

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK)
 TRIBE, formerly SHEEP RANCH OF)
 ME-WUK INDIANS OF CALIFORNIA)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA)
 GALE A. NORTON, Secretary of the)
 Interior,)
)
 and)
)
 MICHAEL D. OLSEN, Acting Assistant)
 Secretary – Indian Affairs)
)
 Defendants.)

No. 1:05CV00739
Judge James Robertson

DEFENDANTS’ MOTION TO DISMISS

Defendants hereby move to dismiss this suit for lack of subject matter jurisdiction pursuant to FRCP 12 (b)(1), or, in the alternative, for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6).

A Memorandum in Support of this motion is attached.

Dated this 5th day of August, 2005.

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MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS

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- ATTACHMENT B Complaint for Injunctive and Declaratory Relief (April 29, 2002), California Valley Miwok Tribe v. United States, No. CIV. S-02-0912-FCD GGH (E.D. Cal.).
- ATTACHMENT C Memorandum and Order (July 1, 2004), California Valley Miwok Tribe v. United States, No. CIV. S-02-0912 FCD GGH (E.D. Cal.).
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- ATTACHMENT G Order (August 28, 2003), Williams v. United States, No. CIV. S-01-2040 WBS JFM (E.D. Cal.).

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MEMORANDUM IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS

INTRODUCTION

Plaintiff California Valley Miwok Tribe^{2/} challenges the government’s “decision” (allegedly contained in the February 11, 2005 letter from Michael Olsen, Acting Principal Deputy Assistant Secretary - Indian Affairs to Mr. Yakima Dixie,^{3/}) not to recognize: (1) the Tribe’s

^{1/} This is not Mr. Olsen’s correct title.

^{2/} At the present time, the California Valley Miwok Tribe (hereafter, “Tribe”) lacks “a governing body duly recognized by the Secretary of the Interior” as required by 28 U.S.C. § 1362. As explained *infra* while the Tribe seeks to appeal the Secretary’s decision that the Tribe does not have a recognized governing body, that decision became final over a year ago.

^{3/} See Paragraph No. 6 of Prayer for Relief and Plaintiff’s Opposition to Defendants’ Motion to Transfer Venue and Suspend Obligation to Answer in District of Columbia, filed on

constitution adopted by the Tribe in September, 2001 as a legitimate governing document, Comp. at ¶¶ 21, 30, 32, 42, 43, and 45; (2) Ms. Sylvia Burley as the Tribal Chairperson, *id.* at ¶¶ 14, 15, 19, 22, 23, 27, 28, 29, 36, 37, 40, 41, and 45; and (3) the tribal forum created by Tribal Council Resolution No. R-1-02-04-2004, *id.* at ¶¶ 38, 45, and 46. In short, Plaintiff seeks to have this Court settle an internal tribal dispute by declaring that Plaintiff's constitution, leader and tribal forum are legitimate, even though they are not supported by the will of the tribal membership⁴ - - that is, not supported by a majority of the "whole tribal community." See Exhibit No. 3 attached to the Complaint (Letter of March 26, 2004 from the Superintendent of the BIA's Central California Agency to Sylvia Burley⁵).

Plaintiff has asserted that the February 11, 2005 Olsen letter to Mr. Yakima Dixie is the

July 11, 2005. Plaintiff's Opposition states that this action was filed ". . . seeking declaratory relief from the February 11, 2005 letter of Michael D. Olsen in view of 25 U.S.C. [sec] 476(h)." Pl. Opp. at 2). Plaintiff adds that the Olsen letter is "[t]he only event giving rise to the instant case . . ." [Emphasis supplied] (Pl. Opp. at 3). (Excerpt of Pl. Opp attached as Attachment A).

⁴ Plaintiff's Complaint asks this Court to declare the following: 1) that the Plaintiff retains "inherent sovereign power to adopt governing documents under procedures other than those specified in 25 U.S.C. § 476 (a-g);" 2) that the constitution adopted by the Tribe in 2001 is a valid governing document for the Tribe; 3) that Tribal Council Resolution R-2-3-16-2000 adopted by the Tribe on March 16, 2000 which resolved that Yakima Dixie waived his right to contest his resignation is a valid governing document; 4) that Tribal Council Resolution R-1-02-04-2004 adopted by the Tribe on February, 2004 to provide a tribal forum for Yakima Dixie's appeal is a valid governing document; 5) that the Tribe "has lawfully organized pursuant to 25 U.S.C. § 476;" and 6) that the February 11, 2005 letter from Defendant Michael D. Olsen in his capacity as Acting Assistant Secretary – Indian Affairs to Yakima Dixie is invalid. Plaintiff has brought two previous cases alleging similar facts. The first was dismissed for lack of jurisdiction and is currently pending before the Court of Appeals for the Ninth Circuit. C.A. No. 04-16676. The second was voluntarily dismissed before this court. CIV. 1:04CV1794 RWR.

⁵ In this letter, BIA concluded that the Plaintiff tribe was not "organized" and therefore, BIA could neither recognize the Tribe's constitution as a valid document nor recognize Sylvia Burley as the Tribal Chairperson. The letter specifically informed Ms. Burley that she could file an administrative appeal from this decision under 25 C.F.R. Part 2 (2004).

“only event giving rise to the instant case...” (Pl. Opposition to Defendants’ Motion to Transfer Venue and Suspend Obligation to Answer in the District of Columbia, filed July 11, 2003 at 3). This assertion is consistent with Paragraph 6 of the Prayer for Relief requesting that the Olsen letter be declared “invalid,” but not requesting that the March 26, 2004 letter be declared invalid.

Mr. Olsen, however, did not render the particular decisions plaintiff attempts to challenge in this action.⁹⁷ More notably, the Olsen letter refers to the March 26, 2004 letter as “BIA’s decision” and discusses the contents of the March 26th letter.

All three of Plaintiff’s claims arise from the BIA’s March 26, 2004 decision letter. If there is only one event giving rise to this lawsuit, then it is the issuance of this decision letter from which all claims flow. This conclusion is based upon the March 26, 2004 decision that the finding that the Plaintiff tribe is not “organized”. Based upon this finding, the BIA refused to recognize the tribal constitution and to recognize Ms. Burley as Tribal Chairperson. The BIA’s refusal to recognize the tribal forum created by Tribal Resolution R-1-02-04-2004 also necessarily flows from its March 26, 2004 decision that the Tribe is not “organized” and, therefore, can adopt no governing documents until it becomes “organized.” It also flows from Defendants alleged failure to recognize the tribal constitution because, as Plaintiff alleges in its

⁹⁷ Mr. Olsen rendered other decisions in his letter: He determined that: (1) an appeal submitted by Yakima Dixie was moot; (2) that Mr. Dixie raised new issues that had not been previously raised at a lower level of his administrative appeal; and (3) that Mr. Dixie’s appeal was untimely. None of these decisions is at issue this lawsuit.

