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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

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

Plaintiffs,

v.

S.M.R. JEWELL, in her official capacity as U.S. Secretary of Interior, et al.,

Defendants

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants

Case No. 2:16-01345 WBS CKD

**INTERVENOR-DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Judge: Hon. William B. Shubb
Date: May 30, 2017
Time: 1:30 p.m.
Courtroom 5

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Other Authorities

**TO THE COURT, ALL PARTIES AND THEIR COUNSEL:**

PLEASE TAKE NOTICE that on May 30, 2017, at 1:30 p.m., before the Hon. William B. Shubb in Courtroom 5 of the United States District Court for the Eastern District of California, located at 501 I St # 4200, Sacramento, California, Defendant-Intervenors The California Valley Miwok Tribe, The Tribal Council, Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Gilbert Ramirez, Jr., Antoinette Lopez and Iva Sandoval (collectively, Intervenors) will and hereby do move for an order granting summary judgment on all causes of action in Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 56. Intervenors move for summary judgment on grounds that the undisputed evidence in the administrative record demonstrates that the United States Department of the Interior and its Bureau of Indian Affairs fully complied with all applicable laws in issuing the December 30, 2015 decision challenged by Plaintiffs, that the decision was not arbitrary, capricious or an abuse of discretion, and that Intervenors are entitled to judgment as a matter of law.

This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities, the Administrative Record lodged with the Court, all other papers and pleadings on record with the Court or of which this Court may take judicial notice at or before the time of the hearing of this motion, and on such other arguments as may be presented to the Court at the hearing of this matter.

This motion is made pursuant to the Court's scheduling order dated November 14, 2016 (ECF No. 41), which established the following schedule for briefing:

By March 6, 2017, the parties shall file their motions for summary judgment.

By April 3, 2017, the parties shall file their oppositions to summary judgment.

By May 8, 2017, the parties shall file their replies to oppositions to summary judgment.

The court will hear oral arguments on the cross-motions for summary judgment on May 30, 2017.

Dated: March 6, 2017

Respectfully submitted,

Robert J. Uram
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Zachary D. Welsh
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Attorneys for Intervenor-Defendants The California Valley Miwok Tribe, et al.

By /s/ James F. Rusk
JAMES F. RUSK

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has not recognized a government of the California Valley Miwok Tribe, also known as the Sheep Ranch Rancheria of Me-wuk Indians (Tribe), since 2004. Plaintiffs Silvia Burley, her two daughters and her granddaughter (Burleys) claim they are the only members of the Tribe and that the several hundred lineal descendants of the Miwok Indians for whom the Rancheria was established have no right to participate in the creation of a Tribal government or otherwise to enjoy the benefits of Tribal membership. The Burleys claim the United States must recognize a Tribal government based on a process conducted in 1998 in which only two people participated. They continue to make this claim even though three published federal court decisions in the D.C. Circuit have already rejected their "antimajoritarian gambit" and affirmed the federal Bureau of Indian Affairs' (BIA) duty to uphold majoritarian values in its dealings with this Tribe. *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (*Miwok II*), *affirming California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. Mar. 31, 2006) (*Miwok I*). *See also California Valley Miwok Tribe v. Jewell*, 5 F.Supp.3d 86 (D.D.C. 2013) (*Miwok III*).

In this case, the Burleys challenge a December 30, 2015 decision (2015 Decision) by Assistant Secretary - Indian Affairs Kevin Washburn, issued on remand from the D.C. District Court's order in *Miwok III*. Consistent with all three *Miwok* decisions, the 2015 Decision found that the Tribe's membership is not limited to the four Burleys and Intervenor Yakima Dixie, and that the United States cannot recognize a Tribal government based on a "tribal resolution" adopted in 1998 by just two people. The Decision therefore rejected the Burleys' claims to represent the Tribe, just as the BIA did in 2004 and 2005 — a decision the courts upheld in *Miwok I* and *II*.

The 2015 Decision reaffirms the well-settled principle that the United States can only recognize a Tribal government formed through a process in which all members of the Tribal community — which the Decision refers to as the "Eligible Group" members — have the opportunity to participate. The Decision identifies three Eligible Groups, each consisting of lineal descendants of one or more known historical members of the Tribe.

The Intervenor-Defendant Tribal Council and its individual members lead a Tribal government ratified through a Tribal election on July 6, 2013, which was open to all of the approximately 200 adult Eligible Group members.[1] The Tribal Council has intervened in the name of the Tribe to protect the interests of those members and their children, for whom the 2015 Decision opens a path to ending nearly 20 years of justice repeatedly denied and delayed.

Intervenors ask the Court to find that the 2015 Decision was not arbitrary or capricious, and grant summary judgment to Intervenors and Federal Defendants, because the factual record and the prior court decisions unequivocally support the Decision's findings. First, the record shows that the Tribal community includes hundreds of Eligible Group members — a fact the Burleys do not dispute. Case law confirms that this community cannot be winnowed to five people based on arbitrary distinctions such as residence on the Tribe's reservation, or on the Burleys' *ipse dixit*. Second, simple math shows that the two people who approved the 1998 resolution are not a majority of the Eligible Groups. Thus, the federal Indian Reorganization Act (IRA) and the United States' trust obligations to the Tribe prohibit the BIA from recognizing a Tribal government based on the 1998 resolution.

## II. FACTS

The history of the Tribe and the current dispute is well documented in the *Miwok* opinions, and in the administrative record.

### A. Tribal history

In 1915, federal Office of Indian Affairs (now BIA) agent John Terrell located a group of Miwok Indians — remnants of a larger band — living in and near the former mining town of Sheepranch in Calaveras County, California. (2011-22.)[2] The agent took a census of the 13 band members he found there and noted they were "[t]o some extent … interchangeable in their

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[1] The Tribe also allowed participation by lineal descendants of Miwoks named on the 1929 federal census of Calaveras County Indians—another group that the 2015 Decision recognized as eligible to participate at the Eligible Groups' discretion. The 1929 descendants made up less than 10 percent of the eligible voters.

[2] References to the administrative record prepared by federal defendants include a year (2011 or 2017) and a page number.

relations" with the Indians of nearby Miwok communities in Murphys, Six Mile, Avery and Angles. (2011-22.) The United States acquired a small parcel of land and created a reservation for the benefit of these Indians, which was known as the Sheep Ranch Rancheria.[3] (2011-6.) The Tribe has been recognized by the United States since then, initially as the Sheep Ranch Rancheria of Me-Wuk Indians of California and more recently as the California Valley Miwok Tribe. First Amended Complaint, ECF No. 4, ¶ 127 (FAC).

