No. 12-16539

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.

On Appeal from the U.S. District Court for the Northern District of California
Case No. 5:10-cv-01605-JF
Hon. Jeremy Fogel

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants allege jurisdiction on the basis of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* and § 701 *et seq.*, the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, 43 U.S.C. § 1451, and 25 C.F.R. Part 900. The district court entered an order on May 17, 2011, and a second order on May 11, 2012, dismissing the case for lack of subject matter jurisdiction as to the first three claims and for lack of standing as to the remaining three claims. ER Tab 2–3.[1]

Plaintiffs timely filed a notice of appeal on July 9, 2012. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs-Appellants Javier Martinez, Sarah Goodwin, Lenette Laiwa-Brown, Gerad Santana, and John Trippo ("Cloverdale Individuals"), purportedly acting on behalf of the Cloverdale Rancheria of Pomo Indians of California ("Cloverdale Rancheria" or "the Tribe"), seek an order compelling Defendants-Appellees Secretary Salazar, et al., to reevaluate whether it has recognized the

[1] References to Appellants' excerpts of record are denoted by ER Tab number, and, where relevant, the document page number. References to Appellees' supplement excerpts of record are denoted by SER page number.

correct governing body of the Cloverdale Rancheria. The questions presented on appeal are:

1) Whether general federal Indian law or the *Hardwick* settlement, which restored tribal status to the Cloverdale Rancheria, creates a nondiscretionary duty for the Bureau of Indian Affairs ("Bureau") to review whether it is conducting government-to-government dealings with the correct tribal council.

2) Whether the Indian Self-Determination and Education Assistance Act (ISDA), which authorizes the Bureau to enter into contracts for tribal administration of Federal tribal programs and benefits, creates an independent legal duty for the Bureau to resolve a challenge to the validity of internal tribal governance decisions.

3) Whether the Bureau is required under the ISDA to evaluate the merits of the Cloverdale Individuals' self-determination contract, when the statute applies only to federal dealings with a "recognized governing body of any Indian tribe," 25 U.S.C. § 450b(j), (l), and the Bureau has recognized, and the Interior Board of Indian Appeals ("Board") has affirmed, the election of a different governing body.

STATEMENT OF THE CASE

Plaintiffs-Appellants Committee to Organize the Cloverdale Rancheria Government, et al., filed their original complaint on April 14, 2010, in the name of

the Cloverdale Rancheria. Dist. Dkt. 1. They seek a writ of mandamus compelling Defendants-Appellees to recognize what Plaintiffs claim is the duly authorized government of the Tribe. Defendants-Appellees moved to dismiss the case pursuant to Fed. R. Civ. P. 12(b). Dist. Dkt. 4. Plaintiffs filed their First Amended Complaint on July 9, 2010. Dist. Dkt. 14. On May 17, 2011, the district court dismissed the case for lack of subject matter jurisdiction because "Plaintiffs do not point to a specific legislative command for [the] proposition" that Defendants were required to recognize their government as a matter of general federal Indian law, which empowers the Bureau to manage "all Indian affairs and . . . all matters arising out of Indian relations." Tab 3 (2011 Order at 7) (quoting 25 U.S.C. § 2). This dismissal was without prejudice to Plaintiffs' then-pending motion for leave to file a second amended complaint. Tab 3 (2011 Order at 9).

Plaintiffs filed their Second Amended Complaint on July 21, 2011. Dist. Dkt. 75. The amended complaint restated the first three claims that the district court previously dismissed, and Plaintiffs indicated that "relief is not expected on the basis of these three claims," which "remain in the SAC [Second Amended Complaint] only to avoid variance from the Proposed SAC the Court granted leave to file." Tab 2 (2012 Order at 7). On September 16, 2011, the Committee to Organize the Cloverdale Rancheria Government voluntarily dismissed its case as

against all Defendants, leaving the Cloverdale Individuals as the sole plaintiffs in the action. Dist. Dkt. 80.

Defendants again moved to dismiss the action, Dist. Dkt. 82, and the district court granted the motion on May 11, 2012, finding in part that the Cloverdale Individuals did not have standing, "acting in their individual capacities, to seek review of [the Bureau's] conduct in this matter." Tab 2 (2012 Order at 2). Even if the Cloverdale Individuals had established their authority to bring suit on behalf of the purported rightful governing council, the Bureau had already recognized and signed self-determination contracts with the June 1996 Council. Therefore, a challenge to the "failure to act on Plaintiffs' self-determination proposals [is] simply . . . not an appropriate means" for challenging whether the Bureau has recognized the correct governing body. Tab 2 (2012 Order at 13). The Cloverdale Individuals timely filed a notice of appeal on July 9, 2012. Tab 4.[2]

[2] In addition to filing the amended complaint, Plaintiffs sought administrative review of the Bureau's decision not to decide the validity of the [] tribal elections. Subsequent to the district court's decision and the docketing of this appeal, the Board affirmed the Bureau's conclusion "declining to decide the validity of the 2008 or 2009 elections" through which the Cloverdale Individuals claim governing authority. SER 10, *Cmte. to Organize the Cloverdale Rancheria Gov't v. Acting Pac. Regional Director*, 55 IBIA 220, 226 (Aug. 6, 2012). The Board noted that there was no "single discrete action that was required of [the Bureau] at the time [the Committee] asked [the Bureau] to issue a decision on the validity of the constitution" adopted by Plaintiffs. SER 08 (55 IBIA at 224).

STATUTORY FRAMEWORK

The APA authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Section 706(1) "empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *Norton v. S. Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 64 (2004) (internal quotation marks omitted). A court may compel a "circumscribed, discrete agency action[]," such as a statutory command requiring an agency to promulgate regulations by a certain date. *Id.* at 62, 71. A plaintiff cannot invoke § 706(1) merely because it disagrees with an agency's reasonable choice to comply with broader statutory mandates in a particular manner. *See id.* at 66–67 ("The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.").