⁷ As Mr. Olsen repeatedly observes in his letter of February 11th, the decisions Plaintiff seeks to challenge in this litigation were made in March 2004 and conveyed at that time directly to Silvia Burley. Despite providing appeal rights, no administrative challenge has ever been made to these decisions. Thus, they became final several months prior to Mr. Olsen’s February 11th letter.

“First Claim for Relief” (¶¶ 49(a) and (b) of Complaint), the 2004 tribal resolution creating the tribal forum and the tribal constitution are both tribal governing documents. Accordingly, it follows that the refusal to recognize the tribal constitution implicitly encompasses any and all tribal governing documents.

Plaintiff predicates its claims on the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, *et seq.*, and the Indian Reorganization Act (“IRA”), 25 U.S.C. § 476 (h), (the Native American Technical Corrections Act). Defendants hereby move to dismiss this action for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1) or, alternatively, for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6). Subject matter jurisdiction is absent because the resolution of internal tribal disputes are not within the court’s limited jurisdiction.

Alternatively, Plaintiff fails to state a claim under the APA because the decisions which are challenged in this suit were made in March, 2004, and have never been administratively appealed, as authorized by Section 2.6(a) of 25 C.F.R. Part 2 (See ATTACHMENTS D and E). As to its claims under the IRA, Plaintiff cannot show that Defendants’ March 26, 2004, decision violated the IRA. Plaintiff’s argument relating to the IRA is also without merit. Section 103 of the Native American Technical Corrections Act of 2004 which added subsection (h) to Section 16 of the IRA (25 U.S.C. § 476 (h)), simply confirmed the right of Indian tribes to adopt their own governing documents outside the provisions of that IRA. The added subsection did not do away with the substantive and procedural requirements of IRA and the Secretary’s regulations when a tribe sought to reorganize pursuant to it and in return to obtain the Secretary’s approval of its governing document pursuant to the act.

Sylvia Burley (born in 1960) and her two daughters have changed the name of the Sheep Ranch Rancheria of Me-Wuk Indians, and seek legitimacy as a tribe consisting only of them and their descendants. In its prior suit against the government in the Eastern District of California (California Valley Miwok Tribe v. United States, et al., No. CIV. 5-02-0912 FCD GGH), the Tribe alleged in the Complaint: “Plaintiff claims it is an Indian tribe with a potential membership of 250 people . . .” (Copy of Complaint appended as ATTACHMENT B). These 250 people, in our opinion, constitute the “whole” (or a least) “greater” tribal community discussed in the March 26th letter, which is not reflected in the present membership of the Tribe.

SUMMARY OF ARGUMENT

This case should be dismissed for lack of subject matter jurisdiction because it involves, in essence, an internal tribal dispute. In the alternative, it should be dismissed for failure to state a claim upon which relief may be granted under the Administrative Procedure Act because Plaintiff failed to exhaust its administrative remedies and because the supposed violation of the Indian Reorganization Act is not supported by the facts alleged.

FACTUAL BACKGROUND

In 1998, the BIA Central California Agency recognized the right of certain individuals to “ ‘participate in the initial organization of the Tribe.’ ”[§] (¶ No. 11 of General Allegations of the Complaint). Following the Tribe’s general election in May of 1999, the BIA’s Central California Agency recognized Sylvia Burley as Tribal Chairperson in June, 1999. (Paragraph Nos. 14 and 15 of General Allegations of Complaint).

[§] Organizing the tribe entails identifying the greater tribal membership, drafting governing documents, and seeing that those documents are adopted by the membership.

In October, 1999, the Tribal Council adopted a resolution on “Interim Operations Authorities and Rights.” (¶ No. 25 of the General Allegations). In July of 2000 and 2001, the BIA’s Central California Agency confirmed its recognition of Sylvia Burley as Tribal Chairperson. (¶¶ Nos. 27 and 28 of General Allegations).

In a June 7, 2001 letter, Ms. Burley withdrew the Tribe’s initial request for the review of the Tribal constitution and the scheduling of a Secretarial Election to approve this constitution. (¶ No. 30 of the General Allegations).

In an October 31, 2001, letter to Sylvia Burley, the Superintendent of the BIA’s Central California Agency stated, in pertinent part, as follows:

The Agency will continue to recognize the Tribe as an unorganized Tribe and its selected officials as an Interim Tribal Council until the Tribe takes steps to complete the Secretarial election process. Agency staff is available to provide technical assistance in this matter upon receipt of the Tribe’s written request. We are returning the original document [the September, 2001 tribal constitution] without any action.

[Emphasis added.] (¶¶ Nos. 32 and 21). In 2001, Yakima Dixie filed suit filed in federal district court for the Eastern District of California, “. . . challenging the Tribe’s membership and leadership;” the suit was dismissed in 2002, in part, for failure to exhaust administrative remedies. (¶¶ Nos. 31 and 33 of Complaint; Attachment C to Memorandum in Support of Defendants’ Motion to Transfer Venue and Suspend Obligation to Answer in District of Columbia). (Copy of Attachment C appended hereto as Attachment C.) Around October of 2003, Mr. Dixie filed an “Administrative Appeal” to the Deputy Assistant Secretary - Indian Affairs raising the same issues that were raised in the Eastern District of California suit. (¶ No. 35).

On February 11, 2004, the Tribe transmitted a copy of its September 2001 constitution to the Superintendent of the BIA's Central California Agency for BIA's "... records, and not for review." (§ No. 42). In a March 26, 2004 letter to Sylvia Burley, the Superintendent states, in pertinent part, as follows:

Although the Tribe has not requested any assistance or comments from this office in response to your document, we provide the following observations. As you know, the BIA's Central California Agency (CCA) has a responsibility to develop and maintain a government-to-government relationship with each of the 54 federally recognized tribes situated within the CCA's jurisdiction. This relationship includes, among other things, the responsibility of working with the person or persons from each tribe who either are rightfully elected to a position of authority within the tribe or who otherwise occupy a position of authority within an unorganized tribe. However, the BIA does not view your tribe to be an 'organized' Indian Tribe and this view is borne out by the document you have presented as the tribe's constitution but additionally, by our relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria .

