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Our File Number: 26RJ-159149

January 6, 2011

By Electronic Mail and Certified Mail
Honorable Ken Salazar
Secretary
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Request for Stay and Reconsideration of Determination by Assistant Secretary for Indian Affairs Regarding Organization of California Valley Miwok Tribe

Dear Secretary Salazar:

I am writing on behalf of Mr. Yakima Dixie and the Tribal Council of the California Valley Miwok Tribe¹ to ask that you immediately stay and reconsider the decision issued on December 22, 2010, by Donald (Del) Laverdure for Larry Echo Hawk, Assistant Secretary for Indian Affairs (the "December 22 Determination") (Attachment 1), regarding the status of the California Valley Miwok Tribe ("Tribe"). We believe that the December 22 Determination erroneously reverses longstanding, judicially approved Department of the Interior ("Department") decisions and fails to carry out the Department's statutory mandate to ensure that the representatives of the Tribe with whom the Department conducts government-to-government relations are valid representatives of the Tribe as a whole. The December 22 Determination turns control of the Tribe over to three people—Sylvia Burley and her two daughters (the "Burley Group")—and effectively disenfranchises more than 200 potential members of the Tribe in violation of the Department's trust responsibility.

Although we hope to avoid litigation by seeking your review, we intend to seek judicial review of the December 22 Determination unless the Department stays the Assistant Secretary's decision and reconsiders its implementation.

1. Summary

The December 22 Determination would terminate the Department's efforts to ensure that membership and governance of the Tribe are determined in accordance with the

¹ The Tribal Council consists of Mr. Dixie and putative Tribe members Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo.

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Department's trust responsibility and reflect the involvement of the whole tribal community. It cedes complete control over the Tribe to the Burley Group, which has repeatedly attempted to exclude and disenfranchise other members of the Tribe. As described more fully below, the December 22 Determination does not provide a reasoned explanation of why it purports to rescind actions the Department took in 2004 and 2005 that were upheld as proper by the Court of Appeals for the District of Columbia Circuit. The Court of Appeals held that the Department had acted appropriately to ensure that a small group of tribal members would not exclude the broader tribal community from participation. *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Circuit 2008) (Attachment 2).

The stakes are considerable. The day after the December 22 Determination was issued, the Burley Group issued a notice for a Special Meeting of the Tribe to be held on January 7, 2011, to elect officers for the Tribe. The notice states that only four Tribal members are entitled to vote at this Special Meeting—of whom three are members of the Burley Group. Litigation is pending in California state court in which the Burley Group is seeking immediate dispersal of more than \$6 million from the California Gaming Control Commission. The Burley Group has already brought the December 22 Determination to the attention of the state court that is hearing the case. The court so far has declined to grant the Burley Group's request to disburse any money based on the December 22 Determination, stating that the Determination is "a radical departure from the previous position of the BIA." See Reporter's Transcript of Hearing Re Ex Parte Application, *California Valley Miwok Tribe v. California Gambling Control Commission*, No. 37-2008-00075326 page 14, line 9 (Ca. Sup. Ct. San Diego, Dec. 28, 2010) (Attachment 3). A further hearing regarding the Burley Group's motion for summary judgment in that litigation is scheduled for January 28, 2011.

If the Department proceeds in accordance with its prior decisions to assist the Tribe in ensuring that individuals who are entitled to be part of the Tribe are accorded the fair opportunity to be recognized as members, the Gambling Control Commission funds will be distributed to the Tribe to be equitably distributed to all members. If the December 22 Determination remains in effect, the Burley Group will be in a position to ignore the interests of these potential members and to retain the proceeds for their personal benefit. An immediate stay is needed to protect the interest of the Tribe and the potential members while you review our objections to the December 22 Determination.

2. Background

The dispute over the Tribe's membership and governance has been ongoing for many years. The December 22 Determination suggests that it will expedite the resolution of the dispute. In fact, the reverse is true. The December 22 Determination effectively reopens many issues that were long settled and will only delay the just resolution of the Tribe's status.

