

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CALIFORNIA VALLEY MIWOK TRIBE, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 11-160 (RWR)
	)	
KEN SALAZAR, <u>et al.</u> ,	)	
	)	
Defendants.	)	

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MEMORANDUM OPINION AND ORDER

This matter is a dispute over the U.S. Department of the Interior's determination of the legitimate government and membership of the California Valley Miwok Tribe ("Tribe"), a federally recognized Indian tribe. Defendants are Secretary of the Interior Ken Salazar, Assistant Secretary for Indian Affairs Larry Echo Hawk, and Director of the Bureau of Indian Affairs Michael Black. Plaintiffs Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson, and Antoine Azevedo bring suit individually and on behalf of the Tribe and its Tribal Council, arguing that the defendants' decision to recognize a General Council led by Sylvia Burley as the legitimate government of the Tribe, and to discontinue efforts to adjudicate the status of other putative tribal members, constituted arbitrary and capricious agency action, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and also violated due process and the Indian Civil Rights Act ("ICRA"), 25 U.S.C.

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§ 1301, *et seq.* Another group representing the Tribe, as organized in the form of the General Council, moves to intervene as a defendant in this action for the limited purpose of filing a motion to dismiss, arguing that intervention is necessary to protect its fundamental interests in defending its sovereignty and defining its citizenship.<sup>1</sup> Because the proposed intervenor satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), the motion to intervene will be granted.<sup>2</sup>

#### BACKGROUND

The leadership and membership of the California Valley Miwok Tribe have been in dispute for over a decade. The Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, included the California Valley Miwok Tribe as a federally recognized tribe. In 1998, the Department of the Interior's Bureau of Indian Affairs ("Bureau") initiated efforts to facilitate reorganizing the Tribe under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. A tribe whose government is organized according to the IRA's procedural and substantive requirements qualifies for certain federal benefits

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<sup>1</sup> Both the plaintiffs and the proposed intervenor use the name "California Valley Miwok Tribe." To avoid confusion, the terms "plaintiffs" and "proposed intervenor" will be used when discussing the respective parties' positions here.

<sup>2</sup> In light of the decision to grant the motion under Rule 24(a)(2), the parties' arguments regarding permissive intervention will not be addressed.

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and may maintain government-to-government relations with the United States and with state and local governments. The Bureau identified plaintiff Yakima Dixie, then serving as tribal chairperson, Sylvia Burley, the present leader of the proposed intervenor, along with several others, as members of the Tribe who were able to participate in the reorganization (First Am. Compl., Ex. A., August 31, 2011 letter from Assistant Secretary of Indian Affairs ("August 31 decision") at 4). See also California Valley Miwok Tribe v. United States, 424 F. Supp. 2d 197, 198 (D.D.C. 2006) ("CVMT I") (reviewing Tribe's reorganization process). The Bureau recommended that the Tribe establish a general council form of government for the organization process. (August 31 decision at 4.) Following this recommendation, the Tribe established the General Council by resolution in 1998 and began to develop a draft constitution. (Id.) Plaintiffs dispute the validity of the resolution, alleging that it did not receive the approval of the required number of members. (First Am. Compl. ¶¶ 43-47.)

Soon afterwards, leadership disputes between Dixie and Burley developed within the Tribe. (August 31 decision at 4; First Am. Compl. ¶¶ 48-50.) In 2004, the Bureau declined to approve a constitution submitted by Burley because she had not involved the "whole tribal community" in the organizational process. (August 31 decision at 4; First Am. Compl. ¶¶ 51-53.) It also issued a communication stating that it did not view the

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Tribe as "organized" under the IRA and that it did not recognize anyone as chairperson, though it recognized Burley as a "person of authority" within the Tribe. (See August 31 decision at 4; First Am. Compl. ¶¶ 54-56.) See also CVMT I, 424 F. Supp. 2d at 200 (D.D.C. 2006). In 2005, Burley and her supporters brought the CVMT I suit in the name of the Tribe challenging the Secretary of the Interior's refusal to approve the constitution. (See August 31 decision at 4; First Am. Compl. ¶ 58.) The D.C. Circuit upheld the district court's finding that the Secretary had the authority to decline to approve the constitution on the grounds that it did not enjoy support from the majority of the tribe's membership. California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1263 (D.C. Cir. 2008). During the period of disputed leadership, Dixie and other members of a tribal council endeavored to identify and organize potential members of the tribe. (First Am. Compl. ¶¶ 65-70.) The Bureau assisted by publishing a notice seeking genealogies and other information from potential Tribal members, among other efforts to identify individuals entitled to participate in the reorganization process. (First Am. Compl. ¶¶ 71-74.) Burley and her supporters did not participate in these activities but challenged the reorganization process through administrative appeals within the Bureau. (First Am. Compl. ¶¶ 75-77.)

