Case No. 12-16539
On Appeal From District Court No. 5:10-cv-1605-JF (N.D. Cal.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLOVERDALE RANCHERIA OF POMO INDIANS OF CALIFORNIA, ET AL.,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE CLOVERDALE RANCHERIA OF POMO INDIANS OF CALIFORNIA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS-APPELLANTS' ACTION

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This brief is filed with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Cloverdale Rancheria of Pomo Indians of California declares:

1. No party's counsel authored this brief in whole or in part;
2. No party or party's counsel contributed money to fund preparing or submitting this brief; and
3. No person or entity other than Amici contributed money to fund preparing or submitting this brief.

STATEMENT OF INTEREST

The Cloverdale Rancheria of Pomo Indians of California ("Tribe" or "Cloverdale Rancheria"), is a federally-recognized Indian tribe. The Tribe is represented by a duly established Tribal Council: Patricia Hermosillo, Chairperson; Silver Galleto, Vice-Chairperson; Christina Hermosillo, Secretary; Vickey Macias, Treasurer; and Sandy Roope, Member.[1] This Tribal Council is the tribal government authorized to represent the Tribe and recognized by the United States in its government-to-government relationship. While Plaintiffs-Appellants are dissatisfied with the present tribal government, there is no dispute between the Federal-Appellees and the Tribe as to the Tribe's current authorized government representatives.

Plaintiffs-Appellants are a handful of disgruntled individuals who are attempting to overthrow the recognized tribal government to control the development of a casino in Sonoma County, California, and who failed to obtain officer positions in elections held pursuant to the Tribe's Constitution and Election

[1] The current Tribal Council consists of members who were elected in 1996 and were subsequently re-elected and other members elected as recently as January 2013. The Tribal Constitution and Election Ordinance provides for Tribal Council elections, with staggered four-year terms, every two years.

Ordinance.[2] In 2008, Plaintiffs-Appellants held an election outside of the tribal process and law to appoint themselves to office and sought to have these results recognized by the Federal-Appellees. The Federal-Appellees have consistently refused to recognize Plaintiffs-Appellants' actions.

The Tribe's interests in this action are to protect the integrity of the Tribe and its sovereignty. The claims presented by Plaintiffs-Appellants are direct attacks on the Tribe's ability to self-govern and the decision by the United States to continue to recognize the Tribe's present government. The practical effect of this suit would be to divest the Tribe of its present government and to anoint Plaintiffs-Appellants as representatives of the Tribe. While Plaintiffs-Appellants take great pains to draft new claims centered on the Indian Self-Determination and Education Assistance Act ("ISDA") to create the ruse of the Court's jurisdiction, this appeal represents simply another example of Plaintiffs-Appellants' continuing efforts to seize control of the Tribe and to force the United States' to recognize their self-

[2] A California company, Native American Resource Development Group LLC ("NARDG") was established by investors, former BIA officers, and Eileen Peebles, spouse of John Peebles a name partner of Fredericks, Peebles and Morgan LLP and counsel for Plaintiffs-Appellants, for the "purposes of organizing, funding and managing a company to develop a casino at Cloverdale, California." First Amended Compl., Ex. A, *Beer v. Smith*, No. 34-2010-00076862 (Sacramento Super. Ct. filed April 29, 2010). Pursuant to the NARDG Membership Agreement, a loan "was due and payable on November 30, 2010 or upon any financing obtained in conjunction with the development of a Casino with the *Committee to Reorganize the Cloverdale Rancheria*." *Id*. ¶ 21 (emphasis added).

appointment. The determinations in this action sought by Plaintiffs-Appellants' could have dramatic and far-reaching impacts on the Tribe's future governmental structure, its relationship with the Federal-Appellees, and the Tribe's ability to self-govern without interference from the Federal-Appellees and from federal courts.

If Plaintiffs-Appellants' requests for relief regarding the ISDA contract proposal were to be granted, the Tribe's present contract would necessarily be terminated by such an action. Throughout its complaints, Plaintiffs-Appellants admit that the Federal-Appellees have renewed the Tribe's ISDA contract at the request of the Tribe's presently recognized tribal government. (Opening Br. at 29; SAC ¶ 166, ER Tab 5.) Thus, any disruption to the Tribe's present ISDA contract would impact the Tribe and its members by divesting its present tribal government of its appropriate powers and by disenfranchising a tribal community that elected a tribal government to represent its interests.

Furthermore, the Tribe has a significant protectable interest because it was improperly named as a party in this suit. The Tribe is represented by a Tribal Council that has been recognized by and contracts with the Federal-Appellees. Neither the Tribal Council nor the General Council has authorized this lawsuit. The Tribe has participated as an interested party in proceedings regarding all requests and appeals made by Plaintiffs-Appellants to the Bureau of Indian Affairs ("BIA") and the Interior Board of Indian Appeals ("IBIA") and consistently

opposed efforts by Plaintiffs-Appellants to obtain "recognition" in the District Court.

