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

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, *et al,* Defendants, and, CALIFORNIA VALLEY MIWOK TRIBE Intervenor-Defendant.	Case No. 1:11-cv-00160-BJR Hon. Barbara Jacobs Rothstein

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S BRIEF IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

No party in this case can dispute that "tribal organization . . . must reflect majoritarian values." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008) (*Miwok II*). But the Secretary's August 31, 2011 decision ("2011 Decision") subverts the majoritarian principles established for this Tribe in *Miwok II* by declaring that a "majority" means only a majority of five individuals. The Secretary's membership determination represents a 180-degree turn away from both the Secretary's prior recognition of the larger Tribal membership, and the overwhelming evidence in the record. That record, which includes members' genealogies, a Tribal Roster, and historical documents, shows that there are more than 200 adult members of the Tribe, just as the parties acknowledged in *Miwok II*.[1] Because the 2011 Decision and its recognition of a Tribal government depend on the Secretary's unlawful attempt to limit the Tribe's membership, the Decision must be reversed.

The Burley Faction argues that the Secretary's 2011 Decision properly deferred to an established Tribal government and membership criteria, and that "the Secretary cannot forcibly expand the membership and alter the governmental structure of an Indian tribe with an existing, defined and established citizenship and form of government." ECF No. 83, p. 1 ("MSJ Brief"). But, as the Secretary has admitted and as this Court previously found, "Prior to the decision on review, the Secretary recognized no government of the Tribe." ECF No. 76, p. 10 ("September Opinion"). Therefore, the Secretary's determination that the Tribe has only five members cannot rest on deference to any established Tribal authority.

[1] The Courts in *Miwok I* and *II* accepted the Secretary's and the Burley Faction's estimates that the Tribe may number around 250 members, but they were not asked to identify the Tribe's members. *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 201, 203 n.7 (D.D.C. 2006) (*Miwok I*); *Miwok II*, 515 F.3d at 1267.

Instead, the 2011 Decision rests squarely on the Secretary's post hoc rationalization that membership in this Tribe is limited to individuals named in the 1966 Distribution Plan prepared under the Rancheria Act, and their descendants. The Burley Faction urges the Court to accept that argument, claiming that the United States owes "no legal or moral obligation [] to any other ancestral Indian . . . including the 1915 Census Indians." MSJ Brief, p. 8. But the Distribution Plan did not define or limit this Tribe's membership, as Plaintiffs have explained previously.

The Burley Faction also argues that Plaintiffs seek "to have this Court ignore the United States' documented history of dealings with this tribe since 1915." MSJ Brief, p. 4. The opposite is true: Plaintiffs recognize 242 adult Tribal members who are lineal descendants of acknowledged historical members of the Tribe. It is the Burley Faction that seeks to wipe out the Tribe's history by implicitly arguing, as the Secretary put it, that "the Tribe did not exist until the 1990s, with the exception of Yakima Dixie" [2004 Decision, AR 000500]. The 2011 Decision, likewise, disregards the historical evidence, including the 503 genealogies submitted to the BIA and the Tribal Roster that Plaintiffs submitted in their May 3, 2011 briefing [AR 002265-002275]. In short, the historical record confirms that there are hundreds of Tribal members. The Burley Faction argues that, with one or two exceptions, those members have never been anything more than "potential" members—a nonsensical claim that would nullify the history of the Tribe.

Because the Tribe's membership is not limited to the five people named in the 1998 Resolution, the Secretary's recognition of a Tribal government based on that document also violates the majoritarian requirements of the Indian Reorganization Act ("IRA"). The Burley Faction's argument that the IRA does not require the Tribe to organize under a constitution misses the point. Whether a tribe chooses to organize itself through a Secretarial election and constitution under IRA 476(a), or through other governing documents and procedures under IRA

476(h), "tribal actions [must] reflect the will of a majority of the tribal community . . .." *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 202 (D.D.C. 2006) (*Miwok I*).

Finally, the Burley Faction's claim that the 2011 Decision is "completely consistent" with the Secretary's previous position is unavailing. The Secretary has admitted, and the record unequivocally proves, that the 2011 Decision represents a "180-degree change of course" [AR 002050] from the position that the Secretary defended in *Miwok I* and *Miwok II*. Likewise, the Burley Faction cannot escape the preclusive effect of the Court's prior holding in *Miwok I* that the Burley Faction had not organized the Tribe "outside of the IRA," because it failed to comply with the majoritarian principles required by IRA section 476(h). *Miwok I,* 424 F.Supp.2d at 201.