Rancheria resident Jeff Davis, the sole eligible voter, voted in 1935 to accept application to the Tribe of the Indian Reorganization Act (IRA), 25 U.S.C. § 476, which authorizes tribes to "organize" by adopting a constitution and government through a majoritarian process.[4] (2011-20, 21.) The Tribe did not organize at that time.[5] *Miwok III*, 5 F.Supp.3d at 89.

In 1966, the BIA began proceedings to terminate the United States' relationship with the Tribe under the California Rancheria Act, P.L. 85-671, as amended, by distributing the assets of the Rancheria. (2011-39.) As part of that process, the BIA prepared a list of people entitled to vote on a "distribution plan" for the Rancheria assets. (2011-34 - 35, 38.) Because the Tribe was still unorganized, the regulations in effect at the time required the list to be based on who was currently using Rancheria lands through formal or informal allotments, and not on membership in the Tribe. *Compare* 25 C.F.R. §242.3(a) *with* §242.3(b) (1965) (included in the record as 2011-35). The list included only Mabel Hodge Dixie, the sole Indian resident of the Rancheria at that time. (2011-48 - 51.) The BIA never completed the termination process, and all parties agree the United States' relationship with the Tribe and its members was never terminated. FAC ¶23.

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[3] The record reflects that the Rancheria currently covers 0.92 acre, but it may have included 2 acres when first purchased. (2011-6.) The difference is not germane to this litigation.

[4] Although Jeff Davis was the only eligible IRA voter by virtue of his residence on the Rancheria at that time, he was not the only Tribal member; the Tribe's membership was never limited to those people living on the tiny Rancheria property at any given time. (2017-1400.)

[5] In the 2015 Decision and throughout the *Miwok* opinions, "organize" and "reorganize" are used interchangeably to refer to the process of adopting tribal governing documents through a majoritarian process — whether under procedures prescribed by the IRA, *see* 25 U.S.C. § 476(a)-(d), or under other procedures, *see* 25 U.S.C. § 476(h). Regardless of the procedures used, organization must "reflect the will of a majority of the tribal community." *Miwok I*, 424 F.Supp.2d at 202.

**B. The 1998 Resolution and interim council**

Ms. Dixie's son Yakima Dixie was the only Tribal member living on the Rancheria property in 1998 when Silvia Burley "wrote for Yakima's signature, a statement purporting to enroll herself, her two children, Rashel Roznor [sic] and Anjelica Paulk, and her granddaughter, Tristian Wallace, into the Tribe." *Miwok III*, 5 F.Supp.3d. at 90.[6] (2011-110 – 114, 461-464.) BIA staff met with Mr. Dixie and Ms. Burley and told them the BIA could make federal funds available for the process of Tribal organization, including identifying the Tribe's full membership, drafting a constitution, and establishing a government. (2011-119.) Later in 1998, Dixie and Burley signed a document, "Resolution #GC-98-01" (the 1998 Resolution), which recited that the membership of the Tribe consisted of "at least" the Burleys and Dixie, and purported to establish a "general council" consisting of all adult members. (2011-177.) They did not involve any other members of the Tribe in this process. (2011-179.) *See Miwok III*, 5 F.Supp.3d at 90-91. The BIA, which drafted the 1998 Resolution, described it as "an initial document to get started from" which would facilitate the organization process. (2011-145.) After this initial step, the BIA expected Mr. Dixie and the Burleys to "identify other persons eligible to participate in the initial organization of the Tribe" and eventually, with the participation of those other members, to draft a constitution, hold elections and adopt a government. (2011-173 – 174, 771.)

In 1999, Burley submitted a letter to the BIA claiming she had replaced Dixie as the leader of the Tribe under the 1998 Resolution — a claim Mr. Dixie disputed. (2011-180, 182, 2319.) *See Miwok III*, 5 F.Supp.3d at 91-92. The BIA initially accepted Burley as the head of an interim Tribal Council and, from 1999 through 2004, provided that council with federal funds under the Indian Self Determination Act, Public Law 638, for the purpose of organizing the Tribe. (2011-

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[6] Although the 2015 Decision accepted the purported enrollment of the Burleys as an "appropriate step" that benefited Yakima and Melvin Dixie, Intervenors maintain that Mr. Dixie lacked authority to "enroll" the Burleys into the Tribe without consulting the rest of the Tribal community. The enrollment documents themselves (2011-110 – 114), which Ms. Burley has admitted she wrote (2011-463 – 464), further strengthen the inference that Ms. Burley deliberately took advantage of Mr. Dixie's lack of sophistication. Evidence in the record also suggests that, although Ms. Burley claimed she was motivated by educational and health care benefits, her real motivation was to enter into an agreement to develop a gaming casino. (2017-1116 – 1117.)

198, 202, 289-292, 528-529.) *See Miwok I*, 424 F.Supp.2d at 200; *Miwok II*, 515 F.3d at 1265 n.6; *Miwok III*, 5 F.Supp.3d at 91, 93 n.10. During that time, Burley submitted a series of proposed Tribal constitutions to the BIA, seeking to demonstrate that the Burleys had properly organized the Tribe. (2011-255, 261, 864.) But the constitutions reflected the involvement of only Burley and her two adult daughters and would have limited Tribal membership to only them and their descendants (*e.g.*, 2011-261, 499-500), even though Burley herself estimated the Tribe's membership at around 250 people (2011-299). *See Miwok II*, 515 F.3d at 1265-1266.

**C. *Miwok I* and *II***

The BIA rejected the Burley constitutions, "explaining that [Burley] would need to at least attempt to involve the entire tribe in the organizational process before the Secretary would give approval."[7] *Miwok II*, 515 F.3d at 1265. (*E.g.*, AR 261-262.) By letter dated March 26, 2004 (the 2004 Decision), the BIA rejected another purported constitution, informed Ms. Burley that Tribal organization must involve the entire Tribal community, and identified some members of the Tribal community who should be involved. (2011-499-502.) The BIA also rescinded its interim recognition of Burley and the general council and terminated federal funding to the council. (2011-612; 2011-596 ("the Tribe has not yet reorganized despite the funds provided by the federal government for that purpose").) In a separate decision in February 2005, the acting Assistant Secretary informed Burley and Dixie that the BIA "does not recognize any tribal government" for the Tribe.[8] (2011-610 – 611.)

