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**

NOTICE OF ERRATA REGARDING PROPOSED INTERVENOR- DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO ITS AMENDED MOTION TO INTERVENE AS DEFENDANT

Proposed Intervenor, the California Valley Miwok Tribe ("Tribe"), hereby submits a Notice of Errata for its Reply to Plaintiffs' Opposition to the Amended Motion to Intervene as Defendant, filed on January 9, 2012 ("Reply," Dkt. No. 42). Review of the Reply revealed that a typographical error occurred on the thirteenth (13th) line of page three (3). The corrected sentence should read as follows:

> Because Plaintiffs' insubstantial Opposition does nothing to weaken the compelling grounds for intervention articulated in the Tribe's Statement of Points and Authorities in Support of its Amended Motion, the Tribe respectfully requests that the Court grant its intervention as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2), or, in the alternative, permissively, pursuant to Fed. R. Civ. P. 24(b)(2).

The Tribe submits as Exhibit "A" the corrected Reply to Plaintiffs' Opposition to Amended Motion to Intervene as Defendant, correcting the typographical error by replacing the word "but" with the word "to."

Respectfully submitted this 12th day of January, 2012.

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CERTIFICATE OF SERVICE

I certify that on January 12, 2012, I caused a true and correct copy of the foregoing Notice of Errata Regarding Proposed Intervenor-Defendant's Reply To Plaintiffs' Opposition To Amended Motion To Intervene As Defendant to be served on the following counsel via electronic filing:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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PROPOSED INTERVENOR-DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO AMENDED MOTION TO INTERVENE AS DEFENDANT

Proposed Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully submits its reply to Plaintiffs' opposition to the Tribe's Amended Motion for Leave to Intervene as Defendant ("Amended Motion"), filed on December 29, 2011 ("Opposition," Dkt. No. 40). Just as Plaintiffs fail in their Amended Complaint to demonstrate their standing to bring the instant action and fail to state a claim for relief that can be granted by this Court, they similarly fail to demonstrate in their Opposition why the most obvious necessary and indispensable party to this action, the Tribe, should not be permitted to join as a party in this lawsuit.

Rather than adhering to the well-established factual record in this case, which served as the basis for the Department of Interior's August 31, 2011 decision upholding the authority of the Tribe and its governing body ("August 2011 Decision"), Plaintiffs once again resort to factual misrepresentations in their Opposition, as they did in their Amended Complaint, in an

effort to mischaracterize the Tribe as a faction who has no legitimate interests in intervening in this case. Nothing could be further from the truth. They are the Plaintiffs, composed of a group of individuals that have never once been recognized by the Tribe or the United States as having any membership rights or interests in this federally-recognized Tribe ("Non-Members"), who have no legitimate rights to assert interests in or to fraudulently purport to be the Tribe. As Federal Defendants have acknowledged in their Answer, based upon almost a decade of history with the United States, the federally-recognized Indian tribe in this case is not Plaintiffs' fictitious Tribal Council and its membership is not comprised of 242 members, as Plaintiffs unabashedly allege. (*See* United States' Answer to Plaintiffs' First Amended Complaint, ("Amended Complaint"), Dkt. No. 34, ¶1). The Tribe and its five (5) federally-recognized members comprise the only governing body that the United States has ever recognized in almost a decade of dealings with the Tribe and with which it has maintained government-to-government relations through P.L. 638 contracts and otherwise. There is nothing that Plaintiffs' assert in their Opposition that demonstrates otherwise. Plaintiffs' feeble attempt to discredit the Tribe's legitimacy is an allegation that the Tribe "does not recognize any rights of the bona fide descendants of the historical members." (*See* Plaintiffs' Opposition to the Burley Faction's Amended Motion to Intervene ("Opposition"), Dkt. No. 40, p.1). Plaintiffs' contention is not only inaccurate, as they have never once even submitted enrollment applications to the Tribe for consideration, but it also demonstrates why the Tribe must be permitted to intervene as a party in this action.

