IN THE 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

PROPOSED INTERVENOR-DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

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I. INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the California Valley Miwok Tribe ("Tribe") respectfully seeks leave to intervene as a defendant in the above-titled matter as a matter of right, or in the alternative, with this Court's permission. The Complaint, filed on January 24, 2011, seeks judicial review pursuant to Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. of the December 22, 2010 final agency action of the Assistant Secretary – Indian Affairs' decision ("Decision") pertaining to the membership and enrollment status of the California Valley Miwok Tribe. In light of the April 1, 2011 act of the Bureau of Indian Affairs ("BIA") setting aside the Decision, the Tribe's inclusion and participation in any litigation regarding the Decision is even more critical

Plaintiffs claim the Assistant Secretary's Decision was arbitrary and capricious and seek its reversal as a desperate effort to compel the federal government to reach beyond its authority and confer California Valley Miwok Tribe membership upon non-members and urge the BIA to recognize a purported "tribal government" comprised of five non-members that have never once been recognized by the Tribe or the United States as being members or the governing body of the Tribe. To support their claims, Plaintiffs gravely and improperly mischaracterize previous federal court precedent and continuously cite dicta of the Tribe's previous litigation as the holding.

Now that the BIA has set aside the Decision and taken the matter under reconsideration, proposed Intervenor-Defendants have an even greater interest in protecting the sovereignty of the Tribe and asserting the authority of the Tribe's governing document, Resolution # GC-98-01. Because Plaintiffs' position and request for relief intimately affects the Tribe's legitimate membership and form of government, the Tribe seeks to intervene as a defendant to protect its

interests and prevent an unjustifiable encroachment on its sovereignty at the hands of individuals unwilling to go through proper tribal channels to seek legitimate enrollment and membership.

II. ARGUMENT

Both the Federal Rules of Civil Procedure and the binding case law of this circuit substantiate the Tribe's position that it is a proper party to intervene as a matter of right, or by the discretion of the Court. As discussed fully in the original statement of points and authorities, and further refined herein, Intervenor-Defendant meets both standards for intervention.

A. The California Valley Miwok Tribe Meets The Requirements For Intervention Of Right.

Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure and applicable case law, to intervene as a matter of right, proposed intervenors need to show: (1) the timeliness of the motion, (2) a cognizable interest in the action, (3) impairment of the interest, and (4) the lack of adequate representation in the lawsuit. *Williams & Humbert, Ltd. v. W & H Trade Marks (Jersey), Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Rule 24(a) is examined and applied liberally and in favor of intervention. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). The Tribe meets each of the requirements for intervention of right when analyzed in conjunction with binding authority.

i. The Tribe Has Timely Filed Its Motion to Intervene.

A determination of an intervenor's timeliness is "to be determined by the court in the exercise of its sound discretion" upon consideration of all the circumstances of the case including "the amount of time elapsed since the suit was filed." *NAACP v. New York*, 413 US 345, 365-366 (1973); *PETA v. Babbitt*, 151 F.R.D. 6, 7 (D.D.C. 1993), citing *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980).

Here, the Motion to Intervene has been filed less than two months after the filing of the Complaint. The Tribe filed before any kind of responsive pleading from Defendant was submitted. Because the elapsed time has been so short, and because there has been no response or initiation of the litigation except for the initial filing of the Complaint, the Tribe has timely exercised its right to intervene in this case to protect its interests.

ii. Intervenor-Defendant Has a Very Real Interest in Protecting the Sovereignty and Identity of the Tribe, Particularly in the Pending Litigation.

"Indian tribes are distinct, independent political communities, retaining their original natural rights" in matters of local self-government . . . they remain a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (cites omitted).

Despite Plaintiffs' words of personal and professional attack in their opposition, the fact remains that no one is in a better position to demonstrate the history and issues of tribal membership than the Tribe itself. And while Plaintiffs have attempted to paint Intervenor-Defendant's counsel as unethical and predatory, the Court certainly cannot fail to notice that Plaintiffs' Complaint unequivocally states that "Plaintiff Tribal Council is the *duly authorized and legitimate governing body of the Tribe*, appointed by Chief Dixie . . ." and that "Plaintiffs Velma WhiteBear, Antoniz Lopez, Michael Mendibles, Evelyn Wilson and Antoine Azevedo are members of the Tribe." (Emphasis added.) *See* Plaintiffs' Complaint, ¶¶ 22-23.

