ORAL ARGUMENT NOT YET SCHEUDLED

No. 24-5231

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE,
Diane Aranda, Joshua Fontanilla, Yolanda Fontanilla, Michael Mendibles, Bronson Mendibles, Jasmine Mendibles, Leon Mendibles, Christopher Russell, and Rosalie Russell,
Plaintiff/Appellant,

v.

DOUGLAS BURGUM, U.S. Secretary of the Interior, *et al.,*
Defendants/Appellees.

APPEAL FROM THE UNTIED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF-APPELLANT/PLAINTIFF CALIFORNIA VALLEY MIWOK TRIBE, et al.,

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AS-IA	Assistant Secretary Of Indian Affairs
BIA	Bureau Of Indian Affairs/Appellees
CDIB	Certificate of Degree of Indian Blood
COBB DECISION	California Valley Miwok Tribe v. Haaland, No. 1:22-cv-01740-JMC, Docket Nos. 45 & 46 (Aug. 12, 2024)
CVMT or Tribe	California Valley Miwok Tribe (Appellant)
CVMT I	*Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.D.C. 2006)
CVMT II	*Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008)
CVMT III	*Cal. Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86, 95 (D.D.C. 2013) (Remand Decision)

CVMT IV	*California Valley Miwok Tribe v. Zinke*, 2017 WL 2379945 (E.D.Cal. 2017)
DOI	Department of the Interior (Appellees)
IBIA	Interior Board of Indian Appeals
IRA	Indian Reorganization Act of 1934
NEWLAND DECISION	DOI 2022 Decision of AS-IA Newland
OFA	Office of Federal Acknowledgement
PUTATIVE MEMBERS	1915 Census Descendants
WASHBURN DECISION	DOI 2015 Decision of AS-IA Washburn

SUMMARY OF ARGUMENT

AS-IA Washburn's decision should not be modified based on AS-IA Newlands speculation that all Miwok families on the 1929 Indian Census of Calaveras County have a right to be eligible members of the California Valley Miwok Tribe ("CVMT"). As the *CVMT III* Remand Decision clearly found, the first step is ensuring a duly constituted government exists.[1] That Tribal government cannot exist if based on rogue leaders or members. The Cobb Decision,[2] misinterpreted the Court's findings in *CVMT III*, by assuming the limited number of people proposing a constitution in the Burley faction, meant that the Dixie faction (that included Washburn's Eligible Groups) too was trying to limit membership to only a few members. Affidavits in the administrative record of descendants of the 1915 census, affirmed the extended community. But that community was based on known interaction with the other Miwok families of Sheep Ranch that some are now known to have descendance from collateral relatives. (i.e. great grandparents, uncles, aunts, and cousins).[3] The Appellants here, CVMT, instead support a process that identifies Miwoks with a historical

[1] *Cal. Valley Miwok Tribe v Jewel*, 5 F.Supp. 3d 86 (D.D.C. 2013) ("*CVMT III*")
[2] *California Valley Miwok Tribe v. Haaland*, No. 22-01740 (JMC) Docket Nos. 45 & 46 (Aug. 12, 2024) "(Cobb Decision")
[3] Affidavit of Michael Mendibles, CVMT-002431-537. His and Yakima Dixie Affidavits, speak of meetings with 30 to 100 Miwoks, that assisted Yakima Dixie with organization of community. CVMT-002609-2616.

connection to the Sheep Ranch Rancheria, that allows historical descendants of the tribe to set membership criteria, not the Federal Government.

Thus, the record supports that the Appellants/CVMT advocated in prior court decisions, that a larger community existed, and had included those Miwoks in organizational meetings. They were not advocating[4] in the lower court, or the *CVMT* cases, that membership should be limited to only a few people identified in the eligible groups (putative members). But that membership criteria can only be developed for future membership, by Miwoks with known historical connections to the tribe. In other words, whose ancestors were known by the community, not by those in modern times who either want to be members or believe they should be.

There is a community of Miwoks that have since the turn of the century been part of Sheep Ranch.[5] The Sylvia Burley faction is used as an example why tribal history is important in the development of membership criteria. The lower courts saw the fraud, with her actions to declare herself the Chairman of the Tribe, and to disenroll Yakima Dixie. See Exhibit A. Attachment L to the Washburn 2015 decision. (DOI failed to include this attachment to the Washburn decision in the record). It was upon those findings that the *CVMT III* court remanded the case,

[4] Plaintiff's Summary Judgment memo, Civ Act No. 22-01740, Doc. 28 pages 21-22. Plaintiff's argued "the Newland Memo suggests that this "community" consists of people who believe they are members of the Tribe"…rather than based on membership criteria.