II. ARGUMENT

A. The Secretary Unlawfully Found that the Tribe's Membership Is Limited to Five People

1. Deference to Tribal Self-Government Cannot Justify the Secretary's Determination of Tribal Membership

The Burley Faction argues that the 2011 Decision properly respected Tribal rights of self-determination by declining to "second-guess" the "established membership and form of government" of the Tribe. MSJ Brief, p. 5. This argument implies the existence of a Tribal government that is capable of making membership determinations to which the Secretary could properly defer. But, as the Court found in its September Opinion: "Prior to the decision on review, the Secretary recognized no government of the Tribe." Sept. Op., p. 15 (citation omitted). Nor did the Secretary recognize any written documents that formally defined the Tribe's membership criteria. This includes the 1998 Resolution, and its "General Council," on which the 2011 Decision relies.[2] Therefore, the Secretary's determination that the Tribe's

[2] The Secretary had rejected the Burley Faction's constitutions containing membership criteria. *See Miwok I*, 424 F.Supp.2d at 199, 203 n.7. The 1998 Resolution only states that the Tribe consists of "at least" the four Burleys and Yakima Dixie. AR 000177.

membership is limited to five people cannot be justified as deference to an established Tribal government or established membership criteria.

Moreover, the Secretary's reliance on the 1998 Resolution and General Council to define the Tribe's membership is circular. The Secretary's deference to that Council *assumes* the very fact that the 2011 Decision seeks to establish. If the Secretary's determination is to survive scrutiny, it must stand not on blind deference to a claim of tribal sovereignty but on the evidence that was before the Secretary when she issued the 2011 Decision.

2. The Lineal Descendants Have Always Been Actual Members, Not 'Potential Members'

The Burley Faction claims that "the Tribe's five citizen membership [as defined in the 2011 Decision] is the only membership that the United States has ever acknowledged and stems from a historical record with the Tribe dating back to 1915." MSJ Brief, p. 5. According to the Burley Faction, all others are merely "potential members" with no rights. As a threshold matter, the federal government's "acknowledgment" does not make someone a Tribal member. The *Tribe's* acknowledgement determines membership. *E.g.*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981) (citing *U.S. v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978)); 25 C.F.R. § 81.1(k) (BIA regulations defining a tribal "member" based on recognition by the tribal community).

In addition, the historical record shows that the United States acknowledged the Tribe's historical members, and their lineal descendants, as actual members. The United States' formal recognition of the Tribe began when the 1915 Indian census identified the remnants of an Indian community living near the present-day Sheep Ranch Rancheria, which the United States then purchased for the benefit of those 12 Indians, the 1915 Members [AR 000003-000004]. The Burley Faction strains to avoid characterizing the 1915 Members as actual citizens of the Tribe, instead referring to them as a "cluster of twelve Indians." MSJ Brief, p. 6. But the record is

clear: prior to the 2011 Decision, the United States recognized the 1915 Members, and their descendants, as Tribal members. *E.g.*, 2004 Decision, AR 000500; Legal Notice, AR 001501.

Nor did Tribal members lose their membership rights by not voting in the 1935 IRA referendum, as the Burley Faction suggests. Nothing in the IRA states that the voting list for the referendum determines membership in a tribe. As the Department has stated, the IRA voter list represents an *additional* source of information about historical members of the Tribe, not a *limitation* on membership. *See* 2004 Decision, AR 000500; Legal Notice, AR 001501.

The United States continued to recognize the 1915 Members, and their Lineal Descendants, until the "180 degree change of course" reflected in the 2011 Decision. For instance, in 2004 BIA official Brian Golding testified that "the Tribe [as of 1997] consisted of a loosely knit community of Indians in Calaveras County. . . . In no way was the [1997] letter intended to suggest that the Tribe had no members or that the Tribe did not exist . . .." AR 000507. In a 2004 federal court brief, the Secretary refuted the Burley Faction's argument that (in the Secretary's words) "there were no tribal members until 1992 or thereabouts," stating:

> 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. And in the 2007 Legal Notice, the Secretary identified the known historical members of the Tribe, including the 1915 Members, and stated that individuals who could establish themselves as Lineal Descendants of those members were "eligible to participate in all phases of the organizational process of the Tribe" [AR 001501]. Each of the Tribal members named on Plaintiffs' Tribal Roster is a Lineal Descendant of one of those historical members.