On December 22, 2010, the Assistant Secretary for Indian Affairs issued a decision, addressing Burley's appeals, in which

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it concluded that the Tribe was organized as the General Council under the resolution adopted in 1998 and that the Bureau would cease efforts to facilitate reorganization. (Compl., Ex. C, December 22, 2010 letter from Assistant Secretary of Indian Affairs.) The plaintiffs then initiated this action challenging the legality of the decision. In April of 2011, the Assistant Secretary granted reconsideration and sought briefing from Dixie, Burley, and their respective supporters. (August 31 decision at 1.) The Assistant Secretary reinstated his prior decision on August 31, 2011, but stayed its effectiveness pending resolution of this litigation. (Id. at 8.) The Assistant Secretary represented that at present, the recognized citizenship of the Tribe consists of Dixie, Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace.<sup>3</sup>

The first amended complaint alleges that the Assistant Secretary presented no reasoned explanation for the Bureau's reversal of its previous positions that the Tribe was not yet organized in accordance with the IRA and in support of identifying additional tribal members to participate in reorganization. The plaintiffs therefore allege that the decision was arbitrary and capricious under the APA, as well as a violation of due process and ICRA. (First Am. Compl. ¶¶ 90-119.)

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<sup>3</sup> According to the plaintiffs, "Reznor, Paulk, and Wallace are Burley's daughters and granddaughter, respectively." (First Am. Compl. at 21 n.1.)

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The plaintiffs allege that they have been harmed by the Assistant Secretary's action because they have been denied the opportunity to participate in reorganization and governance of the Tribe; they are not and will not be eligible to receive federal health, education and other benefits provided to members of recognized Indian Tribes; and the decision could provide a basis for Burley to divert funds held in trust for the Tribe by the State of California and paid by the California Gambling Control Commission to tribes that do not operate casinos or gaming devices, and to divert federal grant funds. (First Am. Compl. ¶¶ 82-89.) The plaintiffs seek declaratory and injunctive relief including an order vacating the August 31 decision and directing the Assistant Secretary "to establish government-to-government relations only with a Tribal government that reflects the entire Tribal community, including individual Plaintiffs and all other Current Members." (First Am. Compl. at 30.) The plaintiffs also seek an order enjoining the defendants from awarding any federal funds to Burley. (Id.) The defendants have answered the amended complaint.

The proposed intervenor moved to intervene as a defendant in the action for the limited purpose of filing a motion to dismiss for lack of subject matter jurisdiction, for failure to join an indispensable party, and for failure to state a claim.<sup>4</sup>

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<sup>4</sup> The proposed intervenor's first motion to intervene was fully briefed before the Assistant Secretary granted

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The proposed intervenor argues that intervention as of right is warranted because the complaint "involves an attempt to forcibly expand the Tribe's citizen[ship] and alter its relationship with the United States, directly implicating the Tribe's sovereign responsibility to determine its own citizenship and resolve its own internal affairs." (Proposed Intervenor-Defendant's Am. Mot. for Leave to Intervene as Defendant ("Mot. to Intervene") at 3.) The plaintiffs oppose on the grounds that the proposed intervenor fails to demonstrate that its interests are not protected adequately by the federal defendants. (Pls.' Opp'n to Mot. to Intervene ("Pls.' Opp'n") at 3-4.) The federal defendants take no position on the motion to intervene. (Mot. to Intervene at 3 n.2.)

