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

APPELLANTS' REPLY BRIEF

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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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Appellants submit the follow Reply Brief jointly in response to both Appellees' Answer Briefs.

I.

YAKIMA DIXIE, A PARTY-INTERVENOR DEFENDANT HAS DIED

On December 12, 2017, Yakima Dixie ("Dixie") died. Since Dixie's claims were declaratory relief in nature (whether the Tribe was properly organized and whether the Tribal membership consists of five (5) members), his claims are now extinguished. Rhodes v. Stewart (1988) 488 U.S. 1, 4; Boddie v. Evans (E.D.N.Y. 2011) 2011 WL 1085159, *2.

There is now no longer a Tribal leadership dispute that created the pending lawsuit and appeal. The Assistant Secretary-Indian Affairs ("AS-IA") 2015 Decision, which is the subject of this appeal, was entirely predicated on Dixie's claims challenging the validity of the 1998 Resolution establishing the General Council presently led by Silvia Burley ("Burley").

The BIA never recognized Dixie as the leader of the Tribe after he resigned in 1999, and he testified he

did in fact resign and that his claim of forgery in connection with his resignation for over 16 years was proven to be false. (ER 1762-1763, 2134, 2147, 2156). As stated, the AS-IA 2015 Decision was erroneous, in part, because it was predicated on Dixie's time-barred claim that the 1998 Resolution establishing the General Council was invalid because it purportedly did not involve the descendants of the 1915 census, and because it misconstrued the BIA's long-time policy of tying residency on the Rancheria with membership and the right to organize the Tribe.

As stated, Dixie alone had the power and authority to enroll the Burleys and organize the Tribe when he did in 1998, because he alone resided on the Rancheria purchased for the Tribe in 1916. He cannot supersede that action, sanctioned by the BIA, by filing a time-barred claim challenging his own actions and then attempt to organize another governing body. His challenges over the years were clearly predicated on his claim that he, not Burley, was the leader of the

Tribe, and that he never resigned. Those claims are now moot and extinguished. Rhodes, supra.

II.

THE BIA HISTORICALLY REQUIRED RESIDENCY ON THE 0.92 ACRE LOT FOR AUTHORITY TO ORGANIZE AND ENROLL MEMBERS

The Appellees misconstrue the actual history of how the Tribe was formed in 1916 and how the BIA tied "residency" on the 0.92 acre Rancheria to membership and authority to organize and enroll other members. The Assistant Secretary-Indian Affairs ("AS-IA") Washburn in his 2015 Decision made the same error. (ER 894). When the lot was purchased in 1916 for the 12 member Band of Indians near Sheepranch, it created an opportunity for the band members to organize the Tribe. All that needed to occur was for at least one person to reside on the property. In doing so, that person or persons became a Tribal member with the authority to organize the Tribe and enroll members, including Band members who, like Peter Hodges, chose to live away from the 0.92-acre lot (i.e., "potential members," as opposed to "actual members"). Even the AS-IA 2015

Decision recognized this concept, but misconstrued its application. (ER 894: "And since membership in an unorganized Rancheria was tied to residence, potential residents equated to potential members."). **The BIA's consistent policy over the years since 1916 in recognizing only those persons who actually resided on the 0.92-acre lot as "actual" members with the authority to organize the Tribe and enroll members was the key factor in Yakima Dixie's sole authority in enrolling the Burleys and organizing the Tribe in 1998 under the 1998 Resolution**.

Jeff Davis alone, together with his wife, Betsy (ER 28), chose to reside on the property soon after it was purchased. However, the federal government was more interested in assimilating Native American Indians at that time than in encouraging them to organize their respective tribes. It was understandable, therefore, that the Tribe never organized itself in 1916. However, the federal policy changed in 1928 through 1942, which included the enactment of the Indian

Reorganization Act of 1934 ("IRA"). During this period, the federal policy was a shift toward more tolerance and respect for traditional aspects of Indian culture, and to encourage tribes to interact with and adapt to modern society as a governmental unit, instead of forcing the assimilation of individual Indians. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §1.05, pages 79-82, (2012 ed.). This was manifested in 1935 when the BIA approached Jeff Davis and presumably encouraged him to organize the Tribe under the IRA. But first he needed to vote for it. Since he was the only resident on the property at that time, the BIA considered him as the only member of the Tribe and thus the only one with authority to vote for the organization of the Tribe under the IRA. (ER 42-44). He alone then voted for the Tribe being organized under the IRA, at the exclusion of all other Band members listed on the 1915 census. The BIA never reached out to Peter Hodges or his family, or anyone else listed in John Terrell's 1915 census, or their descendants. (ER 44).