The Burley Faction, like the Secretary, now seeks to relegate most of the Tribe's known historical members, and their Lineal Descendants, to "potential members" with no rights. Although the Secretary previously used the term "potential members" in litigation briefs during

the *Miwok* cases, it was used to indicate a class of unknown individuals who, *once identified*, would be entitled to participate in the organization of the Tribe. *E.g.*, AR 002073, 2074, 2082, 2084, 2087, 2097, 2099. Department *decisions* used the term "putative member," which means "generally accepted or deemed such; reputed [a putative ancestor]." Webster's New World Dictionary (bracketed language in quoted text). *See* 2005 Decision, AR 000610-000611 ("the first step in organizing the Tribe is identifying putative tribal members"); 2007 Legal Notice, AR 001501 (same). Not until the 2011 Decision did the Secretary take the position that these Lineal Descendants are not actual members and have no membership rights [AR 002051]. Neither the Secretary nor the Burley Faction has provided any legal or factual basis for this arbitrary limitation on the Lineal Descendants' membership rights.

3. The Distribution Plan Did Not Terminate the Rights of the Tribe's Members

To support its efforts to strip the Lineal Descendants of their membership, the Burley Faction argues that the 1966 Sheep Ranch Distribution Plan identified all of the Tribal members to whom the United States owed a "legal or moral obligation," and that anyone not named in the Plan was not a member. MSJ Brief, p. 7. This claim echoes the Secretary's post hoc rationalization that the Tribe's membership must be limited to distributees and their descendants. The Burley Faction's argument fails for the same reasons as the Secretary's rationale.

Congress did not intend for distribution plans prepared under the now-repealed California Rancheria Act to determine tribal membership or to identify all members of a tribe, and thus "no provision [wa]s made for preparing a membership roll for each rancheria or reservation." Sen. Report 1874, p. 3 (July 22, 1958); House Report 1129, p. 4 (Aug. 13, 1957) (same). Distribution plans merely identified those tribal members who were using reservation lands under administrative allotments, so that those lands could be distributed to them. House Report 1129, p. 5; 25 C.F.R. § 242.3(a) (1965) (AR 000035). Further, under the plain language of the

Rancheria Act, only the members to whom the United States distributed a rancheria tribe's assets, and their immediate families, gave up their Indian status and eligibility for benefits under federal law. P.L. 85-671, § 10(b). Thus, the Burley Faction's claim that the United States owes no trust obligation to anyone *not* named in the 1966 Distribution Plan is exactly backward.

Finally, all parties agree that the United States never actually terminated its trust relationship with this Tribe. The Secretary cannot terminate the Tribe now, or limit this Tribe's membership using a standard that applies only to certain tribes that *were* terminated and later restored. *See* ECF No. 61, pp. 13-21. Moreover, the United States has long since repudiated Termination Era policies, which sought to extinguish federal obligations to Indian tribes and their members. The Burley Faction's suggestion that the Court rely on the Distribution Plan to deny the Secretary's "legal or moral obligation[s]" to Plaintiffs and hundreds of other Tribal members conflicts absolutely with the United States' ongoing trust duties to Tribal members.

B. The Secretary's Recognition of a Tribal Government Based on the 1998 Resolution Violates the IRA and the APA

1. The IRA Controls This Case

This case is not about the power of a federally recognized Indian tribe to govern itself, as the Burley Faction argues. It is about whether the organization of a Tribal government meets the standards for recognition by the United States. Organization of a tribe simply means the adoption of valid governing documents and membership criteria by a majority of a tribe's members. Osage Tallchief Decision, AR 000066. For tribes that have accepted it, the IRA provides for two models of organization: adoption of a tribal constitution through a Secretarial election, or adoption of other governing documents (or a constitution) through other procedures, pursuant to a tribe's "inherent authority" under IRA 476(h). The second option allows for great

flexibility in the form of government and the procedures used to create it. *Miwok II*, 515 F.3d at 1264-1265. But under either option, majoritarian principles control. *Id.* at 1267-1268.

The Burley Faction argues that the Tribe is not required to adopt a constitution under IRA procedures. MSJ Brief, pp. 8-9. This misses the point entirely. All parties agree that this Tribe accepted the IRA in 1935. Under either option offered by the IRA, a Tribal government must reflect the will of the entire Tribal community. The 1998 Resolution does not meet this standard. There is no third, "non-IRA model," MSJ Brief, p. 9, that requires the Secretary to accept the Burleys' claims of tribal sovereignty at face value. IRA 476(h) *is* the "non-IRA model," and the Secretary may not sidestep its requirement of majoritarian rule.

2. The 1998 Resolution Was Not Adopted By a Majority of the Tribe's Members

As the federal government has acknowledged (see above), the Tribe's membership in 1998 included many more individuals than Yakima Dixie and the Burleys.[3] Plaintiffs have identified at least 83 current members who were alive and over the age of 18 in 1998. The 1998 Resolution, adopted "without so much as consulting" those members, *Miwok II*, 515 F.3d at 1263, does not comply with the IRA.[4]

3. Plaintiffs' Claims Are Not Time-Barred

The Burley Faction claims that the 2011 Decision merely "reaffirms" the United States' recognition of an existing Tribal government and membership that began in 1998, and thus Plaintiffs' lawsuit is a "time-barred challenge to a final agency actions [sic] issued over 15 years ago"—*i.e.*, the September 24, 1998 BIA letter stating that the Burleys and Yakima Dixie were

[3] Even assuming for the sake of argument that the Burleys were properly admitted to the Tribe, which Plaintiffs continue to contest.