On or about April 14, 2010, the Plaintiffs-Appellants filed the present action against the United States in the name of "Cloverdale Rancheria" without any authority to act on the Tribe's behalf or to use its name for any purpose. The Tribe first filed motions to intervene and dismiss on June 16, 2010. (Dist. Dkt. 6.) The Tribe re-filed motions to intervene, dismiss, and requesting sanctions on September 3, 2010 after the Plaintiffs-Appellants filed a First Amended Complaint. (Dist. Dkt. 9.) On May 17, 2011, the District Court dismissed the First Amended Complaint pursuant to motions field by the United States and held the Tribe's pending motion to intervene moot. On July 21, 2011, Plaintiffs-Appellants filed their Second Amended Complaint. The Tribe again re-filed motions to intervene and related motions on September 2, 2011. (Dist. Dkt. 78.) On May 12, 2012, the District Court dismissed the Second Amended Complaint and held the Tribe's pending motion to intervene moot.

Because the Plaintiffs-Appellants continue to assert that the Federal-Appellees has a duty to recognize Plaintiffs-Appellants' as the "correct governing body" of the Tribe, the Tribe respectfully submits this amicus brief in support of the Federal-Appellees opposition to Plaintiffs-Appellants' appeal to provide this Court information, as well as to provide insight to the public and private interest

that would be affected should this Court reverse the District Court's dismissal of Plaintiffs-Appellants' action.

INTRODUCTION AND SUMMARY OF ARGUMENT

In seeking an order compelling the Federal-Appellees to recognize them as the governing body of the Cloverdale Rancheria, Plaintiffs-Appellants seek to convince the Court that the BIA left open a tribal "organizational" issue for the past sixteen (16) years. Frustrated by the BIA's legal inability to award Plaintiffs-Appellants the federal recognition it so desperately desires and entirely unwilling to participate in appropriate internal tribal processes and elections, Plaintiffs-Appellants attempt to frame this action as one where the BIA has allegedly failed to comply with an obligation to assist in the organization of the Tribe. However, Plaintiffs-Appellants actually are challenging the actions of the Tribe's governing body.

The rightful and duly elected Tribal Council for the Cloverdale Rancheria is charged with protecting the interest of the Tribe and its members. We respectfully request the Court affirm the District Court's dismissal of Plaintiffs-Appellants' action.

A. Cloverdale Rancheria Organization After *Hardwick*.

The Tribe was previously terminated under the California Rancheria Act of 1958, Pub. L. 85-671, 72 Stat. 619, *amended by* Pub. L. 88-419, 78 Stat. 390. In 1983, the Tribe was restored pursuant to *Hardwick v. United States*, No. C-79-1710-SW (N.D. Cal.). In 1996 and 1997, the Tribe organized itself with the assistance of the BIA. Cloverdale Rancheria's post-restoration organization was the most well-documented organization of any tribe restored pursuant to *Hardwick*. Not only was the BIA actively involved in the Tribe's organization, that involvement is detailed in litigation that ensued over the organization, specifically *Alan-Wilson v. Sacramento Area Director ("Alan-Wilson I")*, 30 IBIA 241 (1997); *Alan Wilson v. Acting Sacramento Area Director ("Alan-Wilson II")*, 33 IBIA 55 (1998); and *Cloverdale Rancheria of Pomo Indians of California v. United States*, No. C-96-1037-CW (N.D. Cal. 1996), *aff'd*, 23 Fed. App. 819 (9th Cir. 2001). The Zunie Report cited throughout Plaintiffs-Appellants' complaints was prepared as an exhibit for and filed in *Cloverdale Rancheria of Pomo Indians of California*, No. C-96-1037-CW (N.D. Cal. 1996), *aff'd*, 23 Fed. App. 819 (9th Cir. 2001) and was used as evidence before the IBIA and the federal court that Cloverdale Rancheria was organized by the BIA in a manner consistent with that of other *Hardwick* tribes.

In 1991, Jefferey Alan-Wilson, an individual who is not a distributee, dependent member or lineal descendant of a distributee, attempted to formally organize the Cloverdale Rancheria by proclaiming himself Interim Spokesperson. In 1994, John Santana, a distributee of the Cloverdale Rancheria, informed the BIA of his intent to organize a tribal government. On August 19, 1994, the BIA withdrew its recognition of Alan-Wilson and recognized an interim government headed by Santana.

On June 1, 1996, in an election conducted and supervised by the BIA, the Cloverdale Rancheria's distributees, dependent members and their lineal descendants ("*Hardwick* class") voted to elect the Tribal Council led by Patricia Hermosillo as Chairperson ("June 1996 Council"). Only the 127 members of the *Hardwick* class were eligible to vote. Since then, the BIA has conducted government-to-government with the June 1996 Council and its successors.

