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**

INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT (RELATED TO DOCKET NOS. 58 AND 60)

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INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe") respectfully submits the following reply in support of its Amended Motion to Dismiss Plaintiffs' First Amended Complaint For Declaratory and Injunctive Relief ("Motion to Dismiss"), dated March 26, 2012 (Dkt. No. 58), and in response to the gratuitous "Response" filed by the United States ("United States" or "Federal Defendants") on April 20, 2012 (Dkt. No. 60) ("Opposition"). In a clear demonstration as to why the Tribe's intervention in the instant litigation was appropriately deemed necessary by this Court in the first instance, the United States is opposing the dismissal of a meritless judicial attack against its own final agency action, and, in doing so, is attempting to re-characterize the basis of this litigation, despite a well-established administrative record whereby Federal Defendants themselves assert the contrary. *California Valley Miwok Tribe v. Pacific Regional Director, BIA*, 51 IBIA 103, 122 (January 28, 2010); *See also* RAR Decl.[1], Ex. L (December 2011 Decision), p.1; Ex. O (April 8, 2011 final agency action); and Ex. P (August 2011 Decision).

In advocating on the Plaintiffs' behalf and urging that this Court treat the instant action and requests for intrusion into tribal governance and self-determination as a simple challenge to a final agency action under the APA, Federal Defendants not only ignore the plain language of the Amended Complaint, but they also disregard the procedural history and underlying determinations of the current litigation. Moreover, in stating that dismissal of the instant action would "inappropriately insulate an entire category of the federal government's decisions from judicial review," Federal Defendants neglect the fact that decades of well-established federal

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Tribe's Motion to Dismiss and Amended Motion to Intervene as a Defendant (Dkt. No. 35).

Indian policy and case precedent already "insulate" judicial intrusion into delicate issues of tribal membership and self-governance – which is the precise relief sought by Plaintiffs through the guise of an APA challenge.[2] Despite Federal Defendants' contentions, this Court has already found the Tribe to be a necessary party to this litigation under the parallel inquiry of Rule 24(a) and its determination that the Tribe can intervene as a party to the current action as of right. (Dkt. #52) The filing of the instant Opposition only strengthens the Tribe's position on this issue in that it clearly demonstrates what the Court has already recognized in this case – that the interests of the Tribe and the Federal Defendants are far from aligned and that Federal Defendants have not and cannot adequately represent the Tribes interests, despite contentions made in the Opposition to the contrary. Accordingly, because the Tribe meets the required elements of Rule 19(a) and (b), Plaintiffs Amended Complaint must be dismissed in its entirety.[3]

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[2] *See, e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) *Smith v. Babbit*, 875 F.Supp. 1353, 1362 (D. Minn. 1995), *aff'd* 100 F.3d 556 (8th Cir. 1996); *Montana v. U.S.*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)); *Prairie Band of Pottawatomie Tribe v. Udall*, 355 F.2d 364 (10th Cir. 1966); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10 Cir. 1974); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994) (per curiam); *Lewis v. Norton*, No. CIV. S-03-1476 slip op. at 7 (E.D. Cal. Nov. 4, 2003); *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F.Supp. 966, 967 (E.D. Mich. 1997) *aff'd*, 156 F.3d 1230 (6th Cir. 1998).

[3] In yet another perplexing tactic pursued by Federal Defendants (in addition to the filing of the Opposition itself), Federal Defendants state in their Opposition that the Tribe's basis for dismissal under Fed. R. Civ. P. 19 "is the only basis for dismissal meriting discussion." (Opposition at 5). Yet, Federal Defendants proceed (in a footnote, no less), to attempt to discredit several of the Tribe's grounds for dismissal, demonstrating just how effective an advocate Federal Defendants have proven to be for the Tribe in this litigation. With respect to this Court's lack of subject matter jurisdiction, Federal Defendants summarily (and without analysis), conclude that Plaintiffs satisfy both constitutional and prudential standing because based upon Plaintiffs' legal conclusions that they are the Tribe, Tribal Council and Tribal citizens, and assert that this Court accept those conclusions as true. This Court is under no obligation to do such thing. (*See* Tribe's Reply to Plaintiffs' Opposition (Related to Docket Nos. 58 and 59). Further, Federal Defendants state that Plaintiffs' interests "plainly fall within the zone of interests that the IRA was designed to protect," ignoring the fact that Plaintiffs do not

ARGUMENT

A. Dismissal of the Instant Action is Both Necessary and Appropriate Under Federal Rule of Civil Procedure 19.

1. The Tribe is a Necessary Party Based on Undeniable Tribal Interests, Inconsistent Obligations, and the Inadequacy of Any Relief That Can Be Accorded.

