Manuel Corrales, Jr., Esq. SBN 117647
ATTORNEY AT LAW
17140 Bernardo Center Drive, Suite 358
San Diego, California 92128
Tel: (858) 521-0634
Fax: (858) 521-0633
Email: mannycorrales@yahoo.com

Attorney for Plaintiffs
CALIFORNIA VALLEY MIWOK TRIBE,
THE GENERAL COUNCIL, SILVIA BURLEY,
RASHEL REZNOR, ANJELICA PAULK and
TRISTIAN WALLACE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, a federally-recognized Indian tribe, **THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR; ANJELICA PAULK**; and **TRISTIAN WALLACE**

Plaintiffs,

vs.

SALLY JEWEL, in her official capacity as U.S. Secretary of Interior; **LAWRENCE S. ROBERTS**, in his official capacity as Acting Assistant Secretary of Interior – Indian Affairs; **MICHAEL BLACK**, in his official capacity as Director of the Bureau of Indian Affairs.

Defendants.

Case No.: 2:16-cv-01345-WBS-CKD

PLAINTIFFS' REPLY TO INTERVENOR-DEFENDANTS' OPPOSITION TO MOTION FOR AN ORDER STAYING THE AS-IA'S DECEMBER 30, 2015 DECISION

Judge: Hon. William B. Shubb
Date: October 17, 2016
Time: 1:30 p.m.
Courtroom 5

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. SUMMARY OF POINTS IN REPLY 1

II. PLAINTIFFS DID NOT FAIL TO APPEAL THE U.S. DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT, BUT INSTEAD WERE BARRED FROM APPEALING THAT ORDER WHEN THE GOVERNMENT ELECTED NOT TO APPEAL 2

III. A STAY IS WARRANTED BECAUSE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS 3

A. THE 2015 DECISION IS ERRONEOUSLY PREDICATED ON A TIME-BARRED CLAIM THAT THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS INVALID AT THE OUTSET 3

B. THE U.S. DISTRICT COURT IMPROPERLY DIRECTED THAT THE AS-IA RECONSIDER HIS 2015 DECISION BASED ON A TIME-BARRED CLAIM 13

C. PLAINTIFFS PRESERVED THE STATUTE OF LIMITATIONS ISSUE BEFORE THE U.S DISTRICT COURT IN DIXIE'S FEDERAL ACTION 14

D. THE ISSUE OF THE VALIDITY OF THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS NEVER REFERRED TO THE AS-IA FOR REVIEW BY THE INTERIOR BOARD OF INDIAN APPEALS 17

E. THE 2015 DECISION ERRONEOUSLY CONCLUDED THAT THE 1998 GENERAL COUNCIL WAS ESTABLISHED MERELY TO "*MANAGE THE PROCESS* "OR REORGANIZING THE TRIBE" 19

F. THE 2015 DECISION INCORRECTLY CONCLUDES THAT PRIOR FEDERAL COURT DECISIONS HAVE HELD THAT THE TRIBE'S MEMBERSHIP IS LARGER THAN FIVE MEMBERS AND HAS MISCONSTRUED THE HISTORY OF THE CALIFORNIA RANCHERIAS 21

G. THE "ELIGIBLE GROUP SYSTEM" IMPROPERLY FORCES THE TRIBE TO "RE-ORGANIZE" 23

IV. PLAINTIFFS HAVE SHOWN THEY ARE LIKELY TO SUFFER IMMINENT AND IRREPARABLE HARM ABSENT A STAY 24

V. CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Acri v. Int'l Ass'n of Machinists & Aerospace Workers
(9th Cir. 1986) 781 F.2d 1393, 1396 4

Alvarado v. Table Mountain Rancheria
(N.D.Cal. July 28, 2005) 2005 WL 1806368 23

California Valley Miwok Tribe v. Jewell
(D.D.C.2013) 5 F.Supp.3d 86, 100 .....5-6, 14, 21

California Valley Miwok Tribe v. Pacific Director, BIA
(01/28/2010) 51 IBIA 103, 120 18-19

In re E.P.A.
(6th Cir. 2015) 803 F.3d 804, 806 1

Muwekma Ohlone Tribe v. Salazar
(D.D.C.2011) 813 F.Supp.2d at 191 4-5

Santa Clara Pueblo v. Martinez
(1978) 436 U.S. 49, 55-56, 72, fn. 32 24

Shiny Rock Mining Corp. v. United States
(9th Cir. 1990) 906 F.2d 1362, 1364 13

Sissten-Wahpeton Sioux Tribe v. United States
(9th Cir. 1990) 895 F.2d 588, 592 13

Spannaus v. U.S. Dep't of Justice
(D.C.Cir.1987) 824 F.2d 52, 56 4

United States v. Kubrick
(1979) 444 U.S. 111, 122 4

Washington v. Reno

(6th Cir. 1994) 35 F.3d 1093, 1099 1

Wilton Miwok Rancheria v. Salazar

(N.D.Cal. June 8, 2009) No. C-07-02681 22

Wind River Min. Corp. v. U.S.

(9th Cir. 1991) 946 F.2d 710, 713 4

OTHER AUTHORITIES

25 U.S.C. § 476(f)(h) 24

28 U.S.C. § 2401(a) 4

I.

SUMMARY OF POINTS IN REPLY

As stated in their motion papers, a decision on whether to grant a stay of a final agency action pending review of that decision in federal court is guided by consideration of four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. In re E.P.A. (6th Cir. 2015) 803 F.3d 804, 806. These preliminary injunction factors are to be balanced, and are not prerequisites that must be met. Washington v. Reno (6th Cir. 1994) 35 F.3d 1093, 1099.

The Intervenor-Defendants' ("Dixie Faction") main argument is that the Plaintiffs here cannot show that they are likely to succeed on the merits so as to enable them to obtain the requested stay of the Assistant Secretary of Interior—Indian Affairs' ("AS-IA") December 30, 2015 Decision. The Dixie Faction's argument is based entirely on the erroneous assumption that the U.S. District Court's Order remanding to the AS-IA for reconsideration is correct. It is not. As shown below, there is a likelihood of success on the merits, the Plaintiffs will suffer irreparable harm without the stay, and the Dixie Faction will not be harmed if a stay is granted.