[5] See, Mar. 26, 2004 letter of Dale Risling, Sr., Superintendent BIA Pacific Region, to Sylvia Burley rejecting constitution, CVMT 001097. Exhibit A. Attachment I of Washburn 2015 Decision. "It is only after the greater tribal community is identified that governing documents should be drafted and the Tribe's base and membership criteria identified."at CVMT-001098.

declaring there was no valid tribal council or constitution, and ordering the organization of the Tribe establishing a valid tribe existed.

In DOI's Reply brief, they accuse Appellant of supplementing documents supporting the fraud in the record. These documents were submitted as reference to underscore, the fact, the *CVMT III* court, had evidence of the fraud, and based on this evidence, the Revenue Sharing Funds were held in trust until the tribe was organized. The remand decision was a result of more than the fact of Burley's faction consisted of only 4 people. Thus, the records submitted are not to prove that the Newland decision violated the remand. But rather, to stand for the integrity of the Dixie faction that included historical descendants, in confronting someone, attempting to hijack the tribe without proof of a historical connection to the tribal community and who was unknown to the greater community. These facts were part of the Yakima Dixie declaration that is part of the administrative record. JA___ CVMT -001456-67.

The facts concerning Burley's faction, misappropriating funds, and attempting to disenroll Yakima Dixie, were known to AS-IA Washburn, and why he left it to the initial organizing group, to decide if those on the 1929 census could establish their connection to Sheep Ranch. Instead, he relied on the 1915 census that identified historical Sheep Ranch Miwoks. *See* Exhibit A, Attachments I and L to the Washburn Decision. JA___ECF 34-43-CVMT-003719-3726. He knew the

1929 Census did not distinguish which tribe the Indians in Calaveras County named on the census belong to, or whether over time they were a part of the Tribe. Attached to his 2015 decision was a 2014 document by the Regional BIA Director-Pacific Region, that reviewed prior attempts to organize the tribe and write a constitution including the Miwoks on the 1929 census. These documents point out the inconsistency in the membership criteria that fail to distinguish the Miwoks, on the 1929 census, from Miwoks family lines that were part of other tribes, or from other indigenous Miwoks in Calaveras with little known historical connection to Sheep Ranch. In Exhibit A, Attachment L, to Washburn Decision, contains a December 19, 2014, Memo of Dale Risling, Acting Regional Director, Pacific Region, of a review of 2013 Constitution to organize tribe, finding "[t]his Office recommends stating clear criteria for what "indigenous to Calaveras County" means and to specifically identify the process that would be used by the Tribal Council to certify the individual" [for membership in tribe] page 3. Risling disapproved of the 2013 draft constitution until it becomes legally sufficient.

DOI's Reply Brief attempts to use the Appellants participation in the organizational process prior to the Washburn decision and developing constitutions against them. But these early attempts to organize, assumed all descendants of John Jeff were related to Jeff Davis and therefore eligible as the initial organizing members (putative members). But out of frustration with the process the 1915

descendants challenged the vote on the constitution and the election was invalidated. JA___ CVMT-005356-57. These early drafts of constitutional documents were assisted by BIA staff and again when reviewed by Dale Risling, the 2013 constitution draft was found lacking in clear membership criteria and not legally sufficient. *Supra*, *See* Appellee Br., at Doc. #2119660 page 23 and f.n.9.

AS-IA Newland's decision that used a general Miwok census as membership criteria for the Tribe violated the remand because it failed to follow a final agency decision, that required the Agency determine first "whether a duly constituted government actually exists." *CVMT III* at 100. The Office of Federal Acknowledgement report and the Beckam Report, that revealed John Jeff was not Jeff Davis's son and therefore not in the eligible groups, was delayed because the failure of the BIA to use due diligence in the organization process and cannot now be used as an excuse to void the 2015 Decision of AS-IA Washburn. Modification to the Washburn decision resulted in the BIA overstepping its role, by setting the future membership of the Tribe without using due diligence in the *process.* Washburn knew of inaccuracies in the general 1929 calaveras census, when he wrote "[a]t the discretion of the Eligible Groups, the Miwok Indians named on the 1929 Census and their descendants may be given that opportunity to participate in the reorganization of CVMT." Washburn Decision at page 8. JA___ECF. 34-43-CVMT-003719-3726. But he was leaving that to the Tribe as a matter of self-

governance and self-determination to clarify. *Id.* He did not leave that decision to the BIA.

