Docket No. 17-16321

In the
UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE, THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR, ANGELICA PAULK, and TRISTIAN WALLACE,

Plaintiffs-Appellants,

vs.

RYAN ZINKE, MICHAEL BLACK, and WELDON LOUDERMILK

Defendants-Appellees,

THE CALIFORNIA VALLEY MIWOK TRIBE, THE TRIBAL COUNCIL, YAKIMA DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, MICHAEL MENDIBLES, GILBERT REMIREZ, JR., ANTOINETTE LOPEZ, and IVA SANDOVAL

Intervenor-Defendants.

Appeal from a Summary Judgment by the U.S. District Court for the Eastern District of California, No. 2:16-cv-01345-WBS-CKD
The Honorable William B. Shubb

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellants hereby certify that they are not incorporated or corporate entities and therefore they have no parent corporation, and no publicly held corporation owns 10% or more of their stock (they have no stock, since they are not corporate entities).

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I.

INTRODUCTION

This is an appeal from a summary judgment in favor of the Assistant Secretary of Interior—Indian Affairs ("AS-IA") who, in 2015, and in response to a U.S. District Court order remanding for reconsideration of a 2011 decision authored by a previous AS-IA, entertained a time-bar claim by a competing tribal faction (the "Dixie Faction" led by Yakima Dixie) that claimed the original, 1998 organization of the Tribe's governing body was invalid, and thus should not be recognized for purposes of government-to-government relations, because it did not involve descendants of a 1915 census of a band of 13 Indians that originally constituted the Tribe, but who never resided on the small 0.92 acre reservation called a Rancheria. The District Court found as reasonable, and thus would not disturb, the AS-IA's conclusion that the Tribe's membership does not presently consist of five (5) members, as originally enrolled in the 1998 organization, but that it includes

descendants of the 1915 census, who the AS-IA concluded must be allowed to participate in a "re-organization" of the Tribe's governing body.

The AS-IA's 2015 decision is erroneous as a matter of law. The sole surviving member of the dwindling Tribe, Yakima Dixie, was the only one residing on the 0.92 Rancheria, and it was he alone who had the authority to enroll the four (4) additional members in 1998 and organize the Tribe. Bureau of Indian Affair ("BIA") policy had historically tied residency on the Rancheria to membership in the Tribe and authority to enroll other members and organize the Tribe, at the exclusion of any participation of the descendants of the 1915 census.

The District Court's summary judgment was also based on the erroneous conclusion that issue preclusion, or collateral estoppel, barred the Plaintiffs here from challenging prior federal court decisions that purportedly held that the Tribe's membership was not limited to five members. No prior

federal court has ever so held. In any event, the prior 2013, U.S. District Court's summary judgment order remanding to the AS-IA to reconsider his decision specifically rejected this collateral estoppel argument, thus collaterally estopping the Defendants here, including the Dixie Faction, from re-litigating that issue.

II.

STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2, Plaintiffs-Appellants California Valley Miwok Tribe, the General Council, Silvia Burley, Rashel Reznor, Angelica Paulk, and Tristian Wallace (collectively "the Burley Faction" or Plaintiffs) submit the following statement of jurisdiction:

1. The U.S. District Court for the Eastern District of California (the "District Court") had subject matter jurisdiction over this action against the AS-IA pursuant to 28 U.S.C. §1362 providing that the district court shall have original jurisdiction of all civil actions brought by any Indian tribe or band.

The District Court also had jurisdiction over the subject matter of this action based upon 28 U.S.C. §1331 concerning original jurisdiction on all civil actions arising under the Constitution, laws, or treaties of the United States.

2. The District Court entered final judgment on all claims for relief in the underlying action on May 31, 2017 (Excerpts of Record ["ER"] 1). The District Court's judgment is final under Federal Rule of Civil Procedure 54 and this Court has jurisdiction pursuant to 28 U.S.C. §1291.

3. The Burley Faction appeals from the District Court's judgment entered on May 31, 2017. Notice of Appeal was filed on June 22, 2017 (ER 907), and is timely pursuant to 28 U.S.C. §2107(a) and (b), and Federal Rule of Appellate Procedure 4(a)(1).

III.

ISSUES PRESENTED

1. Did the District Court commit legal error in granting summary judgment in favor of the Defendants because the AS-IA's 2015 Decision was not arbitrary and

capricious? The AS-IA's 2015 Decision concluded that the California Valley Miwok Tribe ("the Tribe") consists of more than five (5) members, and that the Tribe's governing body, the General Council, established in 1998, was invalid because it was organized by only the adult members of these five enrolled members, and without the participation of certain descendants of a 1915 federal government census that the AS-IA characterized as additional "potential" members.

2. Was membership and authority to organize the Tribe tied to residence on the Rancheria, and, if so, did Yakima Dixie, the only resident on the Rancheria in 1998, have the exclusive authority to enroll the Burleys and organize the Tribe without requiring the consent and participation of the other descendants of the 1915 census who had never resided on the Rancheria? Was the AS-IA's rejection of this historically applied BIA policy unreasonable and arbitrary and capricious, and did the District Court err in concluding otherwise?

3. In addition, was the challenge to the validity of the General Council established in 1998 barred by the six-year statute of limitations?

4. Did the AS-IA also exceed his jurisdiction in entertaining the Dixie Faction's challenge to the validity of the General Council established in 1998, on the grounds the issue was never referred to the AS-IA by the Interior Board of Indian Appeals ("IBIA") for consideration and was never an issue appealed to the IBIA by the Burley Faction? Did the District Court err in concluding otherwise?

5. Was the AS-IA's 2015 Decision inconsistent and contradictory, and therefore arbitrary and capricious, because it concluded the 1998 General Council was valid to manage the "process" of re-organizing the Tribe into a government under the Indian Reorganization Act of 1935 ("IRA"), but otherwise invalid at the outset? Did the District Court err in concluding otherwise?

6. Also, did the District Court here err as a matter of law in concluding that Plaintiffs were

collaterally estopped from asserting the Tribe presently consists of five (5) enrolled members, based on prior federal court decisions that never addressed that issue? Were the Defendants otherwise collaterally estopped from arguing this issue based on the prior, 2013 U.S. District Court's decision rejecting this claim?

IV.

REVIEWABILITY AND STANDARD OF REVIEW

Judicial review of an agency decision commences in the district court before the matter makes its way to the Ninth Circuit. Earth Island Institute v. U.S. Forest Service (9th Cir. 2012) 697 F.3d 1010, 1013. The applicable standard of review in such cases turns in the first instance on the applicable standard for the district court action, Id., and then on the standard applicable to the agency action. Baxter v. Sullivan (9th Cir. 1991) 923 F.2d 1391, 1394.

Where the district court grants or denies summary judgment in an agency case, the Ninth Circuit reviews that decision de novo. Baxter, supra. Then, the Ninth

Circuit independently reviews the agency decision. Baxter, supra. Where an agency decision involves a "mixed question of law and fact," de novo review is appropriate "where a mixed question primarily involves the consideration of legal principles." See Osage Nation v. Irby (10th Cir. 2010) 597 F.3d 1117, 1393-94. Specifically, the factual findings underlying the agency's denial of relief are reviewed independently under the substantial evidence standard. Pavlik v. U.S. (9th Cir. 1991) 951 F.2d 220, 223. However, the Ninth Circuit reviews de novo "purely legal questions" and "mixed questions of law and fact" requiring it to exercise judgment about legal principles." U.S. v. Ramos (9th Cir. 2010) 623 F.3d 672, 679; Chowdhury v. INS (9th Cir. 2001) 249 F.3d 970, 972.

Here, in the first instance, the District Court's ruling affirming the AS-IA's 2015 Decision is reviewed de novo. Afterwards, the reviewing court must also review the AS-IA's 2015 Decision de novo to the extent it involves mixed questions of law and fact, and where

the mixed question "primarily involves the consideration of legal principles." Wyoming v. U.S. E.P.A. (10th Cir. 2017) 849 F.3d 861, 869. In other words, if the question requires consideration of *legal concepts* and the exercise of judgment about *legal principles*, it should be classified as a question of law and reviewed *de novo*. United States v. Hinkson (9th Cir. 2009)(en banc) 585 F.3d 1247, 1259-1260.

