IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CALIFORNIA VALLEY MIWOK TRIBE,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

THE TRIBAL COUNCIL,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

YAKIMA DIXIE,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

VELMA WHITEBEAR,
213 Downing Drive
Galt, CA 95632

ANTONIA LOPEZ
P.O. Box 1432
Jackson, CA 95642

MICHAEL MENDIBLES,
P.O. Box 1432
Jackson, CA 95642

EVELYN WILSON
4104 Blagen Boulevard
West Point, CA 95255

ANTOINE AZEVEDO,
4001 Carriebee Court
North Highlands, CA 95660

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior,
United States Department of the Interior

Case No. 1:11-CV-00160-RWR

Hon. Richard W. Roberts

1849 C Street, N.W.
Washington, D.C. 20240
LARRY ECHO HAWK, in his official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior,
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

MICHAEL BLACK, in his official capacity as Director of the Bureau of Indian Affairs within the United States Department of the Interior,
Bureau of Indian Affairs
MS-4606
1849 C Street, N.W.
Washington, D.C. 20240

Defendants.

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PROPOSED INTERVENOR-DEFENDANT'S AMENDED MOTION FOR LEAVE TO INTERVENE AS DEFENDANT

Robert A. Rosette
(D.C. Bar No. 457756)
ROSETTE, LLP
565 W. Chandler Boulevard, Suite 212
Chandler, Arizona 85225
Tel: (480) 889-8990
Fax: (480) 889-8997
rosette@rosettelaw.com

Attorney for Proposed Intervenor,
The California Valley Miwok Tribe

Dated: December 13, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Codes

Federal Rules

Local Rules

Other

I. INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Civil Rule 7(a), the California Valley Miwok Tribe ("Tribe") respectfully submits its Statement of Points and Authorities in Support of its Amended Motion to Intervene as a Defendant in the above-captioned matter. The Tribe respectfully seeks leave to intervene as a defendant in this action as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2), or in the alternative, with this Court's permission pursuant to Fed. R. Civ. P. 24(b). The Tribe's intervention in this case is sought for the limited purpose of filing a motion to dismiss Plaintiffs' Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 19.[1] The August 31, 2011 decision ("August 2011 Decision") issued by the Assistant Secretary – Indian Affairs ("Assistant Secretary"), which is currently under judicial attack by Plaintiffs, directly and explicitly affects the sovereign rights and authority of the genuine Tribe and its federally-recognized citizens. Accordingly, the Tribe is entitled to intervene in this matter as a matter of right, or in the alternative, permissively, for the purpose of protecting its interests in the defense of the August 2011 Decision and promoting a swift resolution of this meritless lawsuit.

The Tribe previously sought leave to intervene as a defendant in the instant action as a result of Plaintiffs' initial challenge to the Assistant Secretary's December 22, 2010 decision ("December 2010 Decision"), which reaffirmed sovereign authority of the Tribe's governing

[1] The Tribe seeks leave to intervene solely for the limited purpose of filing and prosecuting its motion to dismiss, and does not waive its sovereign immunity from suit or consent to be sued with regard to any issue or claim now or hereafter presented in this case or otherwise, and expressly reserves their sovereign immunity from suit. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp.2d 995, 1000 (W.D. Wisc. 2004) (explaining that sovereign "entities may intervene for a limited purpose such as moving to dismiss the lawsuit for failure to join an indispensable party without waiving their sovereign immunity."); *see also Vann v. Kempthorne,* 467 F.Supp 2d 56, 60, 60 (D.D.C. 2006); and, *Miami Tribe of Oklahoma v. Walden,* 206 F.R.D. 238, 240 (S.D. Ill 2001).

body and reestablished the government to government relationship between the United States and the Tribe. *See* the Declaration of Robert A. Rosette in Support of Proposed Intervenor-Defendant's Amended Motion For Leave To Intervene As Defendant and Motion To Expedite Consideration of The Amended Motion For Leave To Intervene As Defendant (the "RAR Decl."), Ex. L thereto. Resulting, in part, from the issues raised in connection with Plaintiffs' challenge to the December 2010 Decision and the assertions related thereto, the Assistant Secretary, in an abundance of caution, requested that ***Tribal members*** (and not the non-member Plaintiffs), Yakima Dixie and Silvia Burley, submit substantive briefs for reconsideration of his December 2010 Decision. (RAR Decl., Ex. N thereto) After careful consideration of the briefs, the administrative record, as well as the United States' government's entire history of dealings with the Tribe, the Assistant Secretary issued the August 2011 Decision, and, in so doing, once again reaffirmed the governing body of the Tribe and strengthened the basis for the Tribe's intervention in, and for this Court's dismissal of, the instant action. (RAR Decl, Ex. P thereto) In light of Plaintiffs' First Amended Complaint For Declaratory and Injunctive Relief ("Amended Complaint") filed on October 17, 2011, the Tribe respectfully submits its Amended Motion for Leave to Intervene as a Defendant in the instant action, to address the arguments raised in the Amended Complaint and to incorporate the very comprehensive points and authorities used as the basis for the August 2011 Decision.

Because Plaintiffs' position and request for relief seriously threatens the Tribe's legitimate, recognized, and true membership and form of government, the Tribe seeks to intervene as a defendant in this action 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.[2]

II. FACTS

The facts pertaining to the history of the Tribe and the procedural background behind the August 2011 Decision are undisputed. As elaborated further below, and as reaffirmed by both the August 2011 and the December 2010 Decisions, as well as numerous final agency actions of the Bureau of Indian Affairs ("BIA"), the Tribe consists of five (5) recognized Tribal members - Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace - and is organized pursuant to Resolution #GC-98-01, the only governing document acknowledged and recognized by the United States for its maintaining government to government relations with the Tribe. With the exception of Yakima Dixie, *not one* of the Plaintiffs (the "Non-Members") has *ever* been recognized by either the United States or the duly-organized Tribe as being citizens of the Tribe or otherwise possessing any of the rights and privileges related thereto. Rather, the Non-Members have interjected themselves into the internal affairs of the Tribe at the eleventh hour, under the guise of being a "tribe" based solely on their assertions as proof thereof, and at the tail end of an over five year struggle for the Tribe to resume its government to government relationship with the United States and have the sovereign authority of its government reaffirmed.