Burley sued the United States in the Tribe's name, claiming the IRA required the BIA to approve her constitution. *Miwok III,* 515 F.3d at 1266. She argued, in the alternative, that the BIA had previously recognized the general council under the 1998 Resolution with her as its

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[7] Congress has charged the Secretary of the Interior with authority over Indian affairs, 43 U.S.C. § 1457, and the Secretary has delegated this responsibility to the BIA, which is headed by the Department of the Interior's Assistant Secretary – Indian Affairs. *See Miwok I*, 424 F.Supp.2d at 201 n.6.

[8] Burley also sued the United States in this court in 2008, alleging the BIA had unlawfully failed to renew funding contracts with her tribal council. The case was dismissed for failure to exhaust administrative remedies. *California Valley Miwok Tribe v. Kempthorne*, No. 2:08-cv-03164 (E.D.Cal. 2009).

leader, and could not "reverse that position" despite her failure to identify the Tribe's members and involve them in forming a Tribal government as the BIA contemplated when it provided funds for Tribal organization.[9] *Miwok I*, 424 F.Supp.2d at 201.

The district court in *Miwok I* upheld the refusal to recognize the Burley government, finding it consistent with the BIA's "responsibility to ensure that [the] Secretary deals only with a tribal government that actually represents the members of a tribe." 424 F.Supp.2d at 201. The D.C. Circuit affirmed, holding that Burley's "antimajoritarian gambit deserves no stamp of approval from the Secretary." *Miwok II*, 515 F.3d at 1267.

**D. The 2011 Decision**

After *Miwok I*, the BIA attempted in 2006-2007 to help the Tribe involve the Tribal community in the organization process. It published a public notice asking Tribal community members to submit documentation to the BIA demonstrating their lineal descent from known historical members, including: (1) individuals listed on the 1915 Indian Census of Sheep-ranch Indians; (2) eligible voters listed on the federal government's 1935 IRA voting list for the Rancheria (*i.e.*, Jeff Davis); and (3) distributees under the Rancheria distribution plan prepared in 1966 (*i.e.*, Mabel Hodge Dixie). (2011-1501.) The BIA received about 500 genealogies in response to the public notice. (2011-2105.) It reviewed the submissions and prepared a letter to each person, verifying their degree of Indian blood and lineage. (2011-2105.)

Before the letters could be sent, Burley filed multiple administrative appeals, which culminated in a decision by the Interior Board of Indian Appeals, dismissing most of Burley's claims and referring one issue to the Assistant Secretary – Indian Affairs. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 104, 2010 WL 415327 (2010). The Assistant Secretary issued a decision on August 31, 2011 (2011 Decision) that reversed the BIA's prior position and found (i) the Tribe's membership was limited to the four Burleys and Yakima Dixie, and (ii) the Tribe was already organized with a general council form of government under

[9] The Burleys have never accounted for the millions of dollars in federal and state funds they received in the name of the Tribe between 1999 and 2004.

the 1998 Resolution.[10] (2011-2049 – 2050.) The Intervenors in this action filed suit challenging the 2011 Decision (2017-23), and the Burleys intervened in the name of the Tribe (2017-240.)

**E. The *Miwok III* decision by the D.C. District Court**

The district court found the 2011 Decision arbitrary and capricious because the Assistant Secretary unreasonably assumed the Tribe's membership was limited to five people despite a record "replete with evidence" of a much larger Tribal community. *Miwok III*, 5 F.Supp.3d. at 98. The court also found the Assistant Secretary's conclusion that the 1998 Resolution established a valid Tribal government to be unreasonable in light of the record. *Id.* at 99-100. The court observed that "when an internal dispute questions the legitimacy of the *initial* tribal government, the BIA must ascertain whether the initial government is a duly constituted government" and cannot merely "repeat[] the rhetoric of … federal noninterference with tribal affairs." *Id.* at 100 (italics added; quotation marks and citations omitted). The Assistant Secretary's acceptance of the 1998 general council, despite its failure to involve the Tribe's members, violated the United States' "distinctive obligation of trust" to the Tribe. *Id.* (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). On December 13, 2013, the district court remanded the 2011 Decision to the Secretary of the Interior for reconsideration consistent with its decision. *Id.* at 101.

**F. The Tribe's 2013 election**

While the administrative appeals and federal litigation were ongoing, the Tribal Council continued efforts to involve the entire Tribal community in Tribal organization. The Council members conducted extensive outreach to the Tribal community through monthly open meetings, mailings, meetings and phone calls with local Miwok organizations and individuals, and participation in cultural activities and Native American gatherings. Under the Council's leadership, the Tribal community met repeatedly to draft and discuss a Tribal constitution. (2011-2138 –2142; 2017-898 – 899.)

[10] For litigation purposes, the Burleys count Yakima Dixie as the fifth member of the Tribe, but they purported to disenroll him in 2005. (2011-864.)

After an unsuccessful attempt to ratify a Tribal constitution in 2012, the Tribal Council called an election for July 6, 2013, for the Tribal community to consider ratifying a revised constitution (2013 Constitution). (2017-685.) Of the 200 eligible voters, 100 cast ballots in the election, and they overwhelmingly approved the 2013 Constitution by a vote of 90 to 10. (2017-677.)[11] The Burleys had notice of the organization process but chose not to participate with the Tribe. (2017-685.) The Tribal Council informed the Assistant Secretary of the election results on July 11, 2013 and stated that it intended to seek BIA recognition of its government after *Miwok III* was resolved. (2017-685.)

**G. Briefings to the BIA by the parties**

Following the district court's remand order, both the Burleys and the Tribal Council submitted information to the BIA for use in making its reconsidered decision. Along with other correspondence, the Burleys submitted substantive briefings and letters (through four different law firms) on January 17, 2014; January 21, 2014; April 24, 2014; May 19, 2014; June 6, 2014; September 3, 2014; June 12, 2015; and September 3, 2015. (2017-954, 977, 1002, 1025, 1034, 1099, 1298.) The Tribal Council submitted letters and briefings on December 24, 2013; March 19, 2014; May 12, 2014; June 27, 2014; September 22, 2014; and August 11, 2015. (2017-898, 997, 1028, 1044, 1115, 1344.)[12] Both sides had ample opportunity to express their views.

