IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,	
v.	**C.A. No. 1:11-cv-00160-RWR**
KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	**Hon. Richard W. Roberts**

PLAINTIFFS' OPPOSITION TO CALIFORNIA VALLEY MIWOK TRIBE'S MOTION TO INTERVENE AS DEFENDANT

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Dated: March 29, 2011

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INTRODUCTION

Proposed Intervenor filed a motion on March 17, 2011, in the name of the California Valley Miwok Tribe, seeking leave to intervene as a defendant in this litigation. The proposed Intervenor represents a faction of the California Valley Miwok Tribe ("Tribe"), consisting of Silvia Burley, her two daughters and her granddaughter (collectively, the "Burleys), with whom Plaintiffs have been engaged in a dispute over Tribal organization since approximately 1998. Both Plaintiffs and the Burleys claim to represent the Tribe, although the two groups have very different views of whom the Tribe includes. To avoid confusion, Plaintiffs will refer to the Burleys' version of the Tribe as the "Burley Faction," and to Plaintiffs' version of the Tribe, as governed by Chief Dixie and his tribal council, as the "Dixie Tribe." The December 22, 2010 decision of the Department of Interior ("2010 Decision") that Plaintiffs challenge in this litigation allows the Burley Faction to unilaterally define and control the Tribe at its sole discretion.

Before the Burley Faction filed its motion to intervene and Plaintiffs' counsel had an opportunity to review the motion, Counsel for Plaintiffs indicated that Plaintiffs had no position on the motion at that time. Having now reviewed the motion, Plaintiffs oppose the motion because, *inter alia*, it contains material misstatements regarding prior litigation involving the Tribe, and the Burley Faction has failed to allege, much less demonstrate, that its interests in this case will not be adequately represented by the federal Defendants in this case.

FEDERAL LAW REGARDING TRIBAL ORGANIZATION

Plaintiffs' case stands on the bedrock principle that organization[1] of an Indian tribe under the Indian Reorganization Act ("IRA") must involve the entire Tribal community. This Court, and the Court of Appeals for the D.C. Circuit, made this requirement clear in a recent case filed by the Burley Faction against the Secretary of Interior who is also named as a Defendant in this case. The prior case, like this one, centered on the issue of Tribal organization under the IRA. *California Valley Miwok Tribe v. USA*, 424 F. Supp. 2d 197, 201-203 (D.D.C. 2006) ["*CVMT*"] (holding that organization under the IRA requires "notice, a defined process, and minimum levels of tribal participation"); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008), ["*CVMT*"] (holding that "tribal organization under the [IRA] must reflect majoritarian values"). The decision in that case is the law of this Circuit and is also binding on federal Defendants and the Burley Faction under the doctrine of issue preclusion.

In light of the fundamental requirement of majority participation, the first step in tribal organization necessarily is to identify the members of the tribal community so that they can participate in the organization process.[2] *See CVMT*, 515 F.3d at 1265-1266. The tribal community can then complete the organization process by adopting and obtaining federal approval of a tribal constitution and other governing documents. *See* 25 U.S.C. § 476; *CVMT*, 515 F.3d at 1264. *Once it is organized*, a tribe may adopt membership criteria that enlarge or

[1] "Organization" is a term of art referring to establishment of a tribal government in compliance with the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*. *See* 25 U.S.C. § 476. A tribe that has complied with the Act is considered "organized."

[2] As the Bureau of Indian Affairs explained in rejecting a tribal constitution that the Burleys submitted without any participation by the remainder of the tribal community: "It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified. The participation of the greater tribal community is essential to this effort." Letter from Dale Risling, Superintendent, Bureau of Indian Affairs Central California Agency, to Sylvia Burley (Mar. 26, 2004) (Exhibit "A" to Affidavit of Robert J. Uram ("Uram Affidavit"), attached hereto as Exhibit "1").

reduce the tribe's membership base. But any such action presupposes the existence of a validly organized tribal government that reflects majoritarian principles. *See id.* at 1268 (holding that "tribal governments should fully and fairly involve the tribal members in the proceedings leading to constitutional reform") (quoting *Morris v. Watt*, 640 F.2d 404, 414 (D.C. Cir. 1981). Prior to the 2010 Decision that is challenged in this litigation, the Department of the Interior shared that view. *See CVMT*, 424 F. Supp. 2d at 202 ("BIA's response . . . is that [IRA] subsection 476(h) . . . does not relieve BIA of the duty to ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members").

Plaintiffs maintain, consistent with the law, that all members of the Tribal community are entitled to participate in the organization of the Tribe. This position necessarily leads to the conclusion that the 2010 Decision is unlawful, because that Decision concludes that the Tribe was organized under a 1998 tribal resolution signed by two people. Since late 2003, Plaintiffs have been working to identify the members of the Tribal community and restore the Tribe's community structure. More than a hundred putative Tribe members have participated in these efforts as members of the Dixie Tribe. Plaintiffs represent the interests of these members, and of all those who claim membership in the Tribe based on their lineal descent from historical Tribe members.

