

JEFFREY H. WOOD
Acting Assistant Attorney General

JODY H. SCHWARZ
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Ph: (202) 305-0245
Fx: (202) 305-0506
jody.schwarz@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES FEDERAL DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Plaintiffs,

vs.

RYAN ZINKE, Secretary of the UNITED
STATES DEPARTMENT OF THE INTERIOR,
et al.,

Defendants,

THE CALIFORNIA VALLEY MIWOK TRIBE,
et al.,

Intervenor-Defendants.

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

FEDERAL DEFENDANTS' REPLY IN
SUPPORT OF THEIR CROSS-MOTION FOR
SUMMARY JUDGMENT AND OPPOSITION
TO PLAINTIFFS' SUPPLEMENTAL
REQUEST FOR JUDICIAL NOTICE

Hon. William B. Shubb

Hearing Date: May 30, 2017
Time: 1:30 p.m.
Courtroom: No. 5, 14th Floor

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESPONSE TO PLAINTIFFS’ STATEMENT OF FACTS AND ARGUMENT.....	2
A.	The 1998 Resolution.....	3
B.	Dixie’s Fraud and Tribal Leadership Dispute	4
C.	U.S. District Court’s December 2013 Order (<i>Miwok III</i>).....	5
III.	ARGUMENT.....	6
A.	Plaintiffs’ Challenge to the December 2015 Decision is Barred by Issue Preclusion and Claim Preclusion	6
B.	The Record Supports the Assistant Secretary’s Determination that the Tribe’s Membership is more than Five Individuals.....	9
C.	Plaintiffs Remaining Arguments in Opposition	9
1.	Membership in Unorganized Tribes and Rancherias.....	9
2.	The 1998 Resolution.....	10
3.	The Tribe is Not Being Forced to Reorganize.....	12
4.	Third Party Scheme to Take Control of the Tribe and Mr. Yakima Dixie’s Alleged Fraud.....	13
5.	Reinstatement of 2011 Decision.....	13
IV.	OPPOSITION TO PLAINTIFFS’ SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE AND TO INTRODUCE ADDITIONAL DOCUMENTS.....	14
V.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Alan-Wilson v. Acting Sacramento Area Director</i> , 1998 I.D. LEXIS 85; 33 IBIA 55 (IBIA 1998).....	10
<i>Alaska Oil & Gas Ass’n</i> , 840 F.3d at 675.....	6
<i>Asarco, Inc. v. EPA</i> , 616 F.2d 1153 (9th Cir. 1980).....	16
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977).....	2
<i>California Valley Miwok Tribe v. Jewell</i> , 5 F. Supp. 3d 86 (D.D.C. 2013)	passim
<i>California Valley Miwok Tribe v. United States</i> , 424 F. Supp. 2d 197 (D.D.C. 2006)	passim
<i>California Valley Miwok Tribe v. United States</i> , 515 F.3d 1262 (D.C. Cir. 2008)	6, 8, 11
<i>California Valley Miwok Tribe v. United States</i> , No. 02-0912 (E.D. Cal. Apr. 29, 2002).....	8
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	2
<i>Ctr. for Biological Diversity v. Fish & Wildlife Serv.</i> , 450 F.3d 930 (9th Cir. 2006)	16
<i>Fed. Election Comm’n v. Akins</i> , 524 U.S. 11 (1998).....	13
<i>Fence Creek Cattle Co. v. U.S. Forest Serv.</i> , 602 F.3d 1125 (9th Cir. 2010)	15
<i>Fla. Power & Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....	2, 15
<i>Great Basin Mine Watch v. Hankins</i> , 456 F.3d 955 (9th Cir. 2006)	15
<i>Native Ecosys. Council v. Weldon</i> , 848 F. Supp. 2d 1207 (D. Mont. 2012)	15
<i>Powell v. Thomas</i> , 643 F.3d 1300 (11th Cir. 2011).....	7
<i>Rybachek v. EPA</i> , 904 F.2d 1276 (9th Cir. 1990).....	15
<i>San Luis & Delta-Mendota Water Auth. v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014)	16
<i>Seminole Nation v. Norton</i> , 223 F. Supp. 2d 122 (D.D.C. 2002)	12
<i>Udall v. Littell</i> , 366 F.2d 668 (D.C. Cir. 1996)	12
<i>Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.</i> , 435 U.S. 519 (1978)	2, 15

Statutes

28 U.S.C. § 2401(a)	11
5 U.S.C. § 706.....	passim
72 Stat. 619 (1958)	10

Rules

Federal Rule of Evidence 201.....	14, 15
-----------------------------------	--------

