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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**IN RE \$323,647.60 IN FUNDS
BELONGING TO THE
CALIFORNIA VALLEY MIWOK
TRIBE**

Case No. 18-cv-01194-JAP/KBM

Hon. James A. Parker

**RESPONSE IN OPPOSITION TO
MOTION TO LIFT STAY**

Defendants-in-Interpleader Silvia Burley, *et al.*, have asked this Court to lift the stay in this action and award to them \$323,647.60 in funds belonging to the California Valley Miwok Tribe (Tribe). (Motion to Lift Stay, ECF No. 8.) While Defendants-in-Interpleader Velma WhiteBear, Antonia Lopez, Gilbert Ramirez, Jr., Antoinette Lopez, Michael Mendibles, and Iva Carsoner (collectively, the Tribal Council) oppose the Motion to Lift Stay, the Tribal Council has also filed, concurrently with this opposition, a motion to transfer this action to the Eastern District of California.¹ The Tribal Council respectfully requests that the Court rule on the transfer request before addressing the Motion to Lift Stay and that, if the Court transfers this action, it decline to rule on the Motion to Lift Stay and allow the transferee court to rule on the Motion.

If the Court does rule on the Motion to Lift Stay, the Tribal Council submits that the Motion should be denied because it fails to identify any relevant change in the status quo since the Court granted the parties' joint request for a stay in February 2017, and because it asks the Court to decide issues over which the Court lacks jurisdiction. The Tribal Council requests that the Court deny the motion and leave the stay in place, pending a decision by the federal Bureau of Indian Affairs (BIA) to recognize an authorized representative for the Tribe.

¹ When the Complaint-in-Interpleader was filed in this case, the Tribal Council also included Yakima Dixie, who was named as a Defendant-in-Interpleader. Since that time, Mr. Dixie has died, and Briana Sanchez has been appointed to fill the Tribal Council seat left vacant by Mr. Dixie's death. Ms. Sanchez has not been named as a party in this case; however, the six Tribal Council members named as Defendants-in-Interpleader make up a supermajority of the seven-person Tribal Council, which is authorized to act for the Tribe under the 2013 Tribal Constitution. Teresa Gonzalez is also listed as a Defendant-in-Interpleader, but Ms. Gonzalez was replaced as a Tribal Council member before the Complaint-in-Interpleader was filed, and this firm does not represent Ms. Gonzalez. (*See* Declaration of A. Lopez in support of Motion to Transfer Venue, ¶ 3, filed Jan. 14, 2019.)

I. INTRODUCTION AND SUMMARY

This case stems from a dispute regarding the membership and leadership of a federally recognized Indian tribe. The Tribal Council is the Tribal governing body established under a Tribal Constitution that the Tribal community ratified in 2013 (2013 Constitution). Under the 2013 Constitution, all lineal descendants of historical Tribal members who choose to affiliate with the Tribe are eligible for Tribal membership; currently, this group includes nearly 300 adults and several hundred children. (Declaration of A. Lopez in support of Motion to Transfer Venue, ¶ 4, filed Jan. 14, 2018 (Lopez Declaration)).

Defendant-in-Interpleader Silvia Burley represents a group that consists solely of herself, her two daughters, and her granddaughter (collectively, the Burley Faction). Ms. Burley maintains that the four members of the Burley Faction are the Tribe's only members and that they also constitute the Tribe's governing body. (Motion to Lift Stay, ¶¶ 3-4, 7-8.)

Both the Tribal Council and the Burley Faction claim to be entitled to the Tribe's share of settlement proceeds in the *Ramah* class action (No. 1:90-cv-00957-JAP-KBM). Class Counsel in the *Ramah* action filed a complaint-in-interpleader in that case, asking the Court to resolve the conflict. (ECF No. 2.)² Because the United States currently does not recognize either the Tribal Council or the Burley Faction as the Tribe's government, the Court granted a joint motion by all Defendants-in-Interpleader to stay the interpleader action "pending a final decision by the Department of the Interior recognizing a government for the Tribe or until further order of the

² The pleadings filed in the interpleader action were subsequently re-filed under the current case number, after the Court severed the interpleader action from the *Ramah* case. See ECF No. 1. Citations are to the re-filed pleadings unless otherwise indicated.