Alan-Wilson appealed the BIA's decision. In *Alan-Wilson I*, the IBIA determined "this case concerns, in essence, the creation of a tribal entity from a previously unorganized group," and remanded the case back to the BIA to demonstrate what practice the BIA has followed in the reorganization of other tribes restored under *Hardwick* and apply that same practice to the Cloverdale Rancheria. 30 IBIA at 261-62. The IBIA also affirmed the BIA's conclusion that under *Hardwick* the individuals entitled to participate in the organization of a

government for the Tribe were the *Hardwick* class. As a result, on October 21, 1997, the BIA again sent notices to the *Hardwick* class. On November 8, 1997, the *Hardwick* class voted again to support the June 1996 Council.

On December 23, 1997, the BIA recognized the June 1996 Council as the *rightful governing body of Cloverdale Rancheria*. In his decision, the Area Director stated:

> With the results of Mr. Zunie's research in hand, this office made the determination that the Bureau has been consistent in following the Hardwick Decision when recognizing all but the Cloverdale Rancheria Tribal Council. The Area Director then determined that the proper parties to organize the Cloverdale Rancheria are the distributees, dependant members and lineal descendants thereof who were listed on the distribution plan for the Cloverdale Rancheria. Upon making this decision the Area [Director] instructed Mr. Zunie to comply with the instructions of IBIA by establishing a meeting with those individuals who met the Hardwick criteria in order to allow them to determine how they desired to organize the Cloverdale Rancheria.
>
> Mr. Zunie, on October 21, 1997, sent notices to the qualified individuals inviting them to a November 8, 1997, meeting regarding the organization of the Tribe. The eligible participants were the same 127 individuals who were previously determined to be eligible to vote at the June 1, 1996, election. On November 8, 1997, at the Citrus Fairgrounds, Cloverdale, California, a meeting was held with those individuals who responded to the notice. During that meeting the attendees caucused, without BIA officials present, to discuss whether to support the June 1 Council or hold a new election. The attendees then passed a resolution to support the June 1 Council as their interim governing body.
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> . . . .

> Based upon the above, it is my decision to recognize the June 1 Council as the rightful governing body of the Cloverdale Rancheria.

See Alan-Wilson II, 33 IBIA at 56 (quoting Area Director's Dec. 23, 1997 Decision at 2). The Area Director's decision was then upheld by the IBIA in *Alan-Wilson II*. *Id*. For years following the IBIA's determination recognizing the June 1996 Council, Alan-Wilson, purportedly under the name of the Tribe, challenged the IBIA's determination and the recognition of the June 1996 Council. The matter was finally resolved in December 2001 when the Ninth Circuit upheld the District Court's dismissal of Alan-Wilson's challenge. *Cloverdale Rancheria of Pomo Indians of California*, 23 Fed. App. 819 (9th Cir. 2001). Notably, in its Opening Brief, Plaintiffs-Appellants omit the entirety of the Tribe's history from 1996 until 2008, and neglect to inform this Court of its earlier finding. *See Id*. The Tribe continued to build its government without challenge until Plaintiffs-Appellants 2007 actions.

B. Because Cloverdale Rancheria Is Organized, The BIA's Oversight Is Limited To That Of Any Other Federally-Recognized Indian Tribe.

At every step along the way, the Tribe sought and received the BIA's approval of its tribal organization, and the Tribe's organization was also subsequently approved by the IBIA and federal courts. Since initial organization, the Tribe has advanced its tribal government. Tribal membership has been consistent since 2003 when members of the *Hardwick* class voted to provide *all*

lineal descendants of the Cloverdale Rancheria equal benefits. Such a vote was not different or less valid than the same type of vote taken by many tribes throughout California who expanded their membership after the initial tribal organization was conducted by the *Hardwick* class. The Cloverdale Rancheria is entitled to the same respect and deference with regard to its decisions relating to tribal membership and elections as afforded to all other federally-recognized Indian tribes.

Despite its oversight responsibility of the initial organization of the Tribe, the BIA retained no authority as to membership and elections issues arising with the Cloverdale Rancheria after that initial organization. The federal government lacks the authority to interfere in internal tribal affairs. *Wheeler v. U.S. Dep't of Int.*, 811 F.2d 549, 550-552 (10th Cir. 1987); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). As previously noted by the IBIA, the "BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so." *Alan-Wilson I*, 30 IBIA at 252. However, once the BIA has exercised its responsibility with respect to the initial tribal government, its responsibilities with respect to organization ends. *See Jackson v. Pacific Regional Director*, 39 IBIA 234 (2004).

It is undisputed that the BIA has recognized and worked with the Tribe's governing body since 1997. Now, sixteen years after the organization of the Tribe,

Plaintiffs-Appellants seek to unwind years of tribal governance and disenroll a large number of tribal members who have historical ties to the Cloverdale Rancheria – threatening the Tribe's history and culture. Plaintiffs-Appellants' end game is to change the criteria for tribal membership thereby limiting membership to take over the majority. If allowed to proceed, Plaintiffs-Appellants would disenroll over a hundred tribal members including elders and children.

C. The IBIA Rejected Plaintiffs-Appellants Attempt To Recast This Intra-Tribal Dispute As A Federal Duty To Recognize Them As The Governing Body Of The Tribe.