#### DISCUSSION

Intervention as a matter of right should be granted when the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless

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reconsideration of his December 22, 2010 decision. Following reinstatement of that decision, the proposed intervenor filed an amended motion to intervene. This opinion cites to the second round of briefing on intervention. In the amended motion to intervene, the proposed intervenor presents a lengthy recitation of the factual background, as well as arguments going to the merits of the motion to dismiss it intends to file. Because it is not necessary to the resolution of the motion to intervene, these arguments are not addressed.

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existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Evaluating Rule 24(a)(2), the D.C. Circuit has "identified four prerequisites to intervene as of right: '(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'" Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting SEC v. Prudential Sec. Inc., 136 F.3d 153, 156 (D.C. Cir. 1998)). Importantly, "a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." Fund For Animals, Inc. v. Norton, 322 F.3d 728, 731-32 (D.C. Cir. 2003); see Defenders of Wildlife v. Jackson, Civil Action No. 10-1915 (RWR), 2012 WL 896141, at \*4 (D.D.C. March 18, 2012) (discussing view that Article III standing and Rule 24(a)(2) interest requirements are additive, and view that any party who satisfies Rule 24(a) will also meet Article III's standing requirement).

#### I. STANDING

The plaintiffs do not contest the proposed intervenor's standing to intervene. However, this threshold issue will be addressed since a party's Article III standing is a prerequisite to subject matter jurisdiction. See Fund For Animals, Inc., 322 F.3d at 732. "To establish standing under Article III, a prospective intervenor -- like any party -- must show: (1)

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injury-in-fact, (2) causation, and (3) redressability." Id. at 732-33. The proposed intervenor easily meets these requirements. If the plaintiffs prevail in this action, the Assistant Secretary's August 31 decision will be vacated, the Bureau will be ordered to cease government-to-government relationships with the Tribe as organized in the form of the General Council, and the defendants will be enjoined from awarding any federal funds to Burley. These actions are concrete and particularized injuries to the proposed intervenor's financial resources and governmental integrity. The causation prong is satisfied because the threatened loss of sovereignty and funds is fairly traceable to the agency action that the plaintiffs seek to compel in the instant action. Finally, a decision in the proposed intervenor's favor would leave the August 31 decision undisturbed and thereby prevent the injuries from occurring, satisfying the redressability prong.

## II. RULE 24(a)(2) REQUIREMENTS

The proposed intervenor also meets each of the four requirements for intervention as a matter of right. First, the proposed intervenor's motion was timely, as it was initially filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer." Fund For Animals, Inc., 322 F.3d at 735. Second, the proposed intervenor has shown a legally protected interest in the matter since, in this Circuit, "satisfying constitutional standing requirements

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demonstrates the existence of a legally protected interest." Jones v. Prince George's County, 348 F.3d 1014, 1019 (D.C. Cir. 2003) (citing Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1076 (D.C. Cir. 1998)). Third, plaintiffs' action "threaten[s] to impair," Karsner, 532 F.3d at 885, the proposed intervenor's legally protected interest because resolution of the matter in the plaintiffs' favor would directly interfere with the governance of the Tribe as currently recognized and preclude access to federal funds. The plaintiffs appear to concede that the above three requirements are met as they presented no arguments on these points in their opposition.

The basis of the plaintiffs' opposition to intervention concerns the fourth requirement, the adequacy of existing parties' representation of the proposed intervenor's interests. The proposed intervenor argues that the federal defendants do not adequately represent its interests since the federal defendants may make different arguments from those of the proposed intervenor, the proposed intervenor's stake in the litigation differs from that of the defendants, the defendants may not choose to appeal an adverse judgment, and the proposed intervenor will provide necessary information to the proceedings that the defendants might neglect. (Stmt. of P. & A. in Supp. of Proposed Intervenor-Defendant's Mot. to Intervene ("Proposed Intervenor's Stmt.") at 22-23.) The plaintiffs counter that the federal defendants adequately represent the proposed-intervenor's

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interests because both seek the same "ultimate objective," that is, upholding the August 2011 Decision. (Pls.' Opp'n at 3.)

