UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs, v. KEN SALAZAR, et al., Defendants.	Case No. 1:11-CV-00160-RWR

MOTION TO DISMISS

(ORAL ARGUMENT REQUESTED)

The California Valley Miwok Tribe ("Tribe"), a federally-recognized Indian tribe, respectfully requests the Court dismiss the above-captioned action for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. Rule 12(b)(6). Plaintiffs, who have wrongfully and fraudulently represented themselves to this Court as both the Tribe and the governing body of the Tribe, do not have standing to bring this action under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. and have failed to allege facts sufficient to assert a "plausible entitlement to relief." *Bell v. Atl. Air Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

This motion is based on the Statement of Points and Authorities; Declaration of Robert A. Rosette, and a proposed Order Dismissing Plaintiffs' Complaint; the oral argument at the hearing on this matter, which the Tribe specifically requests; all pleadings and records heretofore filed in this action; and all relevant matters subject to judicial notice.

For the reasons set forth fully in the Statement of Points and Authorities, the Tribe

respectfully requests that the Court grant its Motion to Dismiss.

Dated: March 17, 2011

Respectfully submitted,

By: */s/ Robert A. Rosette*

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CERTIFICATE OF SERVICE

I certify that on March 17, 2011, I caused a true and correct copy of the foregoing Motion to Dismiss, the Supporting Statement of Points and Authorities, and a proposed Order to be served on the following counsel via electronic filing:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs, v. KEN SALAZAR, et al., Defendants.	Case No. 1:11-CV-00160-RWR

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

I. INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully moves to dismiss the action pending before this Court based on: (1) Plaintiffs' lack of standing and this Court's lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. Rule 12(b)(1); and (2) Plaintiffs' failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. Rule 12(b)(6).

II. BACKGROUND

A. Brief History of the California Valley Miwok Tribe.

In 1966, the Bureau of Indian Affairs ("BIA") recognized Ms. Mabel Dixie as the only member of the Tribe, then known as the Sheep Ranch Rancheria, by virtue of eligibility to distribution of Tribal assets. In 1998, Ms. Mabel Dixie's son, Yakima Dixie, acting as the leader of the Tribe, adopted Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace as members of the Tribe. *See* Ex. B to Declaration of Robert A. Rosette ("Rosette Decl."). On September 24, 1998, the BIA recognized these five individuals, along with Yakima Dixie's brother Melvin, as enrolled members of the Tribe and stated that these individuals "possess[ed] the right to participate in the initial organization of the Tribe." *See Id.* The Tribe followed the BIA's guidance and on November 5, 1998, it organized a formal, resolution form of government and established a General Council, pursuant to Resolution # GC-98-01, whose actions were acknowledged and ratified by the BIA.[1] *See* Ex. A to Rosette Decl.; *California Valley Miwok Tribe v. United States*, et al., 424 F.Supp.2d 197 (D.D.C. 2006). The Tribe was organized and maintained government-to-government relations with the BIA and the membership of the

[1] To the extent that Mr. Dixie now, for the first time, seeks to challenge the validity of the Tribe's governing document, Resolution # GC-98-01, after almost three years of administrative proceedings (*See* Complaint, p. 24, ¶ 77), such a claim is misguided, misplaced, and reinforces the defectiveness of Plaintiffs' Complaint on its face.

aforementioned individuals, as the General Council of the Tribe, has never been disputed. Indeed, on February 4, 2000, subsequent to its notice of an internal leadership dispute within the Tribe, the BIA provided a letter to Yakima Dixie, reaffirming the fire aforementioned individuals as the recognized members of the Tribe "enjoying all benefits, rights and responsibilities of Tribal membership. *See* Ex. C, p. 2 to Rosette Decl. Moreover, following its meeting with Yakima Dixie regarding the Tribe's leadership dispute, on March 7, 2000, the BIA provided a summary of this meeting which reaffirmed the BIA's position that the General Council of the Tribe was comprised of Yakima Dixie, Silvia Burley and Rashel Reznor (the then eligible adult members of the Tribe). *See* Ex. D, p. 1-2. In this letter, the BIA further explained that as members of the Tribe with no limitations on their enrollment, these individuals possessed full rights of membership. *See Id.*

Individual Plaintiffs Velma White Bear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo have never been adopted into the Tribe, nor have they ever been recognized as part of the Tribe's General Council or as Tribal Members by the Tribe or the BIA. There is not a single BIA letter or case ruling or any other official document to which Plaintiffs can point that would demonstrate otherwise.