In 2007, Plaintiffs-Appellants submitted a petition on behalf of a group referred to as the "Committee to Organize the Cloverdale Rancheria Government" to the BIA requesting that the BIA authorize the calling of a Secretarial election. The Tribe challenged the petition, and ultimately the BIA by letter dated April 18, 2008, denied Plaintiffs-Appellants' petition for a Secretarial Election.[3] In 2008, Plaintiffs-Appellants filed a second petition for a Secretarial election with the BIA. The petition was improperly forwarded by the Superintendent to the Regional Director without any comment or review by the Tribe. Eventually the Tribe received a copy of an August 8, 2008 letter from the Regional Director to the

[3] As evidence that Cloverdale Rancheria is organized and its government supported by its membership, the Tribe submitted declarations to the BIA from over 200 of the Tribe's 272 enrolled adult members, reaffirming the Tribe's organization outside of the IRA and that a Secretarial election should not be called.

Superintendent authorizing a Secretarial election on Plaintiffs-Appellants second petition. In response, the Tribe immediately filed an appeal to that decision with the IBIA. The IBIA stayed the Secretarial election, finding that the Tribe "demonstrated a likelihood of success on the merits that the Regional Director erred in authorizing a Secretarial election." *Cloverdale Rancheria of Pomo Indians of California v. Pacific Regional Director*, No. 08-151-A (2008) (Order Staying Further Action by BIA), *dismissed on other grounds*, 48 IBIA 308 (2008). As a result of the stay and the IBIA's finding of the Tribe's likelihood of success on the merits, Plaintiffs-Appellants withdrew their request for a Secretarial election and the case was dismissed. *Id*. at 312.

After their failed attempt at a Secretarial election, the Cloverdale Individuals conducted their own election. In March of 2009, Plaintiffs-Appellants filed an "Official Request for Recognition" with the BIA, seeking recognition of their election. The Superintendent denied their request in a June 19, 2009 decision which was upheld by the Regional Director in a June 3, 2010 decision letter. On July 6, 2010, Plaintiffs-Appellants filed an appeal of the Regional Director's decision with the IBIA. (SAC ¶ 76, ER Tab 5.) *See Committee to Organize the Cloverdale Rancheria v. Acting Pacific Regional Director*, 55 IBIA 220 (2012); SER 4. On July 9, 2010, three days *after* the appeal was filed with the IBIA, Plaintiffs-Appellants filed their First Amended Complaint in the present action.

That same day, Plaintiffs-Appellants submitted a request to the BIA to "modify" the Tribe's existing ISDA contract with the BIA. (SAC ¶ 90; ER Tab 5.) The stated purpose of the request was "to accurately reflect the current duly-authorized governing body and duly elected officials of the Cloverdale Rancheria []." (SAC, Ex. 11, ER Tab 5.)

In response to allegations that the BIA failed to timely act to organize the Tribe, the United States at the direction of the District Court requested an Expedited Consideration of Plaintiffs-Appellants July 6, 2010 IBIA appeal. The IBIA denied the request and found:

> The only separate request for Federal action that the [Committee-Appellants] identifies in its opening brief is a July 9, 2010, request by the Committee to BIA to "modify" the Tribe's existing self-determination contract. That request *post-dated* both the Superintendent's and the Regional Director's decisions and came *after* the Committee appealed to the Board, when it was clear that BIA no longer had jurisdiction to act on the request. *See supra* note 5. Obviously, if the Committee considered it important to allow BIA to take action on its July 9, 2010, request, it could have withdrawn this appeal, thus returning jurisdiction to BIA, or it could have sought an order from the Board to grant BIA jurisdiction to consider that request notwithstanding this appeal. It did neither.
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> . . .
>
> Even assuming that some dispute within the Tribe has existed for a long time, the present dispute arose from the [Committee-Appellants'] request that BIA recognize the Committee-sponsored 2008 and 2009 elections. As noted earlier, *it was the [Committee-Appellants] that mooted an earlier appeal which appeared to implicate some of the same underlying issues that the Committee's most recent request to BIA would also implicate* (e.g., whether the Tribe is already

> organized; whether only members of the *Tillie Hardwick* class are entitled to vote on a Tribal constitution), if the Board were to determine that BIA erred in declining to address the merits of the tribal dispute.

See Dist. Dkt. 53, Def. Supplemental Br. in Supp. Of Mot. to Dismiss FAC, Ex. 1 at 6-7 (emphasis added); ER Tab 3.

On August 6, 2012, the IBIA issued an Order to Plaintiffs-Appellants' July 6, 2010 IBIA appeal, holding that the BIA correctly declined to issue a decision addressing the merits of an internal governance dispute within the Tribe because there was no federal action required from the BIA that would have necessitated a decision on the tribal dispute. *Committee to Organize the Cloverdale Rancheria*, 55 IBIA 220; SER 4.