Even though the Tribe was never organized under the IRA when Jeff Davis voted for it in 1935, the point is that he alone had the power to organize the Tribe to the exclusion of the other Band members who never took up residence on the 0.92-acre lot. Indeed, Jeff Davis did not have to organize the Tribe at all under the IRA, but he could have organized it instead orally or by other written documents. As COHEN, supra, explained:

> "Native response to the IRA was therefore divided. Some tribes voted to reject the IRA completely; they continued under existing tribal government or remained unorganized. A majority of tribes (often after federal pressure) elected to come under the provisions. Attempts to organize under the IRA brought disruption and heightened intra-tribal disputes to some tribes..."

COHEN, supra at 83. Because of the federal policy shift away from assimilation and toward organizing governing bodies to enable tribes to interact with the government as a government unit, which began in 1928, it is understandable that the first time the BIA sought to encourage the Tribe to become organized was when it

approached Jeff Davis in 1935 to see if he wanted to vote for an IRA government.

A. INDIAN AGENT JOHN TERRELL: THE 1916 PURCHASE OF THE 0.92-ACRE LOT

John Terrell, the person who took the 1915 census of the Band of Indians near Sheepranch, was a "Special Indian Agent" whose duties included taking a census of Indians. (ER 28); Act of July 4, 1884, (23 Stat. 76, 98)("That hereafter each Indian agent be required, in his annual report, to submit a census of the Indians at his agency or upon the reservation under his charge"). As an Indian Agent, he was also given the responsibility to purchase land for "this little band" of Indians. In doing so, he considered buying two (2) one-acre lots for this small band (ER 27-28), but ultimately decided to buy the one 0.92 acre lot that is the subject of this litigation.

Terrell's decision to buy one instead of two one-acre lots was for the purpose of "fairly well meet[ing] the requirements of this little band..." (ER 28). He was, however, referring to only 6, at best, of the

Band. This is because the Band leader, Peter Hodges, was living in a small one room "little Indian cabin" with his wife and four (4) children on his 160-acre homestead land 2 ½ miles north of the Sheepranch area, and had been living there for "5 or 6 years." (ER 28). He obviously had no plans to leave his 160-acre property to live in 0.92 acre lot. Terrell's intent to limit the lot to 0.92 acres instead of two acres is a product of the era of his time, specifically the allotment and assimilation period (1871 through 1928). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §1.04, pages 71-79, (2012 ed.).

In 1916, when Terrel purchased the 0.92 acre Rancheria for these 12 band of Indians, Native American Indians were not considered U.S. citizens, and were not subject to the draft in the military during World War I (which broke out in 1917), although some did obtain citizenship by volunteering when the Citizenship Act for World War I Veterans was passed in 1918 (42 Stat. 208 (1918)). Nevertheless, it was not until 1924, when

the Synder Act was passed that they achieved citizenship. During this period (1871-1928), the government looked down on Native American Indians, and considered them to be "sub-human" and in need of abandoning their "savage" and "heathenish practices" such as "sun dances and scalp dances" which at the time were considered "immoral." COHEN, supra at 75-76.

Accordingly, in 1916 when Terrell purchased the 0.92 acre lot, the current theme of Indian policy at that time was "civilization and assimilation." COHEN, supra at 72. Under this policy, and during this period, white advocates of the so-called "Friends of the Indians" were determined to make farmers out of the American Indian. COHEN, supra at 74-75. As stated in COHEN, supra:

> "Under the federal allotment and assimilation policy [1871-1928], the Native American was to become another lost race in the American melting pot. He was to abandon his nomadic lifestyle, leave tribal lands, own his own farm, and compete for material goods. Two stages of development were thus required. **Indians had to be permanently settled on fixed reservations**, since only then could tribal lands be assigned to individuals..." (Emphasis added).

