysis, I re-affirm the following:

- CVMT is a federally recognized tribe whose entire citizenship, as of this date, consists of the five acknowledged citizens;
- The 1998 Resolution established a General Council form of government, comprised of all the adult citizens of the Tribe, with whom the Department may conduct government-to-government relations;
- The Department shall respect the validly enacted resolutions of the General Council; and
- Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents.

In my December 2010 decision letter I rescinded several earlier decisions. I am persuaded that such attempts to rewrite history are fraught with the risk of unintended consequences. Past actions, undertaken in good faith and in reliance on the authority of prior Agency decisions, should not be called into question by today's determination that those prior Agency decisions were erroneous. Thus, today's decision shall apply prospectively.

This decision is final for the Department and effective immediately, but implementation shall be stayed pending resolution of the litigation in the District Court for the District of Columbia, *California Valley Miwok Tribe v. Salazar*, C.A. No. 1:11-cv-00160-RWR (filed 03/16/11).

Finally, I strongly encourage the parties to work within the Tribe's existing government structure to resolve this longstanding dispute and bring this contentious period in the Tribe's history to a close.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

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EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, Plaintiffs, v. KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al*, Defendants.	Case No. 1:11-cv-00160-RWR Hon. Richard W. Roberts

JOINT STATUS REPORT AND PROPOSED ORDER REGARDING THE STATUS OF THE RECONSIDERED DECISION OF THE ASSISTANT SECRETARY - INDIAN AFFAIRS

Pursuant to this Court's order of August 15, 2011, the parties provide the following status report to the Court.

1. On January 24, 2011, Plaintiffs brought suit challenging the December 22, 2010 decision of the Assistant Secretary - Indian Affairs of the United States Department of the Interior ("Assistant Secretary"). *See* Dkt. No. 1.

2. On March 16, 2011, Plaintiffs filed a Motion for Preliminary Injunction, Dkt. No. 8, and, after granting the Defendants' Consent Motion for an Extension of Time, Dkt. No. 17, this Court ordered the Defendants to file their opposition to Plaintiffs' Motion for a Preliminary Injunction by April 5, 2011.

3. However, on April 1, 2011, the Assistant Secretary - Indian Affairs of the United States Department of the Interior set aside the prior December 22, 2010 decision

regarding the organization and governance of the California Valley Miwok Tribe. *See* Joint Motion to Stay Litigation, Dkt. No. 22, ex. 1.

4. On April 8, 2011, the Assistant Secretary sent letters to both Mr. Yakima Dixie and Ms. Silvia Burley requesting responsive briefing pertaining to a number of issues. Joint Motion to Stay Litigation, Dkt. No. 22, ex. 3.

5. The April 8, 2011, letter set May 3, 2011, as the deadline for the respective parties' submission of briefs responding to the Assistant Secretary's inquiries. Both Mr. Dixie and Ms. Burley submitted briefs on May 3, 2011.

6. On April 19, 2011, the parties jointly requested this Court stay the litigation and all attendant deadlines so that the Assistant Secretary could prepare and issue the reconsidered decision. *See* Joint Motion to Stay Litigation, Dkt. No. 22.

7. On April 25, 2011, this Court issued a minute order granting the parties' joint motion to stay until July 7, 2011, and ordered the parties to file a joint status report and proposed order on July 7, 2011 as well.

8. On July 7, 2011, the parties filed a joint status report and requested this Court stay the litigation and all attendant deadlines until August 15, 2011, to accommodate the Assistant Secretary's ongoing preparation of the reconsidered decision. *See* Joint Status Report Regarding the Status of the Reconsidered Decision of the Assistant Secretary - Indian Affairs and Motion for Extension of the Temporary Stay of Litigation, Dkt. No. 23.

9. Plaintiffs consented to the extension on the condition that it was the final extension and that this Court order the Assistant Secretary to issue his reconsidered decision by August 15, 2011. *Id.* §§ 9, 9(a).

10. Defendants would not consent, however, to a condition mandating final agency action, and requested that should the Assistant Secretary not issue a reconsidered decision by August 15, 2011, that the result be a release of the voluntary stay. *Id.* §§ 9, 9(b). Accordingly, the parties each submitted a separate proposed order. *See id.*, Attachment 1-2.

11. On July 11, 2011, this Court granted the Joint Motion for Temporary Stay of Litigation and adopted Plaintiffs' proposed order. *See* Order Granting Joint Motion for Temporary Stay of Litigation, Dkt. No. 24. This Court's order struck paragraph 2, which requested, "This extension of the temporary stay shall be the final one granted by the Court and is conditioned upon the Assistant Secretary issuing his decision on reconsideration of the December 22, 2010 Decision on or before August 15, 2011." *Id.*

12. On August 12, 2011, the parties again requested the Court to extend the stay anticipating the issuance of the decision on August 26, 2011. This Court granted that request and stayed the litigation until September 2, 2011. *See* Order, Staying case until 09/02/11, Dkt. No. 26.

13. The Assistant Secretary issued the decision on Wednesday August 31, 2011. The Assistant Secretary reinstated his prior decision. While the August 31, 2011 decision is final for the Department for purpose of judicial review, the Assistant Secretary stayed the effectiveness of the August 31, 2011 decision pending resolution of this matter. As a result, the August 31, 2011 decision will have no force and effect until such time as this court renders a decision on the merits of plaintiffs' claims or grants a dispositive motion of the Federal Defendants.

14. Accordingly, no further temporary stay of the litigation is required.

15. Plaintiffs and Defendants request that the stay of the litigation be terminated and that a joint Status Report be filed by September 16, 2011 and that the Proposed Order be adopted.

Respectfully submitted this 1st day of September, 2011.

Respectfully submitted,

/s/ M Roy Goldberg
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CERTIFICATE OF SERVICE

I certify that on September 1, 2011, I filed a copy of the foregoing Joint Status Report and Proposed Order Regarding the Status of the Reconsidered Decision of the Assistant Secretary – Indian Affairs was filed with the Court pursuant to the electronic filing rules. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/
Roy Goldberg

EXHIBIT 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 11-160 (RWR)
KEN SALAZAR, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is a dispute over the U.S. Department of the Interior's determination of the legitimate government and membership of the California Valley Miwok Tribe ("Tribe"), a federally recognized Indian tribe. Defendants are Secretary of the Interior Ken Salazar, Assistant Secretary for Indian Affairs Larry Echo Hawk, and Director of the Bureau of Indian Affairs Michael Black. Plaintiffs Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson, and Antoine Azevedo bring suit individually and on behalf of the Tribe and its Tribal Council, arguing that the defendants' decision to recognize a General Council led by Sylvia Burley as the legitimate government of the Tribe, and to discontinue efforts to adjudicate the status of other putative tribal members, constituted arbitrary and capricious agency action, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and also violated due process and the Indian Civil Rights Act ("ICRA"), 25 U.S.C.

§ 1301, *et seq.* Another group representing the Tribe, as organized in the form of the General Council, moves to intervene as a defendant in this action for the limited purpose of filing a motion to dismiss, arguing that intervention is necessary to protect its fundamental interests in defending its sovereignty and defining its citizenship.[1] Because the proposed intervenor satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), the motion to intervene will be granted.[2]

BACKGROUND

The leadership and membership of the California Valley Miwok Tribe have been in dispute for over a decade. The Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, included the California Valley Miwok Tribe as a federally recognized tribe. In 1998, the Department of the Interior's Bureau of Indian Affairs ("Bureau") initiated efforts to facilitate reorganizing the Tribe under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. A tribe whose government is organized according to the IRA's procedural and substantive requirements qualifies for certain federal benefits

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[1] Both the plaintiffs and the proposed intervenor use the name "California Valley Miwok Tribe." To avoid confusion, the terms "plaintiffs" and "proposed intervenor" will be used when discussing the respective parties' positions here.

[2] In light of the decision to grant the motion under Rule 24(a)(2), the parties' arguments regarding permissive intervention will not be addressed.

and may maintain government-to-government relations with the United States and with state and local governments. The Bureau identified plaintiff Yakima Dixie, then serving as tribal chairperson, Sylvia Burley, the present leader of the proposed intervenor, along with several others, as members of the Tribe who were able to participate in the reorganization (First Am. Compl., Ex. A., August 31, 2011 letter from Assistant Secretary of Indian Affairs ("August 31 decision") at 4). See also California Valley Miwok Tribe v. United States, 424 F. Supp. 2d 197, 198 (D.D.C. 2006) ("CVMT I") (reviewing Tribe's reorganization process). The Bureau recommended that the Tribe establish a general council form of government for the organization process. (August 31 decision at 4.) Following this recommendation, the Tribe established the General Council by resolution in 1998 and began to develop a draft constitution. (Id.) Plaintiffs dispute the validity of the resolution, alleging that it did not receive the approval of the required number of members. (First Am. Compl. ¶¶ 43-47.)

Soon afterwards, leadership disputes between Dixie and Burley developed within the Tribe. (August 31 decision at 4; First Am. Compl. ¶¶ 48-50.) In 2004, the Bureau declined to approve a constitution submitted by Burley because she had not involved the "whole tribal community" in the organizational process. (August 31 decision at 4; First Am. Compl. ¶¶ 51-53.) It also issued a communication stating that it did not view the

Tribe as "organized" under the IRA and that it did not recognize anyone as chairperson, though it recognized Burley as a "person of authority" within the Tribe. (See August 31 decision at 4; First Am. Compl. ¶¶ 54-56.) See also CVMT I, 424 F. Supp. 2d at 200 (D.D.C. 2006). In 2005, Burley and her supporters brought the CVMT I suit in the name of the Tribe challenging the Secretary of the Interior's refusal to approve the constitution. (See August 31 decision at 4; First Am. Compl. ¶ 58.) The D.C. Circuit upheld the district court's finding that the Secretary had the authority to decline to approve the constitution on the grounds that it did not enjoy support from the majority of the tribe's membership. California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1263 (D.C. Cir. 2008). During the period of disputed leadership, Dixie and other members of a tribal council endeavored to identify and organize potential members of the tribe. (First Am. Compl. ¶¶ 65-70.) The Bureau assisted by publishing a notice seeking genealogies and other information from potential Tribal members, among other efforts to identify individuals entitled to participate in the reorganization process. (First Am. Compl. ¶¶ 71-74.) Burley and her supporters did not participate in these activities but challenged the reorganization process through administrative appeals within the Bureau. (First Am. Compl. ¶¶ 75-77.)

On December 22, 2010, the Assistant Secretary for Indian Affairs issued a decision, addressing Burley's appeals, in which

it concluded that the Tribe was organized as the General Council under the resolution adopted in 1998 and that the Bureau would cease efforts to facilitate reorganization. (Compl., Ex. C, December 22, 2010 letter from Assistant Secretary of Indian Affairs.) The plaintiffs then initiated this action challenging the legality of the decision. In April of 2011, the Assistant Secretary granted reconsideration and sought briefing from Dixie, Burley, and their respective supporters. (August 31 decision at 1.) The Assistant Secretary reinstated his prior decision on August 31, 2011, but stayed its effectiveness pending resolution of this litigation. (Id. at 8.) The Assistant Secretary represented that at present, the recognized citizenship of the Tribe consists of Dixie, Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace.[3]

The first amended complaint alleges that the Assistant Secretary presented no reasoned explanation for the Bureau's reversal of its previous positions that the Tribe was not yet organized in accordance with the IRA and in support of identifying additional tribal members to participate in reorganization. The plaintiffs therefore allege that the decision was arbitrary and capricious under the APA, as well as a violation of due process and ICRA. (First Am. Compl. ¶¶ 90-119.)

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[3] According to the plaintiffs, "Reznor, Paulk, and Wallace are Burley's daughters and granddaughter, respectively." (First Am. Compl. at 21 n.1.)

The plaintiffs allege that they have been harmed by the Assistant Secretary's action because they have been denied the opportunity to participate in reorganization and governance of the Tribe; they are not and will not be eligible to receive federal health, education and other benefits provided to members of recognized Indian Tribes; and the decision could provide a basis for Burley to divert funds held in trust for the Tribe by the State of California and paid by the California Gambling Control Commission to tribes that do not operate casinos or gaming devices, and to divert federal grant funds. (First Am. Compl. ¶¶ 82-89.) The plaintiffs seek declaratory and injunctive relief including an order vacating the August 31 decision and directing the Assistant Secretary "to establish government-to-government relations only with a Tribal government that reflects the entire Tribal community, including individual Plaintiffs and all other Current Members." (First Am. Compl. at 30.) The plaintiffs also seek an order enjoining the defendants from awarding any federal funds to Burley. (Id.) The defendants have answered the amended complaint.

The proposed intervenor moved to intervene as a defendant in the action for the limited purpose of filing a motion to dismiss for lack of subject matter jurisdiction, for failure to join an indispensable party, and for failure to state a claim.[4]

[4] The proposed intervenor's first motion to intervene was fully briefed before the Assistant Secretary granted

The proposed intervenor argues that intervention as of right is warranted because the complaint "involves an attempt to forcibly expand the Tribe's citizen[ship] and alter its relationship with the United States, directly implicating the Tribe's sovereign responsibility to determine its own citizenship and resolve its own internal affairs." (Proposed Intervenor-Defendant's Am. Mot. for Leave to Intervene as Defendant ("Mot. to Intervene") at 3.) The plaintiffs oppose on the grounds that the proposed intervenor fails to demonstrate that its interests are not protected adequately by the federal defendants. (Pls.' Opp'n to Mot. to Intervene ("Pls.' Opp'n") at 3-4.) The federal defendants take no position on the motion to intervene. (Mot. to Intervene at 3 n.2.)

DISCUSSION

Intervention as a matter of right should be granted when the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless

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reconsideration of his December 22, 2010 decision. Following reinstatement of that decision, the proposed intervenor filed an amended motion to intervene. This opinion cites to the second round of briefing on intervention. In the amended motion to intervene, the proposed intervenor presents a lengthy recitation of the factual background, as well as arguments going to the merits of the motion to dismiss it intends to file. Because it is not necessary to the resolution of the motion to intervene, these arguments are not addressed.

existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Evaluating Rule 24(a)(2), the D.C. Circuit has "identified four prerequisites to intervene as of right: '(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'" Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting SEC v. Prudential Sec. Inc., 136 F.3d 153, 156 (D.C. Cir. 1998)). Importantly, "a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." Fund For Animals, Inc. v. Norton, 322 F.3d 728, 731-32 (D.C. Cir. 2003); see Defenders of Wildlife v. Jackson, Civil Action No. 10-1915 (RWR), 2012 WL 896141, at *4 (D.D.C. March 18, 2012) (discussing view that Article III standing and Rule 24(a)(2) interest requirements are additive, and view that any party who satisfies Rule 24(a) will also meet Article III's standing requirement).

I. STANDING

The plaintiffs do not contest the proposed intervenor's standing to intervene. However, this threshold issue will be addressed since a party's Article III standing is a prerequisite to subject matter jurisdiction. See Fund For Animals, Inc., 322 F.3d at 732. "To establish standing under Article III, a prospective intervenor -- like any party -- must show: (1)

injury-in-fact, (2) causation, and (3) redressability." Id. at 732-33. The proposed intervenor easily meets these requirements. If the plaintiffs prevail in this action, the Assistant Secretary's August 31 decision will be vacated, the Bureau will be ordered to cease government-to-government relationships with the Tribe as organized in the form of the General Council, and the defendants will be enjoined from awarding any federal funds to Burley. These actions are concrete and particularized injuries to the proposed intervenor's financial resources and governmental integrity. The causation prong is satisfied because the threatened loss of sovereignty and funds is fairly traceable to the agency action that the plaintiffs seek to compel in the instant action. Finally, a decision in the proposed intervenor's favor would leave the August 31 decision undisturbed and thereby prevent the injuries from occurring, satisfying the redressability prong.

II. RULE 24(a)(2) REQUIREMENTS

The proposed intervenor also meets each of the four requirements for intervention as a matter of right. First, the proposed intervenor's motion was timely, as it was initially filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer." Fund For Animals, Inc., 322 F.3d at 735. Second, the proposed intervenor has shown a legally protected interest in the matter since, in this Circuit, "satisfying constitutional standing requirements

demonstrates the existence of a legally protected interest." Jones v. Prince George's County, 348 F.3d 1014, 1019 (D.C. Cir. 2003) (citing Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1076 (D.C. Cir. 1998)). Third, plaintiffs' action "threaten[s] to impair," Karsner, 532 F.3d at 885, the proposed intervenor's legally protected interest because resolution of the matter in the plaintiffs' favor would directly interfere with the governance of the Tribe as currently recognized and preclude access to federal funds. The plaintiffs appear to concede that the above three requirements are met as they presented no arguments on these points in their opposition.

The basis of the plaintiffs' opposition to intervention concerns the fourth requirement, the adequacy of existing parties' representation of the proposed intervenor's interests. The proposed intervenor argues that the federal defendants do not adequately represent its interests since the federal defendants may make different arguments from those of the proposed intervenor, the proposed intervenor's stake in the litigation differs from that of the defendants, the defendants may not choose to appeal an adverse judgment, and the proposed intervenor will provide necessary information to the proceedings that the defendants might neglect. (Stmt. of P. & A. in Supp. of Proposed Intervenor-Defendant's Mot. to Intervene ("Proposed Intervenor's Stmt.") at 22-23.) The plaintiffs counter that the federal defendants adequately represent the proposed-intervenor's

interests because both seek the same "ultimate objective," that is, upholding the August 2011 Decision. (Pls.' Opp'n at 3.)

The D.C. Circuit has emphasized repeatedly that the standard to demonstrate inadequacy of representation is lenient. See Fund For Animals, Inc., 322 F.3d at 736 n.7 (concluding that Supreme Court precedent "makes clear that the standard for measuring inadequacy of representation is low"); Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing burden as "not onerous"); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980) (recognizing view that a movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee") (internal quotations omitted). In addition, the Circuit has expressed skepticism that United States governmental entities, with their unique obligations to the serve general public, can be found to adequately represent the interests of potential intervenors. See Fund For Animals, Inc., 322 F.3d at 736 & n.9 (collecting cases).

That skepticism is warranted here. The federal defendants' interest in this action is to defend the Assistant Secretary's decision as lawful agency action. By contrast, the proposed intervenor possesses a distinct and weighty interest in protecting its governance structure and its entitlement and access to federal grant monies. Because the federal defendants do not share these concerns, their defense of this action may not

adequately represent the proposed intervenor's interests. See Hardin v. Jackson, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("The D.C. Circuit has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit.") (quoting Dimond, 792 F.2d at 192).[5]

The purpose for which the proposed intervenor seeks to participate in the case reflects the proposed intervenor's distinct aim of asserting its sovereign interests. The federal defendants, and the plaintiffs, anticipate that the case may be resolved on cross-motions for summary judgment and the administrative record. (See Joint Mot. for Briefing Schedule.) The proposed intervenor, however, seeks intervention for the limited purpose of moving to dismiss on several grounds, including lack of jurisdiction to adjudicate internal tribal disputes and failure to state a claim, a tactic the federal

---

[5] Plaintiffs propose a different standard employed in the Ninth Circuit according to which "[w]here the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a compelling showing to the contrary." Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 951 (9th Cir. 2009) (internal quotations omitted). The D.C. Circuit has not endorsed this articulation of the intervention standard, and cases in the Circuit have been "inconsistent as to who bears the burden with respect to [the adequacy of representation] factor." Fund For Animals, Inc., 322 F.3d at 736 n.7. Although both defendants and the proposed intervenor oppose invalidating the August 31 decision, they do so for different reasons and their respective stakes in the matter differ greatly. The standard for finding inadequate representation here is satisfied regardless of who bears the burden.

defendants have not pursued. See Proposed Intervenor-Defendant's Reply to Pls.' Opp'n ("Proposed Intervenor-Defendant's Reply") at 7 (asserting that defendants' representation is demonstrably not adequate because "[s]trong grounds exist for dismissal of Plaintiffs' Amended Complaint on Rule 12(b)(1) and Rule 12(b)(6) grounds, but the United States failed to seek such a dismissal"). The plaintiffs argue that the choice of a "different procedural mechanism for seeking judicial affirmance of the agency decision does not mean that the government is not adequately representing the prospective intervenor's interests." (Pls.' Opp'n at 4.)

A difference in litigation strategies does not always demonstrate an insufficiently coterminous relationship between a potential intervenor and an existing party. Here, however, the divergence highlights that the proposed intervenor's conceptualization of the action, as an internal tribal dispute not amenable to resolution in a federal judicial forum, is not shared by the defendants. In an important regard, then, the proposed-intervenor does not seek "judicial affirmance" that the agency decision was not arbitrary and capricious or otherwise unlawful; it seeks to persuade "this Court to refrain from presiding over a procedurally defective Amended Complaint and rendering a ruling on the merits in an action over which it lacks jurisdiction." (Proposed Intervenor-Defendant's Reply at 3.) For the foregoing reasons, the defendants do not adequately represent the proposed intervenor's interest in protecting its current

governmental structure and its ability to define its membership independently.

CONCLUSION AND ORDER

Because all four requirements of Rule 24(a)(2) are met, the proposed intervenor is entitled to intervention as of right. The plaintiffs ask that, if intervention is granted, the filing of the motion to dismiss be coordinated with the briefing and resolution of the parties' cross motions for summary judgment. (Pls.' Opp'n at 5.) Accordingly, it is hereby

ORDERED that the proposed intervenor-defendant's amended motion [35] for leave to intervene as defendant be, and hereby is, GRANTED. The Clerk's Office is directed to docket Exhibits 3 through 7 to the proposed intervenor-defendant's amended motion for leave to intervene as the intervenor-defendant's motion to dismiss the plaintiffs' first amended complaint. It is further

ORDERED that the proposed intervenor-defendant's motion [36] to expedite consideration of its motion for leave to intervene be, and hereby is, GRANTED. It is further

ORDERED that the parties' joint motion [41] to extend time for plaintiffs to request supplementation of the administrative record be, and hereby is, GRANTED nunc pro tunc. It is further

ORDERED that the parties' amended joint motion for briefing schedule [47] for cross motions for summary judgment be, and hereby is, GRANTED nunc pro tunc, and the parties' joint motion

[38] for briefing schedule for cross motions for summary judgment be, and hereby is, DENIED as moot. It is further

ORDERED that the parties and the intervenor shall meet and confer and file by April 4, 2012 a joint status report and proposed order reflecting deadlines for opposing and replying in support of the intervenor's motion to dismiss and proposing any necessary amendments to the briefing schedule for cross motions for summary judgment.

SIGNED this 26th day of March, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge

EXHIBIT 10

SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

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February 9, 2011

VIA FACSIMILE AND U.S. MAIL

Amy Dutschke
Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way Suite W-2820
Sacramento, California 95825

Facsimile: (916) 978-6099

NOTICE OF APPEAL

Dear Regional Director Dutschke:

On January 12, 2011, Troy Burdick, Superintendent of the Central California Agency, United States Bureau of Indian Affairs, issued a decision recognizing the results of a purported special election of the California Valley Miwok Tribe ("Tribe") held on January 7, 2011. The Superintendent's decision was contained in a letter to Silvia Burley ("Burley"), a true and correct copy of which is attached as Exhibit "A" (the "January 12 Decision"). The January 12 Decision states that the Bureau of Indian Affairs ("BIA") recognizes Burley and Rashel Reznor ("Reznor") as representatives and officials of the Tribe, based on the results of the January 7, 2011 election. Specifically, the Superintendent's decision recognizes Burley as Chairperson and Reznor as Secretary/Treasurer of the California Valley Miwok Tribal Council.

Pursuant to 25 C.F.R. sections 2.2 and 2.4(a), Yakima Dixie ("Chief Dixie"), the California Valley Miwok Tribe, and Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo, individually and as members of the California Valley Miwok Tribe Tribal Council ("Tribal Council"), appeal the Superintendent's January 12 Decision to the BIA's Pacific Regional Director. Chief Dixie, the Tribe, the Tribal Council and Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo are collectively referred to as "Appellants." Appellants are interested parties who are adversely affected by the January 12 Decision. Appeal of the January 12 Decision to the Pacific Regional Director is authorized by 25 C.F.R. section 2.4(a). *See also LeCompte v. Superintendent, Cheyenne River Agency*, 38 IBIA 62, 62 (2002).

Appellants will file a separate STATEMENT OF REASONS within the time period prescribed by 25 C.F.R. section 2.10(c).

The filing of an appeal under 25 C.F.R. Part 2 triggers an automatic stay of the challenged action during the pendency of the appeal. *See* 25 C.F.R. § 2.6(b); *Yakama Nation v. Northwest Regional Director Bureau of Indian Affairs*, 47 IBIA 117, 119 (2008). Accordingly, the BIA may take no further action to implement the January 12 Decision, including any action to recognize or conduct business with Burley or Reznor as officials or representatives of the Tribe or of its Tribal Council, until this appeal is resolved.

Appellants note that they are interested parties within the meaning of 25 C.F.R. section 2.2 but were not served with notice of the January 12 Decision as required by 25 C.F.R. section 2.7(a). Therefore, the time for filing an appeal is tolled until the BIA provides proper notice to Appellants. 25 C.F.R. § 2.7(b); *Charlotte J. Begaye v. Navajo Regional Director Bureau of Indian Affairs*, 41 IBIA 109, 110 (2005); *Alonzo S. Gallegos et al. v. Southwest Regional Director Bureau of Indian Affairs*, 41 IBIA 286, 290 (2005). Nonetheless, and without waiving any objection to the lack of proper notice, this Notice of Appeal is timely because it is filed within 30 days of the date of the Superintendent's January 12 Decision. 25 C.F.R. § 2.9(a).

Any and all notices given or required to be given to Appellants in this matter, and all papers served or required to be served on Appellants in this matter, should be delivered and served upon the following:

Robert J. Uram, Esq.
Sheppard Mullin Richter & Hampton, LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Telephone: 415-434-9100
Facsimile: 415-434-3947
ruram@sheppardmullin.com

CERTIFICATION OF SERVICE. Service of this document was made by U.S. Mail, return receipt requested, on February 9, 2011, in accordance with all applicable rules, including 25 C.F.R. Part 2 of the Code of Federal Regulations.

Dated: February 9, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By Robert J. Uram /sf
ROBERT J. URAM

Attorneys for Appellants Yakima Dixie, the California Valley Miwok Tribe, the Tribal Council, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On **February 9, 2011**, I served the following document described as **NOTICE OF APPEAL** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes sent by certified mail, return receipt requested, addressed as follows:

Troy Burdick
Superintendent
Central California Agency
Bureau of Indian Affairs
650 Capital Mall, Suite 8-500
Sacramento, CA 95814
Facsimile: (916) 930-3780

Silvia Burley
10601 N. Escondido Pl.
Stockton, CA 95212

Robert Rosette, Esq.
Rosette & Associates
193 Blue Ravine Rd, Suite 255
Folsom, CA 95630
Facsimile: (916) 353-1085

Executed on February 9, 2011, at San Francisco, California.

Yolanda Hogan

Exhibit A

The January 12 Decision

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

JAN 12 2011

Honorable Silvia Burley
Chairperson, California Valley Miwok Tribe
10601 N. Escondido Place
Stockton, California 95212

Dear Chairperson Burley:

The purpose of this correspondence is to acknowledge receipt of the Tribe's Report of Tribal Election and Addendum to Report of Tribal Election by tribal correspondence dated January 7, 2010. On January 7, 2011, the following witnesses: Tiger Paulk, Colleen Pringle, Richard Windfeathers Muniz, and Ty Muniz certified the election results of the January 7, 2010, Tribal election for the Chairperson and Secretary-Treasurer to be true and correct.

Therefore, as reported in the Tribe's Report of Tribal Elections, the following individuals currently represent and serve as officials of the California Valley Miwok Tribal Council:

1. Silvia Burley, Chairperson
2. Rashel Reznor, Secretary/Treasurer

Congratulations are extended to all the elected officials. Please feel free to contact my office about any Bureau program or any questions you may have.

Should you have any questions pertaining to this matter, please do not hesitate to contact Carol Rogers-Davis, Tribal Operations Officer, at (916) 930-3794.

Sincerely,

Troy Burdick
Superintendent

EXHIBIT 11

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 11 2005

Mr. Yakima K. Dixie
Sheep Ranch Rancheria of MiWok Indians of California
11178 Sheep Ranch Rd.
P.O. Box 41
Sheep Ranch, California 95250

Dear Mr. Dixie:

I am writing in response to your appeal filed with the office of the Assistant Secretary – Indian Affairs on October 30, 2003. In deciding this appeal, I am exercising authority delegated to me from the Assistant Secretary – Indian Affairs pursuant to 209 DM 8.3 and 110 DM 8.2. In that appeal, you challenged the Bureau of Indian Affairs' ("BIA") recognition of Sylvia Burley as tribal Chairman and sought to "nullify" her admission, and the admission of her daughter and granddaughters into your Tribe. Although your appeal raises many difficult issues, I must dismiss it on procedural grounds.

Your appeal of the BIA's recognition of Ms. Burley as tribal Chairman has been rendered moot by the BIA's decision of March 26, 2004, a copy of which is enclosed, rejecting the Tribe's proposed constitution. In that letter, the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. Rather, the BIA would recognize her as "a person of authority within California Valley Miwok Tribe." Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you, either in conjunction with Ms. Burley, other tribal members, or potential tribal members, to continue your efforts to organize the Tribe along the lines outlined in the March 26, 2004, letter so that the Tribe can become organized and enjoy the full benefits of Federal recognition. The first step in organizing the Tribe is identifying putative tribal members. If you need guidance or assistance, Ray Fry, (916) 930-3794, of the Central California Agency of the BIA can advise you how to go about doing this.

In addition, your appeal to my office was procedurally defective because it raised issues that had not been raised at lower levels of the administrative appeal process. In May 2003, you contacted the BIA to request assistance in preparing an appeal of the BIA's recognition of Ms. Burley as tribal Chairman. You specifically stated that you were not filing a formal Notice of Appeal. In June 2003, you filed an "Appeal of inaction of official," pursuant to 25 C.F.R. §2.8, with the Central California Agency Superintendent challenging the BIA's failure to respond to your request for assistance. In August 2003, you filed another "Appeal of inaction of official"

with the Acting Regional Director challenging the failure of the Superintendent to respond to your appeal of the BIA's inaction. Your appeal with my office, however, was not an "Appeal of inaction of official." Rather, your "Notice of Appeal" challenged the BIA's recognition of Ms. Burley as tribal Chairman and sought to nullify the Tribe's adoption of her and her family members. Those issues were not raised below. They are not, therefore, properly before me.

In addition, your appeal appears to be untimely. In 1999, you first challenged the BIA's recognition of Ms. Burley as Chairman of the Tribe. In February 2000, the BIA informed you that it defers to tribal resolution of such issues. On July 18, 2001, you filed a lawsuit against Ms. Burley in the United States District Court for the Eastern District of California challenging her purported leadership of the Tribe. On January 24, 2002, the district court dismissed your lawsuit, without prejudice and with leave to amend, because you had not exhausted your administrative remedies by appealing the BIA's February 2000 decision. After the court's January 24, 2002, order, you should have pursued your administrative remedies with the BIA. Instead, you waited almost a year and a half, until June 2003, before raising your claim with the Bureau. As a result of your delay in pursuing your administrative appeal after the court's January 24, 2002, order, your appeal before me is time barred.

In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum. Should other issues arise with respect to tribal leadership or membership in the future, therefore, your appeal would properly lie exclusively with the BIA.