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- a. The Department Determined that the Tribe Is Not 'Organized' and that Ms. Burley Cannot Be Recognized As Its Chairman

The Department has determined that the Tribe is a federally recognized tribe. Since 1998, the Department has attempted to assist the Tribe in becoming organized under the Indian Reorganization Act of 1934 ("IRA"). At the suggestion of the Department, the Tribe adopted a resolution in 1998 establishing a General Council, with the expectation that the organization process would be completed by the adoption and Departmental approval of a tribal constitution. For a variety of reasons, the process was never completed.

The Department initially recognized Yakima Dixie as Tribal Chairman. It subsequently recognized Ms. Burley (who our client Mr. Dixie adopted as a member of the Tribe) as Tribal Chairman, an act which, in our view, Mr. Dixie properly disputed. Due to intra-tribal disputes, principally between Mr. Dixie and the Burley Group, the Tribe was unable to function to such an extent that the Department determined it threatened the government-to-government-relationship between the Tribe and the United States. After attempting to mediate these disputes, the Department withdrew its recognition of Ms. Burley as Tribal Chairman and stated that she could only be considered a "person of authority," because the Tribe was not properly "organized" under the IRA. Letter from Dale Risling Sr., Superintendent, Bureau of Indian Affairs Central California Agency, to Silvia Burley (Mar. 26, 2004) (the "March 26, 2004 Letter").

In the March 26, 2004 Letter, the Department also rejected a Tribal constitution submitted by the Burley Group because it was not developed in a way that involved the entire tribal community. The Department noted that only three people were involved in its development—Ms. Burley and her two daughters—and that they had not attempted to identify or include other potential members of the Tribe. The March 26, 2004 Letter reads in part:

Where a tribe that has not previously organized seeks to do so, [the Secretary] 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.

The Department confirmed its view that the Tribe was not organized in a letter from Assistant Secretary Olson to Mr. Dixie on February 11, 2005 (the "Olson Determination"). The Olson Determination reiterated that the Department had rejected the Burley Group's proposed constitution, that the Department did not recognize Ms. Burly as Tribal Chairman, and

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that no one could be recognized as Tribal Chairman until the Tribe was organized, as set out in the March 26, 2004 Letter.

b. The Federal Court of Appeals Upheld the Department's Determinations

Ms. Burley challenged the Olson Determination in federal court. The Court of Appeals for the District of Columbia expressly upheld the decisions contained in the March 26, 2004 Letter and the Olson Determination. *California Valley Miwok Tribe, supra*, 515 F.3d 1262.² The court held that the Department's decisions regarding the status of the Tribe were proper and were needed to ensure that the Tribe's organization reflected "majoritarian values." According to the court, the decisions fulfilled the cornerstone of the Department's trust obligation: to "promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." 515 F.3d at 1272. The Court of Appeals also took judicial notice that Ms. Burley had acknowledged, in another proceeding, that there could be more than 200 potential members of the Tribe, notwithstanding her efforts to exclude these potential members from participating in the Tribe's organization. 515 F.3d at 1268 n. 5

c. The IBIA Rejected Ms. Burley's Appeal of the Department's Decision to Involve the Larger Tribal Community In the Tribe's Organization

The December 22 Determination stems from actions the Department has taken to assist the Tribe in completing the process of organizing. As set out more fully in *California Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103 (Jan. 28, 2010), the Bureau of Indian Affairs ("BIA") Central California Agency decided in 2006 to publish notice of a general council meeting of the Tribe to allow members and potential members of the Tribe to meet and discuss the issues and needs confronting the Tribe. Ms. Burley appealed that decision to the BIA's Pacific Regional Director, who affirmed in 2007. Ms. Burley then appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA").