Court.” (ECF No. 7.) Subsequently, the Court granted Class Counsel’s motion to sever the interpleader action from the *Ramah* case and to designate a separate case number and caption for the severed action. (ECF No. 1.)

Ms. Burley now asks the Court to lift the stay and distribute the Tribe’s share of the *Ramah* settlement proceeds to the Burley family (Motion to Lift Stay, ¶ 9) — despite the fact that the BIA does not recognize the Burleys as the Tribe’s government. In fact, the Ninth Circuit affirmed, less than one month ago, a December 30, 2015 Decision by the BIA’s Assistant Secretary – Indian Affairs which found that “Ms. Burley and her family do not represent the [Tribe]” (2015 Decision, p. 5, Exhibit A to Complaint-in-Interpleader, ECF No. 2). *See California Valley Miwok Tribe v. Zinke*, No. 2:16-01345, 2017 WL 2379945 (E.D. Cal. June 1, 2017) (*Miwok IV*), *affirmed*, No. 17-16321 (9th Cir. 2018).

Ms. Burley claims that the Court does not need to wait for the BIA to recognize a Tribal government, and that the Court can determine who the Tribe’s members are, and “who is the authorized representative of the Tribe.” (Motion to Lift Stay, ¶ 4.) These are determinations that only the Tribe itself, and the BIA in certain situations, are authorized to make. Ms. Burley also argues that the Ninth Circuit wrongly decided her appeal in *Miwok IV*. That argument must be addressed to the Ninth Circuit, and Ms. Burley has done so by filing a petition for rehearing. *Res judicata* bars Ms. Burley from relitigating her challenge to the 2015 Decision in this Court. Moreover, her attempt to do so highlights the risk of inconsistent judgments and unnecessary litigation that has led the Tribal Council to request, in its separate Motion to Transfer Venue, that the Court transfer this case to the Eastern District of California.

In short, nothing has changed to warrant the lifting of the stay in this case. Furthermore, the Court lacks jurisdiction to decide the issues that Ms. Burley raises in her Motion. Only the BIA can recognize a Tribal government, and it will do so in due course. Only when that occurs can the Tribe's share of settlement funds be distributed to an authorized recipient. Accordingly, the Tribal Council requests that the Court defer ruling on the Motion to Stay until the Court has considered the Tribal Council's Motion to Transfer Venue. If the Court does rule on the Motion to Lift Stay, the Tribal Council requests that the Court deny the Motion.

II. FACTUAL AND PROCEDURAL HISTORY

A. Tribal leadership dispute

As explained in the Tribal Council's Motion to Transfer Venue, the dispute between the Tribal Council and the Burley Faction dates back to 1998 and has been the subject of multiple published federal court opinions. *See California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. Mar. 31, 2006) (*Miwok I*), *affirmed*, *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (*Miwok II*); *California Valley Miwok Tribe v. Jewell*, 5 F.Supp.3d 86 (D.D.C. 2013) (*Miwok III*). *See also Miwok IV*, *supra*, 2017 WL 2379945. For purposes of this opposition, it suffices to say that each court to consider the dispute has rejected the Burley Faction's "antimajoritarian gambit," *Miwok II*, 515 F.3d at 1267.