Sincerely,

Michael D. Olsen
Principal Deputy
Acting Assistant Secretary - Indian Affairs

Enclosure

cc: Sylvia Burley
Troy M. Woodward, Esq.
Thomas W. Wolfrum, Esq.
Chadd Everone

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-300
Sacramento, CA 95814

IN REPLY REFER TO

MAR 26 2004

Certified Mail No.7003 1680 0002 3896 9127
Return Receipt Requested

Ms. Sylvia Burley, Chairperson
California Valley Miwok Tribe
10601 Escondido Pl.
Stockton, California 95121

Dear Ms. Burley:

This letter acknowledges our February 11, 2004, receipt of a document represented to be the tribal constitution for the California Valley Miwok Tribe. It is our understanding that the Tribe has shared this tribal constitution with the Bureau of Indian Affairs (BIA) in an attempt to demonstrate that it is an "organized" tribe. Regretfully, we must disagree that such a demonstration is made.

Although the Tribe has not requested any assistance or comments from this office in response to your document, we provide the following observations for your consideration. As you know, the BIA's Central California Agency (CCA) has a responsibility to develop and maintain a government-to-government relationship with each of the 54 federally recognized tribes situated within CCA's jurisdiction. This relationship, includes among other things, the responsibility of working with the person or persons from each tribe who either are rightfully elected to a position of authority within the tribe or who otherwise occupy a position of authority within an unorganized tribe. To that end, the BIA has recognized you, as a person of authority within the California Valley Miwok Tribe. However, the BIA does not yet view your tribe to be an "organized" Indian Tribe and this view is borne out not only by the document that you have presented as the tribe's constitution but additionally, by our relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria.(Let me emphasize that being an organized vis-à-vis unorganized tribe ordinarily will not impact either your tribe's day-to-day operations but could impact your tribe's continued eligibility for certain grants and services from the United States).

Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was

attempted or has occurred with the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who have maintained any cultural contact with Sheep Ranch. To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters. We are unaware of any efforts to involve Yakima Dixie or Mr. Dixie's brother Melvin Dixie or any offspring of Merle Butler, Tillie Jeff or Lenny Jeff, all persons who are known to have resided at Sheep Ranch Rancheria at various times in the past 75 years and persons who have inherited an interest in the Rancheria. We are also not aware of any efforts to involve Indians(such as Lena Shelton) and their descendents who once lived adjacent to Sheep Ranch Rancheria or to investigate the possibility of involving a neighboring group. We are aware that the Indians of Sheep Ranch Rancheria were in fact, part of a larger group of Indians residing less then 20 miles away at West Point. Indeed, at your February 23, 2004 deposition, you yourself testified you were at one time of the West Point Indian Community; we understand as well, that you had siblings residing there for many years. The BIA remains available, upon your request, to assist you in identifying the members of the local Indian community, to assist in disseminating both individual and public notices, facilitating meetings, and otherwise providing logistical support.

It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified. The participation of the greater tribal community is essential to this effort. We are very concerned about the designated "base roll" for the tribe as identified in the submitted tribal constitution; this "base roll" contains only the names of five living members all but one whom were born between 1960 and 1996, and therefore would imply that there was never any tribal community in and around Sheep Ranch Rancheria until you met with Yakima Dixie, asking for his assistance to admit you as a member. The base roll, thus, suggests that this tribe did not exist until the 1990's,with the exception of Yakima Dixie. However, BIA's records indicate with the exception not withstanding, otherwise.

Base membership rolls are used to establish a tribe's cohesiveness and community at a point in time in history. They would normally contain the names of individuals listed on historical documents which confirm Native American tribal relationships in a specific geographical region. Since tribes and bands themselves did not usually possess such historical documents, therefore, tribal base rolls have included persons listed on old census rolls, Indian Agency rolls, voters rolls, etc. Our experience with your sister Miwok tribes (e.g., Shingle Springs Rancheria, Tuolumne Rancheria, Ione Band, etcetera) leads us to believe that Miwok tradition favors base rolls identifying persons found in Miwok tribes stretching from Amador County in the North to Calaveras and Mariposa Counties in the South. The Base and Enrollment criteria for these tribes vary; for example, Amador County tribes use the 1915 Miwok Indian Census of Amador County, El Dorado County tribes utilize the 1916 Indian Census Roll, tribe(s) in Tuolumne County utilize a 1934 IRA voters' list. The base roll typically constitutes the

cornerstone of tribal membership and based upon our experience, has been the basic starting point and foundation for each of the Miwok tribes in our jurisdiction, i.e., the Ione Band of Miwok Indians, Shingle Springs Rancheria and Tuolumne Rancheria.

We must continue to emphasis the importance of the participation of a greater tribal community in determining membership criteria. We reiterate our continued availability and willingness to assist you in this process and that via PL 93-638 contracts intended to facilitate the organization or reorganization of the tribal community, we have already extended assistance. We urge you to continue the work that you have begun towards formal organization of the California Valley Miwok Tribe.

If we can assist your efforts in any way , please contact Raymond Fry, Manager, Tribal Services, at (916) 930-3794.

Should you wish to appeal any portion of this letter, you are advised that you may do so by complying with the following:

This decision may be appealed to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825. In accordance with the regulations in 25 CFR Part 2 (copy enclosed). Your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing or notice is the date it is post marked or the date it is personally delivered to this office. Your notice of appeal must include your name, address and telephone number. It should clearly identify the decision to be appealed. If possible attach a copy of the decision. The notice of and the envelope which it is mailed, should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list the names and addresses of the interested parties known to you and certify that you have sent them copies of the notice.

You must also send a copy of your notice to the Regional Director, at the address given above.

If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal.

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

Dale Rising, Sr.

Dale Rising, Sr.
Superintendent

CC: Pacific Regional Director
Debora Luther, Assistant US Attorney
Myra Spicker, Deputy Solicitor
Yakima Dixie-Tribal Member

EXHIBIT 12

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

CERTIFIED MAIL NO. 7003 1680 0002 3892 1019
RETURN RECEIPT REQUESTED

NOV - 6 2006

Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

CERTIFIED MAIL NO. 7003 1680 0002 3892 1002
RETURN RECEIPT REQUESTED

Mr. Yakima K. Dixie
c/o Mr. Chadd Everone
2054 University Avenue, #407
Berkeley, California 94704

Dear Ms. Burley and Mr. Dixie:

The Bureau of Indian Affairs (BIA) remains committed to assist the California Valley Miwok Tribe (Tribe) (formerly Sheep Ranch Rancheria of the Me-Wuk Indians of California) in its efforts to reorganize a formal governmental structure that is representative of all Miwok Indians who can establish a basis for their interest in the Tribe and is acceptable to the clear majority of those Indians. We are writing you because of your claim of leadership of the Tribe.

The Central California Agency (Agency) has been meeting with both of you and your representatives for some time to discuss issues and to offer assistance in your organizational efforts for the Tribe. It is evident; however, that the ongoing leadership dispute is at an impasse and the likelihood of this impasse changing soon seems to be remote. Therefore, we renew our offer to assist the Tribe in the organizational process. Our intention is not to interfere with the Tribe's right to govern itself. Rather, we make this offer consistent with the well-established principle that the BIA has a responsibility to determine that it is dealing with a government that is representative of the Tribe as a whole. The authority and responsibility to take this action becomes evident once there is clear evidence that the dispute between competing leadership factions, such as yours, threatens to impair the government-to-government relationship between the Tribe and the United States.

The Agency, therefore, will publish a notice of a general council meeting of the Tribe to be sponsored by the BIA in the newspapers within the Miwok region. This will initiate the reorganization process. The notice shall invite the members of the Tribe and potential members to the meeting where the members will discuss the issues and needs confronting the Tribe. We have used this sort of general council meeting approach in other instances to help tribes reorganize when for various reasons the tribes lacked an organized tribal government that represented the entire membership.

It appears that you each have determined your membership criteria, and membership, and developed constitutions or governing documents. We understand, however, you do not agree on certain issues that are fundamental to the process of building an organized government. We propose to discuss the following issues that are preventing you from moving forward as a unified tribe:

- form of government;
- organization under a federal statute (should the tribe decide to adopt a constitution);
- should the tribe adopt a constitution, what constitution will be used: the Dixie or Burley constitution, combination of both, or another;
- determining the census where membership is first listed, i.e., 1916 Sheep Ranch Rancheria census or other document;
- determining leadership of the tribe, i.e., holding a transitional election or agreeing to some type of power sharing.

The general council first needs to determine the type of government your tribe will adopt. Tribes do not always adopt constitutions; some govern according to the tribe's tradition or have some sort of power sharing in an open participatory type of government. Next, the general council needs to agree to the census or other documents that establishes the original members of the Rancheria. That census should be the starting point from which the tribe develops membership criteria. The immediate goal is determining membership of the tribe. Once membership is established and the general council determines the form of government, then the leadership issues can be resolved.

The Agency will coordinate the meeting by setting the date, time, location and other arrangements, but we would appreciate your suggestions, date, time, location, and possible agenda items. The BIA offers the assistance of an independent observer/mediator to facilitate the meeting or meetings. Please respond to the Agency concerning your willingness to participate in a meeting to discuss the issues in depth and begin the resolution process.

We very much desire that you both participate. We intend to conduct a fair and open process in which supporters of each of you can participate and be heard. We will proceed with this process, however, even if one or both of you declines to participate.

Please contact Carol Rogers-Davis, Acting Tribal Operations Officer, Central California Agency, at (916) 930-3764, to work with her on setting up the meeting.

Sincerely,

Troy Burdick
Superintendent

cc: Director, Pacific Region
Regional Solicitor
Director, Bureau of Indian Affairs
Assistant Solicitor, Branch of Tribal Government & Alaska

EXHIBIT 13

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

APR - 2 2007

CERTIFIED MAIL NO. 7006 0810 0001 4950 9008
RETURN RECEIPT REQUESTED

Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

Dear Ms. Burley:

The purpose of this correspondence is to inform you of my decision regarding your Notice of Appeal dated November 10, 2006, filed pursuant to 25 Code of Federal Regulation (CFR) Part 2, from the decision dated November 6, 2006 of the Bureau of Indian Affairs (BIA), Superintendent, Central California Agency (Agency), which noticed you and Yakima Dixie, because of your leadership claims, of the Agency's commitment to assist the California Valley Miwok Tribe, California (formerly the Sheep Ranch Rancheria of Me-Wuk Indians of California), with the Tribe's efforts to organize a formal governmental structure that is representative of all Miwok Indians who can establish a basis for their interest in the Tribe. Your Notice of Appeal, Statement of Reasons, Answer of Interested Party and the Administrative Record of the Superintendent were all received on January 11, 2007. The Superintendent has indicated that your Appeal was timely filed.

It is a well established BIA policy that the federal government not intervene in internal tribal disputes where there is no threat to government-to-government relationship. However, in this situation, where the BIA does not recognize a tribal government we feel that such a threat appears imminent, and we believe that the better course of action would be to allow the Agency to assist the Tribe to sort out the situation. Therefore, based on our analysis, it was concluded that I remand this matter back to the Superintendent and allow the Agency to continue with its plans to assist the Tribe with its organizational efforts. We present our analysis of the situation as follows.

BACKGROUND

An August 13, 1915 letter from Special Indian Agent to the Commissioner of Indian Affairs, Washington, D. C., reported his finding and in part, stated that, " The census the Indians designated Sheepranch-Indians only aggregating 12 in number, constitutes the remnant of once a larger band of Indians ....". A census of the Indians at and near Sheep Ranch in Calavaras County, California was attached to the August 13 letter that listed the follows individuals; Peter Hodge (1/2 Indian blood), Annie, wife (4/4 Indian blood), their children Malida, Lena, Tom, and

Andy, Jeff Davis (4/4 Indian blood), Betsey, wife (4/4 Indian blood), Mrs. Limpey (4/4 Indian blood), John Tecumchey (4/4 Indian blood) and his wife Pinkey (4/4 Indian blood), and Mamy Duncan, granddaughter of Jeff Davis (3/4 Indian blood). Further states that the "to some extent the Indians of Sheepranch, Murphys, Six-Mile, Avery and Angles are interchangeable in their relationships." These communities are all located in Calavaras County, California.

On April 5, 1916, the Sheep Ranch Rancheria, comprising of 0.92 acres located in Calaveras County, California was purchased and held in trust by the United States of America for the use and benefit of certain homeless California Indians.

On June 8, 1935, the approved list of Voters for Indian Reorganization Act (IRA) for the Sheep Ranch Rancheria, Calaveras County, only listed a Jeff Davis, who voted to accept the terms of the IRA. Although Mr. Davis voted in 1935 to accept the terms of the IRA, the Tribe never formally organized under a constitution approved by the Secretary of the Interior. There were no documents located that referenced Mr. Davis attempted to organize the Tribe under the IRA or any record requesting the Agency to assist in the Tribe's efforts to organize.

On August 18, 1966, pursuant to the Rancheria Act (P.L. 85-671, 72 Stat. 619), as amended, whereby the distribution of the Rancheria's assets were made to one distributee, a Mabel Hodge Dixie. On April 11, 1967, the property was deeded to Mrs. Dixie; however, the transfer of title was nullified by a quit claim deed executed by Mrs. Dixie on September 6, 1967, which reverted title of the property to the United States of America. Prior to the complete implementation of the distribution plan, Mabel Hodge Dixie passed away on July 11, 1971. As a result of a probate decision in 1990, the Rancheria was distributed to five heirs, listed as follows; Richard Dixie, and Merle Butler, Mrs. Dixie's common-law husband. Melvin Dixie and Yakima Edward Dixie are the only two remaining heirs. BIA records reflect that the Rancheria land is held in trust for the heirs of Mable Hodge Dixie.

A Notice of Termination was never published in the Federal Register or other letter or notice stating the federal government's intention to terminate services to and/or relations with the Sheep Ranch Rancheria. Furthermore, as evident by the earliest publication of federally recognized tribes in a booklet published in 1972 entitled "American Indians and Their Federal Relationship." The Sheep Ranch Rancheria was listed therein as a recognized tribe eligible for funding and services from the Bureau by virtue of their status as an Indian tribe. This notice and subsequent notices were published pursuant to Section 104 of the Act of November 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792). The Federal Register, dated November 25, 2005: Sheep Ranch Rancheria is listed as the California Valley Miwok Tribe. For the above reasons, the BIA has never viewed this Tribe as a "restored" tribe, which is a term that refers to a tribe once acknowledged as a federally-recognized tribe, then was "terminated," and subsequently "restored" to federal recognition.

DISCUSSION

The BIA has recognized Mr. Yakima Dixie, one of the two remaining heirs, as the spokesperson of the Tribe until April 1999. This recognition was based on the fact that Yakima Dixie is a lineal descendant of the sole distributee, his mother Mable Hodge Dixie. Mrs. Dixie was

identified in the Plan for the Distribution of assets of the Sheep Ranch Rancheria, as approved by the Associate Commissioner of Indian Affairs on October 12, 1966. Yakima Dixie was also one of two remaining heirs identified in the Order of Determination of Heirs issued on November 1, 1971 and reaffirmed by a subsequent Order issued on April 14, 1993.

On August 5, 1998, by letter signed by Yakima Dixie, as Spokesperson/Chairman of the Sheep Ranch Rancheria informed the Agency that he had accepted you and your daughters; Rashel K. Reznor and Angelica J. Paulk, and granddaughter Tristian S. Wallace as enrolled members of the Tribe. However, he did not provide the criteria he used to determine your eligibility to be enrolled into the Tribe; what documentation that you provided to substantiate your eligibility to be enrolled and his authority to initiate this enrollment action. The above individuals, including Melvin Dixie, comprised the total membership of the Tribe.

On September 8, 1998, a meeting was held at the Rancheria between the Agency staff, you and Yakima Dixie, Spokesperson/Chairman of the Tribe. The purpose of the meeting was to discuss the process of formally organizing the Tribe, the status of the Tribe, membership, governance, grant funding and other issues. The Agency staff advised that Yakima Dixie, as the Spokesperson of the Tribe and as one of the two remaining heirs, had the right to choose the membership criteria, which may possibly, include a larger community.

Since the resignation letter dated April 20, 1999 of Yakima Dixie, which you submitted to the Agency, you had initiated a number of actions such as: to recognize yourself as Chairperson and your daughters as the only members of the Tribe. You provided Meeting Notices to the Agency indicating that the Tribe was proposing to adopt a Constitution and ordinances for the purpose of organizing the Tribe. Prior to this, the Tribe had never formally organized or requested assistance for the organization of the Tribe even though the Tribe voted to accept the provisions of the 1934 Indian Reorganization Act (IRA).

On April 21, 1999, by letter from Yakima Dixie, he notified you that he cannot and will not resign as Chairman of the Tribe; however, he gave you the right to act as a delegate to represent the Tribe. This began the constant dispute between you and Yakima Dixie as to who is the rightful Chairperson of the Tribe.

The Agency continued to provide technical assistance to the Tribe for the purpose of awarding a P.L.93-638 Contract. This process was to assist in the development of the Tribe and organization for the benefit of future tribal members. During this period, the Agency continued to work separately with you and Mr. Dixie by providing technical assistance for the purpose of organizing.

On March 7, 2000, by letter to you, the Agency stated that it would not interfere in the internal matters of the Tribe unless the dispute regarding the composition of the governing body of the Tribe continues without resolution, and the government-to-government relationship between the Tribe and the United States may be compromised and in such situations, the Agency will advise the Tribe to resolve the dispute internally within a reasonable period of time.

On March 26, 2004, by letter to you, the Agency addressed its concerns regarding the constitution you had submitted to the Agency in which you attempted to demonstrate that the Tribe is organized. The Agency advised you, that you were considered as a person of authority within an unorganized tribe, for the purpose of receiving P.L. 93-638 contract/grants and services from the United States Government. The Agency addressed the fact that the BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community and that the Constitution provided did not demonstrate involvement of a greater tribal community. In fact, a Constitution, ratified March 8, 2000, which you submitted, under Article III, Membership, identified the base roll, consisting of only five living members: Silvia Burley, Yakima Dixie, Rashel Reznor, Anjelica Paulk, and Tristian Wallace. In a document dated January 9, 2006, you submitted a revised Official Tribal Roll which excluded Yakima Dixie, indicating that he was disenrolled.

Since the purported resignation of Yakima Dixie and his disenrollment, for the purpose of organizing the Tribe, you and Yakima Dixie separately began initiating a number of actions such as; recognizing each of yourselves as Chairperson, proposing to adopt a Constitution and ordinances, and creating lists of potential members. The documents for which you both provided to the Agency were returned by the Agency without action or passed back for further information in order to process requests for which you requested.

The Agency has been meeting with the both of you and with your representatives to discuss and offer assistance in your organizational efforts of the Tribe. However, it is evident that the ongoing leadership dispute between you and Yakima Dixie is at an impasse and the likelihood of this changing soon seems to be remote. The Agency currently recognizes you as the authorized representative of the California Valley Miwok Tribe with whom government-related business is conducted; however, the Agency does not yet view the Tribe to be an "organized" Indian Tribe. This is due to the fact that both of you have failed to identify the whole community who are entitled to participate in the Tribe's efforts to organize, which the Agency has been mentioning in prior correspondences and meetings with you and Yakima Dixie.

CONCLUSION:

Please be advised that Federal Law requires that we know with whom we are dealing with when we contract on a government-to-government basis with tribes pursuant to, for example, the 1974 Indian Financing Act, 25 U.S.C. 1451; the 1975 Indian Self-Determination and Education Assistance Act, Public Law 93-638; the 1978 Indian Child Welfare Act, 25 U.S.C. 1901, and other federal statutes intended to benefit Indian tribal governments. In instances where there is a dispute as to the identity of the rightful tribal leaders empowered to conduct business on behalf of the tribe and it is apparent that no tribal resolution is forthcoming, we are authorized to determine whether or not to continue our government-to-government relationship with the tribe.

Congress has delegated to the Secretary of the Interior broad authority over "public business relating to ... Indians." 43 U.S.C. § 1457.[1] At the core of this authority is a responsibility to ensure that Secretary deals only with a tribal government that actually represents the members of

[1] In turn, the Secretary has delegated this responsibility to the BIA and the Principal Deputy Assistant Secretary - Indian Affairs.

a tribe. As early as 1942, when the government still held lands in trust for many tribes, the Supreme Court stated that the Department had a duty to conduct business only with lawfully-constituted governing bodies who represent the tribal membership.
It is the Agency's position that both factions are at an impasse and cannot come to an agreement for the organization of the Tribe. We believe it is not the goal of the Agency to determine membership of the Tribe or the intent of the Agency to determine who the members of the Tribe will be. The purpose of the November 6, 2006, letter was to bring together the "putative group" who believe that they have the right to participate in the organization of the Tribe, contrary to your assertions. We believe that the main purpose was to assist the Tribe in identifying the whole community, the "putative" group, who would be entitled to participate in the Tribe's efforts to organize a government that will represent the Tribe as a whole. A determination of who is a tribal member must, however, preclude any determination of who is a tribal leader. It is our belief that until the Tribe has identified the "putative" group, the Tribe will not have a solid foundation upon which to build a stable government.

In all fairness to the current tribal membership and the "putative" group, and for the reasons stated above, I agree with the Superintendent's proposed actions as stated in his November 6th letter to assist the Tribal in its efforts to organize. Therefore, to further assist the Tribe regarding this matter, I am, by copy of this letter, remanding this matter back to the Superintendent, Central California Agency to implement the actions mentioned in his November 6th letter, and as soon as possible publish a Notice in the newspapers, within the Miwok region, of the Agency's plan to assist in identifying the "putative" group of the Tribe. Furthermore, the Superintendent will provide personal oversight to assure that the proposed actions outlined in his November 6th letter are fully implemented and completed.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203, in accordance with regulations in 43 CFR § 4.310 - 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4140 MIB, U.S. Department of the Interior, 1849 C Street, N. W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,

Regional Director

cc: See List of Interested Parties
TO: tdj:03/21/2007/1236-P5Burley

List of Interested Parties:

CERTIFIED MAIL NO. 006 0810 0001 4950 8995
RETURN RECEIPT REQUESTED
Chadd Everone, Deputy
c/o Yakima Dixie
2140 Shattuck Avenue, #602
Berkeley, CA 94704

Phillip Thompson, Esq.
601 Pennsylvania Ave., Suite 900
South Building
Upper Marlboro, MD 20772-3665

California Valley Miwok Tribe
c/o 11178 Sheep Ranch Rd.
P.O. Box 41
Sheep Ranch, CA 95250

Superintendent, Central California Agency
Bureau of Indian Affairs
650 Capitol Mall 8-500
Sacramento, CA 95814

Assistant Secretary - Indian Affairs
U.S. Department of the Interior.
1849 C Street, N. W., 4140 MIB
Washington, D.C. 20240

Director, Bureau of Indian Affairs
Attention: MS4606-MIB
1849 C Street, N.W. MS4513-MIB
Washington, D.C. 20240

Deputy Director-Field Operations
Bureau of Indian Affairs
1849 C Street, N.W. MS4513-MIB
Washington, D.C. 20240

Deputy Director, Tribal Services
Attention: Chief, Tribal Government
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Bureau of Indian Affairs
1951 Constitution Ave., N.W.
MS-320-SIB
Washington, D.C. 20240

Associate Solicitor
Division of Indian Affairs
Attention: Jane M. Smith,
Office of the Solicitor MS-6456-MIB
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Regional Solicitor
Pacific Southwest Region
U.S. Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

Office of Hearings and Appeals
Chief Administrative Judge
Interior Board of Indian Appeals
801 North Quincy Street, Suite 300
Arlington, VA 22203

EXHIBIT 14

SUPERIOR COURT OF THE STATE OF CALIFORNIA.

COUNTY OF SAN DIEGO - CENTRAL DISTRICT

--oOo--

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

vs. Case No. 37-2008-00075326-CU-CO-CTL

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendants.

_____/

--oOo--

TUESDAY, JUNE 28, 2011

--oOo--

VIDEO DEPOSITION OF

YAKIMA DIXIE

--oOo--

Ref. No. 31-10000
Reported By: PATRICIA MCCARTHY, CSR No. 12888
Registered Professional Reporter

Page 30

09:57:02 VIDEOGRAPHER: We are going off the record at
09:57:05 9:57 AM.
09:57:07 (Break taken.)
10:03:49 MR. CORRALES: Back on the record.
10:07:11 VIDEOGRAPHER: We are back on the record at
10:07:19 10:07 A.M.
10:07:20 BY MR. CORRALES:
10:07:21 Q. Mr. Dixie, may we proceed? May we continue
10:07:24 with your deposition?
10:07:25 A. Yes.
10:07:28 Q. All right. Now, I want to show you what I
10:07:33 will have marked as Exhibit No. 27 next in order.
10:07:33 (Exhibit Number 27 Was Marked For
10:07:33 Identification.)
10:07:33 BY MR. CORRALES:
10:07:44 Q. This purports to be the declaration of Yakima
10:07:48 Dixie. So a one-, two-, three-, four-page document,
10:07:55 dated October 2010.
10:08:00 Have you ever seen this document before?
10:08:04 MR. FREEMAN: Counsel, if we can let the
10:08:06 witness review the document.
10:08:07 MR. CORRALES: Please review the document.
10:08:10 MR. FREEMAN: Take your time and read it,
10:08:13 okay.
10:08:13 THE WITNESS: Fine.

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10:08:11 MR. FREEMAN: Take your time and read this.
10:08:11 You signed it.
10:08:14 THE WITNESS: 2010.
10:08:19 (Off-the-record discussion.)
10:08:19 THE WITNESS: Okay, you can continue.
10:08:50 BY MR. CORRALES:
10:08:51 Q. Is this your signature on the last page? Is
10:08:54 that your signature on the last page?
10:08:56 A. Yes, it is.
10:08:58 MR. FREEMAN: Excuse me, counsel.
10:08:59 Do you need reading glasses?
10:09:01 THE WITNESS: I am okay.
10:09:02 BY MR. CORRALES:
10:09:03 Q. Okay.
10:09:04 MR. FREEMAN: Counsel, do you have one for me?
10:09:06 MR. CORRALES: I thought I did. She has one.
10:09:08 There you go.
10:09:10 BY MR. CORRALES:
10:09:11 Q. All right. So this is your declaration that
10:09:15 you signed?
10:09:15 A. I guess it is.
10:09:18 Q. I want you to go to page 2, second page, and
10:09:26 it is paragraph five, number five.
10:09:30 It says, "In 1999, I allowed Ms. Burley into
10:09:36 the tribe. Shortly thereafter, Ms. Burley alleged that

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10:09:40 I resigned as Tribal Chairman, that she represented that
10:09:45 she spoke for the Sheepranch Miwok people and that she
10:09:49 was the leader and chairperson of the tribe. I have
10:09:53 never consented to her claim of leadership. The
10:09:56 document allegedly showing my resignation as tribal
10:10:00 chairman is a forgery."
10:10:03 What document is that, sir?
10:10:05 A. I do believe that is true. Exactly what you
10:10:10 read right there. Read.
10:10:11 Q. What documents do you claim to be a forgery?
10:10:16 What is that document?
10:10:17 A. There was something, a document that someone
10:10:19 had forged.
10:10:21 Q. Do you know what that was? Was it your letter
10:10:24 of resignation you are referring to?
10:10:26 A. I don't have no knowledge of that. I do
10:10:29 believe there is an individual, not here, though. He
10:10:35 had to go to a hospital or something, that has all of
10:10:39 the records and files and stuff.
10:10:41 Q. Okay. And one of them is a document that you
10:10:45 claim to be a forgery in that file?
10:10:48 A. Repeat that one.
10:10:53 Q. I will repeat it.
10:10:54 You said somebody that had to go to the
10:10:57 hospital had the files. Are you saying that the

Page 33

10:11:00 document that you claim to be a forgery is in those
10:11:05 files?
10:11:05 A. Yes.
10:11:08 Q. Okay.
10:11:09 Do you remember what that document was?
10:11:11 A. At this time, I will not answer that question.
10:11:19 It may incriminate me.
10:11:20 Q. You think it would incriminate you?
10:11:23 A. Uh-huh.
10:11:24 Q. Okay, all right. Did you resign as the
10:11:30 chairperson of the tribe in the valley?
10:11:33 A. With my --
10:11:43 MR. FREEMAN: I am going to object.
10:11:44 Ambiguity.
10:11:46 THE WITNESS: On my knowledge, as far as some
10:11:48 concern, and no. I never resigned.
10:11:53 BY MR. CORRALES:
10:11:55 Q. Okay. When you say that you didn't resign,
10:12:00 never resigned. When did you discover that Ms. Burley
10:12:08 was the chairperson?
10:12:09 A. I --
10:12:12 MR. FREEMAN: I am going to object. Assumes
10:12:14 facts not in evidence.
10:12:16 THE WITNESS: I don't recall.
10:12:17 BY MR. CORRALES:

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10:12:18 Q. Okay. Did you -- do you claim that she forged
10:12:27 a letter that said that you resigned?
10:12:33 A. I have no knowledge of that.
10:12:46 Q. In your declaration when you say the document
10:12:50 showing my resignation is a forgery, is it a letter
10:12:55 saying that you resigned that you claim is a forgery?
10:12:58 A. I believe that is what it was, yeah.
10:13:01 Q. Okay. When did you discover that? When did
10:13:04 you find out about that?
10:13:05 A. Again, again, I refuse to answer that question
10:13:17 on the grounds it may incriminate myself. I have no
10:13:23 knowledge at this time.
10:13:25 Q. Okay. So you don't know when you first found
10:13:28 out about that. Is that what you are saying?
10:13:31 A. True.
10:13:32 Q. Let me see if I can ask it a little
10:13:34 differently to help you.
10:13:35 Did you at some point meet Mr. Everone, Chadd
10:13:41 Everone? I mean you didn't know him your entire life,
10:13:46 right? You met him at some point, correct?
10:13:50 A. I don't have one, no. But there is
10:13:53 approximately around five or six people that do have
10:13:56 those, that I am acquainted with.
10:13:59 Q. We are not tracking here. Do you know Mr.
10:14:02 Everone, Chadd Everone?

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10:14:04 A. Sure.
10:14:05 Q. When did you first meet him?
10:14:07 A. Quite some time ago.
10:14:12 Q. Okay.
10:14:12 A. He is an attorney.
10:14:14 Q. A few years ago? Many years ago?
10:14:16 A. Yeah.
10:14:18 Q. You didn't know him when you were growing up,
10:14:21 right? You did not know him when you were growing up as
10:14:25 a child?
10:14:25 A. No.
10:14:26 Q. You met him some time in your later years,
10:14:32 correct?
10:14:32 A. I am trying to think. Was it --
10:14:46 Q. If you don't remember the exact date, that is
10:14:50 okay. I just want you to tell me about when you met him
10:15:00 in relationship to certain things that happened to you
10:15:03 in your life. Did you meet him --
10:15:10 A. Again --
10:15:11 Q. Follow my question here. Listen up.
10:15:11 A. Again, for the record --
10:15:12 Q. Yes.
10:15:13 A. You have to bear with me.
10:15:15 Q. Okay.
10:15:18 A. I was badly injured. I had my head opened,

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10:15:25 busted open. It is kind of hard for me, a little bit --
10:15:29 Q. Okay.
10:15:30 A. -- to remember, to go down here.
10:15:34 Q. Sure, okay. That is okay. Just do the best
10:15:37 you can.
10:15:38 Now, did you meet Mr. Everone before or after
10:15:48 you found out about what you believe to be this forgery?
10:15:54 A. Before, I do believe, yeah.
10:16:08 Q. Okay, all right. And did he help you discover
10:16:11 the forgery?
10:16:12 A. Again, I am going to stand on the Fifth
10:16:28 Amendment.
10:16:29 Q. Okay. All right. That's okay. That's okay.
10:16:32 What did Mr. Everone tell you about the forged
10:16:42 document?
10:16:45 MR. FREEMAN: I will just object. Assumes
10:16:49 facts in evidence -- not in evidence.
10:16:49 BY MR. CORRALES:
10:16:49 Q. Go ahead.
10:16:52 A. I believe that is the same question. But you
10:16:54 are just turning it around and around here. Again, I
10:16:56 will refuse to answer that, that question.
10:16:59 BY MR. CORRALES:
10:16:59 Q. Okay. All right. You are refusing to answer
10:17:02 because?