Here, the question of whether the Tribe was organized by a "majority" of the Tribe's membership in 1998 requires the consideration of legal concepts and the application of legal principles. It is not a factual calculation of numbers. The legal question is whether "majority" means majority of the five (5) members who organized the Tribe in 1998, or majority of the descendants of the 1915 census who never resided on the 0.92-acre ranch. This analysis includes, but is not limited to, consideration of: (1) the BIA's policy and Indian case law tying residency on a reservation (or Rancheria) with membership and authority to

organize a Tribe; (2) what constitutes a Tribe; (3) the legal impact of the BIA's actions in giving Jeff Davis, a descendant of the 1915 census and sole adult resident on the ranch, in 1935 the sole authority to vote for an IRA Tribal government at the exclusion of the descendants of the 1915 census; (4) the legal impact of the BIA's actions in giving Mabel Dixie, a descendant of the 1915 census and sole adult resident on the ranch, the sole authority in 1966 of voting for termination and being put on the Distribution Plan List to the exclusion of the descendants of the 1915 census; (5) whether Yakima Dixie, the sole resident on the ranch, had the sole legal authority to enroll the Burleys and organize the Tribe in 1998 to the exclusion of the descendants of the 1925 census; (6) the legal impact of the Department of Interior's ("DOI") probate order giving Yakima Dixie's mother, Mabel Dixie, exclusive ownership of the 0.92 acre ranch; (7) whether prior federal court decisions have held that the Tribe's membership is not limited to five persons; (8)

whether the six-year statute of limitations barred the AS-IA in 2015 from concluding that Dixie's actions in organizing the Tribe in 1998 under the General Council was invalid; and (9) whether the Tribe was legally required to "re-organize" under the IRA in order to be eligible for federal benefits and have a government-to-government relationship with the federal government. These issues must be reviewed de novo, because they are "legal concepts" that required the AS-IA to exercise judgment about and apply "legal principles." Hinkson, supra.

The Administrative Procedure Act, 5 U.S.C §706 ("APA"), provides that a court must hold unlawful and set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C §706(2)(A). The "arbitrary and capricious" standard has been described as "synonymous with" the "abuse of discretion" standard that is common in review of district court cases. See Tremain v. Bell Indus., Inc. (9th Cir. 1999) 196 F.3d

970, 975, fn. 5. "To make this finding the court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although the court should not substitute its judgment for that of the agency, its review must be "searching and careful." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (citation omitted). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." Ransom v. Babbitt, 69 F.Supp.2d 141, 149 (D.D.C. 1999) (quoting Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

"[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of [APA] §706." Butte County, Cal. V. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010)(citing Motor Vehicles Mfrs. Assn., 463 U.S. at

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

And although the appellate court generally defers to the agency's decision, it will not forgive a *clear error in judgment*. Judulang v. Holder (2011) 565 U.S. 42, 53.

V.

STATEMENT OF THE CASE

A. 1998 ENROLLMENT OF THE BURLEYS AND ORGANIZTION OF THE TRIBE

In 1998, Yakima Dixie ("Dixie" or "Yakima Dixie") was the sole descendant of the 1915 census who was living on the ranch. (ER 5; 2011 AR 82). On August 5, 1998, Dixie, signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolled

Burley's two daughters and her granddaughter. (ER 350; AR-CVMT-2011-001688). As a result of Dixie's actions, the Tribe in 1998 consisted of six enrolled members: (1) Yakima Dixie; (2) Melvin Dixie; (3) Silvia Burley ("Burley"); (4) Anjelica Paulk; (5) Rashel Reznor; and (6) Tristian Wallace. (Id.).

On September 24, 1998, the BIA told Yakima and Burley that it "recommend[ed] the Tribe operate as a General Council," because of its "small size," so that they could elect or appoint a chairperson and conduct business. (Id.).

Using the draft resolution form prepared by the BIA, Dixie and Burley prepared and signed a resolution on November 5, 1998, establishing a General Council consisting of all adult members of the Tribe, to serve as the governing body of the Tribe. (ER 352, 123-127; AR-CVMT-2011-001690, 00172-176). The resolution became known as Resolution #CG-98-01, which the BIA accepted as the governing document of the Tribe. (ER 131; AR-CVMT-2011-000179).

Pursuant to Resolution #GC-98-01, Yakima Dixie was appointed and elected as the Tribal Chairman. (ER 384; AR-CVMT-2011-002052).

B. 1999 TRIBAL LEADERSHIP DISPUTE

On April 20, 1999, Yakima Dixie signed a notice of resignation as Tribal Chairman. (ER 1694-1709; RJN "32", Letter to Washburn from Corrales, 6/6/2014, Ex. "46" to Decl. of MCJ). On the same date, Yakima Dixie also signed a document confirming his resignation as Tribal Chairman and agreeing to the appointment of Silvia Burley to replace him as the new Tribal Chairperson. (Id.).

Yakima Dixie then thereafter falsely told the BIA and others that he never resigned and that his resignation was forged. This then created a Tribal leadership dispute between Yakima Dixie and Burley. (ER 383, 2127-29; AR-CVMT-2011-002051, 001573-75). Yakima maintained that claim from 1999 up through February 7, 2012, when he was deposed and testified in a California state action that he in fact resigned in April of 1999,

that his resignation was not forged as he had previously claimed, and that the signatures on the Tribal resignation documents were in fact his. (RJN "33", Letter to Washburn from Corrales, 7/9/2014).

C. THE JANUARY 28, 2010 IBIA DECISION

Because of the ongoing Tribal leadership dispute was not coming to an end, the BIA, in 2006, took it upon itself, to begin a process of "re-organizing" the Tribe under the IRA. (ER 346-347; AR-CVMT-2011-001684-85). It invited descendants of the 1915 census it called "potential" or "putative" members to participate in a general council meeting in this re-organization process, which included enrolling new members. (AR-CVMT-2011-001684). The BIA claimed these actions were necessary, because, according to the Interior Board of Indian Appeals ("IBIA"), it felt "until the tribal organization and membership issues were resolved, a leadership dispute between Burley and Yakima...could not be resolved, and the resolution of that dispute was necessary for a functioning government-to-government

relationship with the Tribe." CVMT v. Pacific Regional Director, BIA (Jan. 28, 2010) 51 IBIA 103, 103-104. (ER 346-347; AR-CVMT-2011-001684-85).

The Burley Faction appealed the Pacific Regional Director's decision to the IBIA. (ER 346; AR-CVMT-2011-001684). The IBIA, however, deemed the matter to be a membership enrollment dispute, because it involved the issue of whether the BIA could re-organize the Tribe under the IRA without the Tribe's consent and force the enrollment of nonmembers to participate in that re-organization. (ER 365; AR-CVMT-2011-001703). Because the IBIA did not have jurisdiction over enrollment disputes, it referred the issue to the AS-IA. (Id.).

The IBIA did not refer to the AS-IA any issue concerning whether the 1998 Resolution establishing the General Council was invalid for any reason. Nor did the Burley Faction raise that as an issue before the IBIA. (ER 346-367; AR-CVMT-2011-001684-1705).

D. AS-IA LARRY ECHO HAWK'S AUGUST 31, 2011 DECISION

On August 31, 2011, the AS-IA Larry Echo Hawk, in response to the IBIA's referral of the enrollment

dispute, made the following decisions concerning the Tribe:

1. He reaffirmed his December 22, 2010 Decision that the Tribe is a federally recognized tribe whose entire citizenship, as of August 31, 2011, consists of five acknowledged citizens;

2. The 1998 Resolution established a General Council form of government, comprised of all the adult citizens of the Tribe, with whom the Department may conduct government-to-government relations;

3. The Department shall respect the validly enacted resolutions of the General Council; and

4. Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents.

5. Although the Tribe's General Council does not render the Tribe organized under the IRA, as a federally recognized tribe, the Tribe is not required to "organize" under the IRA.

6. It is impermissible to treat the Tribe, as a non-IRA tribe, differently from tribes organized under the IRA and not allow it to receive federal benefits. (ER 381-382; AR-CVMT-2011-002049-50).