Plaintiffs seek merely to preserve the status quo pending resolution of their challenge of the AS-IA's December 30, 2015 Decision.

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II.
PLAINTIFFS DID NOT FAIL TO APPEAL THE U.S. DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT, BUT INSTEAD WERE BARRED FROM APPEALING THAT ORDER WHEN THE GOVERNMENT ELECTED NOT TO APPEAL

The Dixie Faction argues that Plaintiffs "cannot re-litigate" the U.S. District Court decision granting summary judgment in the Dixie Faction's favor, because Plaintiffs "did not appeal that decision." (Opp. Page 2, lines 1-2). This is inaccurate and misleading.

Plaintiffs ("the Burley Faction") were Intervenor-Defendants in the Dixie Faction's suit challenging the Assistant Secretary of Interior—Indian Affairs' ("AS-IA" or "Assistant Secretary") August 31, 2011 Decision ("2011 Decision"). The Federal Defendants in that suit chose not to appeal the decision. When the Burley Faction attempted to appeal, the Federal Defendants moved to dismiss the appeal for lack of jurisdiction, pointing out that "a private party – unlike the government – may not appeal a district court's order remanding to an agency because it is not final within the meaning of 28 U.S.C. § 1291." (Ex. "1," Motion to Dismiss Appeal for Lack of Jurisdiction). The Burley Faction conceded this point and stipulated to voluntarily dismiss their appeal. (Ex. "2," Stipulation of Voluntary Dismissal).

Accordingly, Plaintiffs here are not "re-litigating" issues decided by the U.S. District Court that remanded the matter back to the AS-IA to "reconsider" his 2011 Decision. That remand order was not final. Plaintiffs' suit instead is against the AS-IA relative to his December 30, 2015 Decision ("2015 Decision") which Plaintiffs contend is unlawful and arbitrary and capricious for several reasons, as outlined below.

///

III.

A STAY IS WARRANTED BECAUSE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. THE 2015 DECISION IS ERRONEOUSLY PREDICATED ON A TIME-BARRED CLAIM THAT THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS INVALID AT THE OUTSET

Dixie filed a Complaint against the federal government on January 24, 2011, challenging the AS-IA's December 22, 2010 decision recognizing the General Council established under the 1998 Resolution. After the AS-IA withdrew his December 22, 2010 decision, he issued another decision on August 31, 2011, reaffirming his December 2010 decision. Dixie then amended his Complaint on October 17, 2011 challenging the AS-IA's August 31, 2011 decision. Dixie's original Complaint included a claim that the 1998 Resolution establishing the Tribal Council was invalid at the outset, even though that was not an issue referred to the AS-IA to decide. In his second suit, Dixie reasserted that claim. Specifically, Dixie's attack on the validity of the 1998 Resolution was that "the identification of the Burleys as members was incorrect because Yakima Dixie did not have the authority to enroll them into the Tribe without the consent of the Tribe's existing members," which Dixie alleged to be members who were "living in the vicinity of the Sheep Ranch Rancheria in 1998" who "were readily identifiable as Tribal members, and were known or should have been known to the BIA." (Ex. "3," First Amended Complaint, paragraphs 44-46, pages 10-11, filed October 17, 2011). Dixie's claim in his federal action attacking the validity of the 1998 Resolution was, however, time-barred, and the AS-IA's decision based upon that claim was, therefore, erroneous as a matter of law.

Actions for judicial review of final agency actions brought under the Administrative Procedure Act are subject to a **six-year**

statute of limitations. Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713; 28 U.S.C. § 2401(a). Generally, a claim subject to the six-year statute of limitations period under § 2401(a) first accrues when the plaintiff comes into possession "of the critical facts that he has been hurt and who has inflicted the injury." United States v. Kubrick (1979) 444 U.S. 111, 122. Under federal law, a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action. Acri v. Int'l Ass'n of Machinists & Aerospace Workers (9th Cir. 1986) 781 F.2d 1393, 1396. Stated another way, "[t]he moment at which a cause of action first accrues within the meaning of Section 2401(a) is when 'the person challenging the agency action can institute and maintain a suit in court.'" Muwekma Ohlone Tribe v. Salazar (D.D.C.2011)(quoting Spannaus v. U.S. Dep't of Justice (D.C.Cir.1987) 824 F.2d 52, 56).

In Muwekma, supra, the U.S. District Court concluded that the Tribe's claims under the APA against the Department of Interior ("DOI") and its agency officials for purportedly terminating its tribal status was barred by the six year statute of limitations under 28 U.S.C. § 2401(a). It found that the Tribe's claim first accrued and thus it could have pursued a cause of action against the agency on the following three occasions:

(1) in 1927, when the Muwekma contends that "the Department provided [it with only] a fraction of the federal funding and services allocated to ... Indian tribes;

(2) in 1979, when the Muwekma "was not listed on the Federal Register list of entities recognized by the Secretary of Interior as a tribe;" and

(3) in 1989, when the Muwekma filed its petition for federal acknowledgment.

813 F.Supp.2d at 191. The Court then stated:

> Of these three dates, the Court finds that the most obvious point at which the Muwekma **could have brought suit** against the agency for purportedly terminating its tribal status was **in 1989, when it was clear that it was aware that it was not a federally recognized tribe**. Given that the Muwekma did not bring this action against the Department until 2001, approximately twelve years after it undoubtedly **possessed knowledge** that it **lacked acknowledgment by the federal government as a tribe**, its unlawful termination of tribal status claim is plainly barred by the limitations period of 28 U.S.C. § 24001(a). (Emphasis added).