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10:17:02 A. Yes.
10:17:04 Q. Why?
10:17:04 A. I do believe that is my right.
10:17:08 Q. Okay.
10:17:13 Did Mr. Everone tell you that he thought that
10:17:16 the document was forged?
10:17:18 A. Again, I am going to stand on the Fifth.
10:17:24 MR. FREEMAN: Counsel, I would like to take
10:17:27 another break with my client.
10:17:27 MR. CORRALES: Yes. Okay, maybe we --
10:17:25 MR. FREEMAN: I think he may not understand
10:17:31 what the Fifth Amendment is.
10:17:31 MR. CORRALES: Let us take a break. We'll
10:17:31 come back. He wants to talk to you.
10:17:38 MR. FREEMAN: Let us chat for a second.
10:17:39 VIDEOGRAPHER: We are going off the record at
10:17:42 10:17 A.M.
10:17:43 (Break taken.)
10:22:46 VIDEOGRAPHER: We are back on the record at
10:23:35 10:23 A.M.
10:23:37 MR. CORRALES: Okay. Mr. Freeman, are you
10:23:38 instructing him not to answer on the grounds of the
10:23:41 Fifth Amendment?
10:23:42 MR. FREEMAN: I am not.
10:23:37 MR. CORRALES: Okay. Can he answer the

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the Fifth.
MR. CORRALES: Mr. Freeman, are you instructing him not to answer the question based upon the Fifth Amendment?
MR. FREEMAN: No.
BY MR. CORRALES:
Q. Will you answer the question, sir?
A. I am not going to incriminate myself. So I am still going to stand on the Fifth Amendment.
MR. FREEMAN: Counsel, I do believe I could assist in the progress of the deposition if I could ask him a few questions to just get the ball rolling. I know you want to ask your questions.
MR. CORRALES: No. This is my deposition, Counsel, and he is required to answer my questions; and it is clear that he is refusing to answer my questions. And we'll just have to move on, and come back, after we speak with the judge.
BY MR. CORRALES:
Q. Why is it that you claim the document to be a forgery that says that Ms. Burley is the chairperson and not you? Why do you claim that to be a forgery?
A. Again, I am going to stand on the Fifth until I talk to my attorneys here.
Q. Until you talk to your attorneys. Okay.

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Why don't we -- I am going to break with the rule that prohibits a deponent from taking a break and asking, asking his attorney questions before answering. I will make an exception to that in order to facilitate the deposition.
So I am going to allow you to talk to Mr. Freeman for a couple of minutes. Then we'll come back and I want you to answer the question.
MR. FREEMAN: Let us take a break.
VIDEOGRAPHER: We are going off the record at 10:30 A.M.
(Break taken.)
VIDEOGRAPHER: We are back on the record at 10:37 A.M.
MR. CORRALES: Mme. Court Reporter, could you repeat the question, please?
(Record read.)
THE WITNESS: Did you hear what she said?
MR. FREEMAN: Yes.
THE WITNESS: Real good?
MR. FREEMAN: Yes.
THE WITNESS: I didn't hear her, so I am going to ask --
MR. CORRALES: Can you repeat that again, please?

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THE COURT REPORTER: Sure.
(Record read.)
THE WITNESS: On that right there, on our Miwok, tradition-wise, the chief does -- never resigns.
And I do mention that about a document. If there was a document I'd like to see that document. Can you prove it? Do you guys have the document here?
BY MR. CORRALES:
Q. Do you claim that a document that says that you resigned as the chairperson is forged?
A. Do you have it?
Q. I am asking you, sir, if you claim that?
A. No, I don't.
Q. And you have seen that document before?
A. No.
Q. When you say that you are the chief and you never resign, what do you mean by that?
A. That is our traditional ways.
Q. You claim in your declaration on paragraph two, it says, "I am seeking to intervene in this litigation because I am the Heredity Chief and Traditional Authority for the Federally Recognized Tribe known as the California Valley Miwok Tribe..."
MR. FREEMAN: Counsel --
THE WITNESS: California Valley Miwok --

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MR. FREEMAN: Don't answer. Can you finish reading the entire sentence?
MR. CORRALES: No. I don't want to.
MR. FREEMAN: Well, then. I think you need to be clear.
BY MR. CORRALES:
Q. I am going to ask a question, sir.
Mr. Dixie, when you say that you are the heredity chief; when you say that you are the heredity chief, when did you first make that assertion?
A. Oh, boy. It has been years and years ago. That is even before my mom died.
Q. Okay. So at the time that you met Mr. Everone did you tell him that you were the heredity chief? That you had the right to be the chairperson because you were the heredity chief?
A. I don't recall.
Q. Did you ever, when you first discovered this forged document, did you ever tell Ms. Burley that it didn't matter about the forged document you were the heredity chief anyway. Did you ever tell her that?
A. Did I tell her what?
Q. Did you ever tell Ms. Burley that it didn't matter about whether the document was forged, your resignation, you are still the chief because you are the

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10:42:09 heredity chief. Did you ever tell Ms. Burley that when
10:42:13 you first discovered what you believe to be a forged
10:42:18 document?
10:42:18 A. I do believe that I only talked to her just
10:42:29 once when she came up to the rancheria.
10:42:41 Q. Did you ever write her a letter, or
10:42:46 communicate to her in any way after you first discovered
10:42:50 what you believed to be a forged resignation?
10:42:54 A. Not that I know of.
10:42:56 Q. Okay. Why didn't you communicate with her
10:43:01 when you first discovered what you believed to be a
10:43:04 forged resignation?
10:43:05 A. Will you repeat that again, please.
10:43:09 Q. Why didn't you communicate with her when you
10:43:13 first discovered what you believed to be a forged
10:43:15 resignation?
10:43:35 THE WITNESS: Could you help me on that
10:43:37 question a little bit? What he just asked me?
10:43:42 MR. FREEMAN: Do you understand the question?
10:43:44 THE WITNESS: No, I didn't.
10:43:46 MR. CORRALES: Okay.
10:43:47 MR. FREEMAN: Would you like him to explain to
10:43:50 you better? Explain?
10:43:51 BY MR. CORRALES:
10:43:52 Q. I will rephrase the question. Why didn't you

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10:43:54 talk to Ms. Burley when you first discovered what you
10:44:00 believed to be a forged resignation?
10:44:03 A. I still don't understand that question.
10:44:22 MR. FREEMAN: Maybe he can explain it further.
10:44:25 BY MR. CORRALES:
10:44:26 Q. You said that you didn't talk to Ms. Burley
10:44:28 after you discovered that your resignation was forged,
10:44:37 correct?
10:44:37 A. I don't know.
10:44:50 Q. So, you are not sure whether you talked to Ms.
10:44:56 Burley when you first discovered that your resignation
10:44:59 was forged?
10:45:00 A. It might have been afterwards.
10:45:07 Q. Okay.
10:45:07 A. That, I found that out.
10:45:09 Q. Yes. So then did you speak to Ms. Burley
10:45:13 about that some time afterwards?
10:45:14 A. The forgery?
10:45:17 Q. Yes. Did you confront her with it? Talk to
10:45:22 her?
10:45:22 A. I am too sure if I did or not.
10:45:25 Q. Do you believe that you would have confronted
10:45:31 her about that?
10:45:37 MR. FREEMAN: I am going to object,
10:45:38 speculation.

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10:45:39 THE WITNESS: I don't think I would have
10:45:41 because -- yeah, I don't think I would have.
10:45:46 BY MR. CORRALES:
10:45:46 Q. Why not?
10:45:47 A. Well, for the simple reason that she was
10:45:55 invited to our meetings. She doesn't come to our
10:45:58 meetings. She doesn't want to be a part of it. And
10:46:03 that is why I don't think I would do that.
10:46:10 Q. Did you arrange to have a letter sent to her
10:46:17 to tell her that you objected to what you believe to be
10:46:26 a forged resignation?
10:46:28 A. No.
10:46:30 Q. Any reason why you didn't do that?
10:46:32 A. No.
10:46:35 Q. If you claim to be the heredity chief --
10:46:52 A. Uh-huh.
10:46:53 Q. Of the tribe, why do you believe it is
10:46:56 important now that the -- that your resignation was
10:47:05 forged? Why do you believe that is important?
10:47:08 MR. FREEMAN: Objection. I think you are
10:47:09 asking for a legal conclusion.
10:47:15 BY MR. CORRALES:
10:47:16 Q. Go ahead.
10:47:19 A. Repeat that again.
10:47:25 Q. Let me rephrase it. If you are claiming to be

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10:47:28 the heredity chief --
10:47:30 A. Yeah.
10:47:30 Q. What difference does it make to you, whether
10:47:35 the document you believe to be forged?
10:47:46 A. The only way I can look at that is somebody
10:47:50 wanted the authority and signed that piece of paper
10:47:54 saying that I resigned, which traditionally I cannot
10:47:59 resign.
10:48:00 Q. If it wasn't, if you believed that it didn't
10:48:07 mean anything, why didn't you communicate that to Ms.
10:48:17 Burley and tell her that you are the heredity chief
10:48:20 anyway? Why didn't you tell her that?
10:48:27 A. Repeat that one again.
10:48:31 Q. Did you ever tell Ms. Burley that you were the
10:48:35 heredity chief and it didn't make any difference whether
10:48:39 your resignation was forged. Did you ever tell her
10:48:42 that?
10:48:42 A. I don't recollect on that one.
10:48:42 Q. Okay.
10:48:47 A. Whether I did or not.
10:48:48 Q. Okay. So is it correct that some time later
10:48:51 on through the years, you first began to tell Ms. Burley
10:49:00 that you were the heredity chief?
10:49:03 MR. FREEMAN: Objection. Misstates the
10:49:04 testimony.

I, PATRICIA MCCARTHY, a Certified Shorthand Reporter of the State of California, duly authorized to administer oaths, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript ( ) was ( ) was not required.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: _____

PATRICIA MCCARTHY CSR 12888

--o0o--

EXHIBIT 15

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DISTRICT

--oOo--

CALIFORNIA VALLEY MIWOK TRIBE,	)	
Plaintiff,	)	
vs.	)	Case No.
CALIFORNIA GAMBLING CONTROL	)	37-2008-00075326-
COMMISSION,	)	CU-CO-CTL
Defendant.	)	
	)	VOLUME II

Continued Deposition of

YAKIMA KENNETH DIXIE

February 7, 2012

--oOo--

Reported by: MARY BARDELLINI, CSR No. 2976

Jordan Media, Incorporated, at 1228 Madison Avenue in San Diego, California.

The certified shorthand reporter today is Mary Bardellini in association with Kramm Court Reporting, San Diego, California.

Would counsel please state their appearances for the record.

MR. CORRALES: Yes. My name is Manuel Corrales. I represent plaintiff, California Valley Miwok Tribe.

MR. McCONNELL: Matthew McConnell on behalf of intervenors.

MR. RUSK: James Rusk also on behalf of intervenors.

THE VIDEOGRAPHER: Would you please swear the witness.

(Whereupon the witness was sworn to tell the truth and testified as follows.)

MR. McCONNELL: Before we start, I'm going to lodge an objection to the presence of Tiger Paulk. The Court's order regarding Mr. Dixie's deposition was clear; it was limited to counsel and parties only. That was directly in response to the arguments raised by intervenors that Mr. Paulk's presence at the last deposition was harassing.

I have asked counsel, Mr. Corrales, to -- about not having Mr. Paulk present, and he has refused to do so.

MR. CORRALES: Okay. Counsel's statement is incorrect. Mr. Paulk is here under my direction as my paralegal. And let's proceed.

CONTINUED EXAMINATION

BY MR. CORRALES:

Q. Could you please give us your full name, sir. Your full name, could you give us your full name?

MR. McCONNELL: Asked and answered.

THE WITNESS: Yakima Kenneth Dixie.

BY MR. CORRALES:

Q. Mr. Dixie, are you -- are you under the influence of alcohol?

A. No.

Q. Are you taking any form of medication that would make it hard for you to answer the questions today?

A. I take epileptic seizure medication.

Q. Are you taking that today?

A. No.

Q. Okay. Is there any reason why we can't have your deposition today?

A. No.

THE WITNESS: I don't recollect on that thing that you're talking about.

BY MR. CORRALES:

Q. Well, when you said that Mary Wynne said that the document, the resignation letter was a forgery --

A. Yeah --

Q. What did that mean to you? That you were still the chairman of the tribe?

A. No. It was where somebody had forged my name.

Q. So when you say forged your name --

A. On the resignation.

Q. So you didn't resign; is that what you're saying?

MR. McCONNELL: Asked and answered.

THE WITNESS: No.

BY MR. CORRALES:

Q. So if you didn't resign, you'd still be the chairman?

MR. McCONNELL: Asked and answered.

THE WITNESS: I still am the chairman.

BY MR. CORRALES:

Q. Now, did you ever -- so if you weren't the chairman -- let me ask you this: Were you ever the vice chairman of the tribe?

MR. McCONNELL: Objection. It's beyond the

Do you remember making a request of the BIA, that is Mr. Risling, as -- in your capacity as vice chairperson of the tribe?

MR. McCONNELL: Compound. Misstates the testimony of the evidence.

THE WITNESS: No.

BY MR. CORRALES:

Q. Okay. Let's go to Question Number 5. In brackets it says: In your Declaration, when you say the documents showing my resignation is a forgery, is it a letter saying that you resigned that you claim is a forgery? I believe that is what it was, yeah.

And then it says: When did you discover that? When did you find out about that?

Do you understand the question, sir? I'm asking when did you find out that the resignation letter was what you believed to be a forgery, when did you discover that?

A. I don't recollect.

Q. Okay. Now, on page -- what did I do with that -- there it is. Page 36 of your deposition transcript, you say -- actually, Page 34, in your Declaration, when you say the document showing my resignation is a forgery, is that a letter saying that you resigned, that you claim is a forgery? I believe

it that you claim that the document to be a forgery that says Miss Burley is the chairperson and not you? Why do you claim that to be a forgery?

So why do you claim the document that says that you resigned as chairperson, why do you claim that be a forgery?

A. I do believe that document was tooken in front of a handwriting expert in Sacramento. Again, it was forged.

Q. Okay.

A. It was not my writing.

Q. So you believe it to be a forgery based upon some handwriting expert saying that it wasn't your handwriting; is that the only reason?

A. No.

Q. What's the other reason?

A. No.

Q. Did Mr. Everone, for example, tell you that the document appears to be forged?

A. No.

Q. Did Mr. Everone tell you that you had to say the document was a forgery in order for him to help you?

A. No, nobody told me anything.

Q. All right. Question Number 10. Is it correct that when you first discovered that your resignation was

but --

THE WITNESS: I'm glad and I'm happy about that.

MR. CORRALES: That's fine. I will propose that we have the same stipulation --

MR. McCONNELL: I have a couple of questions.

MR. CORRALES: Okay.

EXAMINATION

BY MR. McCONNELL:

Q. Mr. Dixie, earlier you were shown what was marked as Exhibit 33, a document that reads Formal Notice of Resignation. And it says: I, Yakima K. Dixie, being of sound mind and body on this date of Tuesday, April 20, 1999, am resigning as chairperson of the Sheep Ranch Tribe of Miwok Indians Sheep Ranch, California.

There's a signature on that document, Exhibit 33. Did you write the signature that's on Exhibit 33?

A. I don't believe I did. And in fact, this is the first time I seen this -- well, maybe second time, if, you know -- but here's my signature here.

MR. CORRALES: You say here's my signature here, let the record reflect that the witness is pointing to Exhibit Number 34.

Q. Is that a yes?
A. Uh-huh.
Q. We need to hear a yes.
A. Yeah.
Q. Uh-huhs don't work well.
A. Okay.
Q. Okay. And you said, as far as Exhibit 33 goes, that that is not your signature, correct?
MR. CORRALES: Objection. Leading and suggestive.
THE WITNESS: That's true.
MR. McCONNELL: Okay.
BY MR. McCONNELL:
Q. And if you take a look at what you previously were shown as Exhibit 34, this is a document that indicates that the General Council as the Governing Body of the Sheep Ranch Tribe of the Miwok Indians has agreed to accept the resignation of chairperson from Mr. Yakima K. Dixie.
Now, did you ever resign as chairperson of the Miwok Tribe?
A. Well, in the Miwok Tribe, in our tradition, if you got -- you hold a position, you cannot resign --
Q. So did you ever resign?
A. -- until you die or whatever.

Q. And did you ever resign?

A. Not that I know of, no.

Q. And you were asked about this signature. Did you write the signature that's on Exhibit 34 that says that you're resigning as chairperson? Did you write this signature?

A. I don't believe I did.

MR. McCONNELL: I have no further questions.

MR. CORRALES: Okay. Let me see those two documents.

FURTHER EXAMINATION

BY MR. CORRALES:

Q. Mr. Dixie, before we took a break -- before we took a break you were asked questions about Exhibit Number 33 and 34, correct? Before we took a break, do you remember that, sir?

MR. McCONNELL: Earlier today.

BY MR. CORRALES:

Q. Earlier today, when we took a break, before we took a break you were asked questions about 33 and 34; is that right?

A. I believe so.

Q. Okay. And before we took a break you said -- the record will reflect this -- that Exhibit Number 33 contained your signature. Do you remember saying that?

State of California)
)ss.
County of Placer)

I, Mary Bardellini, Certified Shorthand Reporter No. 2976, State of California, do hereby certify:

That said proceedings were taken at the time and place therein named and were reported by me in shorthand and transcribed by means of computer-aided transcription, and that the foregoing 98 pages is a full, complete, and true record of said proceedings.

And I further certify that I am a disinterested person and am in no way interested in the outcome of said action, or connected with or related to any of the parties in said action, or to their respective counsel.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificate null and void.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of February 2012.

Mary Bardellini

MARY BARDELLINI, CSR No. 2976
Certified Shorthand Reporter
State of California

EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,	
v.	**C.A. No. 1:11-cv-00160-RWR**
KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	**Hon. Richard W. Roberts**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs The California Valley Miwok Tribe, *et al.* ("Plaintiffs"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court for summary judgment against Defendants on the Causes of Action stated in the Complaint. Among other claims, Plaintiffs allege that the August 31, 2011 decision of the Department of the Interior, finding that membership of the California Valley Miwok Tribe is limited to five people and recognizing a Tribal government based on a 1998 Resolution signed by only two people, is arbitrary, capricious, unsupported by substantial evidence in the record, an abuse of discretion and otherwise not in accordance with law. Plaintiffs request the Court enter judgment in accordance with the attached Proposed Order.

The grounds for this Motion are set forth in the accompanying Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and all of the pleadings, records, and papers filed herein, deemed to be on file or of which this Court may take judicial notice at or before the time of the hearing of this Motion.

Dated: March 2, 2012

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I caused the forgoing Motion for Summary Judgment and proposed Order which were filed through the ECF system, to be sent electronically to all registered participants. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg
Roy Goldberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, v. KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	C.A. No. 1:11-cv-00160-RWR Hon. Richard W. Roberts

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY

In 1916, the United States purchased approximately one acre of land near Sheep Ranch, California, creating the Sheep Ranch Rancheria for the benefit of 12 named Indians who were all that remained of a larger Miwok Indian band. Since then, those 12 Indians and their descendants have lived on and around the Rancheria property as an Indian community governed by Miwok customs and traditions, without formal governing documents. The community, now known as the California Valley Miwok Tribe ("Tribe"), was and is a federally recognized Indian tribe.

Undisputed evidence shows that, as of April 2011, this community included 242 adult Indians who were lineal descendants of the 12 Tribe members named in 1915 or of other historical Tribe members named on Indian census documents, voter registration lists or rolls (collectively, the "Lineal Descendants"). Undisputed evidence shows that each of the individual Plaintiffs[1] is a Lineal Descendent. Plaintiff Tribal Council represents all of the Lineal Descendants and their children, who together make up the current citizenship of this Tribe.

Plaintiffs challenge an August 31, 2011 decision ("2011 Decision") of the Assistant Secretary – Indian Affairs ("AS-IA"). The 2011 Decision rules that, except for Yakima Dixie, *none* of the individual Plaintiffs or the other Lineal Descendants is a member of the Tribe. Instead, the Lineal Descendants and their children are only "potential citizens." The 2011 Decision concludes that the Tribe has only five "actual citizens": Plaintiff Yakima Dixie, and Silvia Burley, her two daughters and her granddaughter (collectively the "Burley Faction").

The 2011 Decision also accepts a 1998 document, signed only by Silvia Burley and Yakima Dixie, as establishing a valid government for the Tribe. The AS-IA accepts this

[1] Plaintiffs are the Tribe, and Tribal Council members Yakima Dixie, Velma Whitebear, Antonia Lopez, Michael Mendibles, and Evelyn Wilson, individually and as members of the Tribal Council. Antone Azevedo, a Tribal Council member who was one of the Plaintiffs at the inception of this action, is now deceased.

document, Resolution #GC-98-01 (the "1998 Resolution"), as expressing the will of the Tribe's "General Council" (*i.e.*, all adult members) even though it was adopted without the knowledge, participation or consent of Plaintiffs Velma WhiteBear, Antonia Lopez, Evelyn Wilson, Antone Azevedo and Michael Mendibles, or any of the other Lineal Descendants. The AS-IA also ignores the fact that the 1998 Resolution was not even signed by a majority of those whom the 2011 Decision would have recognized as Tribal members in 1998.

Based on the 1998 Resolution, the 2011 Decision recognizes a Tribal government controlled by the Burley Faction, openly disregarding a recent ruling by the Court of Appeals for the D.C. Circuit. Just four years ago, that court upheld the Secretary of the Interior's ("Secretary") *refusal* to recognize the Burley Faction as the Tribe's government, precisely because the Burley Faction and its governing documents did not represent the majority of the Tribe's members. Their claim to "govern the Tribe without so much as consulting its membership" violated the fundamental principle of majoritarian rule. *California Valley Miwok Tribe v. USA*, 515 F.3d 1262, 1263, 1267 (D.C. Cir. 2008) [*CVMT II*].

The Secretary and his delegate, the AS-IA (collectively the "Government"), cannot evade their "responsibility to ensure that a tribe's representatives, with whom [they] must conduct government-to-government relations, are valid representatives of the tribe *as a whole*." *CVMT II*, 515 F.3d at 1267 (emphasis in original; citation omitted). Yet that is exactly what the 2011 Decision seeks to do. It endorses the Burley Faction's "antimajoritarian gambit," which the Court of Appeals disapproved, and allows "the will of tribal members [to be] thwarted by rogue leaders." *Id.* (citation omitted). In so doing, the 2011 Decision violates the Indian Reorganization Act and the United States' "unique trust obligation to Indian tribes." *Id.* (citation omitted).

In his 2011 Decision, the AS-IA acknowledges that he is making a "180 degree change of course from positions defended by this [Interior] Department in administrative and judicial proceedings over the past seven years." He describes this reversal as being "driven by a straightforward correction in the Department's understanding of the [Tribe's] citizenship and a different policy perspective . . . in light of those facts." The alleged "correction" to the Government's understanding is the AS-IA's novel conclusion that the Lineal Descendants are merely "potential" Tribal members and that the Government therefore has no obligation to them.

Plaintiffs will show that this "correction" lacks any legal or factual foundation and improperly usurps the Tribe's right to determine its own members. While the AS-IA claims that his predecessors "misapprehended their responsibility" and "fundamentally misunderstood the role of the Federal Government," the reverse is true. There is no proper basis for the AS-IA's conclusions that the Tribe has only five legitimate members, that the Lineal Descendants are only "potential" members, that the 1998 Resolution was validly adopted, or that it established a valid Tribal government controlled by the Burley Faction. In addition, the AS-IA is estopped from reaching those conclusions by the prior decisions of this Court in *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. 2006) [*CVMT I*], *affirmed*, 515 F.3d 1262, and of the Court of Appeals in *CVMT II,* and by the Government's own representations before this and other federal courts.

The AS-IA compounds these substantive errors with egregious procedural violations. The 2011 Decision stems from Silvia Burley's administrative appeal of a decision that the Bureau of Indian Affairs ("BIA") issued in 2007, seeking to facilitate a meeting of the Tribe's members. The appeal process is governed by binding regulations that limit the scope of the appeal to issues that were timely raised. The AS-IA did not limit his review to those issues. Instead, he expanded his

review to issues that were not before him and overturned final decisions that were not subject to further appeal. In addition, the appeal process was tainted by illegal *ex parte* contacts.

The stakes here are high. The 2011 Decision not only would disenfranchise hundreds of Tribal members, it also would prevent Plaintiffs' Tribal government from performing cultural, economic and social services that include protection of children under the Indian Child Welfare Act, economic development and job creation, and work with state and local agencies to protect cultural and environmental resources. Access to more than nine million dollars that the State of California holds in trust for the Tribe is also at stake. Depending on the result of this Court's decision, that money will go either to the four members of the Burley family or to the 242 Lineal Descendants and their children. Plaintiffs will suffer concrete and particularized injury if the 2011 Decision is allowed to stand.

Plaintiffs ask the Court to find that the 2011 Decision is arbitrary, capricious and not in accordance with law and to declare it invalid.

II. STATEMENT OF FACTS

A. The Tribe's Formal History Begins in 1915

In 1915, a United States Indian Service official discovered a cluster of approximately 12 Miwok Indians living in or near Sheep Ranch, California, which was a remnant of a once-larger band [AR 000003]. In 1916, the United States purchased approximately one acre of land near Sheep Ranch for the benefit of those Indians and created the Sheep Ranch Rancheria. The United States thereafter recognized the Tribe as an Indian tribe [AR 000006, 000009, 000063-000065]. The members of the Tribe at that time, as listed in the 1915 Sheep Ranch Indian census, were: Peter Hodge, Annie Hodge, Malida Hodge, Lena Hodge, Tom Hodge, Andy

Hodge, Jeff Davis, Betsey Davis, Mrs. Limpey, John Tecumchey, Pinkey Tecumchey and Mamy Duncan (collectively, the "1915 Members") [AR 000005].

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), P.L. 73-383, as amended, codified at 25 U.S.C. § 461 *et seq.* The IRA allowed Indian tribes to formally "organize" for the purpose of self-government, through the adoption of written governing documents such as a constitution and bylaws. *See* 25 U.S.C. § 476. The Tribe accepted the IRA in 1935 [AR 000021], but it did not take action to "organize" under the IRA [*e.g.*, AR 000048 (unorganized as of 1966)]. Instead, the Tribe continued to exist as a loose-knit community of families living on or near the Rancheria in Calaveras County, with only an informal governmental structure and no formal governing documents [AR 000507, 000510].

In 1965, the BIA began proceedings aimed at terminating the federal government's trust relationship with the Tribe pursuant to the California Rancheria Act, P.L. 85-671, as amended, by distributing the assets of the Rancheria [AR 000039]. As required by regulations in effect at that time, the BIA prepared a list of people entitled to vote on a "distribution plan" for the Rancheria [AR 000034-000035, 000038]. Because the Tribe was still unorganized, the regulations required the list to be based on who was currently using Rancheria lands through formal or informal allotments, and not on membership in the Tribe. *Compare* 25 C.F.R. §§ 242.3(a), 242.3(b) (1965) [AR 000035].

The distribution plan for the Rancheria's assets named Mabel Hodge Dixie (Yakima Dixie's mother) as the sole distributee, because she was the only Indian then living on the Rancheria [AR 000048-000051]. But the BIA never completed the steps necessary for termination under the Rancheria Act, and all parties agree that the Tribe was never terminated

[*e.g.*, AR 000509, 000517].[2] The United States continued to recognize the Tribe [*see* AR 000505, 000063-000064] and has done so ever since. *See* 75 Fed. Reg. 60810 (Oct. 1, 2010).

For unorganized tribes, the BIA has a practice of identifying a spokesperson through whom the BIA can maintain contact with the tribe until formal organization occurs [AR 001083]. After Ms. Dixie's death, Yakima Dixie eventually came to live on the Rancheria, and the BIA identified Mr. Dixie as a spokesperson for the Tribe [AR 000235].

B. The Initial Effort to Organize The Tribe With a Formal Government Began In 1998

In 1998, a tribeless part-Indian woman named Silvia Burley sought the BIA's assistance in becoming a member of a recognized tribe. BIA official Raymond Fry advised Ms. Burley to contact Yakima Dixie, and she did so [AR 000110]. Around August 1998, based on the BIA's advice, Mr. Dixie agreed to "adopt" Ms. Burley, her two daughters, and her granddaughter into the Tribe [AR 000110]. Based on the BIA's advice, Mr. Dixie did not consult other Tribal members about the adoption or seek their approval. The BIA accepted the Burleys as members of the Tribe, apparently based on the authority it had imputed to Yakima Dixie as spokesperson [AR 000173]. Nothing in the record supports the view that Mr. Dixie had the authority to adopt the Burleys into the Tribe without the consent of other Tribal members.

In September 1998, two BIA officials met with Yakima Dixie and Ms. Burley and discussed the process of formally organizing the Tribe [AR 000127-000171]. The BIA informed Mr. Dixie and Ms. Burley that the BIA could make federal funds available for the process of organization, including identifying the Tribe's full membership, drafting a constitution, and establishing a government [AR 000119].

[2] Silvia Burley unsuccessfully filed suit in federal court in 2002, seeking a determination that the Tribe had in fact been terminated and later restored [AR 000298]. Her suit was dismissed on statute of limitations and jurisdictional grounds [AR 000534-000557].

The BIA was aware at this time that the Tribe's membership included far more people than Yakima Dixie and (arguably) the Burleys. For example, BIA official Raymond Fry told Mr. Dixie during the meeting, "[W]e've done an awful lot of research on the Rancheria, or I have, and conceivably, it could be a pretty good size tribe, depending on what you're comfortable with" [AR 000119]. Brian Golding, the other BIA official present at the meeting, later testified that the BIA knew in November 1997 that the Tribe "consisted of a loosely knit community of Indians in Calaveras County," even though the Tribe "kept to itself" at that time [AR 000507]. The BIA also knew, specifically, that Yakima Dixie's brother Melvin Dixie was still alive and living nearby in Sacramento, California [AR 000127].

Despite this knowledge, the BIA told Yakima Dixie in 1998 that he, Ms. Burley and her adult daughter were the "golden members" of the Tribe [AR 000144] and that they could "pretty much determine the criteria for membership" and participation in Tribal organization. [AR 000136]. The advice was erroneous and violated the rights of the Lineal Descendants, including Plaintiffs. The BIA position was based on the BIA's erroneous assumption that membership and participation were limited to those persons named on the distribution plan prepared for the Rancheria, even though that standard applies only to certain tribes that were terminated and later restored to recognition through litigation [AR 000144, 000172-000173 (September 24, 1998 letter from BIA to Yakima Dixie re participation in Tribal organization process)[3]].

As a first step toward organization, the BIA suggested that Yakima Dixie and the Burleys adopt a draft resolution provided by the BIA, establishing a "general council" [AR 000173-000174]. A general council is a form of government that consists of all of the members of a Tribe acting jointly. This "interim tribal government" [AR 000770] would then adopt resolutions

[3] Note that the BIA's letter to Mr. Dixie uses the confusing term "unterminated" to refer to tribes that *were* terminated but later restored to recognition [AR 000172].