* * *

When a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence of such general involvement was attempted or has occurred within the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who maintained any cultural contact with the Sheep Ranch. To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters. We are unaware of any efforts to involve Yakima Dixie or Mr. Dixie's brother Melvin Dixie or any offspring of Merle Butler, Tillie Jeff or Lenny Jeff, all persons who have resided at Sheep Ranch Rancheria at various times in the past 75 years and persons who have inherited an interest in the Rancheria. We are also not aware of any efforts to involve Indians (such as Lena Shelton) and their descendants who once lived adjacent to Sheep Ranch Rancheria or to investigate the possibility of involving a neighboring group. We are aware that the Indians of the Sheep Ranch Rancheria were in fact, part of a larger group of Indians residing less than 20 miles away at West Point. * * * The BIA remains available, upon your request, to assist you in identifying the members of the local Indian community, to assist in disseminating

both individual and public notices, facilitating public meetings, and otherwise providing logistical support.

It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified. The participation of the greater tribal community is essential to this effort. We are very concerned about the designated 'base roll' for the tribe as identified in the submitted tribal constitution ***

* * * *

We must continue to emphasize the importance of the participation of a greater tribal community. We reiterate our continued availability and willingness to assist you in this process and that via PL 93-638 contracts intended to facilitate the organization or reorganization of the tribal community, we have already extended assistance. we urge you to continue the work you have begun towards formal organization of the California Valley Miwok Tribe. * * *

* * * *

Should you wish to appeal any portion of this letter, you are advised you may do so by complying with the following:

* * * *

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

(emphasis added.) See Exhibit 3 attached to Complaint. In her effort to organize the tribe, therefore, Ms. Burley had failed to identify the greater tribal membership and obtain its support for her proposed constitution, which she acknowledged/asserted to exist in her prior complaint in the Eastern District of California (see supra, p. 5).

Defendant Olsen addressed the issue of the tribe's forum in a February 11, 2005 letter to Yakima Dixie which states, in pertinent part as follows:

Your appeal of the BIA's recognition of Ms. Burley as Tribal Chairman has been rendered moot by the BIA's decision of March 26, 2004, . . . rejecting the Tribe's proposed Constitution. In that letter, the BIA made clear that the

Federal government did not recognize Ms. Burley as the tribal Chairman. * * *

* * * *

In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum. * * *

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. Rule 12(b)(1) Motions

In ruling on a FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not limited to the allegations of the Complaint, but can consider matters outside the Complaint. Marsh v. Johnson, 263 F. Supp. 2d 49, 54 (D.D. C. 2003). Indeed, the factual allegations in the Complaint receive “closer scrutiny” than they do in the case of a FRCP 12(b)(6) motion. The principal rationale for this “closer scrutiny” is because “subject matter jurisdiction focuses on the court’s power to hear the claim.” (Id.) Bobreski v. U.S. Environmental Protection Agency, 284 F. Supp. 2d 67, 72 (D.D.C. 2003). Another rationale for this “closer scrutiny” is that a 12(b)(1) motion “. . . focuses on the Court’s power to hear the claim.”(Id.). The Plaintiff has a burden of establishing by a preponderance of the evidence that the court has jurisdiction to adjudicate these three claims. U.S. v. ex rel. Rockefeller v. Westinghouse Electric Co., 274 F. Supp. 2d 10, 14 (D.D. C. 2003), aff’d sub nom. Rockefeller ex rel. U.S. v. Washington TRU Solutions, LLC, 2004 WL 180264 (D.C. Cir. 2004).

B. The Court Lacks Jurisdiction to Adjudicate an Internal Tribal Dispute.

At heart this case is about an internal tribal dispute between Yakima Dixie and Sylvia Burley over leadership and tribal organizational issues. Ms. Burley's submission of a constitution to the BIA in March 2004 was part of that dispute and the BIA's March 26, 2004 letter was the BIA's response to it. Plaintiff's claims, therefore, will necessarily require this court to settle that internal tribal dispute. The Plaintiff's prayer for relief is most telling. It requests the court to declare, among other things, that Ms. Burley's constitution is a valid governing document, that Ms. Burley is the tribal chairperson, and that the resolution establishing the tribal forum is a legitimate governing document. This court, however, lacks jurisdiction to resolve Plaintiff's claims and grant its requested relief.

As a general rule, federal district courts lack jurisdiction over internal tribal leadership disputes, membership issues, and organizational issues. In re Sac & Fox Tribe, 340 F.3d 749, 763 (8th Cir. 2003) (leadership); Smith v. Babbitt, 100 F.3d 556, 558-559 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997) (membership); Ordinance 59 Ass'n v. United States Dep't of the Interior, 163 F.3d 1150, 1159-1160 (10th Cir. 1998) (membership); Potts v. Bruce, 533 F.2d 527, 529-530 (10th Cir. 1976) (organizational issues), cert. denied, 429 U.S. 1002 (1976); Motah v. United States, 402 F.2d 1, 2 (10th Cir. 1968) (organizational issues). But see Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002).

There is a limited exception to this general rule when a federal statutory responsibility is implicated. In Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002) this court adjudicated a challenge by the Seminole Nation to the Secretary's refusal to recognize the tribal government and its principal chief because the Nation was excluding its Freedmen members from voting. But Seminole is distinguishable from the case at hand because in

Seminole the Secretary had a statutory responsibility to ensure the integrity of the tribal election process. In this case, the Defendants have no comparable statutory responsibility under Section 476(h) which would require the Secretary to review a tribal constitution, as opposed to review at the Secretary's discretion.

This case squarely involves an internal tribal dispute over leadership and organizational issues. First, Yakima Dixie and Sylvia Burley dispute who should lead the Tribe, as evidenced by Michael Olsen's February 11, 2005 letter about Mr. Dixie's challenge of Ms. Burley's leadership position. Second, Yakima Dixie and Sylvia Burley are presently working with the BIA along parallel lines to organize the tribe. Were the Court to adjudicate the Plaintiff's claims, it would necessarily decide these issues for the tribe. Under the authority cited above, the court does not have jurisdiction to do so. The case should be dismissed under FRCP 12(b)(1).

C. The Government Has Not Waived its Sovereign Immunity

_____The United States, its agencies and its employees may not be sued in the absence of a waiver of sovereign immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988); United States v. Testan, 424 U.S. 392, 399 (1976). The terms of the sovereign's consent define a court's jurisdiction. United States v. Sherwood, 312 U.S. 584, 586-87 (1941). Therefore, the United States, as a sovereign, is immune from suit except to the extent that it consents to be sued. Id.

