

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CALIFORNIA VALLEY MIWOK :
TRIBE, :
      Plaintiff, :
      v. : CA 05-0739
UNITED STATES OF AMERICA, :
      Defendant. :
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Washington, D.C.  
January 19, 2006  
2:03 p.m.

Transcript of Motions Hearing  
Before the Honorable James Robertson  
United States District Judge

APPEARANCES:

For the Plaintiff:                   SONYA ANJANETTE SMITH-  
  VALENTINE, ESQ.  
  GEORGE L. STEELE, ESQ.  
  PHILLIP E. THOMPSON, ESQ.

For the Defendant:                   SCOTT KEEP, ESQ.  
  JAMES M. UPTON, ESQ.  
  JAMES SMITH, ESQ.

Court Reporter:                    JON HUNDLEY  
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  Washington, D.C. 20003  
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1                                   P R O C E E D I N G S  
2                                   THE DEPUTY CLERK: This is Civil Action  
3 05-0739, California Valley Miwok Tribe v. United  
4 States of America. Sonya Smith-Valentine, George

5 Steel, Phillip Thompson present for the plaintiff.

6 James Upton present for the defendant.

7 MR. UPTON: Your Honor, I would also like  
8 to add at counsel table, Mr. Scott Keep, who is the  
9 assistant solicitor for private government in  
10 Alaska at Main Interior, and next to him is James  
11 Smith, who also works in the solicitor's office  
12 here.

13 THE COURT: Thank you.

14 There are three motions before me. One is  
15 the government's motion to dismiss. The second is  
16 a motion by plaintiff for leave to file an amended  
17 complaint. And the third is a motion for a  
18 preliminary injunction.

19 I think there are issues raised by the  
20 government's motion to dismiss that if granted  
21 would moot the other two, and so I think I ought to  
22 hear the motion to dismiss first. So I will hear  
23 from the government.

24 I've got a couple of preliminary questions  
25 for the government. Please come up. The acoustics

3

1 are so good in here that I'm afraid if I cough,  
2 I'll blow everybody out of the courtroom.

3 I need for you to orient me a little bit  
4 in the statutory scheme here. I mean I have done  
5 what I can to get my hands around it, but it is not  
6 an uncomplicated subject. I need to know where  
7 this section 476 fits into the big picture, how it  
8 came to be, what you know about its legislative  
9 history, and I need to know something about the

10 Miwok. I don't know whether there are two Miwok or  
11 250 Miwok.

12           And finally I need to know something about  
13 what is really at stake here. I mean what are we -- are we  
14 really talking about purely the issue of  
15 who gets to speak for this tribe, or are we talking  
16 about who gets to divvy up some money someplace?

17           So you might start by giving me a little  
18 background lecture on those subjects, and then I'll  
19 hear from you on your motion.

20           MR. UPTON: Section 476 of the Indian  
21 Reorganization Act was passed in 1934 for the  
22 purpose of allowing or giving guidance to tribes in  
23 organizing private governments. The 476(a)  
24 provides for what are called secretarial elections,  
25 basically elections run by the Secretary at which

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1 either tribal officers are elected or where tribal  
2 governing documents are approved or amended, for  
3 example, a tribal constitution.

4           The plaintiff relies on 476(h) which was  
5 passed in 2004. We view 476(h) as essentially  
6 relieving the government or the tribe from the  
7 procedures that are set forth in 476(a) and (c),  
8 and we do not deny that a tribe obviously has  
9 inherent authority to adopt tribal governing  
10 documents.

11           The tribe's position is that that  
12 precludes any kind of role for the Bureau of Indian  
13 Affairs with respect to such documents. We can't -- we can  
14 interpret them, the tribal documents. We

15 can't approve or reject.

16           Our position is that 476(a) and by  
17 extension 476(h) essentially embody the principle  
18 that the Secretary not only has the authority but  
19 the responsibility to make sure that tribal  
20 governing documents reflect the will of the members  
21 of the tribe.

22           In this instance we are talking about a  
23 tribe that the BIA has found to be unorganized.  
24 This is because when the BIA looked at the tribal  
25 constitution that it had before it -- and I should

5

1 point out that originally the tribe was going to  
2 seek a secretarial election to approve the tribal  
3 constitution, but later on it withdrew that  
4 request.

5           THE COURT: Much later on, as I understand  
6 it.

7           MR. UPTON: Yes. Yes.

8           The BIA examined the constitution which  
9 was accompanied by a membership roll and membership  
10 information, and it decided that there was no  
11 evidence that in its organizational efforts up to  
12 that point, i.e., up to March 26, 2004, the tribe  
13 had attempted to involve what it called the greater  
14 tribal community.

15           One of the things that the superintendent  
16 pointed out was that, for example, there were  
17 people who had ties to the sheep rancheria. Well,  
18 originally the tribe was called the Sheep Branch of  
19 the Miwok Indians of California. And so there were

20 people with ties, particularly Yakima Dixie who  
21 had inherited the land on which that rancheria was  
22 located, and there were other people, for example,  
23 Melvin Dixie as well. The BIA, I think was trying  
24 to give the tribe some guidance in this regard.

25 I would also point out in terms of

6

1 authority, 43 US 1457, which recognizes -- it  
2 grants the Secretary of the Interior broad  
3 authority over Indian affairs, and in addition  
4 there are two other sections of title 25, sections  
5 2 and 9, which also are broad grants of authority  
6 to Interior officials over Indian affairs.

7 In terms of what is at stake, from the  
8 government's perspective, as I mentioned, there is  
9 a responsibility to ensure that whatever tribal  
10 governing documents are adopted by the Court, and  
11 whatever person may be selected as tribal chairman,  
12 those determinations should be made in accordance  
13 with the will of the greater tribal community.

14 What we have here is essentially, as we  
15 pointed out, an internal tribal dispute between two  
16 factions, the Burley faction and the Dixie faction,  
17 and with your permission I would just like to go  
18 through a brief recitation of the facts that sort  
19 of -- the key facts as I regard them that establish  
20 that that's what we are dealing with here.

21 As I pointed out, Yakima Dixie inherited  
22 the land on which the Sheep Branch Rancheria was  
23 located. Mr. Dixie allowed Ms. Burley to become a  
24 member of the California Valley Miwok Tribe in

25 1998.

7

1           As a result, her daughters were admitted  
2 to membership --

3           THE COURT: What do you mean, allowed her  
4 to become a member? Did he have the power to allow  
5 it or not allow it?

6           MR. UPTON: As I understand it, he had the  
7 power to allow it. He had been the first -- he was  
8 also the first tribal chairperson. He became  
9 chairperson in 1998.

10           Prior to the action of Mr. Dixie, Ms.  
11 Burley had made contact with various bands of  
12 Miwoks -- I do not know how many -- but she had no  
13 particular ties to the Sheep Branch Rancheria.

14           In 1999, Ms. Burley became the tribal  
15 chairperson and Mr. Dixie became the vice  
16 chairperson. The BIA California agency, Central  
17 California agency, recognized Ms. Burley as tribal  
18 chairperson in 1999.

19           In 2001, Mr. Dixie filed a suit in Federal  
20 district court for the eastern district of  
21 California challenging BIA's recognition of Burley  
22 as tribal chairperson.

23           THE COURT: Even though he had resigned?

24           MR. UPTON: That's right. And the suit  
25 was dismissed in 2002.

8

1           In 200--

2 THE COURT: Do you know what, or does it  
3 matter what was the substance of that challenge?

4 MR. UPTON: I don't recall at the moment,  
5 Your Honor.

6 THE COURT: Okay.

7 MR. UPTON: In this 2002 suit against the  
8 Federal government by the tribe, the tribe alleged  
9 in its complaint that it is a federally recognized  
10 tribe with "a potential membership of 250 people."