Plaintiffs seek relief from this Court – enrollment of Non-Members into a federally-recognized Tribe – that this Court cannot provide and their Amended Complaint alleges claims over which this Court lacks subject matter jurisdiction. Because Plaintiffs' Amended

Complaint is procedurally defective, the Tribe seeks to intervene for the purpose of disposing of the instant action, at the outset, in the form of a motion to dismiss. Federal Defendants have not and will not make the Tribe's arguments. Only the Tribe has the unique knowledge of the Tribe's history and circumstances to effectively correct Plaintiffs' factual misrepresentations of the record. Further, in light of the continuing hardships imposed on the Tribe as a result of Plaintiffs' efforts to delay the implementation of the August 2011 Decision and the resumption of the Tribe's government-to-government relationship with the United States, only the Tribe has the greatest interest in the expeditious resolution of this case. Despite Plaintiffs' contentions, the Tribe's efforts to intervene in this action would not, in any way, delay resolution of this case or prejudice the existing parties. On the contrary, the Tribe's intervention would allow this Court to refrain from presiding over a procedurally defective Amended Complaint and rendering a ruling on the merits in an action over which it lacks jurisdiction. Because Plaintiffs' insubstantial Opposition does nothing to weaken the compelling grounds for intervention articulated in the Tribe's Statement of Points and Authorities in Support of its Amended Motion, the Tribe respectfully requests that the Court grant its intervention as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2), or, in the alternative, permissively, pursuant to Fed. R. Civ. P. 24(b)(2).

I. ARGUMENT

Just as Plaintiffs' have failed both in the previous administrative proceedings as well as in the instant action to demonstrate why they, as a group of non-Tribal members, are able to assert interests on behalf of the Tribe, they have similarly failed to set forth even a creative argument in their Opposition as to why the entity to which the August 2011 Decision directly and explicitly pertains, should not be permitted to protect its interests by intervening in this case. Plaintiffs

have not and cannot demonstrate that the Tribe is unable to meet this district's requirements for intervention as a matter of right, pursuant to Fed. R. Civ. P. 24(a). Nor does their Opposition set forth any plausible reasons as to why the Tribe's permissive intervention is not authorized under Fed. R. Civ. P. 24(b)(2). Thus, for the reasons set forth herein as well as in the Tribe's Statement of Points of Authorities in Support of its Motion, the Tribe respectfully requests that this Court grant its request to intervene as a defendant in this case.

A. PLAINTIFFS FAIL TO DEMONSTRATE THAT THE TRIBE DOES NOT MEET ANY OF THE FOUR REQUISITE STANDARDS FOR MANDATORY INTERVENTION.

In its Amended Motion and accompanying Statement of Points and Authorities, the Tribe sets forth, in detail, substantive reasons as to why its intervention under Fed. R. Civ. P. 24(a) is proper, demonstrating that it meets this district's four-part test for intervention as a matter of right. Specifically, the Tribe has demonstrated that it is entitled to intervene as a matter of right in this action because: (1) it's application for intervention was timely; (2) it has a cognizable interest in the pending action; (3) disposition of this action could impair the Tribe's ability to protect its interests; and (4) the existing parties cannot adequately protect the Tribe's interests. Fed. R. Civ. P. 24(a); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). In their Opposition, Plaintiffs concede the Tribe's demonstration of all but one of the required factors for intervention under Fed. R. Civ. P. 24(a)(2) - the minimal showing of inadequate representation by existing parties.

In their Opposition, Plaintiffs incorrectly cite to the Ninth Circuit's standard of "compelling showing" required for a proposed intervenor in its demonstration of inadequate representation under Fed. R. Civ. P. 24(a)(2). Such is not the standard followed by this district. *See Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 739-40 (D.C. Cir. 1979). Indeed, in this

district, a movant's "showing that existing representation is inadequate is 'not onerous;'" rather, "'an applicant need only show that representation of his interest may be inadequate, not that representation will in fact be inadequate.'" *Hardin v. Jackson,* 600 F.Supp. 2d 13, 16 (D.D.C. 2009) (citing *Dimond v. District of Columbia,* 792 F.2d 179, 192 (D.C. Cir. 1986).