The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended principally at 25 U.S.C. § 450 *et seq.*), authorizes self-determination contracts between Indian tribes and the Secretaries of the Interior and of Health and Human Services. 25 U.S.C. §§ 450a, 450b, 450f. Congress enacted the ISDA to promote tribal participation in the management of Federal Indian programs. *See* 61 Fed. Reg. 32482, 32482 (June 24,

1996). The ISDA does not define a procedure for the organization of tribal governments or for the Bureau's recognition of tribes or tribal governments.

The Supreme Court has explained that, in regard to the recognition of Indian tribes, "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. Holliday*, 70 U.S. 407, 419 (1865); *see also Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." (internal quotation marks omitted)). It is well-established that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body. *See Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996) (citing *Bucktooth v. Acting E. Area Director*, 29 IBIA 144, 149 (1996)); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

In evaluating proposals for self-determination contracts, the Federal government "ha[s] a duty to conduct business only with lawfully-constituted governing bodies who represent the tribal membership." *Cal. Valley Miwok Tribe v. Kempthorne*, No. S-08-3164 FCD, 2009 U.S. Dist. LEXIS 13465, at *23 (E.D.

Cal. Feb. 23, 2009). "Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged" under the regulations governing federal dealings with tribes. 25 C.F.R. § 83.3(d).

STATEMENT OF FACTS

This case arises from a disagreement between two groups within the Cloverdale Rancheria, both of which claim to represent the Tribe. In 1921, the federal government purchased 27.5 acres of land comprising the Cloverdale Rancheria for the use of the Cloverdale Pomo Indians. ER Tab 5, ¶ 28. Congress subsequently enacted the California Rancheria Act of 1958, Pub. L. 85–671, 72 Stat. 619, amended by Pub. L. 88–419, 78 Stat. 390, which provided that the land and other assets of certain specified tribes, including the Cloverdale Rancheria, were to be distributed to the rancheria members and the federal trust relationship dissolved. ER Tab 5, ¶¶ 31–32.

The Cloverdale Rancheria's distribution plan identified five families residing on the Cloverdale Rancheria. *See Jefferey Alan-Wilson v. Sacramento Area Director* ("*Alan-Wilson I*"), 30 IBIA 241, 1997 I.D. LEXIS 85 (Apr. 1, 1997). The heads of those families, to whom the Tribe's assets were distributed, were Ernest Buck, Blanche Hermosillo, Lillian Jack, Agnes Santana, and John

Santana. *Id.* at *10–11; *see also* 30 Fed. Reg. 16,274 (Dec. 30, 1965) (notice of termination of the tribe identifying twenty individuals — five distributees and fifteen dependent members — who no longer held Cloverdale tribal status pursuant to the Rancheria Act).

In 1979, distributees of some of the terminated tribes, including those of the Cloverdale Rancheria, brought a class action suit against the United States. The plaintiffs sought restoration of their status as Indians, entitlement to federal Indian benefits, and the right to reestablish their tribes as formal government entities. *See Hardwick v. United States*, No. C 79-1710, 2006 WL 3533029, at *1 (N.D. Cal. Dec. 7, 2006); *see also* Tab 18. In 1983, seventeen of the tribes entered into a settlement agreement that, among other things, recognized them "as Indian entities with the same status as they possessed prior to distribution of the assets of the Rancherias under the California Rancheria Act." *Hardwick*, 2006 WL 3533029, at *1; *see also* ER Tab 5, ¶ 34. The Cloverdale Rancheria remains on the list of federally-recognized tribes. *See* 74 Fed. Reg. 40218, 40219 (Aug. 11, 2009).

I. The Bureau's Recognition of the June 1996 Council.

In the years following the *Hardwick* settlement, disputes arose among several rival groups, which each organized governing bodies. Between 1991 and 1995, two competing councils — one led by John Santana and the other by

Jefferey Alan-Wilson — held tribal elections and sought the Bureau's recognition as the Tribe's government. *Alan-Wilson I*, 30 IBIA 241, at *14–18, *24, *27 n.10. Santana was one of the five distributees identified in the termination and subsequent restoration of the Tribe; Alan-Wilson was not. *Id.* at *14. The Bureau first recognized Alan-Wilson's government in 1992, but then withdrew that recognition in 1994, observing that Alan-Wilson was not a distributee, dependent member, or lineal descendant of the five Cloverdale Rancheria families and determining that he thus did not have the right to formally organize the Tribe. *Id.* at *17–18. The agency then recognized Santana's council as the governing body. *Id.* at *18.

Alan-Wilson appealed the Area Director's recognition of the Santana council to the Board, which placed the Area Director's decision into effect and informed Alan-Wilson that he could proceed to federal court. *Id.* at *24. Alan-Wilson did so, and the court granted a preliminary injunction which limited his authority but required the Bureau to recognize his government as the governing body of the Tribe pending the Board's resolution of the dispute on the merits. *Id.* at *24–25 (citing *Cloverdale Rancheria of Pomo Indians v. United States*, No. C-96-1037-CW (N.D. Cal. June 6, 1996)).

On June 1, 1996, during the pendency of the federal court action, another tribal council election was held, in which 127 individuals had voting privileges. The election involved members of the Santana faction and another faction, which identified itself as the Cloverdale General Council Interim of Lineal Descendants. *Id.* at *25. Patricia Hermosillo was elected as Chair. *Id.* The district court and this brief refer to the Hermosillo-led tribal council as the "June 1996 Council."