11 In 2003, Mr. Dixie filed an administrative  
12 appeal to the Deputy Assistant Secretary  
13 challenging BIA's recognition of Ms. Burley as  
14 tribal chairperson.

15 Then on March 26th, 2004, as I noted, the  
16 superintendent of the Central California agency  
17 made the determination that the tribe was not  
18 organized, that the tribal constitution therefore  
19 did not reflect the will of the greater tribal  
20 community, and of course the same could be said for  
21 other governing documents, such as the resolution  
22 setting up a tribal forum.

23 THE COURT: Back up just for a minute.  
24 You say that Mr. Dixie filed an administrative  
25 appeal with the Deputy Assistant Secretary of

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1 Indian Affairs in 2002 --

2 MR. UPTON: And '3, 2003.

3 THE COURT: Who were the parties to that?

4 MR. UPTON: Well, as I understand it, Mr.  
5 Dixie is the only party. I don't believe Ms.  
6 Burley was a party. As you recall, in the February

7 11th, 2005 letter that Mr. Olson wrote to Mr.  
8 Dixie, he pointed out that for various reasons,  
9 procedural reasons, his administrative appeal was  
10 being dismissed.

11 THE COURT: But that's the one as to which  
12 you claim Ms. Burley has not exhausted.

13 MR. UPTON: Ms. Burley relies on that  
14 letter as basically a decision, central decision-making  
15 document in this case, and it is simply not  
16 true. The reason she picks that letter is because  
17 obviously Mr. Dixie had exhausted his  
18 administrative remedies, effectively exhausted  
19 them. There was no place else for him to go.  
20 Whereas in the case of the March 2004 letter, the  
21 determination had been made by the superintendent  
22 that could have been appealed, as the  
23 superintendent pointed out, to the director of the  
24 Pacific regional office of BIA, and from there it  
25 could have been appealed to the Interior Board of

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1 Indian Appeals.

2 Of course, Ms. Burley did not appeal it,  
3 even though the letter not only informed her about  
4 her right to appeal but told her how to go about it  
5 and told her that the office would give her  
6 assistance if she wanted to appeal.  
7 But as our papers establish, there was never any  
8 appeal filed.

9 During the time in 2005, when the BIA was  
10 holding meetings with both factions in an attempt  
11 to help organize the tribe, Ms. Burley sent



12 representatives, but she refused to appear in  
13 person at any of those meetings.

14           There were essentially five issues that  
15 were brought up and discussed at these meetings.  
16 Again, these issues are all factional in nature.

17           First of all, the first issue was to  
18 identify putative members of the tribe, and as Mr.  
19 Dixie points out in his motion to intervene at page  
20 2, he's the spokesperson for putative members of  
21 the tribe.

22           Second, there was a question of exactly  
23 what organizational processes were to be used or  
24 could be used.

25           Thirdly, there was a concern over how Ms.

11

1 Burley had used what are known as 638 funds, funds  
2 that are made available pursuant to the Indian  
3 Self-Determination Act, which enable a tribe to  
4 implement a BIA program or carry out a BIA program  
5 and the BIA provides the funds needed to carry out  
6 that program.

7           Fourthly, there was a concern with how the  
8 what are called the revenue-sharing trust funds,  
9 which were being used by the Burley faction. The  
10 revenue-sharing trust fund is a state fund which  
11 consists of revenues from the gaming tribes in  
12 California, the federally recognized tribes that  
13 carry on gaming pursuant to the Indian Gaming  
14 Regulatory Act. They are required to submit or  
15 required to deposit a certain percentage of their  
16 earnings each year into this fund, and then the

17 commission distributes these monies to the  
18 nongaming tribes.

19           In the case of this tribe, it is my  
20 understanding that prior to this last August,  
21 August of 2005, there had been 12 quarterly  
22 distributions of money, and as I understand it, the  
23 annual amount that was received by the tribe was  
24 approximately \$700,000. So it's an insignificant  
25 amount of money.

12

1           The fifth issue was the fact that Ms.  
2 Burley had failed to appear in person at these  
3 meetings. The Yakima Dixie faction was very  
4 concerned about this.

5           The next thing that happened was that Ms.  
6 Burley disenrolled Mr. Dixie from the tribe in  
7 August of 2005. Right after that Mr. Dixie moved  
8 to intervene in this case, and finally these issues  
9 that I have spoken about are still pending. They  
10 have not been resolved, and so as far as the  
11 government is concerned, this internal tribal  
12 dispute is clearly still ongoing, and I would also  
13 refer the Court to the declaration of Mr. Fry that  
14 is attached to our reply brief, in which he says  
15 the dispute is still ongoing.

16           The tribe says, well, Mr. Dixie is in jail  
17 now, and there's no pending litigation involving  
18 Mr. Dixie, and therefore the dispute is at an end.

19           The government would submit that that is  
20 not really the case at all. The dispute is still  
21 going on.

22                   What is at stake here, as you asked, what  
23 is at stake here is essentially whether whatever  
24 governing documents are adopted are really what  
25 reflects the will of the greater tribal community.

13

1 As I pointed out, the BIA was concerned that there  
2 had been no showing of the involvement of the  
3 greater tribal community. At this point the tribe  
4 consists of, as I understand it, five enrolled  
5 members -- in other words -- and they are all  
6 Burley family members. So basically at this point  
7 that's how many people are in the tribe.

8                   THE COURT: So five people are carving up  
9 \$700,000 a year?

10                   MR. UPTON: Well, I don't know how they're  
11 handling it, to tell you the truth. Ms. Burley has  
12 been -- the money from the commission, from the  
13 California Gambling Control Commission, has been  
14 sent to Ms. Burley. She was recognized as -- well,  
15 originally as tribal chairperson, but then as a  
16 person of authority in the tribe, somebody who  
17 would be authorized to handle the receipt of that  
18 money.

19                   And I would point out the tribe --

20                   THE COURT: What requirement does the  
21 tribe have to account for that money?

22                   MR. UPTON: Well, those are tribal funds.  
23 They are not tribal trust funds, but they are  
24 tribal funds because they are distributed, as I  
25 pointed out, to the nongaming tribes in California.

1           THE COURT:  So this is a California  
2  distribution?

3           MR. UPTON:  Yes, that's right.  This is a  
4  California distribution.

5           THE COURT:  But they don't have to account  
6  to anybody about how they spend it or who gets it  
7  or how it's whacked up?

8           MR. UPTON:  Well, they have not, up to  
9  this point, as far as I'm aware, there has been no  
10 accounting.

11          THE COURT:  What about the money that  
12 comes from BIA?

13          MR. UPTON:  Well, the money that comes  
14 from BIA under 25 CFR part 900 is monitored, the  
15 use of that money is monitored by BIA.  BIA has the  
16 authority to request an annual site visit which has  
17 come up in this case recently within the last  
18 couple of months.  BIA scheduled three site visits  
19 for the purpose of monitoring how the 638 monies  
20 were being used, and those were all cancelled by  
21 Ms. Burley.  So that has not happened yet.

22          Now there have been monitoring visits in  
23 the past.  I mean this isn't something new.  And  
24 it's clearly something that BIA not only has the  
25 authority to do but it has an obligation to do.

1           THE COURT:  How much money is that every  
2  year?

3 MR. UPTON: I'm not certain, Your Honor.

4 I know -- I believe that some years --

5 THE COURT: Ball park.

6 MR. UPTON: Four hundred thousand or  
7 something like that. But I don't know that they  
8 get it -- and perhaps Mr. Keep could inform me on  
9 that.