Where suit is brought against the United States, as here, the United States' waiver of sovereign immunity is one of the cornerstones informing the court's jurisdiction. F.D.I.C., 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature"); United States v. Mottaz, 476 U.S. 834, 841 (1986)("When the United States consents to be sued the terms of its waiver of

sovereign immunity define the extent of the court's jurisdiction")(emphasis added); Block v. North Dakota, 461 U.S. 273, 278 (1983)(same); *see also* United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)("Jurisdiction over any suit against the [United States] Government requires a clear statement from the United States waiving sovereign immunity. . . together with a claim falling within the terms of the waiver"). The burden of establishing waiver of sovereign immunity rests at all times with the party asserting a claim against the United States, its agencies and/or its employees. Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987) (plaintiff "bears the burden of demonstrating an unequivocal waiver of immunity"), cert. denied, 487 U.S. 1204 (1988).

Here, Plaintiff has not identified any waiver of sovereign immunity which would allow it to bring suit on the claims at issue. Without such a waiver, this court has no subject matter jurisdiction over Plaintiff's claims.

II. ALL OF PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Rule 12(b)(6) Motions.

In ruling upon a FRCP 12(b)(6) motion, the court must accept the allegations of the complaint as true, but need not accept any of plaintiff's legal conclusions as true. Briton v. Palestinian Interim Self - Government Authority, 310 F. Supp. 2d 172, 177 (D.D.C. 2004); Coleman v. Elec. Power Co., 310 F. Supp. 2d 154, 157 (D.D.C. 2004), aff'd, No. 04-7043, 2004 WL 2348144 (D.C. Cir. Oct. 19, 2004). In the same vein, the court need not accept plaintiff's legal inferences or conclusory allegations unsupported by facts set forth in the complaint. Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 238 F. Supp. 2d 174, 177-178 (D.D.C.

2002). Also, the court need not accept legal conclusions cast in the form of factual allegations. In re Lorazepam & Clorazepate Antitrust Litigation, 295 F. Supp. 2d 30, 34 (D.D.C. 2003).

The court may take judicial notice of matters of a general public nature such as court records. Primorac v. CIA, 277 F. Supp. 2d 117, 119 (D.D.C.), aff'd, No. 03-5271, 2004 WL 869631 (D.C. Cir.2004).^{2/} In ruling on a 12(b)(6) motion, the court may consider public records and matters of which a court may take judicial notice. Jackson v. City of Columbus, 194 F. 3d. 737, 741 (6th Cir. 1999) overruled on other grounds sub nom., Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002). Matters of “public record” include pleadings, orders and other papers filed with the court or records of administrative bodies. Barapind v. Reno, 72 F. Supp. 2d 1132, 1141 (E.D. Cal. 1999), aff'd, 225 F.3d. 1100 (9th Cir. 2000).

B. The Failure to Exhaust Administrative Remedies is Properly Pled Under a 12(b)(6) Motion.

The Second Claim for Relief in the Complaint alleges that all of Plaintiff’s three claims implicate the APA. See ¶¶ Nos. 53, 54, and 57. Plaintiff, however, has failed to exhaust administrative remedies and, therefore, the Complaint should be dismissed under FRCP 12(b)(6).

The BIA’s decision of March 26, 2004, which gave rise to all of Plaintiff’s claims, was appealable to the Regional (formerly Area) Director of BIA’s Pacific Regional Office. Under 25 C.F.R. Part 2 (2004). Plaintiff does not allege that it filed such an administrative appeal. Indeed, no such appeal has ever been filed. See ATTACHMENTS A and B hereto.

^{2/} But see Herron v. Veneman, 305 F. Supp. 2d 64, 69 (D.D.C. 2004) which held the court could not consider factual allegations in briefs or the memoranda of law, particularly when they contradict the complaint. This case can be distinguished because it concerns the government’s failure to use the proper format for its motion for summary judgment. Rather than prepare a Statement of Uncontroverted Facts with supporting documents, the government attached excerpts from its prior pleadings in Veneman.

This Circuit has held that even in the case of “non-jurisdictional” exhaustion, the failure to exhaust administrative remedies is properly pled under a 12(b)(6) motion. See Johnson v. District of Columbia, 368 F. Supp. 2d 30, 36 (D.D.C. 2005):

In cases involving the application of the non-jurisdictional exhaustion requirement imposed by the Freedom of Information Act (“FOIA”), the D.C. Circuit has treated exhaustion as a condition precedent to filing suit in federal court. See Hidalgo v. F.B.I., 344 F.3d 1256, 1259-60 (D.C.Cir.2003); see also Wilbur v. C.I.A., 355 F.3d 675, 677 (D.C.Cir.2004). A plaintiff's failure to demonstrate that he or she has satisfied this condition, then, is tantamount to a failure to sufficiently plead a necessary element of a federal cause of action. Thus, when a federal court finds that the plaintiff failed to exhaust his or her administrative remedies, and the exhaustion requirement is prudential rather than jurisdictional, the appropriate disposition is to dismiss the plaintiff's unexhausted claims under Federal Rule of Civil Procedure 12(b)(6). In such a case, the plaintiff has in fact “failed to state a claim on which relief may be granted” with respect to the unexhausted claim or claims by failing to demonstrate that a necessary precondition to judicial review of those claims has been satisfied. In evaluating the defendants' exhaustion argument on the present motion, then, the Court will proceed under the legal standard applicable to Rule 12(b)(6) motions to dismiss.

Id.

C. Exhaustion of Administrative Remedies in General.

“Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.” Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (citations omitted). Until a party has exhausted all administrative remedies required by a statute or an agency rule, it may not obtain judicial review of the challenged agency action. Darby v. Cisneros, 509 U.S. 137, 146-147 (1993). See also James v. United States Department of Health and Human Resources, 824 F.2d 1132, 1136-1137 (D.C. Cir. 1987) (held that suit filed by dissident tribal faction of an unrecognized Indian tribe seeking federal recognition of the Tribe by the Department of the Interior was properly dismissed

for failure to exhaust its administrative remedies). However, BIA's regulations, 25 C.F.R. Part 2 (2004) do not require exhaustion; thus, the type of exhaustion at issue is "non-jurisdictional" exhaustion (where exhaustion is provided for, but not mandated).

Although the BIA's regulations give rise only to the "non-jurisdictional" type of exhaustion, we submit that the exhaustion of remedies is a "condition precedent" to filing suit. Hidalgo v. Federal Bureau of Investigation, 344 F.3d 1256, 1258-59 (D.C. Cir. 2005). (dismissed for failing to pursue administrative appeal process); Johnson v. District of Columbia, 368 F. Supp. 2d 30, 32, 36-37 (D.D.C. 2005) (dismissed for failing to pursue administrative appeal process). Given the circumstances of this case, and based upon the strength of these two decisions alone, we submit that the Court should, as a "prudential" matter, dismiss the Complaint because of the Plaintiff's failure to exhaust its administrative remedies. We reiterate that Plaintiff does not even allege that it exhausted its administrative remedies, and, in fact, has never attempted to exhaust its administrative remedies.