COHEN, supra at 75. COHEN further explains:

> "Assimilationists wished to civilize the Indian and drive the native into the mainstream of civilization. Thus the goal was to end the tribe as a separate political and cultural unit, destroy the Indian's own heritage and language, and replace all of this with and American heritage. Official policy reflected this attitude; in 1889, the Commissioner of Indian Affairs wrote: 'The American Indian is to become Indian American...'"

COHEN, supra. This federal policy still existed in 1916, and it explains Terrell's state of mind about the small band having an opportunity to engage in nearby farming (away from the Rancheria), even though the only person who would use the Rancheria would be Jeff Davis, since Peter Hodges desired to stay on his homesteaded property 2 ½ miles away. Terrell thus stated:

> "By reason of the long and strong attachment of this small band to Sheepranch, the fact that the country to the S., S.W., and W. [South, Southwest and West] has developed into considerable farming and fruit country, giving promise for permanent employment nearby for these Indians, and that in the old town a number of old improved places of one to two acres with more or less orchards and vines may be purchased cheap, would suggest, if possible to do so, one or two of such places be purchased for these Indians." (Emphasis added).

(ER 27).

It is clear, therefore, from Terrell's comments that he was advancing this "assimilation" policy when he bought the 0.92-acre lot. He purchased the lot to enable this small band of Indians to have a place to live (they were nomadic or "landless") so as to enable them to engage in farming away from but nearby the Rancheria, which COHEN explains was to "civilize the Indian" and "drive [them] into the mainstream of civilization." COHEN, supra at 75. It was not so they could become an organized Tribe, although the purchased lot gave them that opportunity. Indeed, one of the duties of an Indian Agent at that time was to see to it that Indians in their respective locality are not "idle for want of opportunity to labor" and that they can farm successfully. (Indian Agents in mid-late 19th Century, WIKIPEDIA).

Based upon Terrell's census, 53-year-old Jeff Davis and 46 year old John Tecumchey were the only ones who would be able to engage in nearby farming. Peter Hodges and his family had chosen to live on his

homestead 2 ½ miles away. Hodges was engaged in working at the local saw mill, so it would appear that Terrell was satisfied with his "assimilation" and that may have played a role in his decision to buy only one 0.92 acre lot rather than two. In other words, Peter Hodges was actively engaged in working in a sawmill six days a week and had a 160-acre homesteaded piece of land that he and his family lived on (ER 28), he was providing for his family, and thus he was being assimilated into main stream civilization. The other two Indians he identified, 80-year-old Mrs. Limpey and 8 year old Mamy Duncan were, by virtue of their age, not in a position to work or farm. Presumably, Mrs. Limpey, Mamy Duncan and John Tecumchey lived in the three (3) "old little Indian cabins" Terrell saw in the Sheepranch area when he arrived in 1915.

Accordingly, only Jeff Davis chose to take up residence on the 0.92 acre lot. There is no record of what happened to John Tecumchey. In any event, there

was no reason why he could not have also resided on the lot.

Thus, the 2015 AS-IA Decision stating that the lot was not large enough for all the band members to reside on is inaccurate.

What Terrell did, therefore was to plant a seed for the organization of the Tribe. That seed was Jeff Davis.

B. THE SEED PLANTED: JEFF DAVIS

Terrell mentions Jeff Davis as one of the two Indian boys who hung out with the miners in the mining camps near Sheepranch during the Civil War. (ER 28) The early miners gave him his name. (ER 28). (The name is obviously in reference to the President of the Confederacy, Jefferson Davis). Given the fact that Jeff Davis spent much of his time around the mining camps, it stands to reason that he was one of the Indians his "white neighbors" told Terrell was away in "nearby streams panning for gold." (ER 27). If that is true, then he most likely never turned to farming or

work like Peter Hodges, but instead panned for gold when he grew older.

There is no evidence that Terrell followed through with seeing who would take up residence on the 0.92-acre lot, or that he followed through with ensuring that those who lived on the lot became farmers or obtained employment somewhere, for purposes of implementing the policy of allotment and assimilation.