813 F.Supp.2d at 191.

For the same reasons, the Dixie Faction's claim that the 1998 Resolution was purportedly invalid is barred by the six year statute of limitations, because Dixie knew more than six years before he and his Faction filed suit against the DOI and its agencies on January 24, 2011, that the DOI and the BIA were acknowledging and accepting the General Council established under the 1998 Resolution while he was simultaneously objecting to it. As in the case of Muwekma, supra, there were several dates that Dixie could have brought suit against the DOI and the AS-IA for purportedly acknowledging and recognizing the General Council established under the 1998 Resolution which the Dixie Faction claimed in its 2011 suit was invalid at the outset. These dates are as follows:

(1) The U.S. District Court noted that "from as early as April 1999" Dixie "contested the validity of the [General] Council." It stated:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raises significant doubts about the legitimacy of the General Council. **From as early as April 1999, Yakima [Dixie] contested the validity of the Council**. *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205

> (October 10, 1999 letter from Yakima to BIA raising questions about Burley's authority); AR 001690, 000231 (Yakima notifying the BIA of "fraud and misconduct" with respect to the Tribe's leadership). (Emphasis added).

California Valley Miwok Tribe v. Jewell (D.D.C.2013) 5 F.Supp.3d 86, 100.

(2) On February 4, 2000, the BIA wrote to Dixie in response to his allegations of "fraud or misconduct" concerning the change in Tribal leadership that Dixie claims occurred in April and May of 1999. The BIA letter memorialized a meeting between BIA personnel and Dixie that occurred in December 1999. The letter recounts that Dixie presented the BIA with his own "constitution" for governing the Tribe that was purportedly adopted by Dixie and his Faction on December 11, 1999. The BIA returned the document to Dixie in its letter and stated that:

> "...the body that acted on December 11, 1999, upon the document **does not appear to be the proper body to so act.**" (Emphasis added).

(Ex. "4," Letter from BIA to Dixie dated February 4, 2000, page 5). In short, the BIA unequivocally informed Dixie that it was recognizing the General Council established under the 1998 Resolution, and not the Dixie Faction's Tribal Council, despite Dixie's claim of fraud in connection with its formation.

(3) On March 7, 2000, the BIA wrote Silvia Burley, as the Chairperson of the Tribe, and summarized discussions its personnel had with Dixie on February 4, 2000. The letter recounts that Dixie was challenging his enrollment of Burley and her family into the Tribe. (Ex. "5," BIA letter to Burley dated March 7, 2000, page 2). His argument was obviously that if he never intended to enroll them as Tribal members, then the General Council established under the 1998 Resolution was invalid at the outset. The BIA indicated that it rejected Dixie's claims and requested he submit his grievances to the

Tribe's General Council, thus reaffirming the BIA's recognition of the General Council established under the 1998 Resolution. The letter stated:

> "**We also reiterated [to Dixie] our view**, notwithstanding a Tribal decision to the contrary, **that the appropriate Tribal forum is the General Council [established under the 1998 Resolution]**. At present, we view, again notwithstanding a Tribal decision to the contrary, the General Council as comprised of Yakima Dixie, Rashel Reznor, and you [Burley]..." (Emphasis added).

(Ex. "5," BIA letter to Burley dated March 7, 2000, pages 1-2).

(4) On July 18, 2001, Dixie filed suit in the U.S. District Court, Eastern District of California, alleging fraud against Burley in connection with the formation of the General Council established under the 1998 Resolution. Dixie alleged that the Tribe was "small," and that he, his brother Melvin and his son "Rocky" were the only members of the Tribe by virtue of being "lineal descendants of the Sheep Ranch Miwok Tribe." (Ex. "6," Complaint, "Sheep Ranch Miwok Tribe v. Burley, et al.," Case No. CIV.S-01-1389 MLS-DAD, pp. 14, 27, 30-31, filed July 18, 2001). He alleged that his enrollment of Burley and her family was conditioned on them "following his leadership." Id. He alleged that Burley and her family by fraud voted her to become the Tribal Chairperson and that they never intended to follow his leadership. Id. He alleged that had he known of Burley's true intentions, he would have never accepted her and her family as members. Id.

The U.S. District Court dismissed Dixie's suit and observed as follows:

> As an initial matter, the court may take judicial notice of evidence that defendants Silvia Burley and Rashel Reznor are **recognized by the BIA as the sole members of the governing body of the Sheep Ranch Rancheria of Me-Wuk Indians**. See BIA July 12, 2000 Letter of Recognition, Burley Decl. Exh. C. (Emphasis added).

(Ex. "23," Order, January 24, 2002, No. CIV. S-01-1389 LKK/DAD, page 3, lines 12-16). Dixie never appealed this order of dismissal. The BIA letter of July 12, 2000, which was attached to the motion to dismiss, and which Dixie obviously got a copy of during the briefing of the motion, explicitly states:

> "The Bureau of Indian Affairs, Central California Agency, recognizes the following individuals as members of the Tribal Council, governing body, of the Sheep Ranch Rancheria of Me-Wuk Indians:
>
> 1. Silvia F. Burley, Chairperson
> 2. Vacant, Vice-Chairperson
> 3. Rashel K. Reznor, Secretary/Treasurer
>
> "Please contact Raymond Fry, Tribal Operations Officer, at (916) 566-7124 should you require additional information with regard to this matter."

(Ex. "7," BIA letter of July 12, 2000, to Burley). As stated, Dixie got a copy of this letter during the briefing of the motion to dismiss, and was therefore put on notice of the BIA's position with respect to the validity of the General Council established under the 1998 Resolution, at least as far back as January 24, 2000, the date of the order.

(5) On October 30, 2003, Dixie wrote a letter to the U.S. Department of the Interior ("DOI") attempting to appeal the BIA's 1999 recognition of Burley as the Chairperson of the Tribe, and requesting that the DOI "nullify her appointment and her and her families' adoption as member of the Tribe." His appeal states in pertinent part:

> "In this appeal, I Yakima K. Dixie, as Appellant, am contesting the administrative action (without my knowledge and consent) by agents of the Bureau of Indian Affairs, in which Silvia Burley fraudulently came to be the recognized authority for and Chairperson of my ancestral tribe, of which I am the hereditary Chief and **rightful** Chairperson by lineal descent. As explained herein, I was tricked by Silvia Burley and others; and I, the Appellant, am

> requesting the nullification of both her appointment as Chairperson and the nullification of her original adoption and the adoption of her daughter and two grand-daughters into my tribe, which, again, I allege was fraudulent..." (Emphasis added as to "hereditary" only; other emphasis in the original).

