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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** ) Case No.: 2:16-cv-01345-WBS-CKD  
federally-recognized Indian )  
tribe, **THE GENERAL COUNCIL,** ) **PLAINTIFFS' REPLY TO FEDERAL**  
**SILVIA BURLEY, RASHEL REZNOR;** ) **DEFENDANTS' OPPOSITION TO**  
**ANJELICA PAULK; and TRISTIAN** ) **MOTION FOR SUMMARY JUDGMENT**  
**WALLACE** )

Plaintiffs, ) Date: May 30, 2017  
Time: 1:30 p.m.

vs. ) Judge: Hon. William B. Shubb  
Courtroom 5

**SALLY JEWELL, in her official** )  
capacity as U.S. Secretary of )  
Interior, et al., )

Defendants )

**THE CALIFORNIA VALLEY MIWOK** )  
**TRIBE, et al.** )

Intervenor-Defendants. )

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1 Plaintiffs CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or  
2 "the Miwok Tribe"), THE GENERAL COUNCIL, SILVIA BURLEY  
3 ("Burley"), RASHEL REZNOR ("Rashel"), ANJELICA PAULK  
4 ("Angelica"), and TRISTIAN WALLACE ("Tristian") (collectively  
5 "the Burley Faction"), submit the following Memorandum of Points  
6 and Authorities in **Reply** to the Federal Defendants' Opposition  
to Plaintiffs' Motion for Summary Judgment.

7 **I.**

8 **THE THREE CRITICAL DOCUMENTS**

9 Plaintiffs' arguments center around the following three  
10 critical documents that the Court should review and refer to in  
11 connection with these motions. They are as follows:

12 1. The AS-IA Larry Echo Hawk's August 31, 2011 Decision  
(CVMT-2011-002049-2057);

13 2. The U.S. District Court's Order granting the Dixie  
14 Faction's motion for summary judgment and remanding to the AS-IA  
15 for reconsideration of his August 31, 2011 Decision (CVMT v.  
16 Jewell (D.D.C.2013) 5 F.Supp.3d 86); and

17 3. The AS-IA Kevin Washburn's December 30, 2015 Decision  
18 (CVMT-2017-001397-1403).

19 **II.**

20 **THE AS-IA'S 2015 DECISION REMAINS ERRONEOUS AS A MATTER OF LAW,  
21 BECAUSE IT IS BASED ON DIXIE'S TIME-BARRED CHALLENGE OF THE 1998  
22 RESOLUTION**

23 The fundamental flaw in the AS-IA's 2015 Decision is that  
24 it is based on Dixie's untimely challenge of the validity of the  
25 1998 Resolution establishing the Tribe's General Council. The  
26 Dixie Faction's only response to this glaring error, and that of  
27 the Federal Defendants', is that the six-year statute of  
28 limitations under 28 U.S.C. §2401(a) only applies to "claims"  
made against the U.S. government and does not apply to  
"arguments made to federal agency officials or to decisions made

1 to those officials." (Page 9, Dixie Faction Opposition, lines 8-  
2 9; page 8, Federal Defendants' Opposition). This contention is  
3 without merit and is not supported by any authority.

4 As pointed out in Plaintiffs' motion papers, actions for  
5 review of final agency actions brought under the Administrative  
6 Procedure Act ("APA") are in fact subject to a **six-year** statute  
7 of limitations. Wind River Min. Corp. v. U.S. (9<sup>th</sup> Cir. 1991)  
8 946 F.2d 710, 713; see Muwekma Ohlone Tribe v. Salazar  
9 (D.D.C.2011) 813 F.Supp.2d 170, 191 (holding that the Tribe's  
10 claims under the APA against the Department of Interior for  
11 terminating its tribal status was barred by the six-year statute  
12 of limitations under 28 U.S.C. §24019(a)); see also Hardwick v.  
13 U.S. (N.D.Cal.2012) 2012 WL 6524600 (Plaintiff's challenge of  
14 the legitimacy and **validity** of the **Tribe's governing body** was  
15 held barred by the six-year statute of limitations).

16 As stated, the issue of the validity of the 1998 Resolution  
17 was only first raised and tendered by the Dixie Faction on  
18 January 24, 2011, when they filed a lawsuit in federal court  
19 challenging the AS-IA's December 2010 Decision which was vacated  
20 sua sponte and reaffirmed by the AS-IA's August 2011 Decision.  
21 When that occurred, the Dixie Faction amended their complaint on  
22 October 17, 2011, re-alleging the same claims that the 1998  
23 Resolution establishing the General Council was invalid, because  
24 potential members in the surrounding community (i.e., the  
25 descendants of the 12 or 13 Indians identified in the 1915  
26 census who lived in the Sheepranch area) did not participate in  
27 its organization. (AR-CVMT-2017-000023). Over the Burley  
28 Faction's objection (Plaintiff's RJN No. "8," AR-CVMT-2017-  
000762), the U.S. District Court entertained and ruled on this  
untimely challenge, and ultimately concluded that the AS-IA's  
2011 Decision was "remiss" in "assuming that the General  
Council" established under then 1998 Resolution "is a duly



1 constituted government" "without addressing the validity of the  
2 General Council." CVMT v. Jewell (D.D.C.2013) 5 F.Supp.3d 86,  
3 96, 99. Upon remand, the AS-IA then, "reconsidered" its  
4 Decision "consistent with the terms of [the Court's Order]"  
5 (CVMT v. Jewell, supra at 101), and concluded that the 1998  
6 Resolution was invalid, because it did not consist of "valid"  
7 representatives of the Tribe. He stated:

8 "[T]he people who approved the 1998 Resolution (Mr. Dixie,  
9 Ms. Burley, and possibly Ms. Burley's daughter Rashel  
10 Reznor) are not a majority of those eligible to take part  
11 in the reorganization of the Tribe. Accordingly, I cannot  
12 recognize the **actions** to establish a tribal governing  
13 structure taken pursuant to the 1998 Resolution..."  
14 (Emphasis added).

15 (CVMT-2017-001401, AS-IA 2015 Decision, page 5). By not  
16 recognizing the "actions" taken by Dixie, Burley and Reznor in  
17 drafting and adopting the 1998 Resolution, the AS-IA was making  
18 a determination that those actions were invalid and thus the  
19 1998 Resolution was invalid.