B. Summary of Previous Federal Litigation Involving the Tribe.

Because Plaintiffs erroneously cite to and mistakenly rely upon previous litigation to which the Tribe was a party to support its judicial attack of the final agency action at issue in the instant action, it is important that an accurate account of the previous litigation be conveyed to this Court. In *California Valley Miwok Tribe v. United States,* 424 F.Supp.2d 197 (D.D.C. 2006), the Tribe challenged the United States government's denial of the Tribe's Constitution, submitted pursuant to the Indian Reorganization Act ("IRA"). The District Court dismissed the

Tribe's claim on a procedural issue, ruling that the Tribe failed to state a claim for which relief could be granted. *Id.* at 203. This ruling was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008). The issue of the Tribe's membership, enrollment, or form of organization was never before the federal court, and any dicta cited by Plaintiffs in their Complaint mischaracterizes the issues in that case in an attempt to cast doubt upon the final agency action at issue here. Moreover, as stated above, the fact that the BIA previously rejected the Tribe's submission of an IRA Constitution, and that the federal court upheld such a rejection, has no bearing whatsoever on the fact that the Tribe was already formally organized pursuant to its resolution form of government, Resolution # GC-98-01. Short of rescinding this resolution, an action that the Tribe has never taken, there is nothing that can compromise the validity of the Tribe's previously recognized resolution form of government.

C. Procedural History Leading to December 22, 2010 Decision.

On November 6, 2006, with no legal support or basis, the Superintendent of the BIA Central California Agency issued letters to Silvia Burley and Yakima Dixie questioning the Tribe's existing and previously recognized governing body and stating that the BIA would "assist the Tribe in the organization process" by publishing notice of a meeting to determine the Tribe's membership and form of government. The Tribe appealed this decision to the BIA's Pacific Regional Director, who affirmed the Superintendent's decision on April 2, 2007.[2] Reiterating its position that consistent longstanding federal Indian law, the Tribe was organized and comprised of an established, federally-recognized membership of five individuals, the Tribe

[2] It is critical to note that the Tribe's membership, structure of government and status as a federally-recognized tribe was exactly the same from the period when the government first recognized the Tribe and its membership to when the BIA's recognition of the Tribe's government abruptly ceased.

then appealed the decision to the Interior Board of Indian Appeals ("IBIA").

On January 28, 2010, the IBIA issued an opinion that referred the Tribe's claim pertaining to Tribal membership and enrollment to the Assistant Secretary-Indian Affairs for final determination ("IBIA Decision"). *See California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs,* 51 IBIA 103 (January 28, 2010). Despite Plaintiffs' egregious attempt to mischaracterize the holding and opinion of the IBIA Decision (*See* Complaint p. 17-18, ¶¶ 58-59), it is important that the precise holding of the IBIA Decision be accurately set forth. Holding that it "lack[ed] jurisdiction to adjudicate tribal enrollment disputes," the IBIA reasoned: "[u]nderstood in the context of the history of this Tribe and the BIA's dealings with the Tribe since approximately 1999, this case is properly characterized as an enrollment dispute." *Id.* at 122. In doing so, the IBIA then referred the tribal enrollment dispute issue to the Assistant Secretary – Indian Affairs for final determination, pursuant to 43 C.F.R. 4.330.1(b). The specific issue referred to the Assistant Secretary for determination was as follows: "claims that BIA improperly determined that the Tribe is 'unorganized,' failed to recognized [Silvia Burley] as Chairperson, and is improperly intruding into tribal affairs by determining the criteria for a class of putative tribal members and convening a general council meeting that will include such individuals." *Id* at 123-124.

After nearly a year of deliberation, the Assistant Secretary issued his decision on December 22, 2010 ("Decision"). In his Decision, acting consistent with the scope of the IBIA's referral, pursuant to 43 C.F.R. 4.330.1(b), the Assistant Secretary appropriately considered previous BIA letters, which cast doubt upon the Tribe's membership and organizational status, and in doing so, recognized the validity of the Tribe's previously recognized governing body and resolution form of government, pursuant to Resolution # GC-98-01 and re-established the

government-to-government relationship between the Tribe and the United States. Most importantly, based on previous actions taken by the Tribe and previous federal government recognition, the Decision explicitly recognizes the members of the Tribe as being Silvia Burley, Yakima Dixie, Rachel Reznor, Anjelica Paulk and Tristian Wallace, and states that "[o]nly those individuals who are actually admitted as citizens of the Tribe are entitled to participate in its government." *See* Ex. E to Rosette Decl., p. 4, ¶¶ 7-8. As the governing body of the Tribe, the decision also provides that, consistent with well-established federal Indian law, the Tribe "is a distinct political community possessing the power to determine its own membership" and is "vested with the authority to determine its own form of government." *Id*. at ¶ 3 and p. 5 ¶ 1; a*lso see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence); and *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues.").

