

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

THE CALIFORNIA VALLEY MIWOK
TRIBE, *et al.*,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as
Secretary of the United States Department of
the Interior, *et al.*,

Defendants.

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

Hon. Richard W. Roberts

**PLAINTIFFS' OPPOSITION TO THE BURLEY
FACTION'S AMENDED MOTION TO INTERVENE**

The "Amended Motion for Leave to Intervene as Defendant" ("Amended Intervention Motion") should be denied because the Burley Faction's interest in upholding the August 31, 2011 decision ("August 2011 Decision")¹ of the defendant U.S. Department of Interior (the "Department") is already adequately represented by the Department and allowing intervention will disrupt the orderly conduct of the litigation.

The proposed intervenor, which claims to be the California Valley Miwok Tribe ("Tribe"), consists only of Silvia Burley, her two daughters and her granddaughter (the "Burley Faction"), has been engaged in a dispute over organization of the Tribe since approximately 1999. Plaintiffs represent 242 adult members, and their children, all of whom are lineal descendants of historical Tribal members identified in a 1915 census conducted by the Department of the Interior. Plaintiffs regularly participate in Tribal meetings and cultural functions. The Burley Faction had no association with the Tribe before 1998 and it does not recognize any rights of the bona fide descendants of the historical members.

¹CVMT-2011-002049 to 002057.

The August 2011 decision that Plaintiffs challenge in this litigation wrongfully recognizes the Burley Faction as the Tribe's government based on an "organization" process in which only two people participated. Based on that defective process, the August 2011 Decision allows the Burley Faction to unilaterally organize, define, control and dominate the Tribe at its sole discretion and to exclude Plaintiffs from participating in the Tribe. Plaintiffs' First Amended Complaint alleges that the August 2011 Decision violates federal law and that the Department may not recognize a tribal government formed without the participation or consent of a majority of the tribe's members. It also alleges, *inter alia*, that it was unlawful for the Department to rely on a purported tribal resolution that is invalid on its face because, as Defendants conceded, it was not signed by a majority of tribal members even under Defendants' position as to who comprised the membership at that time.

Through its Amended Intervention Motion and accompanying motion to dismiss, the Burley Faction mischaracterizes this case as an internal dispute within an *already organized* tribe. That is not correct. The case is a challenge to Department of the Interior's erroneous decision to recognize as the Tribal government a family whose first association with the Tribe was in 1998 and to ignore the rights of the descendants of the historical members of the Tribe to participate in the Tribe's organization. Plaintiffs position is set out in its First Amended Complaint.

ARGUMENT

The Burley Faction seeks to intervene for the sole purpose of filing a motion to dismiss the First Amended Complaint. "Statement of Points and Authorities in Support of Proposed Intervenor-Defendant's Amended Motion for Leave to Intervene as Defendant" ("Burley Br."), at 1. They do not seek to intervene for any other purpose or to participate in the litigation. *Id.* The Burley Faction has tendered to the Court a "Statement of Points and Authorities in Support of Intervenor Defendant's Motion to Dismiss First Amended Complaint for Declaratory and

Injunctive Relief," which is 28 pages in length. While we do not address the substance of the Motion here, we believe it is without merit.

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

The Burley Faction has the burden of showing intervention is proper. It must meet four factors: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit. In opposing the motion, Plaintiffs primarily focus on the fourth factor: 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 August 2011 Decision that is at issue in this case.

The Burley Faction asserts that the burden for showing that the government fails to adequately represent the would-be intervenor's interests is "minimal." Burley Br. at 22. However, that does not mean that such a finding should be assumed in every case. Indeed, courts have ruled 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 that the interests are not fully aligned because the federal Defendants did not file a motion to dismiss, and the Burley Faction wants to pursue such a motion. Burley Br. at 24. However, the fact that the government wants to pursue a different procedural mechanism for seeking judicial affirmance of the agency decision does not mean that the government is not adequately representing the prospective intervenor's interests. Indeed, the government accepted the Burley factions arguments as the basis for its decision. The fact remains that both the government Defendants and the Burley Faction want the exact same thing: for the Court to uphold the August 2011 Decision. Nor is this a case where the proposed intervenor has special knowledge of the facts or an special or separate interest to be protected that might require intervention be granted. It has no such special knowledge or circumstances.

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.

II. IF INTERVENTION IS GRANTED THE AMENDED MOTION TO INTERVENE SHOULD NOT BE ALLOWED TO DELAY RESOLUTION OF THIS CASE ON CROSS MOTIONS FOR SUMMARY JUDGMENT.

As discussed above, Plaintiffs ask that the Court deny the request for intervention. However, should the Court grant intervention, the proposed Intevenors should not be allowed to seize control of the litigation. Plaintiffs and the Department have agreed to file cross motions for summary judgment based on the administrative record. On December 28, 2011, they jointly submitted to the Court a proposed schedule for the briefing on those motions. (Doc. No. 38)

Plaintiffs are justly concerned that granting the Burley Faction's Amended Intervention Motion and letting it file its tendered motion to dismiss would improperly delay the orderly briefing and resolution of the cross motions for summary judgment if this motion is heard before and separate from the motions for summary judgment. If proposed intervenors are allowed to participate, the filing of their motion to dismiss should be coordinated with the schedule Plaintiffs and Defendants have proposed.

**III. PERMISSIVE INTERVENTION SHOULD NOT BE GRANTED
BECAUSE THE BURLEY FACTION WILL USE INTERVENTION
TO NEEDLESSLY PROLONG OR COMPLICATE THIS LITIGATION.**

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 24-26. A key determining factor in whether to grant permissive intervention is "whether intervention will prolong or unduly delay the litigation" Rule 24(b)(1)(B). Counsel for the Burley Faction has already exhibited a propensity to try to improperly prolong and delay this case. It did 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. This effort 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, were 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.

In addition, for the reasons set forth in Section I above, if the Burley Faction is permitted to intervene and files its motion to dismiss, that will only serve to needlessly delay the consideration of the cross motions for summary judgment that Plaintiffs and Defendants intend

to file unless the court grants our request to coordinate the filing of the Motion to Dismiss with the proposed schedule for motions for summary judgment. .

In addition, it is clear that the Burley Faction would delay these proceedings by its prolix filings. The Burley Brief in support of its amended motion to intervene is *26 pages*, and contains large sections of irrelevant factual allegations.

Accordingly, permissive intervention should be denied.

CONCLUSION

For the reasons set forth above, Plaintiffs request that the Burley Faction's amended motion to intervene be denied. Alternatively, if the Court allows intervention, the Court should require that the filing of the Motion to Dismiss be coordinated with the planned Motions for Summary Judgment and not delay or interfere with their consideration.

Dated: December 29, 2011

Respectfully submitted,

/s/ M. Roy Goldberg

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CERTIFICATE OF SERVICE

I certify that on December 29, 2011, I caused the foregoing opposition brief to be filed with the Court pursuant to the electronic filing rules. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg

Roy Goldberg