20 While it is true that the Bureau of Indian Affairs ("BIA")  
21 and the Department of Interior ("DOI") went back and forth over  
22 the years in recognizing Burley as Chairperson of the Tribe (at  
23 one time calling her a "person of authority," CVMT-2011-001691),  
24 they never ruled or determined that the General Council was  
25 invalid, because it purportedly did not involve potential  
26 members in the surrounding community (i.e., the descendants of  
27 the 12 or 13 Indians identified in the 1915 census who lived in  
28 the Sheepranch area), or was invalid for any reason. It simply  
suspended the award of federal contract funding in 2005, because  
the Tribe refused to "re-organize" under the Indian  
Reorganization Act of 1934 ("IRA"), and because of the ongoing  
Tribal leadership dispute. (CVMT-2011-000801-802; CVMT-2011-  
001684-1685). This is a far cry from refusing to recognize a

1 tribal government because its initial organization was invalid  
2 at the outset in 1998.

3 Historically, the BIA simply lost its patience in hoping  
4 that the Tribe under Burley's leadership would "re-organize"  
5 under the IRA, and withheld federal benefits from the Tribe  
6 based on the erroneous belief that those benefits were tied to  
7 the Tribe having an IRA governing body. (CVMT-2011-002054, page  
8 6 of 1011 Decision; CVMT-2011-000801-802 [suspension of federal  
9 contract funding because the Tribe was not re-organized under  
10 the IRA]). However, as time passed the Tribe simply changed its  
11 mind when the IRA was amended to allow tribes to organize  
12 outside the IRA, and chose instead to allow the General Council  
13 established under the 1998 Resolution to be its governing  
14 document, as it had the legal right to do. As observed by the  
15 AS-IA in its 2011 Decision:

16 "Related to this issue is the Tribe's current reluctance to  
17 'organize' itself under the IRA, choosing instead to avail  
18 itself of the provisions in 25 U.S.C. §476(h), first  
19 enacted in 2004, which recognizes the inherent sovereign  
20 powers of tribes 'to adopt governing documents under  
21 procedures other than those specified...[in the IRA.]'"

22 (CVMT-2011-002053). The AS-IA 2011 Decision correctly concluded  
23 that the Tribe could not be compelled to re-organize its  
24 governing body under the IRA, and that its failure to do so  
25 cannot result in federal benefits being withheld. (CVMT-2011-  
26 002054: "I reject as contrary to §476(h) the notions that a  
27 tribe can be compelled to 'organize' under the IRA and that a  
28 tribe not so organized can have 'significant federal benefits'  
withheld from it. Either would be a clear violation of 25  
U.S.C. §476(f)"). Thus, there was never a time prior to the AS-  
IA's 2015 Decision when the BIA or DOI refused to recognize the  
Tribe's governing body, i.e., the General Council established  
under the 1998 Resolution, because it was purportedly invalid.

1 Even the AS-IA's 2015 Decision observed that "[a]t the time  
2 of its enactment, the 1998 Resolution undoubtedly seemed a  
3 reasonable, practical mechanism for establishing a tribal body  
4 to *manage the process* of reorganizing the Tribe..." (CVMT-2017-  
5 001401, page 5 of AS-IA 2015 Decision). Despite this  
6 observation, the AS-IA 2015 Decision erroneously concluded that  
7 the 1998 Resolution establishing the General Council was  
8 invalid, because it did not involve potential members in the  
9 surrounding community (i.e., the descendants of the Indians  
10 identified in the 1915 census who lived in the Sheepbranch area)  
11 who the AS-IA determined were purportedly "eligible" to  
12 participate in the organization of the Tribe. In short, the  
13 U.S. District Court and the AS-IA on remand both ruled on the  
14 Dixie Faction's challenge to the validity of the 1998  
15 Resolution, which, as shown, was barred by the six-year statute  
16 of limitations. Because that claim was time-barred, the  
17 foundation upon which the AS-IA's 2015 decision stands  
18 collapses. There was no legal basis for the U.S. District Court  
19 or the AS-IA to address this claim, let alone accept it as  
20 grounds to vacate the AS-IA's 2011 Decision.

21 The Dixie Faction, however, argues that the Plaintiff still  
22 cannot challenge the AS-IA 2015 Decision, because, in essence,  
23 it is a challenge of the U.S. District Court's 2013 Order (CVMT  
24 v. Jewell, supra), and Plaintiffs purportedly "cannot challenge  
25 the *Miwok III* decision in this Court.". (Dixie Faction PAs, page  
26 9, lines 12-13). This contention is equally meritless, since  
27 the record is undisputed that Plaintiffs were unable to appeal  
28 that order, because it was not final under 28 U.S.C. §1291. (RJN  
No. "1," Motion to Dismiss Appeal for Lack of Jurisdiction). If  
one were to accept the Dixie Faction's argument in this regard,  
Plaintiffs would be in "black hole" and have no avenue of relief  
in challenging the AS-IA's 2015 Decision at all. Notably, the

1 Federal Defendants concede Plaintiffs' point and do not repeat  
2 the Dixie Faction's argument here.

3 **III.**

4 **THE AS-IA 2011 DECISION DID NOT DECIDE ANY ISSUE RELATIVE TO THE  
5 VALIDITY OF THE 1998 RESOLUTION**

6 As pointed out in Plaintiffs' moving papers, the Interior  
7 Board of Indian Appeals ("IBIA") never actually referred to the  
8 AS-IA the issue of the validity of the 1998 Resolution, largely  
9 because the Tribe (under Burley's leadership) never raised that  
10 as an issue to be decided on appeal. It is also inconceivable  
11 that the Tribe would have done so, since to do so would be  
12 contrary to the position it was taking with respect to its right  
13 not to be compelled to "re-organize" under the IRA and its right  
14 not to be compelled to admit additional persons as Tribal  
15 members against its will. Nevertheless, the Dixie Faction  
16 argues that the reason the IBIA did not specifically refer the  
17 validity of the General Council to the AS-IA was because the BIA  
18 had already decided it did not "recognize" any Tribal government  
19 in 2004 and 2005. (Dixie Faction PAs, page 13). The Federal  
20 Defendants repeat this argument. (Federal Defendants'  
21 Opposition , p. 9). This contention is without merit and  
22 misleading.