[2] Indeed, it is worth noting that, on November 28, 2011, counsel for Yakima Dixie in a California State Court action pending in San Diego – Central Division, issued a check payable to "California Valley Miwok Tribe" in the amount of $750.00. This check was issued as a result of sanctions levied against Mr. Dixie and in favor of the Tribe – the Proposed Intervenor in this case. Therefore, the Plaintiffs in the instant action, by their own admission, acknowledge that the Proposed Intervenor is the genuine, authentic Tribe, despite Plaintiffs misleading and erroneous filing of the Amended Complaint in the Tribe's name. (RAR Decl, Ex. R thereto).

A. The Tribe and Its Tribal Membership Has Been Indisputably Defined Throughout United States' Relations with the Tribe.

1. The Non-Member Plaintiffs Were Never Recognized as Tribal Members in the Tribe's Early History.

In 1915, a federal Indian Agent forwarded to the Commissioner of Indian Affairs a census comprised of a cluster of twelve Indians living on 160 acres in or near the city of Sheep Ranch, California (the "1915 Census Indians"). *See California Valley Miwok Tribe v. U.S., et al.,* 424 F. Supp. 2d 197 (2006).[3] In 1934, the membership of the Tribe, then known as the Sheep Ranch Rancheria, dwindled to only one individual, Jeff Davis, who was identified by the United States as the Tribe's sole member eligible to vote on the Indian Reorganization Act ("IRA"). (RAR Decl, Ex. D thereto). It is important to note that, with the exception of Jeff Davis, the BIA did not adopt any of the 1915 Census Indians during the Tribe's adoption of the IRA in 1934. The very fact that the BIA allowed one single member of the Tribe to vote on the IRA demonstrates that the remaining 1915 Census Indians were never recognized as members of the Tribe. Further, this decision by the BIA to adopt only Jeff Davis as a Tribal Member went unchallenged, and therefore became a final agency action.

2. The United States Once Again Did Not Recognize the Non-Members in 1966 Final Agency Actions.

Consistent with the United States' decision to only recognize a single Tribal member in 1934, was its decision in 1966 to also only recognize a single Tribal Member. In preparation for termination of the federal government's relationship with various Indian tribes in the state of

[3] Specifically, the August 13, 1915 Census named the following individuals as living at and near Sheep Ranch: Peter Hodge, Anita Hodge, Malinda Hodge, Lena Hodge, Tom Hodge, Andy Hodge, Jeff Davis, Betsey Davis, Mrs. Limpy, John Tecumchey, Pinkey Tecumchey, and Mamy Duncan. These are the very individuals that are collectively identified in the BIA's 2007 *Ledger Dispatch* Public Notice, in an attempt to enroll their descendants into the Tribe, despite subsequent determinations made by the United States that such individuals had no claims to membership in the Tribe.

California pursuant to the Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), in 1966, the BIA prepared a distribution plan to distribute the Tribe's assets. The BIA's distribution plan named Mabel Hodge Dixie as the only recognized Tribal member. Further, in 1966, the government found there to be no evidence that Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata or her two granddaughters had ever lived on the Rancheria, and, therefore, denied their claims to membership in the Tribe and issued deed to the land to Mabel Dixie. ("1966 Final Agency Action") (RAR Decl. ¶ 3, Ex. A thereto) Importantly, none of the 1915 Census Indians, nor any of their descendants (including Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata and her two granddaughters), challenged the 1966 Final Agency Action or their exclusion of Tribal Membership.

3. The 1966 Final Agency Action to Disallow the Non-Members to Participate in the Tribe Withstood Judicial Scrutiny in 1971 and Again in 1993.

Upon the passing of Mabel Dixie, the United States government's previous actions and distribution plan were subsequently reanalyzed and reaffirmed by an Administrative Law Judge who issued an Order of Determination of Heirs on October 1, 1971, which was again reaffirmed on April 14, 1993, following a challenge from the Regional BIA Superintendent ("1971 and 1993 Final Agency Actions") (RAR Decl., Ex. D thereto, p. 2). Once again, the United States clearly only recognized a trust responsibility to the recognized member and governing body of the Tribe, and appropriately recognized the heirs of the single remaining Tribal Member as having rights to membership in the Tribe. Importantly, none of the Non-Members or 1915 Census Indians were recognized as Tribal Members, and at no time did the Non-Members appeal or challenge their exclusion from the Tribe. It has gone undisputed, in fact, that the only identifiable Tribal Member(s) would be the heirs of Mabel Hodge Dixie.

4. In 1998, The Tribe Organized Itself With the Enactment of Resolution #GC-98-01 and Was Recognized By the BIA As Being Comprised of Five Members: Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace.