10 THE COURT: So we're talking about -- I  
11 mean let's not put too fine a point on it. What  
12 this case is really about is who is going to  
13 control and direct the expenditure of about \$1  
14 million a year. Is that a reasonable statement?

15 MR. STEELE: Actually, Your Honor --

16 THE COURT: The question is to him.  
17 You'll get your chance.

18 MR. UPTON: With the Court's permission,  
19 Mr. Keep can address it.

20 MR. KEEP: Your Honor, we believe that the  
21 California Gaming Commission, the annual amount --  
22 although the amount cited in this current brief is  
23 about \$1.1 million, Mr. Upton is correct that  
24 between the direct costs and the indirect costs,  
25 the Bureau of Indian Affairs contract costs under

16

1 Public Law 92-638 are about \$400,000. So it's  
2 really a little bit closer to a million and a half,  
3 I believe.

4 THE COURT: All right.

5 MR. UPTON: Yes, certainly it's important  
6 who gets control of how that money is used.

7 THE COURT: Talk to me about the

8 exhaustion argument in your motion. You concede  
9 that exhaustion is not jurisdictional here, but  
10 argue for nonjurisdictional prudential exhaustion.  
11 How does that -- what's the mechanics of that? Are  
12 you asking me to remand it or to dismiss it? And  
13 if to remand it, for what? What would happen and  
14 is the BIA moving any faster on this than it moves  
15 on other matters that you've been before me on?

16 MR. UPTON: Well, I have not -- I was -- I  
17 am really asking for dismissal. I guess there are  
18 two basic points I made. The first is that we  
19 believe in this situation, prudential exhaustion  
20 situation, that exhaustion of administrative  
21 remedies is a condition precedent to filing suit,  
22 and we relied on the Johnson case and Hidalgo v.  
23 FBI case. The Johnson case probably has the most  
24 pertinent language.

25 In Johnson, page 36, 368 F Sup 2d at 36,

17

1 the Court said:

2 "In cases involving the application of the  
3 nonjurisdictional exhaustion requirement imposed by  
4 the Freedom of Information Act, the D.C. Circuit  
5 has treated exhaustion as a condition precedent to  
6 filing suit in Federal court."

7 And it cites the Hidalgo and also the  
8 Wilbur case.

9 The Court goes to say:

10 "A plaintiff's failure to demonstrate that  
11 he or she has satisfied this condition then is  
12 tantamount to a failure to sufficiently plead a

13 necessary element of a Federal cause of action.  
14 Thus when a Federal court finds that the plaintiff  
15 failed to exhaust his or her administrative  
16 remedies and the exhaustion requirement is  
17 prudential rather than jurisdictional, the  
18 appropriate disposition is to dismiss the  
19 plaintiff's unexhausted claims under rule  
20 12(b)(6)."

21           So that is essentially what we are asking  
22 for.

23           THE COURT: But suppose I dismiss, what  
24 happens then? I mean there are unexhausted claims  
25 that you assert that Ms. Burley failed to follow up

18

1 on after the finding in March 2004 that the tribe  
2 was unorganized.

3           MR. UPTON: Well, that's still the central  
4 issue here. And she, as I pointed out, despite  
5 what the letter told her, she failed to take  
6 advantage of administrative remedies she had. She  
7 claims or her attorneys claim there are no  
8 available administrative remedies. But that  
9 argument is only accurate if you look at the Olson  
10 letter of February 11, 2005 to Mr. Dixie. And in  
11 fact, of course, that came out in Ms. Burley's  
12 favor, ironically, because BIA rejected the  
13 challenge.

14           Again, that is still the central issue,  
15 and --

16           THE COURT: Is the -- I have some  
17 understanding that the California gaming money has

18 been escrowed or the faucet has been turned off  
19 during the pendency of this case. Right?

20 MR. UPTON: Well, back in August the  
21 commission decided that it was not certain to whom  
22 the distribution should be made. I would point out  
23 that the BIA, when it was contacted by the  
24 commission, was not urging the commission to  
25 withhold the distribution.

19

1 Just recently in December the commission  
2 decided to file an interpleader suit in state  
3 court, and the commission deposited the withheld  
4 distribution back in August, that distribution, put  
5 it in a court register, and I'm assuming that the --  
6 obviously the same would be true for any future  
7 distributions.

8 So the money is sitting there. It's not  
9 going to disappear, and so in that sense there is  
10 no permanent loss here, nor is the loss  
11 noncompensable.

12 THE COURT: How about the Federal money?  
13 Does that continue to flow?

14 MR. UPTON: Federal money -- it is my  
15 understanding the Federal money, yes, would  
16 continue to flow and, in fact, the 638 contract  
17 with the tribe is up for renewal as we speak. And  
18 as I understand it, the Pacific regional director  
19 has said that it will be processed promptly by BIA.  
20 So that money continues to flow.

21 THE COURT: To whom?

22 MR. UPTON: That money would still be



23 delivered, as I understand it, to Ms. Burley. Now  
24 the reason for that is that Mr. Risling, in his  
25 2004 letter, although he indicated Ms. Burley was

20

1 no longer the recognized tribal chairperson, he  
2 said she is still a person of authority in the  
3 tribe and still has some authority. In his  
4 declaration attached to our reply brief, Mr. Fry  
5 points out that she is a person with some authority  
6 still, and so that money can go to her.

7 THE COURT: All right. I think I  
8 understand your exhaustion argument. Your subject  
9 matter jurisdiction argument I don't frankly think  
10 you need to spend a lot of time on, and I think  
11 this really -- you characterize this as an internal  
12 tribal dispute, and it certainly is that, but it's  
13 also about the government's treatment of it in the  
14 BIA, and I think that's -- I don't think we need to  
15 spend a lot of time on it. I think that and your  
16 waiver claim are both APA claims -- I mean they are  
17 both answered by the APA, and if the -- I think the  
18 plaintiffs have moved to amend to add an APA count,  
19 among other things.

20 So if we proceed at all, that amendment  
21 cures that problem.

22 MR. UPTON: Your Honor, with your  
23 permission, I just want to point out one thing with  
24 respect to subject matter jurisdiction, and that is  
25 the rationale for the decisions that we cite is

1 that it's not possible for a Federal court to  
2 assume jurisdiction or exercise jurisdiction over a  
3 case of this nature without in effect imposing its  
4 will on how the internal tribal dispute should be  
5 resolved, and that's mentioned specifically in the  
6 Ordinance 59 Association case.

7 THE COURT: Well, that's like saying it's  
8 not possible for the Court to decide any APA case  
9 without imposing its will on the outcome, and I --  
10 I mean as long as they hew to the APA standards,  
11 I'm not too much concerned about that. I hear you,  
12 but I am more interested in your analysis of  
13 failure to state a claim and particularly the  
14 meaning of 476(h) which is really the, as I  
15 understand it, the touchstone of the plaintiff's  
16 case here. You have a different pitch on it. I'm  
17 reading from your brief in which you say:

18 "While we read section 476(h) as having  
19 freed tribes from the procedural requirements of  
20 476(a) and (c), where the Secretary at the tribe's  
21 request calls and conducts an election, section  
22 476(h) does not negate the Secretary's authority to  
23 find that a tribe is unorganized and refuse to  
24 recognize its constitution because it does not  
25 reflect approval by the majority of the membership

1 of the greater tribal community. The problem for  
2 the plaintiff is it has yet to identify its  
3 membership. Therefore, Ms. Burley's constitution

4 cannot possibly have the requisite support of the  
5 membership in order for the BIA to accept it as a  
6 legitimate governing document."

7 I think that makes sense. The question is  
8 whether there is any place here for a Chevron  
9 analysis of that interpretation of the statute.