(also provided by the BIA) requesting federal funds to defray the costs of organizing [AR 000174-000175]. The BIA described the general council resolution as "an initial document to get started from" which would facilitate the organization process [AR 000145]. After taking this initial step, the BIA expected Mr. Dixie and the Burleys to "identify other persons eligible to participate in the initial organization of the Tribe" and eventually, with the participation of those other members, to draft a constitution, hold elections and adopt a government [AR 000173-174].

Ms. Burley and Mr. Dixie apparently signed the draft resolution provided by the BIA to establish a general council, Resolution #CG-98-01 (the "1998 Resolution" discussed in the introduction) [AR 000177-000179]. The 1998 Resolution bore only Ms. Burley's and Yakima Dixie's signatures and was not signed by Ms. Burley's adult daughter Rashel Reznor, Mr. Dixie's brother Melvin, or any other member of the Tribe. No one made any effort to give Melvin Dixie or any of the Lineal Descendants any notice or opportunity to participate in the adoption of the 1998 Resolution. As discussed more fully below, the 1998 Resolution was invalid by its own terms since it was not adopted by a majority of the Tribe's members, or even by a majority of the four people whom the BIA believed at that time were entitled to participate.

C. The BIA Rejects the Burley Faction's Claim that They Control the Tribe and That Membership Is Limited to Five People

In April 1999, a leadership dispute erupted when Ms. Burley filed a document with the BIA purporting to be Yakima Dixie's resignation from the position of Tribal chairperson, along with a resolution appointing her as chairperson [AR 000180-000181]. Mr. Dixie denied the validity of the documents and challenged Ms. Burley's claims to leadership [AR 000182, 000205, 000241-000246]. The reason for the leadership dispute is clear. Ms. Burley hoped to limit Tribal membership to her family and to deprive the Lineal Descendants of membership.

The BIA at first took the position that the leadership dispute was an "internal matter" to be resolved within the Tribe [AR 000237]. The BIA improperly recognized Ms. Burley as the Tribal chairperson pending resolution of the dispute[4] and even provided substantial annual funding to Ms. Burley to assist with Tribal organization. Contrary to the BIA's expectations, Ms. Burley did not use the funds to organize the Tribal community and in fact never spent a penny of the federal funds on any programs or services that benefited anyone outside of her immediate family [AR 002198, 002209, 002221, 002229, 002235, 002243].

Between 2000 and 2004 Ms. Burley submitted a series of tribal constitutions, signed only by herself and her daughters, which would have limited membership in the Tribe to the Burleys, their descendants and, in some cases, Yakima Dixie (who would have been outvoted and powerless and whom the Burley Faction purported to "disenroll" in 2005) [*see, e.g.*, AR 000255, 000261, 000864]. The BIA rejected or declined to act on each of these documents, growing increasingly concerned by Ms. Burley's failure to involve the rest of the Tribe [*see, e.g.*, AR 000261-000262 (2001 letter rejecting Burley constitution)].

In March 2004, Ms. Burley submitted another constitution for "informational purposes," claiming that she did not need the BIA's approval because the Tribe had the inherent authority to organize without regard to any requirements under the IRA [AR 001574]. The BIA responded by letter on March 26, 2004 (the "2004 Decision"), which informed Ms. Burley that Tribal organization must involve the entire Tribal community, and identified some members of the Tribal community who should be involved [AR 000499-000502]. The 2004 Decision also stated

[4] Recognition of Ms. Burley violated the BIA's stated policy of "continu[ing] to recognize the Tribal government as constituted prior to the [contested] appointment or election," which in this case would have been Mr. Dixie [AR 000237].

that "the BIA does not yet view your tribe to be an 'organized' Indian Tribe" and that, as a result, the BIA could not recognize Burley as the Tribe's Chairperson [AR 000499].

A Sacramento BIA official explained the 2004 Decision during testimony in 2005: "[T]his office [was] troubled by the apparent creation of this Tribe solely for Ms. Burley's family. . . . [T]his office determined it was inappropriate to continue to acknowledge Ms. Burley as a tribal chairperson who leads an organized tribe or to acknowledge a governing council for the Tribe" [AR 000762-000763]. Ms. Burley did not timely appeal the 2004 Decision [AR 000763].

During this same time period, Yakima Dixie was separately pursuing Tribal organization. As early as 1999, he contacted other members of the Tribe, including Melvin Dixie, and attempted to create a constitution and government [AR 000210-000231]. The BIA disregarded these efforts [AR 000245] or simply ignored them, even when Yakima Dixie and other members formally requested in 2003 that a Secretarial election be called, as provided by the IRA, to allow the Tribe to vote on a constitution [AR 002245].

Simultaneously, Yakima Dixie pursued a series of administrative and judicial challenges to the BIA's recognition of Ms. Burley's Tribal government. Those challenges continued until 2005, when the AS-IA determined that the 2004 Decision had rendered Mr. Dixie's appeal moot because the BIA no longer recognized Ms. Burley's tribal government [AR 000610-000611]. In a decision dated February 11, 2005 (the "2005 Decision"), the AS-IA stated:

> In [the 2004 Decision], the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. . . . Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you . . . to continue your efforts to organize the Tribe along the lines outlined in the March 26, 2004 letter so that the Tribe can become organized and enjoy the full benefits of Federal recognition. The first step in organizing the Tribe is identifying putative tribal members.

[AR 000610-000611.] Ms. Burley responded by challenging the 2005 Decision in federal court.

D. *CVMT I* and *II*: This Court and the Court of Appeals Uphold the Government's Decisions That Rejected Burley's 'Antimajoritarian Gambit'

In April 2005, Ms. Burley filed suit in this Court. *CVMT I*, 424 F.Supp.2d 197. Her suit challenged the Government's refusal to approve her governing documents and to recognize her purported Tribal government, and sought a judgment that the Tribe was organized pursuant to its inherent authority under IRA § 476(h), despite Burley's failure to involve the full Tribal community. *Id.* at 201. This Court dismissed Ms. Burley's claims and held that the Secretary has "a responsibility to ensure that [she] deals only with a tribal government that actually represents the members of a tribe." *Id.* The Court held that the Government's refusal to recognize the Burley government was consistent with its "duty to ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members." *Id.* at 202-203.

The Court noted that the Burleys' constitution "conferred tribal membership only upon them and their descendants . . . [but] the [U.S.] government estimates that the greater tribal community, which should be included in the organization process, may exceed 250 members." *Id.* at 203 n. 7. Since the Tribe was eligible to receive approximately $1.5 million per year in state and federal funds, the Court concluded that Ms. Burley's motivation for restricting membership was self-evident. *Id.*

Ms. Burley appealed this Court's decision. The Court of Appeals affirmed, stating that the 2005 Decision fulfilled a cornerstone of the Government's trust obligation to Indian tribes: to "promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." *CVMT II*, 515 F.3d. at 1267. The Court of Appeals further explained, "Although [the Tribe], by its own admission, has a potential membership of 250, only Burley and her small group of supporters

had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary." *Id.* at 1267.

E. The BIA Attempts to Assist the Tribe By Gathering Genealogies to Document Tribal Membership

On November 6, 2006, after this Court had dismissed Ms. Burley's claims, the BIA wrote to Burley and Yakima Dixie that the BIA "remains committed to assist the [Tribe] in its efforts to reorganize a formal governmental structure that is representative of all Miwok Indians" (the "2006 Decision") [AR 001261-001262]. The BIA offered to facilitate a public meeting of those with a legitimate claim to Tribal membership, and asked both Ms. Burley and Mr. Dixie to participate [AR 001261-001262]. Mr. Dixie agreed, but Ms. Burley refused and appealed the 2006 Decision to the BIA's Regional Director, who affirmed in a decision dated April 2, 2007 (the "2007 Decision") [AR 001494-001500].

The BIA then published a public notice requesting that "putative members"[5] submit documentation of their membership to the BIA (*e.g.*, personal genealogies). The public notice defined the putative members as lineal descendants of known historical members: (1) individuals listed on the 1915 Indian Census of Sheep-ranch Indians; (2) eligible voters listed on the federal government's 1935 IRA voting list for the Rancheria; and (3) distributees under the Rancheria distribution plan prepared in 1966 [AR 001501].

According to the BIA, 503 persons submitted genealogies in response to the public notice [AR 002105]. The BIA reviewed all of the submissions and prepared a letter to each person,

[5] First the Burleys, and now the AS-IA, have attempted to equate the term "putative member" with "potential member," to argue that these individuals are not current members of the Tribe and have no rights as citizens. "Putative" does not mean "potential." It means "generally accepted or deemed such; reputed [a putative ancestor]." Webster's New World Dictionary (bracketed language in quoted text). "Putative members" refers to persons who are accepted as Tribal members, not to people who merely have the potential to become members.

verifying their degree of Indian blood and lineage based on the BIA's genealogical research [AR 002105]. But the BIA has never released that information and refuses to acknowledge that the genealogies are part of the record in this case [Affidavit of Robert J. Uram, attached as Exhibit 1 to Plaintiffs' Motion to Supplement the Administrative Record).

F. The Burley Faction Attempts to Relitigate Its Claims to Control the Tribe, Before the Interior Board of Indian Appeals

Burley appealed the Regional Director's 2007 Decision to the Interior Board of Indian Appeals ("Board") [AR 001502]. Among other claims not relevant here,[6] Burley claimed that the BIA's decision to involve the Tribal community in organization impermissibly intruded into Tribal affairs, because the Tribe was *already* organized under her leadership. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 104 (2010) [*CVMT III*].

The Board held that the Government's 2005 Decision and *CVMT I* and *CVMT II* had already *finally* determined that: (1) the Government did not recognize the Tribe as being organized; (2) the Government did not recognize any tribal government that represents the Tribe; (3) the Tribe's membership was not necessarily limited to the Burley Faction and Yakima Dixie; and (4) the Government had an obligation to ensure that a "greater tribal community" was allowed to participate in organizing the Tribe. *Id.* at 120-121. The Board held that, to the extent Burley's appeal attempted to relitigate those issues, it had no jurisdiction over her claims. *Id.* at 104-105. The Board therefore dismissed all of Burley's claims except for a single, narrow issue.

According to the Board, Ms. Burley's appeal only raised new issues to the extent the 2007 Decision went beyond what was already decided and determined "more specifically what BIA would do to *implement* those [2004 and 2005] determinations." *CVMT III*, 51 IBIA at 121

[6] Ms. Burley also claimed that the 2007 Decision violated a federal contract with the Tribe and that the Decision erroneously stated that the Tribe was never terminated. 51 IBIA at 104.

(emphasis added). Thus, the only issue properly raised by Ms. Burley's appeal concerned the BIA's authority to determine "who would constitute the 'greater tribal community,' or class of 'putative members,'" and to call a meeting of those members for organizational purposes. *Id.* The Board characterized this as a "tribal enrollment dispute." Because the Board lacks jurisdiction over enrollment questions, it referred this issue to the AS-IA for resolution. *Id.* The referral was improper, because the Board failed to recognize that the BIA's 2007 proposed actions would not and could not enroll anyone in the Tribe. Instead, the BIA merely identified those who were *already* recognized as Tribal members based on custom and tradition.

G. While Burley's Appeal Was Pending, Plaintiffs' Actions Eliminated the Need for the BIA to Assist the Tribe

Although Ms. Burley's appeal to the Board forced the BIA to stay its efforts to assist the Tribe in organizing, Plaintiffs moved forward on their own to organize the Tribe in a manner consistent with the judicially approved 2004 and 2005 Decisions. As the AS-IA had encouraged in his 2005 Decision [AR 000610-000611] and as outlined in the 2007 Decision, Plaintiffs set out to "bring together the . . . whole community, the 'putative' group, who would be entitled to participate in the Tribe's efforts to organize a government that will represent the Tribe as a whole" [AR 001498]. Plaintiffs invited all lineal descendants of the Tribe's known historical members—including all those identified in the BIA's 2007 public notice—to participate in organization and the drafting of a Tribal constitution [*see* AR 002259-002261, 002295-002296].

Several hundred people submitted genealogical information to the Tribe and have since participated in regular meetings and Tribal activities, including the drafting of a Tribal constitution that would formally define inclusive citizenship criteria, embracing all members of the Tribe [AR 002297-002313]. When the Plaintiffs filed their First Amended Complaint, the

Tribe's roster contained 242 adult members, along with approximately three hundred children (names of children withheld) [AR 002265-002275]. The Tribe will hold an election to ratify the Constitution and will ask the Secretary to recognize its government when that process is complete [AR 002142].[7] As a result, there is no need for the BIA to convene a meeting or to take any other action. As discussed below, this renders the Burley's appeal moot.

H. The AS-IA's 2011 Decision Makes a 180 Degree Change From Prior Administrative and Judicial Decisions and Approves Burley's Antimajoritarian Gambit

In March 2010, while the AS-IA was considering Ms. Burley's appeal, Ms. Burley's lobbyist, Wilson Pipestem, provided top BIA officials with a letter containing the arguments that formed the basis for the AS-IA's eventual decision [AR 001997[8]]. The Government withheld this letter from Plaintiffs until filing the administrative record on December 1, 2011, in violation of the prohibitions on ex parte contacts for pending appeals.

The AS-IA issued his initial decision in Burley's appeal on December 22, 2010 (the "2010 Decision") [AR 001797-001893]. Plaintiffs challenged the 2010 Decision before this Court, and the AS-IA withdrew the decision on April 1, 2011 [AR 001998-001999]. The AS-IA stated in his April 1 letter that he would issue a new decision after briefing by both parties [AR 001998]. But five days later, before any briefing, Ms. Burley's attorney stated in open court, in a

[7] To date, Plaintiffs' Tribal Council has derived its authority to represent the Tribe from consensus and tradition. The Tribe's members have recognized the Council's authority by their acceptance of its proposals and their participation in Tribal meetings and affairs. But the Tribe's draft constitution and election ordinances call for a general election to be held as soon as possible following the ratification of the constitution, in order to formally establish an elected government of the Tribe.

[8] The letter is an attachment to the email bearing Bates number 001997. The letter itself is not Bates-stamped and can only be accessed by right-clicking the "Attachment" line in the electronic version of the email included in the DVD of the administrative record. Also, Defendants' index to the administrative record incorrectly dates this document as March 25, *2011*, instead of March 25, *2010*, the date the document was delivered.

related California court proceeding, that the Government had informed him it planned to reaffirm the substance of the December 22 Decision [AR 002013]. This additional ex parte communication supports the view that the reconsideration was not conducted in good faith.

After briefing by Ms. Burley and the Plaintiffs, the AS-IA issued the 2011 Decision. The AS-IA reached substantially the same conclusions as he had in his 2010 Decision. He reached far beyond the scope of the issues raised in Ms. Burley's appeal and purported to decide both issues beyond his authority (*i.e.*, Tribal membership) and issues that were already finally resolved by prior DOI decisions and *CVMT I* and *CVMT II* (*i.e.*, whether the Tribe was already organized).

The 2011 Decision finds that the Tribe's membership is limited to the five people whom the AS-IA recognizes as members: the Burley Faction and Yakima Dixie [AR 002049, 002051]. The 2011 Decision incorrectly describes all of the Tribe's other members as "potential citizens" and finds that they have no right to participate in the Tribe's governance [AR 002051].

The 2011 Decision finds that the Tribe is organized under the 1998 Resolution, a document signed by just two people [AR 002050]. In doing so, the 2011 Decision effectively overturns the 2004 and 2005 Decisions that determined the Tribe was not organized.[9] The Decision finds that the "General Council" created by the 1998 Resolution consists solely of the five people whom the AS-IA acknowledges as Tribal members, and that it has the sole right to determine membership criteria for the Tribe and to "conduct the full range of government-to-government relations with the United States" [AR 002050-002051].

[9] The AS-IA states that his ruling "shall apply prospectively" to avoid what he calls the "unintended consequences" of rescinding prior decisions [AR 002054]. This statement cannot be reconciled with his actions, which clearly overturn the Government's prior decisions.

III. APPLICABLE LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *McKinley v. Board of Governors of Fed. Reserve*, 647 F.3d 331 (D.C. Cir. 2011). The movant bears the burden of showing that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 325. But the mere existence of a factual dispute will not bar summary judgment. A factual assertion is *material* if it is capable of affecting the substantive outcome of the litigation, and an issue is *genuine* only if supported by sufficient admissible evidence that a reasonable trier of fact could find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986); *Laningham v. U. S. Navy*, 813 F.2d 1236, 1242-1243 (D.C. Cir. 1987).

B. Judicial Review Under the Administrative Procedure Act

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 a 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").

C. The Indian Reorganization Act

The IRA, 25 U.S.C. § 461 *et seq.*, adopted in 1934, authorizes Indian tribes to "organize for [their] common welfare" by adopting a tribal constitution and bylaws. 25 U.S.C. § 476(a). Majoritarian values lie at the heart of the IRA. Among other things, the IRA provides that a constitution or bylaws adopted pursuant to the IRA must be (1) "ratified by a majority vote of the adult members of the tribe" in a special tribal election called by the Secretary,[10] and (2) approved by the Secretary. *Id. See also* 2 Ops. Sol. Int. 1253, 1255 (Mar. 10, 1944) (tribal members are entitled to vote on membership criteria because, under the IRA, "the right to organize is given to the 'adult members of the tribe'").

[10] The Secretary has also promulgated regulations that govern such elections. 25 C.F.R. Part 81.

A provision of the IRA added in 2004, subsection 476(h), also allows tribes to "adopt governing documents under *procedures* other than those specified in [Section 476]." 25 U.S.C. § 476(h) (emphasis added). But, as this Court has explained, subsection 476(h)'s reference to "governing documents"

> must be understood as references to documents that have been 'ratified by a majority vote of the adult members,' as required by subsection 476(a). Subsection 476(h) did not repeal the provisions of 476(a), nor will it be construed to repeal or water down the protections afforded by the IRA when tribes organize: notice, a defined process, and minimum levels of tribal participation."

CVMT I, 424 F.Supp.2d at 202-203. *See also CVMT II*, 515 F.3d at 1267-1268 ("tribal organization under the [IRA] must reflect majoritarian values").

This interpretation of subsection 476(h) is informed by the United States' obligations as a trustee to Indian tribes and the Indian people. *Id.* at 1267. *See also, e.g., United States v. Mitchell*, 436 U.S. 206, 225 (1983) ("[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 147 (D.D.C. 2002) (DOI's "distinctive obligation of trust" to Indian peoples required it to intervene in tribal elections to protect tribe members excluded from elections) (citation omitted).

IV. ARGUMENT

Plaintiffs are entitled to summary judgment under the APA because the undisputed facts in the administrative record show that the 2011 Decision was arbitrary, capricious and unlawful. The 2011 Decision purports to determine that the "Tribe as a whole" now consists of just five people, four of whom had no contact with the Tribe prior to approximately 1998. That determination is arbitrary and capricious because it ignores uncontroverted evidence proving the existence of a much larger body of Tribal members who are Lineal Descendants. In addition, the 2011 Decision lacks any reasoned explanation of how it reached its conclusions regarding Tribal membership.

Because the Tribe's membership is not limited to the Burley Faction and Yakima Dixie, the Government's recognition of a Tribal government that represents only those five people violates the IRA and the Government's trust responsibility to the Tribe and its members.

In addition to those fatal flaws, the Government's 2011 Decision is estopped by the prior decisions of this Court and the Court of Appeals in *CVMT I* and *II*, and by the Government's own representations before this and other federal courts. The 2011 Decision also violates the DOI's own appeals regulations by engaging in prohibited ex parte contacts, exceeding the proper scope of appeal, and purporting to overturn final decisions that are not subject to further appeal.

A. The 2011 Decision Depends Entirely On A Determination of the Tribe's Membership that Is Arbitrary, Capricious and Unlawful

The overwhelming weight of the evidence in the record shows that the Tribe's membership is not limited to the Burley Faction and Yakima Dixie. The AS-IA chose to ignore this information, making his 2011 Decision arbitrary and capricious. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency"). The 2011 Decision also violates the fundamental tenet that the Tribe, not the Government, is entitled to determine Tribal membership.

1. The 2011 Decision Improperly Disregards Undisputed Evidence In The Record That The Tribe Consists Of More Than Five Members

The BIA has been dealing with this Tribe for nearly 100 years. It has compiled a wealth of information proving that the Tribe's membership is not limited to the Burley Faction and Yakima Dixie. In finding that the Lineal Descendants are only "potential members," the 2011 Decision ignores this information .

a. The 2011 Decision Ignores Testimony of BIA Officials and Legal Pleadings in Prior Cases

Brian Golding of the BIA's Sacramento office testified in 2004 that the BIA's records demonstrated the existence of a larger Tribal community beyond the Burley Faction and Yakima Dixie. Explaining a letter that he had written in 1997 regarding the BIA's lack of a "government to government relationship" with the Tribe, Mr. Golding stated:

> **Based on the records of this office, the Tribe [as of 1997] consisted of a loosely knit community of Indians in Calaveras County.** ... [N]o one affiliated with the Tribe had requested any services or assistance from this office, apart from a request from one individual for housing assistance. Essentially, at that time, the Tribe kept to itself. **In no way was the [1997] letter intended to suggest that the Tribe had no members or that the Tribe did not exist or** had been terminated or, in any way, **was ineligible for services or recognition from the federal government as a tribe.**

[AR 000507 (emphasis added.]

The statement that the Tribe existed as a "loosely knit community" in 1997 that was eligible for "recognition from the federal government as a tribe" necessarily implies the existence of Tribal members other than Yakima Dixie and the Burley Faction, since the Burleys did not even enter the scene until 1998. The Government's pleadings in recent cases involving this Tribe, in which membership was a key issue, confirm this conclusion.

In 2002, Ms. Burley sued the Government in federal district court for the Eastern District of California, seeking to force the Government to take land into trust for the Tribe so she could build a casino [AR 000299]. Ms. Burley's claims turned on the erroneous assertion that the Tribe had been terminated under the California Rancheria Act and later restored [AR 000300]. To support her claim that the Tribe had been terminated, Ms. Burley argued that there were no tribal members in the 1980s and early 1990s [AR 000509-000510].

The Government denied Ms. Burley's claims regarding Tribal membership, relying on BIA records and the testimony of BIA officials. In a brief filed in 2004, the Government stated:

> [Ms. Burley] argues that there were no tribal members until 1992 or thereabouts. ... However, the [BIA] consistently has had communications with members of

> this tribe who have continued to live in the area. BIA recognizes this Tribe as a duly constituted, loose-knit Tribe that has not formally organized. **Based on nearly 100 years of interaction with the Tribe, BIA believes that the tribal community constituting this Tribe is substantially larger than is portrayed in the Burley constitution.**

[AR 000510 (emphasis added).] The district court agreed and dismissed Ms. Burley's claims, and the Ninth Circuit affirmed [AR 000555, 000557, 001259].

A year later, in 2005, Ms. Burley filed her claims before this Court in *CVMT I*. In its motion to dismiss, the Government noted that Ms. Burley had admitted in an earlier lawsuit that the Tribe could have a membership of 250 people. The Government then stated, "These 250 people, in our opinion, constitute the "whole" (or at least) "greater" tribal community discussed in the March 26th [2004] letter, which is not reflected in the *present* membership of the Tribe" [AR 000827 (emphasis in original)]. Note that the Government's reference to the "present membership" of the Tribe refers to the five members acknowledged by Ms. Burley in 2005 and is not a determination of the Tribe's *actual* membership [*see, e.g.*, AR 000830 (stating that "Ms. Burley had failed to identify the greater tribal membership and obtain its support")].

b. The 2011 Decision Ignores Prior BIA Decisions and Analysis of Members' Genealogies

BIA decisions contained in the record provide additional information about the Tribe's members. The 2004 Decision noted that Ms. Burley's proposed "base roll" for determining Tribal membership "contains only the names of five living members [i.e., the Burley Faction and Yakima Dixie]" and therefore "suggests that this tribe did not exist until the 1990s, with the exception of Yakima Dixie. *However, BIA's records indicate . . . otherwise*" [AR 000500 (emphasis added)]. The BIA identified various individuals and groups that had resided on the Rancheria, lived adjacent to the Rancheria, or otherwise maintained cultural contact with the Tribal community, including Lena Shelton and her descendants, the offspring of Merle Butler,

Tillie Jeff and Lenny Jeff, and the Indians residing at nearby West Point. The BIA explained that northern California Miwok tribes typically defined their membership by reference to a historical census or other official rolls from the early twentieth century [AR 000500].

Subsequently, the BIA issued a public notice in April 2007, identifying the Tribe's known historical members and inviting descendants of those members to submit documentation to the BIA [AR 001501]. In response, the BIA received genealogies from more than five hundred individuals [AR 002139-002140]. The BIA analyzed those genealogies to confirm which of the individuals were lineal descendants of the historical members [AR 002105-002106]. Although the Government has not released those findings, has ignored the genealogies in reaching the 2011 Decision, and refuses to acknowledge that the genealogies are part of the record for this case, it cannot deny the existence of the information [AR 002139-002140].

c. The 2011 Decision Ignores Plaintiffs' Tribal Roster

Plaintiffs submitted uncontroverted evidence showing that the Tribe's current membership consists of the Lineal Descendants—242 adult members and their children [AR 002264-002275]. This evidence, which included a complete roster of the Tribe's adult members, was provided at the request of the AS-IA [AR 002004]. If the AS-IA did not believe that the individuals included on Plaintiffs' roster were Tribal members, he was required to explain why. He had all the evidence he needed to do so, because most or all of Plaintiffs' 242 adult members also submitted genealogies to the BIA in response to the 2007 public notice [AR 002139-002140]. But the AS-IA simply ignored the information.

"[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 Vehicle Mfrs. Assn.*, 463 U.S. at 43). *See also Fallon Paiute-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).

Remarkably, the 2011 Decision makes no effort to address any of the evidence contradicting its conclusions—neither the genealogies received by the BIA, nor the Plaintiffs' roster, nor the BIA's repeated statements that its records revealed the existence of a larger Tribe. As a result, the 2011 Decision is a quintessential example of arbitrary and capricious agency action.

2. The Government Offers No Reasoned Explanation for Its Determination of Tribal Membership

Not only does the 2011 Decision neglect to address evidence that contradicts its conclusions; it also fails to offer any reasoned explanation *supporting* its determination of the Tribe's membership. 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 Vehicle 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)).

Here, the 2011 Decision simply *assumes* that the Tribe is limited to five members and dismisses all others as merely "potential members" [AR 002051], without offering any clue as to how it reached that result. It defends this conclusion by arguing that "the General Council of the Tribe [*i.e.*, the five members recognized by the 2011 Decision] has the exclusive authority to determine the citizenship criteria for the Tribe" [AR 002051]. But this simply begs the question of how the AS-IA determined that the 1998 Resolution, which allegedly established the "General Council," was a valid Tribal action. The AS-IA's circular argument "provides no basis upon

which [the Court] could conclude that it was the product of reasoned decisionmaking" and therefore violates the APA. *Butte County*, 613 F.3d at 195 (Secretary of Interior violated APA §§ 555(e) and 706 by failing to offer any valid explanation for rejecting interested party's arguments in an informal adjudication concerning tribal trust lands).

The AS-IA's lack of explanation is glaring in light of the acknowledged "180 degree change of course" that the 2011 Decision represents and its failure to "come to grips" with the Government's prior decisions. *Jicarilla Apache Nation, supra*, 613 F.3d at 1120; *Greater Boston, supra,* 444 F.2d at 852. The D.C. Circuit has repeatedly explained that an "agency's unexplained 180 degree turn away from precedent [or] an agency's decision to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Brady Campaign to Prevent Gun Violence, supra*, 612 F.Supp.2d 1, 18 (D.D.C. 2009) (citing *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999)) (quotation marks omitted). *See also F.C.C. v. Fox Television Stations*, 129 S.Ct. 1800 (2009) (a heightened need for explanation exists "when, for example, [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account"). In addition, an agency's reversal of position must be viewed in light of its statutory duties. *See Fund for Animals v. Norton*, 294 F.Supp.2d 92, 105 (D.D.C. 2003) *appeal dismissed*, 2005 WL 375622 (D.C. Cir. Feb. 16, 2005). Here, in light of the Government's prior decisions and its trust obligation to the Tribe, the 2011 Decision's unexplained membership determination is clearly arbitrary and capricious.

3. The 2011 Decision Is Unlawful because the Tribe, and Not the Government, Decides Who Is a Tribal Member

"A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). As the Government stated before the Ninth Circuit in 2005, in another case involving this Tribe, "[U]nless limited by treaty or statute, a Tribe has the power to determine tribal membership" [AR 000649 (*quoting Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978)].

The Government does not suggest that this Tribe's inherent powers of self-government have been limited by any treaty. Nor has Congress acted to define or limit the Tribe's membership, as it has with certain other tribes where it defined a tribal membership roll or authorized the Secretary to do so. *See, e.g., Groundhog v. Keeler*, 442 F.2d 674, 679 (10th Cir. 1971) (discussing enrollment criteria imposed by Congress on the Five Civilized Tribes); 25 C.F.R. § 61.2 (explaining that rules prescribed in 25 C.F.R. Part 61 are to "govern the compilation of rolls of Indians by the Secretary of the Interior pursuant to statutory authority"); 25 C.F.R. § 61.4 (defining criteria for inclusion on tribal rolls prepared by Secretary for the purpose of distributing judgment funds to specific tribes).

Because Congress has not given the Secretary or his delegates the authority to determine the Tribe's membership, that power belongs to the Tribe alone. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010) ("a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so") (Brown, Circuit Judge, concurring) (citation omitted). Thus, the AS-IA's attempt to determine the Tribe's membership is *ultra vires* and violates the APA. 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations"); *Emily's List v. Fed. Election. Com'n*, 581 F.3d 1, 21 (D.C. Cir. 2009) (FEC regulations exceeded agency's statutory and violated the APA).

a. The Tribe Acknowledges Members Based on Hereditary Descent and Participation in the Tribal Community

Generally speaking, "[i]n the absence of Congressional legislation, tribal membership is usually acquired by birth into, affiliation with, and recognition by the tribe." 2 Ops. Sol. Int. 1253, 1254 (Mar. 10, 1944). As explained in the foremost treatise on Indian law:

> [T]ribal membership or citizenship typically turns on *descent from an individual on a base list or roll*, possession of a specified degree of ancestry from such an individual, domicile at the time of one's birth, or some combination of these criteria.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03(2) (2005 ed.) (emphasis added). Tribes may impose additional requirements, such as residence, but are not required to do so.

For example, a California Court of Appeal explained the traditional membership practices of the Pomo Indian Tribe of Northern California prior to organization: "Before the adoption of the articles of association in 1973, the Tribe was governed solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth." *In RE Bridget R.*, 41 Cal.App.4th 1483, 1493 (1996) (superseded by statute on other grounds). The court noted that the Pomo tribe had 225 members, of whom only 25 lived on the reservation. *Id.* at 1492.

A Senate Report prepared for the California Rancheria Act in 1958 shows that, in other California rancheria tribes, it was common for members to have only informal assignments of rancheria land and to come and go as residents of the rancheria properties, just as with this Tribe. Sen. Report 1874, pp. 13-50 (July 22, 1958). This arrangement did not prevent non-residents from being considered members. *Id.* at 39 (discussing Redwood Rancheria). Most of the 41

rancherias identified in the Rancheria Act[11] did not have approved membership rolls. *See id.* at 13-50.