In his decision, Echo Hawk observed that the BIA wrongly concluded it had an obligation to potential members in the surrounding community, i.e., the descendants of the 1915 census who never resided on the Rancheria. (ER 382-383; AR-CVMT-2011-002050-51). He stated:

> "...the BIA clearly understood in 1998 that the acknowledged CVMT citizens had the right to exercise the Tribe's inherent sovereign power in a manner they chose. It is unfortunate that soon after the 1998 General Council resolution was enacted, an intra-tribal leadership dispute erupted, and both sides of the dispute found, at various points in time in the intervening years, that it served their respective interests to raise the theory that the BIA had a duty to protect the rights of approximately 250 'potential citizens' of the Tribe. A focus on that theory has shaped the BIA's and the Departments' position on the citizenship question ever since. By contrast, today's decision clears away the misconceptions that these individuals have inchoate citizenship rights that the Secretary has a duty to protect. They do not. The Tribe is not comprised of both citizens and potential citizens. Rather, the five acknowledged citizens are the only citizens of the

> Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe....”

(Id.).

E. U.S. DISTRICT COURT DECEMBER 2013 ORDER REMANDING TO AS-IA FOR RECONSIDERATION

The Dixie Faction challenged the Echo Hawk 2011 decision in federal court. (ER 49; AR-CVMT-2011-000024). In December 2013, the federal district court granted summary judgment in favor of the Dixie Faction and remanded to the AS-IA for him to “reconsider” his August 31, 2011 decision, because he “assumed” certain factual issues rather than determined them factually. CVMT v. Jewell (U.S.D.C. 2013) 5 F.Supp.3d 86, 100-101. Specifically, the U.S. District Court remanded back to the AS-IA for him to reconsider his August 31, 2011 decision, because, according to the U.S. District Court, the AS-IA merely assumed the Tribe’s membership is limited to five persons and further merely assumed that the Tribe is governed by a duly constituted General Council, without setting forth its reasons for these conclusions, in light of the administrative

record that questioned the validity of those assumptions. (Id.).

The U.S. District Court was led to believe that Dixie maintained that he never resigned as Tribal Chairman, and the court relied upon that on-going claim in her court as a basis for her ruling. For example, the U.S. District Court stated:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council. From as early as April 1999, Yakima contested the validity of the Council. *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205 (October 10, 1999 letter from Yakima to BIA raising questions about Burley's authority); AR 001690, 000231(Yakima notifying the BIA of "fraud and misconduct" with respect to the Tribe's leadership).

5 F.Supp.3d 86, 100-101. The District Court was never told that Dixie admitted he in fact resigned and that his claim that his resignation was forged was false.

The U.S. District Court's order was largely based on Dixie's time-barred claim that the 1998 Resolution was invalid at the outset.

F. THE BURLEY FACTION'S INABILITY TO APPEAL THE DISTRICT COURT ORDER OF REMAND

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

G. AS-IA WASHBURN'S DECEMBER 30, 2015 DECISION

On remand, the AS-IA Kevin Washburn concluded that the Tribe's membership is more than five people, and that the 1998 General Council does not consist of valid representatives of the Tribe. (ER 896; AR-CVMT-2017-

001402). He concluded that the Tribe was never properly "organized" back in 1998, leaving questions as to the overall membership of the Tribe, and therefore the Tribe must be re-organized under the IRA. (ER 895; AR-CVMT-2017-001401). He then directed that un-enrolled, descendants of the 1915 census (which he called "potential members") be allowed to participate in re-organizing the Tribe, even though they never resided on the 0.92 acre ranch. (ER 896; AR-CVMT-2017-001402). He refused to acknowledge the Tribe's governing document, Resolution #GC-98-01, which established the Tribe's General Council, despite the fact that this governing document has been in place for over 18 years. (ER 895; AR-CVMT-2017-001401).

AS-IA Washburn refused to recognize the BIA's consistent, historical policy of tying membership and authority to organize the Tribe to actual residency on the ranch, but instead articulated an unusual, ill-conceived notion that the descendants of the 1915 census who did not reside on the ranch were still

members with rights to participate in the organization of the Tribe, because the 0.92 acre ranch was never large enough for all of the descendants to ever live on. His focus on the "size" of the Rancheria was unreasonable. He stated:

> In many instances, as in the circumstance for the Sheep Ranch, a Rancheria was not large enough for all members of the band to take up residence. Nonetheless, BIA field officials remained cognizant of the Indians of a band associated with, but not residing upon, each Rancheria. When a parcel on a Rancheria came available, BIA would assign the land to such a non-resident Indian who was associated with the band, if possible. Thus, such associated band Indians who were non-residents were potential residents. And since membership in an unorganized Rancheria was tied to residence, potential residents equated to potential members. (Emphasis added).

(ER 894; CVMT-2017-001400)

His decision further confirmed the validity of the 1998 organization of the Tribe, but then claimed it was nonetheless invalid for not having allowed the descendants of the 1915 census to participate in its organization. He stated:

> At the time of its enactment, the 1998 Resolution undoubtedly seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of

reorganizing the Tribe. But the actual reorganization of the Tribe can be accomplished only via a process open to the whole tribal community. Federal courts have established, and my review of the record confirms, the people who approved the 1998 Resolution (Mr. Dixie, Ms. Burley, and possibly Ms. Burley's daughter Rashel Reznor) are not a majority of those eligible to take part in the reorganization of the Tribe. Accordingly, I cannot recognize the actions to establish a tribal governing structure taken pursuant to the 1998 Resolution. Ms. Burley and her family do not represent the CVMT [the Tribe].

(ER 895; AR-CVMT-2017-001401).

H. THE U.S. DISTRICT COURT May 31, 2017 ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTION AND UPHOLDING THE AS-IA 2015 DECISION

Plaintiffs filed suit in the U.S. District Court, Eastern District, challenging the AS-IA 2015 Decision. The Dixie Faction intervened as party defendants. After compiling the administrative record, the parties filed cross-motions for summary judgment on whether or not the AS-IA 2015 Decision violated the APA as "arbitrary and capricious."

On May 31, 2017, the District Court granted summary judgment in favor of the Defendants and denied Plaintiffs' motion. (ER 20). It concluded that the issue of whether the Tribe consists of five (5) persons

was previously decided by two federal decisions (Miwok I and Miwok II), and thus Plaintiffs were collaterally estopped from challenging the AS-IA 2015 Decision on that issue. (ER 13-15). It further concluded that since the Tribe was not organized with participation of the descendants of the 1915 census, the AS-IA's conclusion that the General Council established in 1998 was not established by a "majority" of the Tribe's members, and thus invalid, was reasonable and not "arbitrary and capricious." (ER 15).

The District Court further rejected the historical record showing that the BIA had tied membership and authority to organize the Tribe to actual residency on the ranch. (ER 16-18). It accepted as reasonable the AS-IA's unusual and novel approach that all descendants of the 1915 census were "potential" members who should have been allowed to participate in the 1998 organization of the Tribe, even though they never resided on the ranch. (ER 17-18). It further ignored Plaintiffs' point that the DOI's probate ruling in 1971

giving the ranch to her heir, including Dixie, gave Dixie, as the last remaining heir, the sole authority to enroll members and organize the Tribe when he did in 1998, all to the exclusion of the descendants of the 1915 census who never lived on the property. (ER 1031-36).

The District Court also concluded that Dixie's challenge to the 1998 Resolution establishing the General Council was not time-barred, and thus the AS-IA's 2015 Decision was not predicated on a time-barred claim. (ER 18). It reasoned that the six-year statute of limitation under 28 U.S.C §2401(a) does not apply to administrative proceedings. (ER 18).

The District Court concluded that Plaintiffs failed to show that the AS-IA 2015 Decision was arbitrary and capricious. (ER 20).

VI.

STATEMENT OF FACTS

A. THE 1915 CENSUS AND 1916 PURCHASE OF THE RANCHERIA

In 1915, an Indian Agent by the name of John Terrell, took a census ("the 1915 census") of a band of

Indians living in the Sheepranch area of Calaveras County, California. (ER 349; AR-CVMT-2011-001687). Terrell counted 12 Indians, which he characterized as Sheepranch Indians with a "long and strong attachment" with each other. (ER 27; CVMT-2011-000001).

Terrell therefore arranged for the purchase of a 0.92-acre lot for this small band of Indians, expecting only half (i.e., 6) of them to actually reside on the property. This was based on the following.