The Tribe easily meets this "de minimus" showing. *See Wildearth Guardians v. Salazar*, 272 F.R.D. 4 (D.D.C. 2010). Plaintiffs' judicial attack on the August 2011 Decision is a direct attack on the Tribe's authority, as a sovereign nation, to determine its own membership. Plaintiffs' unwarranted challenge to the August 2011 Decision has halted government-to-government relations between the Tribe and the United States, which resumed subsequent to the issuance of the decision issued on December 22, 2010. (*See* Administrative Record, Dkt No. 33, ("Administrative Record"), document at Bates No. CVMT-2011-001890-001892 (January 12, 2011 Letter from Troy Burdick to the Tribe)). The Tribe has specific and immediate interests in defending the August 2011 Decision, including resumption of outstanding federal contract monies owed to the Tribe, which is necessary for the continuance of the Tribe's governmental operations. (Administrative Record, document at Bates No. CVMT-2011-001941-001996 (March 16, 2011 Letter from Victoria May to the Tribe enclosing approved 638 contract)). The Federal Defendants have no such unique and particularized interests in defending the August 2011 Decision, as demonstrated by their chosen litigation strategies. Such interests, coupled with the Federal Defendants' divergent position that this Court proceed with the merits of procedurally defective complaint, far exceed the minimal showing necessary under Fed. R. Civ. P. 24(a)(2).

Moreover, the burden of proof in this district rests on those opposing intervention to demonstrate that the representation for the applicant will be adequate. *See United States v. Am.*

Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980); *Alexandar v. F.B.I*, 186 F.R.D. 21, 31 (D.D.C. 1998) (citations omitted); and *Akiachak Native Cmty. V. U.S. Dept. of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) (citations omitted). Plaintiffs have made no such demonstration in their Opposition and, consequently, have not met their burden. The Tribe meets each of the required elements for intervention as of right under Fed. R. Civ. P. 24(a)(2); therefore, the Tribe respectfully requests that this Court grant its Amended Motion.

Plaintiffs also observe that "courts have ruled that the government will adequately protect the interests of the party seeking to intervene." (Opposition, p. 3). This broad observation is not relevant to evaluating the Tribe's Amended Motion, especially in light of the particular-circumstance and specific-purpose analyses that are required in this matter by precedent in this district. *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 913 (D.C. Cir. 1977); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293-94 (D.C. Cir. 1980). Rather than focus on the Tribe's particular circumstances in this litigation and the Tribe's specific purpose for seeking intervention, Plaintiff's cases examine denials of motions to intervene based on circumstances completely irrelevant to the Tribe's circumstances or that involve an irrelevant burden of proof.

In *Maine v. Director, United States Fish & Wildlife Service*, the court denied a motion to intervene because the proposed interveners could make their arguments without intervening by virtue of their being granted "amicus-plus" status. 262 F.3d 13 (C.A.1 2001). The Tribe, however, has not sought amicus status because it cannot achieve its objective of filing its Amended Motion to Dismiss as an amicus. In Plaintiff's other cited case, *Gonzalez v. Arizona*, the court denied a motion to intervene because the proposed interveners failed to meet their burden of making a "compelling" showing. 485 F.3d 1041, 1052 (9th Cir. 2007). As previously discussed, this district has not adopted the "compelling" standard, and a lack of detail about the

showing that the *Gonzalez* interveners did make makes comparison impossible. As a result, nothing can be concluded about the Tribe's circumstances or purposes from these cases.