Federal regulations and BIA guidance recognize that traditional tribal ways of defining membership are valid, and that formal enrollment is not required. The BIA's guidelines for implementing the Indian Child Welfare Act state, "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls." 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979). The BIA's regulations for implementing the IRA define a "member" as: "any Indian who is duly enrolled in a tribe who meets a tribe's written criteria for membership *or who is recognized as belonging to a tribe by the local Indians comprising the tribe.*" 25 C.F.R. 81.1(k) (emphasis added). *See also In RE Bridget R.*, 41 Cal.App.4th at 1493 ("although his name is not on the [BIA's] enrollment list for the Tribe, Richard, who was born in 1972, is recognized as a tribal member according to pre-1973 customs").

This Tribe's membership practices are consistent with those described above and are typical for unorganized tribes: Membership in the Tribe is determined by hereditary descent and acknowledgment by the Tribal community, in accordance with Miwok traditions. Residence on the Rancheria is not a condition of membership. Because of the small size of the Tribe's Rancheria property (0.92 acre), it has never been feasible for all of the Tribe's members to live there at any given time. The BIA has never maintained an "approved membership roll" for the Tribe [*see* AR 000649]. The 2011 Decision fails to address these traditional practices or to explain why they would be superseded now.

[11] This Tribe was not one of the 41 tribes that the Rancheria Act specifically singled out for termination.

b. The Tribe's Current Membership Can Be Determined From Historical Records

Because membership is derived from hereditary descent, the Tribe's current membership—and participation in any organization efforts—can best be determined by reference to historical lists of Tribal members. As the Board explained in a case involving the Cloverdale Rancheria in Northern California: "Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership for organizational purposes." *Alan-Wilson, Sr., v. Sacramento Area Director*, 30 IBIA 241, 249-250 (1997).[12] *See also, e.g.*, *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (tribal constitution defining membership based on parentage or descent from tribal ancestors); *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005) (tribal constitution defining members as lineal descendants of persons named on base roll, with added requirement of one-quarter degree California Indian blood).

The record shows that the Tribe existed prior to 1915, when a BIA official identified a band of 12 Miwok Indians living at Sheepranch (the 1915 Members) who were the remnants of "once quite a large band" [AR 000003]. The Rancheria was "purchased for these Indians" [AR 000004], and the Tribe was federally recognized from that time forward [AR 000006, 000009, 000063-000065]. The United States recognized the 1915 Members as members; otherwise the Tribe would have had no members and would not have existed.

[12] In the case of the Cloverdale Rancheria, the Board explained that, although historical records were available, they did not determine membership because the Cloverdale Rancheria was a party to *Hardwick v. United States,* Civil No. C-79-1710 SW (N.D. Calif. Dec. 22, 1983). The stipulated judgment in that litigation restored to federal recognition 17 terminated California rancherias and specified who would be eligible to participate in subsequent organization efforts. *See, e.g., Jeffrey Alan-Wilson Sr. v. Sacramento Area Director*, 30 IBIA 241, 245-246 (1997) (explaining the application of the stipulated judgment to the Cloverdale Rancheria). Thus, for the Cloverdale Rancheria, "the [*Hardwick*] case govern[ed] the initial establishment of a tribal government." 30 IBIA at 250. But this Tribe was never terminated and was not a party to *Hardwick*, so historical rolls govern. For more discussion of *Hardwick*, see subsection (c), *infra*.

The 1915 census document thus forms the first known record of historical membership, from which the Lineal Descendants can be identified [*see* AR 000005]. Other available records that identify historical members of the Tribe include the 1935 IRA voter list for the Tribe [AR 000016] and the 1966 distribution plan [AR 001501].

The BIA recognized this in its 2004 Decision, which identified Indian census documents from 1915 and 1916, and IRA voter lists, as documents that Miwok tribes commonly use to begin constructing a membership roll [AR 000500]. The BIA's 2007 public notice was based on the same historical documents: the census of 1915 members, the 1935 IRA voter list, and the 1966 distribution plan [AR 001501]. The 2011 Decision offers no evidence or explanation for rejecting these normal sources of membership information and intruding into this Tribe's sovereignty by relegating the Lineal Descendants to "potential member" status.

When Plaintiffs set out to organize the Tribe, they invited all lineal descendants of historical Tribe members to participate. Subsequently, the Tribe prepared written rolls of all those who elected to participate. Every person on the Tribe's current roster is a lineal descendant of a known historical member [AR 002139-002140, 002253-002254]. The Tribe has drafted written criteria that formalize the membership traditions described above and that include all the people identified in the BIA's 2007 public notice and 2004 Decision[13] [*see* AR 002253-002254].

c. The 1966 Distribution Plan Did Not Redefine the Tribe's Membership

The 2011 Decision provides no explanation or rationale in support of its conclusion that the membership of the Tribe is limited to five people. However, the Decision's focus on "distributees and their descendants" suggests that the Government is implicitly relying on the

[13] These criteria do not exclude the Burley Faction from being members if they show that they are, in fact, lineal descendants, and desire to participate in the Tribal community. So far they have rejected all involvement with the Tribal community in favor of maintaining their own private "tribe" of four people.

theory that the Sheep Ranch distribution plan prepared in 1966 established the membership of the Tribe and determined who would be entitled to participate in any subsequent Tribal reorganization [AR 000048-000051]. If so, the Government's reliance is misplaced, because the distribution plan did not determine the membership of the Tribe.

The federal regulations in effect in 1966 explicitly provided that distribution plans for unorganized tribes were not based on tribal membership. Distribution plans reflected tribal membership rolls only for those tribes that were already organized and thus had written membership criteria and rolls. For unorganized tribes, such as this Tribe, distribution plans were required to include only those persons who were using Rancheria lands through formal or informal allotments. *Compare* 25 C.F.R. §§ 242.3(a) (1965) (organized tribes), 242.3(b) (1965) (unorganized tribes) [AR 000035]. Thus, the 1966 distribution plan does not define this Tribe's membership. At most, the plan identifies Tribal members who happened to live on the 0.92-acre Rancheria in 1966.

In certain cases, the BIA *has* made a practice of limiting tribal organization to people named on a rancheria distribution plan, and their descendants. *But that practice has no application here.* The practice is limited to the 17 terminated California rancherias that were restored to federal recognition under the stipulated judgment in *Hardwick v. United States,* Civil No. C-79-1710 SW (N.D. Calif. Dec. 22, 1983). This Tribe was never terminated and did not participate in the *Hardwick* litigation. As a result, the stipulated judgment in *Hardwick* does not apply and does not provide a basis for the 2011 Decision to limit this Tribe's membership.

For all the reasons set forth in this section IV.A, the AS-IA's determination of the Tribe's membership is arbitrary, capricious and unlawful.

B. The 2011 Decision Violates the APA, and the Government's Trust Obligations to the Tribe, By Allowing Burley's 'Antimajoritarian Gambit' to Succeed

As the official charged with overseeing the United States' government-to-government relationship with Indian tribes, the Secretary is both authorized and obligated to ensure that he deals only with tribal governments that actually represent the members of their tribes. The 2011 Decision violates the IRA and abdicates the Secretary's obligation to this Tribe by recognizing a Tribal government that does not represent the Tribe's members, based on a process from which all but one of the Lineal Descendants were excluded. As a result, the 2011 Decision is unlawful, and the APA requires this Court to set it aside. *See* 5 U.S.C. § 706(2)(A).

1. The Secretary Must Ensure that a Tribe's Representatives With Whom He Deals Are Valid Representatives of the Tribe as a Whole, Even Under IRA § 476(h)

IRA section 476(a), enacted in 1934, permits Indian tribes to organize by adopting a "constitution and bylaws," which must be ratified by a majority of a tribe's adult members at a special election called by the Secretary. 25 U.S.C. § 476(a); *see also id.* § 476(c) (prescribing election procedures). Subsection 476(h), added in 2004, clarifies that tribes also may adopt constitutions or other governing documents "under *procedures* other than those specified in [section 476]." 25 U.S.C. § 476(h) (emphasis added).

In *CVMT I* and *II*, the Government took the position that IRA 476(h)'s reference to documents adopted outside of the IRA's *procedures* did not repeal the IRA's *substantive* requirement that tribal governing documents must reflect the will of a majority of the tribe's adult members [AR 000846, 000848, 000851; *see also* 002090-002096.]. Thus, "[g]overning documents, whether adopted under Section 476(a) or recognized under 476(h), must, therefore, be adopted by a majority of the tribal members" [AR 000851]. This holds true whether the document in question is a constitution or a tribal resolution [AR 000846, 000848].

Importantly, the Government also acknowledged that the Secretary has the obligation—independent of the IRA—to "determine that he or she is dealing with a government that is

representative of the tribe as a whole" [AR 000849 (citing *Seminole Nation v. United States*, 316 U.S. 286, 295-296 (1942)]. This duty arises from the United States' trust relationship with Indian tribes, which the Secretary is bound to honor in exercising his broad authority over federal Indian relations [AR 000849 (citing 43 U.S.C. § 1457 and *Seminole Nation*, 316 U.S. at 295-296)]. *See also* 25 U.S.C. §§ 2, 9, 13 (granting Secretary power over various aspects of Indian affairs). "This duty to deal only with representative governments has made the majority the yardstick against which legitimacy of tribal governments are measured" [AR 000849]. As the Government argued, nothing in IRA § 476(h) suggests that Congress intended to modify this background principle of Indian law, which is "fundamental to the relationship between the federal government and a tribe" [AR 000849-000851, 002095].

The Government's interpretation of IRA § 476(h) was supported by the rules of statutory construction and by ample statutory authority[14] [AR 000846-000851]. *See, e.g., Seminole Nation v. Norton*, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (DOI upheld its trust obligation by refusing to recognize tribal elections from which members were excluded); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 151 (D.D.C. 1999) (BIA acted arbitrarily and capriciously by recognizing a tribal government based on a constitution it should have realized was not validly adopted); *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552 (10th Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it may need to determine which tribal government to recognize"); *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107

[14] The Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq*, reinforces the Government's duty to uphold majoritarian principles. The Board has repeatedly held that, "in maintaining the government-to-government relationship with Indian Tribes, BIA has the authority and the responsibility to decline to recognize a tribal action where it finds that the action is tainted by a violation of the [ICRA]." *Jeffrey Alan-Wilson, Sr.*, 30 IBIA 241, 260 (1997) [AR 000107] (citations omitted). Recognition of a Tribal government that excludes a majority of a Tribe's members from citizenship, voting or other fundamental rights would deny those members equal protection, a constitutional right guaranteed to Indian citizens by Congress. 25 U.S.C. § 1302(8).

F.3d 667, 669-670 (8th Cir. 1997) (Secretary has authority to disapprove constitutional amendments based on doubts about the "fundamental integrity and fairness" of tribal elections conducted under IRA § 476(a)); *Morris v. Watt*, 640 F.2d 404, 414-416 (D.C. Cir. 1981) (referenda on tribal constitution were invalid due to lack of meaningful opportunity for members to decide fundamental questions of tribal governance).

This Court agreed with the Government in *CVMT I*, finding that IRA§ 476(h) did not repeal the substantive protections afforded by the IRA, and that its reference to "governing document[s] adopted by a tribe" must be understood as references to documents that have been "ratified by a majority vote of the adult members." *CVMT I*, 424 F.Supp.2d at 202-203. The Court of Appeals held that, "[a]s Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values." *CVMT II*, 515 F.3d at 1267-1268; *accord*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(3)(b) n. 398 (2005 ed.) [2009 supplement] (citing to *CVMT II*). The Court of Appeals' holding is now the law of this Circuit.

2. The Government Does Not Deny Its Duty to Uphold Majoritarian Values

The 2011 Decision states that the Tribe has "chosen to avail itself of the provisions in [IRA] § 476(h) . . . which recognizes the inherent sovereign powers of tribes 'to adopt governing documents under procedures other than those specified [in the IRA].'" [AR 002053.] It goes on to state that previous DOI officials misinterpreted both 476(h) and the nature of the Government's general trust obligations to the Tribe [AR 002054]. According to the 2011 Decision, neither 476(h) nor any other law authorizes the Government to intrude into the Tribe's internal affairs by "attempting to force the Tribe to expand its citizenship" [AR 002054].

The 2011 Decision thus attempts to present the issue in this case as one of statutory interpretation, no doubt seeking deference from this Court. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (applying *Chevron* deference to

agency's change in statutory interpretation). But the 2011 Decision does not dispute the Government's legal duty, even under 476(h), to deal only with tribal governments that actually represent their tribes' members.[15] Instead, the Decision rests on a new finding that the Tribe's membership is limited to five people. For example, the Decision states, "this change [of course] is driven by a *straightforward correction in the Department's understanding of the [Tribe's] citizenship* and a different policy perspective on the Department's legal obligations in light of those facts" [AR 002050 (emphasis added)]. "In my view, prior [DOI] officials misapprehended their responsibility when they: (1) took their focus off the fact that the [Tribe] was comprised [of] five individuals, and (2) mistakenly viewed the Federal government as having particular duties relating to individuals who were not citizens of the tribe" [AR 002053].

This new membership determination, and not a change in statutory interpretation, distinguishes the 2011 Decision from the Government's position in *CVMT I* and *II*. In those prior cases, the Government recognized that the Tribe had a membership of approximately 250 people that had not yet been precisely determined, and that only after those members were specifically identified could the Secretary know whether a governing document enjoyed majority support [AR 000848]. Now, the Government argues that the Tribe's membership is limited to five people and that, *as a result*, the five-person "General Council" has the authority to govern the Tribe and cannot be "forced to expand its membership" [AR 002051, 002055].

3. The Undisputed Evidence Shows that the 1998 Resolution Was Not Adopted by a Majority of this Tribe's Members

As explained in Section IV.A of this brief, the Government's attempt to limit the Tribe to five members is arbitrary, capricious and unlawful. The Tribe is not a terminated tribe, and

[15] If the Government does intend to argue that it can ignore the will of a tribe's members and recognize a tribal government that consists of an unrepresentative faction, Plaintiffs welcome the Government's clarification.

whatever membership standards may apply to terminated rancheria tribes do not apply here. Plaintiffs submitted undisputed evidence that the membership of the Tribe consists of 242 Lineal Descendants and their children. That evidence is corroborated by the BIA's own records, sworn testimony and legal filings that are part of the administrative record. The Government has offered no explanation for excluding the Lineal Descendants from this Tribe, and no theory under which it would have the authority to do so.

Because the 2011 Decision depends entirely on the Government's erroneous membership determination, the rest of the Decision must fall as well, including the recognition of a "General Council" based on the 1998 Resolution that was adopted by two people. Plaintiffs' current Tribal roster includes at least 83 members, including each of the individual Plaintiffs, who were 18 years old in 1998 and were entitled to vote on any governing document adopted then (other members then living have since died) [*see* AR 002268-002275; Affidavit of Velma Whitebear, attached as Exhibit "2" to Plaintiffs' Motion to Supplement the Administrative Record]. Two is not a majority of 83.

Even under the Government's view of membership, there were a minimum of four adult members in 1998: Yakima and Melvin Dixie (the two remaining heirs of Mabel Hodge Dixie) and Sylvia Burley and Rashel Reznor [AR 000172-000173, 000111-000114]. Only two persons signed: Yakima Dixie and Silvia Burley [AR 000179]. 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.[16]

Plaintiffs specifically challenged the validity of the 1998 Resolution in their briefing to the AS-IA [AR 002147-002149]. But the AS-IA chose to ignore the issue entirely, again making

[16] Further, given the fact that Mr. Dixie was not the sole member of the Tribe in 1998, the Government cannot assume the validity of Ms. Burley's enrollment into the Tribe. It has made no explanation to support that enrollment. In our view, Ms. Burley was not properly admitted to the Tribe in 1998 and was not entitled to a vote on the 1998 Resolution.

his 2011 Decision arbitrary and capricious. *Butte County, Cal., supra,* 613 F.3d at 194; *Fallon Paiute-Shoshone Tribe, supra,* 455 F. Supp. 2d at 1223-24.

Because the recognition of Burley's five-person "General Council" under the 1998 Resolution violates the IRA, the ICRA and the United States' trust duties to the Tribe, and is unsupported by the record, the 2011 Decision is arbitrary, capricious and unlawful.

C. The Government Is Estopped from Recognizing Burley's 'Unrepresentative Faction'

In addition to violating the APA, the 2011 Decision is precluded by the final decisions of this Court and the Court of Appeals in *CVMT I* and *CVMT II*. Those cases determined that the Tribe was not properly organized under Ms. Burley's antimajoritarian government and that organization must involve the entire Tribal community.

1. *CVMT I and II* Necessarily and Finally Decided that the Tribe Was Not Organized Under Burley's Antimajoritarian Government

Once a court has decided an issue of law or fact necessary to its judgment, the doctrine of issue preclusion prevents the relitigation of that issue in a subsequent proceeding involving a party to the first case.[17] *Allen v. McCurry,* 449 U.S. 90, 94 (1980). A prior proceeding has preclusive effect when (1) the same issue was contested and submitted for judicial determination in a prior case, (2) the issue was actually and necessarily decided in that case, and (3) preclusion would not work a "basic unfairness" to the party bound by the prior judgment. *Yamaha Corp. of*

[17] The Government was a party to *CVMT I and II*. Plaintiffs were not parties to those cases, but Yakima Dixie participated as a proposed intervenor in the *CVMT I* proceedings and as amicus curiae in *CVMT II*. *CVMT I*, 424 F.Supp.2d at 198 n. 2 (stating that Chief Dixie's motion to intervene was mooted by the court's decision dismissing Burley's claims); *CVMT II*, 515 F.3d at 1263. A party who would be precluded from relitigating an issue with the opposing party in the first action is also precluded from relitigating that issue with another person, unless some special circumstances make issue preclusion inappropriate. *Yamaha, infra,* 961 F.2d at 254 n.11 (citing Restatement (Second) of Judgments § 29 (1982)). Here, both the Government and Burley had a full and fair opportunity to litigate the issues related to Tribal organization in *CVMT I* and *II*. *E.g., CVMT I,* 424 F.Supp.2d at 201. Thus, the fact that Plaintiffs were not parties in *CVMT I* and *II* does not prevent the Court from giving preclusive effect to that judgment here.

America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992). Issue preclusion applies to both judicial actions and administrative decisions. *Deerfield v. F.C.C.*, 992 F.2d 420, 424-428 (2d Cir. 1993); *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366, 1369 (D.D.C. 1986).

a. The 2011 Decision Addresses the Same Issue Previously Raised Before This Court

The 2011 Decision revisits a key issue that is identical to an issue already decided by this Court. In *CVMT I*, the Burley Faction argued that they must be recognized as the Tribe's government because they had adopted valid governing documents under IRA § 476(h) and the Tribe's "inherent sovereign authority" [AR 000710 (Burley complaint)]. The Court rejected the Burleys' claims to authority, because their documents were adopted without involving the Tribal community. *CVMT I*, 424 F.Supp.2d at 201, 203 n. 7; *see also CVMT II*, 515 F.3d 1267-1268.

The 2011 Decision now states that the Burley Faction established a valid government by "avail[ing] itself of the provisions in [IRA] § 476(h)" and adopting the 1998 Resolution pursuant to its inherent authority [AR 002053]. Although the Burleys claimed in *CVMT I* that they had "organized" the Tribe, and the 2011 Decision strains to avoid using that word, the issue is the same. The Government's "switch in the verbal formula" cannot escape the binding effect of this Court's prior decision. *Starker v. United States*, 602 F.2d 1341, 1345 (9th Cir. 1979).

b. This Court Actually and Necessarily Determined the Issues Addressed In the 2011 Decision

The preclusive effect of a judgment extends to all issues "actually and necessarily determined" in the prior litigation, including both matters explicitly addressed by the prior court and matters that the court "must necessarily, albeit implicitly," have decided in order to reach its judgment. *Yamaha*, 961 F.2d at 254, 256. Furthermore, "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Id.* at 254 (internal quotations and citations omitted) (emphasis in original).

In *CVMT I*, the Burley Faction claimed that it had established a legitimate Tribal government based on "valid, governing documents" adopted by the Tribe. *CVMT I*, 424 F.Supp.2d at 201. The Burley Faction relied on documents including the 1998 Resolution and subsequent resolutions and constitutions [AR 000713-000718]. In dismissing Burley's complaint, the Court necessarily determined that the Burley Faction had not established a legitimate Tribal government under *any* set of "valid governing documents" then in existence. *See id.* at 203. Although the Court focused on Ms. Burley's constitutions rather than on the 1998 Resolution, the Government itself stated that its "refusal to recognize the [Burleys Faction's] tribal constitution implicitly encompasses any and all tribal governing documents" [AR 000826].

The Court's prior determinations preclude *any* attempt to relitigate the validity of the Burley Faction's government, including both the particular arguments emphasized in *CVMT I*, and arguments based on the 1998 Resolution. *Yamaha*, 961 F.2d at 254; *Seminole Nation, supra*, 223 F.Supp.2d at 134, 133 n.14 (judicial finding that racial discrimination invalidated a tribal election applied equally to a later election not addressed in the first decision).

c. Giving Preclusive Effect to This Court's Decision Would Not Work A 'Basic Unfairness'

Issue preclusion applies unless giving preclusive effect to a prior judgment would work "a basic unfairness" on the party to be precluded. *Yamaha*, 961 F.2d at 254. Here, applying issue preclusion would not violate any overriding public policy or cause manifest injustice. In 2009, the Government argued that another federal court *should* give preclusive effect to *CVMT I* and *II*. In a lawsuit that Ms. Burley filed in the Eastern District of California, the Government urged that Ms. Burley was estopped from relitigating this Court's determinations of her claims to Tribal leadership [AR 001583-1584]. The court agreed, relying on *CVMT I* to establish that the Tribe did not have a recognized government. *California Valley Miwok Tribe v. Kempthorne*, No.

S-08-3164, *3-6 (E.D. Cal. 2009) [AR 001599]. The Government cannot have it both ways. Having relied on *CVMT I* in the previous litigation, it cannot claim unfairness if it is bound by *CVMT I* in this case. Moreover, applying issue preclusion would prevent manifest injustice to Plaintiffs and uphold the overriding public policy in favor of majoritarian rule. *CVMT I*, 424 F.Supp.2d at 202; *CVMT II*, 515 F.3d at 1267-1268.

D. Judicial Estoppel Bars the Government From Denying the Rights of the Tribal Community

Judicial estoppel is a separate equitable doctrine that prevents a party from adopting one argument to prevail in one phase of a case, and then adopting a contrary position to prevail in another phase of that case or in another proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) (citations omitted). The doctrine avoids inconsistent court determinations. *Id.* at 750-751. Judicial estoppel applies to the government as well as to private parties. *See, e.g., Valentine-Johnson v. Roche*, 386 F.3d 800, 810-812 (6th Cir. 2004).

In briefs submitted to this Court and the Court of Appeals, the Government argued that it could not recognize the Burleys' tribal government because "the undisputed facts show that the Burley Government was elected, and its governing documents adopted, by just three people and without the participation of the vast majority of the potential members of the Tribe" [AR 002097]. Three people did not represent a majority of the Tribe, because "the BIA ha[d] records relating to a number of other Indian families who lived or are living in Calaveras County and who are believed to be part of the Indian community of Sheep Ranch, California" [AR 000775]. Yet the 2011 Decision takes the position that those other members have no right to a voice in Tribal governance, and that the Burley government is valid [AR 002051].

The Government's new position is not only inconsistent with its prior position before this Court; it is completely opposite. *New Hampshire*, 532 U.S. at 745-747, 752 (New Hampshire's

position that the "Middle of the [Piscataqua] River" meant the low water mark on the Maine shore was estopped by its previous litigation position that the phrase meant the middle of the River channel). Moreover, this Court and the Court of Appeals wholeheartedly accepted the Secretary's prior position. *CVMT II*, 515 F.3d at 1267-1268. If this Court were to let the Government reverse that position now and disenfranchise the Lineal Descendants, "the risk of inconsistent court determinations would become a reality." *New Hampshire*, 532 U.S. at 755.

Moreover, Plaintiffs would suffer an unfair detriment if the Government were not estopped from reversing its position. Plaintiffs have relied on the Government's prior position by making good faith efforts to organize the entire Tribal community, cooperating with the BIA and submitting genealogies to document their membership, all while Burley filed a series of lawsuits and administrative appeals [AR 002138-002142]. *C.f. Valentine-Johnson*, 386 F.3d at 810-811.

Finally, the Government has pointed to no change in the facts or law upon which *CVMT I* and *II* were decided, or any "broad interest of public policy," to justify its change in position. *See New Hampshire*, 532 U.S. at 755-756. The Government claims that its change of course is "driven by a straightforward correction in the DOI's *understanding* of the [Tribe's] citizenship" [AR 002050 (emphasis added)]. To paraphrase the Supreme Court in *New Hampshire*, "What has changed between [2005] and today is [the Government's] interpretation of the historical evidence." *Id.* at 756. Therefore, the Government is judicially estopped from reversing itself.

E. The 2011 Decision Is Procedurally Invalid Because It Violates the DOI's Own Regulations

An agency action that does not comply with the agency's own rules and procedures violates the APA. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979). Here, the AS-IA violated multiple DOI regulations by reopening issues not subject to appeal and by

relying on ex parte communications, without giving interested parties notice or an opportunity to comment on that information.

1. The AS-IA Violated DOI Regulations By Deciding Burley's Appeal Based on Information Not Disclosed to Interested Parties

In an administrative appeal of a BIA action, if the deciding official intends to consider information not contained in the record on appeal, *see* 25 C.F.R. § 2.21(a), the deciding official must "notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided." 25 C.F.R. § 2.21(b). *See also* 43 C.F.R. § 4.24 (prohibiting any decision based on material not open to inspection by all parties to an appeal).[18] The AS-IA is a "deciding official" within the meaning of the regulations when he hears an appeal on referral from the Board. 25 C.F.R. §§ 2.4(c), 2.20(f). Plaintiff Yakima Dixie was an interested party to Ms. Burley's appeal [AR 001514, 001516, 001685].

On March 25, 2010, BIA Director Jerry Gidner and top officials in the AS-IA's office received a letter from Ms. Burley's lobbyist, Wilson Pipestem, that outlined Ms. Burley's latest theory of Tribal organization [AR 001997]. Even a cursory review of this letter reveals that it formed the template for the AS-IA's decision on Ms. Burley's appeal. The letter argues that (1) the Burley Faction and Yakima Dixie are the only members of the Tribe; (2) the Tribe is organized under the 1998 Resolution with a "General Council" consisting of those five members, and is not required to comply with the IRA; and (3) the five-person "General Council" is entitled to make all decisions regarding Tribal membership criteria and government [AR 001997].

[18] The DOI's general procedures for administrative appeals, found in 43 C.F.R. Part 4, apply to all appeals within the DOI, including actions of the Board or the AS-IA, except where they conflict with the special rules for BIA appeals found in 25 C.F.R. Part 2. 43 C.F.R. § 4.1(b). Here, neither set of regulations would allow the AS-IA to consider information provided by a party to the appeal in secret and without notice to other interested parties.

The AS-IA withheld this document from the other interested parties to Ms. Burley's appeal, in violation of 25 C.F.R. § 2.21(b). As a result, the interested parties were denied the opportunity to "comment on the information before the appeal [wa]s decided," as the regulations require. 25 C.F.R. § 2.21(b). Since the AS-IA substantially adopted the letter's arguments, the violation of the regulations is not harmless and requires the reversal of the 2011 Decision.

2. The 2011 Decision Unlawfully Addressed Issues Not Within the Jurisdiction of the Appeal Referred by the Board

Ms. Burley's appeal to the Board, from which the 2011 Decision arose, challenged the BIA Regional Director's 2007 Decision. The 2007 Decision did not make any determinations about the organizational status of the Tribe, the recognition of any Tribal government, or the need to involve the entire Tribal community in the organization process. The *2004* Decision, which Ms. Burley never appealed, had already finally determined those issues [AR 000499-000501]. The 2005 Decision confirmed those determinations [AR 000611], and both this Court and the Court of Appeals upheld them. The Board therefore *dismissed* Ms. Burley's claims to the extent they attempted to relitigate those issues. *CVMT III*, 51 IBIA at 105, 120.

As the Board recognized, the 2007 Decision only raised new issues to the extent it went beyond what was determined by the 2004 and 2005 Decisions and determined "more specifically what BIA would do to *implement* those [2004 and 2005] determinations." *CVMT III*, 51 IBIA at 121 (emphasis added). Thus, the only issue properly raised by Ms. Burley's appeal was the BIA's authority to "determin[e] who would constitute the 'greater tribal community,' or class of 'putative members,'" and to call a "general council" meeting of those members for organizational purposes. *Id.* That is the issue that the Board referred to the AS-IA.

The 2011 Decision, however, reaches far beyond the scope of the issue referred by the Board and addresses issues that the Board properly dismissed: the organizational status of the

Tribe, the recognition of the Burley government, and the participation of the entire Tribal community in the organization process [AR 002050]. The 2011 Decision also claims to define the membership of the Tribe, an issue not even raised by Burley's appeal [AR 002049]. Because the 2007 Decision did not raise those issues, the AS-IA lacked jurisdiction to decide the issues in resolving Ms. Burley's challenge to the 2007 Decision. *See* 25 C.F.R. § 2.2 (defining "appeal" as a "written request for review of an action or the inaction of an official of the [BIA]").[19]

3. The 2011 Decision Overturns Final DOI Decisions That Are Not Subject to Appeal or Reconsideration

The AS-IA's 2011 Decision not only overturns the 2007 Decision, it effectively reverses the 2004 and 2005 Decisions as well. The 2011 Decision overturns each of the fundamental tenets of the 2004 and 2005 Decisions, which this Court upheld in *CVMT I*: that the Tribe is not organized, that the DOI does not recognize Ms. Burley's Tribal government, and that the entire Tribal community must participate in any Tribal organization [AR 000609-000611].

Reversal of the 2004 and 2005 Decisions was unlawful. The 2004 and 2005 Decisions were final for the DOI and not subject to further appeal within the DOI. The 2004 Decision became final when the time for appeal expired without the filing of a notice of appeal (30 days after receipt of notice of the administrative action). 25 C.F.R. § 2.6(b); 25 C.F.R. § 2.9(a). The 2005 Decision, as a decision of the Acting AS-IA, was final agency action upon its issuance. 25 C.F.R. § 2.6(c). The current AS-IA is bound by these duly adopted regulations and therefore did not have the authority to revisit the 2004 and 2005 Decisions in the context of Burley's appeal. *See Oglala Sioux Tribe*, 603 F.2d at 713 (an agency must comply with its own regulations).

[19] 43 C.F.R. 4.318 also limits the scope of review to those issues before the reviewing official. While 43 C.F.R. 4.318 recognizes the Secretary's inherent authority to "correct a manifest injustice or error," this does not allow the Secretary to reopen final agency actions that have already been subject to appeal and judicial review, nor has the Government suggested that the 2004 and 2005 Decisions involved manifest injustice or error.

4. The AS-IA Should Have Dismissed Burley's Appeal As Moot

If the AS-IA had limited his review to the issues actually presented by Ms. Burley's appeal, it would have been proper to dismiss the appeal as moot. The 2007 Decision stated the BIA's intention to help the Tribe identify the members of the Tribal community and bring them together for purposes of organization [AR 001498]. Since 2007, the Tribe has identified all members of the Tribal community, involved them in an inclusive organization process, and drafted a Tribal constitution that establishes membership criteria [AR 002138-002142, 002265-002275, 002297-002313]. As a result, the assistance contemplated by the 2007 Decision is no longer needed, and Ms. Burley's challenge to that Decision is moot.