ARGUMENT

I. THE BURLEY FACTION MISREPRESENTS THE PRIOR LITIGATION.

In an attempt to avoid the controlling effect of the prior District Court and D.C. Circuit decisions involving this Tribe, the Burley Faction's brief grossly mischaracterizes those decisions. The Burley Faction argues that the prior decisions only involved "the United States

government's denial of the Tribe's Constitution," and that "[t]he issue of the Tribe's membership, enrollment, or form of organization was never before the federal court." Statement of Points and Authorities in Support of Intervenor's Motion for Leave to Intervene as Defendant, p. 4 ("Burley Brief"). That claim is not correct. The Court of Appeals' opinion states quite clearly, "This case involves an attempt by a small cluster of people . . . *to organize a tribal government* . . . ." (emphasis added). The opinion does not focus on the content of the constitution that Burley submitted (as the Burley Brief suggests), but on the fact that it "was not ratified by anything close to a majority of the tribe." *CVMT*, 515 F.3d at 1263. *See also id.* at 1267 ("The exercise of [the Secretary's] authority is especially vital when, as is the case here, the government is determining *whether a tribe is organized* . . . ." (emphasis added); *id.* at 1267-68 ("As Congress has made clear, *tribal organization* under the Act must reflect majoritarian values") (emphasis added).

As the Burley Faction freely admits, the "Tribe" that it seeks to represent in this litigation includes only the four Burleys and Yakima Dixie.[3] Burley Br. at 9. The Burleys claim that these five individuals, with absolutely no involvement by the remainder of the Tribal community, "organized" the Tribe in 1998 by adopting tribal resolution # GC-98-01 (the "1998 Resolution").[4] Burley Br. at 1. Both the Bureau of Indian Affairs ("BIA") and the Burley Faction itself have estimated that the Tribe's membership includes approximately 250 other individuals who are

[3] In practice, the Burley Faction's theory would limit the Tribe to the Burleys alone, because it would make Chief Dixie's membership in the Tribe entirely contingent on the Burleys' goodwill. As evidence of this, the Burleys purportedly disenrolled Chief Dixie from the Tribe in 2005, only to reenroll him later when it became expedient for litigation purposes. *CVMT*, 424 F.Supp.2d at 201 (disenrollment).

[4] The 1998 Resolution actually bears only two signatures, but the Burley Faction apparently maintains that this represents a majority of the Tribe's adult members at that time.

descended from historical Tribe members.[5] *CVMT*, 424 F. Supp. 2d at 203 n. 7; *CVMT,* 515 F.3d at 1265, 1265 n. 5. Yet the Burley Faction claims that those people have no right to participate in the organization of the Tribe. This position flatly contradicts the controlling law, as set forth in the Court of Appeals' previous decision concerning this Tribe. *CVMT*, 515 F.3d at 1267-1268 (holding that the Tribe could not be organized under a constitution adopted by just the Burleys, when the Tribe's membership was estimated at 250).

II. THE BURLEY FACTION FAILS TO ALLEGE, MUCH LESS DEMONSTRATE, THAT ITS INTERESTS ARE NOT PROTECTED BY THE FEDERAL DEFENDANTS.

In determining whether to grant a motion to intervene, it is necessary to decide whether "the applicant's interest is adequately represented by existing parties." *See* Fed. R. Civ. P. 24(a)(2); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). "Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary." *Perry v. Proposition 8 Official Proponents,* 587 F.3d 947, 950-51 (9th Cir. 2009). Here, it is undisputed that the federal Defendants are seeking the same ultimate objective as the Burley Faction: namely, the upholding of the 2010 Decision that is at issue in this case.

[5] In 2007, in response to a public notice it published to assist the Tribe in beginning the organization process, the BIA received personal genealogies and other information from 503 putative Tribe members (i.e., those claiming descent from historical Tribe members). The BIA has already reviewed those submittals and drafted letters to each of the putative members, informing them whether they meet the criteria for participation in the initial organization process. The Burley Faction's administrative appeal of the BIA's actions (which led to the Assistant Secretary's 2010 Decision) has prevented the BIA from sending those letters. A favorable decision by this Court would allow the BIA to complete the process of identifying the Tribal community, so that the Tribe could proceed with organization. Declaration of Troy Burdick, Superintendent, BIA Central California Agency (Exhibit "B" to Uram Aff.)

The Burley Faction points to language in *Fund for Animals* stating that the court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." 322 F.2d at 736. However, that does not mean that such a finding should be assumed in every case. Indeed, courts do find that the government will adequately protect the interests of the party seeking to intervene. *See, e.g., Gonzalez v. Arizona*, 485 F.3d 1041, 1051-1052 (9th Cir. 2007) (citizen group failed to demonstrate that State and its officials would not adequately represent group's interests); *Maine v. Director, United States Fish and Wildlife Service*, 262 F.3d 13 (1st Cir. 2001) (business groups not entitled to intervene as matter of right in challenge to U.S. Fish and Wildlife Service and National Marine Fisheries Service designation of Atlantic salmon as endangered species, despite their prior action against the Services involving the salmon).