In any event, when Terrell purchased the 0.92 acre lot for the 12 member Band of Indians he was planting a seed, and giving the Tribe an opportunity to organize itself when the federal government changed its policy during the Indian Reorganization era of 1928-1942. It is important to note that when Terrell purchased the 0.92-acre lot, a Tribe was formed from those persons of the 12 member Band of Indians identified in the 1915 census who took up residence on the lot, although it was an unorganized one. Contrary to the Appellees' assertion, this rule, as set forth in Montoya v. United States (1901) 180 U.S. 261, has been the "common-law

test" followed by federal courts ever since Montoya, supra, to determine if a group constitutes a "tribe" as opposed to a "band" of Indians. See COHEN, supra, §3.02[6][b], pages 142-144 (discussing how the Montoya common-law test of determining whether a group constitutes a "tribe" has been applied in a variety of contexts). As the Court in Montoya, supra, explained:

> 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. (as quoted verbatim in COHEN, supra at 143). Accordingly, since Jeff Davis and his wife moved onto the 0.92-acre lot in 1916, they alone constituted membership in the unorganized Tribe with the power to organize it and enroll members from those living off of the lot and identified in the 1915 census, or anyone else they chose to enroll. This would have been no different from how other California Rancherias were occupied during this same period.

Once organized, the Tribe could enroll members from the Band members and their descendants identified in the 1915 census. But initial membership and the right to organize the Tribe was tied to residency on the 0.92 acre lot, in light of BIA policy in how it treated California Rancherias since the turn of the 20th century. Alan-Wilson v. Sacramento Area Director (1997) 30 IBIA 241; see Brief of Appellants ("BOA"), pages 57-61.

As stated, Jeff Davis, once he moved onto the property in 1916 (or whoever else did), had the right and the opportunity to organize the Tribe by any means. COHEN, supra, §405[3], page 271 ("No federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution"). Indeed, the fact that Jeff Davis did not have written constitution or written governing document at the time he moved onto the property did not deprive him of the right to organize the Tribe or enroll members. As stated in COHEN, supra:

> "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).

COHEN, supra, §4.04[3][b], page 260.

Accordingly, in 1916 when Jeff Davis moved onto the property, he became a member of the Tribe and thus had the right and the authority to do what Yakima Dixie did in 1998, when he enrolled the Burleys and organized the Tribe under the 1998 Resolution establishing the General Council. At that time, the other 10 or so Indians counted by Terrell's 1915 census had no right to organize the Tribe or even become members of the Tribe unless: (1) they resided on the property; or (2) Jeff Davis enrolled them and included them in the organization process. Had Jeff Davis done that, the Tribe would have grown in numbers and flourished. However, as stated, because Terrell purchased the property during the allotment and assimilation era, the BIA did not encourage any residents of the property,

i.e., Jeff Davis, to pursue efforts to organize the Tribe. That all changed in 1935, when the new era of Indian Reorganization took place.

C. JEFF DAVIS VOTED FOR AN IRA GOVERNMENT IN 1935, BUT NEVER FOLLOWED THROUGH TO ACTUALLY ORGANIZE THE TRIBE

In 1935, Jeff Davis was the sole resident on the property. The BIA approached him at that time, encouraging him, and him alone, to organize the Tribe under the IRA. (ER 42-44, 349). The BIA denied any other person identified in the 1915 census, or their descendants, to vote for an IRA governing body or to participate in any way in the organizational efforts of the Tribe, because they did not meet the criteria of having used or resided on the 0.92-acre lot.

The BIA's actions in approaching Jeff Davis at that time was in keeping with the changed Indian policy under a new era known as the Indian Reorganization era (1928-1942). As explained in COHEN, supra:

> "A marked change in attitude toward Indian policy began in the mid-1920s and continued into the 1930s and early 1940s. The shift was away from assimilation policies and toward more tolerance and

> respect for traditional aspects of Indian culture. It was a time of affirmation of the Indian civilization so strongly condemned in the previous era. This reversal of attitude was reflected in new protections for Indian rights, support for federally defined tribalism, and encouragement of historical and anthropological concerns such as arts, crafts, native rituals, tourism, and traditional economic systems..."