On August 5, 1998, Yakima Dixie, heir of Mabel Hodge Dixie, adopted Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, as enrolled members of the Tribe. (RAR Decl. ¶ 4, Ex. B thereto) Relying upon the then 83 years of United States history and dealings with the Tribe as referenced above, on September 8, 1998, BIA officials, including then Superintendent Dale Risling, met with Yakima Dixie and Silvia Burley for the purpose of "discuss[ing] the process of formally organizing the Tribe." (RAR Decl. ¶ 6, Ex. D thereto, p.1). On September 24, 1998, Superintendent Risling provided a letter which summarized the issues discussed at the September 8th meeting, and based on those discussions and a detailed review of the Tribe's history, confirmed the Tribe's five-member Tribal enrollment. (*Id.*) The Superintendent stated that the BIA was properly "held to the Order [of Determination of Heirs] of the Administrative Law Judge," and this coupled, with Mr. Dixie's formal adoption of Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, demonstrated that these five individuals were the enrolled members of the Tribe who "possess[ed] the right to participate in the initial organization of the Tribe." (*Id.* at Ex. C, p. 2). The letter further stated that the enrollment criteria later established for "*future prospective members"* would "eventually…be included in the Tribe's Constitution." (*Id.*) (emphasis added) The action of the BIA to recognize these five Tribal Members was not appealed by the Non-Members, and thus became a final agency action of the United States.

With respect to the issue of governance, the Superintendent explained two options for the Tribe to consider regarding "how they [would] govern themselves until such time as the Tribe adopts a Constitution through a Secretarial Election." (*Id.*) The option recommended by the

BIA to the Tribe was to "operate as a General Council," to which the BIA enclosed a draft General Council resolution for the Tribe's consideration, "specifying the general powers of the General Council and rules for governing the Tribe." (*Id.* at p. 3) On November 5, 1998, the Tribe's General Council – specifically, the three adult Tribal members explicitly recognized by the BIA as having the right to participate in the tribe's governmental organization – convened, deliberated and made the decision to operate the Tribe's government pursuant to the specific provisions and enumerated powers delineated to its General Council in Resolution #GC-98-01 (titled "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians"). The action of the BIA to recognize the Tribe's governing body established by Resolution #GC-98-01 was never challenged by Mr. Dixie or the Non-Members, and thus became a final agency action of the United States.[4]

5. The BIA Recognized the Legitimacy of Resolution #GC-98-01 in Two Final Agency Actions Dated February 4, 2000 and March 7, 2000.

The BIA recognized the validity of the Tribe's government enacted through Resolution #GC-98-01, as evidenced in subsequent dealings with the Tribe and the United States as well as subsequent final agency actions of the BIA. On February 4, 2000, subsequent to its notice of an internal leadership dispute within the Tribe, the BIA provided a letter to Yakima Dixie, acknowledging that "[o]n November 5, 1998, the majority of the adult members of the Tribe, adopted Resolution #GC-98-01, thus establishing a General Council to serve as the governing body of the Tribe." (RAR Decl. ¶ 7, Ex. E thereto) With respect to the allegations regarding

[4] With the exception of their Amended Complaint and the brief submitted to the Assistant Secretary on May 3, 2011, neither Mr. Dixie nor the Non-Member Plaintiffs have ever questioned the validity of the Tribe's governing document, Resolution #GC-98-01. To the extent that Plaintiffs now seek to raise such assertions in their Amended Complaint, as elaborated in the Tribe's proposed motion to dismiss, such claims are time-barred.

Tribal leadership, the letter went on to state the position of the BIA that "the appointment of Tribal leadership and the conduct of Tribal elections are internal matters." (*Id*. at p. 4) The action of the BIA to recognize the Tribe's governing body established by Resolution #GC-98-01 was never challenged Mr. Dixie or the Non-Members, and thus became a final agency action of the United States ("February 2000 Final Agency Action").

An additional decision addressing Yakima Dixie's concerns was rendered by the BIA on March 7, 2000. (RAR Decl. ¶ 8, Ex. F thereto) In this letter, the BIA Superintendent again reaffirms the authority of the Tribe's General Council and its resolution-form-of government, stating that, in accordance with Resolution #GC-98-01, "only the Tribe, acting at a duly noticed, called, and convened meeting at which a quorum is present, is the proper body to consider and effect [a new member's] enrollment in the Tribe." (*Id.* at p. 4) The Superintendent also, once again, deferred to the Tribe regarding the issues of leadership and membership of the Tribe, stating that such issues "are internal matters to be resolved within the appropriate Tribal forum." (*Id*. at p. 2) Without question, the BIA recognized the legitimacy of Resolution #GC-98-01 and the fact the Tribe was organized pursuant to this document. Again, neither of these final agency actions of the BIA were ever challenged by either Mr. Dixie, or any of the Non-Member Plaintiffs, either at the time of its issuance or any time thereafter.

B. Because Plaintiffs Have Never Been Recognized as Members, They Resort to Mischaracterizing and Misrepresenting Findings By Federal Courts and the Federal Government In a Desperate Attempt to Assert A Membership Interest Where None Exists.

1. Preliminarily, Plaintiffs Have Not - and Cannot - Support Their Suggestion That the Failure of the Tribe to Organize Under the IRA Means that the Tribe was Never Organized.

It is not disputed that, in 1934, the Tribe's sole member, Jeff Davis, voted in favor of the IRA. However, contrary to Plaintiffs' assertions, this action did not obligate this Tribe, or any Indian tribe for that matter, to adopt a written constitution and organize pursuant to IRA provisions, as evidenced by many tribes that similarly did not do so.[5] (RAR Decl. ¶ 18, Ex. P, p. 6 thereto) Indeed, "[n]o federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution. The decision whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative." F. Cohen, *Handbook of Federal Indian Law*, 277 (1942). Therefore, the Tribe's decision to vote in favor of the IRA in 1934 in no way precluded the tribe from later organizing pursuant to a non-IRA model.

2. The BIA's 2004 Letter Refusing to Accept a Constitution Previously Submitted By the Tribe Did Not Invalidate the Tribe's Previously Established Form of Government.