(Ex. "8," Dixie Notice of Appeal, dated October 30, 2003, page 1). Here, Dixie is claiming to have hereditary rights and powers as the "hereditary chief" of the Tribe, notwithstanding the 1998 Resolution, which specifically provides:

> "**RESOLVED**, That all other inherent rights and powers not specifically listed herein shall vest in the General Council..." (Emphasis added).

(Ex. "9," Resolution #GC-98-01, "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians," dated November 5, 1998, page 1). Accordingly, Dixie's 2003 Notice of Appeal is clear evidence that he was attempting to challenge the validity of the General Council established under the 1998 Resolution, and thus was aware of the existence of such a claim more than six years from the time he filed his Complaint against the AS-IA on January 24, 2011.

In any event, Dixie's appeal was dismissed on procedural grounds and as untimely. In a letter dated February 11, 2005, the BIA wrote to Dixie as follows:

> "I am writing in response to your appeal filed with the office of the Assistant Secretary-Indian Affairs on October 30, 2003...In that appeal, you challenged the Bureau of Indian Affairs' ("BIA") recognition of Sylvia Burley as tribal Chairman and sought to 'nullify' her admission, and the admission of her daughter and granddaughters into your Tribe. Although your appeal raises many difficult issues, I must dismiss it on procedural grounds.
>
> * * *
>
> "In addition, your appeal appears to be untimely. In 1999, you first challenged the BIA's recognition of Ms.

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

(Ex. "10," BIA letter to Dixie, dated February 11, 2005, pages 1-2). As the BIA explained to Dixie in this letter of February 11, 2005, Dixie could have challenged the BIA's recognition of the General Council established under the 1998 Resolution as far back as 1999, by first exhausting his administrative remedies and then filing suit in the U.S. District Court. The District Court nevertheless gave Dixie another chance and allowed him to proceed with his claims after exhausting his administrative remedies, but he never followed through with that requirement. In the same way he was time-barred in February 2002, he was also time-barred under the six-year statute of limitations when he attempted to challenge the validity of the General Council established under the 1998 Resolution in his January 24, 2011 suit in federal court.

In addition, Dixie's attempt to "nullify" Burley and her family's adoption as members of the Tribe goes to the heart of the validity of the 1998 Resolution establishing the General Council, which states in pertinent part:

> "**RESOLVED**, That Yakima Dixie, Silvia Fawn Burley, and Rashel Kawehilani Reznor, as a majority of the adult

> members of the Tribe, hereby establishes a General Council to serve as the governing body of the Tribe..."

(Ex. "9," Resolution #GC-98-01, "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians," dated November 5, 1998, page 2). Without these adopted members, there could be no General Council, and the Tribe would not have been organized with a General Council governing body.

(6) On May 5, 2004, Yakima Dixie executed a "Will & Testament." In this document, Dixie reiterates he is the "Chief and rightful authority of the Sheep Ranch Rancheria of MiWok Indians of California a.k.a. California Valley Miwok Tribe," because of his "hereditary and lineal descent." (Ex. "11," Yakima Dixie Will & Testament, May 5, 2004, page 1). The document also references the establishment of a Tribal Council, separate and apart from the "General Council" established under the 1998 Resolution, and states:

> "At the time of this signing, the only member of the Tribal Council is Velma WhiteBear, who is designated as the Executive Director of the Tribe."

(Ex. "11," Yakima Dixie Will & Testament, May 5, 2004, page 2). The document then lists ten (10) persons as the only members of the Tribe, but does not name Burley and her three family members Dixie adopted into the Tribe in 1998. (He was also contradicting his claims that the Tribe consists of more than 200 members). Thus, at the time of the execution of his Last Will & Testament, dated May 5, 2004, Dixie was denying the validity of the General Council established under the 1998 Resolution. Together with his October 30, 2003 letter to the DOI and previous letters to the BIA objecting to the BIA's recognition of Burley as Chairperson of the Tribe and the BIA's recognition of Burley and her family as adopted members of the Tribe, Dixie therefore knew

he had a claim against the federal government for recognizing the Tribe's General Council that was purportedly invalid at the outset, more than six years from the date he filed suit on January 24, 2011.

(7) Notice that the Tribe had changed its name to the California Valley Miwok Tribe was published in the July 12, 2002 Federal Register. (See Ex. "12," copy of 2002 Federal Register and Ex. "13," June 7, 2001, letter from BIA to Burley accepting new name for publication). The placement of the new name of the Tribe was an act of recognition by the DOI of the validity of the General Council established under the 1998 Resolution, after the General Council passed a resolution to change the name of the Tribe and submitted it to the BIA for approval. As the DOI stated in a letter to Silvia Burley on June 7, 2001:

> "The *Sheep Ranch Rancheria* (Tribe) is a small tribe that does not have a tribal constitution. The tribe has a tribal council and conducts tribal business through resolution. A tribal resolution, such a resolution No. R-1-5-07-201, enacted by the Tribal council on May 7, 2001, is sufficient to effect the tribal name change. The Tribe's new name has been included on the Tribal Entities list that will be published in the FEDERAL REGISTER later this year."

(Ex. "13," Letter from Sharon Blackwell at BIA to Burley, dated June 7, 2001).

The DOI's publication of the Tribe's new name in the FEDERAL REGISTER was adequate notice to Dixie and his followers that on July 12, 2002, the DOI recognized the validity of the General Council established under the 1998 Resolution, thereby giving Dixie critical facts to institute a lawsuit.