After considering the Alan-Wilson, Santana, and Hermosillo groups' briefing on the merits, the Board vacated both the 1992 recognition of Alan-Wilson's government and the 1995 recognition of Santana's government. *Id.* at *51. The Board found that the administrative record did not establish that the election organized by Santana included the "full participation . . . by all of the individuals whom the Area Director states the Department has consistently recognized as eligible to reorganize the tribal government of a Hardwick rancheria." *Id.*

On remand, the Bureau Area Director investigated the principles applied by the Bureau in organizing other rancherias that were parties to the *Hardwick* settlement. *Jefferey Alan-Wilson v. Acting Sacramento Area Director* ("*Alan-Wilson II*"), 33 IBIA 55, 1998 I.D. LEXIS 85, at *3–4 (Oct. 14, 1998). The report, authored by a Sacramento Area Tribal Operations Officer, Mr. Dorson Zunie

("Zunie Report"), determined that "the proper parties to organize the Cloverdale Rancheria are the distributees, dependent members and lineal descendants thereof who were listed on the distribution plan for the Cloverdale Rancheria." *Id.*; *see* Tab 19. Pursuant to the Zunie Report, the Bureau sent notices to qualified individuals inviting them to a meeting, to be held on November 8, 1997, regarding the organization of the Cloverdale Rancheria. The eligible participants were the same 127 individuals previously determined to be eligible to vote at the June 1, 1996 election. *Alan-Wilson II*, 1998 I.D. LEXIS 85, at *4. Bureau officials were not present at the November 8 meeting, at which the attendees passed a resolution to support the June 1996 Council as their interim governing body. *Id.* at *4–5. The Area Director subsequently recognized the June 1996 Council as the "'rightful governing body of the Cloverdale Rancheria.'" *Id.* at *5 (quoting Area Director's Dec. 23, 1997 decision).

Alan-Wilson appealed this decision to the Board, which affirmed the Area Director's decision. *Id.* at *10. In its 1998 decision, the Board found that Alan-Wilson lacked standing to challenge the Area Director's decision because he did not claim to be a distributee, dependent member, or lineal descendant of any individual listed on the distribution plan for the Tribe, and therefore was not eligible to participate in the November 8 meeting or to challenge the proceedings at

that meeting. *Id.* at *9–10. Since then, the Bureau has conducted government-to-government relations with the June 1996 Council, including entering into a self-determination contract pursuant to the ISDA, 25 U.S.C. § 450 *et seq.*

II. Intra-Tribal Disputes Following the Recognition of the June 1996 Council.

The Cloverdale Individuals assert that beginning around 2000, the June 1996 Council "went rogue," expanding the membership of the Cloverdale Rancheria to include individuals who are not members of the *Hardwick* class and replacing two members of the original June 1996 Council with two non-*Hardwick* persons. ER Tab 5, ¶¶ 45–46, 49. In 2007, the Cloverdale Individuals formed the Committee to Organize the Cloverdale Rancheria Government ("Committee to Organize"), which they assert was composed of only *Hardwick* class members. *Id.* ¶¶ 60–61.

The Committee to Organize held an election in December 2008 to adopt a Cloverdale Constitution. *Id.* ¶ 66. In January 2009, the Committee to Organize held an election for a tribal council, purportedly with the participation of only the members of the *Hardwick* class. *Id.* ¶ 67. The Cloverdale Individuals were elected to the January 2009 Council. *Id.* ¶ 68. Two months after the election, the Committee to Organize requested that the Bureau recognize the adoption of the December 2008 constitution and the January 2009 Council. *Id.* ¶ 69. In response, the Bureau Superintendent explained that he did not have statutory authority to act

on the Committee to Organize's request because, under the Indian Reorganization Act, the Bureau may review a governing document only in response to a request for a Secretarial Election or if the tribe has otherwise conferred authority on the Bureau to make decisions concerning the validity of tribal elections. ER Tab 17 (citing 25 C.F.R. Parts 81, 82). The Superintendent determined that he lacked authority to take action with respect to the constitution submitted by the Committee to Organize "[s]ince there is no request for a Secretarial Election." *Id.* (Superintendent Letter at 2). The Superintendent's rejection letter noted that the Committee to Organize could take an appeal to the Bureau Regional Director. *Id.*

The Cloverdale Individuals then filed the present action on behalf of themselves and purportedly on behalf of the Tribe, alleging that the Bureau Regional Director had failed to act on their appeal of the Superintendent's decision. ER Tab 5, ¶ 74. After the complaint was filed, the Regional Director issued a decisional letter upholding the Superintendent's determination. ER Tab 24. The letter stated that "the record does not reflect that the Tribe conferred any authority upon [the Bureau] to make decisions concerning the validity of Tribal elections" and noted that "the [Bureau] since 1998 continues the government-to-government relationship with the June 1st Tribal Council headed by Patricia Hermosillo." *Id.*

Following this decision, the district court stayed the case for ninety days while the Cloverdale Individuals sought Board review of the decision. The court also instructed the Bureau to request the Board to consider the appeal on an expedited basis. ER Tab 3 (2011 Order at 5). The Board denied the request for expedited consideration, and the district court subsequently dismissed the claims for lack of jurisdiction. ER Tab 3 (2011 Order at 6–9). The court found that the Cloverdale Individuals failed to "point to a specific legislative command for [the] proposition" that the Bureau is required to recognize a tribal government as a matter of general federal Indian law. ER Tab 3 (2011 Order at 7).

The district court also rejected the Cloverdale Individuals' contention that the Bureau failed to meet its obligation, pursuant to the *Hardwick* settlement, to "'assist with the effective organization of the Cloverdale Rancheria government.'" *Id.* (2011 Order at 8). The Bureau argued that it fulfilled this obligation when it assisted in the November 1997 meeting that resulted in the recognition of the June 1996 Council. *Id.* The court observed, as an initial matter, that the proper claim for relief "would appear to be one for enforcement of [the *Hardwick*] order," and not a general APA § 706(1) claim for "unreasonable delay." *Id.*

"Even if [the Bureau's] duties under *Hardwick* could serve as a basis for an APA action," the court found that the Cloverdale Individuals had not "identified a

discrete, nondiscretionary command with which Defendants have failed to comply." *Id.* The *Hardwick* duty to assist in creating an "effective organization" of the Tribe "leaves considerable discretion in the hands of the agency," and "[t]he APA does not allow courts to engage in 'abstract policy disagreements' with federal agencies." *Id.* (2011 Order at 9) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004)).