Most recently, the Ninth Circuit, on December 11, 2018, affirmed a decision by the U.S. District Court for the Eastern District of California, which dismissed the Burley Faction's challenge to the BIA's 2015 Decision. *See generally Miwok IV*, *supra*. The 2015 Decision determined, in relevant part, that "the Tribe is not limited to five individuals," as the Burley

Faction had claimed;³ that a Tribal government can only be adopted through a “process open to the whole tribal community;”⁴ and that the BIA currently does not recognize any Tribal government. (2015 Decision, pp. 3, 5.) Specifically, the 2015 Decision determined that the BIA could not recognize the Burley Faction’s purported Tribal government because the two people who ratified it were “not a majority of those eligible to take part in the reorganization of the Tribe.” (2015 Decision, p. 5.) The 2015 Decision also found insufficient evidence to recognize the Tribal Council or the Tribe’s 2013 Constitution, but authorized the BIA’s Pacific Regional Director to receive additional information from the Tribal Council for the purpose of determining whether the 2013 Constitution was validly ratified in the BIA’s view. (2015 Decision, p. 6.)

In April 2016, the Tribal Council submitted additional information to the Pacific Regional Director and requested that she recognize the Tribe’s 2013 Constitution as validly ratified, prompting the Burley Faction to file their challenge to the 2015 Decision in *Miwok IV*. (Exhibit A to Declaration of James Rusk in support of Motion to Transfer Venue, filed Jan. 14, 2019 (Rusk Declaration)). On September 11, 2017, while the Burley Faction’s appeal of the *Miwok IV* decision was pending, the Regional Director issued her decision, which found that the BIA could not recognize the results of the Tribal election that ratified the 2013 Constitution, because there was insufficient evidence that the Burley Faction had been given an adequate

³ Prior to the death of Yakima Dixie, the Burley Faction sometimes acknowledged him as a Tribal member, in addition to Ms. Burley, her two daughters and her granddaughter. See *Miwok III*, *supra*, 5 F.Supp.3d at 95.

⁴ The 2015 Decision defined the Tribal community eligible to participate in Tribal organization as all lineal descendants of 14 historical Tribal members who are identified in certain documents. (2015 Decision, p. 4.)

opportunity to participate in that election.⁵ (Exhibit D to Rusk Decl., p. 3.) The Regional Director encouraged the Tribe to petition the BIA for a Secretarial election, which is an election held by the BIA, pursuant to federal regulations, for the purpose of allowing a tribe to adopt a governing document. *Id.*; see 25 CFR Part 81.

On August 7, 2018, the Tribal Council notified the Burley Faction that the Tribe had begun gathering the required signatures and intended to submit a petition for Secretarial election, and that the Burleys would have an opportunity to participate in that election, regardless of whether they chose to sign the petition. (Exhibit E to Rusk Decl., p. 1.) The Burley Faction responded by filing a motion to enjoin the BIA from acting on the Tribe's petition or conducting a Secretarial election. (Exhibit F to Rusk Decl.) The Ninth Circuit denied the motion. (Exhibit G to Rusk Decl.)

The Tribal Council anticipates that, pursuant to the regulations governing Secretarial elections, the BIA will call and conduct a Secretarial election for the Tribe in 2019. *See* 25 C.F.R. §§ 81.19(b). Assuming that a majority of registered voters approve the proposed Tribal constitution, the BIA's Pacific Regional Director will approve the results of that election and recognize a government for the Tribe. *See* 23 C.F.R. § 81.45(b). That recognition will end the Tribal leadership dispute and provide the basis for this Court to lift the stay in this action and

⁵ The Tribe and the Tribal Council believe that the Regional Director's decision was wrongly decided, but chose to forego legal challenge to that decision and instead to pursue a Secretarial election as the Regional Director recommended, in order to obtain federal recognition for the Tribe's government. Nonetheless, the Tribe continues to operate under the 2013 Constitution and recognizes the Tribal Council, whose authority was ratified by that Constitution.

order the distribution of the Tribe's share of the *Ramah* settlement proceeds. (*See* Order Granting Stay, ECF No. 7, p. 2.)