In her IBIA appeal, Ms. Burley contended that the Regional Director erred in stating that the Tribe is unorganized, and that because the Tribe (i.e., the Burley Group) did not request assistance from the BIA, the BIA had no authority to convene a meeting of the Tribe or to determine the class(es) of individuals who could participate in such a meeting. The IBIA rejected her appeal. Based on the Olson Determination, which included the Assistant Secretary's acceptance of the decisions expressed in the March 26, 2004 Letter, the IBIA concluded that the following determinations are final for the Department and not subject to further review by the Board:

² Notably, Ms. Burley did not contest in federal court the Department's decision not to recognize her as the Tribal Chairman. 515 F.3d at 520 n. 6.

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(1) the Department does not recognize the Tribe as being organized or having any tribal government that represents the Tribe; (2) the Department does not recognize the Tribe as necessarily limited to Yakima [Dixie], Melvin [Dixie], Burley, her two daughters, and her granddaughter, for purposes of who is entitled to organize the Tribe and determine membership criteria; and (3) the Department has determined that it has an obligation to ensure that a "greater tribal community" be allowed to participate in organizing the Tribe. Each of these determinations was either explicitly or implicitly accepted in the Assistant Secretary's 2005 Decision as final for the Department, see *supra* at 111-12, and the Board lacks jurisdiction to review a decision by the Assistant Secretary.

51 IBIA at 121. The IBIA went on to say:

[The recognition of the Olson Determination as final] does not end our inquiry, however, because the Regional Director's [2007] Decision arguably went beyond the above determinations by deciding more specifically what BIA would do to implement those determinations. In this appeal, Burley contends that BIA exceeded its authority in determining who would constitute the "greater tribal community," or class of "putative members," and in deciding that they could participate as part of a "general council" meeting of the Tribe, to decide membership and organizational issues.

51 IBIA at 121. The IBIA characterized this as a "tribal enrollment dispute" pursuant to 43 C.F.R. 4.330.1(b) and referred the tribal enrollment issue to the Assistant Secretary for resolution. 51 IBIA at 122. It is critical to recognize that the matter referred to the Assistant Secretary concerned the specific criteria for participation in the organizational meeting of the Tribe called by the Department—not the Department's prior determination that the "greater tribal community" must be allowed to participate in the Tribe's organization, *not* the Department's prior determination that the Tribe was not yet properly organized, and *not* the Department's prior determination that it could not recognize Ms. Burley as the Tribal Chairman.

- d. The Assistant Secretary Exceeded the Scope of the Issue Referred to Him by the IBIA and Revisited Final Agency Decisions That Were Not Subject to Change

Rather than confining his review to the issue that IBIA referred to him, the Assistant Secretary revisited and reversed the final decisions that the Department had made in the March 26, 2004 Letter and the Olson Determination and that were upheld by the Court of Appeals. For the reasons explained below, the actions taken in the December 22 Determination are clearly erroneous and should be vacated.

3. Discussion

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We have identified a number of specific concerns with the December 22 Determination, which we address below.

a. The Letter Improperly Addresses Issues That Are Beyond The Scope Of The Referral From The IBIA

The IBIA referred to the Assistant Secretary what it characterized as a "tribal enrollment dispute" pursuant to 43 C.F.R. 4.330.1(b). We do not agree that the 2006 and 2007 actions of the BIA Superintendent and the Regional Director are properly characterized as "tribal enrollment" decisions. The Regional Director's decision contains express language stating that "it is not the goal of the Agency to determine membership of the Tribe or the intent of the Agency to determine who the members of the Tribe will be." The process put in place by the BIA was intended to facilitate the involvement of the entire Tribal community in the Tribe's organization. Thus, the grounds for referral were not proper.