If the Court should reject this contention, then, in the alternative, Defendants submit that the application of the two-part analysis in Advocado Plus, with respect to the "non-jurisdictional" form of exhaustion, to the facts of this case yields an outcome which clearly warrants dismissal of the Complaint. See discussion under subheading D below.

D. The Circuit Standards for Ruling Upon a "Non-Jurisdictional" Failure to Exhaust Administrative Remedies.

1. The Exhaustion of Remedies Includes Two Distinct Legal Concepts.

In Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004), supra, the United States Court of Appeals for this Circuit held that the defense of failure to exhaust

administrative remedies involves “two distinct legal concepts” the first of which is called “**non-jurisdictional exhaustion.**” (emphasis in original) (370 F. 3d at 1247). The first concept is “a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court.” *Id.* “**Non - jurisdictional exhaustion**” serves three functions: “ ‘giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies’ expertise, and compiling a record inadequate for judicial review.’” *Id.*

The “second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to the judicial review.” (*Id.*) This form of exhaustion – “**jurisdictional exhaustion**” is “rooted, not in prudential principles, but in Congress’ power to control the jurisdiction of the federal courts. [Citation omitted.]” (*Id.*) If a federal statute “mandates exhaustion”, then a federal court has no jurisdiction over the case in question “prior to exhaustion.” (370 F. 3d at 1248). Here, the Defendants are relying upon the “**non - jurisdictional**” form of exhaustion of remedies; under this form of exhaustion, the court has the discretion to require a plaintiff to exhaust its administrative remedies. (370 F. 3d at 1250-51).

2. Required Two-Part Analysis

In making its determination as to whether to so require a plaintiff, the court must conduct a two - part analysis: (1) determine whether requiring exhaustion would “serve the policies underlying the doctrine;” and if it would serve these policies, then (2) balance the “interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion,” (citing McCarthy v. Madigan, 503 U.S. 140, 147 (1992)). McCarthy holds that there are three “sets of circumstances” to be taken into account in

doing this balancing process. (*Id.* at 146-48). These are: (1) whether requiring exhaustion would prejudice a subsequent court action because of unreasonable or indefinite time frames for action by the administrative appellate entity; (2) whether the agency can grant effective relief; and (3) whether the administrative appellate body has been shown to be “biased” or has made a “prejudgment of the issue” before it.

In *James*, the Court of Appeals stated that exhaustion has four purposes:

First, it carries out the congressional purpose in granting authority to the agency by discouraging the frequent and deliberate flouting of administrative processes that could encourage people to ignore its procedures. Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial fact-finding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.

James, 842 F.2d at 1137-38. In this case, requiring exhaustion would serve the purposes of the doctrine.

3. Part I of the Avocado Plus Analysis: Whether Requiring Exhaustion of Remedies Here Would Serve the Purposes of the Exhaustion Doctrine.

a. The Plaintiff has Ignored the Department’s Administrative Process.

Congress granted broad authority over Indian affairs to the Secretary in 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457. Pursuant to that authority, the Secretary has adopted rules and regulations, including those governing agency appeals decisions - 25 C.F.R. Part 2. Section 2.6 of 25 C.F.R. Part 2 authorizes the exhaustion of administrative before seeking judicial review under the APA. In his March 26th decision, the Superintendent informed the Plaintiff of its right

to appeal the his decision to the Regional Director of BIA's Pacific Region. From there, 25 C.F.R. Part 2 provides that an appeal may be taken to the Interior Board of Indian Appeals. During the pendency of an appeal, the Superintendent's decision is stayed. Rather than pursue its administrative appeal rights under 25 C.F.R. Part 2 with respect to Defendants' alleged failure to recognize the tribal constitution, Ms. Burley as the purported Tribal Chairperson, and the Plaintiff ignored the administrative appeal process and waited over a year from the date the agency decision was issued and then filed this Complaint to obtain judicial review of the decision. Here, the Plaintiff is "deliberately flouting" the Defendants' administrative process.

b. The Doctrine of Exhaustion Protects the Agency's Autonomy.

Requiring exhaustion in this case would protect the Department of the Interior's autonomy in managing Indian affairs. As noted above, Congress has delegated to the Department broad authority over Indian affairs. The Department has extensive expertise over Indian matters. See e.g., Shenandoah v. United States, 159 F.3d 708, 712 (2d Cir. 1998); James, 824 F.2d at 1138; Goodface v. Grassrope, 708 F.2d 335, 352 (8th Cir. 1983). Exhaustion here would allow the agency to apply this expertise and its discretion, correct any error it may have made in the first instance prior to being subject to any judicial action. By going directly to district court, Plaintiff has deprived the Department of this opportunity.

c. Requiring Exhaustion Would Aid Judicial Review.

Requiring exhaustion here would aid judicial review by allowing a factual record to be developed prior to review. In this litigation, because the Plaintiff did not exhaust its administrative remedies, the only factual record for the court to review is Superintendent Risling's March 26, 2004 letter to Ms. Burley. Had Plaintiff exhausted its administrative

remedies, the Court would have before it Plaintiff's appeal to the Regional Director, the Regional Director's decision, any appeal the Plaintiff might have taken from that decision to the BIA, and the decision of that appeal. Without exhaustion, the record before the Court is limited.

d. Requiring Exhaustion Would Promote Judicial Economy.

Finally, requiring exhaustion would promote judicial economy by allowing this court to benefit from the development of the factual record as part of the administrative process.

Because Plaintiff failed to exhaust its administrative remedies, this Court does not have the benefit of being able to review a factual record that should have been developed at the agency level and may need to be constructed here.____

Accordingly, Plaintiff should be required to exhaust its administrative remedies before seeking alleged judicial review. As demonstrated below, Plaintiff has not and indeed cannot allege, any facts to demonstrate that it exhausted its administrative remedies with respect to its claim concerning its constitution and Ms. Burley's status as Chairperson warranting dismissal of Plaintiff's Complaint.

e. The Plaintiff Failed to Exhaust Its Administrative Remedies.