B. Interpleader action and stay

After the BIA issued the 2015 Decision, the Tribal Council became aware that the Tribe was a class member in the *Ramah* action.⁶ The Tribal Council notified Class Counsel in March 2016 that there was a dispute regarding Tribal leadership and that, pursuant to the 2015 Decision, the United States did not recognize any Tribal government. (ECF No. 2, Exhibit B.) In September 2016, Class Counsel filed the Complaint-in-Interpleader, naming the Tribal Council members and Silvia Burley as Defendants-in-Interpleader, and asked this Court to determine who was entitled to receive the Tribe's share of the *Ramah* settlement proceeds. (ECF No. 2, ¶ 10.)

The Tribal Council and the Burley Faction jointly requested that the Court stay the interpleader “pending a final decision by the [BIA] to recognize a government for the Tribe.” (Joint Motion, ECF No. 5, MPA p. 2.) The Joint Motion explained: “The Tribal government recognized by the DOI will be the sole entity entitled to receive the Tribe's share of the Net Settlement Amount. *It would be inappropriate and untimely for the court to release any funds owed to the Tribe until that Tribal government is identified.*” (*Id.* [italics added].) The Court granted the request and stayed the interpleader “pending a final decision by the Department of

⁶ At that time, the Burley Faction's address in Stockton, California, was listed as the Tribe's address in settlement documents filed with the *Ramah* court. (Complaint-in-Interpleader, ECF No. 2, ¶¶ 1, 3.)

the Interior recognizing a government for the Tribe or until further order of the Court.” (Order Granting Stay, ECF No. 7, p. 2.)

On December 14, 2018, Class Counsel filed an unopposed motion to sever the Miwok interpleader action from the *Ramah* litigation so that Class Counsel could “close the books” on the *Ramah* case and be relieved of any further responsibilities. (Motion to Sever, No. 1:90-cv-00957, ECF No. 1621, ¶ 5.) The Court granted the Motion to Sever. (ECF No. 1.)

On December 31, 2018, Ms. Burley filed the Motion to Lift Stay. The Motion to Lift Stay asks the Court to lift the stay and release the interpleaded funds to the Burley Faction, notwithstanding the finding in the 2015 Decision that the Burley Faction does not represent the Tribe. (Motion to Lift Stay, ¶¶ 3-5.) Ms. Burley’s motion argues that the Ninth Circuit incorrectly decided the Burley Faction’s appeal in *Miwok IV* and that the BIA unlawfully refuses to recognize the Burley Faction as the Tribe’s government. (Motion to Lift Stay, ¶¶ 3-4.) It argues that Yakima Dixie’s death resolves the Tribal leadership dispute, and asks this Court to determine the membership and leadership of the Tribe. (Motion to Lift Stay, ¶¶ 4, 5.)

While the Motion to Lift Stay was pending, the Burley Faction filed a petition for rehearing and rehearing *en banc* of the Ninth Circuit’s decision in the *Miwok IV* appeal. The petition makes the same arguments that the Burleys make in the Motion to Lift Stay — namely, that the four members of the Burley Faction are the Tribe’s only members and that Yakima Dixie’s death ends any Tribal leadership dispute. (Exhibit B to Rusk Decl., pp. 3, 9.)

III. ARGUMENT

Assuming the Court rules on the Motion to Lift Stay, the Court should deny the Motion because (i) the BIA has not recognized a Tribal government, (ii) this Court lacks jurisdiction to

do so, and (iii) Ms. Burley's arguments about the effect of Yakima Dixie's death are not properly directed to this Court and are barred by the doctrine of *res judicata*.

A. The BIA has not recognized a Tribal government.

The Court stayed this action, at the parties' joint request, to await the BIA's recognition of a Tribal government. (Order Granting Stay, p. 2.) It is undisputed that the BIA has not yet done so. That alone is sufficient reason to deny Ms. Burley's motion.

As explained above, the process of obtaining federal recognition for a Tribal government is ongoing. The Tribe is seeking a Secretarial election to ratify a Tribal constitution, which, if successful, will result in the BIA's acknowledgment of that constitution and of the Tribal government it authorizes. (Exhibit E to Rusk Declaration, p. 1.) If the BIA recognizes the Tribal Council based on the election results, the Court can order the Tribe's share of settlement funds to be distributed to the Tribal Council. (Order Granting Stay, p. 2.)