"[S]tatute of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." Hopland Band of Pomo Indians v. United States (Fed.Cir.1988) 855

F.2d 1573, 1576; Sissten-Wahpeton Sioux Tribe v. United States (9th Cir. 1990) 895 F.2d 588, 592 ("Indian Tribes are not exempt from statute of limitations governing actions against the United States"). Also, [a]ctual knowledge of government action...is not required for a statutory period to commence." Shiny Rock Mining Corp. v. United States (9th Cir. 1990) 906 F.2d 1362, 1364. Instead, "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." Id. Accordingly, the notice published in the Federal Register on July 12, 2002, was adequate to apprise Dixie and his followers that the federal government was acknowledging the validity of the General Council established under the 1998 Resolution. Thus, based on the Federal Register publication alone, a timely action challenging the validity of the 1998 Resolution establishing the General Council should have been filed before July 12, 2008, six years after the 2002 FEDERAL REGISTER publication.

B. THE U.S. DISTRICT COURT IMPROPERLY DIRECTED THAT THE AS-IA RECONSIDER HIS 2015 DECISION BASED ON A TIME-BARRED CLAIM

As indicated, the Burley Faction, as an Intervenor-Defendant in Dixie's federal suit challenging the August 2011 AS-IA's decision, was unable to appeal the U.S. District Court's order granting summary judgment in favor of the Dixie Faction, because the Federal Defendants chose not to appeal and the remand order was not final. As a result, the AS-IA reconsidered its August 2011 decision based on erroneous remand instructions that included an order that the AS-IA address the issue of whether the General Council as established under the 1998 Resolution was valid at the outset, as pled in the Dixie Faction's complaint.

The U.S. District Court stated:

> The August 2011 Decision declares: "[t]he [November] 1998 Resolution established a General council form of government, comprised of all adult citizens of the Tribe, with whom the [BIA] may conduct government-to-government relations. AR 002056. Once again, in reaching this conclusion, the Assistant Secretary simply assumes, without addressing, the validity of the General Council...
>
> The Court finds that the August 2011 Decision is unreasonable in light of the facts contained in the administrative record...Before invoking the principle of tribal self-governance, it was incumbent on [the Assistant Secretary] to first determine whether a duly constituted government actually exists...
>
> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council. From as early as April 1999, Yakima contested the validity of the Council...
>
> ...Accordingly, the Court will remand this issue to the Secretary for reconsideration. (Emphasis added).

California Valley Miwok Tribe v. Jewell (2013) 5 F.Supp.3d 86, 99-101.

However, as stated, the issue of whether the General Council was invalid at the outset was barred by the six-year statute of limitations.

C. PLAINTIFFS PRESERVED THE STATUTE OF LIMITATIONS ISSUE BEFORE THE U.S DISTRICT COURT IN DIXIE'S FEDERAL ACTION

On March 26, 2012, the Burley Faction filed a motion to dismiss the Dixie Faction's FAC in the federal action challenging the AS-IA's 2011 Decision. Among other things, the Burley Faction alleged that the Dixie Faction's claims were barred by the six-year statute of limitations, including the claim challenging the validity of the General Council established under the 1998 Resolution. The motion stated in pertinent part as follows:

> "...Claims which arise under the APA are subject to the statute of limitations governed by 28 U.S.C. §2401(a), which bars civil actions against the United States that are not filed within six years after the right of action first accrues...
>
> * * *
>
> "Plaintiffs' Amended Complaint also very clearly challenges the September 24, 1998 BIA final agency action which first recognized the tribe's five member citizenship and their authority to establish a Tribal government, alleging that the BIA acted 'erroneously'...Neither the Non-Members...nor Mr. Dixie ever challenged the 1998 Final Agency Action. Nor did Plaintiffs challenge subsequent BIA final agency actions issued on February 2000 and March 2000, which reaffirmed the authority of the Tribe's governing body, pursuant to Resolution #GC-98-01, and its five federally recognized members...."

(Ex. "14," PAs in Support of Intervenor-Defendant's Motion to Dismiss, filed 3/26/2012, pages 18-19).

The U.S. District Court's Order denying the motion to dismiss on these grounds was factually and legally erroneous. It stated:

> It is true that in February 2000, the Secretary accepted the "General Council...as the governing body of the Tribe," A.R. at 236, and the Dixie Faction could have challenged his determination then. Any such challenge would have been mooted, however, by the Secretary's reversal in February 2005, when he held "the [Bureau] does not recognize any tribal government." Non-Recognition Letter, A.R. at 611. Because the Secretary's decision on review "mark[ed] a 180-degree change of course" by once again recognizing the General Council as the Tribe's government, the Dixie Faction's challenge is timely. Decision Letter, A.R. at 2050.

(Ex. "15," Memorandum Opinion Denying Motion to Dismiss, 9/06/2013, pages 13-14). This conclusion is erroneous. First of all, the February 11, 2005 letter relied upon by the Court states that because the Tribe was at that time not "organized" under the IRA, the BIA did not recognize its governing body, but

it did "recognize" Silvia Burley as a "person of authority within the California Miwok Tribe." The letter further stated that the BIA would not recognize either Burley or Dixie as "Chairman" of the Tribe, until the Tribe organized itself under the Indian Reorganization Act of 1934 ("IRA"). The BIA was clearly trying to get the Tribe to "re-organize" itself under the IRA, but was continuing to recognize Burley as a person with authority with whom the BIA was at that time conducting government-to-government relations. The letter never stated that the BIA considered the General Council established under the 1998 Resolution to be invalid. Indeed, recognizing Burley as a person of "authority" within the Tribe would seem to contradict that notion, since her authority was derived from the General Council. Thus, the statute of limitations issue was not mooted by the BIA's February 2005 letter.

Secondly, the February 11, 2005 letter did not address the issue of whether the General Council was invalid or not recognized, but simply made passing reference to a letter from the BIA dated March 26, 2004 that indicated the Tribe was not organized, and, because of that, the BIA stated in its February 11, 2005 letter that it therefore could not "defer to any tribal dispute resolution process at [that] time" with respect to the BIA's recognition of Burley as the Tribal Chairperson and the admission of Burley's family as Tribal members.