These, organizing members are referred to here as "putative members", because they too are not full members until the membership criteria are established. Once the initial organizing group or putative members determine the criteria for future membership, then the constitution would be ratified by those that qualify for future membership. In short, the Agency erred by not following a *process* respectful of the Tribes history that would allow known lineal descendants and/or those with historical connection to the tribe to research the tribe's historic community and establish the criteria for membership. A general census of all the Indians in Calaveras County in 1929 would not prove a historical connection to Miwok families part of the Sheep Ranch Rancheria community.

Whether the 2022 Newland decision complied with the *CVMT III* remand is appropriate for review on appeal. It is the legal issue before this court. *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002). The Complaint, (ECF-1) challenged the arbitrary and capricious decision making of the AS-IA in dramatically altering the organizational process based on an error in genealogy. CVMT's contention is the genealogy error, was not a surprising discovery, just one the BIA neglected. The Miwoks at the turn of the century had extended family relationships. As the Sioux in the great plains and other known ethnic variety of Native Americans

around the country. That does not mean a Native American with similar ancestry or collateral relatives can pick and choose their membership in a tribe. Membership criteria is an internal tribal matter. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The BIA has no role in the process of developing these criteria nor in designating members of any Federal Tribe. As Felix Cohen observed, constitutions that are "not the natural offspring of Indian hearts and minds" are "merely scraps of paper."[6] Overriding the heart and mind of historical descendants of the Tribe, or those, that over time, have participated in the community as a Native family, is an overreaching role of the federal government and does not comply with Indian Reorganization Act ("IRA") regulations for organizing Tribes. In 25 CFR part 81, that describes the BIA role in the process of organizing a tribe, it defines the meaning of Tribal member as: Member *of a tribe* or *tribal member* means any person who meets the criteria for membership in a tribe and, if required by the tribe, is formally enrolled. *Id*. § 81.4 Subpart B, Definitions.

The creation of constitutions under the Indian Reorganization Act (IRA) largely occurred between 1934 and 1945. These were documents following federal constitutions or forms. The IRA, enacted in 1934, provided the framework for tribes to adopt constitutions, establish self-governing structures, and receive federal

[6] *See* FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 32 (David E. Wilkins ed., 2006);

assistance. While the Act was in effect, many tribes did create and adopt these federal form constitutions based on its provisions. The period of active constitutional development and tribal governance under the IRA generally ended in the mid-1940s, although the Act's legacy continued to shape Indian policy.[7]

The *Cobb Decision*, R. # 2083738, 2024 WL 4345787, erred by placing emphasis on the number of members in the Burley small five-person general council form of tribal government. In *CVMT III*, the Court did not see a historic Tribe in the Burley family and declared the tribe unorganized. The *Cobb decision* assumed that the 1929 Census was the historic tribe without applying the IRA part 81 regulations, that require tribes to determine membership criteria. The Cobb Court thus allows the Washburn Decision to be modified without the due diligence required to distinguish the Sheep Ranch historic Miwok community from Miwoks on the 1929 Census. The DOI/BIA failed to determine whether those on the 1929 census were ever a part of the historic community or were Calaveras County Miwoks that married out and left the culture, left the Sheep Ranch community, or joined other Tribal communities. This lack of understanding of tribal enrollment practices led to the court's affirmance of the agency action that violated the remand decision, in *CVMT III*. The *Cobb Decision* overlooked the Remand and the

[7] *What Constitutes a Tribal Constitution?*, California Indian Legal Services (Aug 2, 2021) https://www.calindian.org/what-constitutes-a-tribal-constitution/.

regulations that required a *process* to organize the Tribe, that allows Tribal people to create membership criteria that identifies members with historical connections to the Miwok community located around Sheep Ranch Rancheria in Calaveras County, California. As a result, the *Cobb Decision* erred by affirming the use of the 1929 Census that included all Calaveras County Miwoks as the base roll of the Tribe without distinct membership criteria.