Assuming, for the sake of argument, that the BIA's actions can be viewed as a "tribal enrollment" matter, and that the referral was proper, the only issue properly before the Assistant Secretary relates to the process and criteria proposed by the BIA for participation in the Tribe's organizational meeting. But instead of addressing that issue, the Assistant Secretary reexamined the decisions made in the March 26, 2004 Letter and the Olson Determination. Those actions were not the subject of the IBIA appeal and cannot be lawfully addressed as part of the appeal process. *See* 43 C.F.R. 4.332(a) (an appeal to the IBIA must be filed within 30 days of receipt of the decision being appealed, and an untimely notice of appeal will be dismissed for lack of jurisdiction).

b. Reconsideration of the March 26, 2004 letter and the Olson Determination Is Precluded By the Prior Litigation

Furthermore, the validity of the March 26, 2004 Letter and the Olson Determination was fully and finally resolved by the federal court litigation mentioned above. *See California Valley Miwok Tribe, supra*, 515 F.3d 1262. Issue preclusion bars the relitigation of an issue previously litigated and finally decided by a court of competent jurisdiction in a prior dispute between the parties. *Taylor v. Sturgell*, 553 U.S. 880 (2008). Thus, even assuming that the validity of the 2004 and 2005 decisions was properly before the Assistant Secretary as a result of Ms. Burley's IBIA appeal, the December 22 Determination was improper.

To recap, the Department determined in its 2004 and 2005 decisions that the constitution submitted by Ms. Burley should not be approved because it did not reflect the involvement of the whole tribal community, that the Tribe had not been "organized" pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. section 476, and that the Department therefore could not recognize Ms. Burley, or any other person, as Tribal Chairman. Ms. Burley challenged that determination in federal court. *California Valley Miwok Tribe v. USA*, 424 F.

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Supp. 2d 197 (D.D.C. Mar. 31, 2006). There, she argued that the Department's refusal to approve her constitution, and to recognize the Tribe as organized, violated the Tribe's sovereignty. The district court dismissed her complaint for failure to state a claim upon which relief could be granted. *Id.* at 201. The Court of Appeals for the District of Columbia Circuit affirmed, holding that the Department did not act in an arbitrary and capricious manner in rejecting the tribal constitution submitted by Ms. Burley and refusing to recognize the Tribe as organized. *California Valley Miwok Tribe, supra*, 515 F.3d at 1263, 1267-1268.

In her IBIA appeal, filed in 2007 and decided in 2010, Ms. Burley again sought to challenge the Department's determination that the Tribe was never properly organized and that it could not recognize the government she purported to lead. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 104-105. Although she presented her claim as a challenge to the BIA's 2006 decision to assist the Tribe in organizing, Ms. Burley's appeal attempted to re-litigate the same issue already decided by the district court in 2006—namely, the validity of the BIA's refusal to recognize the Tribe as organized under her leadership. That decision, as affirmed by the Court of Appeals in 2008, was a valid and final resolution of the Tribe's status on the merits. *Res judicata* therefore bars Ms. Burley from mounting a collateral attack, in another forum, on the BIA's determination that the Tribe was not organized. *See City of Tacoma v. Taxpayers*, 357 U.S. 320, 334-339 (1958) (holding that a federal Court of Appeals decision, upholding the Federal Power Commission's issuance of a license for a hydroelectric plant, barred a subsequent state court challenge to the project's implementation). There was therefore no basis for the IBIA to reconsider the issue, and in fact it did not attempt to do so.

The IBIA recognized that the status of the Tribe as "organized" was not subject to its review, because it had already been decided by a federal court. *See* 51 IBIA 104-105. It therefore did not refer this issue to the Assistant Secretary for further consideration. It referred to the Assistant Secretary only the issue of the "BIA's actions to assist the Tribe in organizing itself." 51 IBIA 105. Whatever the Assistant Secretary may decide regarding the appropriate criteria and procedures for the Tribe to follow in organizing itself, it was not proper for him to reopen the issue of the Tribe's "organized" status or to rescind the March 26, 2004 Letter or the Olson Determination.

c. The December 22 Determination Fails to Account for Yakima Dixie's Pending Appeal

