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' FIRST AMENDED COMPLAINT (RELATED TO DOCKET NOS. 58 AND 59)

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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), to address the erroneous contentions raised in Plaintiffs' Memorandum of Points and Authorities in Opposition to Intervenors' Motion to Dismiss ("Opposition"), dated, April 20, 2012 (Dkt. No. 59). In their Opposition, Plaintiffs once again attempt to pull the proverbial wool over this Court's eyes by mischaracterizing the facts at issue in this case and creating new facts and legal conclusions to serve their own benefit, all in an effort to convince this Court that it has jurisdiction over what is and always has been an internal tribal enrollment and membership dispute. *See California Valley Miwok Tribe v. Pacific Regional Director, BIA*, 51 IBIA 103, 122; *See also* RAR Decl.[1] Ex. L, p.1 (December 2010 Decision); Ex. (April 8, 2011 Decision); Ex. P, p. 5 (August 2011 Decision).

This Court cannot and appropriately should not be persuaded by Plaintiffs' haphazard efforts to bring a procedurally defective Amended Complaint within the purview of this Court. Indeed, Plaintiffs have failed to present any evidence or authority whatsoever that could compel this Court to: (1) find that the ***legal conclusions*** and conjured injuries cited in Plaintiffs' Amended Complaint and repeated in their Opposition suffice for purposes of standing to bring the instant action; (2) determine that this Court has subject matter jurisdiction over an internal tribal enrollment dispute not-so-cleverly guised in the form of an APA action; (3) determine that the Tribe is not a necessary party to this litigation, when all of the evidence on record, including

[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).

this Court's March 26, 2012 Memorandum Opinion and Order (Dkt. 52), demonstrate otherwise; and (4) conclude that Plaintiffs' Amended Complaint asserts any plausible claim for relief that can be awarded by this Court. Accordingly, and for the reasons stated below, the Tribe respectfully requests that this Court dismiss Plaintiffs' Amended Complaint in its entirety.

ARGUMENT

A. As the Court Lacks Subject Matter Jurisdiction, This Case Must Be Dismissed Under Fed. R. Civ. P. 12(b)(1).

Among the many grounds that warrant dismissal of the instant action is under Fed. R. Civ. P. 12(b)(1) for this Court's lack of subject matter jurisdiction. It is the Plaintiffs' burden to prove that this Court has jurisdiction to preside over its Amended Complaint. *See Kokkonen v. Guardian Life Ins. Co*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction…It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (internal citations omitted). *See also, Grand Lodge of the Fraternal Order of Police v. Ashcroft,* 185 F.Supp 2d 9, 13 (D.D.C. 2001). Here, Plaintiffs have failed to meet their burden of overcoming the three distinct and compelling reasons, discussed below, demonstrating this Court's lack of jurisdiction over their claims. Accordingly, Plaintiffs' Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

1. Plaintiffs Failed to Prove That This Court Has Subject Matter Jurisdiction Over Their Claims.

a. Plaintiffs Do Not Have Constitutional Standing to Bring the Instant Action.

i. Plaintiffs Do Not Have Constitutional Standing to Bring the Instant Action.

In order to demonstrate "constitutional standing," a plaintiff must allege facts

demonstrating that (1) they have suffered an 'injury-in-fact" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical;" (2) there is a "causal connection between the injury and the conduct complained of;" and (3) it is "likely" – not merely "speculative" – that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Rather than attempt to demonstrate how exactly they meet the requirements of constitutional standing, Plaintiffs gloss over the three above required elements, instead stating broadly and nonsensically that they were injured by the August 2011 Decision final agency action at issue simply because Plaintiffs say they were. Such a lackadaisical approach to "concrete and particularized" injuries required of Plaintiffs for this Court to entertain their claims, turn the constitutional requirements of Article III standing on their head.

In their Opposition, Plaintiffs repeatedly cite to their Amended Complaint, urging that this Court accept as true their "material allegations" that they are the Tribe, the Tribal Council, and Tribal members, and consequently, have been "injured" as a result of the August 2011 Decision. While a court in its review of a motion to dismiss for lack of subject matter jurisdiction may be required to accept as true all "factual allegations" contained in the complaint, it is under no similar duty to accept legal conclusions as facts, or to accept as true "asserted inferences or conclusory allegations that are unsupported by the facts set forth in the complaint." *Kowal v. MCI Communications Corp*., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C.Cir.2002); *Nattah v. Bush*, 541 F. Supp. 2d 223, 233 (D.D.C. 2008).