Other precedent in this district also supports the Tribe's intervention as a matter of right, even though the Federal Defendants are purportedly currently defending their interests. This district recognizes that a proposed intervener's narrower interest is justification for intervention. *See Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 242 (D.D.C. 1978) *aff'd*, 78-1471, 1978 WL 23442 (D.C. Cir. 1978). This district also recognizes that even if the Tribe's interests "coincide" with the Federal Defendants' interests, intervention is proper when the intervening party will take an aggressive stance. *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). Unlike a situation in which the proposed intervener's interests are aligned with the public's interest, the Tribe's interest in protecting its recognition is narrower than the Federal Defendants' interest in proving that the Assistant-Secretary followed the APA in issuing a final agency action. Although both interests "coincide" because both the Tribe and the Federal Defendants want the Court to uphold the August 2011 Decision, the United States will only pursue that objective by methods that do not protect the Tribe's narrower and more personal interests. Strong grounds exist for dismissal of Plaintiffs' Amended Complaint on Rule 12(b)(1) and Rule 12(b)(6) grounds, but the United States failed to seek such a dismissal, demonstrating - overwhelmingly - that the United States has not adequately represented the Tribe's interests in this litigation. The Tribe's Amended Motion, therefore, must be granted.

B. PLAINTIFFS FAIL TO ALLEGE ANY PLAUSIBLE REASON AS TO WHY PERMISSIVE INTERVENTION SHOULD NOT BE GRANTED IN THE EVENT THAT THE TRIBE IS NOT PERMITTED TO INTERVENE AS A MATTER OF RIGHT.

Similar to Plaintiffs' inability to demonstrate why intervention should not be permitted under Fed. R. Civ. P. 24(a)(2), they also fail to demonstrate a single plausible reason as to why

permissive intervention is not warranted pursuant to Fed. R. Civ. P. 24(b). Permissive intervention is authorized "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). Such intervention requires consideration of undue delay or prejudice to the original parties' rights. Fed. R. Civ. P. 24(b)(3).

As set forth in the Tribe's Statement of Points and Authorities in support of its Amended Motion, the Amended Motion is timely and the Tribe's interest in affirming the validity of the August 2011 Decision has the same common question of law or fact as those involved in the instant action. Plaintiffs' personal attacks against the Tribe's counsel are not only improperly presented in their Opposition, but it is not a legitimate basis upon which to deny permissive intervention. Actions taken by the Tribe's counsel in early 2011 to inform the Court of improper filings in the Tribe's name do not constitute improper prolonging or delay and will have no effect on the parties' rights or the expeditious resolution of this litigation.

Further, to the extent that Plaintiffs are concerned that the Tribe will "seize control of the litigation" by being permitted to intervene, such fears are unwarranted. (Opposition, p.4). The joint motion filed by the existing parties for a briefing schedule on cross-motions for summary judgment (Dkt. No. 38) was, as this Court is well aware, filed *subsequent* to the Tribe's Amended Motion and its Amended Motion to Expedite Consideration. The Court will rule on the pending motions in a procedurally proper manner. The Tribe is the party with the greatest interest in the expeditious resolution of this case as its government-to-government relationship with the United States has been halted as a result of the Plaintiffs' Amended Complaint. Plaintiffs will remain non-members of this Tribe regardless of any modification made to the joint briefing schedule. Therefore, no prejudice will result to Plaintiffs from this Court's ruling on the

Tribe's Amended Motion and proposed motion to dismiss prior to the consideration of the parties' cross-motions for summary judgment.

II. CONCLUSION

For the reasons fully set forth in the Tribe's Statement of Points of Authorities in Support of its Amended Motion for Leave to Intervene as a Defendant, the Tribe respectfully requests that this Court permit its intervention in the instant action pursuant to Fed. R. Civ. P. 24(a) because it meets this district's requirements for intervention as of right. In the alternative, the Tribe respectfully requests that this Court grant it permissive intervention pursuant to Fed. R. Civ. P 24(b) because it has timely moved to intervene and the Tribe has a clear common interest in law or fact with the instant action.

Respectfully submitted this 9th day of January, 2012.

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CERTIFICATE OF SERVICE

I certify that on January 13, 2012, I caused a true and correct copy of the foregoing Proposed Intervenor-Defendant's Reply To Plaintiffs' Opposition to Motion to Intervene to be served on the following counsel via electronic filing:

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