In July 2010, while this lawsuit was pending, the January 2009 Council submitted a request to the Bureau Regional Director to amend the Cloverdale Rancheria's existing ISDA self-determination contract. ER Tab 5 ¶ 90; ER Tab 26. The Regional Director responded in September 2010, stating that the pending appeal to the Board and district court lawsuit deprived the Bureau of jurisdiction to consider the contract amendment request at that time. ER Tab 27 (citing *Bullcreek v. W. Regional Director*, 39 IBIA 100, 101 (2003)).

Two months later, the January 2009 Council requested that the Bureau renew the Cloverdale Rancheria's self-determination contract subject to the previously-requested amendments. ER Tab 28. The Bureau Superintendent returned the application without approving it, explaining that pursuant to federal regulations, the Bureau was permitted to consider only "application[s] submitted by a federally recognized tribe with a recognized governing body." ER Tab 29

(Burdick Letter at 373) (citing 25 C.F.R. Part 900.6, Subpart B). The decisional letter further explained that "[b]ecause [the Bureau] do[es] not recognize" the January 2009 Council as the governing body, the Bureau is "unable to accept the enclosed proposal." *Id.*

The Cloverdale Individuals filed an amended complaint in July 2011, re-alleging the three claims previously dismissed by the district court and adding three new claims, alleging that (1) the Bureau's failure to approve or deny the July 2010 and November 2010 self-determination proposals within the ninety-day timeframe expressed in the ISDA meant the proposals were "deemed approved," ER Tab 5, ¶¶ 139–148; (2) the Bureau's "refusal and/or unreasonable delay to approve or decline" the self-determination proposals constituted agency action unlawfully withheld or unreasonably delayed under the APA, *id.* ¶¶ 149–159; and (3) each Bureau dealing with the June 1996 Council, as well as the agency's return of the self-determination proposals without approving or denying them, constitutes a final agency action subject to review under the APA, 5 U.S.C. § 704. *Id.* ¶¶ 160–170.

The June 1996 Council, acting in the name of the Tribe, sought to intervene in the district court action. Dist. Dkt. 24. Along with its motion to intervene, the June 1996 Council filed a motion to dismiss, arguing in part that the Cloverdale

Individuals lacked the capacity to sue in the name of the Tribe. Dist. Dkt. 25 at 8. The June 1996 Council also sought dismissal for failure to name a required party, the Tribe, under Fed. R. Civ. P. 19. Dist. Dkt. 25 at 9–10 (asserting that the Tribe had not waived sovereign immunity).

In September 2011, the Committee to Organize filed a voluntary dismissal of its action as to all Defendants. Dist. Dkt. 80. The only parties now before this court are the Cloverdale Individuals.

The district court dismissed the first three claims, noting that "Plaintiffs did not seek reconsideration of that ruling." ER Tab 2 (2012 Order at 7). It also dismissed the three new claims for lack of statutory standing. The court noted that the ISDA authorizes a "tribal organization," defined as "the recognized governing body" of the tribe, to submit self-determination proposals and seek review of the Bureau's action on those proposals. *Id.* (2012 Order at 11).

The Bureau is required to recognize and deal with a single tribal governing body at a time, and as the district court stated, the Bureau has recognized the June 1996 Council as the governing body. *Id.* (2012 Order at 12); *see also Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). In sum, the Cloverdale Individuals' challenges to Bureau's refusal to act on their self-determination proposals "simply

are not an appropriate means for raising" the challenge to the Bureau's recognition of a different governing body. *Id.*

The June 1996 Council's motion to intervene was terminated as moot. This appeal followed.

SUMMARY OF ARGUMENT

The Cloverdale Individuals, who bring suit in the name of the Cloverdale Rancheria, seek a court order compelling the Bureau to reassess whether it has recognized the correct governing body of the Tribe. They assert that the Bureau's continued government-to-government dealings with the June 1996 Council constitute a series of final agency actions reviewable under the APA. The Cloverdale Individuals also allege that general federal Indian law, the *Hardwick* settlement, and the ISDA are sources of the Bureau's nondiscretionary duty to make this determination regarding tribal leadership.

The district court properly dismissed these claims because the Cloverdale Individuals fail to identify a discrete, final agency action that the Bureau is legally required to take pursuant to 5 U.S.C. § 706(1), or that the Bureau's course of dealings with the June 1996 Council is a final agency action reviewable under § 706(2). The Bureau's responsibility to manage Indian affairs is a broad statutory mandate, not a specific, nondiscretionary duty that the Court can compel under the

APA. The Cloverdale Individuals likewise fail to point to language in the *Hardwick* settlement that imposes an obligation for the Bureau to review its dealings with the 1996 Council. The district court therefore properly dismissed the Cloverdale Individuals' first three claims for lack of subject matter jurisdiction.

The district court also properly dismissed the ISDA claims for lack of statutory standing. The ISDA instructs the Bureau to evaluate and either accept or reject contract proposals submitted by "tribal organizations," which the statute defines as the recognized governing body of a tribe. It is undisputed that the Bureau has signed a self-determination contract with the June 1996 Council and has not recognized the January 2009 Council that the Cloverdale Individuals purportedly represent. Thus, the Bureau does not have a statutory duty, pursuant to the ISDA, to act on the contract proposals of the January 2009 Council. The district court appropriately dismissed the claims because the Cloverdale Individuals have not identified a discrete, nondiscretionary duty for the Bureau to assess its recognition of and contractual dealings with the June 1996 Council.

STANDARD OF REVIEW

This Court applies a de novo standard of review for questions of law raised in dismissals under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 741 (9th Cir. 2009). The Court "accepts all

allegations of material fact as true and construe them in the light most favorable" to the plaintiffs. *Id.* at 741–42 (internal quotation marks omitted). Even though "facts set forth in the complaint are assumed to be true," when a question of the court's jurisdiction is raised, "the court may inquire, by affidavits or otherwise, into the facts as they exist." *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *see also Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 939 (D.C. Cir. 2012). The Court is not required to accept as true allegations that are "merely conclusory, unwarranted deductions of fact." *St. Clare v. Gilead Sciences, Inc.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

In addressing questions of statutory interpretation, the Court must give effect to the clearly-expressed intent of Congress. *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 842–43 (1984). The construction of the statute by the agency charged with its administration is entitled to substantial deference, unless that interpretation is inconsistent with the statute or would frustrate Congressional policy. *Young*, 476 U.S. at 981; *Chem. Mfr's Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125–26 (1985).