On March 26, 2004, the Superintendent of the Central California Agency of the BIA wrote in reply to Ms. Burley declining recognition of the tribe as an 'organized' tribe and offering guidance as to the proper procedures to become organized. (Plaintiff's Exhibit 3) The BIA understood that she had submitted the Tribe's constitution "in an attempt to demonstrate that it [Plaintiff] is an 'organized' tribe." The purpose of the letter was to inform Ms. Burley that she had failed to make such a demonstration, explain the tribe's status as an unorganized tribe, and to offer guidance as to how the Tribe could become organized. The letter made two points, which

the Plaintiff's Complaint challenges: first, the Tribe's constitution did not qualify as a valid governing document because the broader tribal community was not involved in its adoption; second, Ms. Burley was not a government official of the Tribe, but was a "person of authority" with whom the BIA would deal. (Complaint ¶¶ 49(a), 53, 57, 58, 59). Plaintiff was informed of its right to appeal the decision to the Regional Director, and was provided a copy of the relevant regulations. The letter provided instruction on how to file an appeal and informed the Plaintiff that, if needed, it could receive assistance preparing its appeal from the Superintendent's office. Finally, the letter explained that if no timely appeal was filed, the decision would become "final" for the Department. (Emphasis added.)

The Plaintiff fails to allege anywhere in its Complaint that it appealed the March 26, 2004 decision. Because Plaintiff failed to avail itself of its administrative appeal rights within the time provided, all three of Plaintiff's claims, or in the alternative, the claims relating to the failure to recognize the tribal constitution and Ms. Burley as tribal Chairperson should, for the reasons set forth earlier, be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See e.g. Johnson v. District of Columbia, 368 F. Supp. 2d at 36-37; Hildalgo v. Federal Bureau of Investigation, 344 F.3d at 1257-1258.

4. Part II of the Advocado Plus Analysis: Whether Balancing the Interests of the Plaintiff and the Institutional Interests of the U.S. Department of the Interior Weighs in Favor of Requiring Exhaustion of Remedies, Here.

As noted, there are three "sets of circumstances" (three elements of the balancing test) that the Court must take into account when it rules upon a "non-jurisdictional" exhaustion Rule 12 (b)(6) motion. The first element is whether requiring exhaustion would prejudice a later court action because of lack of reasonable or definite timeframes for action by the appellate

administrative body. Plaintiff has not alleged that it would be prejudiced if it brought a later court suit. The second element is whether the administrative agency can afford the requested relief. Certainly, the Plaintiff here does not contend that Interior is not empowered to grant the requested relief. Finally, Plaintiff has not asserted that the administrative appellate entity to which Plaintiff could have appealed the March 26, 2004, BIA decision with respect to the claims concerning the failures to recognize the tribal constitution or Ms. Burley as Tribal Chairperson the Regional Director of BIA's Pacific Region, was "biased" or had made a "prejudgment" on the issues raised by these claims.

In sum, the application of the "balancing" test required as the second part of this Court's analysis of Defendants' FRCP 12(b)(6) motion weighs in favor of the institutional interests of the Department of the Interior, and therefore, a dismissal for failure to exhaust administrative remedies is clearly warranted.

**III. PLAINTIFF'S CLAIMS FOR FAILURE TO RECOGNIZE THE TRIBE'S
CONSTITUTION AND TO RECOGNIZE THE TRIBE'S FORUM ARE NOT
CLAIMS UPON WHICH RELIEF MAY BE GRANTED AND SHOULD BE
DISMISSED.**

Plaintiff alleges that the government's failures to recognize the tribal constitution and tribal forum constitute violations of Section 476(h) of the Indian Reorganization Act. See First Claim for Relief, ¶ 49 of Complaint. In the March 26, 2004 letter, Superintendent of the BIA's Central California Agency rejected the constitution submitted by Ms. Burley because she had not involved the greater tribal community, but rather had involved only herself and her two daughters. (Exhibit 3 attached to Complaint). Given the March 26, 2004 decision of the Superintendent that the Tribe was not "organized," Michael Olsen, in turn, reasonably concluded

(in his February 11, 2005 letter) that the BIA does not “recognize any tribal government” of the Plaintiff Tribe and, therefore, does not recognize the “tribal dispute resolution process at this time” as a “legitimate tribal forum.” (Exhibit 4 attached to Complaint). As noted, all of the Plaintiffs’ claims arose from the March 26, 2004 letter.

As stated earlier, a court may dismiss a complaint under Rule 12(b)(6) when the Complaint fails “to state a claim upon which relief can be granted.” A complaint may also be dismissed under Rule 12(b)(6) if relief cannot be granted on some set of facts consistent with the allegations in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). There is no duty on the part of the Department to recognize a governing document without a showing that the will of the membership supports. It has long been recognized that tribal authority derives from the will of the members:

In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe.

Felix Cohen’s Handbook of Indian Law, 122 (1942). Indeed, the IRA requires that a majority of the tribe adopt the Tribe’s governing document. Plaintiff’s reliance on the 2004 addition of subsection (h) to Section 16 of the IRA is misplaced and without merit. As already noted, the plain language of subsection (h) (25 U.S.C. § 476(h)) is simply Congressional confirmation of the right of Indian tribes to adopt their own governing documents outside the provisions of that IRA. The subsection does not impose a duty on the part of the Department to recognize or approve governing documents adopted outside the provisions of the IRA, which imposes significant minimum participation requirements on the recognition of valid elections to adopt

tribal constitutions as a prerequisite for Secretary's approval . See 25 U.S.C. § 478(a). But in this case, Plaintiff failed to allege that a majority of the Tribe did so. Instead, the Plaintiff would have this Court find that the Department was arbitrary and capricious or otherwise violated the IRA in failing to recognize the governing document of the Tribe, a document that was supported by a small group – maybe three or four in number – and not by the majority of the members of the “greater tribal community.” (Exhibit No. 3 attached to Complaint). Without an allegation that a majority of the members of the greater tribal community approved or adopted the constitution, the Complaint does not support the relief Plaintiff seeks with respect to Defendants' alleged failures to recognize the Tribe's constitution and tribal forum. Accordingly, the Plaintiff's claims should be dismissed for failure to state a claim under Rule 12(b)(6).

A. Section 476(h) of the IRA Does Not Contain an Unequivocal Waiver of Sovereign Immunity.

In its First Claim for Relief, Plaintiff asserts that the Defendants' failure to recognize its claims alleging the tribal constitution and failure to recognize the tribal forum involve the violation of Section 476(h) of the IRA (First Claim for Relief, paras. 48-51). Section 476(h), however, does not contain a private right of action such that Plaintiff can properly allege that Defendants violated the statute. While the APA can provide the waiver of sovereign immunity to allege violations of statutes not containing private rights of action, Plaintiff has not invoked the APA in its First Claim for Relief.¹⁰ For example, Williams v. United States, et al, No. Civ. S-01-2040 WBS JFM, Order of August 28, 2003 (E.D. Cal) (Copy attached as Attachment G), individual tribal members based their suit, in part, on alleged violations of Section 476(f) and (g)

¹⁰ Plaintiff, has, however invoked the APA in its Second Count, but not in Count I.

of the IRA. The court held that nothing in these statutes reflected the existence of an “unequivocal waiver of sovereign immunity.” (Order at 6-7). Accordingly, because Section 476(h) does not embody an unequivocal waiver of sovereign immunity, the First Claim for Relief of Plaintiff’s Complaint should be dismissed under 12(b)(6).