When Terrell arrived in the Sheepranch area he found only three (3) "old little Indian cabins," "locked and the Indians away," because "their white neighbors supposed" they had gone "somewhere on the nearby stream panning for gold." (ER 27; CVMT-2011-00001). After further investigation, the 12 Indians he eventually identified were actually comprised of three or four families (ER 28; CVMT-2011-000002), with Peter Hodges as the band's leader. (ER 27; CVMT-2011-CVMT-2011-000001). However, Peter Hodges had homesteaded an extremely rough, 160 acre piece of property 2 ½ miles

away with a "small one room typical little cabin" on it that he came home to on weekends, because he worked at a "sawmill" five miles away. (ER 27; CVMT-2011-000001)). It was therefore unlikely he would move his family to live on the 0.92-acre lot Terrell had purchased for the band. According to Terrell, Peter Hodges lived in this small cabin with his wife (Annize) and his four (4) children (Malida 19 years old, Lena 15 years old, Tom 13 years old, and Andy 10 years old). If Peter Hodges and his family stayed on his own 160 acre homesteaded property, then there would have been only six (6) people that would be available to live on the 0.92-acre plot Terrell had purchased.

Under the circumstances, the 0.92 acre plot of land was large enough to accommodate the other six (6) band of Indians, especially given their custom of living in "little Indian cabins" and spending their time usually "in the nearby streams panning for gold." (ER 27; CVMT-2011-000001).

According to Terrell, the Sheepranch Indians had a custom and practice of living in "one-room," little "cabins." (ER 27; CVMT-2011-000001). Terrell, therefore, considered purchasing two (2) lots for this band, but ultimately settled on only one 0.92-acre lot, which Terrell felt would "fairly meet the requirements of this little band." (ER 28; CVMT-2011-000002). This may have been because, as indicated, Peter Hodges already had a small cabin he and his family were living in on his 160-acre homesteaded property 2 ½ miles away, and it would have been unlikely that he would use the 0.92 acre plot Terrell had purchased for the band.

Once purchased, the 0.92-acre lot became an Indian reservation or Rancheria and the small band became known as the "Sheep Ranch Rancheria" or Tribe. The Tribe became a federally-recognized Tribe, because the land was held in trust for these Indians by the federal government. CVMT v. Jewell (D.C.D.C 5 F.Supp.3d 86, 90). Thus, the purchase of the 0.92-acre lot had the effect of creating a Tribe for this band of Indians.

No formal assignments or allotments were made on the 0.92 Rancheria, and the BIA considered it to be "unorganized" until 1998 when Yakima Dixie organized it outside the IRA. (ER 73; CVMT-2011-000044).

Terrell's 1915 census identified Jeff Davis as one of the 12-member band of Sheepranch Indians, who was 53 years old at the time, and whose name was given to him by the early miners in the area "during the progress of the civil war," because, as a boy, he hung out at the mining camps during that period of time. (ER 28; CVMT-2011-000002). Jeff Davis obviously moved onto the 0.92-acre lot with his wife, Betsy, because he is identified as the sole resident of the 0.92 lot in 1935 who was the "single eligible voter...who voted in favor of the IRA" for the Tribe. (ER 28, 349; CVMT-2011-000002, 001687).

Although the Tribe was never formally organized until 1998, the property has been continuously occupied by an original band member or a descendant of the 1915 census.

Since recognizing the Tribe in 1916, and up until the AS-IA 2015 Decision, the BIA has treated only those original members or descendants of the 1915 census who resided on the 0.92-acre lot as members and with the sole authority to enroll members and organize the Tribe, at the exclusion of the other original members or descendants of the 1915 census who did not reside on the property.

B. JEFF DAVIS: 1935 VOTE FOR IRA GOVERNMENT

In 1934, Congress passed the Indian reorganization Act ("IRA"), which, among other things, required the U.S. Secretary of Interior ("the Secretary") to hold elections through which the adult Indians of a reservation decided whether to accept or reject the applicability of certain provisions of the IRA to their reservation, including provisions authorizing tribes to organize and adopt a constitution under the IRA. 25 U.S.C. Sections 476 and 478. (ER 349; AR-CVMT-2011-001687). In 1935, the BIA considered Jeff Davis as the only eligible and authorized person to vote in favor of

the IRA, because he was the only one of the original band members counted on Terrell's 1915 census who was residing on the 0.92-acre lot. (ER 42-44, 349; CVMT-2011-000017-21; 001687). Neither Peter Hodge, the original leader of the band, nor his children (who by 1935 had obviously reached adulthood), for example, were allowed to vote for organizing the Tribe under the IRA. The BIA never reached out to any of the other original band members or their descendants to solicit their vote, nor considered them to be eligible to vote for the Tribe being organized under the IRA. Instead, the BIA only placed Jeff Davis on the voter list. (ER 44; CVMT-2011-000018, 21). He alone voted in favor of the Tribe being organized under the IRA. (Id.). However, the process was never followed through, and as a result the Tribe was never organized under the IRA by Davis or any subsequent resident of the property. (ER 349; CVMT-2011-001687).

C. MABEL DIXIE: 1966 VOTE FOR TERMINATION

In 1958, in keeping with the then-popular policy of assimilating Native Americans into American society,

Congress enacted the California Rancheria Act, which authorized the Secretary to terminate the federal trust relationship with several California tribes, including several Rancherias, and to transfer tribal lands from federal trust ownership to individual fee ownership. (Act of Aug. 18, 1958, Pub.L. No. 85-671, 72 Stat. 619). To this end, the BIA prepared a plan in 1966 to distribute the assets of the Sheep Ranch Rancheria as a prelude to termination. (ER 349; AR-CVMT-2011-001687). At that time, Mabel Hodge Dixie was the only adult Indian living on the Rancheria who was entitled to receive the assets of the Rancheria. (Id.). She has resided on the property for 30 years. (ER 67; CVMT-2011-000039). In other words, as an adult descendant of the 1915 census who resided on the 0.92 acre property, she alone was authorized to vote for termination of the Tribe and receive a deed to the property. Because none of the other descendants of the 1915 census resided on the property, they were not permitted to participate in any vote for termination of

the Tribe. Mabel Dixie, therefore, was placed on the government's Distribution Plan List and she alone voted to accept the distribution plan and she alone was issued a deed to the land in 1966. (ER 349-350; AR-CVMT-2011-001687-88).

In fact, the U.S. District Court in Miwok I noted from the administrative record that the BIA specifically told other descendants of the 1915 census who protested that they could not vote for termination, because, not having lived on the 0.92-acre property, they were not considered members and had no right to vote or receive proceeds of the land upon termination. The Court stated:

> In 1966, finding no evidence that Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata or her two granddaughters had ever lived on the Rancheria, the government denied their claims to membership in the Tribe...

CVMT v. U.S. (D.C.D.C. 2006) 424 F.Supp.2d 197, 198. The administrative record further explained why Mrs. Lena Shelton's protest was denied by the BIA. In a

letter dated February 3, 1966, the BIA wrote to Mrs. Shelton, Mabel Dixie's neighbor, and stated:

> "A written request for the distribution of the assets of the Sheep Ranch Rancheria, and unorganized Rancheria, was received from Mrs. Mabel Dixie who is presently residing on the Rancheria. Mrs. Dixie meets the requirements in at least one of the above categories [resident of the Rancheria]. Consequently, she has been determined eligible to vote on the issue of whether a distribution plan should be developed...
>
> "After having given careful consideration to the reasons for your protests, it has been determined that neither your name nor the names of members of your family can be included in the list of eligible voters because none of you meets the requirements in any of the above five categories quoted above [having an allotment or assignment or residing on the Rancheria].
>
> "**Although you presently live next to the Rancheria, we find no record that you have ever resided on it**."

(ER 74-75; CVMT-2011-000045-46).

Notably, the administrative record shows that Lena Shelton was the daughter of the leader of the band in 1915, Peter Hodge, when Terrell took his census. (ER 28; CVMT-2011-000002; ER 73; CVMT-2011-000044)). Despite this, the BIA refused to allow her to vote for

termination because she never lived on the 0.92 acre Rancheria. (ER 75; CVMT-2011-000046).

Although the Sheep Ranch Rancheria land had been distributed to Mabel Dixie pursuant to a distribution plan, the Secretary never published a final notice of termination and had accepted the land back from Mabel Dixie through a quitclaim deed. As a result, the Tribe was administratively "unterminated" before it could be formally terminated. In other words, the Tribe was never terminated.(ER 383, 893, 351; AR-CVMT-2011-002051, 1399, 1689).