On March 26, 2004, Superintendent Risling issued a letter to the Tribe, which stated that the BIA would not accept a Constitution previously submitted by the Tribe as evidence that the Tribe was organized pursuant to the IRA. (RAR Decl. ¶ 9, Ex. G thereto) Plaintiffs attempt to use this refusal to accept the proposed IRA constitution as a rejection of "all tribal governing documents submitted prior to that date, and any purported Tribal government created by any such documents." (Amended Complaint, ¶ 56) This is simply not the case. Rather, in the letter,

[5] *E.g.,* Zuni Pueblo; *see* T. Hass, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* 18, 30 (1947); G.Fay, ed., *Charters, Constitutions, and Bylaws of the Indian Tribes of North America* (1967), pt. IV p.112.

the BIA reiterated *recommendations* made to the Tribe, similar to those made in previous letters, for the Tribe to consider in identifying the membership and enrollment criteria to be included in the Tribe's proposed IRA constitution. Specifically, in the letter, the BIA makes the following statements:

> Although the Tribe has not requested any assistance or comments from this office in response to your document, ***we provide the following observations for your consideration***.
> . . .
>
> The BIA remains available, ***upon your request, to assist you in identifying the members*** of the local Indian community, to assist in disseminating both individual and public notices, facilitating meetings, ***and otherwise providing logistical support***.
> . . .
>
> We reiterate our continued ***availability and willingness to assist you*** in this process and that via PL 93-638 contracts…we have already extended assistance."

(emphasis added) (RAR Decl. ¶ 9, Ex. G, p. 1-3).

Despite Plaintiffs' assertions and characterizations to the contrary, this letter does not stand for the proposition that the Tribe was not organized, or that the Tribal Council established pursuant to Resolution #GC-98-01 was somehow invalid. Rather, the BIA once again recognized its delicate and minimal role with respect to internal Tribal affairs, making only observations and recommendations for facilitation and technical assistance with respect to identifying other individuals potentially eligible for membership in the Tribe. These recommendations were made despite a very clear record reflecting that the Non-Members, tying their right to membership through Indian ancestry to the 1915 Indian Census, were simply not eligible for membership into the Tribe.

3. Similarly, the BIA's 2005 Letter Dismissing Yakima Dixie's Appeal Did Not, In Any Way, Eradicate the Tribe's History, Recognized Membership and Established Governmental Structure.

On February 11, 2005, the Acting Assistant Secretary for Indian Affairs, Michael Olsen, dismissed an appeal filed by Yakima Dixie challenging the BIA's recognition of the Tribe's Membership. In rejecting Mr. Dixie's appeal, Mr. Olsen reaffirmed the well-established Membership of the Tribe and "encourage[d]" Mr. Dixie to work with the ***other tribal members*** and organize the Tribe pursuant to an IRA constitution and along the lines outlined in the March 26, 2004 letter. (RAR Decl. ¶ 10, Ex. H thereto) In this letter, the BIA once again offered its "*guidance or assistance"* in identifying membership criteria for inclusion in the Tribe's constitution. (*Id.* at p. 1) In offering such *recommendations and offers for technical assistance* with respect to identification of tribal enrollment and membership criteria, the BIA recognized that for it to overstep its boundaries and intrude upon internal Tribal affairs by actively reorganizing a Tribe with a well-established Membership and form of government, it would be acting in direct contravention with well-established federal Indian law and United States policy with respect to sovereign Indian Nations. Indeed, it was not until the 2006 Superintendent Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to forcibly enroll the Non-Members into the Tribe, described in more detail below, that the BIA overtly exceeded its role, going well "beyond what was decided or confirmed" in the 2004 and 2005 BIA letters and beyond the scope of holdings in the Federal Court litigation. *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs,* 51 IBIA 103 (January 28, 2010). The August 2011 Decision's reaffirmation of the Tribe's Membership and Resolution #GC-98-01 is consistent with both the letters frequently mischaracterized by the Non-Members when analyzing Assistant Secretary's role pursuant to federal Indian law.

4. The Federal Courts' Previous Upholding of the BIA's Refusal to Accept the Tribe's Proposed Constitution Did Not Equate to a Holding That the Tribe Was Not Properly Organized Outside of the IRA Or That The Tribe Was Or Should Be Comprised of Certain Members.

In *California Valley Miwok Tribe v. U.S.,* 424 F.Supp.2d at 197, the Tribe challenged the BIA's rejection of its proposed IRA Constitution in the 2004 and 2005 BIA letters,[6] citing to provisions in the IRA designed to give tribes more procedural flexibility in the adoption of an IRA constitution. *See* 25 U.S.C. §476(h). In its opinion, the district court provided a thorough account of the Tribe's history and dealings with the United States, including recognition of Resolution #GC-98-01 and the BIA's recommended "general council form of government." *California Valley Miwok Tribe,* 424 F. Supp. at 198. The court then acknowledged the subsequent "confusion that surrounded the Tribe" following its internal leadership dispute, recognizing that the BIA's activity "multiplied the confusion." *Id.* at 199.

Adhering to the scope of the issue before it as well as the scope of review of the BIA's actions pursuant to the Administrative Procedures Act ("APA"), the district court examined the statutory language of subsection 476(h) and dismissed the Tribe's claim for failure to state a claim for which relief could be granted. *Id.* at 203. The court did not find that the BIA shall enroll the Non-Members into the Tribe. Nor did the court examine the issue of the individuals who comprised the Membership of the Tribe. For the Non-Members to argue otherwise is a desperate attempt to conflate issues. Rather, the district court examined the Tribe's attempt to submit a constitution, and the BIA's authority to reject such a constitution under an APA scope of review, ***exclusively*** pursuant to the terms of the IRA. In no way does the court's holding as to the BIA's authority pursuant to the APA or its analysis of such authority pursuant to the IRA

[6] Which the Court accepted as final agency actions, "for the purpose of [its] opinion only." *Id.* at 201.

equivalent to a determination that the Tribe's government was not organized ***outside of the IRA***, pursuant to federal Indian law. Such a determination was never made as this issue was never before the district court.