First, the IBIA rejected Plaintiffs-Appellants' arguments that the BIA was required to issue an official decision on the validity of the Committee-sponsored election and constitution on the grounds that the Committee failed to identify any specific federal action that would require an official decision from the BIA. Following a single line of reasoning from previous IBIA decisions, the IBIA reaffirmed that unless and until a specific federal action is "both" necessary and requires that the BIA make a decision on the internal tribal dispute, the BIA must refrain from taking sides and from issuing a decision.

Next, the IBIA addressed Plaintiffs-Appellants' assertion that their July 9, 2010 request to modify the Tribe's ISDA contract serves as "federal action"

sufficient to require the BIA to make a decision on the validity of the Committee-sponsored election and constitution ("post-decisional request"). While the Committee's post-decisional request "arguably might" qualify as federal action requiring the BIA to make a decision, such post-decisional request may not be used retroactively to change an earlier BIA decision. Finally, the IBIA rejected the Committee's argument that federal action should not be required for the BIA to make a decision on the internal tribal dispute. *Id*. at 224. It is well-established that internal tribal disputes are best resolved through the political process of the tribe and the will of its people.

The present action is the latest in a series of attempt by Plaintiffs-Appellants to overthrow the Cloverdale Rancheria's established government and compel the United States to recognize them as the purported governing body. The District Court properly refused to entertain such action.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS-APPELLANTS' FIRST, SECOND AND THIRD CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION.

A. The District Court Did Not Err In Finding Plaintiffs-Appellants Failed To Identify A Discrete Final Agency Action That The BIA Was Legally Required To Take.

Plaintiffs-Appellants allege that the Federal-Appellees failed to take the "discrete" action to recognize them as the "correct governing body" of the Tribe.

(Opening Br. at 27, 31; *see* SAC at 38, ER Tab 5.) However, Plaintiffs-Appellants present no authority, and none exists, requiring the Federal-Appellees to decide whether Plaintiffs-Appellants is the correct governing body of the Tribe. Instead, as the District Court explained, Plaintiffs-Appellants "refer to the expansive provisions 25 U.S.C. § 2, which grants the Secretary power to manage 'all Indian affairs and [] all matters arising out of Indian relations.'" (First Order at 7; ER 21; *see* Opening Br. at 37.) Because Plaintiffs-Appellants failed to show that the Federal-Appellees were "legally required" to recognize Plaintiffs-Appellants, the District Court correctly found that Plaintiffs-Appellants claim of a general deficiency of compliance is not specific enough to support their claim. (First Order at 7; ER 21.) *See Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 63, 66 (2004) (holding that unlike the failure to promulgate a rule or take some decision by a statutory deadline "[g]eneral deficiencies in compliance … lack the specificity requisite for agency action").

This Court held that while "there is a distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]. That alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)) (internal citations omitted).

The BIA may in certain circumstances be required, as an interim measure, to temporarily recognize some tribal entity with which it will establish a government-to-government relationship. *See Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) (the BIA was obligated to recognize a governing body where its failure to provide recognition "jeopardized the continuation of necessary day-today services on the reservation"); *Alturas Indian Rancheria v. Salazar*, No. S-10-1997, 2010 WL 4069455, (E.D. Cal. Oct. 18, 2010). The issuance of such interim determination "should be considered an unusual action to be undertaken only in *emergency* situations." *Cliv Dore v. Eastern Regional Director*, 31 IBIA 173, 174 (1997) (emphasis added); *see also Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130, 145 (1996) (noting that the BIA issued such an interim decision "only when the situation deteriorated to the point that recognition of some government was essential for Federal purposes"). In this case, Plaintiffs-Appellants allege no facts, and none exist, suggesting that the BIA's alleged failure to recognize Plaintiffs-Appellants' as the correct governing body would create an exigent circumstance that might jeopardize the continuation of necessary day-today services to the Tribe. Nor would such an allegation be plausible, as the BIA has since 1997 maintained a government-to-government relationship with the June 1996 Council and its successors to provide uninterrupted governmental programs and services to the Tribe and its members.

B. The District Court Properly Found That The BIA's Denial Of Plaintiffs-Appellants Recognition Is Not A Failure To Act.

Even assuming, arguendo, that "[i]t is conceivable that if the Secretary were to fail to respond to Plaintiffs request for recognition entirely, the delay could eventually constitute final agency action," the District Court properly determined, "that is not the case here." (First Order at 7; ER 21.) Because the BIA denied Plaintiffs-Appellants' Official Request for Recognition which was upheld by the Regional Director in a June 3, 2010 decision letter, the relief requested by the Plaintiffs-Appellants was granted – the BIA denied their request. Accordingly, the District Court properly found, "[t]o the extent that Plaintiffs seek to challenge Defendants' failure to recognize the 2009 Council, their claim is better understood as contesting Defendants' *denial* of recognition rather than a *failure* to recognize." (First Order at 7; ER 21 (emphasis added).) The Federal-Appellees "did not fail to act on Plaintiffs' request; they *denied* it." *Id.* The Supreme Court made clear that "failure to act is not the same thing as a denial. The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request." *SUWA*, 542 U.S. at 63 (internal quotation omitted). Plaintiffs-Appellants confuse inaction by the BIA with the BIA's failure to render a decision in their favor.