**H. The 2015 Decision**

Two years after the court's remand in *Miwok III*, the Assistant Secretary issued the 2015 Decision. (2017-1397.) The 2015 Decision unequivocally rejected the Burleys' claims that the Tribe consists of only five members and that the 1998 Resolution established a valid Tribal government. Accordingly, the Decision determined that "Ms. Burley and her family do not represent the [Tribe]." (2017-1401.)

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[11] Four of the 104 participants cast ballots but abstained from voting for or against adoption of the Constitution.

[12] The Tribe's May 12, 2014 letter to the Assistant Secretary was omitted from the administrative record filed by federal defendants, but counsel for defendants has informed Intervenors that defendants agree to add the letter to the record.

The 2015 Decision determined that the individuals eligible to participate in the reorganization of the Tribe are "the Mewuk Indians for whom the [Sheep Ranch] Rancheria was acquired and their descendants." (2017-1400.) The Decision identified those individuals as: (1) the individuals listed on the 1915 Terrell Census and their descendants; (2) the descendants of Rancheria resident Jeff Davis (who was the only person on the 1935 IRA voter list for the Rancheria); and (3) the heirs of Mabel Dixie, as identified by the Department of Interior's Office of Hearings and Appeals in 1971, and their descendants. (2017-1400.) The 2015 Decision determined that, consistent with *Miwok I*, *II* and *III*, these individuals (collectively the Eligible Groups) must be given an opportunity to take part in any Tribal organization. *Id.* at (2017-1400, 1402.) Recognizing that "the Indians named on the 1915 Terrell Census had relatives in other Calaveras County communities," the 2015 Decision also determined that descendants of Miwok Indians named on the 1929 census of Indians of Calaveras County (1929 Census) may be included in Tribal organization at the discretion of the Eligible Group members. (2017-1401.)

The 2015 Decision determined the BIA could not recognize the general council established under the 1998 Resolution as a valid Tribal government because "the people who approved the 1998 Resolution … are not a majority of those eligible to take part in the reorganization of the Tribe." (2017-1401.) As a result of the Decision, the Burleys do not represent the Tribe and have the same status as any other member of the Eligible Groups. (2017-1401.)[13]

The 2015 Decision also considered the Tribe's 2013 Constitution, which recognizes all Eligible Group members and 1929 Census descendants as eligible for Tribal membership. (2017-1402.) The Decision found the Tribe had not yet demonstrated the 2013 Constitution was validly ratified because the record did not disclose whether adequate notice of the 2013 election was provided to members of the Eligible Groups. (2017-1402.) The Decision authorized the BIA's Pacific Regional Director to receive additional submissions for the purpose of determining whether the 2013 Constitution was validly ratified. (2017-1402.)

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[13] Based on information the Burleys provided to the BIA, the Tribal Council believes the Burleys are members of the Eligible Groups and thus eligible to participate in Tribal organization, but the Burleys have chosen not to participate with the rest of the Tribal community. (2017-685.)

On April 18, 2016, the Tribal Council submitted additional information to the Regional Director and requested that she recognize the 2013 Constitution and Tribal Council ratified through the July 6, 2013 election. As described in earlier briefing in this case, the Tribe's request documented the results of the election, and the outreach and notice to members of the Eligible Groups preceding the election, and showed that the 104 voters who participated in the 2013 election consisted of 95 Eligible Group members and nine 1929 Census descendants who participated with the consent of the Eligible Group members. ECF No. 20, 20-1. To date, the BIA has not issued a decision on the Tribe's request.

**I. The BIA's request for comment from the Burleys and the inception of this litigation**

On June 9, 2016, the BIA notified the Burleys that the Tribal Council had requested recognition of the 2013 Constitution, provided the Burleys with a copy of the Tribal Council's entire recognition request, and invited the Burleys to provide comments on the process used to conduct the 2013 election. ECF No. 11, Exhibit 1. The Burleys instead filed this lawsuit challenging the validity of the 2015 Decision. Rather than returning to the D.C. District Court, which remanded the 2011 Decision for reconsideration, the Burleys filed this suit in a new forum.

## III. PROCEDURAL BACKGROUND

The Burleys filed the Complaint on June 16, 2016 and the First Amended Complaint on June 17, 2016. ECF No. 1, 4. The Burleys filed an ex parte application for an emergency stay of the 2015 Decision on July 1, 2016, which the Court denied without prejudice to the refiling of a properly noticed motion. ECF No. 8, 9. On July 8, 2016, the Burleys filed a noticed motion for an order staying the 2015 Decision. ECF No. 12.

The Court granted Intervenors' unopposed motion to intervene on September 6, 2016, and denied the Burleys' motion for stay on October 24, 2016. ECF No. 30, 37. Federal Defendants have certified their completion of the administrative record. ECF No. 43. Federal Defendants and Intervenors have answered the FAC. ECF No. 31, 32.

## IV. STANDARD OF REVIEW

### A. Judicial review of federal agency action

The Court reviews the merits of the Burleys' challenge to the 2015 Decision under the Administrative Procedure Act (APA), which compels federal courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the court will affirm an agency action "if the agency has articulated a rational connection between the facts found and the conclusions made." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (quotation marks and citation omitted). Courts "must not substitute [their] judgment for that of the agency, but instead must uphold the agency decision so long as the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-954 (9th Cir. 2003) (citation omitted).

In reviewing federal agency action under the APA, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769 (9th Cir. 1985). Accordingly, "the [summary judgment] standard set forth in Rule 56(c) does not apply because the district court's role is limited to reviewing the administrative record." *In re Consolidated Salmonid Cases*, 791 F.Supp.2d 802, 818 (E.D. Cal. 2011) (quotation marks and citation omitted) (*rev'd on other grounds*, *San Luis & Delta-Mendota Water Auth.*, 776 F.3d 971 (9th Cir. 2014)). "In this context, summary judgment becomes the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Consolidated Salmonid* at 818-819.