In their Opposition, Federal Defendants advance several unpersuasive arguments in an effort to convince this Court that the Tribe should not be considered a "necessary" party for purposes of Fed. R. Civ. P. 19(a), the most comical of which is that the Federal Defendants are

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cite in their Amended Complaint a specific statutory provision of the IRA to which their APA action is connected. (Opposition at 5, fn 3) (internal citations omitted). Nor could Plaintiffs possibly fall within the zone of interest that the IRA was designed to protect as non-tribal member individuals were never the intended beneficiaries of the IRA. Indeed, Plaintiffs' requested relief for intrusion into tribal governance and self-determination would directly interfere with the IRA's core purposes of promoting Indian sovereignty and self-government.

Federal Defendants also argue against the Tribe's purported reliance on the August 2011 Decision as a separate basis of dismissal, when, in fact, the Tribe made no such assertions in its Motion to Dismiss. The bases for Plaintiffs' lack of standing exists not with the August 2011 Decision (as this decision made no independent determinations, but merely recognized the established governing body of the Tribe based on a well-documented history with the United States), but rather, based on a decades of a well-established and documented Tribal history where Plaintiffs have not, ***at any time in the Tribe's history***, recognized as what they purport to be and from which their claims of injury stem – the Tribe, the Tribal Council or Tribal citizens. In its Motion to Dismiss, the Tribe cites to a plethora of evidence on the record, including BIA determinations made in 1998 and 2000 as well as the Tribe's continued P.L. 638 contracts with the United States, which are all demonstrative of Plaintiffs' lack of standing, independent of the findings of the August 2011 Decision.

Federal Defendants further argue the identical reason against the Tribe's grounds for dismissal for lack of jurisdiction over an internal tribal dispute and for failure to state a claim upon which relief can be granted – stating simply that the Amended Complaint is an APA challenge to a final agency action. In making such an argument, Federal Defendants disregard the fact that the nature of the very dispute at issue in this litigation has been repeatedly and appropriately recognized by the IBIA *and Federal Defendants themselves* as an internal tribal enrollment dispute. This is not at heart an APA case. It is not an effort by the Plaintiffs to get the Federal Defendants to do their job quickly, or consistently, or completely, or well. Plaintiffs' want Federal Defendants, with the assistance of this Court, to reach a particular decision that will magically enroll the non-member Plaintiffs into this federally-recognized Tribe. This Court is without jurisdiction to preside over such issues or to grant the relief requested by the Plaintiffs. Accordingly, Federal Defendants' concerns with respect to the remaining grounds for dismissal articulated in the Tribe's Motion are unsubstantiated and should have no bearing on this Court.

able to adequately represent the Tribe's interests without their presence in this litigation. With respect to the first element listed in Rule 19(a)(1), it is clear that complete relief cannot be accorded in this case in the Tribe's absence as demonstrated by the Tribe's paramount interests in this litigation and the kinds of harm that it would suffer if the Plaintiffs' requested relief were granted. As stated by this Court in its recent Memorandum Opinion and Order ("Memorandum and Opinion"):

> 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…[t]hese actions are concrete and particularized injuries to the proposed intervenor's financial resources and governmental integrity.

Memorandum Opinion at 9 (Dkt. 52). The unique and fundamental sovereign governmental interests at issue in this case and the potential impairment of such interests that the Tribe would experience in the event that a judgment were entered in its absence clearly demonstrates that the Tribe is a necessary party to this litigation and that it meets the requirement of Rule 19(a)(1). Thus, there can be no adequate remedy where the absent third party is the principal actor in the dispute and is not a party to the action.