On January 6, 2011, Plaintiffs sought a stay and reconsideration of the Decision from the Honorable Ken Salazar, Secretary of the Department of Interior. On January 21, 2011, the Department of Interior issued a response to Plaintiffs' request, stating that the Department was declining to reconsider the Assistant Secretary's Decision. *See* Ex. H to Rosette Decl.

Plaintiffs now attempt to challenge this Decision once again, and in doing so, seek to undermine years of well-established federal Indian law precedent and policy, in an effort to have this Court intrude into delicate matters of internal tribal affairs and convert non-members to be members of this Tribe. This Court is without jurisdiction to do so. Therefore, based on these reasons and the reasons set forth below, Plaintiffs' Complaint for declaratory and injunctive relief should be dismissed.

III. SUBJECT MATTER JURISDICTION

The Constitution limits the judicial power of the United States to "cases" and "controversies." U.S. Const. art. III, § 2. Before a federal court can hear a case or controversy, a plaintiff must have standing to sue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-103 (1998). To properly assert standing pursuant to Article III, a plaintiff must demonstrate: (1) injury in fact that is "actual" or "imminent" instead of "conjectural or hypothetical"; (2) causation wherein the alleged injury is fairly traceable to the conduct of the defendant; and (3) the plaintiff's alleged injury is likely to be redressed by a favorable decision. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102; *Simon v. Eastern Ky. Welfare Rights Org*., 426 U.S. 26, 41-42, 38 (1976).

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., a proper plaintiff must be a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . ." 5 U.S.C. § 702. A plaintiff must demonstrate that it has suffered injury-in-fact and that it falls within the zone-of-interests intended to be protected by the governing statute. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883, citing *Clarke v. Sec. Indus. Assoc*., 479 U.S. 388, 396-397; *Humane Soc'y of U.S. v. U.S. Postal Service*, 609 F.Supp.2d 85, 94 (D.C.C. 2009), citing *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO,* 498 U.S. 517, 524 (1991). Plaintiffs have failed to meet the requisite standard for standing in the instant action and, consequently, this Court must dismiss their Complaint for lack of subject matter jurisdiction.

A. Plaintiffs Have No Actual Injury and Are Thus Not "Aggrieved" Within the Meaning of the APA.

Article III standing requires a plaintiff allege "such a personal stake in the outcome of the controversy" as to warrant invocation of the court's jurisdiction. *Warth v. Seldi*n, 422 U.S. 490,

498-499 (1975). A proper plaintiff must show an injury stemming from an "invasion of a legally protected interest" which is "concrete and particularized." *Lujan*, *supra*, 497 U.S. at 560. Under the APA, a plaintiff must allege perceptible harm by the challenged agency action, "not that he can imagine circumstances in which he could be affected by the agency's action. And, it is equally clear that the allegations must be true and capable of proof at trial." *United States v. SCRAP,* 412 U.S. 669, 689 (1973).

Here, Plaintiffs have failed to properly allege an injury suffered by way of the December 22, 2010 Decision of the Assistant Secretary – Indian Affairs. The Decision explicitly recognizes Plaintiff Yakima Dixie as a member of the Tribe. Thus, a final agency action allowing the Tribe to resume operations of its government-to-government relationship with the United States causes Mr. Dixie no injury whatsoever. In fact, the Decision encourages Mr. Dixie, along with the other Tribal members, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, to "participate in [the Tribe's] government" and to resolve any issues of leadership or membership "through the Tribe's internal process;" however, for no apparent reason, Mr. Dixie has refused to do so despite the potential benefits and rights that he may exercise by virtue of his Tribal membership. *See* Ex. E, p. 4, ¶ 7 to Rosette Decl. Therefore, as Mr. Dixie is benefitted by the Decision of which he is bewilderingly seeking judicial review, he has failed to demonstrate that he is an "aggrieved party" within the meaning of the APA, and consequently, lacks standing to bring the instant action pursuant to the aforementioned case law.[3]

[3] Even if Mr. Dixie were able to somehow allege that he was an "aggrieved party" within the meaning of the APA, his claims pertaining to judicial review of the Decision would still be barred for lack of standing as federal courts routinely dismiss cases brought by tribal members involving internal tribal disputes and membership issues for lack of jurisdiction, as was the scope of the issue decided by the Assistant Secretary. *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 764 (8th Cir. 2003) ([j]urisdiction to resolve internal tribal disputes . . . and issue tribal membership lies within Indian tribes and not in the district courts;" *Bullcreek v. U.S. Dept. of Interior,* 426 F.Supp.2d 1221, 1231-33 (D. Utah 2006).