V. CONCLUSION

The AS-IA's decision works a serious injustice by attempting to turn this Tribe over to a rogue faction that seeks enrichment for itself at the expense of the Tribe's true membership, including Plaintiffs and the other Lineal Descendants. Plaintiffs have worked for many years to establish a Tribal government worthy of recognition by the United States. The AS-IA should not be allowed to cast aside those efforts, along with the reasoned determinations of his predecessors and the Courts, on spurious grounds. For the reasons set forth above and in Plaintiffs' Complaint, the Court should grant Plaintiffs' motion for summary judgment, declare the 2011 Decision invalid, and order the Government to recognize only a Tribal government that actually represents the 242 adult members of this Tribe, including each of the individual Plaintiffs. A proposed Order is attached.

Respectfully submitted,

/s/

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Dated: March 2, 2012

W02-WEST:5JAR1\404510556.13

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I caused the forgoing Memorandum of Points and Authorities in Support of Motion for Summary Judgment which was filed through the ECF system, to be sent electronically to all registered participants. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg
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EXHIBIT 17

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

CALIFORNIA GAMBLING CONTROL COMMISSION, et al.,

Defendants.

No: 37-2008-00075326-CU-CO-CTL

INTERVENORS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DIXIE TO ANSWER DEPOSITION QUESTIONS

Date: November 18, 2011
Time: 8:30 a.m.
Dept.: C-62
Judge: The Hon. Ronald L. Styn

CALIFORNIA VALLEY MIWOK TRIBE, CALIFORNIA (a.k.a. SHEEP RANCH RANCHERIA OF ME-WUK INDIANS, CALIFORNIA), YAKIMA K. DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, ANTONE AZEVEDO, MICHAEL MENDIBLES, AND EVELYN WILSON,

Intervenors.

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CALIFORNIA STATUTES

I. INTRODUCTION

Plaintiff conducted the oral deposition of Intervenor Yakima Dixie on June 28, 2011, in San Andreas, Califomia. Mr. Dixie appeared in good faith and answered all questions to the best of his ability. But Plaintiff, knowing that Mr. Dixie suffers from serious health problems and memory impairment, set out to create a hostile setting for the deposition that would confuse and intimidate Mr. Dixie. Plaintiff succeeded, and Mr. Dixie became confused at times and inappropriately invoked the Fifth Amendment in response to certain irrelevant and harassing questions.

Plaintiff now seeks to compel Mr. Dixie to travel to San Diego, nearly 500 miles from his home in Sheep Ranch, California, to 19 questions for which Plaintiffs are not satisfied with the answer they received. Plaintiff also seeks sanctions against Mr. Dixie for his inability to answer its questions, notwithstanding the fact that Plaintiff contributed to Mr. Dixie's confusion. The Court should deny Plaintiff's motion.

The questions that Plaintiff wants to have Mr. Dixie answer are completely irrelevant to the subject matter of this litigation. Additional questioning could only serve the improper purposes of harassing Mr. Dixie or obtaining information for use in other proceedings. Furthermore, Mr. Dixie is medically unable to travel to San Diego and is financially incapable of making the trip or of paying Plaintiff's deposition costs, as Plaintiff has requested.

Questions 1, 2, and 15 seek information on how the Tribe does business and will not lead to discoverable evidence ("Internal Tribal Management Questions"). Questions 3 to 14 seek information on whether Mr. Dixie resigned as Tribal Chair in 1999 and will not lead to discoverable evidence ("Resignation Questions"). Because the issues raised by Questions 3 to 14 are of absolutely no relevance to this litigation (or for that matter to the pending federal litigation), Intervenors are willing to stipulate that they will not assert the validity of Mr. Dixie's 1999 resignation in this litigation. Questions 16-18 seek information regarding the attorney client relationship; that information is privileged and will not lead to discoverable evidence (Questions Regarding Legal Counsel"). Question 19 concerns Mr. Dixie's understanding of the legal basis for the lawsuit. His invocation of the Fifth Amendment in response to Question 19 exemplifies his

confusion at this point in the deposition. The answer to this question is evident in the pleadings in this matter, and Plaintiff's inclusion of this question is pure harassment.

Plaintiff has had its opportunity to depose Mr. Dixie and to ask any relevant questions it might have. Plaintiff is not entitled to a second chance at harassing Mr. Dixie. To the extent any of these questions may warrant response, (which we believe they do not), Intervenors have already offered to have Mr. Dixie respond to written deposition questions propounded by Plaintiff in order to address any questions that Mr. Dixie did not answer fully at his deposition. Given Mr. Dixie's medical condition, that proposal is more likely to provide satisfactory answers to Plaintiff's questions than is another round of oral deposition questions. It is also more than fair to Plaintiff, given the nature of the questions and Plaintiff's prior conduct.

Intervenors respectfully request that the Court deny Plaintiff's motion to compel Mr. Dixie to appear a second time for oral deposition.

II. FACTS

Plaintiff Silvia Burley filed this action in 2008 in the name of the Tribe, seeking access to Revenue Sharing Trust Fund ("RSTF") money that the state of California holds in trust for the Tribe. Intervenors, as members of the Tribe's Tribal Council, intervened to oppose release of the RSTF funds to Ms. Burley on the ground that Ms. Burley does not represent the Tribe. Intervenors did not ask the Court to resolve the ongoing leadership dispute within the Tribe. Instead, they pointed out that only the United States government has the authority to determine who will be recognized as the Tribe's legitimate representative, and that the United States currently does not recognize any Tribal authority.

The Assistant Secretary – Indian Affairs ("AS-IA") of the United States Department of the Interior ("Department") subsequently issued a series of decisions concerning the governance of the Tribe, beginning with a decision on December 22, 2010. The AS-IA rescinded that decision on April 1, 2011. The AS-IA then issued a new decision on August 31, 2011, which *would* recognize a Tribal government effectively controlled by Plaintiff ("August 31 Decision") (Declaration of Matthew S. McConnell, Ex. 1.) ("McConnell Decl.") But the AS-IA stayed the August 31 Decision pending resolution of Intervenor's judicial challenge to that Decision in federal court.

Under prior Department decisions that remain in effect, the Department does not currently recognize any Tribal government. (McConnell Decl. Ex. 2-5.)

Plaintiff twice asked this Court to enter judgment for it based on the August 31 Decision, notwithstanding the AS-IA's stay of that Decision. The Court twice denied Plaintiff's request, most recently on October 21, 2011. The Court's tentative order on October 20, denying Plaintiff's "motion for entry of judgment," made clear that the outcome of this case will depend on the outcome of the federal litigation challenging the August 31 Decision:

> This court's ruling on Plaintiff's motion for judgment on the pleadings is dependent on the final outcome of the judicial review of the decisions by Assistant Secretary Hawk. Therefore, the court orders that this matter remain stayed, with all previous orders remaining in effect, pending final resolution of *California Valley Miwok Tribe v. Salazar*.

(McConnell Decl., Ex. 6.) Plaintiff nonetheless continues to pursue discovery on issues that cannot possibly affect the outcome of this case.

III. ANALYSIS

A. With the Exception of Question 19, The Questions that Plaintiff Seeks to Compel Mr. Dixie to Answer are Not Relevant to the Subject Matter of this Action

The Code of Civil Procedure limits the scope of discovery to matters that are "relevant to the subject matter involved in the pending action or to the determination of any motion made in that action . . .." C.C.P. § 2017.010. The matter must also be admissible or reasonably calculated to lead to the discovery of admissible evidence. *Id.* Although these limitations on discovery are liberally construed, they are not boundless. Case law makes clear that the scope of discovery does not extend to subjects that are not relevant to the subject matter before the court or to the plaintiff's theory of recovery. For example, the Court of Appeal held in *Shaffer v. Superior Court* that the plaintiff in a legal malpractice action was not entitled to ask deposition questions about the hourly rate that his law firm had paid to a contract attorney working on his case. 33 Cal.App.4th 993, 1000-1002 (2d. Dist. 1995). The firm's costs or profit margin simply were not relevant to the question before the court, which was whether the fees that the firm charged were unconscionable in light of their market value. *Id.* Similarly, in *Snell v. Superior Court*, the court found that a

medical malpractice plaintiff was not entitled to discover whether a hospital required its doctors to carry malpractice insurance. 158 Cal.App.3d 44, 50-51 (3d. Dist. 1984). That information was not relevant to plaintiff's theory of liability, which was that the hospital had been negligent in its screening and admission of doctors. *Id.*

The subject matter of this litigation is the California Gambling Control Commission's ("Commission") release of Revenue Sharing Trust Fund money (the "Funds") owed to the Tribe. All parties agree that the Commission must release the Funds once the legitimate governing body of the Tribe is properly identified. But Plaintiff contends that the Commission must release the Funds *to Ms. Burley* because she represents the government of the Tribe. The Commission and Intervenors dispute that Ms. Burley represents the Tribe and that she is entitled to the Funds.

As the Court has already recognized, the Secretary of the Interior has the exclusive power to recognize a Tribal government. *See* 25 U.S.C. § 2 (giving the Secretary of the Interior power over "all Indian affairs and [] all matters arising out of Indian relations"). Therefore, the central question in this case becomes, "Does the Department recognize Silvia Burley as the government of the Tribe?" The relief that Plaintiff seeks depends entirely on that question.

The scope of Plaintiff's discovery efforts must be evaluated in light of the subject matter before the Court and the limitations on the Court's jurisdiction. Issues not relevant to that subject or to Plaintiff's theory of recovery are not proper subjects of discovery. *Shaffer*, 33 Cal.App.4th at 1000-1002; *Snell*, 158 Cal.App.3d at 50-51. In its motion to compel, Plaintiff has not identified any question that is relevant to the release of the Funds or to whether the Department currently recognizes Ms. Burley as the Tribal government. With the exception of Question 19 which is addressed fully in the filings of this case and which merits no response by Mr. Dixie, the questions that Plaintiff seeks to have Mr. Dixie answer all relate to matters that are not before the Court and that have no bearing on the outcome of this case.

1. **Mr. Everone's Involvement With the Tribe Has No Bearing on Ms. Burley's Status or Entitlement to the Funds**

In its motion to compel, Plaintiff complains that Mr. Dixie "refused to answer any questions at his deposition about his relationship with [Chadd] Everone." (Plaintiff's Statement of

Disputed Questions and Answers p. 3.) The point of the Internal Tribal Management Questions, as Plaintiff freely admits, is to corroborate its theory that Everone is "using [Mr.] Dixie to try and take over the Tribe, so that he and his investors can build a gambling casino through [sic] the name of the Tribe." (Plaintiff's Statement of Disputed Questions and Answers p. 2.) As part of this theory, Plaintiff alleges that Mr. Everone improperly persuaded Mr. Dixie in 1999 to say that he had not resigned as Tribal Chairman.

Plaintiff's conspiracy theory lacks any relevance to the subject matter of this action. No matter what evidence Plaintiff does or does not uncover regarding Mr. Everone's role with the Tribe, it will not shed any light on whom the BIA currently recognizes as a Tribal authority. It will not have any effect on Plaintiff's claim to the Funds. Thus, neither the Tribe's nor Mr. Dixie's relationship with Mr. Everone is a proper subject of discovery.

2. Tribal Leadership in 1999 Is Not Relevant to Whom the Department Recognizes as a Tribal Government Today

The bulk of Plaintiff's request concerns the Resignation Questions. Even if Plaintiff could somehow show that Mr. Dixie's 1999 resignation as Tribal Chairman was valid, that would not in any way support the claim that that the BIA recognizes Ms. Burley as a Tribal authority today. The BIA did recognize Ms. Burley as a Tribal representative, starting in 1999, but it subsequently repudiated that position based on evidence showing that Ms. Burley's purported government was adopted without the participation or consent of the Tribal community. The BIA has issued multiple decisions since 1999 stating that it does not recognize Ms. Burley's purported government and in fact does not recognize *any* governing body for the Tribe. (McConnell Decl., Ex. 2-5.) The federal courts have rejected Ms. Burley's challenges to those decisions. *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. Mar. 31, 2006), *affirmed*, 515 F.3d 1262 (D.C. Cir. 2008), *rehearing en banc denied*. The AS-IA's August 31 Decision does not rescind those prior decisions, and they remain in effect. (McConnell Decl., Ex. 1.) Thus, whether or not Mr. Dixie resigned in 1999 has no bearing on Ms. Burley's claim to the Funds.

3. **This Is Not the Proper Forum for Plaintiff's Arguments About Tribal Leadership**

The AS-IA's August 31 Decision *would* recognize a Tribal governing body that is controlled by Ms. Burley and her daughters, but the Decision has prospective effect only, and the AS-IA has stayed the Decision pending judicial review. Therefore, previous decisions remain in effect, and the current state of affairs is that the BIA does not recognize Ms. Burley's purported Tribal government. No amount of questioning or argument, nor any answers Mr. Dixie may give to the Resignation Questions can change that reality. That is precisely why the Court has stayed this action pending judicial review of the August 31 Decision. (Tentative Order Denying Plaintiff's Motion for Entry of Judgment, p. 2.) Accordingly, the Court should deny Plaintiff's motion to compel on the basis of relevance alone. C.C.P. § 2017.010 (limiting the scope of discovery to the subject matter of the "pending action").

4. **Plaintiff Improperly Seeks Answers Protected By The Attorney-Client Privilege**

Questions 16-18 seek to elicit testimony regarding the representation of Mr. Yakima and Intervenors. Not only are these questions entirely irrelevant, but they necessarily implicate the attorney-client privilege.

B. Mr. Dixie Has Already Answered Plaintiff's Questions to the Best of His Ability

Even if Plaintiff's questions were otherwise proper, Plaintiff would would not be entitled to have Mr. Dixie appear and answer the questions again. Mr. Dixie has already appeared in good faith and answered the questions to the best of his ability, taking into account the state of his health and Plaintiff's improper efforts to intimidate Mr. Dixie. It is true that Mr. Dixie inappropriately asserted the Fifth Amendment in response to some of Plaintiff's questions. But the record shows that Mr. Dixie was simply confused by the questions or unable to remember the events in question, not that he acted in bad faith or without substantial justification.

Mr. Dixie is an elderly man who is in poor health. He was the victim of a near-fatal assault in 2002 that left him with serious head injuries and memory impairment, as Mr. Dixie explained to Plaintiff's counsel during the deposition: "You have to bear with me. . . . I was badly injured. I

had my head opened, busted open. It is kind of hard for me, a little bit . . . to remember, to go down here." (Dixie Deposition Transcript 35:23 – 36:3.) Stressful circumstances exacerbate his condition and can cause him to become confused and disoriented. (McConnell Decl., Ex. 7.)

Knowing Mr. Dixie's condition full well, Plaintiff created a hostile and difficult deposition environment for Mr. Dixie. Plaintiff's counsel insisted that not only Plaintiff but also her husband, James "Tiger" Paulk (a non-party), be present at the deposition. When Intervenors' counsel objected to Mr. Paulk's presence, Plaintiff's counsel claimed that Mr. Paulk was his "paralegal." Plaintiff's counsel later told Mr. Dixie, in response to a question about Mr. Paulk's presence, "He is my designated paralegal. That is all you need to know." (Dixie Deposition Transcript, 67:11-12.)

The hostile presence of Mr. Paulk at the table, combined with the inherent stress of the deposition setting, predictably combined to exacerbate Mr. Dixie's memory problems and confusion. Despite the difficult conditions, Mr. Dixie made a good faith effort to answer Plaintiff's questions. It was only after repeated questions regarding the same irrelevant topic that Mr. Dixie became confused and invoked the Fifth Amendment. The following condensed excerpt from Mr. Dixie's deposition illustrates this pattern.

> Q. Mr. Dixie, when you say that you are the hereditary chief . . . when did you first make that assertion?
> A. Oh, boy. It has been years and years ago. That is even before my mom died.
>
> Q. Ok. So at the time that you met Mr. Everone did you tell him that . . . you had the right to be the chairperson because you were the hereditary chief?
> A. I don't recall.
>
> Q. Did you ever . . . tell Ms. Burley that it didn't matter about the forged document you were the hereditary chief anyway.
> . . .
> A. I do believe that I only talked to her just once when she came up to the rancheria.
>
> Q. Did you ever write her a letter, or communicate to her in any way after you first discovered what you believed to be a forged resignation?
> A. Not that I know of.
>
> Q. Okay. Why didn't you communicate with her when you first discovered what you believed to be a forged resignation.
> A. Will you repeat that again, please.
> . . .

Q. . . . Why didn't you talk to Ms. Burley when you first discovered what you believed to be a forged resignation?
A. I still don't understand the question.

Q. You said that you didn't talk to Ms. Burley after you discovered that your resignation was forged?
A. I don't know.

Q. So, you are not sure whether you talked to Ms. Burley when you first discovered that your resignation was forged?
A. It might have been afterwards.

. . .

Q. Yes. So then did you speak to Ms. Burley about that some time afterwards?

. . .

A. I am too sure if I did or not.

. . .

Q. Did you arrange to have a letter sent to her to tell her that you objected to what you believe to be a forged resignation?
A. No.

. . .

Q. Did you ever tell Ms. Burley that you were the heredity [sic] chief and it didn't make any difference whether your resignation was forged . . . ?
A. I don't recollect on that one.

. . .

Q. Okay. So is it correct that some time later on through the years, you first began to tell Ms. Burley that you were the heredity [sic] chief?

. . .

A. I don't recollect.

Q. Do you believe that Mr. Everone made this up, fabricated this for you? And you started to say that you are the heredity [sic] chief?
A. I don't know why he would.

. . .

Q. . . . Is it correct that when you first discovered that your resignation was forged, that you said nothing to Ms. Burley about you being the heredity [sic] chief?

MR. FREEMAN: Objection. Asked and answered.

Q. Is that true?
A. I do believe that the attorney here objected on that one.

. . .

MR. FREEMAN: You can answer that question. Do you want to have it reread?

. . .

THE WITNESS: Again, I want to stand on the Fifth Amendment.

. . .

Q. The only thing that you said was that the resignation was a forgery, correct?

. . .

A. Again, I will stand on the Fifth Amendment.

Q. And the communications to Ms. Burley about this resignation being a forgery, was actually created by Mr. Everone. Is that right?
A. Again, I am going to stand on the Fifth.

(Dixie Deposition Transcript, 45:8 – 51:20.)

As the transcript shows, Mr. Dixie understandably became confused by Plaintiff's repetitive and ambiguous questions. As Intervenors' counsel explained to Plaintiff's counsel during the deposition, Mr. Dixie apparently feared that he could be liable for perjury if he answered these confusing questions incorrectly. (Dixie Deposition Transcript 38:2-10.) Thus, Mr. Dixie's invocation of the Fifth Amendment is best understood not as a claim of the privilege against self-incrimination, but as a statement that he did not understand Plaintiff's questions or did not know the answers. For example, Plaintiff's counsel asked Mr. Dixie during the deposition, "So – if the BIA recognizes the tribe down the Valley, California Valley Miwok Tribe, then you would agree that they are entitled to the money from the commission, is that right?" Intervenors' counsel objected that the question was ambiguous, vague, compound and confusing, and asked Mr. Dixie, "Do you understand the question?" Mr. Dixie answered, "No. I am going to stand on the Fifth Amendment." (Dixie Deposition Transcript 112:6 – 113:15.)

Under the circumstances, Mr. Dixie's invocation of the Fifth Amendment did not result in any prejudice to Plaintiff. Plaintiff's counsel had ample opportunity to restate the questions and in fact did ask the same questions over and over in a variety of ways. (Declaration of Manuel Corrales, Jr., Ex. 1, pp. 1-5.) It is clear from Mr. Dixie's responses that he did not know or did not remember the answers to the questions, as shown in the extended deposition excerpt reproduced above. Giving Plaintiff a second chance to ask Mr. Dixie the same questions would serve no purpose.

C. <u>The Burden of Further Deposition Testimony Clearly Outweighs the Likelihood that Plaintiff Will Discover Admissible Evidence</u>

The Code of Civil Procedure requires that the court "*shall* limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. C.C.P. § 2017.020(a) (emphasis added). To be admissible, evidence must be relevant. Cal. Evid. Code § 350. Here, the heavy burden of discovery that Plaintiff seeks to impose on Mr. Dixie clearly outweighs the negligible possibility that Plaintiff's questions will lead to discovery of relevant, admissible evidence.

First, granting Plaintiff's motion to compel would force Mr. Dixie to submit to another stressful and harassing round of hostile questions. This is a serious hardship given Mr. Dixie's medical condition. (McConnell Decl., Ex. 7.) The Court must weigh this burden in combination with the other burdens imposed by Plaintiff's request. C.C.P. § 2017.020(a).

Second, forcing Mr. Dixie to answer Plaintiff's questions would be excessively intrusive and burdensome, because Plaintiff seeks to use the questions to delve into private business relations between Mr. Dixie and Mr. Everone that have nothing to do with this litigation. (*See, e.g.*, Dixie Deposition Transcript 53:7 – 57:5, 100:14 – 105:4.) These issues are protected by a constitutional right to privacy, which extends to a person's confidential financial affairs. *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652, 656 (1975). When the right to privacy is involved, it is not enough to show that the information is relevant; the party seeking discovery must demonstrate a compelling need for the information that outweighs the right to privacy. *Lantz v. Superior Court*, 28 Cal.App.4th 1839, 1853-1854, 1857 (5th App. Dist. 1994). If the court finds that disclosure is necessary, it should be kept to the minimum necessary. *Id.* at 1855.

The heavy burdens that Plaintiff seeks to impose on Mr. Dixie are not balanced by any significant interest in obtaining relevant, admissible evidence, much less the compelling need required by *Lantz*. As explained above, Plaintiff seeks to force Mr. Dixie to answer questions that have no relevance to the matters before this Court. None of the Internal Tribal Management Questions, the Resignation Questions or the Legal Counsel Question have any bearing on Ms. Burley's claim to the Funds. Even assuming, for the sake of argument, that Plaintiff could show that Mr. Dixie resigned in 1999, Plaintiff would not be entitled to the relief that it seeks, because the United States does not *currently* recognize Plaintiff as any kind of Tribal government.

D. <u>The Discovery Method that Plaintiff Seeks to Use Is Unduly Burdensome and Expensive and Should Be Limited</u>

Assuming, for the purpose of argument only, that further discovery on these questions is warranted, the Code of Civil Procedure also requires the courts to restrict the use of particular discovery methods under certain circumstances:

> The court *shall* restrict the frequency or extent of use of a discovery method if it determines either of the following:
>
> (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.
>
> (2) The selected *method* of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

C.C.P. § 2019.030(a) (emphasis added).

Here, Plaintiff's proposed use of the oral deposition method of discovery is unduly burdensome and expensive, taking into account the needs of the litigation and the issues at stake. *See* C.C.P. § 2019.030(a)(2). In addition, the proposed discovery is obtainable from another source that is more convenient, less burdensome and less expensive for all parties. *See* C.C.P. § 2019.030(a)(1). Intervenors have already offered to have Mr. Dixie provide written responses to follow-up questions propounded by Plaintiff, including any unanswered deposition questions. (McConnell Decl. Ex. 8.) The Code of Civil Procedure explicitly authorizes this method of deposition testimony. C.C.P. § 2028.010.

Given Mr. Dixie's health problems and memory impairment, and the fact that the oral deposition setting exacerbates these problems, written questions are much more likely to provide Plaintiff with the information it seeks than is another round of oral deposition questions. This method also would avoid the excessive burden of forcing Mr. Dixie to travel nearly 500 miles to San Diego for a second day of oral testimony. If the Court allows further discovery on these questions, which we believe is not warranted, the Court should at a minimum restrict Plaintiff's further use of the oral deposition method with respect to Mr. Dixie and order Plaintiff to submit written deposition questions instead. *See Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 382 (1961) (holding that in discovery disputes the court's discretion can be properly exercised by ordering disclosure in another form than that requested, rather than simply by denying or granting the discovery request *en toto*).

E. **Intervenors Are Willing to Stipulate That They Will Not Assert the Validity of the 1999 Resignation In This Litigation**

As explained above, the validity of Mr. Dixie's 1999 resignation as Tribal Chairman has no relevance to this action. Consistent with our view that the 1999 resignation is of absolutely no relevance to this litigation (or for that matter to the pending federal litigation), Intervenors are willing to stipulate that they will not assert the validity of Mr. Dixie's 1999 resignation in this litigation. Such a stipulation would completely eliminate any possible prejudice to Plaintiff from Mr. Dixie's failure to answer the both the Intemal Tribal Management and Resignation Questions, and it would avoid the need for either party to incur additional expense or inconvenience for the sake of discovery on these questions.

F. **Summary of the Questions and Why the Motion Should be Denied**

Questions 1, 2, and 15 are about Mr. Everone. They are all irrelevant and the testimony demonstrates Mr. Dixie's confusion. Moreover, number 1 is answered at 64:1-65:3, number 2 is answered at 16:19-25 and 20:23-25, and number 3 is answered at 98:4-101:18.

Questions 3 through 14 are about Mr. Dixie's purported resignation and whether it was a forgery. These questions are all irrelevant, particularly given Intervenors willingness to agree not to raise this claim within this litigation. Number 3 is also compound and ambiguous. Number 4 refers to the wrong cite. A review of the transcript shows Mr. Dixie's confusion. See 31:24-33:9. Number 5 is compound and vague. In addition, Mr. Dixie answers the question at 34:4-15. Numbers 6 and 7 show confusion at 34:18-36:12. Number 8 is compound and the question is clearly answered at 40:4-41:2. Number 9 is answered at 31:24-32:9 and 33:15-16. Number 11 is argumentative. Numbers 12, 13 and 14 are confusing as shown at 51:25-53:22.

Numbers 16 to 18 each seek to elicit information about the legal representation of Mr. Dixie. They are all irrelevant and a violation of the attorney-client privilege. For number 16, see 98:4-101:18, which demonstrates the badgering and repetitive questioning that Mr. Dixie was subjected to.

Number 19 improperly seeks a legal conclusion from a lay witness. Moreover, Mr. Dixie answered the question at 110:3-19.

Thus, a careful review of the questions for which Plaintiff seeks to compel further testimony are not only entirely irrelevant, but in many cases were answered in other places in the deposition. It is both surprising and disturbing that Plaintiff would seek to compel further testimony and request sanctions for questions which were in fact answered elsewhere in the deposition.

G. **Plaintiff's Request for Sanctions Should be Denied**

Plaintiff asks the Court to take two punitive actions against Mr. Dixie. First, it asks that Mr. Dixie be forced to travel nearly 500 miles to San Diego, at his own expense, to answer a second round of deposition questions. Second, Plaintiff asks the Court to award it monetary sanctions against Mr. Dixie. Both requests should be denied.

1. **Any Sanctions Would Be Unjust Under the Circumstances**

Sanctions are not warranted because Mr. Dixie's conduct in responding to Plaintiff's deposition was substantially justified. *See* C.C.P. §§ 2023.010, 2025.480(f). He made a good faith effort to answer Plaintiff's questions, considered in light of his memory impairment and cognitive difficulties, and Plaintiff's own efforts to create a hostile deposition environment.

In addition, Mr. Dixie is in poor health, as explained above, and he cannot travel long distances. (McConnell Decl., Ex. 7.) That is why his initial deposition was held in San Andreas, near his home in Sheep Ranch. Forcing Mr. Dixie to travel to San Diego would only exacerbate the conditions that led to his inability to answer Plaintiff's questions in the first place. Mr. Dixie also lacks the financial resources to travel to San Diego at his own expense or to pay the sanctions requested by Plaintiff. For these reasons, imposing sanctions on Mr. Dixie would be unjust under the circumstances. *See* C.C.P. § 2025.480(f).

Therefore, even if the Court finds that Mr. Dixie should answer additional deposition questions, the deposition should take place in San Andreas or some other location equally close to Sheep Ranch and should be at Plaintiff's expense.

2. **Dismissal Is Not an Appropriate Sanction**

Plaintiff also suggests that Intervenors' Complaint in Intervention should be dismissed if Mr. Dixie persists in not answering its irrelevant questions regarding his relationship with Mr.

Everone. Dismissal would be inconsistent with the purpose of discovery sanctions, which "is not to provide a weapon for punishment, forfeiture, and the avoidance of a trial, but to prevent abuse of the discovery process and correct the problem presented." *Parker v. Wolters Kluwer U.S., Inc.*, 149 Cal.App.4th 285, 301 (2d. App. Dist. 2007) (quotations omitted). Sanctions should not exceed what is required to protect the interests of the party denied discovery. *Id.* Thus, where a party is not prejudiced by a deponent's failure to submit to deposition questions, terminating sanctions are not appropriate. *See id.* at 301-302.

Here, Plaintiff is not prejudiced because Mr. Dixie has answered the questions to the best of his ability, and the questions have no bearing on Plaintiff's ability to resolve this litigation or obtain the relief it seeks. In fact, the Court has already granted Plaintiff's motion for judgment on the pleadings, which necessarily implies that no evidence Plaintiff could uncover would be relevant to the outcome of the case.

IV. CONCLUSION

Plaintiff seeks to compel Mr. Dixie to answer questions that have no possible bearing on the subject matter of this litigation or on the relief that Plaintiff seeks. Neither the validity of Mr. Dixie's 1999 resignation nor Mr. Everone's role with the Tribe has any bearing on Plaintiff's claim to the Funds. Plaintiffs are not entitled to inquire into the attorney client relationship. As to Question 19, the answer is self evident and further discovery is not warranted. Therefore the Court should deny Plaintiff's motion based on relevance alone.

Furthermore, the burden of a second oral deposition would far outweigh Plaintiff's interest in obtaining the information it seeks. Mr. Dixie has already made a good faith effort to answer Plaintiff's questions, taking into account his health problems and memory impairment. But if the Court nonetheless finds that Plaintiff is entitled to further discovery on these issues, it should order Plaintiff to propound written deposition questions to Mr. Dixie. Alternatively, Intervenors are willing to stipulate that they will not argue the validity of Mr. Dixie's alleged 1999 resignation in this litigation. Either of those solutions would eliminate any possible prejudice to Plaintiff and avoid the unnecessary waste of additional time, money and resources on irrelevant discovery proceedings.

Finally, the Court should deny Plaintiff's request for sanctions and its demand that Mr. Dixie to travel to San Diego at his own expense to provide additional deposition testimony. Mr. Dixie's deposition conduct was substantially justified in light of all the circumstances. Mr. Dixie also is indigent and in poor health and cannot travel such long distances. Thus, even if the Court requires Mr. Dixie to submit to additional oral deposition questions, it should order Plaintiff to conduct the deposition in San Andreas or another location equally close to Mr. Dixie's home, at Plaintiff's own expense.

Dated: November 4, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
MATTHEW S. MCCONNELL

Attorneys for INTERVENORS

EXHIBIT 18

0578

...FORNIA
...MBLING CONTROL COMMISSION

ARNOLD SCHWARZENEGGER, GOVERNOR

August 4, 2005

Ms. Sylvia Burley
10601 Escondido Place
Stockton, California 95121

Yakima Dixie
P.O. Box 41
11178 Sheep Ranch Road
Sheep Ranch, California 95250

Re: Revenue Sharing Trust Fund (RSTF) Distributions

Dear Ms. Burley and Mr. Dixie:

This is to notify you that the California Gambling Control Commission will not release the current RSTF quarterly distribution to the California Valley Miwok Tribe for the quarter ending June 30, 2005, and any subsequent distributions. This action is based on information recently received from the Bureau of Indian Affairs (BIA) regarding the fact that the California Valley Miwok Tribe (the Tribe) does not have a recognized tribal government, nor a recognized tribal chairperson and that, based on the organizational governmental status of the Tribe, the BIA has taken action to suspend Contract No. CTJ51T62802 (FY 05 06 Mature Status – Aid to Tribal Government Program), pursuant to PL 93-638. We refer you to the following correspondence (copies enclosed):

March 26, 2004 letter from Dale Risling, Sr. (BIA) to Sylvia Burley, copy to Yakima Dixie

February 11, 2005 letter from the Department of Interior, Acting Assistant Secretary – Indian Affairs, Michael D. Olson to Yakima K. Dixie, copy to Sylvia Burley

July 19, 2005 letter from Janice L. Whipple-DePina, (BIA) to Sylvia Burley, copy to Yakima Dixie

These letters reflect, among other things, a long-standing effort to encourage the tribe to organize itself and establish tribal leadership. During the past year to 18 months, the Commission has made quarterly distributions and directed them to Ms. Burley, because she continued to be recognized as the chairperson (3 26 04 letter) or person of authority within the tribe (2 11 05 letter) with whom the BIA conducted business. The July 19, 2005 letter, however, reflects the BIA's decision that the lack of a recognized tribal government or leadership now causes it sufficient concern that it must suspend the above referenced PL 93-638 contract in order to

"safeguard federal funds and until such time as the tribes becomes formally organized and a tribal government is re-established."