Third, the AS-IA's 2011 Decision was not a "180-degree change of course" which "once again" "recognize[ed] the General Council as the Tribe's government," as the U.S. District Court characterized it in its Order. Rather, the 2011 Decision made it clear that its "180-degree change of course" was only with respect to its "finding (6)" that stated:

> "Under the IRA, as amended, it is impermissible for the Federal government to treat tribes not 'organized' under

> the IRA differently from those 'organized' under the IRA (25 U.S.C. §§ 476(f)-(h))."

(Ex. "16," AS-IA's August 31, 2011 Decision, page 2). Up to that point, the DOI was requiring the Miwok Tribe to "reorganize" itself under the IRA in order for it to be eligible to receive federal benefits. The 2011 Decision further stated:

> "I reject as contrary to § 476(h) the notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant federal benefits' withheld from them. Either would be a clear violation of 25 U.S.C. § 476(f)."

(Ex. "16," AS-IA's August 31, 2011 Decision, page 6). This different (180 degree) policy direction was that the BIA should no longer require the Tribe to re-organize its governing body under the IRA, in order to be eligible to receive federal benefits, including P.L. 638 federal contract funding. The "policy" was not whether the General Council was to be recognized as a valid governing body or whether it was invalid at the outset, as the Court was suggesting.

Dixie's claim that the General Council established under the 1998 Resolution was invalid at the outset was time-barred, and the Burley Faction's motion to dismiss this claim should have been granted. Instead, the Court allowed this time-barred claim to proceed against the federal government and improperly ordered the AS-IA to re-evaluate on remand whether the 1998 Resolution establishing the General Council was invalid at the outset.

D. THE ISSUE OF THE VALIDITY OF THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS NEVER REFERRED TO THE AS-IA FOR REVIEW BY THE INTERIOR BOARD OF INDIAN APPEALS

The issue the Interior Board of Indian Appeals ("IBIA") referred to the AS-IA for resolution was limited to an "enrollment dispute," i.e., whether the BIA could force the

Tribe to organize under the IRA and convene a "general council" meeting without the Tribe's consent and have non-members in the surrounding community participate in that "re-organization." Ex. "17," California Valley Miwok Tribe v. Pacific Director, BIA (01/28/2010) 51 IBIA 103, 120. As stated, the BIA was forcing this issue, not because it felt the General Council was invalid at the outset, but rather because it felt the Tribe could not qualify for federal benefits without being re-organized under the IRA. The IBIA did not refer any issue concerning the validity of the General Council. It referred this "enrollment" dispute to the AS-IA because the IBIA lacked jurisdiction to decide that issue. It stated:

> "...In this appeal, Burley contends that BIA exceeded its authority in determining who would constitute the 'greater tribal community,' or class of 'putative members,' and in deciding that they could participate as part of a 'general council' meeting of the Tribe, to decide membership and organizational issues.
>
> "As evidenced by the decisions of the Superintendent and the Regional Director, and the public notices published by BIA in 2007, BIA apparently has decided to create a base roll of individuals who satisfy criteria that BIA has determined to be appropriate and who will be entitled to participate—effectively as members (albeit in a somewhat undefined capacity)—in a 'general council' meeting of the Tribe to organize the Tribe. Although the facts of this case render BIA's decision far from a typical enrollment adjudication, we conclude [...], in substance, that is what it is. Whether or not some or all of the individuals BIA would determine, under the Decision, to be 'putative members' of the Tribe will ultimately be enrolled, BIA's determination of their 'putative membership' apparently will effectively 'enroll' them as members of the 'general council' that is to meet. And that general council, as apparently envisioned by BIA, will have the authority to determine permanent membership criteria.
>
> "Understood in the context of the history of this Tribe, and BIA's dealings with the Tribe since approximately 1999, **this case is properly characterized as**

> **an enrollment dispute**...Because the Board lacks jurisdiction to adjudicate tribal enrollment disputes, we dismiss this claim and refer it to the Assistant Secretary." (Emphasis added).

51 IBIA at 120-121.

In the same way the AS-IA observed as undisputed that the Tribe was a federally-recognized Tribe (AS-IA August 31, 2011 Decision, page 1), the AS-IA in his August 2011 Decision observed as undisputed the fact that the Tribe "operates under a General Council form of government, pursuant to Resolution #CG-98-01." (Id. at page 2). Whether the General Council was invalid at the outset was not referred to him for resolution. Nor could it have been, because **Burley was not disputing that issue in her appeal before the IBIA**. Nor was the BIA. As stated, the issue first came up when Dixie, not Burley, raised it in his January 24, 2011 complaint he filed in federal court challenging the AS-IA's December 22, 2010 Decision, and again on October 17, 2011, when he challenged the August 31, 2011 AS-IA's Decision.

Accordingly, it was improper and erroneous for the AS-IA to entertain and decide that issue in his December 30, 2015 Decision.

E. THE 2015 DECISION ERRONEOUSLY CONCLUDED THAT THE 1998 GENERAL COUNCIL WAS ESTABLISHED MERELY TO "*MANAGE THE PROCESS* "OR REORGANIZING THE TRIBE"

In his 2015 Decision, the AS-IA concluded that the 1998 Resolution establishing the General Council was enacted merely to "*manage the process* of re-organizing the Tribe." (2015 Decision, page 5). The AS-IA used this erroneous statement to justify its further determination that the Tribe was required to re-organize under the IRA with the participation of non-members ("putative members") in the surrounding community, all in opposition to the determinations made by the previous AS-IA in

his August 2011 Decision. In truth and fact, nowhere in the 1998 Resolution is there any mention that it was established to "manage the process of re-organizing the Tribe."

While the Tribe had the option of re-organizing under the IRA, and the record reflects the Tribe pursued that option for a while but decided against it, the 1998 Resolution clearly provides that it "establishe[d] a General Council to serve as the governing body of the Tribe." (Page 2 of Resolution). It was not established to "manage the process of reorganizing the Tribe" under the IRA. Indeed, the title of the Resolution clearly states:

> "ESTABLISHING A GENERAL COUNCIL TO SERVE AS THE GOVERNING BODY OF THE SHEEP RANCH BAND OF ME-WUK INDIANS"

(Ex. "9," Resolution #GC-98-01, page 1). If, pursuant to 25 U.S.C. § 476(h), the Tribe is not required to "organize" under the IRA, and the Tribe decides not to pursue that option, then the General Council remains as the governing body of the Tribe. As stated in the 1998 Resolution:

> "**RESOLVED**, That the General Council shall exist until a Constitution is formally adopted by the Tribe and approved by the Secretary of the Interior or his authorized representative, unless this resolution is rescinded through subsequent resolution of the General Council." (Emphasis added).