COHEN, supra, §1.05, page 79. COHEN, supra, further explained that the IRA was a byproduct of this era, which reflected the federal government's policy of encouraging tribes to organize or reorganize their tribal structures so they could interact with the federal government, instead of forcing the assimilation of individual Indians, as it did in the previous era. COHEN, supra at 81. This was the mindset of the BIA representative when he approached Jeff Davis in 1935, encouraging him to organize the Tribe under the IRA. The BIA saw him as the only member of the Tribe by virtue of his residence on the property. Significantly, the BIA looked to Jeff Davis as the only one with this authority, in the same way it looked to

Yakima Dixie as the sole authority to organize the Tribe and enroll members in 1998.

Peter Hodges had died before the BIA approached Jeff Davis in 1935 with the idea of organizing the Tribe under the IRA, but his family still lived either on his homestead or in the area. Even though he was the original leader of the 12 member Band, the BIA never included any of his family members in the 1935 vote. Their names come up again in 1966, when Mabel Dixie alone was approached by the BIA to vote for termination of the Tribe. (BOA 33-37). Because they never resided on the 0.92 acre lot, and thus were not members of the Tribe, the BIA refused to acknowledge them as members of the Tribe and thus refused to allow them to vote for termination. See CVMT v. U.S. (D.C.D.C. 2006) 424 F.Supp.2d 197, 198 ("Miwok I"). As the Court in Miwok I observed:

> In 1966, finding no evidence that Lena Shelton, her brother Tom Hodges, 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...(Emphasis added).

424 F.Supp.2d at 198. Even though Mrs. Lena Shelton actually lived next door to the Rancheria where Mabel Dixie resided, her request to have the assets of the Tribe, once terminated, distributed also to her was denied because the BIA concluded she never resided on the 0.92 acre lot Terrell had originally purchased for the 12 Band of Indians in 1916, and thus she was not a member of the Tribe. (ER 74-75: "Although you presently live next to the Rancheria, we find no record that you have ever resided on it."). Mabel Dixie was the only one entitled to vote for termination and receive the distribution assets from the property, because she alone resided on the property, and was thus a member. Notably, the BIA told Mrs. Lena Shelton that the Rancheria where Mabel Dixie was residing was "unorganized." (ER 75). Apparently, although Jeff Davis had voted for the Tribe to be organized under the IRA in 1935, that action never occurred, and the Tribe remained "unorganized" while Mabel Dixie was living on the property.

D. MABEL DIXIE: ONLY ONE WITH AUTHORITY TO VOTE FOR TERMINATION OF THE TRIBE IN 1966

In 1966, Yakima Dixie's family was living on the 0.92-acre lot. His mother, Mabel Dixie was the only adult member of the Tribe at that time by virtue of her residence on the property. She was 48 years old at that time. (ER 78). Because of that, the BIA approached her alone on voting for termination of the Tribe and receiving its distribution assets.

When the BIA approached Mabel in 1966 about voting for termination, the federal policy toward Indians was in the final phase of the Termination era that began in 1943. Indian termination was the policy of the federal government from the mid-1940s to the mid-1960s. Cases and Materials on Federal Indian Law, Getches, David H.; Wilkinson, Charles F.; Williams, Robert L., Thomson West publication, pp. 199-216. It was shaped by a series of laws and policies with the intent of assimilating Native American Indians into mainstream American society. It was a sharp return to tribal termination and individual member relocation, after the

reorganization and restoration era that Jeff Davis enjoyed while he lived on the property. COHEN, supra, §1.06, page 85. The policy's intent was that, with or without their consent, tribes were to be terminated so they could begin to live "as Americans." TERMINATION'S LEGACY: THE DISCARDED INDIANS OF UTAH, Metcalf, R. Warren, Lincoln: University Press, p. 7 (2002). To that end, Congress set about ending the special relationship between tribes and the federal government. COHEN, supra at 90; H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953). The goal was to grant Native American Indians all the rights and privileges of citizenship, reduce their dependence on a bureaucracy whose mismanagement had been documented, and eliminate the expense of providing services for native Indians. COHEN, supra; NATIVE AMERICAN SOVEREIGNTY, Wunder, John R., Taylor & Francis, pp. 248-249 (1999). In keeping with this mindset, Congress passed the California Rancheria Termination Act in 1958 (72 Stat. 619), which was later amended in 1964 (78 Stat. 390).