10 MR. UPTON: Well, I think in our reply  
11 brief we had mentioned Chevron. Obviously Interior  
12 has special expertise in Indian affairs.

13 THE COURT: Yes, but so do the Indians.

14 MR. UPTON: That's true, too. But on  
15 Chevron, we would submit, as we did in our reply  
16 brief, Chevron would apply to this situation.  
17 Certainly the Interior Department has had very long  
18 experience in interpreting Indian legislation, and  
19 there should be considerable deference given to  
20 Interior's interpretation.

21 So I believe Chevron is applicable.

22 THE COURT: Well, the plaintiff in this  
23 case is the California Miwok Tribe.

24 MR. UPTON: Yes.

25 THE COURT: Recognized tribe.

23

1 MR. UPTON: It's a recognized tribe.

2 THE COURT: A tribe with which the Bureau  
3 of Indian Affairs has conceded that it has  
4 government-to-government relations.

5 MR. UPTON: Yes.

6 THE COURT: So why is the BIA's expertise  
7 entitled to any more deference by a court than that  
8 of another sovereign nation which is also a party

9 in the case?

10 MR. UPTON: Well, the fact that the tribe  
11 is federally recognized implies that there is  
12 certainly some kind of governmental structure. We  
13 are not arguing that the tribe is not federally  
14 recognized or shouldn't be federally recognized.  
15 We are saying that the current tribe simply doesn't  
16 reflect the greater tribal community, and we are  
17 still free to make -- Interior is still free to  
18 make that determination, notwithstanding the fact  
19 they have Federal recognition.

20 Again, we are not contesting their  
21 recognition and that there is a government-to-government  
22 relationship. We are not denying that.

23 I would just point out with respect to  
24 exhaustion arguments that there are two cases which  
25 -- in other circuits which -- one of which is --

24

1 it's called *Magiera v. Norton*, 108 Fd AP 542, Ninth  
2 Circuit, 2004, and *Kloudt v. DOI*, 900 F2d 409,  
3 Eighth Circuit, 1993, which deal with the BIA regs.  
4 It's not entirely clear, but they seem to say that  
5 the regs require exhaustion, but it's a  
6 nonjurisdictional requirement because the Courts go  
7 on to look at balance between the interested  
8 individual in getting the judicial access and the  
9 institutional interest of the BIA, and essentially  
10 they are talking about the same kinds of  
11 considerations that you look to under the *Avocado*  
12 *Plus* analysis, especially part two.

13 I would just add that we believe even if

14 Hidalgo and Johnson by themselves, in and of  
15 themselves aren't sufficient to persuade the Court  
16 to grant dismissal on the grounds of failure to  
17 exhaust, then under the Avocado analysis, Avocado  
18 Plus analysis, the Court should still come to the  
19 same conclusion.

20 THE COURT: Let me go back to this  
21 exhaustion piece. You say that Ms. Burley takes  
22 the position that there's nothing to exhaust or, to  
23 put it another way, that there's no administrative  
24 procedure that would give her any relief and it's  
25 futile and so forth. If I were to dismiss for

25

1 failure to exhaust, would it still be open to Ms.  
2 Burley or the Miwok tribe or whatever party wishes  
3 to do so to go back and reopen that March 26, 2004  
4 letter and appeal it through the BIA? Or is it  
5 your position that it's too late?

6 MR. UPTON: Our position would be it's too  
7 late to do that.

8 THE COURT: So it would be futile.

9 MR. UPTON: It would be futile to -- yes.

10 THE COURT: So there's no remedy.

11 MR. UPTON: Well, I'd have to amend that  
12 to say under Avocado Plus part two, the Court  
13 looked at whether the agency can grant effective  
14 relief. Certainly when the tribe is shown that it  
15 does represent the will of the greater tribal  
16 community, and it certainly can make a case that it  
17 is organized, and also under Avocado Plus there's a  
18 question, according to Avocado, there is an issue

19 as to whether the administrative appellate body has  
20 been shown to be biased to make a prejudgment, and  
21 there's no showing of that here.

22 As I said, the regional director, the  
23 Pacific regional director would have been the  
24 person to whom the appeal would go.

25 THE COURT: Well, let me -- I'm trying to

26

1 find out what happens if I dismiss this case. What  
2 does the BIA do if I dismiss this case? What do  
3 you next? Anything? Or just let the Miwok set  
4 there as unorganized and keep sending them money  
5 every year and --

6 MR. UPTON: As far as I'm -- the BIA would  
7 keep on with its current efforts to facilitate  
8 organization of the tribe, and bring the factions  
9 together.

10 THE COURT: And how would you do that?

11 MR. UPTON: Well, there's been a series of  
12 meetings, as we point out.

13 THE COURT: The meetings that Ms. Burley  
14 would not attend?

15 MR. UPTON: Right. Which, for the record,  
16 she did send representatives. So the attempt  
17 obviously is to bring the factions together. I  
18 would point out Ms. Burley did say in one letter,  
19 which is an attachment to our pleadings, that she  
20 thought perhaps that Melvin Dixie, who is Yakima  
21 Dixie's brother, might be a person who was entitled  
22 to become a member of the tribe. So at least we  
23 would say that's some recognition on her part that

24 at least there must be some members of the Dixie  
25 faction who are entitled to be enrolled members.

27

1           There's another thing to point out, and  
2 that is the tribe has submitted a list of 29  
3 applicants for membership in the tribe.

4           THE COURT: Who has?

5           MR. UPTON: The tribe has.

6           THE COURT: The tribe has submitted --

7           MR. UPTON: A list of 29 applicants for  
8 membership. The list goes to BIA, and the first  
9 thing that has to happen is that BIA has to get a  
10 waiver of any privacy rights from those individuals  
11 because -- before it releases any information to  
12 the tribe. So far there have been I believe six  
13 waivers out of the 29 people.

14           So, you know, I guess I'm saying that at  
15 least at this point there is some hope, I guess,  
16 that the process is moving in the right direction,  
17 and that the tribe will be organized. We are not  
18 stuck in absolute dead center. There's, you know,  
19 some attempt certainly by BIA to, you know, resolve  
20 this.

21           THE COURT: So this 476(h) question, in  
22 your view, either the tribe has to go through the  
23 standard secretarial election or BIA has to be  
24 convinced that the form of government they have  
25 adopted for themselves under 476(h) is sufficiently

1 representative?

2 MR. UPTON: That's right.

3 THE COURT: Is that essentially where you  
4 are?

5 MR. UPTON: Yes.

6 THE COURT: The finding you made back in  
7 2004 is no longer reviewable, but that doesn't mean  
8 that Ms. Burley could not continue to raise the  
9 question with BIA and obtain a new ruling or a new  
10 finding.

11 MR. UPTON: Well, she certainly -- no, it  
12 doesn't bar her from doing that. Certainly as a  
13 result of this process that's already been started.  
14 I mean I assume that would be ongoing. So if she  
15 doesn't like how it turns out, certainly she could  
16 raise it. I don't know what she will do,  
17 obviously, because it's obviously going to be  
18 fairly complicated and a long process.

19 THE COURT: I don't doubt that, counsel.

20 All right. Thank you very much. I think  
21 I will hear from the tribe.

22 MR. UPTON: Thank you, Your Honor. May I  
23 reserve 10 minutes for --

24 THE COURT: Sure.

25 MR. STEELE: Good day, Your Honor.

1 THE COURT: Good afternoon, sir.

2 MR. STEELE: Should I launch, or would the  
3 Court prefer to ask me some questions?

4 THE COURT: Well, I think you've heard



5 enough of what the issues are that I'm interested  
6 in. You can jump in anywhere you like.