1 **I. INTRODUCTION**

2 The issue before the Court is whether the Assistant Secretary's December 2015 Decision
3 finding that (1) the California Valley Miwok Tribe's ("CVMT" or "Tribe") membership consists
4 of more than five people and (2) a 1998 General Council is not the Tribe's valid representative is
5 arbitrary and capricious under the Administrative Procedure Act. In their opposition, Plaintiffs
6 fail to demonstrate that the decision is arbitrary and capricious or otherwise not in accordance
7 with law. Plaintiffs focus their argument on allegations of time-barred claims and fraud
8 committed by third parties and Mr. Yakima Dixie, but none of these matters have any relevance
9 to the decision they challenge today. Rather, the Assistant Secretary, after careful review of the
10 record before him, offered a reasoned explanation for the findings that CVMT's membership
11 consists of more than five people and that a 1998 General Council is not the Tribe's valid
12 representative. Plaintiffs make no clear attempt to explain why the Assistant Secretary's
13 determinations violate the APA. Instead, Plaintiffs' opposition misrepresents the record,
14 misstates principles of law, and raises inappropriate and irrelevant issues. As the administrative
15 record proves, the Assistant Secretary's December 2015 Decision was made after consideration
16 of all the relevant factors. It is, therefore, entitled to substantial deference. The Court should
17 uphold the decision and grant Federal Defendants' Cross-Motion for Summary Judgment.
18
19

20 In addition, Plaintiffs submitted a Supplemental Request for Judicial Notice of an extra-
21 record document in conjunction with their opposition. ECF No. 48-1. In light of the Court's
22 order requiring the parties to file any motions to supplement the record by February 6, 2017,
23 Plaintiffs' belated attempt should be denied.
24
25
26
27
28

II. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS AND ARGUMENT

In their Statement of Facts and Argument, Plaintiffs again cite to and rely upon many documents that are not part of the certified administrative record and that were not directly or indirectly considered by the Assistant Secretary. See ECF No. 48 at 11-12, 17, 21, 25, 37-40, 42-43, 46, 48, 57-60, 63-67, 74 (Pls.' Opp. to Fed. Defs.' Mot. for Summ. J. ("Pls.' Opp.")) citing to documents attached to Pls.' Request for Judicial Notice (ECF No. 45) and Pls.' Supplemental Request for Judicial Notice (ECF No. 48-1). Plaintiffs, however, cannot rely on these documents to serve as the basis for any facts in this case. The Court reviews Plaintiffs' challenge to the December 2015 Decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et. seq. Under the APA, a "reviewing court shall hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final agency action; rather, the full administrative record that is compiled by the agency delineates the scope of judicial review. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978); see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate standard of APA review . . . to the agency decision based on the record the agency presents to the reviewing court."). The [APA] directs the Court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Review of the whole record is based on the full administrative record that was before the agency decisionmakers at the time they made their decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

On January 7, 2017, Federal Defendants lodged the certified administrative record for the December 2015 Decision. ECF No. 43. Although the Court provided Plaintiffs the opportunity

1 to file a motion to supplement the administrative record, Plaintiffs did not do so. *See* ECF No.
 2 41. Plaintiffs cannot now seek to supplement the record by citing to extra-record documents
 3 attached to a separate Request for Judicial Notice and Supplemental Request for Judicial Notice.
 4 The agency's decision is based on the administrative record lodged with the Court and the
 5 Court's review is limited to that record. Therefore, this Court should disregard Plaintiffs'
 6 statements based on extra-record documents. Additionally, Plaintiffs assert several statements as
 7 fact supported by the administrative record with which Federal Defendants disagree and discuss
 8 below.

9
 10 **A. The 1998 Resolution**

11 On September 24, 1998, the Superintendent stated that "for purposes of determining the
 12 initial members of the Tribe," the BIA must include Mr. Dixie and his brother Melvin, as the
 13 remaining heirs of Mabel Hodge. 2011AR000173. In addition, to Mr. Dixie and Melvin, the
 14 BIA recognized that Mr. Dixie had adopted Ms. Burley, her two daughters, and her
 15 granddaughter into the Tribe, and therefore, those adoptees who were of majority age also had
 16 "the right to participate in the initial organization of the Tribe." *Id.* The Superintendent did not
 17 find that these individuals made up the Tribe's initial members. Rather, he stated:

18
 19 At the conclusion of [the meeting with the BIA staff], you were going to consider
 20 what enrollment criteria should be applied to future perspective members. Our
 21 understanding is that *such criteria will be used to identify other persons eligible to
 participate in the initial organization of the Tribe.* Eventually, such criteria
 would be included in the Tribe's constitution.