23 The two BIA decisions the IBIA decision references, the  
24 2004 and the 2005 decisions, stated only that "the Department  
25 does not recognize the Tribe as being organized or having any  
26 tribal government that represents the Tribe..." (Page 13 of  
27 Dixie Faction's PAs). However, neither of those BIA decisions  
28 made any determination on whether the Tribe's General Council  
established under the 1998 Resolution was invalid at the outset,  
or invalid for any reason. The BIA's refusal to "recognize" the  
Tribe's governing body at that time was because the Tribe was  
not willing to "re-organize" under the IRA, and, in response to

1 that refusal, the BIA had erroneously concluded, despite 25  
2 U.S.C. §476(h) to the contrary, that the Tribe was required to  
3 do so in order for the Tribe to be eligible to receive federal  
4 contract funding. (CVMT-2011-002054: "I reject as contrary to  
5 §476(h) the notions that a tribe can be compelled to 'organize'  
6 under the IRA and that a tribe not so organized can have  
7 'significant federal benefits' withheld from it"). As stated,  
8 there is a distinct difference between not recognizing the  
9 Tribe's governing body because the Tribe refuses to "re-  
10 organize" under the IRA and because of an ongoing leadership  
11 dispute, on the one hand, and not recognizing the Tribe's  
12 governing body because it was invalidly established at the  
13 outset, on the other hand. The BIA was clearly refusing to  
14 recognize the Tribe merely because it was refusing to re-  
15 organize under the IRA and because of the ongoing leadership  
16 dispute. See CVMT v. Pacific Regional Director (2010) 51 IBIA  
17 103, 103-104 (noting that the BIA's actions in attempting to  
18 force the Tribe to re-organize under the IRA were because the  
19 "BIA [had] concluded that these actions were necessary because  
20 until the tribal organization and membership issues were  
21 resolved, a leadership dispute between Burley and Yakima...could  
22 not be resolved, and resolution of that dispute was necessary  
23 for a functioning government-to-government relationship with the  
24 Tribe").

22 In his 2011 decision, the AS-IA merely observed as an  
23 undisputed fact as follows with respect to the Tribe's governing  
24 body:

25 "The CVMT today operates under a General Council form of  
26 government, pursuant to Resolution #CG-98-01, which the  
27 CVMT passed in 1998, facilitated by representatives of the  
28 Bureau of Indian Affairs..."

(CVMT-2011-002050). It did not rule on or resolve any dispute concerning the validity of the resolution establishing the General Council. It did the same with respect to the Tribe's status as a federally-recognized tribe. (CVMT-2011-002049: "I now find the following: (1) The California Valley Miwok Tribe (CVMT) is a federally recognized tribe, and has been continuously recognized by the United States since at least 1916..."). Neither of these issues of fact could have been challenged at that time, based on the six-year statute of limitations. Yet, the Dixie Faction attempted to do so with respect to the validity of the 1998 Resolution when they filed suit in federal court in 2011 challenging the AS-IA's 2010 and 2011 Decisions.

#### IV.

#### **THERE IS NO BASIS TO CONCLUDE THAT THE 1998 RESOLUTION WAS INVALID AT THE TIME IT WAS ADOPTED**

##### **A. THE 1971 PROBATE ORDER LIMITED MEMBERSHIP TO THOSE RESIDING ON THE SHEEPRANCH RANCHERIA CONSISTENT WITH BIA POLICY**

Both the Federal Defendants and the Dixie Faction in their opposition papers ignore the significance of the 1971 Probate Order that reaffirmed the BIA's policy that only those individuals who actually resided on the Sheepranch Rancheria were members of the Tribe who had the sole authority to organize the Tribe as Dixie did in 1998. The AS-IA 2015 Decision ignoring this material fact in the administrative record was arbitrary and capricious.

In concluding that the 1998 Resolution establishing the Tribe's General Council was invalid when adopted, the AS-IA's 2015 Decision misconstrued the historical background of the Tribe that led to Yakima Dixie being the last remaining Tribal member residing on the Sheepranch. Significantly, it ignored the impact of the 1971 Probate Order issued by the Department of

1 Interior pertaining to the death of Mabel Dixie, Yakima's  
 2 mother, and the policy the BIA had over the years in treating  
 3 actual residency on the California Rancherias as tantamount to  
 4 tribal membership. The Decision erroneously concluded that  
 5 descendants of the 12 or 13 Indians identified by the 1915  
 6 Indian Agent, for whom the 0.92 acre parcel was given, had the  
 7 right to participate in the 1998 organization of the Tribe.  
 8 They did not.

9 In Alan-Wilson v. Sacramento Area Director (1997) 30 IBIA  
 10 241, cited by both the Dixie Faction and the Federal Defendants  
 11 in their opposition papers, the IBIA noted that the BIA had a  
 12 policy of limiting membership on the California Rancherias to  
 13 those Indians who actually resided on the Rancherias. The BIA  
 14 revoked assignments given to various individuals when those  
 15 individuals failed to use their assigned portion of the  
 16 Rancheria, and equated that lack of residence with non-  
 17 membership in the Tribe. The IBIA then quoted a 1959 letter  
 18 from the BIA to one of these individuals, which stated:

19 "Our records are not definite as to whether or not you ever  
 20 lived on the lot or used it. However, it appears that **you**  
 21 **did not occupy or use the lot for many years;** consequently,  
 22 **you lost your rights to the assignment.** We believe **your**  
 23 **reinstatement as a member of the Cloverdale group can only**  
 24 **be acquired by a consent of the majority of the adult**  
 25 **residents presently living on the Rancheria.**" (Emphasis  
 26 added).

27 30 IBIA at 243. The IBIA then further observed that the BIA  
 28 considered only those individuals who actually resided on the  
 Rancheria as Tribal members, and stated:

29 "The Cloverdale Rancheria voted on the question of whether  
 30 to organize under the Indian Reorganization Act (IRA), 25  
 U.S.C. §476 (1994). The record shows that the Department  
 determined that only adult residents of the Cloverdale  
 Rancheria at the time of the election would be allowed to  
 vote in that election, **a fact which suggests that the**  
**Department viewed the Rancheria as a group of 'adult**

1 Indians residing on such reservation' within the meaning of  
25 U.S.C. §476..."

2 30 IBIA at 243. This is consistent with what occurred with Jeff  
3 Davis in this case with respect to the Sheepranch Rancheria, who  
4 was the "only single eligible voter" "who voted in favor of the  
5 IRA" in 1935. CVMT v. Pacific Regional Director (2010) 51 IBIA  
6 103, 106 [also found at CVMT-2011-001687]; (CVMT-2011-002051).  
7 Significantly, the IBIA in CVMT, supra, then noted:

8 Neither Davis, nor any subsequent residents of the  
9 Rancheria, organized a tribal government pursuant to the  
IRA. (Emphasis added).