### B. The Indian Reorganization Act

Applicable law here includes the IRA, 25 U.S.C. § 461 *et seq.*, which authorizes Indian tribes to "organize for [their] common welfare" by adopting a tribal constitution and bylaws. 25 U.S.C. § 476(a). This Tribe has accepted the application of the IRA. 2011-20, 21. The IRA provides that a constitution or bylaws adopted pursuant to subsection 476(a) must be (i) "ratified

by a majority vote of the adult members of the tribe" in a special tribal election called by the Secretary, and (ii) approved by the Secretary. 25 U.S.C. § 476(a). Alternatively, IRA subsection 476(h) allows tribes to "adopt governing documents under *procedures* other than those specified in [Section 476]." 25 U.S.C. § 476(h) (italics added). But, as the court explained in *Miwok II*, subsection 476(h)'s reference to "governing documents"

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

*Miwok I*, 424 F.Supp.2d at 202-203. *See also Miwok II*, 515 F.3d at 1267-1268 ("tribal organization under the [IRA] must reflect majoritarian values"). This interpretation of subsection 476(h) is informed by the United States' obligations as a trustee to Indian tribes and the Indian people. *See* i*d.* at 1267; *United States v. Mitchell*, 436 U.S. 206, 225 (1983) ("[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 147 (D.D.C. 2002) (federal government's "distinctive obligation of trust" to Indian peoples required it to intervene in tribal elections to protect members excluded from elections) (citation omitted).

## V. ARGUMENT

The 2015 Decision should be upheld because it properly addressed the two key issues that the D.C. District Court ordered the Secretary to reconsider: whether the Tribe's membership was limited to five people, and whether the 1998 Resolution established a valid Tribal government. *See Miwok III*, 5 F.Supp.3d. at 99-100. The Assistant Secretary's negative answer on both issues was consistent with the overwhelming evidence in the record, with the Tribe's well-established right to define its own membership, and with the BIA's obligation to uphold majoritarian values in its dealings with the Tribe, as affirmed by the federal courts in *Miwok I*, *Miwok II*, and *Miwok III*.

The Assistant Secretary's findings on those two issues render irrelevant the other arguments raised by the Burleys in their briefings on remand. For instance, the 2015 Decision found that the Burleys' purported "enrollment" in 1998 was not improper and did not prejudice the interests of Melvin Dixie. 2017-1400 n.20, 1401 n.23. But, because the Burleys are only four out of hundreds of Eligible Group members, and the 1998 Resolution they rely on was adopted without the participation of the Eligible Groups, those findings do not undermine the Assistant Secretary's conclusion that the Burleys do not represent the Tribe. Likewise, whether Mr. Dixie did or did not resign as "chairman" of the 1998 general council is irrelevant, given the 2015 Decision's conclusion that the council is not a valid Tribal government.

**A. The 2015 Decision reasonably determined that the Tribe's membership is not limited to five people.**

The Assistant Secretary did not act arbitrarily or capriciously in determining that the Tribe's membership is not limited to five people, because (i) only the Tribe itself, acting through a majoritarian process open to the whole Tribal community, can define its membership; (ii) the record shows that the Tribal community — lineal descendants of those Miwok Indians for whom the Sheep Ranch Rancheria reservation was established—is much larger than five people; and (iii) there is no legal basis for the BIA to limit Tribal membership or participation in Tribal organization to a subset of the Tribal community, based on residence on the rancheria, the rancheria distribution plan, or any other reason.

**1. The Tribe has the right to define its own membership.**

A bedrock principle of federal Indian law is that each Indian tribe has the sovereign right to define its own membership unless limited by treaty or federal statute. *E.g.*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership") (citing *U.S. v. Wheeler*, 435 U.S. 313, 322 n.18 (1978)); *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007); *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) (citations omitted). Depending on whether a tribe has adopted formal governing documents, recognition of membership may be a formal or informal process. *See* 25 C.F.R. §81.1(k) (BIA regulations defining a tribal "member" as: "any Indian who is duly enrolled in a tribe who meets a tribe's written criteria for membership

*or who is recognized as belonging to a tribe by the local Indians comprising the tribe*" (emphasis added).)

Given the Tribe's right to define its own membership, the Assistant Secretary's task was not to determine who the Tribe's members are, but only to identify the body politic that the United States would recognize as entitled to participate in establishing an initial Tribal government. *See Miwok III*, 5 F.Supp.3d at 100 (where a tribe seeks to organize for the first time, BIA must ensure "the initial tribal government is organized by individuals who properly have the right to do so" (quoting *Alan–Wilson v. Bureau of Indian Affairs*, 30 IBIA 241, 252, 1997 WL 215308 (1997)).[14]

**2. The 2015 Decision's identification of the Eligible Groups was reasonable.**

The Assistant Secretary identified the Eligible Groups – those entitled to participate in Tribal organization – based on historical evidence and consistent with the means that tribal communities such as this one have traditionally defined themselves. His decision was reasonable, consistent with the Tribe's own practice, and is entitled to deference. *Aguayo v. Jewell*, 827 F.3d 1213, 1227 (9th Cir. 2017) (court's review of the BIA's actions is "highly deferential").

Tribes are free to establish whatever membership criteria they choose, but the Solicitor of the Interior summarized the usual practice more than 70 years ago: "In the absence of Congressional legislation, tribal membership is usually acquired by birth into, affiliation with, and recognition by the tribe." 2 Ops. Sol. Int. 1253, 1254 (Mar. 10, 1944).[15] The foremost treatise on Indian law concurs:

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

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[14] As explained in Part V.A.3.b, *infra*, *Alan-Wilson* involved a rancheria tribe that was a party to the *Tillie Hardwick* stipulated judgment, and thus the particular criteria for participation that applied to that tribe do not apply here. 30 IBIA at 245-246, 249-250 ("We base our determination on the order issued in *Hardwick*").

[15] *Available at* http://thorpe.ou.edu/sol_opinions/p1251-1275.html (last visited March 6, 2017).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[2] (2012 ed.) (italics added). Tribes may impose additional requirements, but they are not required to do so. *See*, *e.g.*, *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005) (tribal constitution defining members as lineal descendants of persons named on base roll, with added requirement of one-quarter degree California Indian blood).

"Rancheria" tribes in California are no exception. A California Court of Appeal explained the traditional membership practices of the Dry Creek Rancheria of Pomo Indians of Northern California prior to organization: "Before the adoption of the articles of association in 1973, the Tribe was governed solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth." *In RE Bridget R.*, 41 Cal.App.4th 1483, 1493 (1996) (superseded by statute on other grounds).