ARGUMENT

I. ISSUES RAISE BY CVMT ON APPEAL ARE NOT NEW LEGAL ISSUES AND ARE APPROPIATE FOR DE NOVO REVIEW

Appellant's CVMT, raise five issues on appeal in their Opening Brief. All five challenged the *Cobb Decision* that found AS-IA Newland modification of the Washburn decision, as arbitrary and capricious decision making that was both contrary to the record, and the application of the law and regulations on the organization of tribes. The five key issues were all related to the questions of law: 1.) Whether the district court erred in applying the Administrative Procedure ACT, finding Newland's 2022 Decision was reasonable under a deferential standard; 2.) Whether AS-IA Washburn's 2015 decision addressing the *CVMT III* remand, depended on the genealogy of Jeff Davis, and John Jeff; 3.) Whether the district court erred in finding AS-IA Washburn intended a larger community as members (1929 census) of the eligible groups to reorganize the Tribe; 4.) Whether the district court erred when it failed to distinguish the role of the organizing members

(putative members) from those that may qualify for membership under a tribal constitution ratified by the eligible members of the Tribe; and 5.) Whether the district court erred when it found the money's held in trust for the CVMT would be diverted from the Tribal membership unless the broader Miwok community participated in the reorganization of the Tribe. The CVMT also claimed in its complaint that BIA's modification, seven years after the final agency action, was unreasonable delay and in violation of the APA. R. 1, ¶¶ 82-88.

The issues challenging the Agency's decision making were pled in the Complaint. Each issue raise is an obvious legal question, raised appropriately under the APA, where questions of law are reviewed de novo by the Court of Appeals without deference to the lower court's decision. *Gerber*, 294 F.3d at 178 (quoting *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859 (D.C. Cir. 1993) ("We review the district court's APA ruling de novo, 'as if the agency's decision had been appealed to this court directly'").

The core issue raised by CVMT in the Court below, was that the Appellee, DOI/BIA violated the Remand decision of *CVMT III* and the law, when they allow Miwoks on the 1929 census to participate in a Secretarial Election to ratify a tribal constitution. AS-IA, Washburn 2015 decision addressing the Remand of *CVMT III*, did not designate Tribal members in his 2015 Decision. He designated those with known historical connections to the tribe, to be the initial organizing group

(putative members). He acknowledged these initial members could add additional Miwoks to the organizing group to assist with the initial organization of the tribe. He declined to interfere with the development of membership criteria. He wrote including some Miwoks on 1929 "may be proper", but he left the question of whether "the descendants of the Miwoks identified in the 1929 Census shall be included in the organization of the CVMT is an internal tribal decision that shall be made by the individuals who make up the Eligible Groups." JA___ECF 34-43.

The arguments, DOI highlight as "new" or raise the first time, are all issues found in documents in the Administrative Record. Even the use of the term putative members is in the administrative record. *See*, Exhibit A, attachment L to Washburn Decision. CVMT uses that term here as descriptive of the initial Miwoks, designated as eligible groups to reorganize tribe. This initial organizing group of Miwoks, or putative members, would set the membership criteria that all members of the tribe would need to meet, including the initial organizing group. CVMT, has consistently alleged that Newland violated the Remand followed by Washburn in his 2015 decision. The CVMT's APA claims are all obvious legal issues and appropriate for Appeal.

In the DOI Reply Brief raises two first time issues, that are not appropriate for de novo review of the appellate court. These new issues include violations of the APA for the unreasonable delay in the Agency's decision making, and the issue

of preclusion as baring CVMT's claims. DOI cites *Flynn v. Comm'r of Internal Revenue*, 269 F.3d 1064 (D.C. Cir. 2001) to assert that new arguments cannot be raised on appeal. R. # 2119660 Appellee Br. at 36. The application of *Flynn* here is improper. The *Flynn* court decided whether an argument raised by former workers for the first time on appeal could be considered. *Flynn*, 269 F.3d at 1065. The former workers asserted the new tax regulation had impermissibly given the Secretary too much power to determine which workers could seek a remedy, therefore violating the nondelegation doctrine. *Id. Flynn* substantially relies on the application of tax regulations. *Id.* at 1066-67. The CVMT claims differ because Flynn involved trial court issues. This case is brought under the Administrative Procedure Act and relies substantially on an administrative record, composed of tribal documents, tribal history, and administrative history. Even the *Flynn* Court recognized that exceptions to the general rule-that new arguments cannot be raised on appeal exist. *Id.* at 1069. These exceptions include, but are not limited to, instances where the issue is (1) purely a question of law, and (2) an issue antecedent to and ultimately dispositive of the case. *See Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013) (this was a review criminal trial court decision, but the appellate court discussed the common exceptions to the general rule.)