(Ex. "9," Resolution #GC-98-01, page 3).

In addition, the BIA initially suggested the Tribe operate either as a General Council or an Interim Tribal Council, but the Tribe chose the first option, strongly suggesting that it did not want to be tied to the idea of having to re-organize under the IRA if it later decided against it. (Ex. "18," BIA letter to Dixie, dated September 24, 1998, pages 2-3). Indeed, the Tribe ultimately chose to simply operate as a General Council outside the IRA, and that's where the trouble began with

the BIA later trying to force the Tribe to re-organize under the IRA.

F. THE 2015 DECISION INCORRECTLY CONCLUDES THAT PRIOR FEDERAL COURT DECISIONS HAVE HELD THAT THE TRIBE'S MEMBERSHIP IS LARGER THAN FIVE MEMBERS AND HAS MISCONSTRUED THE HISTORY OF THE CALIFORNIA RANCHERIAS

The 2015 Decision states that "[a]ll of the Federal court decisions examining the CVMT dispute make clear that the Tribe is not limited to five individuals." (Page 3 of AS-IA December 30, 2015 Decision). This is inaccurate.

No federal court decision involving the Tribe directly addressed the issue of whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe. Indeed, the U.S. District Court remanding the AS-IA's 2011 Decision for reconsideration made the same observation. In rejecting the Dixie Faction's argument that collateral estoppel bars the Secretary from recognizing the General Council, the Court observed in a footnote as follows:

> ...*CVMT I* and *CVMT II* do not share the same contested issue with this case. (citation). The only issue before the courts *CVMT I* and *CVMT II* was whether the Secretary had the authority to refuse to approve a constitution submitted under IRA § 476(h)(1). The courts did not directly address the issues raised here, namely whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe...

5 F.Supp.3d at 101, fn. 15. The U.S District Court remanding the 2011 Decision for reconsideration merely criticized the AS-IA for simply assuming that the Tribe consists of five members, but made no ruling or holding itself that it was. 5 F.Supp.3d at 99 ("...rather than simply assume that the Tribe consists of five members, the Assistant Secretary was required to first determine whether the membership had been properly limited to

these five individuals"). Thus, no Court has ever held that the Tribe includes more than five members.

In addition, the AS-IA recounted an inaccurate history of the California Rancherias to further support its erroneous conclusion that the Tribe is not limited to five members. It stated without any evidentiary support as follows:

> "When a parcel on a Rancheria came available, BIA would assign the land to such a non-resident Indian who was associated with the band, if possible...Thus, such associated band Indians who were non-residents were potential residents. And since membership in an unorganized Rancheria was tied to residence, potential residents equated to potential members."

(Ex. "19," AS-IA's December 30, 2015 Decision, page 4). There has never been an occasion where the BIA has determined that the membership lists of unorganized California Rancherias should be culled from "potential residents," and neither the AS-IA nor the Dixie Faction can provide evidence of such instances.

In most instances, the California Rancherias were terminated by the Rancheria Termination Act, i.e., P.L. 85-671. Thereafter, many unorganized Rancherias sought restoration of their status as federally recognized tribes through litigation. In those instances, following restoration of these Rancherias through stipulated judgments, the BIA looked to the ***actual*** residents and relied on distributee lists created during the termination period as the most accurate representation of the active members of a particular tribe and determined that only those individuals were entitled to participate in the tribes' reorganization. See Stipulated Judgment, Paragraph 6, Wilton Miwok Rancheria v. Salazar (N.D.Cal. June 8, 2009) No. C-07-02681, Dkt. 61 (stipulation between the United States and the Wilton Miwok Rancheria that "the initial tribal organization of the Tribe shall be a General Council consisting of all

distributes and dependent members listed in the Distribution Plan...."); Alvarado v. Table Mountain Rancheria (N.D.Cal. July 28, 2005) 2005 WL 1806368, at *1 (noting that the restoration of the Table Mountain Rancheria involved reference to "Indians named in the distribution plan of the assets of the Table Mountain Rancheria and their successors in interests"), *aff'd on other grounds*, (9th Cir. 2007) 509 F.3d 1008; Alan-Wilson v. Sacramento Area Dir. (1997) 30 IBIA 241, 255 (concluding that the individuals entitled to participate in the organization of the Cloverdale Rancheria was based on the list of distributees and the distributees' lineal descendants). These cases show that when the BIA has had to determine who is eligible to reorganize a tribe, it has looked to the distribute list—reflecting actual residence on the Rancheria—as a reliable record to determine membership. There is no legal basis whatsoever—in the case of terminated tribes or tribes that maintained federal recognition—for treating ***potential*** residents as members for purposes of reorganization as the AS-IA's 2015 decision states.

Accordingly, the AS-IA relied upon these inaccurate facts to support its erroneous conclusion that the Tribe is not limited to five members.

G. THE "ELIGIBLE GROUP SYSTEM" IMPROPERLY FORCES THE TRIBE TO "RE-ORGANIZE"

The AS-IA's 2015 Decision establishing the novel "Eligible Group" system creates a system contrary to federal precedent and the requirements of the IRA that equates potential membership with actual membership.

When Burley and her family were adopted into the Tribe by Dixie, their enrollment changed their status from individuals with Miwok ancestry to members of a small tribe. In fact, the 2015 Decision recognizes that at the time of the Burley family's

enrollment the Tribe was suffering from the effects of a "dwindling tribe." (Ex. "19," AS-IA's December 30, 2015 Decision, page 4, fn. 20). Inexplicably, the 2015 Decision rejects the 1998 Resolution establishing the General Council on the purported ground that "the people who approved the 1998 Resolution...are not the majority of those eligible to take part in the reorganization of the Tribe." (Id. at page 5). The 2015 decision then erroneously creates an "Eligible group" system to facilitate the reorganization of the Tribe that includes a larger pool of eligible people based not upon membership, but based upon descent, contrary to well established Indian law.