7 MR. STEELE: Okay, thank you, Your Honor.

8 The first thing that really strikes me  
9 that I want to really make clear is that there is  
10 no internal tribal dispute here. However, however  
11 anyone tries to make it sound as if there is. The  
12 classical internal tribal dispute has one faction  
13 set off against another within a tribe. That is  
14 not what is occurring here.

15 What we have here are tribal members who  
16 are being besieged by people who are not nor have  
17 ever been tribal members, and that is really the  
18 crux of what we perceive the BIA and the U.S.  
19 government trying to do which is to force people  
20 into the tribe who are not currently members nor  
21 have ever been members.

22 It would be a different situation --  
23 Yakima Dixie is a very different situation I'll be  
24 glad to discuss with the Court, but be that as it  
25 may, the larger community to which the government,

30

1 the United States government refers consists of  
2 people who are not tribal members at this time.

3 Now that being said, what I do want to get  
4 to now is that the real issue in this case is  
5 simply that we are seeking a determination of  
6 whether or not 25 USC 476(h) means what it says.  
7 We believe that it means that we can adopt  
8 governing documents outside the procedures  
9 elsewhere in the Indian Reorganization Act. We

10 think that's what it says and we believe and have  
11 shown this Court that that is in fact what the  
12 sponsor of the bill intended.

13           With respect to the original -- the March  
14 2004 letter which the government wants portrayed as  
15 really the inspiration for the subsequent Olson  
16 letter that we are actually challenging, it may  
17 have been the inspiration, but it was clear, and we  
18 feel that the letter stands on its own, to what it  
19 said did not correspond to what Olson said at the  
20 later date. I'll read from the first paragraph,  
21 which I think fairly encapsulates what that letter  
22 stood for, which is:

23           "This letter acknowledges our February  
24 11th, 2004 receipt of a document represented to be  
25 the tribal constitution for the California Valley

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1   Miwok."

2           THE COURT: You're going to have to slow  
3 down because the man trying to take this down can't  
4 talk as fast as you can when you're reading.

5           MR. STEELE: I'm sorry, Your Honor.

6           "It is our understanding that the tribe  
7 has shared this tribal constitution with the Bureau  
8 of Indian Affairs in an attempt to demonstrate that  
9 it is an organized tribe. Regretfully, we must  
10 disagree that such a demonstration is made."

11           I think it is clear the rest of the letter  
12 demonstrates that what that letter really stood for  
13 was the government saying to the tribe, we don't  
14 care if you've got a constitution; we're still

15 going to regard you as unorganized until you admit  
16 people that we want you to admit into your tribe.

17           That is what that letter stood for, and at  
18 that point we don't believe that we really had a  
19 case that necessarily -- because they hadn't  
20 technically violated anything by just calling us  
21 names, effectively. They still regard them as the  
22 person whom they conduct a government-to-government  
23 relationship with, and if that was the case, we  
24 didn't really care. If they called it the monarch,  
25 the queen, the spokesperson, tribal chair, or

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1 whatever, so long as we had that relationship, we  
2 had no further concern than the Soviet Union would  
3 have in a similar situation.

4           THE COURT: Let me put a hypothetical to  
5 you, and it's a fairly stark hypothetical. Suppose  
6 that there are five people all in the same family  
7 who say we're the Miwok tribe, and we rule the  
8 Miwok tribe, and we have adopted our own tribal  
9 constitution, our own form of government, and  
10 476(h) says we can do that. And we're going to let  
11 into the tribe the people we want to let into the  
12 tribe and whack up \$700,000 or a million one plus  
13 another 400,000 anyway we want to, and that's what  
14 476(h) allows, period.

15           Now that's a hypothetical, counsel. Do  
16 you assert that 476(h) basically says government,  
17 butt out, you've got nothing to say about that  
18 scenario?

19           MR. STEELE: Yes, I do, however

20 distasteful the hypothetical scenario you have  
21 drawn would look. Santa Clara Pueblo, I think,  
22 really exemplifies the sort of control that a tribe  
23 has over its internal affairs, which is total.

24           If a tribe in Santa Clara Pueblo can  
25 disallow people who are linked to the tribe through

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1 their mothers while allowing those that are linked  
2 to the tribe through their fathers, I think that  
3 says pretty clearly that the tribe can control  
4 their membership. I mean the case law and  
5 statutory law I believe is rife with law that  
6 supports that proposition.

7           Now is that a good thing? I am not going  
8 to say that that is, but I think that it is within  
9 the right, as a technical matter, within the  
10 context of that hypothetical for a tribe to do  
11 that, to so restrict their membership if that is  
12 the case.

13           And let me go further and say that this is  
14 not -- there's been a course of dealing -- I would  
15 say in the hypothetical, had there been a course of  
16 dealing for years between the tribe and the U.S.  
17 government that supported that membership being in  
18 fact the membership of the tribe, that that would  
19 be a fact that would be taken into account.

20           I would go further in saying that the  
21 course of dealing would indicate -- if the course  
22 of dealing indicated that there had never been a  
23 large number of people associated with this tribe,  
24 even in the eyes of the government, that that would

25 be a factor to be taken into account also.

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1           But I think to get closer to what the  
2 Court is saying is it a just thing, I think that's  
3 a different discussion I'd be prepared to have, but  
4 I think the technical answer, technically, looking  
5 at the law and not a policy approach from somebody  
6 within an administrative agency, as a matter of  
7 law, yes.

8           THE COURT: You've been listening to  
9 Senator Brownback, who gives speeches, quoting from  
10 the Book of Psalms and the Book of Judges in which  
11 he says that the courts of this country are long on  
12 justice and short on the law -- short on  
13 righteousness, I think, is his analysis of it.

14           Let me ask you this: It is very difficult  
15 for me to ignore the elephant in the corner in this  
16 case, which is the money. It is very difficult for  
17 any judge to look at this situation and think that  
18 this is really all about who gets the money.

19           Now when I raised that question with BIA  
20 counsel, you said you disagreed with that, and I  
21 said it will be your turn later, so it's your turn  
22 now. Why isn't this case really all about the  
23 money?

24           MR. STEELE: I guess the consequences are  
25 what we are really talking about here when we talk

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1 about the money, in my opinion. We are in this

2 case to protect the tribe's sovereignty. If a  
3 consequence of that is that somebody gets money,  
4 then so be it. But we believe that the laws ought  
5 to be followed, and that's really all we're asking  
6 for, that the laws should be followed. And if the  
7 consequence is that at this time a lot of money  
8 goes to a small group of people, well, that's a  
9 consequence that is I think just necessary.

10 I mean there are other ways to address  
11 that issue, but the issue at hand --

12 THE COURT: Not exactly in keeping, is it,  
13 with the idealistic vision we all have of the  
14 Native American one for all and all for one sharing  
15 concept, is it?

16 MR. STEELE: I wouldn't say that at this  
17 juncture it is, but at this juncture what we are  
18 faced with is dealing with what's in front of us.  
19 And what is in front of us right now is we are not  
20 even being allowed to resolve our own internal  
21 disputes if it's left to the Federal government. I  
22 mean these -- that basic premise is what's really  
23 at stake here.

24 I would go further to say that before we  
25 can even discuss -- let's just deal with this

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1 gorilla in the corner for a minute.

2 THE COURT: Good.

3 MR. STEELE: Between -- I know we have  
4 overloaded this court with paper and exhibits and  
5 such, and I've got to give a nod to opposing  
6 counsel here, and to the extent that in their --

7 the exhibits they attached to their opposition to  
8 the preliminary injunction application, I think  
9 tell a story of a dialogue that is going on between  
10 the tribe and the Federal government with respect  
11 to membership.