In *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the Tribe's complaint, concluding that "the Secretary lawfully refused to approve the proposed constitution." *Id* at 1263. In doing so, the court characterized the "central issue in this case" as "the extent of the Secretary's power to approve a constitution under [Section 476(h) of the IRA]. *Id.* at 1265. Examining the statutory text of 25 U.S.C. § 476(h) as well the Secretary's role delineated in 25 U.S.C. § 2, the court held that the BIA acted permissibly and in accordance with the APA in rejecting the Tribe's proposed IRA constitution. *Id.* at 1268. Again, similar to the district court, the court examined the Tribe's organization as well as the Secretary's authority to assist in such organization, ***exclusively pursuant to the IRA*** and under an APA scope of review. The court did not and indeed could not examine facts as to the Tribe's existing membership and established form of government or the BIA's previous relationship with the Tribe pursuant to either the APA or federal Indian law, because "there ha[d] been no fact development" in the case, nor was the Tribe's membership and enrollment within the scope of the issue to be decided by the court. Once again, it is critical to emphasize that the 2006 Superintendant Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to reorganize the Tribe and enroll the Non-Members was ***not*** the decision at issue before the Court. Even if the issues of Tribal membership and enrollment had been before the court for its review, similar to the IBIA, it would have been outside of its jurisdiction, consistent with the long-standing principle that "[j]urisdiction to resolve internal tribal disputes…and issue tribal membership determinations

lies with Indian tribes and not in the district courts."[7] *In re Sac & Fox Tribe of Mississippi in Iowa/Meskawaki Casino Litigation*, 340 F.3d 749, 763 (8th Cir.2003).

The court's finding that the BIA's actions and Secretary's authority to reject the Tribe's proposed IRA constitution was permissible as a matter of law in no way validates the BIA's subsequent attempt to enroll Non-Members into an Indian tribe pursuant to federal Indian law. Nor should the court's holding regarding rejection of an IRA constitution have any bearing on the narrowly-defined issue of Tribal enrollment and membership referred by the IBIA to the Assistant Secretary and currently before this Court. Indeed, the issues of the Tribe's membership or enrollment and validity of the Tribe's resolution form of government were never before the federal courts. As acknowledged by the court itself, the lack of fact development in the case precluded the court from making any determinations that were outside its jurisdiction and its scope of review. *Id* at 1268. Therefore, the Assistant Secretary's August 2011 Decision to recognize the existing Tribal Members and Resolution #GC-98-01 as the Tribe's governing document is completely consistent with the D.C. district court and Appellate Court decisions.

5. The 2006 BIA Decision and *Ledger Dispatch* Public Notice Represented a True Departure from the United States' Entire History of Dealings with the Tribe and its Governing Body.

Despite nearly a century of history demonstrating the Tribe's unwillingness to enroll various heirs of a 1915 census, on November 6, 2006, the Superintendent of the Bureau of Indian Affairs ("BIA"), Central California Agency ("Superintendent") made a decision to enroll the

[7] *See United States v. Wheeler*, 435 U.S. 313, 323-36, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)(noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory"); *Runs After v. U.S.*, 766 F.2d 347, 352 (8th Cir. 1985)(holding that the district court lacked jurisdiction to resolve "disputes involving questions of interpretation of tribal constitution and tribal law"); *Smith v. Babbit*, 100 F.3d 556, 559 (8th Cir. 1996)(holding that the district court lacked jurisdiction to hear what, in effect, was an appeal by individuals from an adverse tribal membership determination by a tribe).

Non-Members[8] into the federally recognized Indian Tribe under the guise of "organizing" the Tribe (the "2006 Superintendent Decision"). (RAR Decl. ¶ 11, Ex. I thereto) With no legal support or factual basis, and in direct contravention of the entire United States' history in dealing with the Tribe, the Superintendent's letter questioned the Tribe's existing and previously-recognized governing body and allowed for certain Non-Members, who had never previously been recognized as Tribal Members of the Tribe, to have the opportunity to participate in the organization of the Tribe along with the existing five Tribal Members. The Tribe appropriately and timely appealed the 2006 Superintendent Decision, and on April 2, 2007, this decision was affirmed by the Regional Director. The BIA subsequently published a Public Notice in the *Ledger Dispatch* newspaper for the implementation of the 2006 Superintendant Decision and enrollment of Non-Members into the Tribe, contrary to a century of BIA decision-making and final agency actions. ("*Ledger Dispatch* Public Notice"). (*Id*. at ¶ 15, Ex. K thereto)

Reiterating its position that the BIA's decision to reorganize the Tribe was inconsistent with longstanding federal Indian law and United States policy, as the Tribe had previously organized itself and was comprised of an established, federally-recognized membership of five individuals, the Tribe then appealed the 2006 Superintendent Decision to the Interior Board of Indian Appeals ("IBIA").

[8] While the Non-Members include Yakima Dixie in their claims, it is important to recognize that Yakima Dixie is a recognized Tribal Member, and accordingly, Yakima Dixie's interests are protected by the interests of the Tribe and its Tribal Members. *See Canadian St. Regis Band of Mohawk Indians v. State of NY,* 573 F. Supp. 1530, 1537 (N.D.N.Y.1983) (holding that individual tribal members lack standing to assert claims on behalf of the Tribe); *See Also, California Valley Miwok Tribe v. California Gambling Control Commission,* Case No. 37-2008-00075326-CU-CO-CTL (Order dated March 11, 2011) (finding that Yakima Dixie's interests as an individual Tribal Member are protected actions brought by the Tribe).