D. MABEL DIXIE'S DEATH IN 1971 AND SUBSEQUENT PROBATE ORDER

Mabel Dixie died in 1971. Because the BIA deeded the property to Mabel in preparation for termination, and termination never occurred, the property was probated under the supervision of the Department of Interior ("DOI") and by a DOI Administrative Law judge. (ER 350; CVMT-2011-001688). The 1971 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. (ER 123-124; CVMT-2011-000172-173).

By the time Yakima Dixie enrolled the Burleys and organized the Tribe under BIA supervision in 1998, Yakima's brother, Melvin Dixie, and Yakima were the sole surviving heirs under the probate order who had any interest in the 0.92 acre Rancheria. By this time, Melvin had moved off of the property, and Yakima resided on the property by himself. (CVMT-2011-000178). No other descendant of the 1915 census resided with him. As a result, and in light of the BIA's longstanding and consistent policy of tying membership and authority to enroll members and organize the Tribe to residency, the BIA looked only to Yakima as the sole authority to enroll members and organize the Tribe in 1998, and excluded any participation of the other descendants of the 1915 census, because they never resided on the property. (ER 350; CVMT-2011-001688-89).

E. THE HARDWICK LITIGATION AND TERMINATED TRIBES

In 1979, individuals from a number of terminated Rancherias filed an action in the U.S. District Court, Northern District, styled Hardwick v. U.S. (Civ. No. C-79-1710). The Hardwick lawsuit ended in a settlement between the tribes and the federal government, culminating in a series of stipulated judgments. In the settlement, the Secretary agreed to restore "any of the benefits or services provided or performed by the United States for Indians because of their status as Indians" and to "recognize the Indian Tribes, Bands, Communities or groups of the seventeen Rancherias...as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act." (Stipulation and Order, Hardwick v. United States, No. C-79-1710 (Dec. 22, 1983)).

The Hardwick settlement limited membership of these restored Tribes to residence on the respective Rancherias, and, by virtue of those Indians who were

listed on the distribution plan preparatory to termination, they acquired vested rights that allowed them the right to reorganize the respective Rancheria after termination. This was consistent with BIA policy in dealing with California Rancherias.

That rule was manifested in the BIA's continued policy of giving Mabel Dixie sole vested rights under the Distribution Plan in preparation of termination, treating her as having the sole authority to vote for termination because she alone resided on the Rancheria, then deeding her the property, and then vesting her interest in the Rancheria through the DOI probate proceeding, which was passed on to her heirs, including Yakima Dixie.

F. YAKIMA DIXIE: ENROLLS THE BURLEYS AND ORGANIZES THE TRIBE IN 1998

In 1994, Yakima Dixie ("Dixie"), the son of Mabel Dixie, wrote to the BIA asking for BIA assistance for home repairs on the Rancheria, and described himself as "the only descendent and recognized...member" of the Tribe. (ER 350; AR-CVMT-2011-001688). This was

accurate and consistent with BIA policy as applied to the Sheep Ranch Rancheria over the years. The BIA never disputed Dixie's assertion. As stated, Dixie and his brother, Melvin Dixie, were the only surviving children of Mabel Dixie, but Melvin Dixie's whereabouts were unknown, and he was not living on the property when Yakima wrote to the BIA for assistance. (ER 129; AR-CVMT-2011-000177). Melvin would later die in 2009. (ER 894; AR-CVMT-2017-001400, fn. 20).

In the mid-1990s, Burley contacted the BIA for information related to her Indian heritage. (ER 350; AR-CVMT-2011-001688). The BIA provided her with information that showed she was related to Jeff Davis who had initially voted in favor of the Tribe being organized under the IRA. (Id.). Burley was also related to Dixie. (Id.). Both were descendants of the 1915 census. Thereafter, Burley contacted Dixie and told him about her interest in her Indian heritage that ultimately led to him and his dwindling Tribe. (Id.).

On August 5, 1998, Dixie, with the authority as the only descendant of the 1915 census residing on the Sheep Ranch Rancheria, signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolled Burley's two daughters and her granddaughter. (ER 350; AR-CVMT-2011-001688). As a result of Dixie's actions, the Tribe in 1998 consisted of six enrolled members: (1) Yakima Dixie; (2) Melvin Dixie; (3) Silvia Burley; (4) Anjelica Paulk; (5) Rashel Reznor; and (6) Tristian Wallace. (Id.).

In September of 1998, Yakima Dixie and Burley met at the Rancheria with BIA staff to discuss organizing the Tribe. (AR-CVMT-2011-001688). One of the issues discussed was developing criteria for membership in the Tribe. (Id.). At the time, the whereabouts of Melvin Dixie, Yakima's brother, were still unknown. As a result, the BIA staff told Yakima Dixie that he had both the authority and the broad discretion to decide the criteria for membership, presumably because he was a descendant of the 1915 census who resided on the 0.92

acre Rancheria, and because of the 1971 probate order that gave him a vested interest in the property.

According to the BIA, Yakima Dixie, his brother Melvin Dixie, Burley and Burley's adult daughter were the "golden members" of the Tribe. (Id.). And because Melvin Dixie's whereabouts were unknown, the BIA concluded that the three adult members consisting of Yakima Dixie, Burley and her adult daughter were the General Council of the Tribe that had the authority to take actions on behalf of the Tribe. (AR-CVMT-2011-001688-89).

Because of the unique circumstance that the Sheep Ranch Rancheria found itself in never being terminated, the BIA concluded that "for purposes of determining the initial membership of the Tribe," Yakima Dixie and Melvin Dixie must be included, because they were the remaining heirs of Mabel Dixie, presumably by virtue of the 1971 probate order. (Id.). In addition to these two initial members, the BIA recognized that Yakima Dixie had adopted Burley, her two daughters, and her

granddaughter, into the Tribe. As a result, the BIA concluded that Burley and her adult daughter, together with Yakima and Melvin Dixie had "the right to participate in the initial organization of the Tribe." (Id.).

On September 24, 1998, the BIA told Yakima and Burley that it "recommend[ed] the Tribe operate as a General Council," because of its "small size," so that they could elect or appoint a chairperson and conduct business. (Id.). To this end, the BIA offered the Tribe $50,000.00 in grant money for purposes of improving its tribal government, and provided Dixie and Burley with a draft resolution "form" for them to use in requesting the grant. (Id.). The draft resolution contained language establishing the General Council.

Using the draft resolution form prepared by the BIA, Dixie and Burley prepared and signed a resolution on November 5, 1998, establishing a General Council consisting of all adult members of the Tribe, to serve as the governing body of the Tribe. (ER 352, 123-127;

AR-CVMT-2011-001690, 000172-176). The resolution became known as Resolution #CG-98-01, which the BIA accepted as the governing document of the Tribe. (ER 131; AR-CVMT-2011-000179). The document was signed by Yakima Dixie and Silvia Burley, and later by Rashel Reznor, and specifically noted that the whereabouts of Melvin Dixie were at that time unknown. Resolution #GC-98-01 vested the General Council with the governmental authority of the Tribe to conduct the full range of government-to-government relations with the United States. (ER 130; AR-CVMT-2011-000178).

Pursuant to Resolution #GC-98-01, Yakima Dixie was appointed and elected as the Tribal Chairman. (ER 384; AR-CVMT-2011-002052).

G. TRIBAL LEADERSHIP DISPUTE

On April 20, 1999, Yakima Dixie signed a notice of resignation as Tribal Chairman. (ER 2127; CVMT-2011-001573)(ER 1694-1709; RJN "32", Letter to Washburn from Corrales, 6/6/2014, Ex. "46" to Decl. of MCJ). On the same date, Yakima Dixie also signed a document

confirming his resignation as Tribal Chairman and agreeing to the appointment of Silvia Burley to replace him as the new Tribal Chairperson. (Id.).