ARGUMENT

This action arises out of an internal dispute between rival factions within the Cloverdale Rancheria of Pomo Indians of California. ER Tab 2 (2012 Order at 1). It is a well-established principle of federal Indian law that federal courts lack jurisdiction over such internal disputes. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 72 & n.32; *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

The Cloverdale Individuals have not carried their burden of establishing the Court's subject matter jurisdiction over the claims alleged here. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009). Their first three claims are based on the Bureau's "engagement with the 1996 Council," Br. at 22, and duties that purportedly arise under federal common law and the *Hardwick* settlement. But neither federal common law nor the *Hardwick* settlement creates a discrete, non-discretionary duty to act under § 706(1). To the extent that the *Hardwick* settlement obligated the Bureau to assist the rancherias with the organization of tribal government, the Bureau fulfilled that duty in identifying eligible voters and coordinating a meeting at which the June 1996 Council was recognized as the governing body.

The Cloverdale Individuals also argue that the Court may review the Bureau's allegedly wrongful recognition of the rival governing council, *see* Br. at

27–29, but sidestep the district court's finding that the ISDA is not the appropriate mechanism for seeking such review. The ISDA authorizes the Bureau to evaluate self-determination proposals and enter into self-determination contracts with *recognized* tribal organizations. 25 U.S.C. § 450 *et seq.* Because the Bureau has recognized a different governing body, the Cloverdale Individuals lack statutory standing under the ISDA and "cannot state a claim upon which relief can be granted." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004).

This Court should reject the Cloverdale Individuals' attempt to make an end-run around the fundamental principle of federal non-interference with tribal internal political disputes.

I. The Cloverdale Individuals Fail To Identify a Discrete, Non-Discretionary Duty Arising From General Federal Indian Law or the *Hardwick* Stipulated Judgment.

This Court may compel agency action pursuant to 5 U.S.C. § 706(1) only where the relevant statute or regulation imposes a discrete, nondiscretionary duty to act. *See Rivas v. Napolitano*, 677 F.3d 849, 852 (9th Cir. 2012). The Cloverdale Individuals allege that the Bureau failed to "fulfill its duty to recognize" the January 2009 Council. Br. at 31. The district court correctly found that neither general federal Indian law nor the *Hardwick* settlement creates such a duty.

A. Federal Indian Law

A failure-to-act claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. *SUWA*, 542 U.S. at 64. The Cloverdale Individuals' references to "common law duties," Br. at 35, do not provide the requisite basis for a § 706(1) action.

The Federal government's "general trust responsibility toward" Indian tribes does not suffice as a basis for a § 706(1) action to compel the Bureau to resolve an intra-tribal dispute. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006). In *Gros Ventre Tribe*, this Court dismissed claims brought by Indian tribes over federal authorization of gold mine operations upriver from the tribes' reservation. 469 F.3d at 814. Plaintiffs in that case argued that the Federal agency had a common law trust obligation, coupled with duties under the Federal Land Policy and Management Act, but the Court determined that "the Tribes have no basis for arguing that these obligations require the government to take discrete nondiscretionary actions" in managing operations located off of tribal lands. *Id.* at 814.

The cases that the Cloverdale Individuals rely on do not stand for the proposition that, absent a specific legislative command, a court may "compel[] compliance with broad statutory mandates." *SUWA*, 542 U.S. at 66–67. In *Cobell*,

see Br. at 34, the D.C. Circuit was confronted with allegations of decades-long problems in the management of Individual Indian Money trust accounts. *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001). In that case, the agency owed specific duties under the Indian Trust Fund Management Reform Act to provide accounting for trust funds. *Id.* at 1090. The *Cobell* court's discussion of fiduciary principles was grounded in these statutorily-imposed duties, and the only question before the court was whether the district judge had the power to order the government to develop written policies and procedures for reforming the management of the trust accounts. *Id.* at 1086, 1109. In contrast, there is no duty under *Hardwick* for the Bureau to resolve one tribal faction's challenge to the recognized tribal council.

In *United Steelworkers*, *see* Br. at 35, the Third Circuit invoked § 706(1) to enforce a judicial decree entered after the agency failed to comply with a specific statutory command, under the Occupational Safety and Health Act, to develop regulations for hazard communication. *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263, 1265, 1270 (3d Cir. 1987). The court's authority to enforce a prior judicial order in that case was premised on a specific, nondiscretionary duty found in a statute, and no such duty exists here. The Cloverdale Individuals' invocation of a generalized need to "recognize a tribal government" in order to "carry[] on

government relations with the Tribe," *see* Br. at 37, is not a basis for the relief they request here, since they do not challenge the fact that the Federal government has a functioning government-to-government relation with the June 1996 Council.

The other cases that the Cloverdale Individuals cite, Br. at 36–37, are similarly inapplicable. *See Health Systems Agency v. Norman*, 589 F.2d 486, 490 (10th Cir. 1978) (finding that agency abused its discretion in rejecting an application on the basis of a "wholly arbitrary" application deadline); *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959) (holding that agency is "obligated to conform with the procedural standards [it] had formulated" regarding the discharge of employees on national security grounds); *Enterprise Nat'l Bank v. Vilsack*, 568 F.3d 229, 234 (D.C. Cir. 2009) (rejecting plaintiff's § 706(1) claim because the agency hearing officer's Remand Appeal Determination, while finding the agency erred in not paying any of plaintiff's loss claim, nevertheless "did not expressly order the performance of a discrete action," and the agency's decision to pay part of the claim was within its discretion); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) (finding that the Bureau's recognition of two rival tribal councils "amounts to a recognition of neither" and interfered with Bureau's ability to "carry[] on government relations with the Tribe").