The cases cited by Federal Defendants to support their assertion that the Tribe is not a necessary party are neither compelling nor applicable to the instant action. In *Makah v. Verity*, a tribe sought review under the APA of decisions by the Secretary regarding the allocation of ocean harvest quotas. 910 F.2d 555 (9th Cir. 1990). The court found that the other tribes were necessary parties to any "relocation of the 1987 harvest or challenge to the Secretary's inter-tribal allocation decisions," and correspondingly, did not review those final decisions. *Id.* at 559. The only claims the court heard in *Makah* were those addressing "procedures the Secretary made in following the regulations" and those involving relief that "would affect only the future

conduct of the administrative process." *Id*. at 559. Indeed, the court held that "[n]one of the Makah's other [nonprocedural] requests for relief would be appropriately considered in the absence of the other tribes." *Id.* at 559. This Court is not being asked to review any such similar Secretarial "procedures" in this case. Plaintiffs request that the Court review the substance of the August 2011 Decision, which directly and inexplicably affects the sovereign rights of the Tribe. This Court cannot take such actions in the Tribe's absence, pursuant to Fed.R.Civ.P. 19(a).

Sac & Fox Nation v. Norton, 240 F.3d 1250 (10th Cir. 2001) should also have no bearing on this case. This was a land use case involving economic interests related to gaming wherein other tribes brought suit against the Secretary of Interior to prevent taking of land into trust on behalf of Wyandotte Indian Tribe for gaming purposes. It was not a suit such as that before this Court involving fundamental self-determination rights, like tribal membership determinations, which go to the very core of sovereignty. The interests and relief at stake in such a land use/trust/gaming matter are fundamentally different than interests/relief at stake in a matter involving membership issues as here. Importantly, in this case, the court found that the Secretary's interests in defending his determination was "virtually identical" to the tribe. *Id.* at 1259, (*citing Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr*, 94 F.3d 1407, 1412 (10th Cir. 1996)). This is clearly not the case here. To the extent there could be any doubts about the diverging interests between the Tribe and Federal Defendants here, the Federal Defendants' Opposition certainly puts those to rest.

Significant for purposes of evaluating whether the Tribe meets the necessary requirements of Rule 19(a) is the fact that this Court has affirmatively recognized the Tribe as a necessary party in granting the Tribe's request for intervention, as of right, pursuant to Rule 24(a). "In assessing an absent party's necessity under Fed.R.Civ.P. 19(a), the question whether

that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed.R.Civ.P. 24(a)." *See Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

In its Memorandum Opinion, this Court appropriately found that the Tribe was a necessary party for purposes of intervention as a matter of right pursuant to Fed. R. Civ. P 24(a)(2) (. . . "resolution of the matter in the [P]laintiffs' favor would directly interfere with the governance of the Tribe as currently recognized and preclude access to federal funds.") (Memorandum Opinion at 10). As this Court has already ruled that the Tribe is entitled to intervene as a matter of right under Rule 24(a), it necessarily follows that the Tribe is a necessary party under the parallel inquiry of Rule 19(a)(2)(i). *See Dodson v. Daniel International Corp.*, 514 F.Supp. 109, 110 (E.D. Tenn. 1981). Neither the Plaintiffs nor the Federal Defendants have put forth any convincing arguments that would require this Court to reverse its previous findings.

In *Arviso v. Norton*, a case with facts and issues similar to the instant action, plaintiffs, a group of non-tribal members contesting their eligibility under the blood quantum requirements for enrollment into the Rincon San Luiseno Band of Mission Indians ("Rincon"), filed an APA action against the Assistant Secretary for a final agency action, similar to the one at hand, which rejected plaintiffs' contentions seeking enrollment into the tribe, stating that "in deference to the principles of tribal sovereignty" such matters must be decided by the tribe itself. Case No. 3:02-cv-00253-BTM-JAH, at *4 (S.D. Cal, Order dated September 30, 2003). The United States in this case filed an Answer, while Rincon filed a motion to intervene for purposes of filing a motion to dismiss. In an order granting Rincon's motion to dismiss pursuant to Rule 19, the court addressed the claim that the United States was capable of adequately representing the tribe's interests, stating: "This contention is belied by what has already happened in this case.