The non-member Plaintiffs have an even greater burden of proof with respect to standing than Mr. Dixie, as neither the Decision, nor any official document from the United States has demonstrate that these individuals have any interest whatsoever in the Tribe. To be clear, with the exception to Yakima Dixie, not one of the five individual Plaintiffs have ever, in the history of the United States dealings with the Tribe, been recognized as members of the Tribe by the BIA or Tribe, nor have they otherwise been recognized as having any rights to or interests in the Tribe. Indeed, Plaintiffs cannot point to one document from the United States government which demonstrates how they have a "concrete and particularized" "legally protectable interest" in the instant action. *Lujan*, *supra*, 497 U.S. at 560. Unfortunately for Plaintiffs, the listing of a website in their Complaint as well as alleged participation in such activities as "ceremonial Indian dance group[s]," does not lend credence to an authoritative tribal governing body that has ever had a legal government-to-government relationship with the United States. *See* Complaint, p. 11, ¶ 40. Plaintiffs cannot point to any "concrete and particularized" evidence.

Moreover, in citing to "genealogies and other documentation," which they allegedly submitted to BIA in response to the April 2007 public notice, individual Plaintiffs are, in essence asking this Court to open the membership of the Tribe and intrude upon the most delicate of internal tribal affairs. This Court is without jurisdiction to do so. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence); and *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues."); *See also Williams v. Gover.* 490 F.3d 785 (9th. Cir. 2007) (holding that potential members of tribe were not denied due process of law when tribal membership was narrowly defined by Indian tribe itself.); *Prairie Band of*

Pottawatomie Tribe v. Udall, 355 F.2d 364 (10th Cir. 1966); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10 Cir. 1974); *Groundhog v. Keeler,* 442 F.2d 674 (10th Cir. 1971).

Plaintiffs can show neither a "concrete" nor "particularized" "invasion of a legally protected interest" meeting the standing requirements of the APA. Indeed, they cannot show a legally protected interest at all. Without a legally protected interest, Plaintiffs have only an imaginary circumstance in which they would be affected by the Decision. Mr. Dixie's interests continue to be represented by the Tribe, and he is entitled to participate in the Tribe's governance. The remaining non-member Plaintiffs cannot meet this burden because there is no documented proof of their membership (nor do Plaintiffs allege any), from either the BIA or the Tribe. On the contrary, numerous correspondence and actions from the BIA as well as previous federal court precedent have acknowledged the ability of the Tribe to exercise its sovereignty through its duly recognized governing document, Resolution # GC-98-01 and have repeatedly reaffirmed the authority of the five specific Tribal members to participate in the governance of the Tribe. *See* Exs. B-D of Rosette Decl. As a result, the Decision recognized the existing membership and government of the Tribe and reaffirmed the Tribe's ability conduct business and to engage in a government-to-government relationship with the federal government as a federally-recognized, organized Tribe. Absent allegations that the non-member Plaintiffs in this action were once recognized members of the Tribe but as a direct result of the Decision are no longer valid members of the Tribe (which Plaintiffs have not and cannot claim), there is no injury, and as a result, Plaintiffs lack standing to bring this action.

B. There Is No Causal Link Between the Decision and the "Injuries" Plaintiffs Allege.

For a court to have subject matter jurisdiction over an APA claim, a plaintiff must establish they have suffered a legal wrong because of the final agency action or that adversely affected or aggrieved. *Air Courier Conference*, *supra*, 498 US at 523-524. Further, "[t]he indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Article III." *Warth*, *supra*, 422 U.S. at 505. To meet this requirement, the "injury" needs to be "fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party . . . ." *Simon, supra*, 426 U.S. at 41-42.

Plaintiffs allege "injuries" that include being denied the opportunity to participate in Tribal governance and denied the benefits of Tribal membership including access to Tribal "funds, benefits and services," most notably the Revenue Sharing Trust Fund ("RSTF") monies to which the Tribe is entitled. *See* Complaint ¶¶ 62-63. In addition to completely misrepresenting Mr. Dixie's position in the Tribe, the Complaint utterly fails to assert a causal link connecting these purported denials and the Decision.