Sometime after he resigned, Yakima Dixie was approached by a non-Indian, Chadd Everone ("Everone"), who sought Yakima's cooperation in taking control of the Tribe in order to build a gambling casino using the name and status of the Tribe. (ER 776-777; AR-CVMT-2017-000955-56). The problem was that Yakima Dixie had already expressly resigned. Plaintiffs have contended that to regain control of the Tribe, Everone conspired with Yakima to have Yakima falsely say that he never resigned and that his written resignation was a forgery. Yakima Dixie then thereafter falsely told the BIA and others that he never resigned and that his resignation was forged. (Jewell, supra, 5 F.Supp.3d at 91). This then created a Tribal leadership dispute between Yakima Dixie and Burley that has since 1999 caused havoc with the Tribe and crippled the Tribe's ability to operate effectively over the years. (ER 383,

2127-29; AR-CVMT-2011-002051, 001573-75). Yakima maintained that claim from 1999 up through February 7, 2012, when he was deposed and testified in a deposition that he in fact resigned in April of 1999, that his resignation was not forged as he had previously claimed, and that the signatures on the Tribal resignation documents were in fact his. (ER 1711-1744) (RJN "33", Letter to Washburn from Corrales, 7/9/2014).

Despite Dixie's claim that he never resigned, the BIA chose to acknowledge Burley as the Chairperson of the Tribe, and, as a result, accepted and honored numerous Tribal resolutions passed by the General Council under Burley's leadership from 1999 through July 2005. (ER 353; AR-CVMT-2011-001691).

VII.

SUMMARY OF ARGUMENT

The AS-IA 2015 decision in "invalidating" the Tribe's General Council established in 1998, and in concluding the Tribe's membership necessarily consists of more than five (5) members is arbitrary and capricious.

Yakima Dixie had the sole authority to enroll the Burleys and organize the Tribe in 1998, because he alone resided on the 0.92 acre Rancheria. BIA policy tied membership and authority to enroll and organize the Tribe to residency, allotment or assignment. Since no formal allotments or assignments were ever made on the Rancheria, residency became the key determinative factor in who were deemed Tribal members and who had the authority to enroll additional members and organize the Rancheria. The 1971 probate order regarding Mabel Dixie vested that right in Dixie as her designated heir of the Rancheria deeded to her when she voted for termination in 1966. The other descendants of the 1915 census who never resided on the Rancheria did not have the right to participate in the organization of the Tribe when Dixie organized it in 1998, and they presently do not have that right.

Because the descendants of the 1915 census had no right to participate in the organization of the Tribe, and in fact were not considered members because they

never resided on the Rancheria, Dixie's actions in organizing the Tribe in 1998 was done by a majority of the adult members of the Tribe, i.e., a majority of the four adult members at the time.

Plaintiffs are not collaterally estopped from disputing the Tribe consists of more than five members. In fact, the Defendants are collaterally estopped from arguing that prior federal court decisions purportedly held it does.

The AS-IA 2015 Decision is erroneously based on Dixie's time-barred challenge to the validity of the Tribe's 1998 organization, i.e., the General Council established under the Tribe's 1998 Resolution. Moreover, the issue of the validity of the 1998 General Council was never referred to the AS-IA for resolution, and therefore the AS-IA has no jurisdiction or authority to pass on Dixie's time-barred challenge of its validity.

The AS-IA 2015 Decision's conclusion that the 1998 General Council was valid enough to manage the process

of re-organizing the Tribe, yet ultimately invalid, is contradictory and unreasonable.

Dixie was not required to originally organize the Tribe under the IRA or under any particular format, and the AS-IA 2015 Decision requiring the Tribe be "re-organized" under the IRA is contrary to law and arbitrary and capricious.

In addition, the AS-IA 2015 Decision requiring the descendants of the 1915 census participate in the "re-organization" of the Tribe is contrary to established Indian law, a violation of tribal sovereignty, and contrary to BIA policy in dealing with this particular Rancheria and other California Rancherias since the turn of the century.

VIII.

ARGUMENT

A. PLAINTIFFS ARE NOT COLLATERALLY ESTOPPED FROM DISPUTING THE TRIBE CONSISTS OF MORE THAN FIVE MEMBERS

The Defendants argued, and both the AS-IA 2015 Decision and the District Court here concluded, that prior federal court decisions purportedly held that the

Tribe consists of more than five people. As a result, the Defendants contended, and the District Court agreed, that Plaintiff were barred from "re-litigating" this issue again in this proceeding. This contention is without merit and underscores the arbitrary and capricious reasoning of the AS-IA 2015 Decision.

> As the District Court in Miwok III aptly concluded:
>
> 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 (9th Cir. 1998) 136 F.3d 1219, 1224-1225; Allen v. McCurry, supra.

B. DEFENDANTS THEMSELVES ARE COLLATERALLY ESTOPPED FROM ARGUING THAT PRIOR FEDERAL DECISIONS NECESSARILY DECIDED THE TRIBE CONSISTS OF MORE THAN FIVE MEMBERS

As stated, the Court in Miwok III specifically rejected the Dixie Faction's and the Federal Defendants' argument that that prior federal court cases have held the Tribe consists of more than five members. Since the Federal Defendants chose not to appeal that ruling, and because of that neither the Dixie Faction nor the Burley Faction could appeal it,

the ruling is final as to the Defendants here, who were parties to Miwok III.

Accordingly, the Defendants here are bound by that ruling and cannot re-litigate it here. The District Court erred in ignoring that part of the Miwok III decision as binding on the Defendants.

C. THE ORGANIZATION OF THE TRIBE IN 1998 WAS DONE BY A MAJORITY OF THE TRIBE'S MEMBERSHIP

1. BIA policy toward the Sheepranch Rancheria.

The AS-IA 2015 Decision concluded the General Council established in 1998 was invalid because its organization did not include participation of the descendants of the 1915 census, and therefore was not done by a "majority" of the Tribe's membership. This conclusion is erroneous and arbitrary and capricious.

The administrative record clearly shows that the BIA had historically equated residence on the 0.92 acre Rancheria purchased by Terrell in 1916 with membership and authority to enroll members and organize the Tribe, to the exclusion of the descendants of the 1915 census who never resided on the property.

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 only one the BIA recognized as having the sole authority to organize the Tribe under the IRA, which for some unknown reason never took place. (ER 42-44, 349; CVMT-2011-000017-21, 001687). Notably, none of the descendants of the 12 Indians identified in the 1915 census who lived in the Sheepranch area, and who never lived on the Rancheria, 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. (ER 349-350; CVMT-2011-001687-1688). None of the descendants of the 1915 census who lived in the Sheepranch area, but never resided on the property, were allowed to vote for termination. Nor were they on the Distribution Plan list. (ER 73-75; CVMT-2011-000044-46). When Mabel

died, the interest to the property went to her heirs, including Yakima Dixie and his brother, Melvin. (ER 124; CVMT-2011-000173). Significantly, it was the "Department of Interior" who "probated the property." (ER 350; CVMT-2011-001688). However, because Melvin left the property and Yakima was the only resident on the property in 1998, the BIA recognized Yakima Dixie alone as having the sole authority to enroll Burley and her family as adopted members of the Tribe and organize the Tribe. At that time, Yakima and Melvin were the only surviving heirs of Mabel Dixie. (ER 124; 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. (ER 123-124; 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 were deemed members of the Tribe

and had the authority to enroll members 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 Indians identified in the 1915 census. It solidified Mabel Dixie and her family as the sole members of the Sheepranch 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 Sheepranch band who, because he alone resided on the property, had the authority to enroll Indians as members and organize the Tribe.

2. BIA policy toward other Rancherias.

In dealing with the Rancherias in general since the turn of the century, the BIA consistently tied residency with membership and authority to enroll and organize the Tribe.

For example, in Alan-Wilson v. Sacramento Area Director (1997) 30 IBIA 241, the IBIA noted that the BIA had a policy of limiting membership on the California Rancherias to those Indians who actually resided on the Rancherias. The BIA revoked assignments given to various individuals when those individuals failed to use their assigned portion of the Rancheria, and equated that lack of residence with non-membership in the Tribe. The IBIA then quoted a 1959 letter from the BIA to one of these individuals, which stated:

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

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

> "The Cloverdale Rancheria voted on the question of whether 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 Indians residing on such reservation'** within the meaning of 25 U.S.C. §476..."

30 IBIA at 243. This is consistent with what occurred with Jeff Davis in this case with respect to the Sheepranch Rancheria, who was the "only single eligible voter" "who voted in favor of the IRA" in 1935. CVMT v. Pacific Regional Director (2010) 51 IBIA 103, 106 [also found at CVMT-2011-001687]; (ER 382; CVMT-2011-002051). Significantly, the IBIA in CVMT, supra, then noted:

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

51 IBIA at 106. Thus, even the IBIA correctly assumed, based on the BIA's consistent policy, that only actual residents of the Sheepranch Rancheria would have the right to organize the Tribe. And those actual residents were considered to be the members of the Tribe, not the descendants of the 12 Indians identified in the 1915 census who never resided on the Sheepranch.