The exception of purely a question at law, has been applied in *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290 (9th Cir. 2015). In *Kaass Law*, the

appellant raised a new issue on appeal about whether a law firm could be subject to sanctions. *Id.* at 1292. The court allowed the new argument, under the purely at question of law exception, because there were two conflicting statutes which the court needed to distinguish. *Id.* at 1293. The court also acknowledged the opposing party would not suffer prejudice by considering the issue. *Id.* While review on appeal of the *Cobb decision* does not review statutory provisions like in *Kaass Law*, the issue here is still purely a legal question. This Court must determine if the lower court was in error, when it found, the modification of the Washburn 2015 decision seven years later was reasonable decision making and not in violation of the APA or laws governing the reorganization of the Tribe.[8]

APA review by Courts, is on the Administrative Record, much like the review of trial court decisions in the Courts of Appeals. When assessing a decision on summary judgment motion in an APA case, "the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "The entire case on review is a question of law, and only a question of law." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). "In such a case, summary judgment merely serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the

[8] *Planned Parenthood of Greater Wash. v. United States HHS*, 946 F.3d 1100, 1111 (9th Cir. 2020), applying the exception of purely a matter of law to an APA case.

administrative record and otherwise consistent with the APA standard of review." *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 106 (D.D.C. 2011). The Newland's departure from the Washburn Determination – setting a base roll for membership – is arbitrary, capricious, and contrary to law.

CVMT is entitled to de novo review of the lower court decision that challenged the modification of the remand, that was made 7 years after the Washburn decision. The action under APA for unreasonable delay is an obvious issue, based on the length of time CVMT parties have waited for the completion of the organizational process. This delay is well documented in the record. JA___ May 30, 2019 Letter from Pacific Region, Director, CVMT-005356. The additional three years passed the time when the genealogy corrections were made, added to an already delayed process caused by the lack of the Agency's due diligence in completing its genealogy review of the sheep ranch descendants. These facts were discoverable at the time of the Washburn Decision and cannot be used as facts to justify modification seven years later. *Liberty Mut. Inc. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 764-64 (8th Cir. 2003). The issues on appeal are not first time or new issues and are appropriate for appellate review.

II. ISSUE PRECLUSION DENIES DOI THE RIGHT TO MODIFY THE WASHBURN DECISION IN VIOLATION OF TRIBAL SOVEREIGNTY.

The DOI in their Reply Brief argue AS-IA Newland did not purport to modify

the Washburn Decision in the face of a judicial decision on the matter. Therefore, the application of the doctrine of issue preclusion has no bearing on the question whether a federal agency may modify an earlier agency decision in light of new evidence. They combine this argument, in their challenge, to Appellants argument that the DOI or federal Agency had a trust obligation to ensure the organization of the tribe protected the integrity of the future membership of the Tribe. This trust obligation the *CVMT III* court found, required the Agency to ensure the tribe was organized by members of the historic tribe to protect the tribe's political integrity. This is what the Appellant refers to as a *process* that complies with the *CVMT III* remand. *CVMT III*, 5 F. Supp. 3d at 95. JA_____CVMT 003250-56.

The findings of *CVMT III* that lead to Remand are as follows:

> "First, since at least 1831, Congress and the Supreme Court have acknowledged the existence of a trust relationship between the United States and Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 8 L. Ed. 25 (1831)…. Second, Congress has delegated to the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians. See, *Udall v. Littell*, 366 F.2d 668, 672, 125 U.S. App. D.C. 89 (D.C. Cir. 1966); *CVMT II*, 515 F.3d at 1267…. In light of these governing principles, the D.C. Circuit has held—and reaffirmed in this very case—that the Secretary has a duty "to promote a tribe's political integrity." CVMT II, 515 F.3d at 1267 ("A cornerstone of this [trust] obligation is to promote a tribe's political integrity, which includes ensuring that the will of the tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits."). (noting that the Secretary "has the power to manage all Indian affairs, and all matters arising out of Indian relations.")…. *CVMT I*, 424 F. Supp. 2d at 197, 201 (the Secretary must "ensure that [she] deals only with a tribal government that actually represents the members of the tribe);… This Court finds that the Assistant Secretary's conclusion that