The [tribe] was forced to intervene because Defendants did not raise its arguments regarding failure to join a party." *Id.* at 11. Thus, in finding Rincon to be a necessary party under Rule 19(a), the court concluded that in the tribe's absence, "the disposition of this action will impair the [tribe's] ability to protect its interest in defining its own membership." *Id.*

Despite Federal Defendants' assertions, the inquiry under Rule 19(a)(2)(i) also weighs in favor of the Tribe in determining that they are a necessary party to this action, as it is evident, similar to the *Arviso* case, that the Federal Defendants have not and cannot adequately represent the Tribe's interests. The Tribe has a fundamental interest relating to the subject of the action which would undoubtedly be impaired if this action were disposed of in the Tribe's absence. Plaintiffs would have this Court undermine, if not change, the entire government under which the Tribe now operates and with which it has maintained government-to-government relations with the United States. In their Opposition, Federal Defendants repeatedly attempt to convenience this Court that they share the Tribe's unique interests in its self-governance and ability to define its own membership. Yet, such assertions are contradicted by the very statements made in Federal Defendants' Opposition and their baffling attempt to re-characterize the basis of this litigation, despite a clear administrative record establishing the contrary. As appropriately recognized by this Court:

> The federal defendants' interest in this action is to defend the Assistant Secretary's decision as a 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 adequately represent the proposed intervenor's interests.

(Memorandum Opinion at 12).

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Moreover, the case cited in Federal Defendants' Opposition to stand for the fact that adequate representation could still be demonstrated here despite the Federal Defendants' opposition to the Tribe's Motion to Dismiss, is distinguishable from the facts at hand. In *Sw. Ctr. For Biological Diversity v. Babbit*, 150 F.3d 1152, 1154 (9th Cir. 1998), an environmental organization brought an action against Secretary of Interior alleging that the federal government's plan to begin using a newly-completed reservoir violated the Endangered Species Act and the National Environmental Policy Act. The district court dismissed for failure to join a tribe, who had rights under another settlement agreement to store water in the reservoir. The court of appeals then held that the tribe was not a necessary party. Similar to other cases cited in Federal Defendants' Opposition, this case did not implicate fundamental issues of tribal self-governance and membership, pertaining instead to water storage rights. Further, in *Sw. Ctr. For Biological Diversity*, even though the government did not agree with the non-party tribe's motion to dismiss under Rule 19, the tribe could still be adequately represented by the federal government because both parties shared the fundamental interest in defeating plaintiff's claims and ensuring that the reservoir became available for use as soon as possible.

There are no such fundamental interests shared in this litigation. As demonstrated in their Opposition, Federal Defendants' inability to recognize the critical and sensitive issues of Tribal self-governance and self-determination directly implicated by the instant action demonstrates that Federal Defendants not only could not adequately represent the Tribe's fundamental interests, but *they do not even seem to understand the import of these interests*. (*See* (Opposition at 10, indifferently stating "recognition of tribal self-determination does not transform the decision into one exclusively regarding internal tribal matters.").

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Thus, because the Tribe has effectively demonstrated that it is a necessary party to this litigation and because the Federal Defendants have equally as effectively demonstrated their inadequate representation of the Tribe's interests, the Tribe meets the requirements under Fed. R. Civ. P. 19(a).[4]

2. The Tribe is an Indispensable Party Under Rule 19(b) and This Action Cannot Proceed "in Equity and Good Conscience" Without the Tribe.

The Tribe is not only a necessary party under Rule 19(a), it is also indispensable under the factors set forth in Rule 19(b). In their Opposition, Federal Defendants essentially ignore the Tribe's sovereign immunity status in balancing the factors under Rule 19(b). This District has held that determining a necessary party to be immune from suit results in "cabining the district court's discretion to consider factors under Rule 19(b)." *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1994); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765,