12 We have said on numerous occasions,  
13 anybody who is interested in joining the tribe,  
14 please send us an application. There are certain  
15 people who have aggressively tried to force  
16 membership -- force themselves into membership who  
17 refused to do and prefer to work as what I regard  
18 as straw man to support the government's fiction, I  
19 believe --

20 THE COURT: We're talking about Yakima  
21 Dixie now.

22 MR. STEELE: Yakima Dixie is actually a  
23 separate issue. Yakima Dixie was the first person  
24 they chose to support, but he has since adopted a  
25 small following, and this small following may or

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1 may not be eligible for membership, but we don't  
2 know because they won't submit an application  
3 because they feel emboldened by the government that  
4 they can interfere and force themselves into the  
5 tribe outside of the tribal procedures.

6 My point is that if the Court looks at the  
7 correspondence and the course of dealing between  
8 the parties, there is an ongoing dialogue regarding  
9 the membership issue. Mr. Upton referred at one  
10 point to a request we had for 29 people that he  
11 wanted background checks on to process them for

12 possible membership. It's been months, I'd say at  
13 least nine, 10 months, and we have still gotten on  
14 response.

15           Is that a crime? Not necessarily. But  
16 what it really stands for is that this is not a  
17 static situation in that this gorilla as it sits in  
18 the corner now is the gorilla that's going to be in  
19 place for time immemorial regardless of how this  
20 particular action plays out. And the tribe is  
21 aware of it, that there is an issue to be addressed  
22 with respect to membership, but until we get a  
23 clarification of the relationship between the  
24 parties, that being do we actually have the right  
25 to resolve our own internal disputes and control

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1 our membership, to control -- to perform the  
2 typical governmental functions that a tribe, any of  
3 the tribes is allowed to perform, we can't really  
4 make any progress on that front in any negotiation  
5 with the BIA.

6           So in my mind, this is really about  
7 clarifying the position between the parties so that  
8 we can then go on and address these other issues.

9           THE COURT: By what formula, if you know,  
10 does the California agency distribute funds to  
11 nongaming tribes?

12           MR. STEELE: You're talking about the  
13 state revenue sharing?

14           THE COURT: Yes.

15           MR. STEELE: It's capped at a certain  
16 amount. The amount that they distribute at any



17 given time is going to be a reflection of what  
18 proceeds they receive from the compact tribes that  
19 contribute to that fund. But every time is capped  
20 I believe at 1.2 million, and the distributions  
21 really depend on what's in the coffers at any given  
22 time.

23 THE COURT: Every tribe, irrespective of  
24 the size of the tribe, the number of members of the  
25 tribe, a tribe is a tribe, they all share?

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1 MR. STEELE: A tribe is a tribe, they all  
2 share.

3 THE COURT: One tribe, one share; is that  
4 it?

5 MR. STEELE: Correct.

6 THE COURT: Okay. Tell me what you can  
7 about the legislative history of 476(h).

8 MR. STEELE: There wasn't a great deal,  
9 but what there was is included in the papers, and  
10 it was simply a response from the sponsor, who was  
11 Ben Campbell, a senator at the time, who stated  
12 that the purpose of the statute was to ensure that  
13 tribes had the inherent authority to adopt  
14 government documents outside of the Indian  
15 Reorganization Act, and we believe that was because  
16 there was in the actual Senate record --

17 THE COURT: Which is roughly what the  
18 statute says.

19 MR. STEELE: Pardon?

20 THE COURT: I say that doesn't elaborate  
21 very much on the statute.

22                   MR. STEELE: The plain language of the  
23 statute says -- you know, means what it is, which  
24 is in 476(h) says specifically that -- and I don't  
25 want to bore you with me digging through the papers

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1 here to grab it. But what it says is that tribes  
2 possess the inherent authority to adopt government  
3 documents and procedures other than those  
4 prescribed in, and it mentions all the other  
5 paragraphs in IRA that relate to such things.

6                   The underlying dispute between them is  
7 that some tribes have adopted the Indian  
8 Reorganization Act earlier and decided to reject it  
9 at some later date. There was a great deal of  
10 confusion over whether or not tribes actually had  
11 the authority to reject IRA if they had previously  
12 adopted it. That statute clarified that. And  
13 that's what we believe, what I believe the statute  
14 really stands for, is that they're making it clear  
15 that even if you had previously adopted IRA, that  
16 you can opt out of it and adopt government  
17 documents as you see fit. Because otherwise you  
18 have the situation where people that hadn't adopted  
19 IRA operated without governmental -- with  
20 interference from the Bureau of Indian Affairs,  
21 where somebody -- another tribe where somebody  
22 might have adopted -- voted to accept IRA in the  
23 early 1900s was bound to allow the government to  
24 interfere based on the government documents that  
25 were governing the tribe at that time.

1           THE COURT: You say the Yakima Dixie story  
2 is another story. Everybody says Yakima Dixie is  
3 another story, but I'm ready for the other story.

4           MR. STEELE: Yakima Dixie is a son of the  
5 woman who was the sole tribal member that the BIA  
6 recognized for purposes of terminating the tribe in  
7 1967. That termination was a subject of our  
8 pending suit in the Ninth Circuit, but Mr. Dixie --  
9 after a period of time, the termination occurred in  
10 1967, and everything was pretty much dormant with  
11 the tribe for 20 or so years. He made contact  
12 again with the Bureau of Indian Affairs in the late  
13 '90s, and when he made contact, he was clearly --  
14 because the -- based on his lineal connection to  
15 the former Rancheria, the Bureau of Indian Affairs  
16 recognized him as a tribal member.

17           Subsequent to being recognized as a tribal  
18 member, he then admitted Silvia Burley and her  
19 daughters into the tribe. He remained a tribal  
20 member until recently, and at some point during the  
21 relationship -- and when I say the relationship, I  
22 mean between 1998 and today, he made contact with a  
23 group of people who encouraged him, as we see, to  
24 take control of the tribe from Ms. Burley despite  
25 the fact that there had been a democratic process

1 that had placed her there.

2           That is really pretty much the story of

3 Mr. Dixie, that he basically has gone ahead and  
4 followed the counsel of these people who he has  
5 made contact with, and become sort of the straw  
6 man, as I say, with the government, likes to use to  
7 create this appearance of an internal tribal  
8 dispute.

9 He also has problems staying out of  
10 custody, and that, among other reasons, is part of  
11 the reason why he's no longer a tribal member.

12 THE COURT: He's in custody right now?

13 MR. STEELE: Yes.

14 THE COURT: Okay. If I were to dismiss  
15 this case on the government's prudential exhaustion  
16 theory, which really is another way of saying a  
17 judge has to be very careful where he puts his foot  
18 in something like this, and maybe BIA ought to sort  
19 it out first -- that's really what the ruling would  
20 amount to -- what does Ms. Burley do?

21 MR. STEELE: I would file an amended  
22 complaint that would look a lot like the  
23 supplemental complaints that are before this Court  
24 at this time. If we don't have a remedy here, we  
25 don't really have a remedy.

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1 THE COURT: Why not?

2 MR. STEELE: Well, the Secretary, the  
3 Assistant Secretary, the Acting Assistant Secretary  
4 for Indian Affairs is the one who actually made the  
5 determination we're trying to challenge. There's  
6 nobody to appeal to. I mean the appeals board is  
7 subservient to him. And by Federal rule, 25 CFR

8 2.6(c), by definition there is no administrative  
9 remedy to an Assistant Secretary decision, which is  
10 what occurred here.