Plaintiffs have wrongfully asserted themselves as the Tribe and representative of the Tribe's governing body. They can point to no documentation whatsoever to substantiate that any of the individuals besides Yakima Dixie have ever been recognized as members of the Tribe. Similarly, Plaintiffs can point to nothing that recognizes Plaintiffs as the "duly authorized and

legitimate governing body of the Tribe." *Id.* Indeed, the BIA does not recognize Plaintiffs as the Tribe.

These untruths made it imperative that the Tribe seek to intervene to protect not only the Tribe's sovereignty, but to alert the Court to the more blatant mischaracterizations and fantastical storytelling they may attempt over the course of the litigation. The Tribe's very existence has been challenged by Plaintiffs' allegations, and no other group is more appropriate to defend and protect the Tribe than the recognized Tribe.

The very status of the Tribe's government and ability to conduct itself in the best interest of its members is at stake. Plaintiffs attempt to grossly distort the procedural history of the Tribe's leadership dispute and the Tribe's mandate to serve pursuant to its governing document, Resolution # GC-98-01. The BIA, the IBIA and previous federal court precedent have repeatedly acknowledged the authority of the Tribe's governing document Resolution # GC-08-01 and have repeatedly reaffirmed the Tribe's membership consisting of individuals listed in the Resolution and the Decision: Silvia Burley, Yakima Dixie, Rashel Reznor, Anjelica Paulk, and Tristian Wallace. *See* Affidavit of Robert A. Rosette ("Rosette Afft."), Exs. A-H. Proposed Intervenor's interest in the litigation is very strong and sufficient to warrant intervention of right.

iii. The Outcome of this Litigation Could Adversely Affect the Tribe's Interests.

An intervening party must have "an interest relating to the property or transaction that is subject to the action." Fed. R. Civ. P. Rule 24(a)(2). Disposition of a plaintiff's challenge that "could well impair" an intervenor's ability to protect its interest is sufficient to meet this threshold. *Dimond, supra*, 792 F.2d at 192.

In light of the BIA setting aside the Decision as of April 1, 2011 for reconsideration, the Tribe has an even more heightened interest in protection of its sovereignty and in protecting the

record in this Circuit. Further, Plaintiffs seem to concede by omission that the Tribe has an interest in the litigation that could be adversely affected. The Tribe's interest is inextricably bound with this Court's review of the Assistant Secretary's Decision, and proposed Intervenor-Defendants have an even more crucial need to assert itself now that the Assistant Secretary is reconsidering the Decision and the litigation remains pending because the Tribe's interests could be adversely affected by any new arguments that Plaintiff may raise stemming from a reconsidered decision from the Assistant Secretary in the instant case.

iv. *The Tribe's Interests in the Litigation May Not Be Adequately Represented by the Federal Government Because the Tribe Can Raise Arguments Central to its History and Customs that are Divergent from Defendants' Interest in Upholding Final Agency Actions Generally.*

Intervention of right requires a showing that his or her interests "may be" inadequately represented; the burden of showing this possible inadequacy should be treated as minimal. *Trbovic v. United Mine Workers of America*, 404 U.S. 528, 538, fn. 10 (1972); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962). This requirement is "not onerous." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003), citing *Dimond, supra*, 792 F.2d at 192. The trend in this Circuit is to allow intervention "unless it is *clear* that the party will provide adequate representation." *American Tel. & Tel. Co.*, *supra*, 642 F.2d at 1293. (emphasis added.) Additionally, this Circuit has often found that "governmental entities do not adequately represent the interest of aspiring intervenors." *Fund for Animals, supra,* 322 F.3d at 736.

Tribes often meet the burden of showing a possible inadequacy. In *Glamis Imperial Corp. v. U.S. Dept. of the Interior*, 2001 WL 1704305, this Court found the Quechan Indian Tribe's intervention as of right proper based on Quechan's argument that the Department of the Interior had a "multiple-use mandate" and duty to represent the general public and its interests. Further, the Court was swayed by Quechan's arguments that it was concerned about

safeguarding interests in a particular land site and that Quechan itself could best advance its own unique arguments in its favor. *Id.* Based on this, the Court deemed Department of the Interior may not be able to adequately represent Quechan's interests.