This most recent action and the position of the BIA regarding tribal leadership and organization leave us with no alternative, but to withhold funds until such time as there exists sufficient tribal government organization and leadership to allow the BIA to conduct government-to-government relations with the tribe - either through a recognized tribal chair or representative.

We take this action pursuant to our RSTF trustee responsibilities under Section 4.3.2.1 of the Tribal-State Gaming Compact (the Compact). In taking this action, we want to be clear that there is no question of the tribe's eligibility to receive RSTF distributions, and that we have neither authority over nor responsibility for the composition of tribal government or leadership. However, we believe that our trustee status under the Compact demands that we ensure the RSTF distributions go to the Tribe for the benefit of the Tribe and not merely to an individual member. We have not received any direction in this regard from the BIA, but in situations involving tribal leadership disputes and or tribal organizational problems, we take our lead from the actions and positions of the BIA. We take no position regarding the future form of tribal government, nor the selection of tribal leadership. We look forward to being able to make distributions as soon as the Tribe's leadership and organizational status is resolved to a degree sufficient to allow the BIA to resume government-to-government relations.

Distributions from the RSTF will remain in the fund until such time as the current situation is resolved, and the Commission is notified of resolution, at which time withheld distributions will be forwarded to the Tribe with appropriate accrued interest.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Cyrus J. Rickards
Chief Counsel

Cc: Peter Glick

EXHIBIT 19

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814

JUL 19 2005

Certified Mail No. 7003 1680 0005 5923 6359
Return Receipt Requested

Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

Dear Ms. Burley:

In accordance with 25 CFR 900.6 Definitions – Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

In light of correspondence addressed to Mr. Yakima K. Dixie dated February 11, 2005 (copy enclosed) and signed by Mr. Michael D. Olsen, Principal Deputy, Acting Assistant Secretary – Indian Affairs, it states in part that the Bureau of Indian Affairs does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time.

Therefore, based on the above and in accordance with Title I – Indian Self-Determination Act, Sec. 102. (a)(1) The Secretary is directed, upon the requests of any Indian Tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs –

Whereas there is no recognized tribal government with which to take action on behalf of the tribe or to sustain a government to government relationship with, we must take appropriate action to safeguard federal funds and until such time as the tribe becomes formally organized and a tribal government is re-established, the following modification is issued.

Enclosed for your information is Modification No. Fourteen (14) to Contract No. CTJ51T62802 (FY 05/06 Mature Status – Aid to Tribal Government Program). This modification suspends the current contract in it entirety effective February 11, 2005,

Should you have any questions regarding the above, please feel free to contact me at (916) 930-3742.

Sincerely

Janice L. Whipple-DePina
Awarding Official

cc: Mr. Yakima K. Dixie, c/o Chad Everone
Pacific Regional Director
Regional Solicitor, Pacific Southwest

Debora G. Luther, Esq.
Assistant United States Attorney

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT | 1. CONTRACT CODE | PAGE 1 OF 1 | 0576

2. AMENDMENT/MODIFICATION NO	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO	5. PROJECT NO (If applicable)
Fourteen (14)	2-14-05		

6. ISSUED BY CODE	7. ADMINISTERED BY (If other than Item 6) CODE
Bureau of Indian Affairs Central California Agency 2800 Cottage Way, Suite 8-500 Sacramento, California 95814	SAME AS BLOCK #6

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICITATION NO.
CALIFORNIA VALLEY MIWOK TRIBE 31 ESCONDIDO PLACE STOCKTON, CALIFORNIA 95212		9B. DATED (SEE ITEM 11)
	X	10A. CTJ51T62802
		10B. DATED (SEE ITEM 11) 01/01/02

FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ___ is extended, ___ is not extended.
Offer must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning ___ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

N/A

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHNAGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc) SET FORTH IN ITEM 14, PURSUANT TO THE ATUHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
X	D. OTHER (Specify type of modification and authority) Public Law 638

IMPORTANT: Contractor X is not ___ is required to sign this document and return N/A copy to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Modification No. Fourteen (14) to Contract No. CTJ51T62802 (FY 05/06 Mature Status – Aid to Tribal Government Program) is issued to make the following change(s):

1. The contract is hereby suspended in its entirety effective Feb. 11, 2005., due to the tribe no longer having a tribal government with which to sustain an effective government to government relationship.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
	Janice Whipple-DePina, Awarding Official BIA-2001-L1-000024

15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
BY _____ (Signature of person authorized to sign)	04/01/04	BY _____ (Signature of Contracting Officer)	7/15/05

NSN 7540-01-152-8070
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA FAR (48 CFR) 53.243

EXHIBIT 20

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO:

DEC 14 2007

CERTIFIED MAIL NO. 7001 2510 0009 4494 1906
RETURN RECEIPT REQUESTED

Silvia Burley
10601 Escondido Place
Stockton, California 95212

Dear Ms. Burley:

In accordance with 25 CFR Part 900.6, Subpart B, Definitions, we are returning your application to contract FY 2008 funding from the Bureau of Indian Affairs, under P.L. 93-638, as amended as it does not meet the definition stated below:

> "Tribal Organization means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which included the maximum participation of Indians in all phases of its activities: provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract of grant."

Under this Part, consideration to contract federal funds to operate Bureau of Indian authorized programs will only be given to an application submitted by federally recognized tribe with a recognized governing body. The Department of the Interior does not recognize that the California Valley Miwok Tribe has a governing body. The District Court for the District of Columbia has upheld that determination, California Valley Miwok Tribe v. United States, 424 F Supp. 2d 197 (D.C.D.C. 2006). That decision is now on appeal.

Because we do not recognize any current governing body for the California Valley Miwok Tribe, we are unable to accept the proposal for the above stated reason. We are hereby returning the proposal.

Should you wish to appeal any portion of this letter, you are advised that you may do so by complying with the following:

This decision may be appealed to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, W-2820, Sacramento, California 95825. In accordance with the regulations in 25 CFR Part 2 (copy enclosed), your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. Your notice of appeal must include you name, address and telephone number. It should clearly identify the decision to be appealed. If possible attach a copy of the decision. The notice of appeal and the envelope which it is mailed, should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list the names and addresses of the interested parties known to you and certify that you have sent them copies of the notice.

You must also send a copy of your notice to the Regional Director, at the address given above.

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

Troy Burdick
Superintendent

Enclosure

EXHIBIT 21

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

In reply, please address to:
Main Interior, Room 6513

Peter Kaufman, Esq.
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

DEC 12 2008

Dear Mr. Kaufman:

This letter is in response to your telephone inquiry requesting information on the status of the leadership for the California Valley Miwok Tribe (CVMT). CVMT presents the Bureau of Indian Affairs (BIA) with a unique situation. The following summarizes the history of the Tribe and the current leadership dispute.

CVMT began as a rancheria set up for 12 individual Indians in 1916. The government set aside .92 acres of land on which those twelve individuals could live. In 1935, the sole adult member of the rancheria voted not to reject the Indian Reorganization Act (IRA).[1] In 1966, the Federal government undertook to terminate the rancheria by, among other things, distributing the assets of the rancheria to the rancheria's residents. Ultimately, the Federal government failed to take the steps necessary to complete terminate of the Federal relationship with the rancheria and the rancheria continued to exist. There was one resident, Mabel Hodge Dixie. For reasons that are not relevant to your inquiry, the government did not convey the property to Ms. Dixie successfully and ultimately held it in trust for her. When she died, her heirs inherited the 0.92 acre held in trust by the government. In 1998, Ms. Dixie's son, Yakima Dixie, resided on the rancheria land and was its only known member. That same year, Silvia Burley, a distant relative of Mr. Dixie, approached Mr. Dixie about adopting her, her two daughters, and her granddaughter into the Tribe so that they would be eligible for Indian health and education benefits. Mr. Dixie adopted Ms. Burley and her family.

Mr. Dixie and Ms. Burley became interested in organizing the tribe formally– that is establishing a tribal government. In 1999, the two of them approached the BIA for assistance. At that time, Mr. Dixie acted as the Tribe's leader and he held the title of "Chairman." On April 20, 1999, Ms. Burley submitted a purported letter of resignation from Mr. Dixie. The next day, Mr. Dixie asserted he never resigned his position and refused to do so. He claims that Ms. Burley forged his name on the resignation letter. After Mr. Dixie's purported resignation, Ms. Burley became leader of the Tribe, having been elected by herself and one of her daughters. Ms. Burley claimed the title of

[1] While it is common for people to refer to the Indians of a reservation as voting to accept the IRA, the act applied to a reservation unless a majority of the Indians voted against its application within a year, later extended for another year. *See* 25 U.S.C. § 478.

"Chairman." The BIA accepted her in this position but noted the leadership dispute between her and Mr. Dixie. On March 7, 2000, the BIA wrote in a letter to Ms. Burley that it would not interfere in the dispute unless the dispute continued without resolution and the government-to-government relationship between the United States and the Tribe became threatened. If the government-to-government relationship were to become threatened, the BIA advised, it would advise the Tribe to resolve the dispute within a reasonable period of time.

Ms. Burley and her daughters responded by attempting to organize the Tribe. Initially, they sought to organize the government under the provisions of the Indian Reorganization Act, but the BIA failed to call the requisite election on the proposed constitution.

In 2002, counsel purporting to represent the California Valley Miwok Tribe and Ms. Burley filed suit in the United States District Court for the Eastern District of California claimed the United States had breached its trust responsibilities and violated the California Rancheria by conveying the less than one acre of land to Ms. Dixie in 1967 when the tribe had potentially 250 members. The court dismissed the suit on grounds that it was filed beyond the six-year statute of limitations. The Ninth Circuit Court of Appeals affirmed in an unpublished opinion. *See California Valley Miwok Tribe v. United States*, No. 04-16676, 2006 WL 2373434 (9th Cir., Aug. 17, 2006))

Ultimately, in 2003, Ms. Burley tried to organize the Tribe under the Tribe's inherent sovereign authority without the supervision of the BIA. Ms. Burley submitted the Tribe's constitution to the BIA for informational purposes. The BIA reviewed the constitution and determined that it was not valid because Ms. Burley had failed in the process of developing and adopting the constitution to include other Indians with legitimate ties to the Tribe. On March 26, 2004, the BIA informed Ms. Burley that the Tribe remained unorganized and had no government. Because the Tribe had no government, it could not have a governmental leader. The BIA would not recognize Ms. Burley as Chairman, that is, the governmental leader of the Tribe. Instead the BIA would deal with her as a "spokesperson" or "person of authority" for the Tribe for the purposes of awarding Federal contracts.

Meanwhile, Mr. Dixie continued to assert that he was the hereditary leader of the Tribe and that he had never resigned his position. In March 2005, a representative of the Assistant Secretary – Indian Affairs decided Mr. Dixie's appeal of the BIA's acceptance of Ms. Burley as tribal Chairman. In the letter dismissing Mr. Dixie's appeal, the Deputy Assistant Secretary informed Mr. Dixie that Ms. Burley was not the governmental leader of the Tribe. In fact, the letter explained, the Tribe could have no governmental leader until it had a government developed through an organizational process that included the broader tribal community of other Indians with legitimate ties to the Tribe.

Thus, the BIA faced a stand-off between Ms. Burley, who insisted the Tribe had organized properly under her constitution, and Mr. Dixie, who claimed to be the hereditary leader of the Tribe. Ms. Burley sued the BIA in Federal district court in the District of Columbia, claiming that the BIA improperly denied her constitution's validity.

The district court granted the BIA's motion to dismiss for failure to state a claim. The Court of Appeals affirmed. *See California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.D.C. 2006), *aff'd* 515 F.3d 1262 (D.C. Cir. 2008).

When the district court granted its motion to dismiss, the BIA worked with both Ms. Burley and Mr. Dixie to assist the Tribe in organizing itself. After initial efforts by the BIA to find a mutually agreeable solution, Ms. Burley chose not to cooperate. The BIA decided to initiate the organization process by identifying those persons who are lineal descendents of the original twelve Indians for whom the government established the rancheria, the single resident who voted in 1935 on the IRA, and the sole distributee, Mabel Hodge Dixie. Ms. Burley appealed the BIA's decision to the Interior Board of Indian Appeals (IBIA), *California Valley Miwok Tribe v. Pacific Regional Director*, Docket No.: IBIA 07-100-A. Under the Departments regulations, a decision of a Regional Director that has been appealed to IBIA is not final and effective except under certain circumstances, not present here, which effectively stayed the BIA's effort to assist the Tribe in organizing itself. *See* 25 C.F.R. § 2.6(a).

When the BIA is faced with a situation such as this, when it cannot determine who the legitimate leader of the Tribe is, the BIA must first defer to the Tribe to resolve the dispute. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978); *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Wheeler v. Department of the Interior*, 811 F.2d 549 (10th Cir. 1987). The difficulty with CVMT is that because it has no government, it has no governmental forum for resolving the dispute. In similar situations, the BIA would turn to a tribe's general council, that is, the collective membership of the tribe. *Johannes Wanatee v. Acting Minneapolis Area Director*, 31 IBIA 93 (1997). But because CVMT has not even taken the initial step of determining its membership, a general council meeting is not possible.

The only answer is for the BIA to wait for the Tribe to organize itself. The Tribe will be able to do so once the IBIA decides Ms. Burley's appeal. The IBIA has a significant workload but the briefing on Ms. Burley's appeal was completed essentially a year ago and the D.C. Circuit Court opinion of earlier this year has been served as supplemental authority in the IBIA proceedings so we could expect a decision at any time. In the meantime, neither the BIA nor any court has authority to resolve the leadership dispute that is crippling the Tribe. *See, Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).

I hope that this letter provides all the information you need. Should you need additional information or have further questions, please contact Jane Smith (202-208-5808), the member of my staff handling this matter.

Sincerely,

Edith R. Blackwell
Associate Solicitor, Indian Affairs

EXHIBIT 22

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 14 2009

In reply, please address to:
Main Interior, Room 6513

Peter Kaufman, Esq.
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Dear Mr. Kaufman:

I write in response to your telephone inquiry concerning the letter of November 10, 2008, addressed to Silvia Burley as Chairman of the California Valley Miwok Tribe (CVMT). You asked whether the letter reflects that the United States recognizes Ms. Burley as the governmental leader of the CVMT. The letter was an administrative oversight. The Bureau of Indian Education sent the letter to 583 tribes based on a list of tribal leaders which had not been updated to reflect that the Federal government does not recognize Ms. Burley as the Chairperson of the CVMT. In fact, because the CVMT is in the midst of a leadership dispute between Ms. Burley and Yakima Dixie, the United States does not recognize any tribal government or governmental leader of the Tribe.

If you have additional questions, please feel free to contact Jane Smith (202-208-5808), the person on my staff handling this matter.

Sincerely,

Edith R. Blackwell
Associate Solicitor, Indian Affairs

EXHIBIT 23

BILL LOCKYER
Attorney General of the State of California
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General
MARC A. LE FORESTIER, State Bar No. 178188
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5452
Fax: (916) 322-5609

Attorneys for Plaintiff California Gambling Control Commission

Calendared: 2/1/06 CD 10
Respond
2/15/06

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA GAMBLING CONTROL COMMISSION, Plaintiff, v. SYLVIA BURLEY; YAKIMA DIXIE; MELVIN DIXIE; DEQUITA BOIRE; and VELMA WHITEBEAR, Defendants.	CASE NO. 05AS05385 **FIRST AMENDED COMPLAINT IN INTERPLEADER**

Plaintiff California Gambling Control Commission ("Plaintiff") alleges as follows:

1. Plaintiff is the California Gambling Control Commission, an agency of the State of California, vested with jurisdiction over all persons or things having to do with the operation of gambling establishments within the State of California. Plaintiff also has responsibilities defined by certain tribal-state class III gaming compacts completed between the State of California and various California Indian tribes, under which the Plaintiff is identified as "the State Gaming Agency:".

2. Plaintiff is informed and believes and thereon alleges, that Defendant Sylvia Burley ("Burley") is an individual who claims to be a person of authority within the government of the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more fully in the paragraphs below.

3. Plaintiff is informed and believes and thereon alleges, that Defendant Yakima Dixie ("Yakima Dixie") is an individual who claims to be a person of authority within the government of the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more fully in the paragraphs below.

4. Plaintiff is informed and believes and thereon alleges, that Defendant Melvin Dixie ("Melvin Dixie") is an individual who claims to be a person of authority within the government of the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more fully in the paragraphs below.

5. Plaintiff is informed and believes and thereon alleges, that Defendant Dequita Boire ("Boire") is an individual who claims to be a person of authority within the government of the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more fully in the paragraphs below.

6. Plaintiff is informed and believes and thereon alleges, that Defendant Velma Whitebear ("Whitebear") is an individual who claims to be a person of authority within the government of the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more fully in the paragraphs below.

7. The California Valley Miwok Tribe ("CVMT") (fka Sheep Ranch Rancheria of Mi-Wuk Indians) is a federally recognized Indian tribe, and Plaintiff is informed and believes, and thereon alleges, that at present CVMT has few members, no recognized or functioning tribal government, and does not conduct tribal gaming activities.

8. The tribal-state class III gaming compacts completed between the State of California and various federally-recognized California Indian Tribes in 1999, and at other times ("Compacts"), continue in effect, and provide for the creation and maintenance of a Revenue Sharing Trust Fund ("RSTF"), under which fund California Indian tribes that either do not

engage in casino-style gambling at all, or do so only on a limited basis ("Non-Compact Tribes"), are entitled to a share of revenue from California Indian tribes engaged in larger-scale casino operations. CVMT is a Non-Compact Tribe within the meaning of the 1999 Compacts. An exemplar of the 1999 Compacts is attached to this complaint at Exhibit A, and is incorporated by reference here. The RSTF provisions are contained in section 4.3.2 of the 1999 Compacts.

9. The Compacts provide that Non-Compact Tribes are entitled to receive up to $1.1 Million annually in distributions from the RSTF.

10. Plaintiff is identified by the Compacts as a limited "Trustee" of the RSTF, and in that role is required to make RSTF distributions to Non-Compact Tribes, but has "no discretion with respect to the use or disbursement of the trust funds." (Compacts, § 4.3.2.1, subd. (b).) The Compacts provide that Plaintiff's sole authority "shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes." (Compacts, § 4.3.2.1, subd. (b).)

11. Plaintiff is now in possession of approximately SEVEN HUNDRED EIGHTY-EIGHT THOUSAND and ONE DOLLARS and 99 CENTS (U.S. $ 788,001.99) ("RSTF Money"), derived from the RSTF, which is to be distributed to CVMT.

12. Burley, Yakima Dixie, Melvin Dixie, Boire and Whitebear have made conflicting claims to leadership of the Tribe's government, and to distributions from the RSTF, including the RSTF Money, on the Tribe's behalf.

13. Plaintiff is informed and believes, and thereon alleges, that the federal Department of the Interior, Bureau of Indian Affairs ("BIA"), does not recognize any tribal government of the CVMT, does not recognize any individual with authority to represent the CVMT for general purposes, and at present does not conduct government-to-government relations with the CVMT.

14. It is Plaintiff's practice to make RSTF distributions to the federally recognized government of each recipient Non-Compact Tribe.

15. Plaintiff lacks knowledge and authority to determine the validity of the defendants' conflicting claims to control of the CVMT's government, or to the authority to represent it, and so cannot determine to whom the RSTF monies should be distributed, on behalf of the CVMT.

16. Plaintiff claims no interest in the RSTF Money, or in future RSTF distributions to which the CVMT will be entitled under the terms of the Compacts, except that it seeks a determination of whether and to whom the RSTF Money should be distributed.

17. Concurrently with the filing of the original complaint in this action on December 5, 2005, Plaintiff deposited the RSTF Money with the clerk of this Court pursuant to Code of Civil Procedure, section 386, subdivision (c).

18. Plaintiff has incurred costs and reasonable attorney's fees in connection with these proceedings, and may incur additional costs and fees hereafter.

WHEREFORE Plaintiff prays for judgment as follows:

1. That defendants and each of them be ordered to interplead and litigate their claims to receive the RSTF Money, and future RSTF distributions, on behalf of the CVMT;

2. That Plaintiff be discharged from liability to each of the defendants, if any, with respect to the RSTF money;

3. That Plaintiff be permitted to deposit future RSTF distributions to the CVMT with the clerk of this Court, until the defendants resolve this litigation, or until further Order of this Court.

4. That Plaintiff be awarded costs and reasonable attorney's fees to be paid to Plaintiff from the funds deposited with the Court clerk as described above; and

5. For such other and further relief as the Court deems just and proper.

Dated: December 28, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General

MARC A. LE FORESTIER
Deputy Attorney General
Attorneys for the California Gambling Control Commission

EXHIBIT 24

ML #150

George L. Steele (189399)
Law Offices of George L. Steele
790 E. Colorado Boulevard, Suite 900
Pasadena, CA 91101
Telephone: (626) 240-0628
Facsimile: (206) 203-3847
Email: gsteele@glslaw.net

Attorney for Specially-Appearing Defendant
SILVIA BURLEY, *erroneously sued as Sylvia Burley*

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA GAMBLING CONTROL COMMISSION, Plaintiff, v. SYLVIA BURLEY; YAKIMA DIXIE; MELVIN DIXIE; DEQUITA BOIRE; and VELMA WHITEBEAR, Defendants.	Case No. 05AS05385 The Honorable Loren McMaster **DEMURRER OF SPECIALLY-APPEARING DEFENDANT SILVIA BURLEY TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Filed Concurrently with Motion to Quash, Declaration of Silvia Burley, Request for Judicial Notice, and Appendix of Out-Of-State Authorities] DATE: April 21, 2006 TIME: 2:00 p.m. DEPT: 53

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 21, 2006, at 2:00 p.m., or as soon thereafter as the matter may be heard in Department 53 of the above-entitled Court, located at 800 Ninth Street, 3rd Floor, Sacramento, California, the Specially-Appearing Defendant Silvia Burley ("Defendant," "Chairperson Burley," or "Ms. Burley") will, and hereby does, demur to the First Amended Complaint ("Complaint").

The Demurrer is based on Code of Civil Procedure Sections 430.10(a) and (e) on the following grounds:

1. This Court lacks subject matter jurisdiction of internal enrollment and leadership matters of a sovereign Indian tribe.

2. The Complaint fails to state a cause of action against the Defendant in her individual or official capacity. Defendant has no ability in her individual capacity to receive funds for the benefit of a federally-recognized Indian Tribe, or otherwise afford Plaintiff any relief sought in the Complaint. Defendant is immune from suit in her official capacity.

This Demurrer is based on California Code of Civil Procedure Section 430 *et seq.*, this Notice, the Memorandum of Points and Authorities, the Declaration of Silvia Burley, the Request for Judicial Notice, the Appendix of Out-Of-State Authorities, the Motion to Quash which is currently filed by Specially-Appearing Defendant, the pleadings and papers on file herein, and upon such other evidence as may be presented to the Court by or at the time of the hearing.

Dated: March 8, 2006

Respectfully submitted,

LAW OFFICES OF GEORGE L. STEELE

By: _____

George L. Steele
Attorney for Specially-Appearing Defendant
Silvia Burley *erroneously sued as*
Sylvia Burley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiff, the California Gambling Control Commission ("Plaintiff" or "CGCC") has served a Summons and First Amended Complaint in Interpleader on several individual Defendants. The Defendants include Silvia Burley, the Chairperson of the California Valley Miwok Tribe ("CVMT"), a federally recognized Tribe, and the recipient of each of the prior distributions from the Revenue Sharing Trust Fund ("RSTF"). Specifically, since July 1, 2000, CGCC has made approximately 12 distribution payments to CVMT, through the Tribal Council chaired by Silvia Burley. The remaining Defendants are not members of the CVMT.

The Complaint purports to seek a determination of the proper recipient of funds from the RSTF. However, Plaintiff ignores the documents and course of conduct that clearly demonstrate the ongoing government-to-government relationship between the United States, and the tribal council chaired by Chairperson Burley, and is in reality, asking this Court to interfere with CVMT's self-governance by selecting the Tribe's leadership in this action. Accordingly, Chairperson Burley respectfully requests that this Court grant the Demurrer, with prejudice, in view of the Court's lack of subject matter jurisdiction, and the doctrine of sovereign immunity.

II. STATEMENT OF FACTS

CVMT is a federally recognized Indian Tribe. In September, 1999, CVMT became a contracting Tribe pursuant to the Indian Self-Determination Act, Public Law 93-638 ("638"). Public Law 638 provides for federal funding to organized Tribes to support and assist Tribes in the development of tribal government, tribal programs, and economic development.

In January 2004, CVMT was granted "Mature Contract Status." A Mature Contract is a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization. 25 U.S.C. § 450b. CVMT's contract was recently renewed for the 8th consecutive year on February 16, 2006.

Silvia Burley was elected Chairperson of the Tribal Council in 1999, and has held that office continuously since that time. As Chairperson, Ms. Burley has the responsibility of managing and supervising CVMT's accounting department. CVMT's accounting department handles and accounts for receipt of all Tribal funds, makes all Tribal disbursements, and insures compliance with federal laws and regulations concerning financial matters as they apply to federally recognized Tribes.

III. ARGUMENT

A. A Pleading Is Subject To Demurrer When It Is Insufficient To State A Cause Of Action

This Demurrer "tests the sufficiently of the plaintiffs' complaint, i.e., whether it states facts sufficient to constitute a cause of action upon which relief may be based." Young v. Gannon, 97 Cal. App. 4th 209, 220 (2002) (*citing* Code Civ. Proc., § 430.10(e); Friedland v. City of Long Beach, 62 Cal. App. 4th 835, 841-842 (1998)). In determining whether the complaint states facts sufficient to constitute a cause of action, "the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom." Id. The "court also may consider matters of which it may take judicial notice." Id. (*citing* Code Civ. Proc. § 430.30(a); City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 459)). In adjudicating this demurrer, the Court should take judicial notice of the inconsistent facts alleged in the Complaint. *See* Del. E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 604 (1981) (pleading seemingly valid on its face is nevertheless subject to demurrer when matters judicially noticed render the complaint meritless). The Court also should take judicial notice of exhibits and admissions contained in Plaintiff's pleadings. *See* Bohrer v. County of San Diego, 104 Cal. App. 3d 155, 163 (1980).

This demurrer may also be properly sustained for lack of "jurisdiction over the subject matter of the cause of action ...." Miller v. R.K.A. Management Corp., 99 Cal. App. 3d 460, 465 (1979) (*citing* Code Civ. Proc. § 430.10(e)). A demurrer is properly

granted where jurisdiction over the subject matter of an action exclusively belongs to another sovereign under preemptive federal law. Id. Aubry v. Tri-City Hospital Dist., 2 Cal. 4th 962, 967 (1992); Jager v. County of Alameda, 8 Cal. App. 4th 294, 297 (1992).

B. This Court Lacks Subject Matter Jurisdiction Over Issues Of Tribal Self-Governance

The thrust of Plaintiff's actions is illustrated in its first prayer for judgment, in which it requests "[T]hat Defendants and each of them be ordered to interplead and litigate their claims to receive the RSTF Money, and future RSTF distributions, on behalf of CVMT." In other words, Plaintiff wants this Court to decide leadership and membership of CVMT, and in effect, challenge tribal membership on behalf of the non-Tribal member Defendants. However, Plaintiff's attempt to end run the jurisdictional hurdles of sovereign immunity and lack of jurisdiction over matters of tribal self-governance is impermissible as a matter of law.

It is a settled matter than Indian Tribes possess the right to resolve their internal matters based upon their inherent sovereign authority. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). It is also settled that tribes are immune from federal and state court jurisdiction in disputes regarding challenges to membership in the tribe. Santa Clara at 56; Lewis v. Norton, 424 F.3d 959, 961 (9th Cir. 2005); Lamere v. Superior Court, 131 Cal. App. 4th 1059, 1068. And the 9th Circuit made clear in Lewis that a party cannot end run tribal immunity by bringing suit against non-tribal parties in an effort to put a tribal governance issue before a court. Lewis at 963.

In Lewis, a group of siblings sought to compel the United States to enroll them as members of a federally recognized tribe. The court held that their claim could not withstand the "...double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." Lewis at 960.

In the instant case, Plaintiff seeks to obtain a judicial determination of a tribal self-governance matter by bringing suit against a group of individuals, all but one lacking tribal membership, and alleging that each of their claims to be a "person of authority" within

CVMT. Here, as in Lewis, the claims cannot survive the obstacles of sovereign immunity and lack of jurisdiction over tribal membership. Id. In addition, Plaintiff's allegations regarding the non-tribal members' claims directly interfere with CVMT's sovereignty because only tribes retain authority to determine tribal membership. Id. at 963.

Thus, despite Plaintiff's attempt to avoid the obvious legal obstacles to interfering with matters of trial self-governance, this Court should sustain Chairperson Burley's Demurrer in view of the Court's lack of subject matter jurisdiction.

C. Plaintiff Has Failed To State A Cause Of Action Upon Which Relief Can Be Granted

The Complaint does not, and cannot, allege any claim for relief against Chairperson Burley in her individual capacity. Chairperson Burley in her individual capacity is without any authority or ability to either have taken the acts alleged by Plaintiff or to afford Plaintiff the relief they seek. Chairperson Burley's actions as an individual have no independent significance. It is only the official action taken by the CVMT Tribal Council as a tribal governmental entity that can lawfully claim RSTF distributions for CVMT. Plaintiff's allegations in the Complaint make it clear that there cannot be a claim against Chairperson Burley in her individual capacity. Paragraph 14 of the Complaint alleges that it is Plaintiff's practice to make Revenue Sharing Trust Fund distributions to the federally recognized government of each recipient tribe. Therefore, Chairperson Burley should be dismissed in her individual capacity.

If this Court were to allow this interpleader, it would be ordering CVMT to litigate a leadership dispute in state court. Obviously, CVMT is an indispensable party and cannot be joined without its consent as a result of its sovereign immunity. Moreover, state courts have no jurisdiction over tribal governance matters, as discussed above. A demurrer should be granted because the complaint seeks relief which, as a mater of law, cannot be provided. *See* Hill v. Miller, 64 Cal. 2d 757 (1966); Casterson v. Superior Court, 101 Cal. App. 4th 177, 183 (2002) ("a general demurrer will lie where the complaint has included allegations that clearly disclose some defense or bar to recovery").