B. The *Hardwick* Settlement

The Cloverdale Individuals argue that Bureau failed to carry out duties under the *Hardwick* settlement and criticize the district court's statement that it can compel action only where the agency has ignored a specific legislative command. Br. at 32–41; *see* Tab (2011 Order at 8). This is an incomplete characterization of the decision below, which explained that "the proper claim for relief would appear to be one for enforcement of [the court] order." Tab 3 (2011 Order at 8). Instead, the Cloverdale Individuals have brought an APA action without identifying a "discrete, nondiscretionary command with which Defendants have failed to comply." *Id.*

As this Court determined in *Alvarado v. Table Mountain Rancheria*, "[e]nforcement of [a] settlement agreement . . . whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." 509 F.3d 1008, 1017 (9th Cir. 2007). The plaintiffs in *Alvarado* sought an order compelling the Table Mountain Rancheria to admit them as members. *Id.* at 1011. They asserted an APA claim based on the agency's failure to comply with its duty under a settlement agreement that restored the rancheria's tribal status. *Id.* at 1013. This Court dismissed the APA claim because the settlement agreement did not cover the

issue of membership, and thus there was no discrete action that the agency had failed to take. *Id.* at 1018–20.

Similarly, here, even if the terms of the *Hardwick* stipulation could serve as the basis of an APA action, the Cloverdale Individuals fail to point to any particular provision in the settlement that creates a duty for the Bureau to intervene in subsequent intra-tribal leadership disputes. Unlike the failure to promulgate a statute or make some decision by a statutory deadline, the settlement does not enumerate discrete duties that the court can compel through a § 706(1) action. *See SUWA*, 542 U.S. at 63, 66 ("[G]eneral deficiencies in compliance . . . lack the specificity requisite for agency action.").

Under the terms of *Hardwick*, the Bureau was to assist the rancherias with the initial organization of tribal governments. As the district court correctly concluded, this provision "leaves considerable discretion in the hands of the agency," and is not a discrete command that serves as the basis of a § 706(1) claim regarding resolution of subsequent disputes between tribal factions. Tab 3 (2011 Order at 8–9); *see also SUWA*, 542 U.S. at 66; *cf. Miami Tribe v. United States*, 198 Fed. Appx. 686, 691 (10th Cir. 2006) (determining that the court lacked jurisdiction to compel specific performance of a joint stipulation because it is "treated like a contract for enforcement purposes"). To the extent that there was an

obligation, the Bureau fulfilled it — the agency produced the Zunie Report identifying eligible voters and notified the voters of a November 8, 1997 meeting, at which members of the Tribe voted to recognize the June 1996 Council.

In short, neither the *Hardwick* settlement nor the Bureau's "obligation to Indian tribes generally, rooted in the Constitution and statutes, and described in case law," Br. at 37, is a specific duty giving rise to a § 706(1) action.

II. The ISDA Does Not Create A Duty to Reevaluate the Bureau's Recognition of the June 1996 Council.

The Cloverdale Individuals allege that the Bureau is required, under the ISDA, to evaluate whether it has recognized the correct governing body. The district court properly rejected this claim, stating that a § 706(1) claim regarding the Bureau's failure to approve the Cloverdale Individuals' contract proposals is not an appropriate means for raising this challenge. Tab 2 (2012 Order at 12). Moreover, the ISDA applies to recognized tribal organizations, which the Cloverdale Individuals are not.

A. ISDA Contract Proposals Must Be Submitted by a Recognized Governing Body.

Congress promulgated the ISDA to foster tribal self-governance through tribal administration and development of educational and other programs.

25 U.S.C. § 450a(a)–(c). The statute does not provide an alternative avenue for a faction, such as the Cloverdale Individuals, to obtain Federal recognition as the governing body of a tribe through the mere submission of a contract proposal, absent a valid resolution from the tribe enacted in accordance with the tribe's governing documents.

The district court decision in *San Pasqual Band of Mission Indians v. Salazar*, No. 09-1716(RMC) (D.D.C. Mar. 10, 2010), supports this conclusion. SER 01. The *San Pasqual* plaintiffs sought a declaration that its proposed contract was deemed approved by operation of law because the Bureau did not comply with the declination requirements of 25 U.S.C. § 450f. SER 01. However, like the Cloverdale Individuals here, plaintiffs in *San Pasqual* had not established that they were a recognized tribal organization. SER 01. The district court denied the plaintiffs' requested relief because "the declination procedures are only triggered upon the request of any Indian tribe." SER 02 (internal quotation marks omitted). The court explained that the Bureau "returned the contract proposal based on its determination that the resolution supporting the contract proposal was not from a recognized governing body," and that action "is not the same as [the Bureau] declining the contract proposal because it 'includes activities that cannot lawfully be carried out by the contractor.'" SER 02–03.

Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director is also persuasive here. 54 IBIA 320, 2012 I.D. LEXIS 35 (Apr. 18, 2012). The appellants in that case were incumbents on a tribal council and allegedly were ousted when their seats were declared vacant by other members of the governing council. The council asked the Bureau Superintendent for acknowledgment of the tribe's new leadership, which the Superintendent provided and the Regional Director affirmed. *Id.* at *5–7. The Bureau argued that its action was required because the existing ISDA contract created "'ongoing' Federal action," including "maintain[ing] consultation" with the tribal government. *Id.* at *10. The Board rejected this position and vacated the Bureau's decision to recognize the new tribal council because there was no "required [Bureau] action that prompted [the Bureau's] intervention" in a dispute between tribal factions. *Id.* at *1–2. Indeed, the Board stated that "not all interaction between [the Bureau] and a tribe regarding the tribe's administration of an ISDA contract, e.g., through which tribal staff provide certain services to tribal members, requires a determination of the tribe's political leadership." *Id.* at *16 n.12.