11           And without belaboring the -- was it the  
12 March 2004 letter or the February 2005 letter  
13 issue, one thing that is absolutely clear is that  
14 nothing in the 2004 letter refers to the tribal  
15 forum. The 2005 letter specifically rejects the  
16 tribal forum. Now I don't really want to torture  
17 the 2004 letter. They can't overcome that issue.  
18 And if for no other reason, we're not conceding our  
19 interpretation of the 2004 letter, but we  
20 absolutely say if the Court were not to engage any  
21 other aspect of our argument, that one, we believe,  
22 is unassailable. And when you take the tribal  
23 forum issue, that puts you straight in 25 CRF  
24 2.6(c), which leaves you no administrative remedy.

25           So our only remedy would be to seek

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1 redress in this court once again, and to amend our  
2 pleadings to satisfy whatever the Court's  
3 misgivings were about them.

4           THE COURT: Well, the refutation of the  
5 tribal forum, that was -- I mean Dixie wanted to --

6           MR. STEELE: Your Honor, if I may?

7           THE COURT: Yes.

8           MR. STEELE: During the early discussion  
9 with opposing counsel, I believed that there was  
10 sort of a misunderstanding going on that I wanted  
11 to make clear. The Dixie appeal was completely  
12 separate from anything the tribe was doing. That

13 was his own personal appeal. That really has no  
14 bearing on what the tribe was doing --

15 THE COURT: Well, that's fine, but the  
16 February 11th, 2005 letter is all about the Dixie  
17 appeal, isn't it?

18 MR. STEELE: Yes.

19 THE COURT: So it has nothing to do with  
20 the rest of the trial. So I mean the tribe wasn't  
21 even a party to that.

22 MR. STEELE: Except that the consequences  
23 to the tribe are what we are trying to address. It  
24 was one thing for the Assistant Secretary to  
25 dismiss Mr. Dixie's appeal, but they are well aware

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1 that everything they put on a document finds its  
2 way to every person that is doing business with the  
3 tribe, in every facet of government, be it Federal,  
4 state, and business. And they went beyond that.

5 THE COURT: So the consequences for the  
6 tribe, the letter says the BIA has rejected the  
7 tribe's constitution, doesn't recognize Ms. Burley  
8 as tribal chairperson, would not recognize anybody  
9 as tribal chairperson until or unless the tribe  
10 organizes as described in the 2004 letter, and  
11 doesn't recognize the tribal hearing process as a  
12 legitimate tribal forum. That's what the letter  
13 does.

14 MR. STEELE: Correct.

15 THE COURT: Now what is the operative  
16 effect of the refusal to recognize the tribal  
17 forum? I mean the only person interested in the

18 tribal forum was Yakima Dixie, wasn't he?

19 MR. STEELE: Yes, and the tribe, but  
20 interference with governmental processes is an  
21 inherent harm. We cannot govern if the Federal  
22 government makes it a point of telling anybody  
23 within hearing distance that nobody -- that they  
24 will not honor any decision the tribe makes it, be  
25 it a governmental decision, by resolution, a

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1 constitution, or decision by its governing body.

2 What is more, how would one expect the  
3 tribe to be shall we say eager to admit a lot of  
4 new members when you've got the Federal government  
5 basically telling anybody -- again, as I said --  
6 we're not going to allow you to resolve your own  
7 internal disputes? We're not going to allow you to  
8 govern. That's the basic effect.

9 Now can you -- does there -- I guess that  
10 it may not sound dramatic, but I don't think it  
11 needs to sound dramatic because the courts have  
12 recognized, as recited in Seneca, Kiowa, and  
13 Prairie Band cases before this court, that  
14 interference with governmental activities is an  
15 inherent harm in and of itself. And when you tell  
16 somebody that -- you tell a tribe that they cannot  
17 resolve their own differences, we think that is the  
18 epitome of interference with tribal government.

19 THE COURT: Okay, counsel, I think I've  
20 got it. Anything else?

21 MR. STEELE: Not at this time, Your Honor.

22 THE COURT: All right. Thank you.

23 MR. STEELE: Your Honor, if I may -- not  
24 at this time. Thank you very much.

25 MR. UPTON: At some point in his argument,

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1 it is important to note that Mr. Steele did concede  
2 there is an internal tribal dispute here, and I  
3 think that is important.

4 Secondly, with respect to membership, it's  
5 important for the Court to know that the present  
6 constitution, the one that was examined by BIA,  
7 limits membership to people that are Silvia  
8 Burley's lineal descendants. It's an extremely  
9 narrow membership criteria.

10 As far as his argument about BIA not  
11 responding with respect to the designation of 29  
12 applicants for membership, I think I explained that  
13 --

14 THE COURT: I'm sorry, let me back up  
15 there for a minute because I was going to ask you  
16 the precise question I think you just answered,  
17 which is why the BIA rejected the tribe's  
18 constitution.

19 MR. UPTON: The BIA rejected the  
20 constitution primarily because of two reasons:

21 There was no evidence from the membership  
22 rolls that they had tried to -- they had first of  
23 all identified people within the greater tribal  
24 community that would -- putative members, at least;  
25 and secondly, they said up to now, the BIA said up



1 to this point, meaning up to March 2004, there's no  
2 evidence that the tribe has even attempted to  
3 include in its attempts to organize, there's no  
4 evidence that it tried to reach out to this greater  
5 tribal community and include them in those  
6 organizational efforts.

7 I would submit that that's certainly  
8 supported, that decision is certainly supported by  
9 the fact that the constitution also limits  
10 membership to Silvia Burley's lineal descendants.  
11 It's certainly, I think, is --

12 THE COURT: Well, that's a fairly powerful  
13 point to me. The question is whether that is a  
14 point which, if we had a full administrative  
15 record, an APA review and so forth, it would turn  
16 out that that was a deciding factor or one of the  
17 deciding factors in the rejection of the  
18 constitution.

19 MR. UPTON: Well, I would assume that the  
20 -- in the March 2004 decisionmaking process, I am  
21 assuming that the BIA certainly took note of that.

22 THE COURT: Is the constitution of record  
23 in this case?

24 MR. STEELE: Yes, Your Honor.

25 THE COURT: Where is it? Attached to

1 what?

2 MR. STEELE: Definitely the complaint.

3 And, Your Honor, we'll have an opportunity after

4 Mr. Upton's finished?

5 THE COURT: Sure. There's no such thing  
6 as last word in this courthouse.

7 [Laughter.]

8 MR. UPTON: I just wanted to reiterate,  
9 Your Honor, with respect to the applications of the  
10 list of applicants for membership, that BIA has  
11 only gotten six waivers of privacy rights, written  
12 consent to waiver of privacy rights out of the 29  
13 people, and four of those are members of the Burley  
14 family.

15 THE COURT: Yes. Now what do you make of  
16 that, and doesn't that -- do you have to have  
17 waivers from everybody before you can proceed?  
18 Does this mean the BIA has to proceed at its own  
19 inexorable snail's pace?

20 MR. UPTON: Well, BIA does have to have  
21 the waivers before it can release information it  
22 has about those particular people to the tribe, and  
23 I -- it may well be that some of these waivers  
24 haven't been submitted because the people in  
25 question perhaps don't want the information

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1 released to Ms. Burley. That is certainly a  
2 possibility.

3 THE COURT: But you don't have to have all  
4 the waivers before you release any of the  
5 information, do you? If you've got six waivers,  
6 you can release --

7 MR. UPTON: With the Court's permission, I  
8 would like to have Mr. Keep address that. I don't

9 know.

10 THE COURT: Okay. Mr. Keep.

11 MR. KEEP: Your Honor, yes. Certainly to  
12 the extent that the department has received waivers  
13 from individuals, they are free to release that  
14 information to the tribe.