10 51 IBIA at 106. Thus, even the IBIA correctly assumed, based on  
11 the BIA's consistent policy, that only actual residents of the  
12 Sheepranch Rancheria would have the right to organize the Tribe.  
13 And those actual residents were considered to be the members of  
14 the Tribe, not those in the surrounding community who claimed to  
15 be descendants of the 12 or 13 Indians identified in the 1915  
16 census, and who did not reside on the Sheepranch.

17 **B. THE 1971 PROBATE ORDER VESTED MABEL DIXIE AND HER HEIRS**  
18 **THAT RESIDED ON THE SHEEPRANCH WITH THE SOLE AUTHORITY TO**  
**ORGANIZE THE TRIBE AND ENROLL MEMBERS**

19 When the BIA met with Yakima Dixie and Burley in 1998 to  
20 assist them in organizing the Tribe, there was no obligation to  
21 reach out to the descendants of the 12 or 13 Indians identified  
22 in the 1915 census to allow them to participate in the  
23 organization process. Only Yakima Dixie had that right, since  
24 he was the only one residing on the 0.92 acre Sheepranch  
25 property at the time. He exercised that right by first  
26 enrolling Burley and her family as members, and then, together  
27 with Burley and Reznor, they adopted the 1998 Resolution  
28 establishing the General Council.



Dixie's sole right to enroll Burley and her family and organize the Tribe in 1998 was solidified by the 1971 Probate Order. That Probate Order must be viewed as limiting the right to organize the Sheepbranch Rancheria to persons living on the property who are listed as "distributees or dependent members on the federally approved Distribution Plan." (CVMT-2011-000172). Because Mabel Dixie acquired a vested interest in the property when she was listed as the sole distributee preparatory to termination (which never occurred), that vested interest passed to her heirs under the 1971 Probate Order, at the exclusion of all other descendants of the 12 or 13 Indians identified in the 1915 census. As stated in Alan-Wilson, supra, with respect to the effect of the Distribution Plan creating vested interests in those listed therein in having the right to reorganize the Tribe after termination:

The basic question presented in this appeal is: Who can reorganize the Cloverdale Rancheria's tribal government? The Area Director based his answer to this question on the stipulated judgment in Hardwick, concluding that the **Department has consistently interpreted that judgment as limiting the right to reorganize the tribal government of a Rancheria restored under Hardwick to that rancheria's distributees, dependent members, and lineal descendants...** [T]he Area Director argues: The "decision in Smith v. U.S. [, No. C 74 1016 WTS (N.D. Cal. Mar. 28, 1978)]", determined that the **distribution plans created vested interests in the Distributee.** This case established the **standard to be utilized in the organization of all the previously terminated Rancherias** as those parties with vested rights and this standard was confirmed in the stipulated judgment in the Tillie Hardwick case."

30 IBIA at 254. In Smith v. U.S. (N.D.Cal.1978) 515 F.Supp. 56, the federal government conceded, and based upon this concession and its own review of the evidence the court concluded, that the Hopland Rancheria was unlawfully terminated and should not be treated as terminated. 515 F.Supp. at 60. Accordingly, the

1 Court held that the Plaintiff distributees or heirs of  
2 distributees were entitled to recover damages from the federal  
3 government as a result of the federal government's failure to  
4 provide statutorily required water and sewer systems prior to  
5 termination. Accordingly, even though the Hopland Rancheria was  
6 to be treated as "unterminated," the Court still looked to the  
7 Distribution plan to afford relief to the individual  
8 "distributees," given the fact that the Distribution Plan gave  
9 them a vested interest in the Rancheria.

10 Also, in Duncan v. Andrus (N.D.Cal.1977) 517 F.Supp. 1,  
11 Plaintiffs sued the federal government as Indian distributees  
12 who were on the distribution plan for termination of the  
13 Robinson Rancheria. They claimed the Tribe was unlawfully and  
14 prematurely terminated before sanitation and water facilities  
15 were installed, thereby depriving them of federal Indian  
16 benefits and subjecting them to state and local taxes. 517  
17 F.Supp. at 3-4. The Court held that the Tribe must be  
18 "unterminated," "and its distributees and their families must be  
19 given the opportunity to regain federal benefits lost through  
20 termination." 517 F.Supp. at 6. The Court then held:

21 [T]he Indian distributees are entitled to prompt relief  
22 restoring their federal benefits, but respecting the vested  
23 rights in the Rancheria land which they have acquired  
24 through the operation of federal regulations. See 25 C.F.R.  
25 §242.7 (1960); 24 F.R. 4652-4654 (June 9, 1959). (Emphasis  
26 added).

27 517 F.Supp. at 6. Both Smith, supra, and Duncan, supra,  
28 preceded the Hardwick 1983 stipulated judgment and shed light on  
the policy of the BIA in treating distributees under the  
Distribution Plan preparatory to termination has having vested  
rights in their respective Rancherias, to the exclusion of any  
descendants not listed in the Distribution Plan, notwithstanding

1 the fact that "termination" either did not occur or was  
2 rescinded.

3 For the same reasons, Mabel Dixie acquired a vested  
4 interest in the Sheepbranch Rancheria in 1966, to the exclusion  
5 of the descendants of the 12 or 13 Indians identified in the  
6 1915 census, when she was placed on the Distribution Plan and  
7 voted for termination as the sole resident on the property. She  
8 alone had a vested interest in the property by virtue of her  
9 being the only one on the list of the Distribution Plan  
10 preparatory to termination. While the Sheepbranch was never  
11 lawfully terminated, her vested interest as the sole distributee  
12 never changed. She did not lose that interest when termination  
13 did not occur. The fact that the Sheepbranch was not part of the  
14 Hardwick stipulated judgment did not change her sole, vested  
15 right as the only member of the Tribe when she was made a  
16 distributee under the Distribution Plan in 1966, as the  
17 foregoing cases demonstrate.

18 Mabel Dixie's sole vested rights in the Sheepbranch  
19 Rancheria, to the exclusion of all other descendants of the 12  
20 or 13 Indians identified in the 1915 census, were passed on to  
21 her heirs and confirmed by the Probate Order issued by the U.S.  
22 Department of Interior on November 1, 1971. (CVMT-2011-0000061).  
23 These were her children and her husband at that time. As shown,  
24 Yakima Dixie was the sole remaining heir under this Probate  
25 Order who was living on the Sheepbranch in 1998 when he enrolled  
26 the Burley family as members and organized the Tribe under the  
27 1998 Resolution. Based upon the foregoing history and case law,  
28 Dixie had the sole right and the authority to do so, to the  
exclusion of any descendants of the 12 or 13 Indians identified  
in the 1915 census.