To be sure, the purported "Eligible group" system improperly places persons with only Miwok ancestry on par with enrolled members. See Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 55-56, 72, fn. 32. It also violates the provisions of 25 U.S.C. § 476(f) and (h), because it forces the Tribe to reorganize under the IRA in order to receive federal benefits.

IV.

PLAINTIFFS HAVE SHOWN THEY ARE LIKELY TO SUFFER IMMINENT AND IRREPARABLE HARM ABSENT A STAY

The Dixie Faction argues that Plaintiffs here will not suffer any imminent an irreparable harm so as to warrant a stay of the 2015 Decision. This contention is without merit.

The fact that the AS-IA's 2011 decision was stayed by its own terms cuts against the Dixie Faction's argument. The Dixie Faction had already sued the federal government challenging the 2011 Decision when the AS-IA's Decision came down, because the Dixie faction had sued over the AS-IA's December 22, 2010 Decision, which was withdrawn. In light of that pending litigation, the AS-IA incorporated a stay of his own decision "pending resolution of the litigation in the District Court for the District of Columbia." (Ex. "16," AS-IA's August 31, 2011

Decision, page 8). There is no reason why the Court should not do the same here. The issues are the same. The AS-IA reversed its position, and now the Plaintiffs are challenging that decision and requesting that the AS-IA's 2011 Decision be re-affirmed as the correct one.

As stated, the California Gambling Control Commission ("the Commission") has been paying out but withholding certain quarterly payments of Revenue Sharing Trust Fund ("RSTF") money for the Tribe. Presently, the RSTF payments being withheld exceed $13 million. The AS-IA's 2015 Decision provides that the Dixie Faction may submit additional evidence that their proposed 2013 Constitution was validly ratified and that adequate notice was given to others in the surrounding community to participate in the re-organization of the Tribe. Once the BIA accepts the Dixie Faction's proposed Constitution, the Dixie Faction will use that to get the Commission to release the RSTF payments to them, despite the fact that this lawsuit is presently challenging the AS-IA's 2015 Decision.

The Dixie Faction contends that if the BIA approves the Dixie Faction's proposed Constitution, the Plaintiffs can always administratively appeal that agency action. This contention is without merit, and skirts the issue. The Plaintiffs should not be strapped with the burden of battling two fronts. A stay will prevent that from ever occurring and allow the parties to resolve the issue here instead. If the Court grants the relief sought by the Plaintiffs, there will be no administrative appeal, because the BIA will not be authorized to approve the Dixie Faction's Constitution and allow that faction to take control of the Tribe.

The Dixie Faction's argument against a stay is premised on the erroneous assumption that it is the recognized, controlling governing body of the Tribe. However, that decision has not yet

been made. For example, if the RSTF payments (over $13 million) are released to the Dixie Faction, and the AS-IA's 2015 Decision is reversed, the money will be irretrievably lost. It is unlikely the Dixie Faction will ever return those funds to the Tribe. This was the position the Dixie Faction took in its Complaint challenging the AS-IA's December 22, 2010 Decision (which the AS-IA reaffirmed in his August 2011 decision). Dixie alleged:

> "The December 22 Decision, if upheld, could provide a basis for allowing Burley to divert funds held in trust for the Tribe by the State of California...
>
> "In 2005, the Commission ceased distribution of the State Funds to Burley...Burley has filed litigation in California Superior Court, seeking to compel the Commission to resume distribution of the State Funds to her, including approximately $6.6 million of the State Funds that the Commission has withheld since 2005...Burley seeks to introduce the December 22 Decision as evidence that she is entitled to receive the State Funds.
>
> "If Burley receives the State Funds, Chief Dixie and the members of the Tribal Council will be denied the benefit of the State Funds, because the State of California has no control over the use of the State Funds once they are paid to the Tribe...."

(Ex. "20," Original Complaint filed by Dixie Faction, dated January 24, 2011, paragraph 64, pages 20-21). For the same reasons alleged by the Dixie Faction in the prior federal suit, the Plaintiffs will also suffer irreparable harm.

The Dixie Faction has plans to use the RSTF money earmarked for the Tribe to build a Casino under the control of a person by the name of Chadd Everone, a non-Indian, who purports to be the "deputy" of the Dixie Faction and Yakima Dixie. (See Ex. "21," Appointment of Chadd Everone as Deputy, dated December 12, 2003). For example, a document from Yakima Dixie's files, entitled "Bridge-Loan Agreement & Prospectus," shows that the

Dixie Faction has plans to use the RSTF money to build and operate a gambling casino. It states in relevant part as follows:

> "'Sheep Ranch...' is a very small (<10 members), long-established (1916), federally recognized California Indian tribe...
>
> "...[A]dministrative procedures and litigation are now in progress to return control of the tribe to Yakima so that he may receive about $1.2 million in income that currently accrues to the tribe from the California Gambling [Control] Commission and so that the tribe can be position[ed] to create a casino."

(Ex. "22," Dixie Bridge-Loan Agreement & Prospectus, dated February 26, 2004, page 1). Notably, Dixie admits in this document that the Tribe has less than 10 members, in direct contradiction to the position he is currently taking, and the position he undertook in his federal suit challenging the ASI-IA's 2011 Decision. Those "members" are identified in his Last Will & Testament, dated February 9, 2004.

V.
CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' motion papers, Plaintiffs' motion for a stay of the AS-IA's December 30, 2015 Decision should be granted, and remain in effect pending resolution of this litigation.

DATED: September 29, 2016

/s/ Manuel Corrales, Jr.
Manuel Corrales, Jr., Esq.
Attorney for Plaintiffs
CALIFORNIA VALLEY MIWOK TRIBE, THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR, ANJELICA PAULK and TRISTIAN WALLACE