The identification of the Eligible Groups is consistent with this customary practice — each of the Eligible Groups consists of lineal descendants of one or more of the known historical members of the Tribe — and is supported by the record and the BIA's long experience with this Tribe. BIA staff have "remained cognizant" of a Tribal community of lineal descendants over the years, including those who did not reside on the Rancheria. (2017-1400.) For instance, in 1935, an Indian Office memorandum showed the "total population" of the Sheep Ranch Rancheria as 16 people, even though the "voting population" for purposes of the Indian Reorganization Act — those adults actually residing on the Rancheria — was found to include only one person just a few months later. (2011-2016; 2017-1400, 1423.)

In 1966, the BIA corresponded with Tribal community members regarding the omission of Lena Hodge Shelton, Tom Hodge, Dora Shelton Mata, Josie Mata, and Valerie Mata from the list of those eligible to vote on preparation of a distribution plan for the Rancheria.[16] (2011-40 – 46.) Lena Hodge and Tom Hodge are individuals named in the 1915 Sheep Ranch census (2011-2),

[16] The BIA found them ineligible to vote because they did not currently reside on the Rancheria — a qualification distinct from Tribal membership. The finding did not affect their status as members.

and the letters show that Dora, Josie and Valerie are her daughter and granddaughters, respectively—*i.e.*, they are lineal descendants (2011-44). All five are Eligible Group members.

In 2004, when the Burleys submitted a constitution and membership "base roll" that included only themselves and Yakima Dixie, the BIA responded in the 2004 Decision that the Burleys' document "suggests that this tribe did not exist until the 1990s [when the Burleys contacted Yakima Dixie], with the exception of Yakima Dixie. However, BIA's records indicate … otherwise." (2011-500.) Citing the BIA's "relations over the last several decades with members of the tribal community in and around Sheep Ranch," the 2004 Decision identified various groups that should have been included in Tribal organization efforts, including the descendants of Merle Butler, Tilly Jeff, Lenny Jeff and Lena Shelton, and a "larger group of Indians" residing at nearby West Point, of which the Sheep Ranch Indians were "a part." (2011-500.) The 2004 Decision explained that northern California Miwok tribes typically used census rolls, voter rolls, and other historical documents to construct a base roll of past members that would serve as the "starting point and foundation" for identifying current membership. (2011-500 – 501.) Also in 2004, BIA official Brian Golding testified that, "[b]ased on the records of this office, the Tribe [as of 1997] consisted of a loosely knit community of Indians in Calaveras County," although the Tribe "kept to itself" at that time. (2011-507.)

After publishing its public notice in 2007 (2011-1501), the BIA received and reviewed genealogies from 503 Tribal community members (the BIA did not say how many of those were children) (2011-2105). That number is consistent with the Tribal roster that the Tribal Council provided the BIA as part of a briefing in May 2011, which included 242 adult members and approximately 300 children (names of children withheld for privacy reasons). (2011-2268.) Declarations submitted with the Tribe's briefing provided genealogical information for each of the individual Tribal Council members and, by extension, for their offspring, and for several other members. (2011-2196, 2204, 2218, 2224, 2231, 2238, 2279, 2285, 2291.)

The Burleys have never offered any evidence to refute the existence of this Tribal community or their status as lineal descendants; in fact, even the Burleys have estimated the Tribal community to number about 250 people. (2011-299.) But they have repeatedly characterized the

lineal descendants as "non-members" based solely on the Burleys' alleged authority to define the Tribe's membership as they wish. As the district court observed in *Miwok III*, "This circular argument provides no basis on which [the Court] can conclude that it was the product of reasoned decisionmaking." 5 F.Supp.3d at 98 n.14 (quotation marks and citation omitted). The Assistant Secretary properly rejected it in the 2015 Decision.

**3. The 2015 Decision reasonably declined to limit participation by the Eligible Groups.**

Recognizing that only the Tribe itself can further define its membership criteria, the Assistant Secretary appropriately included all the lineal descendants in the Eligible Groups and declined to limit participation to (i) those who were residents on the Sheep Ranch Rancheria or (ii) those who were named on the Sheep Ranch distribution plan. His decision was reasonable and consistent with controlling law. As the Ninth Circuit held in a case involving the Mooretown Rancheria, not only does the BIA *not* have any policy or rule limiting the membership in rancheria tribes, but "given a tribe's sovereign authority to define its own membership, it is unclear how the BIA *could* have any such policy." *Williams v. Gover*, *supra*, 490 F.3d at 790 (italics added) (rejecting plaintiff's claim that BIA policy restricted membership in restored rancherias to individuals named on distribution plan and their lineal descendants). Moreover, Congress has specifically amended the IRA to prohibit the BIA from placing limits on the membership of tribes like this one.

**a. The Tribal community is not defined by residence on the Rancheria.**

The 2015 Decision reasonably determined that residence on the Sheep Ranch Rancheria did not equate to membership in the Tribal community. Rancherias were intended not to reflect the geographical boundaries of tribal communities, but simply to accommodate — temporarily or otherwise — community members displaced by white settlement. *See Alan–Wilson v. Bureau of Indian Affairs*, 30 IBIA 241, 242, 1997 WL 215308 (1997). As the 2015 Decision noted, many rancherias are not large enough for all members of a tribe to live there (2017-1400). *See In Re Bridget R.*, *supra*, 41 Cal.App.4th at 1492 (noting that Dry Creek Rancheria had approximately 225 members in 1996, of whom only 25 lived on the reservation). That is certainly true of this

Tribe—the 0.92-acre Rancheria could never have housed more than a handful of the Tribe's members.

The BIA noted in 1915 that the Miwok Indians living at Sheep Ranch were "interchangeable in their relations" with those living in the nearby communities of Murphys, Six-Mile, Avery and Angles [sic: Angels' Camp].[17] (2011-5.) Attempting to limit the Tribe's membership to those living on the Sheep Ranch Rancheria would be arbitrary and would interfere with the Tribe's sovereign right to define its own membership, as the Ninth Circuit recognized in *Williams*.[18] 490 F.3d at 791.