The Court allowed intervention in *Me-Wuk Indian Community of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315 (D.D.C. 2007), upon a finding that even though the plaintiff and the intervenor had a shared interest in the suit (and the tribe's quest for federal recognition) but that they also had interests that may not be adequately represented by the existing plaintiffs because they have different bases upon which the parties believe they are entitled to federal recognition. *Id.* at 320. Like with the California Valley Miwok Tribe, the Tribe has interests separate from the BIA that support findings that the Decision is not arbitrary and capricious. While Defendants will likely evidence its own internal review process in preparing the Decision, the Tribe can point to its own briefing and efforts to educate and reach out to the BIA to support the findings and conclusions reached by the Assistant Secretary.

Plaintiffs' reliance on persuasive authority from the First and Ninth Circuits is misplaced when case law out of this Circuit supports the Tribe's intervention.[1] In *Fund for Animals*, this Circuit found the intervenors' interests "more narrow and parochial" and ultimately determined they were entitled to intervention as of right. *Id.* at 736-737. Additionally, the Court determined

[1] Plaintiffs' cite to *Maine v. Director, United States Fish and Wildlife Service* is seriously flawed, both on the facts presented for the Court (as it was a conservation group and not business groups seeking to intervene), but also on effect of the court's decision; in *Maine*, the conservation group was not granted intervention as of right because it raised one argument separate from the State and had been granted leave to file an amicus brief, ensuring the court would hear its voice. Similarly, Plaintiffs' reliance on *Gonzales v. Arizona*, 485 F.3d 1041 is without merit, as the citizen's group at issue that had labored to help secure the passage of the proposition at issue wanted to ensure the government's implementation of the proposition. This is nothing more than trying to bolster the government's duty to uphold the law. The Tribe's interests are completely separate and distinct in that there are numerous implications on the Tribe personally that have nothing to do with the federal government defending final agency actions.

that Rule 24(a)(2) requires that the existing parties, and not their counsel will adequately represent any intervenor. *Id.*

The federal government has a vastly different interest and motivation in defending the Decision. Defendants wish to protect the legitimacy and relative autonomy of the BIA and be able to defer to its expertise in Indian issues with confidence. Defendants want to defend the Decision because they want to protect the BIA and its credibility. While the Tribe understands and respect that desire, and understands that it too will benefit from a decision recognizing and relying upon the final agency actions of the Bureau, it also recognizes that its own interest in upholding the Decision differs from the BIA because it is personally vested in the outcome. Separate and apart from the BIA's legitimacy, the very core of its sovereignty and ability to function as a tribe under its governing document, Resolution # GC-98-01 is under siege by Plaintiffs who cannot produce any credible evidence demonstrating that they have ever been recognized as the Tribe's "*duly authorized and legitimate governing body of the Tribe*." *See* Plaintiffs' Complaint, ¶¶ 22-23.

Further, as with *Fund for Animals*, the Tribe will have new and distinct arguments and factual expertise to complete the record throughout the life of this litigation. The Tribe seeks to assert interests related to, but not identical to the interest asserted by the BIA. While 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. Though the Tribe and the BIA have the same ultimate goal – a finding that the Decision is not arbitrary and capricious – both parties have different reasons for defending the Decision and

wholly different factual bases to point to in order to illustrate the history of the Tribe and the efforts of the Assistant Secretary.

The Tribe has a real and legitimate fear that Plaintiffs will continue to misrepresent the factual history of the Tribe and completely misread the Tribe's past litigation by creating multiple holdings where they do not exist. While the Tribe certainly trusts the Court to recognize the difference between holding and dicta in the past litigation, the Tribe is not convinced that Defendants are as knowledgeable as the Tribe in the history or convoluted relationships that have formed since the membership dispute arose. This is enough to warrant the Tribe's intervention in the action.

Because the showing of a possible inadequacy in representation is minimal and not onerous, and because the Tribe's current and continued existence is so fundamentally enmeshed with the judicial review of the Assistant Secretary's Decision, the Tribe meets this requirement for intervention of right. There is a possible inadequacy of the federal government's representation in this action because of the Tribe's interests in maintaining its sovereignty and right to conduct itself as the Tribal government is more narrowly tailored than Defendants' interest in upholding the validity of final agency actions generally.

The Tribe meets the requirements of intervention pursuant to Fed. R. Civ. P. Rule 24(a)(2) because it has shown: (1) the timeliness of its Motion to Intervene, (2) the Tribe's easily recognizable interest in the litigation, (3) the possible impairment or adverse effects that could result from this litigation, and (4) the possibility that the federal government "may not" be able to adequately represent the Tribe's more narrowly tailored interests in this action.

B. If the Court Finds Intervention of Right Improper, The Tribe Meets The Requirements To Support Permissive Intervention.