> the citizenship of the Tribe consists solely of Yakima, Burley, Burley's two daughters, and Burley's granddaughter is unreasonable in light of the administrative record in this case. The Assistant Secretary rests his conclusion on principles of tribal sovereignty, but ignores—entirely—that the record is replete with evidence that the Tribe's membership is potentially significantly larger than just these five individuals… The Assistant Secretary rests his decision to reverse course on the BIA's "clear commitment to protect and honor tribal sovereignty." AR 002050. However, once again, the Assistant Secretary starts his analysis a step too late. Before invoking the principle of tribal self-governance, it was incumbent on him to first determine whether a duly constituted government actually exists. See, e.g., *Seminole Nation*, 223 F. Supp. 2d at 140 (noting that the Secretary must "ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole"); *CVMT I*, 424 F. Supp. 2d at 197, 201 (the Secretary must "ensure that [she] deals only with a tribal government that actually represents the members of the tribe). Indeed, as the Interior Board of Indian Appeals has recognized, when an internal dispute questions the legitimacy of "the initial tribal government," the BIA must ascertain whether the initial government is a duly constituted government:
>
> This is not an ordinary tribal dispute, arising from an internal dispute in an already existing tribal entity. In such cases [BIA] and this Board must exercise caution to avoid infringing upon tribal sovereignty. Rather, this case concerns, in essence, the creation of a tribal entity from a previously unorganized group. In such a case, BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so. *Alan-Wilson v. Bureau of Indian Affairs*, 1997 I.D. LEXIS 85, 1997 WL 215308, *10 (IBIA 1997) (citations omitted) (emphasis added); see also, *Ransom*, 69 F. Supp. 2d at 155 (chastising the Department for "merely repeating the rhetoric of tribal exhaustion and federal noninterference with tribal affairs," rather than determining the legitimacy of a disputed tribal government) 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."

The CVMT III court then remanded the case to the Agency:

> In the Federal Defendant's current view of this case, once a Tribe announces a government, the BIA is prohibited from ever questioning the legitimacy of

> the government no matter how many allegations of fraud are raised. Such a conclusion is not consistent with the "distinctive obligation of trust" the federal government must employ when dealing with Indian tribes, 5 F. Supp. 3d 86, *99; 2013 U.S. Dist. LEXIS 174535, Page 11 of 11 Seminole Nation, 316 U.S. at 296, nor is it supported by a reasoned explanation based on the administrative record. Petroleum Communications, 22 F.3d at 1172; CVMT II, 515 F.3d at 1267 (noting that the exercise of the Secretary's authority to manage all Indian affairs is especially vital when the receipt of significant federal benefits is at stake). Accordingly, the Court will remand [*101] this issue to the Secretary for reconsideration.

CVMT III, 5 F. Supp. 3d at 97-100. JA_____CVMT 003250-56.

From this long excerpt of the Courts Remand, the key points that underscore a process is to be follow by the DOI/BIA, to organize a tribe with political integrity, are that; 1.) the Secretary must "ensure that [she] deals only with a tribal government that actually represents the members of the tribe, 2.) Before invoking the principle of tribal self-governance, it was incumbent on him to first determine whether a duly constituted government actually exists, 3.) the Secretary must "ensure that [she] deals only with a tribal government that actually represents the members of the tribe; and 4.) applying the BIA's trust obligations… BIA has… a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so. *Id.*

Appellant CVMT argues, these principals underlying the *CVMT III* remand where not followed by AS-IA Newland when he modified the Washburn decision, allowing all Miwoks descended from the 1929 general census of Calaveras County Indians to be part of the initial organizing group (or putative members). AS-IA

Newland, justified his modification base on an error of genealogy alone. He did not ensure the political integrity of the tribe, by verifying these individuals, actually represent members of the tribe, or had the right by heritage, to be a part of the initial organizing group. He instead, overrode the sovereignty of the tribe, and determined the tribe's membership criteria. This action violated the Tribe's rights in the self-determination era, to determine their own base roll and membership criteria, and develop their own Tribal Constitution consistent with the historic community of the tribe.

AS-IA Washburn followed the Remand, and the Governments Trust obligation to Sovereign Indian Nations. He did not assume the Government had a right to set the future membership of the Tribe, or to create the Constitution based on the BIA's belief of who was a legitimate descendant. The *CVMT III*, the Court, recounting the history of the Burley/Dixie dispute, noted the role of the BIA in organizing a tribe is more flexible, and honors the membership of the tribe. *Id*. at 94.