22 *Id.* (emphasis added). The Superintendent then recommended that the Tribe, for the time being,
 23 operate as a General Council and provided a draft resolution for the Tribe to use. *Id.* In
 24 November of 1998, Silvia Burley and Yakima Dixie signed Resolution #GC-98-01 ("1998
 25 Resolution"), which established the adults of the Tribe as the General Council ("1998 General
 26 Council"). 2011AR001401. The 1998 Resolution states that membership of the Tribe consists
 27
 28

1 of at least Yakima Dixie, Silvia Burley, Silvia Burley's daughters and grandchild, and that
2 membership may change in the future consistent with the Tribe's ratified constitution and any
3 duly enacted tribal membership statutes. *Id.* Thus, the plain language of the 1998 Resolution
4 belies Plaintiffs' assertions that it was intended to, and did, effect the Tribe's organization.

5 **B. Dixie's Fraud and Tribal Leadership Dispute**

6 Plaintiffs include as part of their Statement of Facts a recitation about the Tribe's
7 leadership dispute and alleged fraud committed by Mr. Yakima Dixie in allowing a third party to
8 attempt to take over the Tribe. Pls.' Opp. 11-12, 57-74. Plaintiffs devote a good portion of their
9 brief to discuss allegations that rely on documents not included within the administrative record.
10 The Court should disregard these arguments. Further, Plaintiffs' assertions have no bearing on
11 the Assistant Secretary's decision. The Assistant Secretary's decision does not turn on the
12 reliability and relevance of Mr. Yakima Dixie's alleged admission of fraud as Plaintiffs suggest.
13 See Pls.' Opp. at 66. Instead, the Assistant Secretary's decision examined the two issues of
14 whether the Tribe's membership was limited to five individuals and whether the 1998 General
15 Council was the Tribe's valid representative. The Assistant Secretary looked at the historical
16 record of the tribe, previous Departmental dealings and understandings, previous Assistant
17 Secretary decisions, and the parties' representations as to the Tribe's membership composition.
18 It was this careful consideration of all the relevant factors that support the December 2015
19 Decision, not the threatened fisticuffs in a 2012 deposition that Plaintiffs discuss in detail in their
20 opposition. As all parties have stated, disputes developed over who was the Tribe's valid
21 representative. 2017AR001399, 1401-02. The groups have brought multiple lawsuits against
22 the BIA, the State of California Gaming Commission, and each other in various courts, including
23 this one. But the Assistant Secretary considered the total record before him, which clearly
24 supports his decision.
25
26
27
28

1 **C. U.S. District Court’s December 2013 Order (*Miwok III*)**

2 Plaintiffs allege that the district court’s decision in *Miwok III* is fundamentally flawed for
 3 two reasons: (1) they assert that because the court did not have the benefit of reviewing the
 4 deposition transcript of Mr. Yakima Dixie taken in a California State case, it could not consider
 5 his alleged statements that he did resign as Tribal Chairman; and (2) they assert that the decision
 6 is largely based on a time-barred claim that the 1998 Resolution was invalid at the outset. Pls.’
 7 Opp. at 16. First, Plaintiffs allege that during a 2012 deposition, Mr. Yakima Dixie admitted to
 8 resigning as Tribal Chairman and that not having this information before it mislead the district
 9 court into basing its decision on the erroneous presumption that Mr. Yakima Dixie never
 10 resigned. *Id.* The court in *Miwok III*, however, did not premise its decision on Mr. Yakima
 11 Dixie’s alleged resignation. Rather, it noted that the 2011 Decision “fails to address *whatsoever*
 12 the numerous factual allegations in the administrative record that raise significant doubts about
 13 the legitimacy of the General Council.” *Miwok III*, 5 F. Supp. 3d at 100 (emphasis in original).
 14 On remand, the administrative record contained the deposition transcript. AR2017000137-62.
 15 The transcript’s inclusion, however, does not change the fact that the Tribe consists of more than
 16 five individuals and that the 1998 General Council is not the Tribe’s valid representative.
 17

18 Nor was *Miwok III* largely based on a time-barred claim that the 1998 Resolution was
 19 invalid at the outset.¹ Rather, the district court found that it was unreasonable for the Assistant
 20 Secretary to assume that the 1998 General Council represented the duly constituted government
 21 of the Tribe. *Miwok III*, 5 F. Supp. 3d at 99. The district court discussed the fact that the 2011
 22

23
 24
 25 ¹ Throughout their response in opposition, Plaintiffs consistently mischaracterize the December
 26 2015 Decision as finding that the 1998 Resolution was “invalid at the outset.” The Assistant
 27 Secretary made no such finding. The Assistant Secretary made no ruling on the initial validity of
 28 the 1998 Resolution, rather he found that he could not now accept the validity of actions taken
 pursuant to the authority of that document in light of the rulings by the courts and the
 administrative record.

1 Decision declared that the 1998 Resolution established a General Council form of government
 2 without actually addressing the validity of the General Council and whether a duly constituted
 3 government actually exists. *Id.* at 99-100. Accordingly, the district court remanded the 2011
 4 Decision to the Assistant Secretary to consider the issues raised.