The act called for the "distribution" of all Rancheria communal lands and assets to individual tribe members. Specifically, it called for a plan for "distributing to individual Indians the assets of the reservation or Rancheria, including the assigned and the unassigned lands, or for the selling such assets and distributing the proceeds of sale, or conveying such assets to a corporation or other legal entity organized by the group, or for conveying such assets to the group, as tenants in common." Public Law 85-671, August 18, 1958. *Indian Affairs: Laws and Treaties*, Vol. I (Washington: Government Printing Office), p. 831. Under the act, all Indians who receive a portion of the assets were ineligible to receive any more federal services rendered to them based on their status as Indians. Public Law 85-671, §10(b).

Against this background, and motivated by the federal government's new policy, the BIA approached Mabel Dixie in 1966 inquiring (more accurately "pressuring" her concerning) whether she wished to vote

for termination under the act. She agreed. (ER 67). In exchange, she would be given proceeds of the sale of the property, ownership of the property, and the BIA would no longer provide any more services to her or anyone living on the Rancheria. Because she was the only adult living on the property at the time, the BIA considered her to be the only member of the Tribe, the only one authorized to vote for termination, and the only one to receive distribution of the assets. It therefore denied the requests of Peter Hodge's children for receipt of a portion of those assets, because they did not live on the 0.92 acre lot and thus were not Tribal members. (ER 70-72 [Letter 2/3/1966 to Dora Mata], ER 73-75 [Letter 2/3/1966 to Lena Shelton]); Miwok" I, supra at 198. Accordingly, the BIA prepared a plan to distribute the assets of the Sheepranch Rancheria as a prelude to termination. (ER 1966).

The plan specifically provided that Mabel Dixie was the "only Indian" entitled to the assets of the

property. It stated that once the plan was approved by the BIA and accepted by Mabel Dixie,

> "[S]he shall thereafter be the only Indian entitled to participate in the distribution of the assets of the Sheepranch Rancheria and the rights or beneficial interest of Mrs. Dixie in the property may be inherited or bequeathed..."

(ER 78). As stated, the only reason Mabel Dixie was the only one authorize to vote for termination and be entitled to be listed in the distribution plan and receive the assets of the Rancheria is because she was the only one living on the property.

The plan was approved by the BIA and accepted by Mabel Dixie. (ER 80). While termination never occurred because of some administrative error, the point is that the BIA excluded any of the descendants of the 1915 census who never resided on the property from participating in voting for termination and receiving any of the assets of the Rancheria upon termination. It is clear evidence that the BIA had and implemented a policy that only those descendants of the 1915 census who actually resided on the 0.92 acre lot were members

of the Tribe with the authority to make decisions concerning the status of the Tribe. In this case, it was terminating the Tribe. In the case of Jeff Davis, it was the authority to "organize" the Tribe. In the case of Yakima Dixie, it was the authority to enroll the Burleys and organize the Tribe.

E. MABEL DIXIE'S DEATH: YAKIMA DIXIE RECEIVES AN INTEREST IN THE RANCHERIA THROUGH PROBATE ORDER

As stated, when Mabel Dixie died, her interest in the property passed to her children, which included Yakima. (ER 123-124, 350). By the time Yakima met Burley in 1998, he was the only descendant of the 1915 census residing on the property. However, because he had lawful and full possession of the property, none of the descendants of the 1915 census had the right to live on the property without Yakima's permission. In other words, the unsuccessful efforts by the BIA to terminate the Tribe resulted in Mabel Dixie getting a deed to the property, to the exclusion of anyone else. When she died, the federal Administrative Law Judge ordered that her interest in the property pass to her

children, which included Yakima. When all the Dixie family members left the property, except for Yakima, it was then up to him, and him alone, to regenerate the growth of the Tribe by actually organizing it and enrolling additional members besides himself. He accomplished this through the General Council established under the 1998 Resolution.

The BIA's failure to successfully complete the termination process together with the subsequent probate order (from the DOI Administrative Law Judge) had the legal effect of limiting the authority to organize the Tribe and enroll members to the Dixie family, as long as they continued to reside on the property.