C. The District Court Correctly Held That *Hardwick* Does Not Give Rise To An Action Under The APA To Compel The BIA To Recognize Plaintiffs-Appellants.

Plaintiffs-Appellants allege that the Federal-Appellees violated the APA by failing to act pursuant to a duty arising from the *Hardwick* stipulated judgment. (SAC ¶ 113, 123, and 133, ER Tab 5.) However, neither the facts of this case nor the applicable law support Plaintiffs-Appellants' claims. Plaintiffs-Appellants failed to point to any provision within the *Hardwick* stipulated judgment or to any legal authority which imposed such an obligation on the Federal-Appellees to recognize Plaintiffs-Appellants. As the District Court correctly determined, "Plaintiffs provide no authority to support their contention that an agency's failure to comply with a Stipulated Judgment can give rise to an action under the APA." (First Order at 8; ER 22.); *see also Hardwick v. United States*, No. 5:79-CV-1710-JF, 2012 WL 6524600, (N.D. Cal. Dec. 13, 2012) (reaffirming that "an agency's failure to comply with a stipulated judgment does not give rise to a claim under the APA") (citing instant action). Because Plaintiffs-Appellants present no authority to support their claim that *Hardwick* can give rise to an action under the APA to compel the agency to recognize them as the governing body of the Tribe, the District Court properly found that the BIA assumes no specific duties beyond those found in applicable statutes, regulations, or other specific legislative command.

D. Even if *Hardwick* Could Serve As Basis For An APA Action, The District Court Properly Found That Plaintiffs-Appellants Failed To Show An Agency Action That The Federal Appellees Did Not Comply With *Hardwick*.

Even assuming the Federal-Appellees duties under *Hardwick* can give rise to an action under the APA, the facts are that the BIA did help and assist the members of the Cloverdale Rancheria organize during the 1990's, resulting in the election of the June 1996 Council, which the BIA recognized in 1997. Not only did the organization of the Cloverdale Rancheria occur over sixteen years ago, it did so under the supervision and direction of the BIA. *See* SAC ¶ 44, ER Tab 5 (Plaintiffs-Appellants acknowledge "[o]n or about December 27, 1997, the Acting Sacramento Area Director issued a decision recognizing the June 1 Interim Tribal Council. By Order dated October 14, 1998, the [IBIA] upheld the December 27, 1997 decision of the Acting Sacramento Area Director. [] A subsequent challenge to the decision was dismissed by the District Court for the Northern District of California in *Alan-Wilson v. United States,* No. C-96-1037 CW (N.D. Cal.) (Judgment Sept. 16, 1999), *aff'd sub nom. Cloverdale Rancheria of Pomo Indians of California v. United States*, 23 Fed.Appx [sic]. 819 (9th Cir. 2001)" (internal citations omitted).)

Except for providing assistance to the members of the Cloverdale Rancheria with their initial effort to organize as a tribe, *Hardwick* imposes no additional duty on the BIA to assist the Tribe afterward. Once a tribal organization has been

established, the BIA is not authorized or expected to interfere with the tribal organization, absent a requirement for the BIA to undertake a federal action. *See Jackson*, 39 IBIA at 237. Therefore, the District Court properly determined, "[e]ven if Defendants' duties under *Hardwick* could serve as a basis for an APA action, Plaintiffs have not identified a discrete, nondiscretionary command with which Defendants have failed to comply." (First Order at 8; ER 22.)

Plaintiffs-Appellants mischaracterize this case as one in which the BIA failed to perform a duty to assist in the efforts to organize the Cloverdale Rancheria, allegedly as part of the *Hardwick* case, merely because five individuals—one of whom is not even a tribal member, are dissatisfied with the actions of the Tribe's governing body. *See* SAC ¶ 51; ER Tab 5 ("Defendants have been aware that the Successor Tribal Council has included individuals who are not members of the Tillie Hardwick Class, and has taken direction from the Expanded Membership "General Council," the majority of which are not members of the Tillie Hardwick Class, all without authorization or approbation of the members of the Tillie Hardwick Class"). First, it was the *Hardwick* class, and only

the *Hardwick* class that voted to expand tribal membership in 2003.[4] Second, disagreement with one's tribal government is an internal tribal dispute to which a federal court has no subject matter jurisdiction to intervene.

The ultimate determination of tribal governance must be left to tribal procedures. The IBIA has consistently held that tribal members with grievances against tribal governments should take those grievances up with the tribal government themselves, not the BIA. *See Duncan v. Portland Area Director*, 33 IBIA 220 (1999); *Wadena*, 30 IBIA 130; *John v. Acting Eastern Area Director*, 29 IBIA 275 (1996); *Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144 (1996). Federal courts are specifically restricted from interfering in issues of tribal membership and internal political matters because doing so would "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Santa Clara Pueblo*, 436 U.S. at 71; *see also Boe v. Ft. Belknap Indian Cmty.*, 642 F.2d 276, 278 (9th Cir. 1981).