5 **III. ARGUMENT**

6 In their opposition, Plaintiffs ignore the very issues they challenge in this suit: the two
 7 findings in the December 2015 Decision that (1) the Tribe consists of more than five individuals
 8 and (2) the 1998 General Council is not the Tribe's valid representative. Plaintiffs vigorously
 9 assert that statute of limitations bars arguments made by other parties in other forums, that third
 10 parties conspired to take over the Tribe with the aim of asserting control over its potential
 11 gaming possibilities, and that Mr. Yakima Dixie has committed fraud. Plaintiffs seek to interject
 12 extra-record documents and circular, irrelevant reasoning to obfuscate the facts. Nevertheless, it
 13 is the facts in the administrative record that form the basis for the Assistant Secretary's
 14 determination. Considered within that record are the decisions of federal courts finding that
 15 Plaintiffs are not the Tribe's valid representative and that the Tribe consists of more than five
 16 people. *See Miwok I, Miwok II, and Miwok III.* Also included in the record are many decisions
 17 and letters of Federal Defendants addressing the history of the Tribe and the issues before the
 18 Assistant Secretary. *See* 2017AR001397-402. Reviewing the record as a whole, the Assistant
 19 Secretary articulated a rational connection between the facts found and the choices made and his
 20 decision is entitled to substantial deference. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671,
 21 675 (9th Cir. 2016). Plaintiffs fail to demonstrate otherwise and Federal Defendants' motion for
 22 summary judgment should be granted.

23 **A. Plaintiffs' Challenge to the December 2015 Decision is Barred by Issue** 24 **Preclusion and Claim Preclusion**

25 Plaintiffs again cite to the district court's statement in footnote 15 of *Miwok III*, to
 26 support their argument that *Miwok I* and *II* did not address tribal membership and the validity of
 27 the 1998 General Council, but fail to rebut Federal Defendants' arguments as to why the district
 28

1 court was wrong. Pls.’ Opp. at 20. As Federal Defendants explained in their memorandum in
 2 support of their cross-motion for summary judgment, ECF No. 46 at 17-22, and opposition to
 3 Plaintiffs’ cross-motion for summary judgment, ECF No. 50 at 7, the district court plainly erred
 4 in making that statement.² The courts in *Miwok I* and *II* did not just determine “whether the
 5 Secretary had the authority to refuse to approve a constitution.” *Miwok III*, 5 F. Supp. 3d at 101
 6 n.15. The courts addressed more. They found not only that the Assistant Secretary had the
 7 authority to disapprove the constitution submitted by Ms. Silvia Burley, but that he was correct
 8 in doing so.

9 At issue in those cases was a complaint filed by Plaintiffs in 2005 that included among its
 10 requests for relief a declaration that “the Constitution of the California Valley Miwok Tribe,
 11 adopted by the Tribe in September 2001 is a valid governing document for the Tribe.”
 12 2011AR000709. The Assistant Secretary had disapproved the constitution on the grounds that it
 13 did not involve the greater tribal community and that the Tribe’s leadership was not established.
 14 As the district court stated, “BIA thus defends its refusal to recognize the California Valley
 15 Miwok Tribe as an organized tribe on the ground that the Tribe has failed to take necessary steps
 16 to protect the interests of its potential members.” *Miwok I*, 424 F. Supp. 2d at 202.

17 In affirming the district court’s dismissal of Burley’s complaint, the circuit court
 18 explained:

19 This case involves an attempt by a small cluster of people within the California
 20 Valley Miwok Tribe to organize a tribal government under the [IRA]. [CVMT’s]
 21 chairwoman, Silvia Burley, and a group of her supporters adopted a constitution
 22 to govern the tribe without so much as consulting its membership. *The Secretary*
 23 *declined to approve the constitution because it was not ratified by anything close*
to a majority of the tribe. Burley and her supporters – in [CVMT’s] name – then
 sued the United States claiming that the Secretary’s refusal was unlawful and
 seeking a declaration that [CVMT] is organized pursuant to 25 U.S.C. §476.

25 ² In addition to being wrong, the discussion in footnote 15 is also dicta and not binding precedent
 26 to which the Court should grant any weight because the *Miwok III* court granted plaintiffs’ relief
 27 on other grounds. *See generally Powell v. Thomas*, 643 F.3d 1300, 1304-05 (11th Cir. 2011)
 (“[D]icta is defined as those portions of an opinion that are not necessary to deciding the case
 then before us.”) (internal quotations and citations omitted).

Because we conclude that the Secretary lawfully refused to approve the proposed constitution, we affirm the district court’s dismissal of Burley’s claim.

Miwok II, 515 F.3d at 1263 (emphasis added). The court further stated that

Although [CVMT] by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting the proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary. As Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values.