6. The IBIA Appropriately Characterized This Matter As a Tribal Enrollment Dispute and Recognized the Peculiarity of the 2006 Superintendant Decision.

On January 28, 2010, almost three years after the Tribe's appeal was filed, the IBIA issued an opinion that referred the Tribe's claim regarding Tribal Membership and enrollment to the Assistant Secretary for final determination ("IBIA Decision"). *See California Valley Miwok Tribe,* 51 IBIA 103. Finding that the *Ledger Dispatch* Public Notice – which would ultimately enroll the Non-Members into the Tribe – was published prematurely and done in an "undefined capacity," the IBIA properly held that it "lack[ed] jurisdiction to adjudicate tribal enrollment disputes." *Id.* at 121-122. 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 (emphasis added). In doing so, the IBIA then referred the tribal enrollment dispute to the Assistant Secretary for final determination, pursuant to 43 C.F.R. 4.330.1(b), recognizing that the relief sought was beyond the scope of the IBIA's authority.

7. The 2006 Superintendant Decision Was Properly Reversed Pursuant to the December 2010 and August 2011 Decisions and Consistent with Decades of Federal Indian Law and Policy.

After nearly a year of deliberation on the matters referred by the IBIA, the Assistant Secretary issued a decision on December 22, 2010 (the "December 2010 Decision"). Acting consistent with the scope of the IBIA's referral, pursuant to 43 C.F.R. 4.330.1(b), in the December 2010 Decision, the Assistant Secretary appropriately considered previous BIA final agency actions from nearly a century of dealings with the Tribe, which clearly recognized the Tribe's membership and organization, as well as two previous BIA letters in 2004 and 2005, with which the Non-Members attempted to create confusion regarding the Tribe's membership and organizational status. In doing so, the December 2010 Decision 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 December 2010 Decision appropriately recognized the members of the Tribe as being Rashel Reznor, Yakima Dixie, Sylvia Burley, 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." (RAR Decl. ¶ 14, Ex. L thereto)

On January 6, 2011, the Non-Members sought a stay and reconsideration of the December 2010 Decision from the Honorable Secretary Salazar. (RAR Decl. ¶ 15) The Department of Interior issued a response on behalf of Secretary Salazar on January 21, 2011 in which it declined to reconsider the Assistant Secretary's Decision. (*Id*., Ex. M thereto)

On April 1, 2011, based upon arguments raised in litigation by the Non-Members seeking judicial review of the December 2010 Decision, the Assistant Secretary set aside the same and subsequently provided a list of issues to be briefed for reconsideration of the Decision on April 8, 2011. (RAR Decl. ¶¶ 16-17, Exs. N and O thereto) On May 3, 2011, the Tribe and Plaintiffs submitted substantive briefs to the Assistant Secretary in the reconsideration of his December 2010 Decision. (*Id*.)

After careful consideration of the entire administrative record (including the IBIA proceedings), the litigation records in prior federal court actions, as well as the substantive briefs submitted by both parties, on August 31, 2011, the Assistant Secretary issued his definitive final agency action pertaining to the California Valley Miwok Tribe (the "August 2011 Decision"). (RAR Decl. ¶ 18, Ex. P thereto) In reaffirming the holdings of the December 2010 Decision, the

August 2011 Decision definitively "clear[ed] away the misconceptions that [the Non-Members] have inchoate citizenship that the Secretary has a duty to protect, noting that "the five acknowledged citizens are the ***only*** citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe." (*Id.* at Ex. Q, p. 3) (emphasis added) Citing decades of well-established federal Indian policy and precedent, the August 2011 Decision also asserts that "[t]he Federal government is under no duty or obligation to 'potential citizens' of the [Tribe]," and that [t]hose potential citizens, if they so desire, should take up their cause with the [Tribe's] General Council directly." (*Id.* at p. 7)

Rather than follow the Assistant Secretary's determination and direction to "work within the Tribe's existing government structure to…bring this contentious period in the Tribe's history to a close," the Non-Member Plaintiffs refuse to even submit enrollment applications to the Tribe for its consideration of their membership into the Tribe. (*Id.* at p. 8.) Plaintiffs seek instead to jeopardize the judicial economy of this Court in an effort to undermine years of well-established federal Indian law precedent and policy and 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, in order to protect and preserve its sovereign rights, which the Tribe has relentlessly fought to preserve, the Tribe seeks to intervene as a defendant to protect its interests, promote an expeditious resolution of this meritless lawsuit and continue functioning as a sovereign nation pursuant to its rights to self-governance and self-determination.

III. ARGUMENT

The Tribe asserts interests in this matter related to its sovereignty and the preservation of its internal laws governing its citizenship. As discussed herein, these interests are such that the Tribe is an indispensable party to this proceeding and is entitled to intervene as a matter of right

as a defendant in this case pursuant to Fed. R. Civ. P. 24(a)(2).[9] No current party to this litigation, furthermore, can adequately represent the Tribe's interests in this matter. In the alternative, the Tribe respectfully seeks intervention through this Court's permission, pursuant to Fed. R. Civ. P. 24(b)(2).

A. The Tribe is Entitled to Intervene as a Matter of Right.

Under Fed. R. Civ. P. 24(a), an applicant is entitled to intervene as of right if: (1) it files a timely application to intervene; (2) it has an interest relating to the property or transaction at issue in the action; (3) disposition of the action may impair or impede its ability to protect that interest; and (4) the existing parties may not adequately represent the intervenor's interest. Fed. R. Civ. P. 24(a)(3); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). In other words, the four-part test used to evaluate an applicant's eligibility to intervene under Rule 24(a) examines: (1) timeliness; (2) cognizable interest; (3) impairment; and (4) adequate representation. *See Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (internal citations omitted). Moreover, Rule 24(a) receives liberal interpretation in favor of applicants for intervention. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). As set forth below, the Tribe meets each of the requirements for intervention as of right, pursuant to Rule 24(a).