Moreover, as the District Court properly found, "[e]ven assuming that *Hardwick* does mandate that Defendants assist in creating an 'effective

[4] On February 26, 2003, the *Hardwick* class was noticed by letter that the Tribe would hold a special election to further consider membership. On April 5, 2003, the Tribe held a special election – in which only the *Hardwick* class was entitled to vote – on the question of whether to afford equal status, including voting rights, to all "tribal members" who have a lineal tie to Cloverdale Rancheria. With this vote, Cloverdale Rancheria enlarged its voting membership number to what today includes approximately 272 adults.

organization of the Cloverdale Rancheria,' such a command leaves considerable discretion in the hands of the agency." (First Order at 8; ER 22.) *See SUWA*, 542 U.S. at 66; *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) ("In reference to [matters of tribal recognition], it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. Under that presumption, it will be taken that [officials have] acted upon knowledge of the material facts") (internal citations omitted). Therefore, this Court should not compel the Federal-Appellees to recognize Plaintiffs-Appellants' purported governing body, and should affirm the District Court's decision to dismiss Plaintiffs-Appellants first, second and third claims for lack of subject matter jurisdiction.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS-APPELLANTS' FOURTH, FIFTH, AND SIXTH CLAIMS FOR LACK OF STATUTORY STANDING.

Because Plaintiffs-Appellants are not a tribe or a tribal organization for the purposes of the ISDA, the District Court properly dismissed their fourth, fifth, and sixth claims for lack of standing.

A. Plaintiffs-Appellants Do Not Have Standing To Sue Under The ISDA Because They Are Not A "Tribe" Or A "Tribal Organization."

An ISDA contract proposal must be authorized by an Indian tribe. Subsection (a)(1) of § 450f requires that the BIA, with exceptions not relevant here, to accept an ISDA contract proposal "upon the request of any Indian tribe by tribal resolution." Subsection (a)(2) authorizes a tribal organization to submit an ISDA proposal to the BIA "[i]f so authorized by an Indian tribe under [subsection (a)(1)]." Plaintiffs-Appellants are neither.

In entering into an ISDA contract with an Indian tribe, the BIA necessarily must determine which individuals are authorized to execute the contract as the officials representing the tribe. To that end, the regulations require that an ISDA contract proposal from a tribe must include "[t]he name, title, and signature of the *authorized* representative of the Indian tribe . . . submitting the contract proposal." 25 C.F.R. § 900.8(e) (emphasis added); *see id.* § 900.12 (contract renewal proposals). Therefore, the BIA is authorized to decline or approve *only* ISDA contract proposals submitted by the authorized representative of the tribe. Plaintiffs-Appellants, consisting of five individuals, are clearly not an "Indian tribe" itself, nor are they the recognized governing body of the Tribe.

The ISDA defines "tribal organization" as:

> "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 includes the maximum participation of Indians in all phases of its activities . . . ."

25 U.S.C. § 450b(l). Plaintiffs-Appellants do not currently represent, nor did they represent the Cloverdale Rancheria at the time they submitted their ISDA application. As discussed above, the BIA maintained a government-to-government relationship with the June 1996 Council and its successors as the authorized representative and recognized governing body of the Cloverdale Rancheria since the late 1990s. Plaintiffs-Appellants themselves have admitted that they are "not the governing body recognized by the Department." (Opening Br. at 48.) The Federal-Appellees are obligated to maintain government-to-government interactions with the tribal organization that represents the authorized representative of the Cloverdale Rancheria, and the Federal-Appellees have accordingly continued interactions with the June 1996 Council and its successors over the last sixteen years.

Approval or declination of proposals submitted by any party other than an authorized tribal organization of the Tribe would have represented a violation of the Act. Because Plaintiffs-Appellants do not qualify as a tribal organization, the Secretary is not authorized to decline or approve their proposal, and there was no need for the BIA to address the statutory bases for declining their ISDA contract proposal. 25 U.S.C. § 450f(a)(2), 25 C.F.R. § 900.22. *See* SAC ¶ 94, Ex. 14; ER

Tab 5 (the BIA informed Plaintiffs-Appellants that their proposal was being returned because the Committee did not represent the recognized tribal organization of Cloverdale Rancheria).

Plaintiffs-Appellants misconstrue the ISDA's meaning by quoting selectively from the ISDA. First, Plaintiffs-Appellants allege that they are a tribal organization, and theorized that because they established themselves as an organization of Indians elected by the adult members of the Indian community to be served by such organization, they were necessarily a "tribal organization" under the ISDA and should be so recognized now. (Opening Br. at 47.) Plaintiffs-Appellants conflates being an "established organization of Indians" with being an "authorized representative of the Indian tribe" in an effort to avoid the fact that the Tribe has a recognized governing body. (Opening Br. at 48.) This ignores the language of the statue, which makes clear that it is not enough to be merely a "legally established organization of Indians" to qualify as a "tribal organization" for purposes of the ISDA, such an organization must also be "the authorized representative of the Indian tribe" recognized by the BIA to execute an ISDA contract as the officials representing the Tribe. 25 U.S.C. § 450f(a)(1), (a)(2); 25 C.F.R. § 900.8(e).