The Burley brief does not even allege, much less demonstrate, any specific factual basis for a finding that the federal Defendants would not adequately represent the interests of the Burley Faction. The Burley Faction states: "Defendants cannot adequately represent the Tribe's interests because it [sic] has a specific and vested interest in promoting the affirmation of the Assistant Secretary's Decision and representing the Department of Interior's and the BIA's interest in promoting the validity of its final agency actions." Burley Br. at 12. This statement is nonsensical. But in any event it fails to provide a single *factual* underpinning for a finding that the federal Defendants do not adequately represent the Burley Faction's interest in having the 2010 Decision affirmed.

The Burley Faction also states that "[w]hile Defendant's government interest revolves around withholding APA-authorized judicial scrutiny, the Tribe's interest in this litigation is vital and central to its continuing existence and ability to conduct itself as a government with a

recognized relationship with the federal government." *Id.* This statement merely offers up platitudes and fails to provide any tangible basis for concluding that the federal Defendants will not adequately represent the interests of the Burley Faction.

In seeking intervention, the Burley Faction cites *Trbovic v. United Mine Workers of America*, 404 U.S. 528 (1972). Burley Br. at 11. Reliance on *Trbovic* is misplaced here for the same reason it was in *Maine*, *supra*, where the First Circuit stated:

> In *Trbovic*, the Court's doubts about the adequacy of the government's representation stemmed from the Labor Secretary's statutory duty to represent "two distinct interests" of the individual union members and the general public. Here there is no statutorily imposed conflict and the Services' interests are closely aligned with [the would-be intervenors'] interests.

262 F.3d at 18-19 (citation omitted). Similarly, in this case the Secretary of the Interior has no obligation to represent "two distinct interests." Rather, the Secretary and the other federal Defendants share the same objective as the Burley Faction – *i.e.* the upholding of the 2010 Decision.

Because the Burley Faction provides no factual basis for its general assertion that the federal Defendants cannot protect its interest, the motion to intervene should be denied.

III. THE BURLEY FACTION SHOULD NOT BE PERMITTED TO USE INTERVENTION TO UNDULY DELAY OR PREJUDICE THE PLAINTIFFS' RIGHTS IN CHALLENGING THE 2010 DECISION.

As a fallback position, the Burley Faction requests "permissive intervention in this action pursuant to Fed. R. Civ. P. Rule 24(b)." Burley Br. at 13. A key determining factor in whether to grant permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Rule 24(b)(3). Although this case has only been pending approximately two months, counsel for the Burley Faction has already exhibited a propensity to try to improperly prolong and delay this case. It has done so by filing a specious *ex*

parte complaint with the Clerk of this Court, erroneously accusing counsel for Plaintiffs of engaging in a "fraud on the court" by filing this action on behalf of Plaintiffs.

Plaintiffs' Complaint made it clear that this Firm represents the Dixie Tribe and does not purport to represent the Burley Faction (and that there has been a more than decade-long dispute over which group speaks for the Tribe). Plaintiffs have acknowledged the conflicting claims to Tribal authority made by the Burley Faction and have never suggested that Ms. Burley authorized this Firm to file suit on behalf of the Tribe. Plaintiff's Complaint shows that Plaintiffs and the Burleys each claim Tribal authority but that Plaintiffs do not recognize the Burleys as any kind of Tribal representative. The contrary position of the Burley Faction does not deprive Plaintiffs of the right to act on behalf of the Tribe or to hire counsel to pursue their challenge to the 2010 Decision.

Yet the Burley Faction's lawyers tried to make it appear as if this Firm purported to represent the Burley Faction (which it has never done). In addition to their complaint to this Court, the Burley Faction's lawyers filed similar complaints with the D.C. Bar and the California Bar. To add insult to injury, after this Court expressly invited Plaintiffs' counsel to respond to the *ex parte* complaint by counsel for the Burley Faction, and after Plaintiffs' counsel submitted a letter responding to that complaint, counsel for the Burley Faction then wrongfully attacked Plaintiffs' counsel for sending the letter which (a) was invited by the Court, and (b) replied to the ethics allegations made by the Burley Faction's counsel.

These efforts by the Burley Faction's lawyers to harass and intimidate Plaintiffs and their counsel with bogus ethics complaints, and to litigate the merits of the underlying case through the filing of unwarranted *ex parte* complaints, are frivolous, time-consuming and costly. Plaintiffs are rightly concerned that they are merely a foretaste of the manner in which the Burley

Faction intends to improperly prolong and delay this litigation if it is permitted to intervene. Based on the unprofessional behavior of counsel for the Burley Faction, permissive intervention should be denied.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Burley Faction's motion to intervene be denied. Alternatively, the Burley Faction should be required to adhere to the previously ordered schedule for briefing on Plaintiffs' motion for preliminary injunction, pursuant to which Defendants' response is due April 1, 2011, and Plaintiffs' reply is due April 8, 2011.

Respectfully submitted,

/s/

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Dated: March 29, 2011

CERTIFICATE OF SERVICE

I certify that on March 29, 2011 I caused a copy of the foregoing opposition brief to be filed with the Court pursuant to the electronic filing rules, and that a copy was also provided via electronic mail to counsel for the Movant, as follows:

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