[9] The outcome of this case will not only directly impact the Tribe's sovereignty and internal laws, but may also impact the sovereignty and right to self govern of Indian tribes throughout the United States, as appropriately recognized by the National Congress of American Indians ("NCAI"), the oldest and largest organization of American Indian and Alaska Native tribal governments. On November 2, 2011, NCAI adopted Resolution #PDX-11-014 (the "NCAI Resolution"), which expressly supports the August 2011 Decision and "opposes any effort by state or federal governments or courts to interfere with tribal internal decision making." (RAR Decl. ¶ 19, Ex. Q thereto)

1. The Tribe's Application For Intervention is Timely.

In determining the timeliness of an application for intervention, courts consider all the circumstances of a case including the amount of time elapsed since the suit was filed. *NAACP v. New York*, 413 US 345, 365-366 (1973). Intervention less than two months after the filing of the complaint has been held to be timely in this Circuit. *See Fund for Animals v. Norton,* 322 F.3d 728, 735 (D.C. Cir. 2003). Here, there is no question of timeliness. The Tribe's Amended Motion to Intervene has been filed less than two months after the filing of the Amended Complaint, days after the filing of the United States' Answer to Plaintiffs' First Amended Complaint, and prior to any substantive proceedings being held or any substantive orders being entered. Moreover, there is no legitimate risk of prejudice to the existing parties in permitting the Tribe to intervene because there has been no meaningful discourse between them to date. The allegations in the Amended Complaint are aimed just as much at the authority of the Tribe as they are at the Federal Defendants. Thus, the possibility of prejudice to the parties from the Tribe's intervention is negligible, since the Tribe's interest lies only in refuting the Plaintiffs' claims. Therefore, intervention by the Tribe at this early stage of the proceedings is timely and should be permitted.

2. The Tribe Has a Cognizable Interest in the Pending Action.

The "cognizable interest requirement assists in 'disposing of lawsuits' by involving as many apparently concerned persons as is compatible with efficiency and due process." *People for the Ethical Treatment of Animals v. Babbit*, 151 F.R.D. 6, 8 (D.D.C. 1993) (*quoting Nuesse v. Camp*, 385 F.2d at 700). The Tribe is clearly a "concerned person" given that its interest in this case is in protecting its sovereign authority to determine its own membership.

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. Further, they have the power to make their own substantive law in internal matters and to enforce that law in their own forums. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978) (citations omitted). The federal courts, without exception, recognize that a fundamental hallmark of a tribe's sovereignty is the right to determine its own membership, without interference from the federal government. *Smith v. Babbit,* 100 F.3d at 559; *see Ordinance 59 Assoc. v. Babbit,* 163 F.3d 1150, 1153 n.3 (10th Cir. 1998). Moreover, the United States Supreme Court has recognized that Indian tribes' "participation in litigation critical to their welfare should not be discouraged." *Arizona v. California,* 460 U.S. 49, 55-56 (1978); *see also Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 369, 88 S.Ct. 982, 984, 19 L.Ed.2d 1238 (1968) (citations omitted) (finding that Indians are entitled "to take their place as independent qualified members of the modern body.").

Plaintiffs' action is a collateral attack on the Tribe's authority to determine its own membership. The Tribe clearly has a cognizable interest in ensuring that its authority to determine its membership is not infringed upon. Therefore, because the Tribe's sovereignty is directly implicated by Plaintiffs' challenge to its government and its membership, the Tribe is entitled to participate in these proceedings.

3. Disposition of this Action Could Impair the Tribe's Ability to Protect its Interests.

For many of the same reasons, it is clear that "disposition of th[is] action may as a practical matter impair or impede [the Tribe's] ability to protect [its] interests." Fed. R. Civ. P. 24(a). Disposition of a plaintiff's challenge that "could well impair" an intervenor's ability to

protect its interest is sufficient to meet this threshold. *Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

Here, the Tribe is the immediate beneficiary of the August 2011 Decision which reaffirmed the authority of the Tribe's governing body and reestablished the government–to-government relationship with the Tribe and the United States. The Tribe's ability to resume its self-governance and self-determination cannot move forward until the instant action is disposed of and the August 2011 Decision is implemented. Plaintiffs here seek to prevent or, at the very least, to delay indefinitely the implementation of the August 2011 Decision. Any judgment vacating the Assistant Secretary's decision – and any litigation that delays its implementation – will directly harm the Tribe and its authentic citizens. The Tribe has spent years fighting to restore its government-to-government relationship with the United States. Further delays will impose additional unjustifiable economic and social burdens on the Tribe and its citizens, who have already waited long enough. It is only through participation in this lawsuit as a party that the Tribe will be able to protect its own rights and interests.