In the alternative, proposed Intervenor-Defendant meets the requirements for permissive intervention pursuant to Fed. R. Civ. P. Rule 24(b). "On timely motion, the court may permit anyone to intervene who: has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. Rule 24(b)(1)(B). Such intervention requires consideration of undue delay or prejudice of the original parties' rights. Fed. R. Civ. P. Rule 24(b)(3).

As discussed above, the motion is timely and the Tribe's interest has the same common question of law or fact: namely, the interest in affirming the validity of the Decision or the reconsidered decision as the future may present. Plaintiffs' personal attacks against the Tribe's counsel is not only improperly presented in its opposition, but it is not a legitimate basis upon which to deny permissive intervention.

Plaintiffs' characterization of the letter the firm sent to the Assistant Clerk of Court as well as attempting to downplay the severity of Plaintiffs' misrepresentation of who the Tribe is in their Complaint and blaming the Tribe's counsel for "exhibit[ing] a propensity to try to improperly prolong and delay this case" is wholly ludicrous and not a legitimate reason to deny permissive intervention under Rule 24(b). When the Tribe became aware of the blatant misstatements in Plaintiffs' Complaint, including its representation to the Court that it was the duly authorized and recognized Tribe, addressing these falsities was an immediate imperative. Because the Tribe was not yet a party, the Tribe (as well as the Tribe's counsel) contacted the clerk, not the judge, to alert the Court to the severity of the issue. There has never been any ex parte communication at all with the judge because the Tribe is not yet a party, and in fact, all correspondence to the Clerk was conducted before the Tribe filed its initial Motion to Intervene.

See Rosette Afft. ¶¶ 15-16. This was an appropriate action to take given the situation. Plaintiffs' response to the Court was improper, as it took the opportunity to argue the merits of their case ex parte. Further, in responding to the ex parte letter that Plaintiffs state was invited by the Court, it was unknown that the court had invited a response from Plaintiffs' counsel because the Tribe is not yet a party, and because as of the time the response letter was sent there was no order available for view on PACER.[2]

It has not escaped notice that between the filing of the Complaint and Plaintiffs' filing of its Opposition, Plaintiffs have chosen to reclassify who the Plaintiffs actually are. They have used qualifying language like "Plaintiffs do not recognize the Burleys as any kind of Tribal representative" and saying the action was filed on behalf of the "Dixie Tribe and does not purport to represent the Burley Faction." *See* Opposition p. 8. However, the fact remains that if Plaintiffs' counsel represents the "Dixie Tribe," it does not represent the California Valley Miwok Tribe.

Unfounded concerns Plaintiffs' counsel wish to raise about the Tribe's counsel do not change the fact that the Tribe has a very legitimate, common interest in the laws and facts involved in this case. Actions by the Tribe's counsel to inform the Court of misrepresentations do not constitute improper prolonging or delay and will have no effect on the parties' rights or the expeditious resolution of this litigation. Any prejudice claimed by Plaintiffs will be related to opposing facts and arguments that will force Plaintiffs to be clear with the Court about who they are and why they are here, however that is not prejudicial, that is simply objectivity before the Court and should not be a deterrent to granting permissive intervention.

[2] It is completely incorrect that the Tribe's counsel filed bar complaints against Plaintiffs' attorneys. Counsel for the Tribe alerted the Tribe to the misrepresentations occurring in this Court, and the Tribe chose to respond as it saw fit.

The Tribe merely wishes to protect its interests against the continuous attacks on the Tribe's legitimacy brought by a group predominantly composed of non-members. The common interest in law of fact is obviously the validity and effect of the Assistant Secretary's Decision and the implications it has for the Tribe and its ability to govern itself as a sovereign nation and engage in a government-to-government relationship with the United States. The Tribe thus satisfies the requirements for permissive intervention under Fed. R. Civ. P. Rule 24(b)(1)(B).

III. CONCLUSION

The California Valley Miwok Tribe seeks to intervene as of right pursuant to Fed. R. Civ. P. Rule 24(a)(2) because it has timely moved to intervene, has a cognizable interest in this action, could potentially be adversely affected or impaired by this litigation, and because representation in this action "may not" be adequate. In the alternative, the Tribe asks that this Court allow its permissive intervention into this action pursuant to Fed. R. Civ. P. Rule 24(b) because it has timely moved to intervene and because it has a clear common interest in law or fact.

Dated: April 4th, 2011

Respectfully submitted,

By: */s/ Robert A. Rosette*

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