///

///

1 **C. WHEN THE 0.92 ACRE LOT WAS PURCHASED FOR THE 12 OR 13**  
2 **SHEEPRANCH INDIANS, THE BAND BECAME A "TRIBE" AND HAD THE**  
3 **RIGHT TO ORGANIZE AND DEFINE ITS MEMBERS TO INCLUDE "NON-**  
4 **RESIDENTS"**

5 The AS-IA's 2015 Decision focused on the "size" of the lot  
6 purchased for the 12 or 13 Indians identified in the 1915 census  
7 to conclude that it "was not large enough for all members of the  
8 band to take up residence," and therefore those Indians who were  
9 associated with the band but chose not to reside on the  
10 Sheepranch were still considered members because they were  
11 "potential residents." (CVMT-2017-001400). This conclusion is  
12 without merit and flies in the face of established BIA policy  
13 and practice toward this early band as shown in the historical  
14 timeline.

15 First of all, the AS-IA's 2015 Decision's comment that the  
16 0.92-acre lot was not large enough for the 12 or 13 band members  
17 is misleading and not supported in the administrative record.  
18 In fact, the Indian Agent taking the census in 1915 found only  
19 three (3) "old little Indian cabins" in the Sheepranch area.  
20 The 12 or 13 Indians he identified were actually comprised of  
21 three or four families (CVMT-2011-000002), with Peter Hodges as  
22 the band's leader. (CVMT-2011-CVMT-2011-000001). This would  
23 mean there were about four (4) people in each cabin. Under the  
24 circumstances, the 0.92-acre plot of land was large enough to  
25 accommodate these 12 or 13 band of Indians, i.e., three or four  
26 small families, given their custom of living in "little Indian  
27 cabins" and spending their time usually "in the nearby streams  
28 panning for gold." (CVMT-2011-000001).

Second, once the 0.92 acre land became available in 1916,  
these 12 or 13 band members had the right to take up residence  
on the property and become members of the Sheepranch. Once they  
did, they became a "tribe" and no longer a "band" of Indians.

1 As a tribe, they then had they right to organize, but initial  
2 membership in the Sheepranch "tribe" was necessarily tied to  
3 first residing on the Rancheria.

4 In Montoya v. United States (1901) 180 U.S. 261, the  
5 Supreme Court adopted a common-law test to determine whether a  
6 group constituted a tribe for purposes of the Indian Depredation  
7 Act of 1891. The federal statute allowed U.S. citizens to bring  
8 suit in the Court of Claims for property "taken or destroyed by  
9 Indians belonging to any band, tribe, or nation, in amity with  
10 the United States." Under the statute it became necessary, in  
11 each case, to determine whether the offender belonged to a band,  
12 tribe, or nation in amity with the United States. The Court  
13 then established the following definition of the terms "tribe"  
14 and "band" which was in effect at the time the 0.92-acre plot  
15 was purchased for the 12 or 13 Indians living in the Sheepranch  
16 area in 1916:

17 By a "tribe" we understand a body of Indians of the same or  
18 a similar race, united in a community under one leadership  
19 or government, and inhabiting a particular though sometimes  
20 ill-defined territory; by a "band," a company of Indians  
21 not necessarily, though often of the same race or tribe,  
22 but united under the same leadership in a common design.  
23 (Emphasis added).

24 180 U.S. at 266. Federal courts have applied this common-law  
25 definition of a "tribe" in recent years. See Joint Tribal  
26 Council of the Passamaquoddy Tribe v. Morton (1<sup>st</sup> Cir. 1975) 528  
27 F.2d 370, 376; Mashpee Tribe v. New Seabury Corp (1<sup>st</sup> Cir. 1979)  
28 592 F.2d 575; Wolfchild v. U.S. (2011) 101 Fed.Cl. 54, 68; New  
York v. Shinnecock Indian Nation (E.D.N.Y.2005) 400 F.Supp.2d  
486, 487-90 (Indian band constituted a "tribe" under Montoya  
because, among other things, it had offices and was located on a  
reservation); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW,  
§3.02[6][b], pp. 142-144 (Nell Jessup Newton ed., 2012).

1 The 12 or 13 Indians identified in the 1915 census who  
2 lived in the Sheepranch area, together with most of the Indian  
3 population in California at the beginning of the twentieth  
4 century, were described as "scattered" and "landless." Alan-  
Wilson, supra at 242. As observed in Alan-Wilson, supra:

5 At the beginning of the twentieth century, most of the  
6 Indian population of California was **scattered** and **homeless**.  
7 In recognition of the plight of these Indians, Congress  
8 began appropriating funds to purchase land for them. As  
9 relevant to this case, the Federal government purchased  
27.5 acres of land near Cloverdale, California, for the use  
of **homeless Indians** in that area...

10 \* \* \*

11 The record shows that the Cloverdale Rancheria was  
12 initially divided into 12 lots, which the Department  
assigned to various **homeless Indians**...(Emphasis added).

13 30 IBIA at 242. Thus, the government's purchase of the 0.92  
14 acre plot for this 12 or 13 band of "homeless" Indians on  
15 Sheepranch created for them a residence or reservation. Under  
16 Montoya, supra, therefore, the band became a "tribe" to the  
17 extent any of them moved onto and took up residence on the 0.92  
18 acre plot. As noted by the AS-IA's 2015 Decision, even the IRA,  
19 when passed in 1935, recognized a "tribe" as "Indians residing  
20 on one reservation." 25 U.S.C. §479; (CVMT-2017-001400). Those  
21 other 12 or 13 Indians who chose not to reside on the 0.92 plot  
22 were not members of the Tribe. However, as explained, they  
23 could have become members while still residing off the property  
24 had those Indians who took up residence on the 0.92 acre plot  
enrolled them, after organizing the Tribe.