4. The United States Cannot Fully Represent the Tribe's Interests.

To secure intervention, the Tribe must also establish that its interests are not "adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). This test is satisfied "if the applicant demonstrates that representation of his interest 'may be' inadequate; and the burden of making that showing should be minimal." *Fund for Animals, Inc. v. Norton*, 322 F.3d at 735 (*quoting Trbovic v. United Mine Workers of America*, 404 U.S. 528, 538, fn. 10 (1972)); *see also Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981) (burden is "not onerous"). The Tribe meets this "inadequacy" test here if, for example (1) the United States *may* make arguments different from those of the Tribe; (2) the Tribe's stake in the litigation differs from that of the United

States; (3) the United States might not choose to appeal an adverse judgment; or (4) the Tribe will offer necessary elements to the proceedings that the United States might neglect. *See, e.g. Diamond v. District of Columbia,* 792 F.2d at 192-93; *Kleissler v. United States Forest Service*, 157 F.3d 964, 973 (3d Cir. 1998); *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

The Tribe satisfies this minimal burden. Although the Tribe's interests correspond, to a certain extent, with the interests of the United States in defending the August 2011 Decision, the interests are not co-equal. The scope of the Tribe's specific and immediate interests exceeds in significant part the general interest of the federal government in upholding its action. Neither the practical consequences to the Tribe from the disposition of the case nor the legal interests being asserted by the Tribe are co-terminus with those of the federal government. The Tribe's interests in maintaining its sovereignty and right to conduct itself as the duly enacted and recognized Tribal government are clearly concrete and more narrowly-tailored than Defendants' interest in upholding the validity of final agency actions generally. Only the Tribe is in a position to represent its specific interests and vigorously defend Plaintiffs' mischaracterizations of the record and the fundamental tenants of federal Indian law. Only the Tribe is in a position to adequately articulate the hardships imposed by the continued delay of its lack of government-to-government relationship with the United States and the implementation of the August 2011 Decision. Accordingly, the Tribe brings to this matter an independent and unique perspective to this action that is necessary for the resolution of the pending issues, a perspective that the existing parties do not offer.

Further, the interests of the Tribe and the Federal Defendants have already diverged in this litigation. Although the United States appropriately raised the issue of the Plaintiffs' failure

to state a claim upon which relief may be granted in their recently filed Answer (Dkt. No. 34, p.21), they did so in the context of an affirmative defense and not as a separate basis for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The Federal Defendants will not be considered to adequately represent the Tribe's interest if there is doubt as to whether the Federal Defendants are willing to make all of the Tribe's legal arguments. *See Blake v. Pallan,* 554 F.2d 947, 954 (9th Cir. 1977); *U.S. v. Oregon,* 839 F.2d 635, 638 (9th Cir. 1988). The Tribe believes that strong grounds exists to seek dismissal of the instant action on the face of Plaintiffs' Amended Complaint, and because the United States has failed to assert such extensive grounds in its recently-filed Answer or to seek dismissal of this action by motion, sufficient doubt exists to warrant intervention. The Tribe must be permitted to intervene in this action, as a matter of right, in order to adequately protect its unique and specific interests and to set forth the legal arguments that, as demonstrated by the recently filed Answer, have not and will not be raised by the United States.

For all of the foregoing reasons, the Tribe respectfully requests that it be permitted to intervene as a matter of right.

B. In The Alternative, The Tribe Meets The Requirements To Support Permissive Intervention.

If, for some reason, the Court determines that the Tribe is not entitled to intervene as a matter of right under Rule 24(a)(2), then, alternatively, the Tribe should be granted permissive intervention. Rule 24(b)(2) authorizes permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P 24(b)(2); *Appleton v. FDA,* 310 F.Supp.2d 194, 196 (D.D.C. 2004). Such intervention requires consideration of undue delay or prejudice of the original parties' rights. Fed. R. Civ. P. Rule 24(b)(3).

The Tribe easily satisfies Rule 24(b)(2). Because the Tribe seeks to defend every challenge the Plaintiffs bring, without injecting any new issues into the case, the matters of law and fact that the Tribe will address are identical to those already before the Court. Permitting intervention will not delay the proceedings or prejudice the parties, as the Tribe seeks to intervene at the outset of the case and raises no additional claims. To the contrary, the Tribe has the strongest possible interest in the expeditious resolution of this case and the prompt implementation of the Assistant Secretary's August 2011 Decision. The Tribe seeks only to assert its arguments in support of the August 2011 Decision and protect the Tribe's interests against the continuous attacks on the Tribe's legitimacy brought by a group of non-Tribal members.

Indian tribes are routinely permitted to intervene in cases where aspects of the tribes' sovereignty are implicated. For example, tribes have intervened in litigation where the outcome would affect the status or designation of reservation land. *See New Mexico, ex rel., Energy and Minerals Dept.*, 820 F.2d at 443 (recognizing Navajo Tribe as mandatory intervenor in state's challenge to federal coal regulation in Indian land); *see also, State of Florida v. United States Dep't of the Interior,* 768 F.2d 1248 (11th Cir. 1985), *cert. denied,* 475 U.S. 1011 (where Seminole Tribe of Indians intervened in state's challenge to DOI's designation of Indian trust land).

Tribal intervention has also been allowed where the disposition of cases could affect inherent aspects of tribal sovereignty through taxation or regulation of or by tribes. *See County of Thurston v. Andrus,* 586 F.2d 1212 (8th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979) (Omaha and Winnebago Tribes intervened in tax assessment on allotted reservation lands); *Conoco, Inc. v. Shoshone and Arapahoe Tribes,* 569 F. Supp. 801 (D.Wyo. 1983) (tribes permitted to

intervene in case filed by oil companies against Secretary of Interior and individual members of tribal business councils challenging tribes' imposition of oil and gas severance tax on Wind River Reservation).

There is no reason for a different result here, and the Tribe should be allowed to intervene under either Rule 24(b)(2) or 24(a)(2).

IV. CONCLUSION

For the foregoing reasons, the California Valley Miwok Tribe respectfully moves 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 existing representation is not adequate. In the alternative, the Tribe respectfully requests 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: December 13, 2011

Respectfully submitted,

By: __*/s/ Robert A. Rosette*_____

Robert A. Rosette
(D.C. Bar No. 457756)
ROSETTE, LLP
565 W. Chandler Boulevard, Suite 212
Chandler, Arizona 85225
Tel: (480) 889-8990
Fax: (480) 889-8997
rosette@rosettelaw.com

Attorney for Proposed Intervenors,
The California Valley Miwok Tribe