Id. at 1267-68 (emphasis added).³ On those grounds, the circuit court affirmed the Assistant Secretary’s decision not to approve the Burley faction’s constitution, which did not have the support of the Tribe’s majority, was permissible. *Id.* at 1268. Therefore, the courts did not just determine that the Assistant Secretary had authority to not accept the constitution, but that his very reason for doing so – the fact that the Tribe’s membership was larger than Ms. Silvia Burley and her supporters – was correct. The courts had to consider the very issue of the Tribe’s membership in order to uphold the Assistant Secretary’s decision. And it is this very issue, the membership of the Tribe, that is challenged in this Court. Issues that were necessarily decided by the courts in *Miwok I* and *II* have now been raised by the same plaintiffs before this Court.⁴ All the well-established principles supporting the preclusive effect of prior litigation mitigate for dismissal of this complaint.

³ In discussing the 250 number, the court stated, “[t]his figure was offered by the tribe itself in separate litigation. See Complaint for Injunctive and Declaratory Relief at 1, *California Valley Miwok Tribe v. United States*, No. 02-0912 (E.D. Cal. Apr. 29, 2002). We take judicial notice of that document.” *Miwok II*, 515 F.3d at 1265 n.5.

⁴ Plaintiffs state that the court’s decision in *Miwok III* did not involve a final judgment on the merits as to them because they did not have the ability to appeal the court’s decision. Federal Defendants agree that Plaintiffs did not have the opportunity to appeal that decision but note that their inability to appeal *Miwok III* has no bearing on either the controlling authority of, or the preclusive effects of, *Miwok I* and *II*, which clearly addressed and resolved the Tribe’s membership issue.

B. The Record Supports the Assistant Secretary's Determination that the Tribe's Membership is more than Five Individuals

Even if the issue of whether the Tribe's membership consists of more than five individuals is not precluded by *res judicata* and collateral estoppel principles, Plaintiffs fail to demonstrate how the Assistant Secretary's decision is not fully supported by the administrative record. All the elements of the record on which the Federal Defendants and the courts relied on in the previous litigations were before the Assistant Secretary, including Plaintiffs' previous statements that the Tribe consisted of more than 250 people; the Superintendent's 1998 letter noting that other persons were eligible to participate in the initial organization of the Tribe, 2011AR000172-76; the Superintendent's 2005 letter finding that the Tribe consisted of more than five individuals, 2011AR000610; and the agency decisions challenged in *Miwok I, II*, and *III*. Plaintiffs fail to offer any reason why the Assistant Secretary's decision is not entitled to deference, and more importantly, why is incorrect. *See also* ECF No. 46 19-20.

C. Plaintiffs Remaining Arguments in Opposition

In addition to the specific arguments addressed above, Plaintiffs repeat previous arguments and make many distorted contentions that seek to confuse the basic issues before the Court. While disputing the relevance of the arguments, and asserting that none of them overcome the preclusive effect of *Miwok II*, Federal Defendants discuss the remaining claims below:

1. Membership in Unorganized Tribes and Rancherias

Plaintiffs again argue that the December 2015 Decision, in determining that the Tribe consists of more than five individuals, incorrectly includes Eligible Groups⁵ as part of the Tribe's potential members and thus is arbitrary and capricious on those grounds. Plaintiffs assert that the federal distribution regulations for terminated Rancherias confirm that residence on the

⁵ Plaintiffs use the term "unenrolled potential Tribal members" to describe the individuals who may be eligible to take part in the organization of the Tribe. The December 2015 Decision defines these individuals collectively as the "Eligible Groups."

1 Rancheria equates to actual membership and is the only way a person may be an eligible
 2 member. Plaintiffs are wrong and the cited regulations do not apply. As Federal Defendants
 3 discussed in their Opposition to Plaintiffs' Cross-Motion for Summary Judgement, ECF No. 50
 4 at 13-16, the Tribe was never terminated and, therefore, those regulations have no bearing.

5 Plaintiffs ignore the fact that such restorations were premised on an *illegal termination*
 6 under the Rancheria Act: on that premises, "restoration" was limited to *undoing* the illegal acts
 7 of the Secretary. Under the Rancheria Act, the distributes of the assets of a terminated Rancheria
 8 lost their Federal status as Indians and the Rancheria ceased to be a Reservation. 72 Stat. 619
 9 (1958). As spelled out in detail in *Alan-Wilson v. Acting Sacramento Area Director*, 1998 I.D.
 10 LEXIS 85; 33 IBIA 55 (IBIA 1998), in response to a remand from the IBIA, the BIA undertook
 11 a survey of restored Rancherias, and reached the following conclusion:

12 The record reflects that BIA established two variables in its interpretation of
 13 *Hardwick* when aiding in the organization or reorganization of the 17 terminated
 14 tribes. One variable was whether a rancheria had a pre-termination governing
 15 document, in which case the BIA recognized the membership criteria set forth in
 16 that document. The Bureau utilized the pre-termination governing document
 17 because paragraph 4 of the *Hardwick* decision restored each rancheria to the same
 18 status it had prior to termination by requiring the Secretary of the Interior to
 19 recognize them ". . . as Indian entities with the same status as they possessed prior
 to distributions of the assets of these Rancherias" However, where there was
 no pre-termination governing document, the BIA used the distribution plans for
 the respective rancherias by instructing the Indians thereof that the rightful parties
 to organization of the rancheria were the distributees, dependent members and
 lineal descendants thereof.

20 *Alan-Wilson*, 1998 I.D. LEXIS 85 at *8. No such considerations apply to the initial organization
 21 of a tribe or Rancheria that was not terminated. Plaintiffs, therefore, fail to demonstrate that the
 22 December 2015 Decision is arbitrary and capricious on these grounds.

23 2. The 1998 Resolution

24 Plaintiffs assert variations of a theme regarding the 1998 Resolution: in essence,
 25 Plaintiffs argue that the Assistant Secretary determined in his decision that the 1998 Resolution
 26 was invalid, invalid at the outset, was a time-barred issue, or could not be considered because it
 27
 28

1 was never referred to the Assistant Secretary by the IBIA. These assertions misstate the
2 December 2015 Decision and are premised on meritless arguments.

3 First, the December 2015 Decision made no findings as to the validity of the 1998
4 Resolution “at the outset.” To the contrary, the December 2015 Decision, in considering the
5 issue of the Tribe’s valid representatives, found that the 1998 Resolution “seemed a reasonable,
6 practical mechanism for establishing a tribal body to *manage the process* of organizing the
7 Tribe,” but that the actual reorganization could be accomplished only by a process open to the
8 whole tribal community. 2017AR001401. (emphasis added). The December 2015 Decision
9 further found that, as the courts in *Miwok I* and *Miwok II* had established, and the administrative
10 record had confirmed, because the 1998 Resolution was approved by only Mr. Dixie and Ms.
11 Burley, it could not serve as the actual reorganization of the whole tribal community, which
12 includes the Eligible Groups. *Id.* The Assistant Secretary stated that “Federal courts have
13 established, and my review of the record confirms, the people who approved the 1998 Resolution
14 . . . are not a majority of those eligible to take part in the reorganization of the Tribe.” *Id.*
15

16 Even if the December 2015 Decision can be read as finding the 1998 Resolution invalid
17 at the outset—which it cannot—the statute of limitations does not apply to the Assistant
18 Secretary’s decision. The statute of limitations applicable to an APA claim, 28 U.S.C. § 2401(a),
19 speaks to limits on filing an action *against the United States in federal court*. It does not bar the
20 Assistant Secretary from addressing the issues raised in the administrative process for the
21 challenged decision. Plaintiffs, therefore, rely on an unquestionably flawed statute of limitations
22 argument in their opposition. Plaintiffs’ argument that the statute of limitations applies here
23 because Mr. Dixie’s argument is time-barred is simply wrong. This lawsuit is an APA challenge
24 to the December 2015 Decision. It is timely. Nothing else related to this case could possibly
25 implicate the six year limitation of section 2401(a).
26
27
28

Nor was the Assistant Secretary somehow barred from considering whether a valid government structure was established by the 1998 Resolution on the grounds that it was not an issue referred to him by the IBIA. Plaintiffs allege that in its 2010 decision, 2011AR001683-705, the IBIA limited its referral to the Assistant Secretary to only an enrollment dispute. Pls.’ Opp. at 48. As such, Plaintiffs argue that the December 2015 Decision exceeded the Assistant Secretary’s authority by deciding whether the 1998 General Council was the Tribe’s valid representative. *Id.* Plaintiffs’ argument is undermined by the wealth of authority that establishes the Assistant Secretary’s “plenary administrative authority in discharging the federal government’s trust obligations to Indians.” *Miwok III*, 5 Supp. 3d at 101 n.15 (quoting *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1996)); *see also* 43 U.S.C. § 1457; *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (noting that the Secretary “has the responsibility to ensure that [a tribe’s] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole.”). Thus, the Assistant Secretary was not limited in his decision to consider only issues referred by the IBIA and could consider the matter of whether the 1998 General Council is the Tribe’s valid representative.