25 Third, the timeline for the Sheepranch Tribe after the 0.92  
26 acre plot was purchased establishes that only those individuals  
27 who actually resided on the property were considered members of  
28 the Tribe with sole authority to organize the Tribe's governing

body. For example, in 1935, Jeff Davis who, by virtue of being the sole resident on the property, voted for an IRA government, and was the one the BIA recognized as having the sole authority to organize the Tribe under the IRA, which for some unknown reason never took place. (CVMT-2011-001687). Notably, none of the descendants of the 12 or 13 Indians identified in the 1915 census who lived in the Sheepranch area were allowed to participate in this vote. This was also the case with Mabel Dixie who, being the sole adult resident on the property in 1966, voted for termination and, as a result, the BIA gave her alone the deed to the property as a prelude to termination, which administratively never occurred. (CVMT-2011-001687-1688). None of the descendants of the 1915 census who lived in the Sheepranch area were allowed to vote for termination. Nor were they on the Distribution Plan list. When Mabel died, the interest to the property went to her heirs, including Yakima Dixie and his brother, Melvin. (CVMT-2011-000173). Significantly, it was the "Department of Interior" who "probated the property." (CVMT-2011-001688). However, because Melvin left the property and Yakima was the only resident on the property in 1998, Yakima Dixie alone had the authority to enroll Burley and her family as adopted members of the Tribe and organize the Tribe. In 1998, Yakima and Melvin were the only surviving heirs of Mabel Dixie. (CVMT-2011-000173).

The probate order listed Mabel's husband and her children, including Yakima Dixie and his brother, Melvin Dixie, as the only surviving heirs of Mabel Dixie, and awarded them their respective interest in the land. (CVMT-2011-000172-173). The probate order had the effect of confirming and ratifying the BIA's longstanding policy that whoever resided on the land had the authority to enroll Indians as members of the Tribe and organize the Tribe. It had the effect of excluding any claim of

any other Indians who may have lived in the area, and who did not reside on the land, as having any interest or authority over the land, including the descendants of the 12 or 13 Indians identified in the 1915 census. It solidified Mabel Dixie and her family as the sole members of the Sheepbranch band of Indians. When Melvin left and Dixie remained on the property, the probate order solidified Dixie's sole authority, like what the BIA extended to Jeff Davis back in 1935, as the sole member of the Sheepbranch band who, because he alone resided on the property, had the authority to enroll Indians as members and organize the Tribe.

Accordingly, the AS-IA 2015 Decision's conclusion that the descendants of the 1915 census who did not reside on the Sheepbranch when Dixie adopted the 1998 Resolution were "potential residents" with membership rights (CVMT-2017-001400) is wrong, arbitrary and capricious, and contrary to established BIA policy toward this and other Rancherias since the beginning of the twentieth century.

**D. WHETHER THE GENERAL COUNCIL ESTABLISHED UNDER THE 1998 RESOLUTION WAS "PREPARATORY" TO "RE-ORGANIZING" AN IRA GOVERNMENT IS IRRELEVANT, IN LIGHT OF 25 U.S.C. §476(h)**

Although it rejected the 1998 Resolution establishing the General Council as invalid, the AS-IA 2015 Decision nevertheless concludes that the Resolution initially "seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process of re-organizing the Tribe.*" (CVMTY-2017-001401). It then asserts that the subsequently anticipated re-organization process could only be accomplished with the participation of the descendants of the 1915 census. (CVMT-2017-001401). The Dixie Faction and the Federal Defendants both reassert this reasoning as correct in their opposition papers. (Page 16 Dixie Faction



1 Opposition papers; page 8 Federal Defendants' Opposition papers)  
2 It is not. It is contradictory and simply wrong under the law.

3 First of all, the 1998 Resolution cannot, under the AS-IA's  
4 2015 Decision's reasoning, be valid to "manage the process of  
5 re-organizing the Tribe" into an IRA government, but yet invalid  
6 later on because when adopted it did not involve the  
7 participation of the descendants of the 1915 census. If it was  
8 valid enough to "manage" that process when first adopted, then  
9 logically it must still be valid later on. In other words, if  
10 the AS-IA's 2015 Decision concludes that the 1998 Resolution is  
11 invalid because it did not allow the descendants of the 1915  
12 census to participate in its adoption, it cannot be valid at the  
13 outset to "manage the process of organizing the Tribe." (CVMT-  
14 2017-001401). The contradiction is obvious.

15 The administrative record shows that the BIA was expecting  
16 the Tribe's newly formed General Council established under the  
17 1998 Resolution to be a means of later "re-organizing" the Tribe  
18 under the IRA. (CVMT-2011-000173 [Letter of 9/24/1998 from BIA  
19 to Dixie: "Tribes that are in the process of initially  
20 organizing usually consider how they will govern themselves  
21 until such time as the Tribe adopts a Constitution [under the  
22 IRA]")). The BIA may have expected this to occur, because Jeff  
23 Davis had voted for an IRA governing body in 1935. (CVMT-2011-  
24 001687). However, the IRA was amended in 2004, which  
25 effectively allowed tribes "to adopt governing documents under  
26 procedures other than those specified...[in the IRA.]" 25 U.S.C.  
27 §476(h); (CVMT-2011-002053). In other words, the Tribe could  
28 reject an IRA governing body and simply rely upon its General  
Council established under the 1998 Resolution as its governing  
body. As stated in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW:

"No federal law, including the IRA itself, requires tribes  
to adopt any particular kind of constitution. The decision

whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative.”

COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, §4.05[3], PAGE 271 (Nell Jessup Newton ed., 2012).

The passing of 25 U.S.C. §476(h) in 2004 clarifying that tribes may organize their tribal governments outside the IRA coincides with the BIA’s actions in 2005 suddenly suspending federal contract funding to the Tribe and in 2004 and 2005 taking the position that it did not recognize its General Council as the Tribe’s governing body. At that time, the Tribe had told the BIA that it no longer wished to “re-organize” under the IRA (CVMT-2011-002053 [“the Tribe current reluctance to ‘organize’ itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. §476(h), first enacted in 2004...]) and would instead use its General Council as its governing body, thereby prompting the BIA to suspend federal contract funding and going so far as to force the “re-organization” process with descendants of the 1915 census in 2007. (CVMT-2011-001696).

Accordingly, although the BIA expected the Tribe’s General Council established under the 1998 Resolution to be a precursor to organizing under the IRA, 25 U.S.C. §476(h) was enacted by Congress to clarify that tribes need not be compelled to organize under the IRA, thereby trumping as irrelevant the AS-IA 2015 Decision’s conclusion that the 1998 Resolution was simply a means to “manage the process of reorganizing the Tribe [under the IRA].” The Tribe simply changed its mind, and has every right to keep its General Council as its governing body, which the DOI is required to accept and with whom the DOI is required to conduct government-to-government relations. (CVMT-2011-002056).