**b. The Tribal community is not defined by the Sheep Ranch distribution plan.**

The 2015 Decision reasonably determined that the Sheep Ranch distribution plan prepared in 1966 did not define or limit the Tribal community. Distribution plans for unorganized tribes like this one did not reflect tribal membership. Under the regulations in effect at the time, the plans were based on those individuals who held formal or informal allotments or assignments to use the rancheria property, *not* on the membership of the tribe. *Compare* 25 C.F.R. § 242.3(a) (1965) *with* 25 C.F.R. § 242.3(b) (1965) (*in the record at* 2011-000035) (distribution plans for "organized" tribes were based on membership criteria set forth in tribe's organic documents, but plans for "unorganized" tribes having no written membership criteria were based on allotments or assignments).[19]

Moreover, in enacting the California Rancheria Act, Congress disclaimed any intent to define the membership of rancherias. A 1958 Senate Report discussing the Act states, "Attention

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[17] In a complaint filed in this court in 2002, Ms. Burley alleged that the United States purchased the Sheep Ranch Rancheria "for the use and occupation of the remnants of a band of Northern Sierra Me-wuk Indians … part of the Eastern Me-wuk, who inhabited what is now Calaveras and San Joaquin Counties." (2011-301.)

[18] Defining the Tribe's membership by residency on the Sheep Ranch Rancheria would exclude the Burleys, as none of them has ever resided on the Rancheria. (2011-304 – 370 (Burley deposition discussing her places of residence).)

[19] The Burleys argued before the Ninth Circuit in 2004 that "the BIA excluded *members* from participating in the distribution plan, electing instead to allow only one person to participate." (2011-595 (italics added).)

is directed to the fact that no provision is made for preparing a membership roll for each rancheria or reservation. The preparation of such rolls would be impracticable because the groups are not well defined." Sen. Report 1874, pp. 3, 6, 10 (July 22, 1958). *See also* House Report 1129, pp. 4, 8, 23 (Aug. 13, 1957) (same). The Senate Report also shows that it was common for members of California rancherias to come and go as residents of the rancheria properties, Sen. Report 1874, pp. 13-50, and this did not prevent non-residents from being considered members of those tribes, *id.* at 39 (discussing Redwood Rancheria).

Rancheria tribes that were "terminated" under the California Rancheria Act and later restored to federal recognition under a stipulated judgment in the *Tillie Hardwick* case *did* use distribution plans to identify the individuals entitled to participate in the subsequent reorganization of those tribes. But the *Hardwick* settlement agreement does not control here because (i) this Tribe was not a party to the *Hardwick* case; (ii) all parties agree this Tribe, unlike the Tribes involved in *Hardwick*, was never terminated; and (iii) the Ninth Circuit has held that the BIA cannot impose the requirements of the *Hardwick* agreement on other rancheria tribes seeking to reorganize. *Williams*, 490 F.3d at 791.

**c. The IRA prohibits the BIA from restricting Tribal membership.**

The 2015 Decision is consistent with subsections 476(f) and (g) of the IRA, which Congress enacted in 1994 specifically to prevent the BIA from limiting the membership of tribes like this one. Prior to 1994, the BIA had a self-professed policy of imposing membership limitations on what it called "created" tribes — tribes, such as this one, for which reservations had been established in locations other than their traditional lands, and which the BIA distinguished from "historic" tribes.[20] *See Rosales v. Sacramento Area Dir., Bureau of Indian Affairs,* 32 IBIA 158, 164-165, 1998 WL 233748 (1998). *See also* 140 Cong. Rec. S6144, p. 7 (May 19, 1994) (colloquy between Sen. McCain and Sen. Inouye, co-sponsors of S.1654, enacted as Pub.L. 103-263). In response, Congress added two provisions to the IRA intended to end the BIA's practice and put all tribes on "equal footing." *Rosales*, 32 IBIA at 165. IRA subsection 476(f) provides:

[20] A rancheria is a type of "Indian reservation" for purposes of federal Indian law. 2011-22.

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA], as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe *relative to other federally recognized tribes* by virtue of their status as Indian tribes.

25 U.S.C. §476(f). IRA subsection 476(g) contains similar language that applies to administrative decisions already in effect when the law was enacted. *See* 25 U.S.C. §476(g). Restricting the Tribe's membership, or participation in Tribal governance, would violate subsection 476(f). *Rosales*, 32 IBIA at 165 (holding that BIA's attempt to impose blood quantum requirement for membership in the Jamul Indian Village tribe violated IRA 476(f)).

**4. The 2015 Decision properly defers to the Tribal community to establish membership criteria.**

For all these reasons, the Assistant Secretary did not abuse his discretion by declining to limit the Tribe's membership to five people — indeed, the "BIA could not have defined the membership of [the Tribe], even if [it] had tried." *Williams*, *supra*, 490 F.3d at 791. Instead, the 2015 Decision properly deferred to the Tribal community to define its own membership criteria through the organization process. (2017-1402.) The Assistant Secretary also heeded the district court's admonition that, where a tribe seeks to organize for the first time, the BIA has a "responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so." *Miwok III*, 5 F.Supp.3d at 100 (quoting *Alan–Wilson*, *supra*, 30 IBIA at 252). The 2015 Decision appropriately balanced this obligation with the goal of minimizing federal interference with Tribal affairs, by identifying the known groups that make up the Tribal community (*i.e.*, the Eligible Groups) and encouraging them to complete the organization process. (2017-1401 – 1402.)

The approach taken in the 2015 Decision is consistent with past practice providing for the reorganization of tribes not subject to the *Hardwick* stipulated judgment. "Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership

for organizational purposes." *Alan-Wilson*, 30 IBIA at 249-50. For instance, when Congress restored the Paskentia Rancheria tribe by legislation, it "provided for broad membership for the purpose of reorganizing the … tribal government," including all descendants of Paskenta Indians identified in any rolls prepared by the BIA who have maintained relations with the tribe, "but left the ultimate establishment of membership criteria to the tribe." *Alan-Wilson*, *supra*, 30 IBIA at 255-256 (*citing* 25 U.S.C. §§ 1300m—1300m-7). The Eligible Groups identified in the 2015 Decision are also consistent with those identified in the BIA's 2007 public notice (2011-1501), and with the Tribal community's self-identification as set forth in its 2013 Constitution (2017-661).