The Decision explicitly recognizes the Tribe's governing document, Resolution # GC-98-01, which establishes the authority of the General Council to conduct government business. *See* Ex. E to Rosette Decl. It plainly acknowledges that Mr. Dixie is a member of the Tribe's General Council, and thus entitled to participate in and affect Tribal government action as a voting member of the General Council. Yakima Dixie has not been precluded, denied, or even discouraged from participating in Tribal governance. In fact, the Tribe personally served him with notice on two separate occasions regarding the specially-called General Council meeting following the Decision. *See* Ex. F to Rosette Decl. Mr. Dixie's failure to involve himself in Tribal governance is a personal decision wholly unto himself and has absolutely nothing to do

with an effect of the Decision. Mr. Dixie has the same rights of participation he had before issuance of the Decision, and thus is not an aggrieved or adversely affected party as a result of the Assistant Secretary's final agency action as required by Article III, the APA, and binding case law.

As for the non-members, they cannot legitimately claim a denial of benefits that they never enjoyed before the Assistant Secretary's Decision. The non-members have not been stripped of membership status as a result of the Decision. They never had membership status. Nothing documents or confirms Plaintiffs' blanket assertions that a group of individuals who have submitted genealogical records to the BIA in the hopes of asserting a *claim to potential future membership* in a tribe were receiving the benefits of tribal membership up until the issuance of the Decision. It is a complete factual misrepresentation to allege otherwise. There is no injury that is "fairly traceable" to the Decision. Without being recognized members, the Decision has had no effect on the non-member Plaintiffs, therefore precluding them from legitimately asserting they are aggrieved or affected by the Decision.

Specifically in regards to the monies held in the Tribe's name by the State of California, those funds belong wholly to the Tribe. It is well settled law that individual tribal members do not have standing to claim right to tribal assets simply by way of their membership. *See N. Paiute Nation v. U.S.,* 8 Cl.Ct. 470, 480-81 (1985), citing *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902) ("the general rule is that '[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'"). If recognized tribal members do not have an individual stake or claim against tribal assets, there is no rational explanation as to why non-members should have such an interest. *See Bingham v. Mass*., 2009 WL 1259963 (D.Mass 2009), at *2 (holding that a group

that merely purported to be descendants of the Tribe "does not mean that the plaintiffs represent the tribe or can assert the tribe's rights.")

Plaintiffs' supposed "injury" as articulated in the Complaint fails to establish a cognizable causal connection between the alleged deprivation of Tribal benefits and the Decision. Even when read with the most indulgent eyes in the name of simple pleading standards, the Court cannot discern a causal connection between the "injury" alleged in the Complaint and the Decision. Because Plaintiffs cannot show the requisite causation required by Article III, this Court lacks subject matter jurisdiction and should dismiss this action.

C. The "Injuries" Plaintiffs Allege Are Not Redressable by this Court and Do Not Fall within the "Zone of Interest" as Required by the APA.

Lastly, the Constitution requires that the judicial action is likely to redress the alleged injury by a favorable decision. *Simon, supra*, 426 U.S. 26, 38. 5 U.S.C. § 702 requires a plaintiff to show from the outset of the litigation that the purported injury was caused by the final agency action and falls within the "zone of interest" to be protected by the APA. *Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 US 150, 153; *Clarke, supra*, 479 US at 395-396. The issue turns on "whether the interest sought to be protected…is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Assoc. of Data Processing, supra*, 397 U.S. at 153.

Plaintiffs' claims are not within the zone of interest. Plaintiffs are not properly before this Court under the guise of their APA claim because the redress Plaintiffs seek is judicial affirmation that they are tribal members, a matter well beyond this Court's jurisdiction. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 54 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence" and "[t]o abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good'

reasons, is to destroy cultural identity under the guise of saving it"), and *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues.").

Each of the alleged "injuries" set forth in Plaintiffs' Complaint will not and cannot be redressed until the non-member Plaintiffs navigate the Tribe's enrollment procedures. The redress truly sought cannot be awarded by this Court. Even if Plaintiffs were awarded a favorable decision on their APA claim, their "injuries" still exist. Redress by way of this action is not just unlikely, it is impossible.