Accordingly, when Yakima Dixie enrolled the Burleys and organized the Tribe in 1998, he did so with full authority and consistent with BIA established policy. As the BIA did with Jeff Davis in 1935 with respect to giving him the sole vote to organize the Tribe under the IRA, and what the BIA did with Mabel Dixie in

giving her the sole vote to terminate the Tribe, the BIA gave Yakima Dixie the sole authority to enroll the Burleys and organize the Tribe in 1998. In each of these situations, the descendants of the 1915 were specifically excluded from participating in critical decisions of the Tribe, because they did not reside on the property and thus were not considered actual members. The BIA correctly tied membership and authority to organize with residency on the Rancheria.

For the foregoing reasons, the Appellees' contention that the General Council established under the 1998 Resolution is invalid, because it did not include the participation of the descendants of the 1915 census, is without merit. It was validly organized with the authority of Yakima Dixie as the sole resident of the Rancheria. The "majority" of the members were Yakima and the Burleys. Because Melvin Dixie had left the Rancheria, he was not a member with authority to organize the Tribe. That authority fell

exclusively on Yakima and the adult members of the Burley family after Yakima enrolled them.

III.

THE SIX-YEAR STATUTE OF LIMITATIONS BARS DIXIE'S CLAIMS, AND THE AS-IA FROM RULING THAT THE GENERAL COUNCIL ESTABLISHED UNDER THE 1998 RESOLUTION WAS INVALID

The AS-IA's 2015 Decision ruling that the General Council established under the 1998 Resolution was purportedly invalid is based upon Dixie's claims asserted in his lawsuit challenging the validity of the General Council. (ER 1823, 1831-1832). The AS-IA does not act sua sponte. Dixie clearly sued in federal court for declaratory and injunctive relief, alleging that the General Council established in 1998 was invalid, because the descendants of the 1915 census did not participate in its organization. (ER 1831-1832). In granting Dixie's motion for summary judgment, the U.S. District Court remanded back to the AS-IA to "reconsider" his Decision. CVMT v. Jewell (D.C.D.C. 2013) Supp.3d 86, 100-101 ("Miwok III"). However, Dixie first filed suit on this claim on January 24,

2011, and amended it on October 17, 2011, twelve (12) years after Dixie first claimed the General Council was purportedly "invalid." (ER 2009, 1831-1832).

Actions for judicial review of final agency actions brought under the Administrative Procedure Act are subject to a **six-year** statute of limitations. Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713; 28 U.S.C. § 2401(a). Here, Dixie filed suit on this claim twelve (12) years after claiming the General Council was invalid, and thus sat on his rights to challenge that claim in court. He clearly sought review of a final agency action. (ER 1823 [Dixie asks the Court to "vacate an erroneous decision of the [AS-IA]"]).

Generally, a claim subject to the six-year statute of limitations period under §2401(a) first accrues when the plaintiff comes into possession "of the critical facts that he has been hurt and who has inflicted the injury." United States v. Kubrick (1979) 444 U.S. 111, 122. Under federal law, a cause of action accrues when

the plaintiff is aware of the wrong and can successfully bring a cause of action. Acri v. Int'l Ass'n of Machinists & Aerospace Workers (9th Cir. 1986) 781 F.2d 1393, 1396. Stated another way, "[t]he moment at which a cause of action first accrues within the meaning of Section 2401(a) is when 'the person challenging the agency action can institute and maintain a suit in court.'" Muwekma Ohlone Tribe v. Salazar (D.D.C.2011) 813 F.Supp.2d 170, 191 (quoting Spannaus v. U.S. Dep't of Justice (D.C.Cir.1987) 824 F.2d 52, 56).

The facts are undisputed that Dixie was "contesting the validity of the General Council" as "early as April 1999." For example, the District Court stated in Miwok III as follows:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raises significant doubts about the legitimacy of the General Council. **From as early as April 1999, Yakima [Dixie] contested the validity of the Council.** *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205 (October 10, 1999 letter from

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

Miwok III, supra at 100.