> April 12, 2005, Burley, allegedly on behalf of the Tribe, filed suit in federal court in the District of Columbia, claiming that the BIA was interfering in the Tribe's internal affairs based on the BIA's refusal to recognize the Tribe as organized under the IRA. CVMT I, 424 F. Supp. 2d at 197. The BIA countered that while Section 476(h) of the IRA gives tribes more procedural flexibility in organizing under the IRA, it does not relieve the BIA of its duty to ensure that the interests of all tribal members are protected during organization and that tribal governing documents reflect the will of a majority of the tribe's members. *Id*. BIA thus defended its refusal to

> recognize the Tribe as an organized tribe on the ground that the Tribe had failed to take necessary steps to protect the interests of its potential members. *Id*. The district court agreed with BIA and dismissed the complaint for failure to state a claim. *Id*. at 203.

As discussed in the Appellant's Summary of Argument, *supra*, the era of Self Determination, the BIA, ceased writing Tribal Constitutional documents. Tribes, exercising their sovereignty, consider membership criteria, as an internal tribal matter. *Santa Clara Pueblo,* 436 U.S. 49. The BIA has no role in the process of developing these criteria nor in designating members of any Federal Tribe. As Felix Cohen observed, constitutions that are "not the natural offspring of Indian hearts and minds" are "merely scraps of paper."[9] Overriding the heart and mind of historical descendants of the Tribe, or those, that over time, have participated in the community as a Native family, is an overreaching role of the federal government and does not comply with Indian Reorganization Act ("IRA") regulations for organizing Tribes. As stated above in 25 CFR part 81, that describes the BIA role in the process of organizing a tribe, it defines the meaning of Tribal member as: *Member of a tribe* or *tribal member* means any person who meets the criteria for membership in a tribe and, if required by the tribe, is formally enrolled. *Id*. § 81.4 Subpart B, Definitions.[10]

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[9] *See* FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 32 (David E. Wilkins ed., 2006);

[10]The period of active constitutional development and tribal governance under the IRA generally ended in the mid-1940s, although the Act's legacy continued to shape Indian policy. *See* f.n.6.

The DOI/BIA is now precluded from modifying the *CVMT III* decision, that required the BIA, under its trust obligation, ensure the organizational process protect the integrity of the *historic* tribal membership, so that those who organize the tribe properly have the right to do so. The *CVMT III* decision was clear the agency was responsible for establishing that a historic tribal government exists…not that there are Miwoks today that want to be members of the Tribe. The Court's remand requiring the protection of the Tribe's political integrity was not sanctioning that all Calaveras Miwoks should be included in the Tribe. If DOI disagreed with the Remand, their option was an appeal at the time, not a modification 7 years later that determine a base roll without membership criteria defining the tribe.

The DOI's application of *Jones v. Air Line Pilots Ass'n, Int'l*, 642 F.3d 1100 (D.C. Cir. 2011) to this appeal is improper. In *Jones*, the appellant-pilot raised a new theory on appeal arguing that the federal law did not preempt his state law claims. This argument was directly contrary to the concession he made in the court below, that if the federal law was constitutional then his state law claims were preempted. *Id.* The *Jones* court further emphasized that the new theory could not be considered because the defendant-respondents had no opportunity to address a claim they could not predict. *Id.* at 1104. Additionally, *Jones* was not a case under the APA, it only considers the interaction between state laws and federal laws.

Here, one of the overarching issues in dispute is the validity of the Newland decision. CVMT raising issue preclusion is not a "new theory" as DOI asserts, rather it is simply a new argument that is subject to the same exceptions detailed earlier, it addresses an issue of law.

DOI primarily relies on *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014) to argue that an agency possesses authority to revisit its decisions. Appellee Br. at 53. However, the authorities *Ivy Sports Med.* cite this rule acknowledge that this authority to revisit prior decisions expires once the time to appeal has expired. *See Ivy Sports Med.*, 767 F.3d at 86 (citing *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984); and *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977)). Although DOI asserts that issue preclusion does not apply to administrative decisions, DOI provides no authority to support this. Appellee Br.at 53. *B&B Hardware, Inc., v. Hargis Indus.* demonstrates that when agencies act in an adjudicatory manner and resolve issues of fact where parties had adequate opportunities to litigate, courts commonly apply principles of *res judicata*. 575 U.S. 138, 148 (2014) (citations omitted).