B. This Court cannot determine the Tribe's leadership or membership.

Ms. Burley argues that the Court can "determine who comprises the Miwok tribe" and "determine who is the authorized representative of the Tribe," to order the release of the Tribe's share of settlement funds. (Motion to Lift Stay, ¶ 4). Ms. Burley is mistaken. The Court lacks jurisdiction to determine either the membership or the leadership of the Tribe.

"A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. ... The judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978) (citations omitted) (finding no federal

court jurisdiction over claims challenging tribal membership rule). “The courts have consistently recognized that in absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity.” *Martinez v. S. Ute Tribe of S. Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957), *cert. denied*, 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376 (1958)) (citations omitted). “The great weight of authority holds that tribes have exclusive authority to determine membership issues.” *Smith v. Babbitt*, 875 F. Supp. 1353, 1360 (D. Minn. 1995), *judgment aff’d, appeal dismissed in part*, 100 F.3d 556 (8th Cir. 1996) (citing *Martinez v. Southern Ute Tribe*, *supra*, 249 F.2d at 920 (10th Cir. 1957)). Ms. Burley has identified no legislation defining this Tribe’s membership, or authorizing the federal courts to do so. Accordingly, the Court lacks jurisdiction to decide who is a member of the Tribe.

For similar reasons, the Court cannot determine who represents the Tribe — the Tribe itself must make those decisions, subject to limited oversight by the BIA. “The federal courts have also encouraged self-government [and] stated that when a dispute is an intratribal matter, the Federal Government should not intervene.” *Wheeler v. U.S. Dept. of the Interior*, 811 F.2d 549, 551 (10th Cir. 1987). When there is a dispute over who actually represents a tribe, the BIA has authority to decide whom the federal government will recognize. *Id.* at 552 (“[S]ince the Department is sometimes required to interact with tribal governments, it may need to determine which tribal government to recognize.”) The BIA also has authority to decide whether to recognize the results of a Secretarial election conducted under the Indian Reorganization Act. *See* 25 U.S.C. § 5123; 25 C.F.R. § 81.45. The federal courts have jurisdiction to review the BIA’s decisions, and they have been called upon to review several BIA decisions regarding this

Tribe. *See Miwok II*, 515 F.3d at 1268 (upholding BIA’s decision to *not* recognize Burley Faction as the Tribe’s government); *Miwok III*, 5 F.Supp.3d at 97-100 (finding BIA’s recognition of the Burley Faction to be unreasonable). But the courts lack jurisdiction to decide, in the first instance, who will represent the Tribe.

Because the Court cannot decide the issues that Ms. Burley seeks to raise, it should deny the Motion to Lift Stay.

C. *Res judicata* bars Ms. Burley’s arguments claims.

Ms. Burley argues in her motion that Yakima Dixie’s death ends the Tribal leadership dispute, and that the Ninth Circuit failed to take Mr. Dixie’s death into account when it denied the Burley Faction’s appeal in *Miwok IV*. (Motion to Lift Stay, ¶ 3.) Ms. Burley’s arguments are not properly before this Court and, in any case, they lack merit.

Ms. Burley’s claim rests on the false premise that, prior to Mr. Dixie’s death, he and the four members of the Burley Faction were the only five members of the Tribe, and that his death leaves the Burleys as the only four “enrolled” members. (Motion to Lift Stay, ¶ 4, 7.) The 2015 Decision explicitly rejected this claim, finding that “the Tribe’s membership is not properly limited to Mr. Dixie and the Burley family.” (2015 Decision, p. 4.) The 2015 Decision thus refutes Ms. Burley’s argument that the four members of the Burley Faction are now the “duly constituted Miwok Tribe” (Motion to Lift Stay, ¶ 7), and that they have the right to designate a “spokesperson” for the Tribe (*id*).