B. Section 476(h) of the IRA Does Not Require the Department To Recognize a Tribe As “Organized,” Absent Adoption of the Governing Documents By a Majority of the Members of the Greater Tribal Community.

Under the IRA, of which section 476(h) is a part, a tribe becomes organized upon the adoption of governing documents by a majority vote of the adult tribal members. *See* 25 U.S.C. § 476(a)(1) and 478a; 25 C.F.R. § 81.7. Sections 476(a) and (c) lay out fairly detailed procedures and timetables binding on the Secretary in conducting constitutional elections when a tribe seeks to adopt or amend governing documents to be approved by the Secretary. The Plaintiff here asserts its organization is mandated under Section 476(h). This section provides:

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in the Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph 1.

25 U.S.C. § 476 (h). Certainly, Section 476 is silent as to whether the Secretary has the authority to find that a tribe is not “organized,” and, therefore, to refuse to recognize a tribal forum, and to refuse to recognize of a tribal constitution (or a tribal resolution) which does not reflect the will of the membership of the greater tribal community – that is, a constitution adopted by the majority of the members of that community. When the language of a statute is not clear, a court

may resort to the legislative history thereof. E.g., Rotec Industries, Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1252 (Fed. Cir. 2000). Where statutory language is subject to more than one interpretation, as is true of Section 476(h), the court may examine the legislative history. United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir.), cert. denied, 536 U.S. 932 (2002). The very limited legislative history on this section provides that this section:

clarifies that Indian tribes that accepted the Indian Reorganization Act (IRA), 25 U.S.C. 476 are not required to adopt constitutions pursuant to the IRA and remain free to organize their governing bodies pursuant to organizational governing documents that they determine.

Senate Report 108-49 (May 15, 2003).

We submit that the legislative history of Section 476(h) should be viewed as encompassing Interior's comments on Section 103 of the S. 523^{11/}. Interior noted that it was unclear what Section 103 added to existing law. Interior stated that the IRA and Oklahoma Indian Welfare Act of 1936 form the statutory "basis for tribal reorganization."^{12/} These statutes:

"...guarantee notice, a defined process and minimum participation before a tribe's constitution is adopted. That process and minimum participation provides the Secretary with assurance that those with whom she deals in accordance with the Tribe's constitution represent the majority of tribal members."

(emphasis added.)

The 2003 interpretation of the IRA by Interior quoted above has effectively been held to be reasonable. Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F. 3d 667, 670 (8th Cir. 1997). In Shakopee, the Secretary disapproved the results of the Secretarial

^{11/} The language of Section 476(h) is essentially identical to that of Section 103 of S. 523.

^{12/} See Interior's comments of June 10, 2003 and October 24, 2003 on Section 103 of S. 523 to the House and Senate Committee with jurisdiction over S.523. Copy attached as Attachment E.

election approving certain amendments to the community's tribal constitution. The Secretary interpreted the IRA as allowing him to reject such election results:

...when, as here, the Secretary is unable to determine whether an election has resulted in ratification by a majority of the voting members of the tribe as required by 25 U.S.C. 476(a)(1). We believe that this interpretation is reasonable.

(107 F.3d at 670.)

Although the Tribe initially requested on March 9, 2000, that the Secretary review the draft constitution and hold a Secretarial election under the IRA to approve the draft tribal constitution, (¶ 23 of Complaint), on June 7, 2001, the Tribe withdrew that request. (¶¶ 23 and 30). While we read Section 476(h) as having freed tribes from the procedural requirements of Section 476 (a) and (c), where the Secretary, at the tribe's request, calls and conducts the election, Section 476(h) does not negate the Secretary's authority to find that a tribe is "unorganized" and to refuse to recognize the tribe's constitution, because it does not reflect approval by the majority of the membership of the greater tribal community. The problem for the Plaintiff is that it has yet to identify its membership. Therefore, Mr. Burley's constitution cannot possibly have the requisite support of the membership in order for the BIA to accept it as a legitimate governing document. Section 476(h) cannot be fairly interpreted as requiring the Department to recognize a purported governing document whether it be a tribal constitution or the tribal resolution establishing a forum under such circumstances, as Plaintiff would have this court do. Such a reading of the statute would be contrary to the very nature of the federal-tribal relationship, as well as the canons of statutory construction.

C. The Federal-Tribal Relationship.

The will of the tribal membership is fundamental to the relationship between the federal

government and a tribe. Ransom v. Babbitt, 69 F. Supp. 2d 141, 153 (D.D.C. 1999). Congress delegated to the Secretary of the Interior broad authority over “public business relating to . . . Indians.” 43 U.S.C. § 1457. In discharging this responsibility, the Secretary has an obligation to ensure that the government with which she deals actually represents the members of the tribe. The Supreme Court articulated that the Department has a responsibility to conduct business only with the lawfully constituted governing bodies, specifically those that represent the tribe. As articulated by the Court:

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government’s fiduciary obligation.

Seminole Nation v. United States, 316 U.S. 286, 295-96 (1942).

Consistent with the Supreme Court’s decision in Seminole, the Secretary has a responsibility to determine that he or she is dealing with a government that is representative of the tribe as a whole. This duty to deal only with representative governments has made the majority the yardstick against which legitimacy of tribal governments are measured. See Shakopee, 107 F.3d at 670 (IRA allows Secretary to reject results of election when the Secretary cannot determine whether the results were ratified by a majority of qualified voters); Ransom, 69 F. Supp. 2d at 153 (“By not determining for themselves whether or not the Constitution was valid, [the BIA was] derelict in [its] responsibility to ensure that the Tribe make its own

determination about its government consistent with the will of the Tribe and the principles of tribal sovereignty.”) This is especially true when the Secretary is faced with two competing factions as is the case here. See Milam v. U.S. Department of the Interior, 10 ILR 3013, 3017, No. 82-3099 (D.D.C. 1982), (“The longstanding controversy that has divided the Indian tribes [sic] into competing factions has cast into doubt the representativeness of the General Council and its officers, and has threatened the integrity of the trust funds over which the BIA has ultimate authority and responsibility.”) (citations omitted). The key, therefore, to determining whether a group claiming to be leaders or a document held out as a governing document should be accepted by the Department as such, therefore, is to determine whether the group or the document reflects the will of the membership. Ransom, 69 F. Supp. 2d at 153; Morris v. Watt, 640 F.2d 404 (D.C.Cir. 1981); cf. Goodface, 708 F.2d at 339 (district court must defer to tribal process to resolve election dispute); see also Potts, 533 F.2d at 528 (claims by Business Committee member against BIA dismissed because BIA’s actions were supported by a majority of the tribe). The federal-tribal relationship, thus, is founded on the premise that the tribal governing documents and government reflect the will of the tribal membership.