The BIA applied this policy to Rancherias in general, whether or not they were terminated, even before the Hardwick settlement in 1983. For example, in Smith v. U.S. (N.D.Cal.1978) 515 F.Supp. 56, the federal government conceded that the Hopland Rancheria was unlawfully terminated and should not be treated as terminated. 515 F.Supp. at 60. Accordingly, the Court held that the Plaintiff distributees or heirs of distributees were entitled to recover damages from the federal government as a result of the federal government's failure to provide statutorily required water and sewer systems prior to termination. Accordingly, even though the Hopland Rancheria was to be treated as "unterminated," the Court still looked to the Distribution plan to afford relief to the individual "distributees," given the fact that the Distribution Plan gave them a vested interest in the Rancheria.

Also, in Duncan v. Andrus (N.D.Cal.1977) 517 F.Supp. 1, Plaintiffs sued the federal government as

Indian distributees who were on the distribution plan for termination of the Robinson Rancheria. They claimed the Tribe was unlawfully and prematurely terminated before sanitation and water facilities were installed, thereby depriving them of federal Indian benefits and subjecting them to state and local taxes. 517 F.Supp. at 3-4. The Court held that the Tribe must be "unterminated," "and its distributees and their families must be given the opportunity to regain federal benefits lost through termination." 517 F.Supp. at 6. The Court then held:

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

517 F.Supp. at 6. Both Smith, supra, and Duncan, supra, 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 the fact that "termination" either did not occur or was rescinded.

For the same reasons, Mabel Dixie acquired a vested interest in the Sheepranch Rancheria in 1966, to the exclusion of the descendants of the 12 Indians identified in the 1915 census, when she was placed on the Distribution Plan and voted for termination as the sole resident on the property. While the Sheepranch was never lawfully terminated, her vested interest as the sole distributee never changed. She did not lose that interest when termination did not occur. The fact that the Sheepranch was not part of the Hardwick stipulated judgment did not change her sole, vested right as the only member of the Tribe when she was made a distributee under the Distribution Plan in 1966, as the foregoing cases demonstrate.

Accordingly, the organization of the Tribe in 1998 was done by a majority of the members, because membership consisted of only five (5) in number, and

the descendants of the 1915 census who never resided on the property were not members with any vested interest in the Rancheria, and had no right to participate in the Tribe's organization. As a result, the AS-IA's 2015 Decision in concluding otherwise is arbitrary and capricious.

D. THE AS-IA 2015 DECISION IS ERRONEOUS BECAUSE IT IS BASED ON THE DIXIE FACTION'S TIME-BARRED CHALLENGE TO THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL

The fundamental flaw in the AS-IA's 2015 Decision is that it is based on Dixie's untimely challenge of the validity of the 1998 Resolution establishing the Tribe's General Council. The Defendants asserted, and the District Court concluded, that the six-year statute of 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 to those officials." (Page 9, Dixie Faction Opposition, lines 8-9; page 8, Federal Defendants' Opposition). This contention is without merit and is not supported by any authority.

Actions for review of final agency actions brought under the Administrative Procedure Act ("APA") are in fact subject to a **six-year** statute of limitations. Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713; see Muwekma Ohlone Tribe v. Salazar (D.D.C.2011) 813 F.Supp.2d 170, 191 (holding that the Tribe's claims under the APA against the Department of Interior for terminating its tribal status was barred by the six-year statute of limitations under 28 U.S.C. §2401(a)); see also Hardwick v. U.S. (N.D.Cal.2012) 2012 WL 6524600 (Plaintiff's challenge of the legitimacy and **validity** of the **Tribe's governing body** was held barred by the six-year statute of limitations).

The issue of the validity of the 1998 Resolution was only first raised and tendered by the Dixie Faction on January 24, 2011, when they filed a lawsuit in federal court challenging the AS-IA's December 2010 Decision which was vacated sua sponte and reaffirmed by the AS-IA's August 2011 Decision. When that occurred,

the Dixie Faction amended their complaint on October 17, 2011, re-alleging the same claims that the 1998 Resolution establishing the General Council was invalid, because potential members in the surrounding community (i.e., the descendants of the 12 Indians identified in the 1915 census who lived in the Sheepranch area) did not participate in its organization. (ER 486; AR-CVMT-2017-000023). Over the Burley Faction's objection (ER 1558, 1562-64) (Plaintiff's RJN No. "8," ER 694; 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 constituted government" "without addressing the validity of the General Council." CVMT v. Jewell (D.D.C.2013) 5 F.Supp.3d 86, 96, 99. Upon remand, the AS-IA then, "reconsidered" its Decision "consistent with the terms of [the Court's Order]" (CVMT v. Jewell, supra at 101), and concluded that the

1998 Resolution was invalid, because it did not consist of "valid" representatives of the Tribe. (ER 895; CVMT-2017-001401, AS-IA 2015 Decision, page 5).

While it is true that the Bureau of Indian Affairs ("BIA") and the Department of Interior ("DOI") went back and forth over the years in recognizing Burley as Chairperson of the Tribe (at one time calling her a "person of authority," CVMT-2011-001691), they never ruled or determined that the General Council was invalid, because it purportedly did not involve potential members in the surrounding community (i.e., the descendants of the 12 or 13 Indians identified in the 1915 census who lived in 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. (ER 298-299; CVMT-2011-000801-802; ER 346-347; CVMT-2011-001684-1685). This is a far cry from refusing to recognize a tribal

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

Even the AS-IA's 2015 Decision observed that "[a]t the time of its enactment, the 1998 Resolution undoubtedly seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of reorganizing the Tribe..." (ER 895; CVMT-2017-001401, page 5 of AS-IA 2015 Decision). Despite this observation, the AS-IA 2015 Decision erroneously concluded that the 1998 Resolution establishing the General Council was invalid, because it did not involve potential members in the surrounding community (i.e., the descendants of the Indians identified in the 1915 census who never resided on the Rancheria) who the AS-IA determined were purportedly "eligible" to participate in the organization of the Tribe. In short, the U.S. District Court and the AS-IA on remand both ruled on the Dixie Faction's challenge to the validity of the 1998 Resolution, which, as shown, was barred by the six-year statute of limitations. There

was no legal basis for the U.S. District Court or the AS-IA to address this claim, let alone accept it as grounds to vacate the AS-IA's 2011 Decision.

E. THE ISSUE OF THE VALIDITY OF THE 1998 RESOLUTION WAS NEVER ACTUALLY REFERRED TO THE AS-IA FOR RESOLUTION IN THE FIRST INSTANCE

The IBIA never actually referred to the AS-IA the issue of the validity of the 1998 Resolution, largely because the Tribe (under Burley's leadership) never raised that as an issue to be decided on appeal. It is also inconceivable that the Tribe would have done so, since to do so would be contrary to the position it was taking with respect to its right not to be compelled to "re-organize" under the IRA and its right not to be compelled to admit additional persons as Tribal members against its will. Nevertheless, the Dixie Faction argues that the reason the IBIA did not specifically refer the validity of the General Council to the AS-IA was because the BIA had already decided it did not "recognize" any Tribal government in 2004 and 2005. (Dixie Faction PAs, page 13). The Federal Defendants

repeat this argument. (Federal Defendants' Opposition, p. 9). This contention is without merit and misleading.

The two BIA decisions the IBIA decision references, the 2004 and the 2005 decisions, stated only that "the Department does not recognize the Tribe as being organized or having any tribal government that represents the Tribe..." (Page 13 of Dixie Faction's PAs). However, neither of those BIA decisions 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 that refusal, the BIA had erroneously concluded, despite 25 U.S.C. §476(h) to the contrary, that the Tribe was required to do so in order for the Tribe to be eligible to receive federal contract funding. (ER 386; CVMT-2011-002054: "I reject as contrary to §476(h) the

notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant federal benefits' withheld from it"). The BIA was clearly refusing to recognize the Tribe merely because it was refusing to re-organize under the IRA and because of the ongoing leadership dispute, not because the General Council was purportedly invalid. See CVMT v. Pacific Regional Director (2010) 51 IBIA 103, 103-104 (noting that the BIA's actions in attempting to force the Tribe to re-organize under the IRA were because the "BIA [had] concluded that these actions were necessary because until the tribal organization and membership issues were resolved, a leadership dispute between Burley and Yakima...could not be resolved, and resolution of that dispute was necessary for a functioning government-to-government relationship with the Tribe").