**B. The 2015 Decision reasonably determined that the 1998 Resolution did not create a valid Tribal government.**

Three published federal court decisions involving *this Tribe* have affirmed the BIA's "duty to ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members." *Miwok I*, 424 F.Supp.2d at 202-203. *Miwok I* ruled that, for tribes that have accepted it, "the IRA require[s] that tribal actions reflect the will of a majority of the tribal community — whether or not they choose to organize under the IRA procedures." *Id.* at 202. Thus, whether a tribe adopts a constitution under the Secretarial election procedures in IRA §476(a), or adopts governing documents under different procedures as permitted by §476(h), the IRA requires "notice, a defined process, and minimum levels of participation." *Id.* at 203. The D.C. Circuit affirmed, taking judicial notice of the Burleys' admission that the Tribal community included an estimated 250 people, and rejecting the Burleys' "antimajoritarian" claim that it could "govern the Tribe without so much as consulting its membership." *Miwok II*, 515 F.3d at 1263, 1265.

*Miwok III* reaffirmed the BIA's "distinctive obligation of trust" and admonished the BIA for blindly deferring to the Burleys' claims of Tribal authority and accepting the 1998 Resolution as creating a valid government. 5 F.Supp.3d at 99-100. The Ninth Circuit is in accord: "The Secretary properly exercises discretion not to approve a governing document when it does not

'reflect the involvement of the whole tribal community.'" *Aguayo v. Jewell*, *supra*, 827 F.3d at 1224 (quoting *Miwok II*, 515 F.3d at 1266-67).

In light of these binding judicial rulings, the 2015 Decision correctly rejected the Burleys' claims that the 1998 Resolution had established a valid Tribal government to which the BIA must defer. As the Assistant Secretary explained, the 1998 Resolution may have seemed *at the time* a reasonable mechanism to facilitate the process of Tribal reorganization. (2017-1401 (italics added).) "But the actual reorganization of the Tribe can be accomplished only via a process open to the whole tribal community." *Id.*

Evidence before the Assistant Secretary when he made the 2015 Decision showed that the 1998 Resolution did not meet that standard — the record shows that at least 83 of the adults on the Tribe's 2011 membership roster were aged 18 years or older in 1998 and entitled to participate in any Tribal organization process. Other members who are now deceased were also alive and over age 18 in 1998. (2017-1212 – 13.) Yet only four adults were involved in the adoption of the 1998 Resolution, and only two signed it. (2011-179.) The reasonableness of the 2015 Decision must be judged on this and other information "that was before the agency decision makers at the time they made their [2015] decision." *Repaka v. Beers,* 993 F.Supp.2d 1214, 1218 (S.D.Cal.2014) (citing *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814 (1971)).

That the BIA dealt with the Burleys' council for several years prior to 2004 does not change the BIA's "responsibility to ensure that a tribe's representatives, with whom [they] must conduct government-to-government relations, are valid representatives of the tribe *as a whole*." *Miwok II*, 515 F.3d at 1267 (emphasis in original; citation omitted). (2017-1401.) The BIA not only can, but must, withdraw recognition of a tribal government if it determines that the government was not adopted by those with a right to do so. *See Alan-Wilson*, *supra*, 30 IBIA at 247-248 ("BIA provided Wilson's government with substantial assistance over the next several years. … By letter dated August 19, 1994, the [BIA] Superintendent withdrew his recognition of Wilson's government," stating that the recognition had been "administratively in error…."). *See also Timbisha Shoshone Tribe v. U.S. Department of Interior*, 824 F.3d 807, 809-810 (9th Cir. 2016) (summarizing BIA's recognition and subsequent repudiation of several governments for the

Timbisha Shoshone tribe); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 143-45, 151-53 (D.D.C. 1999) (tribal constitution, though recognized for a time by the BIA, never established a valid tribal government because it was not ratified by a majority of the tribe's members).

The BIA withdrew recognition of the 1998 general council in the 2004 and 2005 Decisions (2011-000499 – 000501, 000611), and the federal courts affirmed, *Miwok II*, 515 F.3d 1252.[21] The Assistant Secretary did not abuse his discretion by rejecting the Burleys' government *again* in the 2015 Decision. (2017-1401.)

**C. The purported enrollment of the Burleys in 1998 has no bearing on the validity of the 2015 Decision.**

The district court in *Miwok III* found that, even if Yakima Dixie *had been* the only Tribal member in 1998, the 2011 Decision failed to explain why the BIA did not have an obligation to ensure that Burley was not "taking advantage of Yakima when she sought membership for her family" or why the purported enrollment did not compromise Melvin Dixie's interests. 5 F.Supp.3d. at 99. On remand, the 2015 Decision accepted that the enrollment was not improper and actually benefited the Dixies' interests. 2017-1400 n.20, 1401 n.23. The Tribe disagrees, but the point is moot — whether or not the Burleys were properly "enrolled," (i) Yakima Dixie was not the only member of the Tribe in 1998, or now; (ii) the Burleys and Yakima Dixie did not constitute a majority of those entitled to participate in Tribal organization in 1998, or now; and (iii) they could not adopt a valid Tribal government without involving the rest of the Tribal community. (2017-1401.)

**D. It is irrelevant whether Mr. Dixie resigned as chairman under the 1998 Resolution.**

Much of the Burleys' briefing on remand focused on allegations that, in a state court deposition in 2012, Mr. Dixie admitted resigning as chairman of the "general council" under the 1998 Resolution. Mr. Dixie's testimony was equivocal at best. He repeatedly denied signing the

[21] The time to challenge the BIA's rejection of the Burley government in 2004 and 2005 has long passed. The issue before the Court is not the validity of the 2004 and 2005 decisions, but whether the 2015 Decision was arbitrary or capricious, based on the record before the Assistant Secretary at the time of that Decision.

resignation document, while appearing confused by the repetitive and unclear questions asked of him. (2017-148 – 152, 157, 161.) Then, shortly after the Burleys' counsel, Mr. Corrales, threatened Mr. Dixie's life on the record (2017-160, Mr. Corrales to Dixie: "You'll be a dead man."), Mr. Dixie said that he had signed the document (2017-161).

Regardless, it makes no difference whether Mr. Dixie resigned from the 1998 council or not. The 2015 Decision correctly found that the United States could not recognize a Tribal government established under the 1998 Resolution because the Eligible Groups had no opportunity to participate in the adoption of that document, making any dispute about the leadership of such a government irrelevant.

## VI. CONCLUSION

The 2015 Decision was not arbitrary, capricious, or an abuse of discretion. Intervenors request that the court grant summary judgment to Intervenors and Federal Defendants on all of Plaintiffs' claims.

Dated: March 6, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2017, I electronically filed the foregoing Notice of Motion and Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof with the Clerk of the Court by using the CM/ECF system, which will provide service to all counsel of record.

Respectfully submitted,

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