D. Defendants’ Position Is Consistent With the Canons of Statutory Construction

In addition to the federal-tribal relationship, canons of statutory construction also support the conclusion that governing documents must be supported by the will of the tribal membership. First, courts presume that Congress knows the law when it passes a statute. Garrett v. United States, 471 U.S. 773, 793-94 (1985); Albernaz v. United States, 450 U.S. 333, 341-42 (1981). Because Congress is presumed to have known the law regarding the federal-tribal relationship

when it passed Section 476(h), Section 476(h) implicitly contains a reflection of that relationship by requiring that a majority of the tribal members support the tribe's governing document.

Second, it is a cardinal rule of statutory construction that a statute is to be read as a whole. Washington State Dep't of Social and Health Services v. Keffler, 537 U.S. 371, 384 n. 7 (2003). This means that sections of the same act are to be read together so as to be consistent. See, e.g., King v. Shaefer, 940 F.2d 1182, 1185 (8th Cir. 1991) *cited in Keffler, id.* In order to read Sections 476(a) and 476(h) consistently, Section 476(a)'s requirement of majority support must also apply equally to Section 476(h). Finally, it is a canon of construction that when a specific section and a general section conflict, the specific section controls. Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267, 273 (S.D.N.Y. 2004); Rodriguez v. West, 189 F.3d 1351, 1353 (Fed. Cir. 1999), cert. denied, 529 U.S. 1004 (2000). In this case, because Section 476(a) is more specific than Section 476(h), the Section 476(a) provision requiring majority support controls. Under these rules of construction, the requirement of majority approval contained in Section 476(a), therefore, also applies to Section 476(h).

In sum, in order for the Department to accept a governing document under the IRA, the document must reflect the will of the tribal membership. This is based on the nature of the federal-tribal relationship, as well as the IRA itself. Governing documents, whether adopted under Section 476(a) or recognized under Section 476(h), must, therefore, be adopted by a majority of the tribal members. This well-reasoned interpretation of the Department of the Interior (which is charged with administering the IRA) can properly be utilized by a court for guidance. Olmstead v. L.C. en rel. Zimring, 527 U.S. 581, 597-598 (1991). The Court must uphold the agency's interpretation so long as it is reasonable. Safe Food & Fertilizer v. EPA, 350

F. 3d 1263,1268, 358 U.S. App. D.C. 416 (D.C. Cir. 2003.)

E. Plaintiff Fails to State a Claim Because It Fails To Allege That A Majority Adopted Its Constitution or the Tribal Resolution Establishing a Forum.

Plaintiff asserts that Defendants violated Section 476 (and in turn the APA) by refusing to accept its constitution as a legitimate governing document, and by refusing to recognize its resolution establishing a tribal forum. (Complaint Para. 49 (a) & (b), and 53-59). But nowhere in its Complaint does the Plaintiff assert that the constitution, or the Resolution were adopted by, or even enjoyed the support of, the majority of the tribe. Indeed, this lack of support is exactly why, in March 2004, the Bureau of Indian Affairs (“BIA”) refused to recognize the constitution and Ms. Burley as the Chairman. Plaintiff, in its litigation in the Eastern District of California, has asserted it has a potential membership of 250. Yet, it has asserted no evidence of the participation of the 250 in the current tribal membership.

In a letter from Superintendent Dale Risling of the BIA to Ms. Burley, dated March 26, 2004, (Plaintiff’s Exhibit 3), the BIA explained that it could not accept the Plaintiff’s constitution because it did not reflect the will of the majority of the tribal membership:

Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was attempted or has occurred with the purported organization of your tribe. . . . To our knowledge, the only persons of Indian descent involved in the tribe’s organization efforts, were you and your two daughters.

Id. (Emphasis added). Defendants found, therefore, that the constitution, reflected only the will of Ms. Burley and her two daughters; it did not reflect the will of the membership as a whole. Accordingly, the BIA’s decision not to accept it as an organizational document was consistent with case law and the standards of the IRA.

The Plaintiff asserts also that the Defendants' failure to recognize the Tribe's Resolution establishing a tribal forum violates the IRA. Defendant Olsen addressed the issue of the Tribe's forum in a February 11, 2005, letter to Mr. Yakima Dixie, a member of the Tribe who opposes Ms. Burley's control of the Tribe. In his letter, Defendant Olsen concluded that the Tribe did not have a forum that the BIA could recognize because it is not an "organized" Tribe. He wrote:

In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum.

(emphasis added) (Plaintiff's Exhibit 4). Plaintiff's claim that Defendants violated the IRA by failing to recognize this forum should be dismissed for the same reason that the tribal constitution claim must fail – until the Tribe as a whole becomes "organized" and adopts its governing documents, there is no forum for the Department to recognize. Both the tribal constitution and tribal forum claims flowed from the March 26, 2004, decision letter. Thus, the conclusions contained in and/or flowing from the March 26th decision letter are neither arbitrary nor capricious. In addition, these conclusions do not constitute an abuse of discretion.

As demonstrated above, nothing in Section 476(h) or its legislative history imposes a duty on the Department to recognize the organization of a tribe, unless it is supported by the will of the greater tribal community. Plaintiff has failed to allege any facts to demonstrate that its constitution ever received the support of the majority of the greater Tribal community. To the contrary, Superintendent Risling's March 26, 2004, letter makes clear that the Department declined to accept the Tribe's constitution as a legitimate governing document precisely because

it did not reflect the will of the greater tribal membership. This, in turn, caused the Department to determine that Ms. Burley could not be recognized as a tribal chairperson and that the Tribe's forum could not be recognized as a legitimate forum. Accordingly, Plaintiff's claims under the IRA should be dismissed for failure to state a claim under Rule 12(b)(6) because the Defendants did not violate the IRA in refusing to recognize the tribal constitution, or tribal forum.

CONCLUSION

For the foregoing reasons, the Defendants request that this case be dismissed for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1). In the alternative, the Defendant request that this case be dismissed for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6)^{13/}.

Dated this 5th day of August, 2005.

Respectfully submitted,

Electronically signed
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Attachments

^{13/} A proposed Order is attached.