Plaintiffs-Appellants further allege that because they come within the definition of "tribal organization," they should be recognized as a tribal

organization separate from the recognized governing body of the Tribe. (Opening Br. at 48.) This argument fails. As the District Court properly found, "the June 1996 Council has been recognized by the BIA, and has entered into self-determination contracts with the Secretary. Plaintiffs have cited no authority for the proposition that the ISDA authorizes the government to enter into separate, additional contracts with other factions of the Tribe." (Second Order at 12; ER 13.) Because Plaintiffs-Appellants do not qualify as a "tribal organization" with which the BIA could contract, Plaintiffs-Appellants could not satisfy the fundamental requirement that requires the Secretary to contract with a tribe through its authorized tribal organization. Thus, the BIA was correct to return Plaintiffs-Appellants' ISDA application.

B. Plaintiffs-Appellants Lack The Capacity To Maintain This Suit.

Because Plaintiffs-Appellants are not a tribe or a tribal organization for purposes of the ISDA, the District Court properly found that Plaintiffs-Appellants as "individuals purporting to represent the Tribe" lacks statutory standing to proceed under the ISDA. (Second Order at 11; ER 12.) Because plaintiff Committee to Organize filed a voluntary dismissal of its action on September 16, 2011, the District Court correctly noted that "the only remaining plaintiffs are the individual members of the January 2009 Council, purportedly acting on behalf of the Tribe." (Second Order at 6, 11; ER 7, 12.) Plaintiffs-Appellants concede that

they lack standing to bring suit as individuals, but allege that they are the correct tribal council acting in their official capacity to bring this suit. (Opening Br. at 52-53; ER 31.) However, as the District Court explained, "even if the Court were to allow amendment to add the January 2009 Council as a plaintiff, that entity lacks standing to proceed under the ISDA." (Second Order at 12; ER 13.) Because Plaintiffs-Appellants are *not* a tribe or a tribal organization, Plaintiffs-Appellants does not have standing to bring suit under 25 U.S.C. § 450f(b) of the ISDA. Plaintiffs-Appellants assert that they have been "duly elected" but offer no support, finding or recognition by the United States of this fact. (Opening Br. at 18; ER 51.) No such finding exists.

Insofar as Plaintiffs-Appellants are attempting to maintain suit in the name of the Tribe, Plaintiffs-Appellants have failed to demonstrate that they have the legal capacity to maintain this lawsuit in the name of the "Cloverdale Rancheria of Pomo Indians of California," the name by which the United States recognizes the Tribe. 77 Fed. Reg. 47868, 47869 (2012). Ordinarily, a plaintiff must assert his own legal interests, rather than those of third parties. *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). In the Indian law context, tribal members, including dissenting factions and individuals within a tribe, may not assert claims on behalf of a tribe. *See James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983); *Hackford v. Babbitt*, 14 F.3d 1457, 1466

(10th Cir. 1994). Even where a case is captioned in the name of a tribe, the suit cannot be maintained as such if the plaintiffs "ha[ve] no authority to act for the [tribe] and bring suits in its name." *Cherokee Nation v. United States*, 80 Ct. Cl. 1, 3 (1932). The Court is not required to accept as true those allegations by Plaintiffs-Appellants that are "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Plaintiffs-Appellants have no authority to use the Tribe's name in any capacity, and certainly not to bring suit against the United States. Perhaps, the most troubling aspect of the Plaintiffs-Appellants' expropriation of the Tribe's name is that sovereign immunity implications have been raised by such a pleading. By bringing a legal action, a tribe consents to adjudication of the claim it sues upon. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). Thus, the naming of a tribe as a plaintiff in an action carries serious legal implications. Plaintiffs-Appellants lacked capacity in this action to name the Tribe as a plaintiff, to sue on behalf of the Tribe's claims, and to waive the Tribe's sovereign immunity for any purposes.

The "Cloverdale Rancheria of Pomo Indians of California" is a party in error and should be dismissed. In the alternative, the Tribe's name should be stricken from the complaint and pleadings as "redundant, immaterial, impertinent or

scandalous matter." Fed. R. Civ. Pro. 12(g). This Court should not disturb the District Court's decision to dismiss Plaintiffs-Appellants' fourth, fifth and sixth claims for lack of standing.

CONCLUSION

Accordingly, and based on the foregoing, Amici respectfully request that the Court affirm the District Court's dismissal of Plaintiffs-Appellants' action.

Respectfully Submitted,

January 29, 2013

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CERTIFICATION OF COMPLIANCE

The undersigned certifies that this brief complies with the length limitation of Circuit Rule 29(d) because it is 6962 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)). The undersigned further certifies that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word in a 14-point proportionally spaced font that includes serifs.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 29, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

January 29, 2013

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