15 THE COURT: Is that process going on, as  
16 far as you know?

17 MR. KEEP: I don't know whether it is  
18 going on or not, Your Honor.

19 THE COURT: Okay. Thank you.  
20 Yes, sir?

21 MR. STEELE: Thank you, Your Honor. I'm  
22 not sure whether I spoke about an internal tribal  
23 dispute, but there is no dispute among existing  
24 tribal members at this time. No tribal member has  
25 any dispute with the --

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1 THE COURT: Well, you've defined the world  
2 and then you've just -- the existing tribal members  
3 are the Burley family, and there is no dispute.

4 MR. STEELE: Yes, Your Honor, they have  
5 been the tribe for some years now as, you know, the  
6 record is replete with examples of that being the  
7 case. And I believe that that warrants some  
8 discussion at some future time, but as a matter of  
9 tribal law and tribal sovereignty, that's the  
10 tribe. However distasteful that may be, that is  
11 the tribe, and there is no dispute there.

12 Now again I'm -- well, let me go on to my  
13 second point, which is the constitution has been

14 amended. It's not limited to lineal descendants.  
15 It's simply not true.

16 THE COURT: When did that happen?

17 MR. STEELE: That happened some time ago.  
18 The most recent amendment was an enrollment  
19 ordinance that was submitted in March.

20 THE COURT: Do I have the current  
21 constitution of record before me?

22 MR. STEELE: I'm almost certain you do,  
23 and it should be in the original complaint.  
24 Basically it has a blood quantum of which is more  
25 the standard among tribes, a blood quantum of Miwok

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1 blood. But no restriction as to lineal  
2 descendancy.

3 And I -- as far as us reaching out to the  
4 tribal community, I think the request that we made  
5 for the information at least as of those 29 people,  
6 we obtained those names on our own. We didn't get  
7 those from the Bureau of Indian Affairs. And we  
8 have also -- if allowed, I will present evidence of  
9 us having -- of the tribe having published requests  
10 for people to apply if they feel that they are  
11 eligible. Then those publications ran in at least  
12 Calaveras County, San Joaquin County, and Merced  
13 County, and one wonders what else one can do. But  
14 we feel at the very minimum that's enough to  
15 overcome any assertion that we are failing to reach  
16 out to the tribal -- any potential tribal  
17 community.

18 THE COURT: You say the constitution has

19 been amended as recently as March. The letter we  
20 are talking about is March 2004. Has anybody shown  
21 the amended constitution to BIA, or is it your  
22 decision that that's your business?

23 MR. STEELE: We submitted it, yes. In  
24 fact, it's been argued in -- I'd have to take a  
25 look at the court file, which -- my pleading file,

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1 which is behind me, but that has been argued in the  
2 pleadings here with respect to the changing of  
3 nature of the constitution, and as I said here, I  
4 believe that it's in the motion to dismiss as an  
5 exhibit. Or our opposition to the motion to  
6 dismiss.

7 THE COURT: All right. Well, we can look  
8 that up and study it at our leisure.

9 Counsel, we've been at this for an hour  
10 and a quarter. Are there any further arguments I  
11 need to hear?

12 MR. UPTON: Just one thing, Your Honor. I  
13 would just point out that the publications that he  
14 mentions with respect to seeking out potential  
15 members are very recent, within the last few  
16 months, so it's not something that happened a long  
17 time ago.

18 MR. STEELE: I agree with that.

19 One other thing I'd like to raise, though,  
20 is with respect to the monitoring visits, there has  
21 been some back and forth -- I think that the story  
22 is actually fairly clearly told in the exhibits,  
23 that opposing counsel attached to the opposition,

24 but what I don't think is really clear is that --  
25 well, I do believe it's clear there, but what the

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1 Court may not be aware of is there has been no  
2 monitoring visit on this tribe since at least 1999  
3 or at the latest 2000. So for six years monitoring  
4 visits haven't been a priority for the BIA  
5 whatsoever. And part of the reason for that is  
6 clearly that the tribe is audited every single year  
7 for the contract status, and every audit has gone  
8 with material exceptions.

9 How do we know that? Because we got  
10 contract status, and we can't have that if there is  
11 ever a material exception to an audit. We believe  
12 that it's somewhat inappropriate -- and I wouldn't  
13 allow any other client to allow the opposition to  
14 come in and dig through their books in the midst of  
15 litigation. That would constitute, I think,  
16 unauthorized discovery.

17 What I would like to request at this time,  
18 though, in the acknowledgement of the fact that a  
19 monitoring visit is part of the contract and  
20 further acknowledge that we are in a difficult  
21 situation with respect to litigation, we would like  
22 to request a special master to rule 53 to supervise  
23 any contact between the Bureau of Indian Affairs  
24 and the tribe during the pendency of this  
25 litigation.

1           We filed two supplemental complaints.  
2   There's a reason for that, and the reason is that  
3   the infringement of the government's authority to  
4   govern continues every day while this litigation is  
5   pending, and we can only get in here so often, we  
6   can only supplement the complaint so many times,  
7   and it's getting to the point where we just can't  
8   supplement and file motions fast enough to  
9   accommodate the actions that the government is  
10  taking to hurt us.

11           So again I would like to make -- with  
12  respect to the monitoring visit, which we have our  
13  suspicions about, given the paucity of the  
14  inspections for the last six years, is that we  
15  would like to request a special master under rule  
16  53. And if expense is a problem, then we feel that  
17  we can work that out if the government is --

18           THE COURT: Mr. Steele, just as a matter  
19  of curiosity, how does a tribe of five members  
20  spend a million and a half dollars a year?

21           THE COURT: Largely in economic  
22  development. I mean I'm not privy to the internal  
23  financial dealings of the tribe, but financial  
24  development is --

25           THE COURT: What does that mean, financial

1   development? For themselves?

2           MR. STEELE: For the tribe. I mean the  
3   tribe -- I don't think it's a secret the tribe is  
4   seeking to develop a casino. But to this date

5 there are other tribal functions that occur also,  
6 and I don't think that's really again -- I don't  
7 really have the basis to make an accurate  
8 assessment of that. But there are tribal  
9 properties, and all these things in the tribal name  
10 that also have to be maintained, and that's part of  
11 where it goes, too.

12           And what's more is that there's a backlog  
13 of that money. It hasn't been the case where \$1.2  
14 million has come to the tribe every single year,  
15 and I don't even know if they have even received  
16 \$1.2 million in any year or at all. I mean I'd  
17 have to check, but it's certainly the case that the  
18 sum of money sounds much bigger than it actually  
19 is, and right now there's \$700,000 pending that's  
20 the subject of the interpleader that's been filed  
21 against Ms. Burley in state court.

22           THE COURT: Okay. All right. Well, this  
23 is a difficult matter and a complicated one, and  
24 the arguments of counsel have been illuminating,  
25 and I appreciate it. The matter is submitted.

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1           I'm just going to deal with the motion to  
2 dismiss because if the motion to dismiss is denied  
3 -- if the motion to dismiss is denied, I will allow  
4 the amendment of the complaint, and I will consider  
5 the motion for preliminary injunction, but I think  
6 it's only reasonable to tell you that my present  
7 inclination -- and it's not a decision, counsel, it



8 won't be until I write it and issue it -- my  
9 present inclination is to decide that this is a  
10 matter that needs to be hassled out within the BIA,  
11 and I am inclined to dismiss this case on the  
12 grounds of the prudential nonjurisdictional  
13 exhaustion ground. I will explain that when I  
14 write it, and if it comes out differently when I  
15 write it, it will come out differently. But I've  
16 got to write it first.

17           That's where I stand today. Thank you  
18 very much.

19           [Whereupon, at 3:24 p.m., the motions  
20 hearing was concluded.]