Plaintiffs rely on *Coyote Valley* for its statement, in dicta, that the "ISDA may require" the Bureau to act on a request for an approval of an ISDA document. Br. at 27. This reliance is misplaced. First, *Coyote Valley* turned on the fact that "in

neither the [Bureau's] Decision nor in this appeal has the Regional Director provided an example of [Bureau] action that was 'necessary' at the time of [the Bureau's] decisions" to "serve as the predicate for [the Bureau's] intrusion into this tribal dispute." *Id.* at *14. Second, this statement from *Coyote Valley* may apply when there is no recognized governing council at all and the Bureau must identify a governing body in order to carry out specific acts as part of the government-to-government relationship. But here, the Bureau has recognized and continues to interact with the June 1996 Council.

This case is unlike *Alturas Indian Rancheria v. Salazar*, where the Bureau declined to act on ISDA contract renewal proposals submitted by two tribal factions while the Board was considering one faction's appeal of a Bureau decision regarding the composition of the tribe's governing body. No. S-10-1997, 2010 U.S. Dist. LEXIS 113083, at * 7–8 (E.D. Cal. Oct.18, 2010). The court reiterated the "well-established" rule that the "ultimate determination of tribal governance must be left to tribal procedures," but noted that pending final resolution of governance disputes, the Bureau "may need to recognize certain individuals as tribal officials on an interim basis" for the purpose of government-to-government dealings. *Id.* at *8. Thus, the court held, the Bureau should have acted on the contract proposal submitted by the last undisputed governing body. *Id.* at *16 (citing *Poe v. Pac.*

Regional Director, 43 IBIA 105, 112 (2006)). In contrast, here, the ability of the Tribe to engage in government-to-government dealings has not been impaired because the Bureau has signed self-determination contracts with the June 1996 Council. In this circumstance, a rival faction's submission of an ISDA contract proposal is not sufficient to trigger a Bureau decision regarding the validity of that faction's election. *Cf. Lenares v. Salazar*, No. 12-cv-00186, 2012 U.S. Dist. LEXIS 141096, at *3–4, *11–12 (E.D. Cal. Sept. 28, 2012) (dismissing § 706(1) action for failure to state a claim because plaintiff's allegation that his tribe filed a notice of intent for recognition is "not sufficient to establish that one or more Defendants failed to act in accordance with statutory duties"); 25 C.F.R. § 83.3(d) ("[s]plinter groups" may not be acknowledged, though groups that "can establish clearly that they have functioned throughout history . . . as an autonomous tribal entity maybe be acknowledged").

B. The Cloverdale Individuals Lack Statutory Standing Under the ISDA.

Even if the ISDA created duties enforceable in a § 706(1) action, the Cloverdale Individuals lack statutory standing to challenge the Bureau's decision not to evaluate their self-determination contract proposal.

In passing the ISDA, Congress authorized the Bureau to enter self-determination contracts enabling tribes to administer tribal programs, such as

education, medical services, construction, and law enforcement services, that otherwise would be administered by the federal government. *See* 25 U.S.C.§ 450f(a). The statute instructs the Bureau, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a *tribal organization*" for the administration of federal tribal programs. *See id.* § 450f(a) (emphasis added). "[A] *tribal organization* may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract" to the Board for review. *Id.* § 450f(a)(2) (emphasis added).

Within ninety days of receiving such a proposal, the Bureau must "approve the proposal and award the contract unless the Secretary" determines that any one of five conditions specified in the statute applies, including a finding that the service "will not be satisfactory," that trust resources will not be adequately protected, or that the proposed project cannot be properly completed or maintained by the proposed contract. *Id.* § 450f(a)(2)(A)–(E). If the Bureau denies a contract proposal, it must, among other requirements, "state any objections in writing to the *tribal organization*" and "provide assistance to the *tribal organization* to overcome the stated objections." *Id.* § 450f(b) (emphases added).

The Cloverdale Individuals argue that because the Bureau may decline a proposal only if it makes any of five particular findings set forth in the ISDA and

implementing regulations, *see* 25 C.F.R. § 900.24, the Bureau has a mandatory duty to "either accept the proposals or decline them in accordance with 25 U.S.C. § 450f(a)(2)." *See* Br. at 43–44. Their reliance on this statutory provision is misplaced. While the ISDA circumscribes the Bureau's review of the merits of a proposal, those limits apply only to proposals submitted by a "tribal organization." 25 U.S.C. § 450f(a)(2). The duties are not triggered here because the ISDA does not grant an unrecognized tribal council, such as the Cloverdale Individuals, the right to sue. *See Cetacean Cmty.*, 386 F.3d at 1175 (discussing statutory standing).

The statute makes plain that the Bureau's duties extend only toward "tribal organizations," which the statute defines 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." *Id.* § 450b(l) (emphasis added); *see also* 25 C.F.R. § 900.6.

The Final Rule implementing amendments to the 1996 ISDA underscores this point. One comment to the draft rules suggested that the regulations explicitly require the Bureau to "return any proposal lacking the required authorizing resolution(s) to the applicant without further action." 61 Fed. Reg. 32482, 32486. The agencies explained that this suggestion was not adopted because "[it] should

be clear . . . that Section 102(a)(2) [25 U.S.C. § 450f(a)(2)] of the Act only requires the Secretary to consider a proposal if 'so authorized by an Indian tribe' pursuant to the tribal resolution required under Section 102(a)(1) [25 U.S.C. 450f(a)(1)]. Therefore, although technically outside of the enumerated declination criteria in Section 102(a)(2) of the Act, it is also clear that the Act precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution." *Id.*

This interpretation of the ISDA was upheld in *Navajo Nation v. Office of Indian Education Programs*. The Bureau "is only required to consider [a proposal] on the merits if the applicant can show that it constitutes a 'tribal organization' for purposes of that proposal." 40 IBIA 2, 2004 I.D. LEXIS 25, at *31 (May 10, 2004). Although *Navajo Nation* concerned the Bureau's refusal to consider a proposed grant amendment under the Tribally Controlled Schools Act, the Board's reasoning is persuasive because that statute incorporates ISDA rules and regulations governing Bureau refusal to approve a grant. *Id.* at *20–21. Because the plaintiff board of directors in *Navajo Nation* had not been recognized "as a tribally-sanctioned organization with authority to submit its proposal" for the school, the decision was not reviewable "as a refusal to approve a grant to a tribe

or tribal organization within the meaning of" the Tribally Controlled Schools Act. *Id.* at *35.