Ms. Burley has challenged the 2015 Decision, and lost. To the extent that Ms. Burley believes the Ninth Circuit erred in rejecting her appeal, she is entitled to seek review of that court’s decision. She has done so by filing a petition for rehearing. (Exhibit B to Rusk

Declaration.) The petition raises the issues presented in the Motion to Lift Stay, including the claim that Yakima Dixie’s death ends the Tribal leadership dispute, and the claim that all individuals except the members of the Burley Faction are merely “potential” members of the Tribe with no legal rights. (Exhibit B to Rusk Declaration, pp. 3, 9.)

Ms. Burley may not, however, relitigate in this Court the issues raised and decided in *Miwok IV*. The doctrine of “issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment.” *Bravo-Fernandez v. U.S.*, 137 S. Ct. 352, 358 (2016). In *Miwok IV*, the Burley Faction challenged the BIA’s determination that the Tribe’s membership was *not* limited to five people and that the Burley Faction did *not* represent the Tribe. *See Miwok IV*, 2017 WL 2379945, at *4. The District Court rejected the Burley Faction’s arguments on both issues, *see id.* at *6 - *8, and granted summary judgment against the Burley Faction, *id.* at *9. The Ninth Circuit affirmed.⁷ This judgment necessarily decided that the Burley Faction does not constitute the Tribe.

Even if *res judicata* and lack of jurisdiction did not bar Ms. Burley’s claims, her arguments would fail. Yakima Dixie’s death does not end the Tribal leadership dispute, because the dispute is not between Mr. Dixie and Ms. Burley. The 2015 Decision found that “the actual reorganization of the Tribe can be accomplished only via a process open to the whole tribal community” (2015 Decision, p. 5) — those individuals the Decision referred to as the “Eligible

⁷ Moreover, the District Court found in *Miwok IV* that *Miwok I* and *Miwok II* had *already* decided that the Tribe is not limited to five members, and that the Burley Faction was precluded from relitigating that issue in their challenge to the 2015 Decision. *Miwok IV*, 2017 WL 2379945, at *6. The Ninth Circuit assumed, without deciding, that issue preclusion did not bar consideration of the issue, and affirmed on the merits. *California Miwok Tribe, supra*, No. 17-16321, p. 2 n.1.

Groups” (2015 Decision, p. 4). The September 11, 2017 decision by the BIA’s Pacific Regional Director states that there is “no dispute” that there may be approximately 250 members of the Eligible Groups, and finds that 183 of those individuals were involved in the 2013 Tribal election in which the 2013 Constitution was ratified.⁸ (Exhibit D to Rusk Declaration, p. 2.) Mr. Dixie’s death does not deprive those individuals of their right to participate in Tribal governance, nor did the 2015 Decision limit Tribal organization efforts to “Dixie, and Dixie alone,” as Ms. Burley claims (Motion to Lift Stay, ¶ 3). The Decision “encourage[d] the Tribe” — not Mr. Dixie — to petition for a Secretarial election. (2015 Decision, p. 6.)

IV. CONCLUSION

The Tribal Council respectfully requests that the Court consider the Tribal Council’s Motion to Transfer Venue before ruling on Ms. Burley’s Motion to Lift Stay. If the Court does rule on Ms. Burley’s Motion, the Tribal Council submits that the Court should deny the Motion because the BIA has not recognized a Tribal government, this Court lacks jurisdiction to do so, and *res judicata* bars Ms. Burley’s attempt to relitigate issues decided by the 2015 Decision and *Miwok IV*.

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⁸ The number of known Eligible Group members is close to 300 today. (Lopez Declaration, ¶ 4.)

Respectfully submitted,

January 14, 2019

/s/ James Rusk

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CERTIFICATE OF SERVICE

I certify that on January 14, 2019, I caused a copy of the foregoing Response in Opposition to Motion to Lift Stay to be filed with the court using the CM/ECF system, which will send notification of such filing to the parties entitled to receive notice.

/s/ James Rusk
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