Accordingly, the AS-IA acted without authority and arbitrarily and capriciously in entertaining the Dixie

Faction's time-barred claim that the Tribe's General Council was invalid.

F. THE AS-IA 2015 DECISION ERRONEOUSLY FOCUSED ON THE "SIZE" OF THE RANCHERIA WHEN FIRST PURCHASED IN 1916 TO ERRONEOUSLY CONCLUDE THAT NON-RESIDENTS COULD BE DEEMED MEMBERS

The AS-IA's 2015 Decision focused on the "size" of the lot purchased for the 12 Indians identified in the 1915 census to conclude that it "was not large enough for all members of the band to take up residence," and therefore those Indians who were associated with the band but chose not to reside on the Sheepranch were still considered members because they were "potential residents." (ER 894; CVMT-2017-001400). This conclusion is without merit and flies in the face of established federal Indian law and BIA policy and practice toward this early band as shown in the historical timeline. It misconceives the principle that membership in an unorganized Tribe is tied to residency.

Once the 0.92 acre land became available in 1916, these 12 band members had the right to take up residence on the property and become members of the

Sheepranch. Once they did, they became members of a "tribe" and no longer a "band" of Indians. As a tribe, they then had they right to organize, but initial membership in the Sheepranch "tribe" was necessarily tied to first residing on the Rancheria. Established Indian case law supports this conclusion, which is consistent with BIA policy toward the Rancherias since the turn of the century.

In Montoya v. United States (1901) 180 U.S. 261, the Supreme Court adopted a common-law test to determine whether a group constituted a tribe for purposes of the Indian Depredation Act of 1891. The federal statute allowed U.S. citizens to bring suit in the Court of Claims for property "taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States." Under the statute it became necessary, in each case, to determine whether the offender belonged to a band, tribe, or nation in amity with the United States. The Court then established the following definition of the terms

"tribe" and "band" which was in effect at the time the 0.92-acre plot was purchased for the 12 Indians living in the Sheepranch area in 1916:

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

180 U.S. at 266. Federal courts have applied this common-law definition of a "tribe" in recent years. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton (1st Cir. 1975) 528 F.2d 370, 376; Mashpee Tribe v. New Seabury Corp (1st Cir. 1979) 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).

The 12 Indians identified in the 1915 census who lived in the Sheepranch area, together with most of the Indian population in California at the beginning of the twentieth century, were described as "scattered," "landless," and "homeless." Alan-Wilson, supra at 242. Thus, the government's purchase of the 0.92-acre plot for this 12 band of "homeless" Indians on Sheepranch created for them a residence or reservation. Under Montoya, supra, therefore, the band became a "tribe" to the extent any of them moved onto and took up residence on the 0.92 acre plot. As noted by the AS-IA's 2015 Decision, even the IRA, when passed in 1935, recognized a "tribe" as "Indians residing on one reservation." 25 U.S.C. §479; (ER 894; CVMT-2017-001400). Any of the 12 Indians who chose not to reside on the 0.92 plot were not members of the Tribe. However, as explained, they could have become members while still residing off the property had those Indians who took up residence on the 0.92 acre plot enrolled them, after organizing the Tribe.

G. THE AS-IA 2015 DECISION'S CONCLUSION THAT THE 1998 GENERAL COUNCIL WAS VALID ENOUGH TO MANAGE THE PROCESS OF ORGANIZING THE TRIBE CONTRADICTS ITS ULTIMATE CONCLUSION THAT IT WAS INVALID AT THE OUTSET

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." (ER 895; CVMT-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. (ER 895; CVMT-2017-001401). This reasoning is contradictory and simply wrong under the law.

First of all, the 1998 Resolution cannot, under the AS-IA's 2015 Decision's reasoning, be valid to "manage the process of re-organizing the Tribe" into an IRA government, but yet invalid later on because when adopted it did not involve the participation of the

descendants of the 1915 census. If it was valid enough to "manage" that process when first adopted, then logically it must still be valid later on. The contradiction is obvious.

The administrative record shows that the BIA was expecting the Tribe's newly formed General Council established under the 1998 Resolution to be a means of later "re-organizing" the Tribe under the IRA. (ER 124; CVMT-2011-000173 [Letter of 9/24/1998 from BIA to Dixie: "Tribes that are in the process of initially organizing usually consider how they will govern themselves until such time as the Tribe adopts a Constitution [under the IRA]"]). The BIA may have expected this to occur, because Jeff Davis had voted for an IRA governing body in 1935. (ER 349; CVMT-2011-001687). However, the IRA was amended in 2004, which effectively allowed tribes "to adopt governing documents under procedures other than those specified...[in the IRA.]" 25 U.S.C. §476(h); (CVMT-2011-002053). In other words, the Tribe could 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 FEDRAL INDIAN LAW, §4.05[3], PAGE 271 (Nell Jessup Newton ed., 2012).

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. (ER 388; CVMT-2011-002056).

H. 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 never resided on the Rancheria 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 Sheepranch 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 1998 organization of the Tribe, and presently have no rights with respect to the Tribe, for the reasons explained above.

I. IN 1998, INDIAN LAW DID NOT REQUIRE DIXIE TO ORGANIZE THE TRIBE IN ANY PARTICULAR FORMAT OR IN ANY PARTICULAR WAY

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

> "Today, at least 160 Indian nations have constitutions adopted pursuant to the IRA, more than 75 have established 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 Dixie chose to organize the Tribe in a written document, Indian law did not require it to be in any particular form.

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)).

Accordingly, the AS-IA 2015 Decision requiring the Tribe to "re-organize" and do so under the IRA is unlawful and arbitrary and capricious.

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 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 Sheepranch at that time, and was therefore the only recognized member of the Tribe.

If the Court were to accept the AS-IA's conclusion that Yakima Dixie did not have the sole authority to enroll the Burleys and organize the Tribe in 1998, then the probate order giving Mabel Dixie's heirs the exclusive interest in the Rancheria would be void, because none of the descendants of the 1915 census participated in that proceeding. This outcome would make no sense, however.

J. DIXIE'S FRAUD RELATIVE TO THE ONGOING LEADERSHIP DISPUTE WAS RELEVANT AND SHOULD HAVE BEEN CONSIDERED BY THE AS-IA AND THE DISTRICT COURT

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. This contention is without merit. The AS-IA should have considered this issue.

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

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

Dixie's fraud in fabricating the leadership dispute is also relevant to show that Dixie considered the 1998 Resolution valid for several years after he resigned. By challenging his resignation as purportedly forged, Dixie was confirming the validity of the 1998

Resolution establishing the General Council, and rejecting the notion that descendants of the 1915 census who never resided on the Rancheria were required to participate in 1998 organization of the Tribe. Because Dixie is a party to this lawsuit, such evidence is admissible against him as an admission under the Federal Rules of Evidence. FRE 801(d)(2)(A).

IX.

CONCLUSION

For the foregoing reasons, the District Court judgment in favor of the Defendants should be reversed. The AS-IA should be directed to reconsider his 2015 Decision and reinstate his 2011 Decision recognizing the General Council established under the 1998 Resolution, acknowledging that the Tribe presently consists of five (5) members, and denying the descendants of the 1915 census any right to membership without first applying to the General Council and denying them any right to force the Tribe to reorganize with or without their participation.

X.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,940 words.

XI.

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

Dated: 9/27/2017

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

CERTIFICATE OF SERVICE

Case Name: **California Valley Miwok Tribe, et al. v. Ryan Zinke, et al.**

Case No. **17-16321**

I hereby certify that on September 28, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **BRIEF OF APPELLANTS**

I, the undersigned, declare that I am over the age of 18 years and not a party to this action; I am employed in, and am a resident of, the County of San Diego, California. My business address is 17140 Bernardo Center Drive, Suite 358, San Diego, California 92128.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I caused the foregoing documents to be served in the manner indicated below on the following persons:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2017 at San Diego, California.

/s/ Heather Skanchy
HEATHER SKANCHY