Issue preclusion is meant to prevent relitigation of issues previously decided. Although new evidence may allow a party to raise a previously decided issue, the new evidence must be the result of a new "factual situation or changed circumstances." *Yamaha Corp. of America v. United States*, 961 F.2d 245, 257

(D.C. Cir. 1992) (citing *Jones v. United States*, 466 F.2d 131, 136 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1979)). Permitting the use of evidence available at the time of the original decision would go against the principles of issue preclusion. *Yamaha Corp*., 961 F.3d at 257. Additionally, a party's failure to perform due diligence in discovering evidence does not render the evidence they did not find at the first hearing to be "new." *See Liberty Mut. Inc. Co..*, 335 F.3d at 764-64 (finding a party's dilatory discovery of a fact was subject to issue preclusion). The evidence Newland relied on was all evidence that existed and was discoverable at the time of Washburn's decision. The OFA and Beckham Reports only served to compile available information that existed prior to and during the Washburn decision. Accordingly, DOI's failure to discover this information at the time of the Washburn decision precludes them from relying on it to support the Newland decision that is contra to the remand.

AS-IA Washburn, when he issued his 2015 Decision, included 12 attachments (A-L). Some of the attachments were mis labeled. But of 11 of the 12 all were in the Administrative Record, except Attachment L. *See* Exhibit A. Attachment L is significant because it is a memorandum written by Regional Director of the Pacific Region Office of the BIA, Dale Risling, dated Dec. 19, 2014, to Jim Porter in the Office of the Solicitor at DOI, reviewing the 2013 Constitution, and finding the membership criteria that combined the 1929 census

and what he list as the Putative members, and other provisions vague and legally insufficient. He attaches a memo from the regional solicitor's office finding the eligibility for membership criteria unclear and recommends not approving. Therefore, based on this Attachment L to his 2015 Decision, AS-IA Washburn was aware of the problems with using the 1929 general Calaveras County Indian Census. He knew the Solicitor's office was not recommending membership criteria, this vague, to establish membership for the Tribe.

On May 30, 2019, after the Office of Federal Acknowledgement confirmed that John Jeff was not the son of Jeff Davis, and therefore, those related to John Jeff identified by the 1929 census were not part of the eligible groups in the Washburn decision, Amy Dutschke the Regional Director of the BIA Pacific region wrote to the 1915 lineal descendants, and inform them that "[i]t would be a violation of the Secretary's responsibility to the Tribe, as well encapsulated in the specific directions set out in the Washburn Decision, to approve a Secretarial election in which most of the voters were not in fact descendants of the eligible groups." This letter acknowledges that the BIA was aware of its trust obligations in organizing the Tribe. Unfortunately, before, discussion with the 1915 descendants and their Counsel could occur with either the Regional Director or the offices of the AS-IA Newland, the organizational process was paused, and a modification to the Washburn decision was not made until May 31, 2022. The modification was

three years after the genealogy error was discovered and reported on May 30, 2019. AS-IA Newland, impacted the reliance interest of the 1915 lineal descendants and those potential collateral descendants in the extended community that may have been able to meet the tribal membership criteria. It is in the record that after the modification of the Washburn decision, the AS-IA refused the request of the Appellants here to meet and discuss the process for organization of the Tribe. JA____ECF 28-1 (Colin West declaration attached to his Summary Judgment motion). The Newland process violated the remand decision, and ignored legal opinions that said membership criteria, using vague references to Miwoks on the 1929 census were legally insufficient. *See* Exh. A, Attachment L to the Washburn Decision.

Thus, the *Cobb Decision*, R. # 2083738, 2024 WL 4345787, misinterpreted the analysis of the prior rulings, that found the governing documents of the small 5 person general council form tribal government invalid. The Cobb court assumed that the Tribe's base roll was the 1929 Census without distinction of families that married out, left the community, or joined other Tribal communities. This lack of understanding of tribal enrollment practices led to the court's affirmance of the Agency's action that violated the remand decision. The *CVMT III* Remand required a *process* fulfilling the Agency's trust responsibility to sovereign tribes, to organize the Tribe composed of members with historical connections to the Miwok

community located around Sheep Ranch Rancheria in Calaveras County, California. As a result, AS-IA Newland modification of the Washburn Decision is issue preluded.

CONCLUSION

For the reasons stated above, the Court should reverse and remand the district court's decision to comply with the *CVMT III* Remand, and applicable law honoring Tribal Sovereignty in the Reorganization of Federal Tribes.

Dated: June 23, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 23, 2025, I caused a copy of the foregoing Reply Brief to be filed electronically and that this document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Dated: June 23, 2025

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