In other words, "it is critical to distinguish between a decision . . . refusing to recognize an applicant as a tribe or tribal organization, and a decision . . . accepting a proposal as having been submitted by a tribe or tribal organization, but then refusing to approve it." *Id.* at *32 n.13. This is not the type of "threshold determination" that the Cloverdale Individuals allege is forbidden under the statute. *See* Br. at 50. Rather, unless the applicant is determined to be the recognized tribal organization, "the [Bureau's] substantive obligations and the ISDA appeals rights that flow to tribes and tribal organizations are not triggered" in the first instance. *Id.* at *32. Indeed, "for a declination or refusal to approve or consider a proposal based on a threshold issue falling under 25 C.F.R. § 900.150(i), such as lack of tribal authorization, the burden of proof is on the applicant." *Id.* at *32 n.13.

The Cloverdale Individuals respond that the 2009 Council was "authorized by the Tribe in its December 2008 Constitution" and "ought to be the recognized governing body, in which case it should also be a 'tribal organization.'" *See* Br. at 48 nn.11–12. It is uncontested, however, that the Bureau recognized the June 1996 Council and continues to engage in government-to-government relations with the Tribe through that Council. Neither the 2009 Council (which is not a party to this

action) nor the Cloverdale Individuals is the "recognized governing body" authorized by statute to enter into or amend a self-determination contract. 25 U.S.C. § 450b(l). Consequently, the ISDA provisions governing the approval of self-determination proposals do not confer standing on the Cloverdale Individuals.

The Cloverdale Individuals also fault the district court for not accepting as true the factual allegations set out in the Complaint. *See* Br. at 51–52. This misapprehends the basis of the court's decision. The district court determined that the Cloverdale Individuals lacked standing "to proceed under the ISDA," Tab 2 (2012 Order at 12), because the ISDA does not create a right of action for plaintiffs who are not members of the recognized tribal government to avail themselves of the substantive and procedural rights to a self-determination contract. *Cf. CGM, LLC v. BellSouth Telcoms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011) ("Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded this injured plaintiff the right to sue the defendant to redress his injury." (internal quotation marks omitted)). Thus, even though the Cloverdale Individuals bring the action "in their official capacities," Tab 5, ER 31, ¶ 18, and "even if the [district court] were to allow amendment [of the Complaint] to add the January 2009 Council as a plaintiff," the Cloverdale Individuals still lack standing to proceed under the ISDA. Tab 2 (2012 Order at 12).

The D.C. Circuit reached a similar result in *Timbisha Shoshone Tribe v. Salazar*, determining that the plaintiffs lacked standing to challenge the taking of tribal property because the Federal government had recognized another governing faction on an interim basis. 678 F.3d at 937. The interim governing council subsequently held a tribal election through which the plaintiffs' faction was defeated. *Id.* The plaintiffs in *Timbisha Shoshone* — like the Cloverdale Individuals here — were "unhappy with how the election was run, who voted, and the results." *Id.* at 938. But the Federal government had recognized a different faction, and the court therefore lacked jurisdiction over the plaintiffs' claims. *Id.* at 939; *cf. Bingham v. Massachusetts*, 616 F.3d 1, 6 & n.8 (1st Cir. 2010) (noting that the tribe had "repeatedly and strenuously disavowed plaintiffs' suit" and holding that "Plaintiffs cannot assert the rights of the tribe, as an entity, simply by styling their claim as a class action on behalf of all tribal descendants"); *Shenandoah v. U.S. Dep't of the Interior*, 159 F.3d 708, 713 (2d Cir. 1998) ("The [Bureau's] determination that [a certain member] does not represent the [tribe] may well moot plaintiffs' claims.").

The Cloverdale Individuals claim that they are "caught in a Catch-22" between "the district court's rulings and the Interior Department's policy" in their attempt to gain recognition as the legitimate Tribal government. *See* Br. at 24–25.

This is incorrect as a factual matter, as the district court ruling said only that the ISDA was not the appropriate mechanism for Plaintiffs to seek recognition as the governing body.[3] Tab 2 (2012 Order at 12). Internal disputes concerning the proper composition of the Tribe's governing body must be resolved in the first instance through tribal procedures. *See, e.g.*, *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996). Moreover, regardless of the "dilemma" that the Cloverdale Individuals assert, this Court does not have the authority to compel agency action that is not required by law.

In sum, the Cloverdale Individuals fail to identify any discrete, nondiscretionary duty in case law, the *Hardwick* settlement, or the ISDA for the Bureau to reassess its recognition of the June 1996 Council. While they may be dissatisfied with the current leadership of the Tribe, the Cloverdale Individuals have not alleged a basis for federal judicial intervention in an internal tribal dispute.

[3] As the Board noted in its August 2012 decision, the Committee to Organize previously submitted a request to the Bureau for a Secretarial election. SER 10 (55 IBIA at 226). The Committee subsequently withdrew its request after a Board decision suggesting that the Bureau Regional Director may not have properly considered relevant issues including whether the Tribe is already deemed organized and whether only members of the *Hardwick* class are eligible to organize the Tribe. *See Cloverdale Rancheria v. Regional Director*, 48 IBIA 308, 2009 I.D. LEXIS 18, at *2–3 (Feb. 27, 2009).

CONCLUSION

Based on the foregoing, this Court should affirm the district court's decision dismissing the case.

Respectfully submitted,

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January 22, 2013
DJ # 90-2-4-13099

STATEMENT OF RELATED CASES

Counsel for the federal defendants-appellees are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I electronically filed the foregoing Answering Brief of Defendants-Appellees with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will serve the brief on the other participants in the case.

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