Appellees' contention that the six-year statute of limitations does not apply to an agency decision maker like the AS-IA, but only against the United States, (Dixie Answering Brief [DAB] 48) is not only legally wrong, but misses the point. The six-year statute of limitations applies to Dixie who sued the United States. If Dixie was barred from making that claim, the AS-IA had no jurisdiction to entertain it. In the same way, in Hardwick v. U.S. (N.D.Cal. 2012) 2012 WL 6524600, the court ruled that a plaintiff's challenge to the legitimacy and **validity** of the **Tribe's governing body** was barred by the six-year statute of limitations.

The Appellees nevertheless argue that the statute of limitations ran when the AS-IA's 2011 Decision was issued, because that Decision caused a "new injury" to Dixie, purportedly because the Decision "reversed the BIA's prior determinations that it did not recognize

the Burley's tribal government." (DAB 51). This is false.

Dixie was not making a claim for a personal injury. His claim was for declaratory and injunction relief. (ER 487). Indeed, the ASI-2011 Decision never entertained or discussed the validity of the General Council. (ER 381-388). Moreover, the change of position the 2011 Decision was referring to was the policy the BIA had of treating tribes not organized under the IRA differently than those who were, not a change of course in recognizing the validity of the General Council. It stated:

* * *

> (6) Under the IRA, as amended, it is impermissible for the federal government to treat tribes not "organized" under the IRA differently from those "organized" under the IRA. (Citation).
>
> (7) ...[W]ith respect to finding (6), on this particular legal point, I specifically diverge with a key underlying rationale of past decisions by the Department of the Interior (Department) officials dealing with CVMT matters, apparently beginning around 2004, and decide to pursue a different policy direction. Under the circumstances of this case, it is inappropriate to...interfer[e] with the CVMT's internal governance...(Emphasis added).

(ER 382). The 2011 Decision goes on to say that this new policy marked a "180-degree change of course" from position the BIA took over the years with respect to the Tribe. (ER 382). Thus, this "change of course" had nothing to do with whether the General Council was invalid, specifically whether, as Dixie alleged in his 2011 lawsuits, the organization of General Council was invalid because it did not involve the descendants of the 1915 census. The issue was whether the BIA could justify treating the Tribe differently because it was not organized under the IRA. Thus, there was no "new injury" that started the running of the six-year statute of limitations.

Dixie's claims challenging the validity of the original organization of the Tribe in 1998 by establishing the General Council were clearly barred. Since the AS-IA's 2015 Decision was based on this time-barred claim, it was erroneous as a matter of law and must be set aside.

IV.

APPELLANTS ARE NOT COLLATERALLY ESTOPPED FROM CHALLENGING THE AS-IA'S 2015 DECISION

The Appellees argue, and the District Court below ruled, that the Appellants are collaterally estopped from challenging the AS-IA's 2015 conclusion that the General Council is invalid and that the Tribe's membership is purportedly "limited" to five (5) people. They contend that the courts in Miwok I and CVMT v. U.S. (D.C. Cir. 2008) 515 F.3d 1262 ("Miwok II") ruled against Appellants on these issues. This contention is without merit.

The Court in Miwok III, supra, specifically rejected this argument, stating that those two prior court cases "do not share the same contested issue with this case." Miwok III, supra at 101, fn. 15. As a result, it is the Appellees, not the Appellants, who are collateral estopped from arguing this point. It has been decided against them. Appellees assertion that the court's ruling in Miwok III, supra, was mere "dicta" is wrong. The court in Miwok III correctly

observed that the Plaintiffs there (Federal Defendants and Dixie Intervenors here) clearly "challenged the August 2011 Decision" on "other legal and procedural grounds," including the argument 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." Id. At fn. 15.

V.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in Appellants' Opening Brief, the judgment must be reversed.

VI.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,472 words.

VII.

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: 12/15/2017

s/Manuel Corrales, Jr.
Manuel Corrales, Jr., Esq.
Attorney for Plaintiffs-Appellants CALIFORNIA VALLEY MIWOK TRIBE, THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR, ANGELICA PAULK, and TRISTAIN 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 December 18, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. **APPELLANTS' REPLY BRIEF**

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 December 18, 2017 at San Diego, California.

/s/ Heather Skanchy
HEATHER SKANCHY