3. The Tribe is Not Being Forced to Reorganize

Plaintiffs assert that the Assistant Secretary’s decision is forcing them to reorganize and is therefore improper. Pls.’ Opp. at 54. Plaintiffs ignore the fact that since 1998, the Tribe has been pursuing reorganization and the genesis of much of this litigation is the Tribal factions’ efforts to have the Tribe organized based on their proffered constitutions. As discussed in this brief, in reviewing the latest submissions, the Assistant Secretary determined that the record did not support a finding that those eligible to participate in the organization were limited to five individuals. Rather, the Assistant Secretary identified the groups of individuals who may be eligible to participate in Tribe’s organization. He did not force the Tribe to organize nor does the existence of the Eligible Groups place any burdens on the Tribe.

1 4. Third Party Scheme to Take Control of the Tribe and Mr. Yakima Dixie's
 2 Alleged Fraud

3 Throughout their brief, Plaintiffs devote considerable time asserting that the current
 4 Tribal dispute is the result of interference by a third party individual, Mr. Chad Everone, who
 5 they allege is attempting to take over the Tribe through Mr. Dixie, who they allege is committing
 6 fraud. Pls.' Opp. 57-71. Plaintiffs cite numerous extra-record documents and assert unsupported
 7 allegations. These arguments, however, fail to demonstrate that the December 2015 Decision
 8 was arbitrary and capricious. The cause of the Tribe's internal dispute is not at issue nor did it
 9 play any part in the Assistant Secretary's decision. It is utterly undeniable that the dispute itself
 10 exists and that the parties have devoted significant time and resources toward pursuing their
 11 claims in federal courts, state courts, and administrative tribunals. The December 2015
 12 Decision, however, is premised on the well-established law of the case that the Tribe consists of
 13 more than five people. Allegations of fraud, greed, and general skullduggery played no role in
 14 the Assistant Secretary's decision and Plaintiffs fail to demonstrate that the December 2015
 15 Decision is arbitrary and capricious on these grounds.

16 5. Reinstatement of 2011 Decision

17 Finally, this Court should not reinstate the 2011 Decision. That decision, the subject of
 18 *Miwok III*, was remanded to the Assistant Secretary for reconsideration. As such, where, as here,
 19 the Court's jurisdiction is based on the APA, vacatur is the presumptive remedy. *See* 5 U.S.C. §
 20 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency . . . action found to
 21 be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right");
 22 *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the
 23 agency misinterpreted the law, it will set aside the agency's action and remand the case."); *Vt.*
 24 *Yankee Nuclear Power Corp.* 435 U.S. at 549 ("[W]hen there is a contemporaneous explanation
 25 of the [challenged] agency decision, the validity of that action must stand and fall on the
 26 propriety of that finding If that finding is not sustainable on the administrative record made,
 27
 28

1 then the [agency's] decision must be vacated, and the matter remanded to [it] for further
 2 consideration.”). Here, should the Court find that the December 2015 Decision was arbitrary and
 3 capricious, the proper remedy would be to set aside the decision and remand the case, not
 4 reinstate the 2011 Decision.

5 **IV. OPPOSITION TO PLAINTIFFS’ SUPPLEMENTAL REQUEST FOR** 6 **JUDICIAL NOTICE AND TO INTRODUCE ADDITIONAL DOCUMENTS**

7 On November 15, the Court entered its Status (Pretrial Scheduling) Order (“Status
 8 Order”) setting forth the schedule for this case, including lodging of the administrative record,
 9 filing motions to augment the administrative record, and filing motions for summary judgment.
 10 Pls.’ Mem. 2-3. On January 13, 2017, Federal Defendants lodged an electronic, word-searchable
 11 version of the record in PDF format and served copies of the record on Plaintiffs’ counsel and
 12 Defendant-Intervenors’ counsel. Pursuant to the Status Order, Plaintiffs had until February 6,
 13 2017, to file any motion to augment the administrative record. *Id.* at 2-3. Plaintiffs did not file a
 14 motion to augment. Instead, on March 3, 2017, when they filed their cross-motion for summary
 15 judgment, Plaintiffs filed a separate Request for Judicial Notice under Federal Rule of Evidence
 16 201 (“FRE 201”) of 33 extra-record documents totaling over 200 pages. ECF No. 45. Plaintiffs
 17 have now filed an additional request. ECF No. 48-1. In their request, Plaintiffs seek to have the
 18 Court take judicial notice of a February 21, 1978, Report of Probation, asserting that the
 19 document is relevant

20 on the issue of whether Dixie was coerced in his deposition testimony, why
 21 counsel reacted to Dixie’s physical threats at a deposition, and the issue of
 22 Plaintiffs’ claim that Dixie and Everone fabricated the Tribal leadership dispute in
 order to steal control of the Tribe from Burley’s leadership in order to build a
 casino.

23 48-1 at 2. Plaintiffs provide no other support for their request.