**E. THE ELIGIBLE GROUP SYSTEM IS UNLAWFUL**

For the same reasons expressed above, the Eligible Group system advocated by the AS-IA 2015 Decision, and as argued by the Dixie Faction and the Federal Defendants in their opposition papers, is unlawful. It wrongfully allows the descendants of the 1915 census who were living in the Sheepbranch area to participate in "re-organizing" the Tribe. First of all, the Tribe need not re-organize under the IRA. Secondly, Yakima Dixie was the only remaining Tribal member living on the Sheepbranch Rancheria in 1998 who had the authority to enroll the Burley family as members and to organize the Tribe. The descendants of the 1915 census had no right to participate in the original organization of the Tribe, and presently have no rights with respect to the Tribe, for the reasons explained above.

**F. THERE IS NO ISSUE OR CLAIM PRECLUSION BARRING PLAINTIFFS' CLAIMS****1. The issues are not identical.**

The Dixie Faction argues that based on the rulings in *Miwok I* and *II* (i.e., *CVMT I* and *CVMT II*) Plaintiffs are barred by the doctrine of issue preclusion, i.e., collaterally estoppel, from challenging the AS-IA December 2015 Decision concluding that the 1998 Resolution establishing the General Council is invalid and that the Tribe's membership is presently limited to five (5) enrolled members. This contention was expressly rejected by the U.S. District Court, and the same reasoning applies here. Significantly, the Federal Defendants have abandoned this same argument raised in its moving papers, and makes no mention of it in their opposition papers. It would appear the Federal Defendants concede their issue and claim preclusion arguments lack merit.

In footnote 15 of the U.S. District Court Order remanding to the AS-IA for reconsideration, the Court stated:

Plaintiffs [the Dixie Faction] challenge the August 2011 Decision on several other legal grounds. However, each of these arguments fails. First, relying on the *CVMT I* and *CVMT II* decisions, Plaintiffs [the Dixie Faction] argue that the Secretary is barred by the doctrine of issue preclusion and/or judicial estoppel from recognizing the General Council as the governing body of the Tribe. [Citation]. This argument is without merit because *CVMT I* and *CVMT II* do not share the same contested issue with this case. See *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). **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...**(Emphasis added).

5 F.Supp.3d at 101, fn. 15. The issues have not changed, since the U.S. District Court ruling. Plaintiffs here have likewise challenged the same issues, but in reverse, i.e., whether the AS-IA's December 2015 decision is correct in concluding that the Tribe does not consist of five members and also concluding that the 1998 Resolution establishing the General Council was invalid at the outset. Those issue were never decided in the prior *CVMT I* and *CVMT II* cases. As a result, Plaintiff is not barred from litigating them here. *Dodd v. Hood River County* (9<sup>th</sup> Cir. 1998) 136 F.3d 1219, 1224-1225; *Allen v. McCurry*, supra.

## **2. No final judgment as to *Miwok III*.**

Collateral estoppel or "issue preclusion" under federal law requires that there be a final judgment before it can apply. In *re Palmer* (9<sup>th</sup> Cir. 2000) 207 F.3d 566, 568. Since the Federal Defendants have conceded that, when they chose not to appeal the U.S. District Court Order, the Burley Faction could not appeal it as a "private party," because the order remanding to an

agency "was not final within the meaning of 28 U.S.C. §1291." (Ex. "1," Motion to Dismiss Appeal for Lack of Jurisdiction, RJN "1"). As a result, collateral estoppel or "issue preclusion" does not apply to *Miwok III*.

**3. There is no res judicata, because the prior litigation did not involve the same claims.**

Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties. Owens v. Kaiser Found. Health Plan, Inc. (9<sup>th</sup> Cir. 2001) 244 F.3d 708, 713. As stated, the claims raised in *Miwok I* and *II* are not identical to the claims being litigated here. As a result, res judicata does bar the litigation of the claims in this action. See Stanton v. D.C. Court of Appeals (D.C. Cir. 1997) 127 F.3d 72, 78 (two cases must share the same nucleus of facts for res judicata to apply).

**4. No final judgment as to *Miwok III*.**

Because the order in *Miwok III* does not involve a final judgment on the merits, there can be no res judicata effect of that case on the present claims being made in this case. Owens, *supra*.

**G. DIXIE AND EVERONE'S FRAUD RELATIVE TO THE FABRICATED LEADERSHIP DISPUTE IS HIGHLY RELEVANT**

The Dixie Faction and the Federal Defendants both argue that the issue of Dixie and Everone fabricating the 16-year Tribal leadership dispute is irrelevant with respect to this case. No so.

Fraud on the Court and upon the federal judicial administrative system is never "irrelevant." Dixie has admitted he in fact resigned from being Chairman of the Tribe and admitted his written resignation was never forged as he maintained throughout the years. But for this fraud perpetrated upon the system, the Tribe's governing body would not have been

1 disturbed and the Tribe would be enjoying the benefits it is  
2 entitled to receive, with Dixie as a member of the Tribe.

3 The fact that the Tribe remained at five (5) people is a  
4 product of this fraud. With the leadership dispute bringing  
5 chaos in conducting Tribal business, the Tribe's membership roll  
6 could not expand as it was designed to do.

7 Dixie and Everone's fraud in fabricating the leadership  
8 dispute is also relevant to show that Dixie considered the 1998  
9 Resolution valid for several years after he resigned. By  
10 challenging his resignation as purportedly forged, Dixie was  
11 confirming the validity of the 1998 Resolution establishing the  
12 General Council, and rejecting the notion that descendants of  
13 the 1915 census identifying 12 or 13 Indians living in the  
14 Sheepranch were required to participate in 1998 organization of  
15 the Tribe. Because Dixie is a party to this lawsuit, such  
16 evidence is admissible against him as an admission under the  
17 Federal Rules of Evidence. FRE 801(d)(2)(A).

18 **H. IN 1998, INDIAN LAW DID NOT REQUIRE DIXIE TO ORGANIZE THE**  
19 **TRIBE IN ANY PARTICULAR MANNER**

20 The above-referenced history of the Tribe demonstrates that  
21 Yakima Dixie alone had the authority to enroll Burley and her  
22 family as members and organize the Tribe when he did in 1998.  
23 The Tribe was not organized under the IRA at that time, nor did  
24 it need to be. As stated in Cohen's Handbook of Federal Indian  
25 Law:

26 "Today, at least 160 Indian nations have constitutions  
27 adopted pursuant to the IRA, more than 75 have established  
28 constitutions outside its framework, and still others  
remain without written constitutions, either because they  
continue to be governed by customs and traditions, or  
because their basic laws are in the form of statutes. **No  
federal law, including the IRA itself, requires tribes to  
adopt any particular kind of constitution.** The decision  
whether to have an IRA constitution, or any written

constitution at all, is a matter of tribal sovereignty and tribal initiative." (Emphasis added).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2012 ed., §405[3], page 271.