[4] In their Opposition, Federal Defendants go to great lengths to analogize the facts of *Alto et al. v. Salazar et al.*, Civ. No. 3:11-cv-2276 (S.D. Cal, Filed September 30, 2011) with the case at hand in an effort to demonstrate their adequate representation and unnecessary grounds for dismissal under Rule 19. Yet, the facts of *Alto* are critically distinguishable. First, in determining that complete relief could be afforded among the existing parties, the court in *Alto* found that a judgment in the tribe's absence would still have a binding effect on the tribe in that the tribe's constitution explicitly provided that the Secretary had final authority over all enrollment challenges. *Id.* at 23. Moreover, the court noted that all of plaintiffs' claims focused on the procedures the Secretary followed in upholding the tribe's enrollment challenge, which were subject to APA review. *Id.* Further, in holding that the federal government could adequately represent the tribe, the court rejected the contention that the case involved an intertribal dispute "because Plaintiffs [were] still members of the Tribe," and the dispute was not "between a tribe and a non-tribe groups or individuals." *Id.* at 25-26 (*citing Rosales v. United States*, 89 Fed. Cl. 565, 586 (Fed. Cl. 2009)). Not a single similar fact exists in the instant litigation, despite Federal Defendants' mischaracterizations. The Tribe would not be bound by a judgment from this Court as there is no Tribal law vesting the Secretary with decision-making authority over internal tribal issues such as enrollment. Moreover, Plaintiffs' claims in their Amended Complaint pertain not to procedures followed by the Secretary, but rather, the underlying basis and merit of his decision, which was merely an affirmation of numerous past final agency actions. Finally, this case is the very definition of an intertribal dispute as it is between a tribe and a non-tribe group or individuals. *Id.* Therefore, the reasons which compelled the court in *Alto* to reject Rule 19 grounds for dismissal could not similarly persuade the Court here.

777 (D.C. Cir. 1986). Even if this Court's discretion to consider the factors of Rule 19(b) was not limited by the existence of sovereign immunity, applying those factors would still dictate dismissal of this action.

The first factor of prejudice, "largely duplicates the consideration that made a party necessary under Rule 19(a)." *American Greyhound Racing Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002). Clearly the scope of relief that Plaintiffs seek in their Amended Complaint would severely prejudice the Tribe, undermining its long-established form of government and authority to determine delicate issues of membership and enrollment. As for the second factor, it is clear that there is no way to shape relief in this case to avoid impairing the Tribe's interests. Plaintiffs here seek to overturn decades of the Tribe's history and form of governance simply because it does not include the members that Plaintiffs so seek. Plaintiffs cannot obtain the relief they seek without infringing on the Tribe's sovereign right to determine its own membership. Plaintiffs seek to have this Court "[d]irect the [Assistant Secretary] and the BIA [to] establish government-to-government relations only with a Tribal government" that includes the non-member Plaintiffs. (Amended Complaint ¶ F, p. 30). These actions would completely undermine the Tribe's authority and self-governance, particularly if rendered in the Tribe's absence.

Finally, with respect to the fourth and final factor considered under Rule 19(b) conveniently left unmentioned in Federal Defendants' Opposition, is the fact that the Plaintiffs have an alternate adequate remedy if this action is dismissed for nonjoinder, and that is, within the Tribal government itself. The Tribe and the Tribe alone is the only appropriate forum in which such sensitive internal membership decisions should and must be made. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 72, 54. Plaintiffs bewilderingly and persistently refuse to pursue

the appropriate forum for their membership grievances, instead preferring to waste the judicial efficiency of the federal courts.

Moreover, even if there were no alternative forum, dismissal of this suit would still be appropriate. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1560-61 (9th Cir. 1994); *Lomayaktewa v. Hathaway*, 560 F.2d 1325, 1327 (7th Cir. 1997); *Confederated Tribe of Chehalis Indian Reservation v. Lujans*, 928 F.2d 1496, 1500 (9th Cir. 1991). A plaintiff's interest in litigating a claim is outweighed by a tribe's interests in maintaining its sovereign immunity, and "dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Quileute Indian Tribe*, 18 F.3d at 1461; *Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 777; *Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel* 883 F.2d 890, 894 (10th Cir. 1989); *Shermoen v. United States*, 982 F.2d at 1320.

The Tribe is thus clearly both a necessary and indispensable party to this suit and because the Court cannot shape meaningful relief for the Plaintiffs without the presence of the Tribe, and the Tribe is unavailable because it has not waived its sovereign immunity from suit, Plaintiffs' Amended Complaint must be dismissed.

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CONCLUSION

For the foregoing reasons, the Intervenor-Defendant respectfully requests that this Court dismiss Plaintiffs' Amended Complaint with prejudice.

Respectfully submitted this 27th day of April, 2012,

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CERTIFICATE OF SERVICE

I certify that on April 27, 2012, I caused a true and correct copy of the foregoing INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT (RELATED TO DOCKET NOS. 58 AND 60) to be served on the following counsel via electronic filing:

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