24 Setting aside the fact that the document is completely irrelevant and has absolutely no
 25 bearing on the decision they challenge, Plaintiffs’ request for judicial notice is an invalid and
 26 untimely end-run around the Status Order’s schedule and the requirements for supplementing the
 27 administrative record. The Court should not consider the extra-record document because
 28

1 Plaintiffs have failed to carry—nor have they even tried to carry—their heavy burden of
2 establishing an exception to APA’s limit on judicial review. *See Fence Creek Cattle Co. v. U.S.*
3 *Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). In cases that are brought under the APA,
4 unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final
5 agency action; rather the full administrative record that is compiled by the agency delineates the
6 scope of judicial review. *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 549. Judicial notice is
7 usually inappropriate under the APA because “[t]he fact finding capacity of the district court . . .
8 is typically unnecessary to judicial review of agency decisionmaking.” *Fla. Power & Light Co.*,
9 470 U.S. at 744. Instead, “courts are to decide, on the basis of the record the agency provides,
10 whether the action passes muster under the appropriate APA standard of review.” *Id.*

11 The United States Court of Appeals for the Ninth Circuit narrowly allows judicial notice
12 of documents in APA cases only when the documents otherwise meet one of the record-review
13 exceptions. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 975-76 (9th Cir. 2006);
14 *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (construing a motion for judicial
15 notice as a motion to supplement the agency’s administrative record). Put simply, “a party
16 cannot circumvent the rules governing record supplementation by asking for judicial notice
17 instead of supplementation” *Native Ecosys. Council v. Weldon*, 848 F. Supp. 2d 1207, 1228
18 (D. Mont. 2012), *vacated as moot*, No. CV-11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov.
19 20, 2012).

20 Plaintiffs provide no basis for supplementing the administrative record. Plaintiffs had
21 ample opportunity to seek to supplement the administrative record, but chose not to do so. They
22 cannot now seek to supplement the record under the guise of an FRE 201 request. Although
23 Plaintiffs assert that the document is relevant to issues concerning the Tribal leadership dispute,
24 ECF No. 48-1, Plaintiffs make no attempt to explain how the document is actually relevant to the
25 decision they challenge or refutes any arguments Federal Defendants assert on their motion for
26 summary judgment, or even, as an initial matter, how their request meets any of the record-
27 review exceptions. To the extent Plaintiffs attempt to argue that the extra-record document is
28

1 needed to correct the administrative record, the APA prohibits this. “Consideration of the
2 evidence to determine the correctness . . . of the agency’s decision is not permitted . . .” *Asarco,*
3 *Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Ctr. for Biological Diversity v. Fish & Wildlife*
4 *Serv.*, 450 F.3d 930, 944 (9th Cir. 2006) (rejecting extra-record evidence because it was offered
5 to advance “‘a new rationalization . . . for attacking an agency’s decision.’”); *see also San Luis &*
6 *Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (same). Plaintiffs’
7 request for judicial review should therefore be denied.

8 **V. CONCLUSION**

9 That the Tribe has many more than five members was decided by the D.C. district court
10 and affirmed by the D.C. circuit court. That fact is the law of the case, and Plaintiffs are barred
11 by preclusion principles from relitigating it. The December 2015 Decision is the result of the
12 Assistant Secretary’s careful and thorough analysis of the history of the Tribe, the administrative
13 record, and the applicable law. The Assistant Secretary was guided by court decisions that have
14 addressed the challenges Plaintiffs raise and also by the administrative record before him. The
15 Assistant Secretary considered the relevant factors and articulated a rational connection between
16 the facts found and the choices made. After his careful consideration, the Assistant Secretary
17 properly found that the Tribe consists of more than five people and that the 1998 General
18 Council is not the Tribe’s valid representative. The December 2015 Decision is presumed to be
19 valid, and Plaintiffs have shown no reason for the Court to deviate from this presumption.
20 Rather, the Court should uphold the decision and find that it was not arbitrary and capricious, an
21 abuse of discretion, or otherwise not in accordance with law. The Court should grant summary
22 judgment in favor of Federal Defendants.
23
24
25
26
27
28

1 Respectfully submitted May 8, 2017

2 JEFFREY H. WOOD
3 Acting Assistant Attorney General

4 /s/ Jody H. Schwarz
5 JODY H. SCHWARZ
6 Natural Resources Section
7 Environment and Natural Resources Division
8 United States Department of Justice
9 P.O. Box 7611
10 Washington, D.C. 20044-7611
11 Ph: (202) 305-0245
12 Fx: (202) 305-0506
13 jody.schwarz@usdoj.gov

14 *Attorneys for Federal Defendants*

15 Of Counsel:

16 James Porter
17 Office of the Solicitor
18 United States Department of the Interior
19 Washington, DC 20240
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing Federal Defendants' Reply in Support of Their Cross-Motion for Summary Judgment and Opposition to Supplemental Request for Judicial Notice by using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz
Jody H. Schwarz