IV. CONCLUSION

The Complaint's allegations establish that the remedies Plaintiff seeks cannot be obtained from Defendant in her individual capacity. To the contrary, this dispute involves Defendant's alleged actions in her capacity as officials of a sovereign, federally-recognized Indian tribe. Only the California Valley Miwok Tribe, acting through its governmental entities, the Enrollment Committee and the Tribal Council, has the authority to adjudicate this issue. Pursuant to C.C.P. § 430.10, since the allegations of the Complaint and the matters judicially noticeable establish that jurisdiction o this matter lies exclusively with the California Valley Miwok Tribe, this honorable Court lacks subject matter jurisdiction. *See* Olcovich v. Grand Trunk Ry., 20 Cal. App. 349 (1912) (demurrer based on lack of jurisdiction proper if allegations show that jurisdiction lies elsewhere). Specially-Appearing Defendant therefore respectfully requests this Court to grant the demurrer, with prejudice, as to any alleged cause of action asserted against Defendant in her individual capacity.

Dated: March 8, 2006

Respectfully submitted,

LAW OFFICES OF GEORGE L. STEELE

By: _____

George L. Steele
Attorney for Specially-Appearing Defendant
Silvia Burley *erroneously sued as*
Sylvia Burley

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 E. Colorado Blvd., Suite 900, Pasadena, California 91101.

On March 9, 2006, I served the document described as **DEMURRER OF SPECIALLY-APPEARING DEFENDANT SILVIA BURLEY TO COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

MARC A. LE FORESTIER
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Fax: (916) 322-5609

[X] **(Via Mail)** Following ordinary business practices, I placed the document for collection and mailing at the Law Offices of George L. Steele, 790 E. Colorado Blvd., Suite 900, Pasadena, California 91101, in a sealed envelope. I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

[ ] **(Via FedEx)** Following ordinary business practices, I placed the document for collection and FedEx delivery at the Law Offices of George L. Steele, 790 E. Colorado Blvd., Suite 900, Pasadena, California 91101. I am readily familiar with the business's practice for collection and processing of correspondence for delivery by FedEx, and, in the ordinary course of business, such correspondence would be deposited with FedEx on the day on which it is collected at the business.

Executed on March 9, 2006, at Pasadena, California.

[X] **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Christina Apostol

EXHIBIT 25

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Judge McMaster discloses that attorneys appearing in cases on todays calendar may have donated to the Committee for Judicial Independence which was formed to oppose the attempted recall of judge McMaster. A list of donors and amounts donated is under the custody of court executive officer Jody Patel and can be reviewed at room 611, sixth floor, courthouse, 720 Ninth Street.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
LOREN E. MCMASTER, Judge
T. West, Clerk
V. Carroll, Bailiff

Friday, June 16, 2006, 2:00 PM

Item 1 **01AS07723** **ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion To Compel Supplemental Interrogatories & Production of Docume

Filed By:

Advanced to and heard on June 1, 2006.

Item 2 **01AS07723** **ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion for Protective Order

Filed By: Ragan, Jennifer L.

Defendant's motion for a protective order quashing plaintiff's demand for Exchange of Expert Witnesses on the ground discovery is closed is denied.

Plaintiff's motion to continue the trial in this matter was granted and the trial court vacated all dates set for trial and MSC. Under such circumstances the discovery cut-off is generally tried to the original trial date.

Plaintiff points out that defendant has propounded discovery and insisted that she could do so because all discovery timelines were vacated when the trial date was vacated. The Court granted the unopposed motion to compel. It would be inequitable to allow defendant to obtain a court order compellingt discovery while at the same time asserting that discovery is closed as to plaintiff.

The court views the conversations between the parties followed by defendant's discovery motion to constitute a stipulation that discovery remain open until closed by an arbitriation or trial date.

This minute order is effective immediately and no formal order is required.

Item 3 **01AS07723** **ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion to Compel Deposition

Filed By:

The motion of Silvia Burley ("Burley") to quash service of summons issued upon the First Amended Complaint of California Gambling Control Commission ("Commission") is denied.

Burley's motion is based upon the premise that she is named in the action solely in her capacity as a person of authority over the California Valley Miwok Tribe ("Tribe"), and in that capacity, she is entitled to the sovereign immunity held by the Tribe. Commission disputes this claim, arguing that Burley is named simply as a private individual who has made a competing claim to the subject fund. Specifically, Commission argues that "because there is no recognized tribal government or representative with authority to represent the Tribe for general purposes, none of the defendants could be acting in an official representative capacity.

With this admission by Commission, and having no evidence that the service of summons was otherwise procedurally defective, Burley was properly served.

This minute order is immediately effective. A formal order pursuant to California Rules of Court, rule 391 is not necessary, and further notice of this ruling is not required.

Item 14 **05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL**

Nature of Proceeding: Demurrer

Filed By:

The demurrer of Silvia Burley ("Burley") to the First Amended Complaint (FAC) of California Gambling Control Commission ("Commission") is sustained without leave to amend.

Burley demurs upon two related grounds: (1) the interpleader action necessarily requires a determination of the "federally recognized government" of the California Valley Miwok Tribe ("Tribe") and the authorized representative thereof - a determination over which this Court lacks subject matter jurisdiction and is otherwise unsettled with the federal government; and (2) since Burley is named in the action solely as a private individual (not an official representative of Tribe) with no potential claim of right to the subject fund, the complaint fails to state a cause of action as against her. Burley's demurrer is sustained upon both grounds.

Commission alleges that it is the Commission's "practice to make RSTF distributions to the federally recognized government of each recipient Non-Compact Tribe." (FAC, p.3:24-25.) Commission alleges that the U.S. Department of Interior, Bureau of Indian Affairs ("BIA") "does not recognize any tribal government of the [Tribe], does not recognize any individual with authority to represent the [Tribe] for general purposes, and at present does not conduct government-to-government relations with the [Tribe]." (FAC, p.3:20-23.) Commission asserts no interest in the subject fund except for its statutory and Compact obligation to act as trustee over the fund, and to distribute it to eligible recipient Indian tribes "without delay." (Gov't Code section 12012.90(d).) Thus, the Commission states that its interpleader action "seeks a judicial determination of which, if any, of the various interested parties it named as

defendants is entitled to the RSTF monies deposited with the court." (Opp. p.3:13-14.)

Based upon these allegations, it is an inescapable conclusion that the relief sought by Commission would compel the Court to determine which individual, or individuals, constitute the lawful governmental representatives of Tribe, if at all. That determination, based upon the Commission's "practice," requires the federal government to "recognize" a government of the Tribe. This Court has no jurisdiction to make either determination. Instead, those decisions lie entirely within the exclusive jurisdiction of the BIA, the federal government, or the federal courts.

As an alternative, Commission suggests that the Court may function as a warehouse, in perpetuity, for the subject funds until the federal government, or the Tribe, finally achieve a "federally recognized government." This is not the proper role of the Court, or the interpleader process.

Commission also contends that the Court has jurisdiction over this matter because the Court may avoid the "impermissible intrusion into issues of tribal self-governance" and "properly limit the scope of the litigation to the Commission's responsibilities and obligations related to distribution of the RSTF monies." (Opp. p.5:23-25.) However, the FAC does not seek such relief. The FAC does not seek a declaration of Commission's responsibilities and obligations as to the RSTF. Commission does not contend that there is a dispute over its legal obligations and responsibilities. Commission does not argue that there is a legitimate dispute that it may distribute the RSTF monies to someone or some entity other than the "federally recognized government" of the Tribe. Instead, Commission seeks a declaration of who or what constitutes the "federally recognized government" of the Tribe. Again, that declaration cannot issue from this Court.

Furthermore, Commission has admitted that it named Burley as a private individual, not as an official representative of the Tribe. Since Commission alleges that its trusteeship of the fund requires it to disburse the fund only to the "federal recognized government" of the Tribe, Burley could not be a proper recipient of the fund in her individual capacity under any circumstance.

Requests for judicial notice are denied.

This minute order is immediately effective. A formal order pursuant to California Rules of Court, rule 391 is not necessary, and further notice of this ruling is not required.

Item 15 **05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL**

Nature of Proceeding: Miscellaneous Motion

Filed By:

The motion of California Gambling Control Commission ("Commission") for discharge of liability from interpleader action pursuant to Code of Civil Procedure section 386, is denied.

Commission has not established that this Court has jurisdiction to adjudicate the named defendants' alleged competing claims to the deposited fund.

EXHIBIT 26

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 10/01/2010 TIME: 10:00:00 AM DEPT: C-62

JUDICIAL OFFICER PRESIDING: Ronald L. Styn
CLERK: Sheryl Alyea
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT: Mark Chadwell

CASE NO: **37-2008-00075326-CU-CO-CTL** CASE INIT.DATE: 01/08/2008
CASE TITLE: **California Valley Miwok Tribe vs. The California Gambling Control Commission**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT TYPE: Civil Case Management Conference

APPEARANCES
MANUEL CORRALES JR, counsel, present for Plaintiff(s).
Terry Singleton, counsel, present for Plaintiff(s).
Sylvia Cates (telephonically) andRandy Pinal appear on behalf of the Attorney General on behalf of defendant, California Gambling Control Commission

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Pursuant to the stipulation of parties, no procedure or deadline set forth herein may be modified, extended or avoided by stipulation or agreement of the parties unless approved by the Court in advance of the date sought to be altered.

Case deemed at issue. Pursuant to stipulation of the parties, no new parties may be added without leave of court and all unserved, non-appearing and fictitiously named parties are dismissed 10/1/10.

The Civil Jury Trial is scheduled for 05/13/2011 at 09:30AM before Judge Ronald L. Styn.

The Trial Readiness Conference (Civil) is scheduled for 06/06/2011 at 09:30AM before Judge Ronald L. Styn.

All Motions and Discovery are to be completed 4/29/11. Motion for Summary Judgment / Summary Adjudication will be heard pursuant to code. First expert exchange to be completed by 03/04/11. Second expert exchange to be completed by 03/25/11. Posting of jury fees is pursuant to code.

Counsel states that the defendants filed a Demurrer which was heard by Judge Joan Lewis. The Demurrer was then appealed and the Court of Appeal Reversed Judge Lewis' ruling. The Answer of the defendants is to be filed by 10/15/10.

Jury demanded by plaintiff and defendant.

EXHIBIT 27

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DISTRICT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant.

Case No.37-2008-00075326-CU-CO-CTL

PLAINTIFF'S OBJECTIONS TO INTERVENORS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF INTERVENORS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Date: March 11, 2011
Time: 2:00 p.m.
Dept: C-62
Judge: Hon. Ronald Styn
Trial Date: May 13, 2011

Plaintiff California Valley Miwok Tribe ("Tribe" or "Plaintiff") hereby submits these objections to Intervenors' Request for Judicial Notice ("RJN" or "Request") in Support of Intervenors' Supplemental Brief in Opposition to Plaintiff's Motion for Reconsideration, and ask that the Court deny the Request and the exhibit attached to the Intervenors' Request:

A. Letter from Troy Burdick of the Bureau of Indian Affairs to Silvia Burley and Yakima Dixie dated November 6, 2006, as Exhibit 2.

Intervenors have offered absolutely no legal argument as to why the Court should take judicial notice of the above-listed items. For that reason alone the Court should deny Intervenors' Request. However, notwithstanding the insufficient legal basis for their Request, Plaintiff objects to the admission of the foregoing documents in Opposition to Plaintiff's Motion because Intervenors fail to meet their burden to prove that the foregoing documents may be judicially noticeable.

Judicial notice may not be taken of any matter unless authorized or required by law. Cal. Evid. Code § 450. The burden is on the party requesting judicial notice to supply the Court with sufficient, reliable and trustworthy sources of information about the matter to be noticed. *See People v. Moore*, 59 Cal. App. 4th 168 (Ct. Cal. App. 1997). Although the existence of a document may be judicially noticeable, the truth of the statements contained in the document requested to be noticed and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable. *See*

Fremont Indem. Co. v. Fremont General Corp., 148 Cal.App.4th 97 (Ct. Cal. App. 2007).

When a court takes judicial notice of official acts or public records, it does not also judicially notice the truth of all matters stated therein. *See Aquila, Inc. v. Superior Court*, 148 Cal.App.4th 556 (Ct. Cal. App. 2007). Intervenors are urging the Court to accept the facts cited within and inferred from Exhibit 2, which is improper. Intervenors failed to establish how this Exhibit constitutes an official record entitled to judicial notice. In fact, Exhibit 2 was superseded and explicitly rescinded by the December 22, 2010 final decision from by Larry Echo Hawk, Assistant Secretary - Indian Affairs. This means that this Exhibit can no longer be considered an "official act" because it has been rescinded by a superior authority. As a result, this Exhibit is now irrelevant and cannot properly be judicially noticed. *See American Cemwood Corp. v. American Home Assurance Co.*, 87 Cal.App.4th 431 (Cal. Ct. App. 2001) (A court may take judicial notice only of relevant material).

Lastly, the hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists. *See North Beverly Park Homeowners Ass'n v. Bisno*, 147 Cal.App.4th 762 (Cal. Ct. App. 2007). Since no hearsay exceptions apply to allow any statements contained in the documents, the Court should deny Intervenors' RJN.

Accordingly, Intervenors' Request for Judicial Notice should be denied in its entirety because Intervenors have not

advanced any properly judicially noticeable facts from the Exhibit proffered.

RESPECTFULLY SUBMITTED this 1st day of March, 2011.

ROSETTE & ASSOCIATES, PC

By: _____

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Attorneys for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DISTRICT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant.

Case No.37-2008-00075326-CU-CO-CTL

PLAINTIFF'S EX PARTE APPLICATION FOR ENTRY OF JUDGMENT AGAINST DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION; DECLARATION OF MANUEL CORRALES, JR.

Date: September 7, 2011
Time: 8:30 a.m.
Dept. 62
Judge: Hon. Ronald Styn

Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or "Plaintiff") hereby applies ex parte for entry of judgment against the Defendant CALIFORNIA GAMBLING CONTROL COMMISSION ("the Commission") on the following grounds:

THE ASSISTANT SECRETARY OF THE U.S. DEPARTMENT OF INTERIOR, LARRY ECHO HAWK, HAS ISSUED HIS RECONSIDERED DECISION AFFIRMING HIS PRIOR DECEMBER 22, 2010 DECISION IN FAVOR OF THE TRIBE

1. On August 31, 2011, the Assistant Secretary of the U.S. Department of Interior, Larry Echo Hawk, issued his long-awaited reconsidered decision. In it, he reaffirmed his December 22, 2010, decision letter that the Tribe is a federally-recognized tribe consisting of five (5) members which operates under a General Council form of government pursuant to Resolution #CG-98-01, which effectively recognized Silvia Burley as the Chairperson of the Tribe. He further reaffirmed that the Tribe is not required to expand its five (5) adult membership to so-called "potential citizens", and that it is not required to organize its present form of government under the Indian Reorganization Act of 1934 ("IRA").

2. On March 11, 2011, Plaintiff successfully sought and obtained an order granting judgment on the pleadings as to the Commission. The Court ruled that the Commission's Answer did not state facts sufficient to constitute a defense to the Complaint, in light of the Assistant Secretary's December 22, 2010 decision letter. The Commission's sole defense in withholding Revenue Sharing

Trust Fund ("RSTF") money paid out for the Tribe since 2005 was that the Tribe purportedly did not have a governing body recognized by the U.S. government, that a leadership dispute called into question Silvia Burley's right to act as Chairperson for the Tribe, and that the Tribe was required to be organized under the IRA and include within its membership other "potential" members in the surrounding community. The Assistant Secretary's December 22, 2011 decision letter, however, refuted each one of these defenses. The Court then took judicial notice of that decision and, on March 11, 2011, granted the motion, and directed Plaintiff's counsel to prepare the judgment. The Court also directed Plaintiff's counsel to prepare a separate order giving the Commission a statutory, temporary stay of execution on the judgment.

3. In accordance with the Court's order, Plaintiff's counsel circulated a proposed judgment to defense counsel for the Commission. When the parties could not agree on the language of both the proposed judgment and the proposed order staying enforcement of the judgment, the parties submitted their respective versions to the Court.

4. On March 25, 2011, the Court signed Plaintiff's proposed order staying enforcement of the judgment, and modified Plaintiff's proposed judgment. The modifying language dealt with how the Commission would release the presently withheld RSTF money. It then directed

Plaintiff's counsel to submit a revised judgment reflecting this modifying language for signature.

5. On March 25, 2011, Plaintiff's counsel revised the proposed judgment in accordance with the Court's order and submitted it to the Court, together with a copy for the Court Clerk to conform and return. Plaintiff's counsel served a copy of the revised, proposed judgment on defense counsel.

6. In accordance with the Court's policy, the Court held the proposed, revised judgment for ten (10) days, so as to allow the opposing party an opportunity to object. Before the Court could sign the judgment, the Assistant Secretary issued a letter dated April 1, 2011, setting aside his December 22, 2010, letter, and advised that he would issue a reconsidered decision letter, after giving the parties an opportunity to brief the issues before him in more detail. As a result, the parties appeared before the San Diego Superior Court on April 6, 2011, advising of this development, prompting the Court to hold off on signing the judgment. In the event the Assistant Secretary reaffirmed his December 22, 2010 decision, the Court indicated that it was only staying the effect of the prior orders granting judgment on the pleadings and denying intervention, and would therefore simply stay entry of judgment until the Assistant Secretary issued his new decision. It indicated it would hold on to the unsigned judgment papers until the Assistant Secretary issued his

reconsidered decision. If the reconsidered decision reaffirmed the December 22, 2010 decision letter, then the Court indicated it would enter judgment. The Court, however, permitted the parties to conduct discovery, in the event the Assistant Secretary completely reverses himself. The parties estimated that the Assistant Secretary would issue his reconsidered decision in mid-July 2011. As it turned out, the decision came down on August 31, 2011.

7. When the parties could not decide on a proposed order with respect to the Court's April 6, 2011, ex parte ruling staying entry of judgment, they submitted their respective versions to the Court. The Court signed the Intervenors/Commission's proposed order, a copy of which is attached and marked as Exhibit "4", which provides that "[t]he entry of judgment against the Commission shall be stayed pending further order of this Court."

8. That the August 31, 2011 letter from the Assistant Secretary reaffirms his December 22, 2010 decision letter is clear from the following language in the letter:

"Obviously, the December 2010 decision, and today's reaffirmation of that decision..." (Page 2 of August 31st Letter)(Emphasis added).

* * *

"Based upon the foregoing analysis, I re-affirm the following:

* CVMT is a federally-recognized tribe whose entire citizenship, as of this date, consists of the five acknowledged citizens;

* The 1998 Resolution established a General Council form of government, comprised of all the adult citizens of the Tribe, with whom the Department may conduct government-to-government relations;

* The Department shall respect the validly enacted resolutions of the General Council; and

* Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents." (Page 8, August 31st Letter)(Emphasis added).

9. Since the August 31, 2011 reconsidered decision by the Assistant Secretary reaffirms his December 22, 2010, decision letter, judgment should be entered against the Commission forthwith.

THE ASSISTANT SECRETARY'S STAY IMPLEMENTING HIS DECISION DOES NOT PREVENT ENTRY OF JUDGMENT AGAINST THE COMMISSION

The August 31, 2011, decision letter states that it is "final for the Department and effective immediately." (Page 8 of Letter). Contrary to what the Commission may argue, this is a far cry from being of "no force and effect." Because of Dixie's pending litigation in federal court challenging the December 22, 2010, decision, the

Assistant Secretary stayed implementation of his August 31, 2011, decision pending resolution of that federal litigation. The word "effective" means OPERATIVE (as the tax becomes *effective* next year. (Merriam-Webster, www.meriam-webster.com). Thus, by its own terms, the August 31, 2011 letter is operative immediately, permitting this Court to take judicial notice of the substance of that decision with respect to this California State Court action.

The word "implement" means CARRY OUT, ACCOMPLISH; *especially*: to give practical effect to and ensure of actual fulfillment by concrete measures. (Merriam-Webster, www.meriam-webster.com). By taking judicial notice of the August 31, 2011, decision letter, this Court is not "implementing" the terms of that decision. The utility of judicially noticing that decision for purposes this California State litigation is to refute the affirmative defenses asserted by the Commission on why it is withholding RSTF money from the Tribe. There is now a final agency action on those issues. Thus, all the Assistant Secretary did was to stay the practical means of carrying out his decision on the federal issues he decided, pending resolution of Dixie's challenges to those issues in federal court, something the federal court was going to do anyway. However, the substance of his decision is still effective and a final agency action. It was not a victory

for Dixie, because he chooses to appeal that decision ad nauseam.

Neither the Assistant Secretary nor the federal court hearing Dixie's challenge to the December 22, 2010 decision letter has any authority to stay the present California State Court action over Revenue Sharing Trust Fund ("RSTF") money belonging to the Tribe.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court take judicial notice of the August 31, 2011, letter from the Assistant Secretary and enter judgment against the Commission.

Plaintiff also requests that the Court put back on calendar it motion for pre-judgment interest.

Dated: 9/5/2011

Manuel Corrales, Jr., Esq.
Attorney for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

DECLARATION OF MANUEL CORRALES, JR.

I, Manuel Corrales, Jr., declare that if called as a witness in this case, I could and would testify as follows:

1. I am an attorney at law duly licensed to practice in the State of California, the State of Utah and the State of New Mexico, and I am one of the attorneys of record for Plaintiff CALIFORNIA VALLEY MIWOK TRIBE. I have personal knowledge of the facts set forth herein.

2. Attached herewith and marked as Exhibit "1" is a true and correct copy of a letter dated March 25, 2011, from me to the Honorable Ronald L. Styn, enclosing the revised, proposed judgment for entry against the Commission.

3. Attached herewith and marked as Exhibit "22" is a true and correct copy of the "Order Staying Enforcement of Judgment under CCP Section 918(b) and (c)", signed and filed March 25, 2011.

4. Attached herewith and marked as Exhibit "3" is a true and correct copy of a letter dated April 1, 2011, from the Assistant Secretary setting aside his December 22, 2010, letter.

5. Attached herewith and marked as Exhibit "4" is a true and correct copy of an "Order Granting in Part Ex Parte Applications for Stay of Entry of Judgment", which was prepared by Mr. Matthew McConnell and submitted to the Court for signature. I never received a conformed copy of this order, but the Court informed the parties at a hearing thereafter that it had signed Mr. McConnell's proposed order over the one submitted by Plaintiff.

6. Attached herewith and marked as Exhibit "5" is a true and correct copy of an Email dated August 31, 2011, from me to Ms. Sylvia Cates and other counsel, attaching the August 31, 2011, letter from the Assistant Secretary, and advising of the ex parte hearing on September 7, 2011, at 8:30 a.m. in Department 62, for purposes of having judgment entered against the Commission.

7. Attached herewith and marked as Exhibit "6" is a true and correct copy of a letter dated September 1, 2011, from me to Ms. Cates and all counsel further advising of the ex parte hearing on September 7, 2011.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5 day of September, 2011, at San Diego, California.

MANUEL CORRALES, JR.

EXHIBIT 29

0581

STATE OF CALIFORNIA
GAMBLING CONTROL COMMISSION
2399 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833-4231

P.O.BOX 526013
Sacramento, CA 95852-6013

(916) 263-0700
(916) 263-0499 Fax

June 27, 2006

Sylvia Burley
California Valley Miwok Tribe
10601 Escondido Place
Stockton, CA 95212

Via Facsimile and U.S. Mail

Re: California Valley Miwok Tribe – Revenue Sharing Trust Fund Distribution

Dear Ms. Burley:

Your June19, 2006, letter to Chairman Dean Shelton has been referred to me for response.

For reasons that have been made clear in previous correspondence and in pleadings in the recent interpleader action filed by the California Gambling Control Commission (the Commission) regarding distributions from the Revenue Sharing Trust Fund (RSTF) designated for the benefit of the California Valley Miwok Tribe (the Tribe), the Commission cannot, in keeping with its Trustee responsibilities under the Tribal-State Gaming Compact (the Compact), Sections 4.3.2 (a)(ii) and 4.3.2.1 (b), send the distribution to you as the representative of the Tribe. The monies will continue to be held in the Revenue Sharing Trust Fund (RSTF) and will be sent to the Tribe as soon as there is either a federally-recognized Tribal government, or the Bureau of Indian Affairs recognizes a representative or person of authority within the Tribe, for all purposes.

In your letter you assert that the Tribe is being treated "unequally" in violation of the California and federal constitutions. However, as you are aware, the Tribe is not similarly situated with other RSTF tribes. The Tribe has no recognized tribal government nor representative or person of authority recognized for all purposes by the BIA. The copy of the BIA Tribal Leaders Directory, which you included in your letter, only serves to underline that fact. Unlike all the other tribes listed, the Tribe has no listed Tribal Chairperson. Moreover, as you are aware, there is an ongoing dispute as to who is the actual person of authority within the Tribe.

Again, let me make clear that the Commission has no interest in the RSTF funds being withheld. However, we do have a duty under the Compact to make our best efforts to see that the funds are sent to an authorized representative of the Tribe.

From our perspective, this is not presently possible. Therefore, we respectfully deny your request to forward the RSTF distribution to you as the Tribe's representative.

Sincerely,

Cyrus J. Rickards
Chief Counsel

cc: Dean Shelton
Philip E. Thompson

EXHIBIT 30

STATE OF CALIFORNIA
GAMBLING CONTROL COMMISSION
39 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833-4231
(916) 263-0700 Phone
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www.cgcc.ca.gov

June 26, 2007

Via Facsimile and U.S. Mail

Ms. Karla D. Bell
Sanders Bell LLP
4712 Admiralty Way, Suite 580
Marina del Rey, CA 90292

Re: California Valley Miwok Tribe

Dear Ms. Bell:

Since we last wrote on June 4, 2007, the Commission staff (Commission) has had a chance to carefully review the District Court decision in *California Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197 (D.D.C. 2006). As a result of this review, in particular the factual recitations regarding the status of the Tribe, we have come to the conclusion that our decision to distribute Revenue Sharing Trust Funds (RSTF) as articulated in the June 4, 2007 letter must be reconsidered.

In the above matter, the California Valley Miwok Tribe (the Tribe) filed suit against the federal government, alleging that the Bureau of Indian Affairs (BIA) violated the Indian Reorganization Act by not recognizing a proposed Tribal constitution. The court granted the government's motion to dismiss finding that the Tribe failed to state a claim upon which relief could be granted. The matter is on appeal to the Court of Appeals for the District of Columbia Circuit.

In our June 4, 2007 correspondence, we indicated that we would make distributions to the tribe if there were a person recognized by the BIA as an "authorized representative of the Tribe with whom government-to-government business is conducted." We have pointed to documents that indicate that Silvia Burley is such a person. Notwithstanding our past position, what gives us concern and what gave the trial court concern in the above case is that not only is there no recognized Tribal constitution, and hence no tribal leadership recognized by the BIA, but that the Tribe as claimed by Ms. Burley to be constituted fails to include or protect the interests of a significant number of potential members. The BIA has asserted in the above litigation that its refusal to recognize the tribal government is based on the ground

that the Tribe has failed to take necessary steps to protect the interests of its potential members. (See 424 F.Supp.2d at 202.) Further, this concern was shared by the court which pointed out: "At the inception of this suit, Ms. Burley and her two daughters were seeking approval of a tribal constitution that conferred tribal membership upon only them and their descendants. . . . The Tribe now proposes a revised constitution that includes non-Burley descendants, and it has submitted a list of 29 possible members, but the government estimates that the greater tribal community which should be included in the reorganization process may exceed 250 members." (424 F. Supp.2d 197 at 203, fn 7.) Thus it is clear that not only the BIA and the District Court, but also Ms, Burley herself, have concluded that the present Tribal membership is not representative of the potential membership.

We reiterate that we have no authority to determine the "appropriate" Tribal membership. We do not by this letter endorse or dispute Ms. Burley's right of membership or claim of Tribal leadership, nor do we endorse or dispute that of Mr. Yakima Dixie. In fact, the legitimacy or lack thereof of those respective positions has no direct bearing on our decision. As we have made clear in past correspondence, the Commission has absolutely no authority to determine the appropriate leadership or membership of the Tribe and takes no position on these matters. However, it is clear from the factual recitations contained in the District Court decision that not only is there no recognized Tribal government, there is no basis upon which to conclude that should RSTF money be sent to the Tribe its use will be determined by a Tribal government recognized by the BIA in carrying out its statutory responsibility that can "ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members." (424 F.Supp.2d 197 at 202.)

The Commission would be derelict in its trust responsibilities under Section 4.3.2.1(b) of the Tribal-State Gaming Compact if it knowingly distributed the money to a group of individuals, however eligible, which did not comprise a representative Tribal membership. Withholding of the funds will not cause them to be dissipated. Once the BIA has recognized a Tribal government and Tribal leadership, the Commission will take immediate steps to distribute the funds.

Thank you for your patience in this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Dean Shelton

DEAN SHELTON
Chairman

Cc: Silvia Burley
1061 Escondido Place
Stockton, CA 95212

Chadd Everone
2140 Shattuck Ave., #602
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Yakima Dixie
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EXHIBIT 31

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January 3, 2008

Via Facsimile and U.S. Mail

Mr. Manuel Corrales, Jr.
Attorney at Law
11753 Avenida Sivrita
San Diego, California 92128

Re: California Valley Miwok Tribe – Revenue Sharing Trust Fund Payments

Dear Mr. Corrales:

I am in receipt of your letter of December 21, 2007, regarding the above matter.

I have enclosed copies of a letter dated June 26, 2007, to Karla D. Bell, then counsel for Ms. Burley; a letter dated September 24, 2007, to Ms. Burley; and a letter dated December 14, 2007, from the Bureau of Indian Affairs (BIA) to Ms. Burley.

The letter of June 26, 2007, in particular, outlines the basis for the Commission withholding Revenue Sharing Trust Fund (RSTF) funds. In short, the Tribe has no recognized government or tribal leadership, nor does the BIA recognize Ms. Burley as "an authorized official" of the tribe. Further, as explained in our letter of June 26, 2007, there is every reason to believe, based on the position of the BIA and the U.S. District Court (*California Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 202; 203, fn. 7. (D.D.C. 2006)), that those individuals aligned with Ms. Burley do not constitute the full membership of the tribe. These are not matters that the California Gambling Control Commission (Commission) has taken upon itself to determine. The determinations have been made by the BIA and the Federal court. Further, the BIA has recently indicated its unwillingness to continue funding under P.L. 93-638 because the Tribe does not have a recognized governing body.

Therefore, under these circumstances, the Commission has no basis to conclude that should RSTF money be sent to the Tribe at Ms. Burley's address, it will be used for the benefit of all tribal members. The Commission would be derelict in its duties as a trustee under Compact Section 4.3.2.1(b) if it knowingly distributed RSTF funds to a group of individuals that did not comprise the tribal membership.

As we have reiterated on numerous occasions, the Commission does not assert that it has the authority to grant recognition to a tribal government or to determine tribal leadership or membership. However, while the Compact states that the Commission has "no discretion with respect to the use or disbursement of trust funds," it also states that the Commission "shall serve as trustee of the fund." (Section 4.3.2.1(b).) Until such time as the BIA/Department of Interior or a court of competent jurisdiction determines that there is a recognized tribal membership or government or a person of authority who represents a legitimate tribal membership, we feel we have no choice but to withhold the funds.

As you may be aware, we sought judicial determination with regard to the distribution (*California Gambling Control Commission v. Sylvia Burley, et al.*, Sacramento County Superior Court, No. 05SA05386) and deposited the withheld funds with the court, pending resolution. However, Ms. Burley successfully opposed that lawsuit, and the amount withheld has since increased four-fold. In that regard, the total amount withheld (as of September 30, 2007) is $3,121, 397.76. This amount is held in the State's Surplus Money Investment Fund (SMIF), which draws interest. The SMIF interest rate adjusts quarterly.

Sincerely,

Dean Shelton

DEAN SHELTON
Chairman

cc: Silvia Burley
1061 Escondido Place
Stockton, CA 95212

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