Accordingly, based on recognized Indian law, Dixie could have organized the Tribe orally and outside the IRA framework. As further stated in Cohen's Handbook of Federal Indian Law:

"Tribes may thus adopt constitutions outside the IRA process.

\* \* \*

"...Some tribes operate without a written constitution. **The absence of a written constitution does not affect the self-governing powers of Indian nations under federal law.**" (Emphasis added).

Id. at §4.04[3][b], page 260.

However, even though he chose to organize the Tribe in a written document, Indian law did not require it to be in any particular form. Thus, the Dixie Faction's attack of Dixie's own written constitution as "invalid," because one signature is missing or that it does not contain places for other adult members to sign who are descendants of the 12 or 13 Indians identified in the 1915 census lacks merit. (See the Dixie Faction's motion for summary judgment, filed March 2, 2012, in CVMT v. Salazar (Jewell), Case No. 1:11-cv-00160-RWR, with respect to the AS-IA's 2011 Decision: "Only two persons signed: Yakima Dixie and Silvia Burley...As the Government admits in its answer, two is not a majority of four. As a result, the 1998 Resolution is invalid on its face." Page 36).

Factually, the 1998 Resolution establishing the General Council was outside the IRA framework. The BIA could not later force the Tribe to "re-organize" under the IRA, or in any fashion, as the AS-IA's 2015 Decision dictates. (CVMT-2011-

002054); see COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* at §4.04[3][b], page 260 ("tribes today may revoke their IRA constitutions," citing 25 U.S.C. §476(b)).

However, the AS-IA's 2015 Decision ignores the Dixie Faction's criticism of the 1998 Resolution as a document, and focuses instead on the assertion that the descendants of the 12 or 13 Indians identified in the 1915 census were purportedly "members" of the Tribe in 1998 and therefore were entitled to participate in the "re-organization" of the Tribe. For the reasons stated above, this conclusion is historically wrong and contrary to the policy the BIA was adhering to over the years with respect to this and other Rancherias since 1915. Over the years, the BIA treated only those individuals who actually resided on the Rancherias as members of the Tribe and having sole authority to organize their respect bands and enroll members. This policy was manifested in the Distribution Plan procedure in listing only those individuals who residing on the Rancherias with the authority to vote for termination. It was previously manifested in the BIA's policy and practice in choosing Jeff Davis as the only person eligible to vote for an IRA government in 1935, because he was the only one residing on the Sheepbranch at that time, and was therefore the only recognized member of the Tribe.

## V.

### JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Dixie Faction's judicial review section in their opposition papers is contrary to what it asserted previously in its own summary judgment motion attacking the AS-IA 2011 Decision. It applies to a review of the AS-IA 2015 Decision. It stated previously as follows:

The Administrative Procedure Act, 5 U.S.C §706 ("APA"), provides that a court must hold unlawful and set aside agency



1 action that is "arbitrary, capricious, an abuse of discretion,  
2 or otherwise not in accordance with law." 5 U.S.C §706(2) (A).

3 "To make this finding the court must consider whether the  
4 decision was based on consideration of the relevant factors and  
5 whether there has been a clear error of judgment." Citizens to  
6 Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

7 Although the court should not substitute its judgment for that  
8 of the agency, its review must be "searching and careful." Marsh  
9 v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)  
10 (citation omitted). "[W]here the agency has failed to provide a  
11 reasoned explanation, or where the record belies the agency's  
12 conclusion, [the court] must undo its action." Ransom v.  
13 Babbitt, 69 F.Supp.2d 141, 149 (D.D.C. 1999) (quoting Petroleum  
14 Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir.  
15 1994)).

16 Whenever an agency changes its course it must "supply a  
17 reasoned analysis for the change." Jicarilla Apache Nation v.  
18 DOI, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (citation and internal  
19 quotation marks omitted). "Reasoned decision making...necessarily  
20 requires the agency to acknowledge and provide an adequate  
21 explanation for its departure from established precedent, and an  
22 agency that neglects to do so acts arbitrarily and  
23 capriciously." Id. (citations and internal quotation marks  
24 omitted). An agency's "failure to come to grips with  
25 conflicting precedent constitutes an inexcusable departure from  
26 the essential requirement of reasoned decision making." Id. At  
27 1120 (citations and internal quotation marks omitted); *see also*  
28 Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C.  
Cir. 1970) ("[I]f an agency glosses over or swerves from prior  
precedents without discussion it may cross the line from the  
tolerably terse to the intolerably mute").

1 "[A]n agency's refusal to consider evidence bearing on the  
2 issue before it constitutes arbitrary agency action within the  
3 meaning of [APA] §706." Butte County, Cal. V. Hogen, 613 F.3d  
4 190, 194 (D.C. Cir. 2010) (citing Motor Vehicles Mfrs. Assn., 463  
5 U.S. at 43). See also Fallon Pauite-Shoshone Tribe v. U.S.  
6 Bureau of Land Management, 455 F.Supp.2d 1207, 1223-1224 (D.  
7 Nev. 2006) (arbitrary and capricious for Bureau of Land  
8 Management to ignore scientific evidence in the agency record  
9 that ancient human remains were affiliated with modern-day  
Native American tribe).

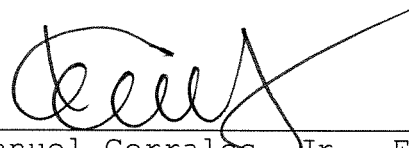
10 The APA requires an agency to "examine the relevant data  
11 and articulate a satisfactory explanation for its action  
12 including a rational connection between the facts found and the  
13 choice made." Motor Vehicles Mfrs. Assn., 463 U.S. at 43. If  
14 the agency itself does not supply a reasoned basis for its  
15 decision, the court cannot make up for that deficiency. Id.  
(citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

16 **VI.**

17 **CONCLUSION**

18 For the foregoing reasons, and for the reasons expressed in  
19 Plaintiffs' moving papers, summary judgment should be granted in  
20 favor of Plaintiffs.

21  
22 DATED: April 28, 2017

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