Even assuming, for argument, that it was proper for the Assistant Secretary to rescind the March 26, 2004 Letter or the Olson Determination, the December 22 Determination would not be a proper exercise of the Assistant Secretary's authority to the extent that it purports to recognize Ms. Burley as the Tribal Chairman. The Olson Determination was issued in response to an appeal that Yakima Dixie filed with the Assistant Secretary for Indian Affairs on October 20, 2003. In that appeal, Mr. Dixie challenged the Department's recognition of Ms. Burley as Tribal Chairman. The Olson Determination stated that Mr. Dixie's appeal had been

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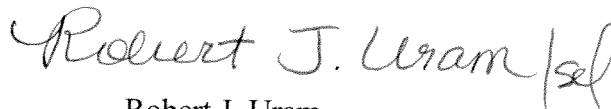
rendered moot by the March 26, 2004 Letter, which expressed the Department's decision that it did not consider the Tribe as organized and therefore could not recognize Ms. Burley or any other person as Tribal Chairman. Thus, if the Olson Determination were properly rescinded, the appropriate action by the Department would be to reinstate Mr. Dixie's appeal and address it before making any further decisions regarding the leadership or status of the Tribe. The December 22 Determination completely ignores the October 23, 2003 appeal.

4. Conclusion

For the reasons stated above, we believe that the December 22 Determination was improper. The Department should continue its efforts to assist the Tribe in organizing itself through a process that includes the entire Tribal community, as expressed in the BIA's 2006 and 2007 decisions. Our clients, and many other potential members of the Tribe, have filed responses with the Department as requested in the 2007 public notice published by the BIA. They are prepared to cooperate fully with the Department to organize the Tribe in a manner that is inclusive and equitable, and to ensure that the government of the Tribe is representative of the Tribe as a whole, not just the Burley Group. We seek your assistance in achieving that goal.

In the hope of avoiding litigation, we request that the Secretary immediately stay the December 22 Determination and reconsider the Assistant Secretary's decision. If the Department does not take immediate action to protect the interests of the Tribe and of our clients, we will be forced to seek judicial review of the December 22 Determination.

Sincerely yours,



Robert J. Uram

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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Attachments

Attachment 1: The December 22 Determination

Attachment 2: *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Circuit 2008)

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Attachment 3: Reporter's Transcript of Hearing Re Ex Parte Application, *California Valley Miwok Tribe v. California Gambling Control Commission*, No. 37-2008-00075326 (Ca. Sup. Ct. San Diego, Dec. 28, 2010)

cc: Larry Echo Hawk, Assistant Secretary – Indian Affairs
Michael Black, Director, Bureau of Indian Affairs
Dale Morris, Pacific Regional Director, Bureau of Indian Affairs
Troy Burdick, Superintendent, Central California Agency, Bureau of Indian Affairs
Mike Smith, Deputy Director-Field Operations, Bureau of Indian Affairs
Deputy Director, Tribal Services, Bureau of Indian Affairs, Attention: Chief, Tribal
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

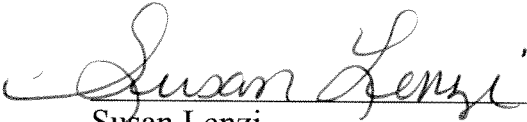
On **January 6, 2011**, I served the following document(s) described as **LETTER TO THE HONRABLE KEN SALAZAR, SECRETARY, DEPARTMENT OF THE INTERIOR, REGARDING REQUEST FOR STAY AND RECONSIDERATION OF DETERMINATION BY ASSISTANT SECRETARY FOR INDIAN AFFAIRS REGARDING ORGANIZATION OF CALIFORNIA VALLEY MIWOK TRIBE, DATED JANUARY 6, 2011**, on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

BY CERTIFIED MAIL: I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 6, 2011, at San Francisco, California.



Susan Lenzi

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