The D.C. Circuit has emphasized repeatedly that the standard to demonstrate inadequacy of representation is lenient. See Fund For Animals, Inc., 322 F.3d at 736 n.7 (concluding that Supreme Court precedent "makes clear that the standard for measuring inadequacy of representation is low"); Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (describing burden as "not onerous"); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980) (recognizing view that a movant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee") (internal quotations omitted). In addition, the Circuit has expressed skepticism that United States governmental entities, with their unique obligations to the serve general public, can be found to adequately represent the interests of potential intervenors. See Fund For Animals, Inc., 322 F.3d at 736 & n.9 (collecting cases).

That skepticism is warranted here. The federal defendants' interest in this action is to defend the Assistant Secretary's decision as lawful agency action. By contrast, the proposed intervenor possesses a distinct and weighty interest in protecting its governance structure and its entitlement and access to federal grant monies. Because the federal defendants do not share these concerns, their defense of this action may not

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adequately represent the proposed intervenor's interests. See Hardin v. Jackson, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("The D.C. Circuit has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit.") (quoting Dimond, 792 F.2d at 192).<sup>5</sup>

The purpose for which the proposed intervenor seeks to participate in the case reflects the proposed intervenor's distinct aim of asserting its sovereign interests. The federal defendants, and the plaintiffs, anticipate that the case may be resolved on cross-motions for summary judgment and the administrative record. (See Joint Mot. for Briefing Schedule.) The proposed intervenor, however, seeks intervention for the limited purpose of moving to dismiss on several grounds, including lack of jurisdiction to adjudicate internal tribal disputes and failure to state a claim, a tactic the federal

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<sup>5</sup> Plaintiffs propose a different standard employed in the Ninth Circuit according to which "[w]here 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, 951 (9th Cir. 2009) (internal quotations omitted). The D.C. Circuit has not endorsed this articulation of the intervention standard, and cases in the Circuit have been "inconsistent as to who bears the burden with respect to [the adequacy of representation] factor." Fund For Animals, Inc., 322 F.3d at 736 n.7. Although both defendants and the proposed intervenor oppose invalidating the August 31 decision, they do so for different reasons and their respective stakes in the matter differ greatly. The standard for finding inadequate representation here is satisfied regardless of who bears the burden.

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defendants have not pursued. See Proposed Intervenor-Defendant's Reply to Pls.' Opp'n ("Proposed Intervenor-Defendant's Reply") at 7 (asserting that defendants' representation is demonstrably not adequate because "[s]trong 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"). The plaintiffs argue that the choice of 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." (Pls.' Opp'n at 4.)

A difference in litigation strategies does not always demonstrate an insufficiently coterminous relationship between a potential intervenor and an existing party. Here, however, the divergence highlights that the proposed intervenor's conceptualization of the action, as an internal tribal dispute not amenable to resolution in a federal judicial forum, is not shared by the defendants. In an important regard, then, the proposed-intervenor does not seek "judicial affirmance" that the agency decision was not arbitrary and capricious or otherwise unlawful; it seeks to persuade "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." (Proposed Intervenor-Defendant's Reply at 3.) For the foregoing reasons, the defendants do not adequately represent the proposed intervenor's interest in protecting its current

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governmental structure and its ability to define its membership independently.

CONCLUSION AND ORDER

Because all four requirements of Rule 24(a)(2) are met, the proposed intervenor is entitled to intervention as of right. The plaintiffs ask that, if intervention is granted, the filing of the motion to dismiss be coordinated with the briefing and resolution of the parties' cross motions for summary judgment. (Pls.' Opp'n at 5.) Accordingly, it is hereby

ORDERED that the proposed intervenor-defendant's amended motion [35] for leave to intervene as defendant be, and hereby is, GRANTED. The Clerk's Office is directed to docket Exhibits 3 through 7 to the proposed intervenor-defendant's amended motion for leave to intervene as the intervenor-defendant's motion to dismiss the plaintiffs' first amended complaint. It is further

ORDERED that the proposed intervenor-defendant's motion [36] to expedite consideration of its motion for leave to intervene be, and hereby is, GRANTED. It is further

ORDERED that the parties' joint motion [41] to extend time for plaintiffs to request supplementation of the administrative record be, and hereby is, GRANTED nunc pro tunc. It is further

ORDERED that the parties' amended joint motion for briefing schedule [47] for cross motions for summary judgment be, and hereby is, GRANTED nunc pro tunc, and the parties' joint motion