[4] Even under the Secretary's theory of membership, the Tribe's adult members in 1998 would have included at least four people: Silvia Burley, Rashel Reznor, Yakima Dixie and Melvin Dixie, who was Yakima's brother and also an heir to Mabel Hodge Dixie. AR 000177. Only two people signed the 1998 Resolution, and the Secretary's Answer admits two is not a majority of four. ECF No. 34, ¶ 43.

entitled to participate in Tribal organization. MSJ Brief, p. 7. The Court rejected this argument in its September Opinion, finding that neither the 1998 letter nor other letters "presaged the Secretary's [2011 Decision] announcement … that the citizenship of the [Tribe] consists *solely* of Yakima Dixie, Silvia Burley, and Burley's three descendants." Sept. Op., p. 13.[5]

C. The Secretary Is Bound by the Decisions, and Her Prior Positions, in *Miwok I* and *II*

1. Issue Preclusion Operates Against the Secretary and the Burley Faction

In *Miwok I*, this Court found that the Burley Faction's purported government failed to meet the requirements for the Tribe to organize pursuant to its "inherent sovereignty" under IRA 476(h).[6] The Burley Faction misrepresents the Court's prior decision, claiming that "in no way does the Court's holding [in *Miwok I*]… equate to a determination that the Tribe's government was not organized ***outside of the IRA . . ..*** [T]his issue was never before this Court." Docket 83, p. 12 (bold and italics in original). But the Court's decision in *Miwok I* speaks for itself:

> The Tribe seeks declaratory and injunctive relief affirming that it possesses the "inherent authority" to adopt the governing documents **outside of the [IRA**], pursuant to 25 U.S.C. § 476(h); that the documents the Tribe has adopted are valid governing documents; and that the Tribe has lawfully organized pursuant to its **inherent sovereign authority**.

Miwok I, 424 F.Supp.2d at 201 (emphasis added). In dismissing the Burley Faction's suit, the Court necessarily held that the Burley Faction had not organized the Tribe "outside of the IRA," because its "governing documents" were not "ratified by a majority vote of the adult members" of the Tribe as required by IRA 476(h). *Id.* at 202. That issue is not subject to relitigation.

2. Judicial Estoppel Bars the Secretary from Reversing Her Prior Litigation Position

The Burley Faction argues that judicial estoppel does not apply in this case because the

[5] The Secretary's decision in 2005 that the United States did not recognize any Tribal government rendered moot any challenge to the Secretary's recognition of the 1998 Resolution and General Council. *Id.*

[6] Because both the Secretary and the Burley Faction were parties to that litigation, the prior case meets the identity of party requirement for issue preclusion.

Secretary's position is not "clearly inconsistent" with her positions in *Miwok I* and *II*. Docket 83, p. 13. The Secretary previously argued that she could not recognize the Burley Faction's Tribal government because it "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; *see also* AR 000775. The 2011 Decision now states that the Secretary must "defer" to a Tribal government controlled by the same three people, and that the "potential members"[7] have no rights. The Burley Faction claims that the Secretary previously recognized the Lineal Descendants only as "possible" members, not as "actual" members. But the fact remains: the Secretary previously argued that the Tribe could not be organized without the participation of the Lineal Descendants, and she cannot now reverse her position and deny their right to participate.

3. The 2011 Decision Violates Prior Department Positions

The Secretary's prior decisions, including the 2004, 2005 and 2007 Decisions, identified groups of individuals who were members of the Tribal community and must be involved in any Tribal organization process. AR 000500, 001501. Whether phrased as "recommendations" or offers of "technical advice," MSJ Brief, p. 14, these decisions *denied* recognition to the Burley Faction because of its failure to include the full Tribal community in its purported government. The 2011 Decision now embraces the very same Burley Faction and its claims to authority. This is exactly the type of "180 degree turn away from precedent" that this Court has found "quintessentially arbitrary and capricious." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 18 (D.D.C. 2009) (citation and quotation marks omitted).

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny federal Defendants' motion for summary judgment and grant Plaintiffs' motion for summary judgment.

[7] As explained above, the Lineal Descendants are actual members, not potential members.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2013, I caused a true and correct copy of the foregoing PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S BRIEF IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR SUMMARY JUDGMENT to be served on the following counsel via electronic filing:

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