Plaintiffs lack the necessary standing to bring this action because they have not asserted a true and legitimate injury in fact that was caused by the Decision and that can be redressed by this Court. Plaintiffs' allegations and perceived harm is not within the zone of interest of the APA because their interest in, and goal of, attaining tribal membership status is far too removed from the judicial review of the Decision to properly vest this Court with subject matter jurisdiction within the meaning of Fed. R. Civ. P. Rule 12(b)(1). For the reasons discussed above, the Court should dismiss Plaintiffs' Complaint for their lack of standing and the Court's lack of subject matter jurisdiction to hear their claims.

IV. FAILURE TO STATE A CLAIM

Motions to dismiss brought under Rule 12(b)(6) test the legal sufficiency of the facts alleged in the complaint. *Mazaleski v. Truesdell*, 562 F.2d. 701 (D.C. Cir. 1977). To that end, a court does not need to accept conclusory allegations or inferences that are not supported by the facts alleged in the complaint. *Kowal v. MCI Commc'n, Corp*., 16 F.3d. 1271 (D.C. Cir. 1994). Instead, a plaintiff must allege a "plausible entitlement to relief." *Bell v. Atl. Air Corp. v. Twombly*, 550 U.S. 544, 559 (2007). "A complaint may be dismissed on jurisdictional grounds

when it 'is patently insubstantial, presenting no federal question suitable for decision.'" *Tooley v. Napolitano*, 586 F.3d 1006, 1009 (D.C. Cir. 2009), citing *Best v. Kelly,* 39 F.3d 328, 330 (D.C. Cir.1994).

In *Tooley*, the D.C. Circuit Court upheld dismissal pursuant to Rule 12(b)(6) because the plaintiff's factual claims against the federal government translated to a legal claim that "seems to [the court] to move these allegations into the realm of 'flimsier than doubtful or questionable . . . essentially fictitious.'" *Id*. at 1009, citing *Best, supra*, 39 F.3d at 330, *Hagans v. Lavine,* 415 U.S. 528, 537 (1974). The plaintiff's factual allegations that the government retaliated against him as a result of an incident occurring with a Southwest Airlines employee in the wake of September 11, including wire taps and other surveillance, were found to be patently insubstantial to support his constitutional claims, and were dismissed.

Such is the case with Plaintiffs' Complaint. The factual allegations that Plaintiffs have been denied the benefits of Tribal membership and the ability to participate in Tribal governance, and any possible or inchoate connection to the Decision descends into the realm of "flimsier than doubtful or questionable." *Id*. Because Plaintiffs cannot properly allege that the Decision, and not the workings of the Tribe's sovereign ability to determine its own membership, constitutes the basis of Plaintiffs' "injury," Plaintiffs have failed to state a claim upon which relief can be granted by judicial review pursuant to the APA.

Similar to the issue of redressability, discussed above, because Plaintiffs cannot state facts sufficient to illustrate they are an aggrieved or adversely affected party within the meaning of the APA, there is no "plausible entitlement to relief" that can be advanced by adjudication of the claims set forth in the Complaint. *Bell, supra*, 550 U.S. at 559. Mr. Dixie is a member of the Tribe who is explicitly recognized as a member in the Decision and is wholly entitled to

participate in Tribal governance and benefit from his membership status. As such, Mr. Dixie has failed to satisfy the factual burden that the Decision in any way harms his interests or claims in a well-pleaded complaint. Further, the non-member Plaintiffs cannot rely on any of the facts alleged to support a claim that they are an aggrieved or adversely affected party because no facts alleged that they were ever recognized members of the Tribe, only that they submitted genealogical records to the BIA to submit a *claim for membership*. This is a wholly implausible claim for an entitlement to relief under the APA. Because non-member Plaintiffs cannot allege a legitimate claim to membership prior to the issuance of the Decision, they cannot rightfully claim to be harmed by the Decision's determination of tribal membership and ability to exercise its sovereignty.

Plaintiffs have not sufficiently pleaded facts in the Complaint to show they have a "plausible entitlement to relief" because they cannot show how the facts alleged makes them an aggrieved or adversely affected party to seek relief under APA judicial review of the Decision. Because Plaintiffs' Complaint fails to state a claim upon which relief can be granted dismissal under Fed. R. Civ. P. Rule 12(b)(6) is proper.

V. CONCLUSION

For the foregoing reasons, the California Valley Miwok Tribe respectfully requests that this Court dismiss this action based on Plaintiffs' lack of standing and the Court's lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. Rule 12(b)(1) and Plaintiffs' failure to state a claim upon which relief can be granted as required by Fed. R. Civ. P. Rule 12(b)(6).

Dated: March 17, 2011

Respectfully submitted,

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