Moreover, "[w]hen the defendant has thus challenged the factual basis of the court's jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the

facts alleged by the plaintiff and disputed by the defendant. Instead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *Callaway v. Hamilton Nat. Bank of Wash.*, 195 F.2d 556, 559 (D.C. Cir. 1952); *Asociacion De Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1191-92 (D.D.C. 1983) (aff'd by 735 F.2d 1517 (D.C. Cir. 1984); *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197-98 (D.C.Cir.1992) (affirming trial court's resolution of disputed facts necessary for subject matter jurisdiction).

In purporting to be the Tribe and "members of the Tribe and of the Tribal Council" in their Amended Complaint, Plaintiffs set forth assertions pertaining to a legally recognized Indian tribe, Tribal citizenship status, and official governmental Tribal positions, the basis for which must be grounded upon Tribal law (Amended Complaint ¶ 28). Executive authority over Indian Affairs generally flows from the President of the United States, to the Secretary of the Interior, and is then further delegated to the Bureau of Indian Affairs ("BIA"), an agency within the Interior Department. *See* F. Cohen, Handbook on Federal Indian Law 403-404 (2005 ed.) (citing 25 U.S.C Secs. 1, 1a, 2; 43 U.S.C. Sec. 1457). Under the BIA, the authority to carry out the duties of the Secretary of Interior is delegated to the Assistant Secretary-Indian Affairs. In the Plaintiffs own facts, they fail to demonstrate any action by the United States, the Department of Interior, or the BIA that resulted in a federally-recognized governing document that could serve as the basis of their "Tribal membership" or "Tribal Council" positions.

For example, the Plaintiffs state on ten (10) separate occasions in their Opposition that they "are direct lineal descendants of a historical member or members of the Tribe." (Opposition at 2, 3, 4, 7, 9, 12, 15, 16). Plaintiffs, however, cannot demonstrate through a single United

States, Department of Interior, or BIA document or decision that they have *ever* been recognized as Tribal Members in United States history. Even if Plaintiffs were to demonstrate that they are "direct lineal descendants of a historical member of the Tribe," the United States, the Department of Interior, nor the BIA has not made any decision or provided any federal agency action that such status entitles one to Tribal membership. Indeed, being a "direct lineal descendant" of a historical member of an Indian tribe does not mean one is entitled to Tribal membership. In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, the Supreme Court determined that an individual claiming Tribal membership could not become a member of the Tribe even though he was a direct lineal descendant of the Tribe's historical and current members.

Plaintiffs fail to allege any facts whatsoever pertaining to a government-to-government relationship with the United States that could shed an ounce of credibility to their "legitimate governing body." (Amended Complaint, ¶ 27). Plaintiffs do not make these necessary factual and legal connections within their Amended Complaint because they are unable to do so. They are unable to demonstrate how the gathering of "raptor features" and "willow roots" confers upon Plaintiffs and their Tribal Council the legal authority of a sovereign Indian nation and the federally-recognized benefits of tribal membership. (Amended Complaint, ¶ 67(h)). With their Amended Complaint, Plaintiffs are hoping that if they throw enough "factual allegations" at the Court, something will stick (*Id.* at ¶¶65-70). However, the critical "glue" necessary to make any sense of Plaintiffs' haphazard facts would be a single factual statement that would render true the bases for Plaintiffs' legal conclusions that they are the Tribe, Tribal Council and Tribal Members, when, in fact, they have never in the history of the Tribe been recognized as such by the United States. Such facts are not surprisingly missing from Plaintiffs' Amended Complaint, thereby warranting dismissal under Fed. R. Civ. P. 12(b)(1).

Indeed, "there is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts." *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Plaintiffs cannot be considered either a federally-recognized tribe or the Tribe in question here merely because they have concluded, without factual support, that they are so. *See also, Pauling v. McElroy*, 278 F.2d 252, 253-54 (D.C. Cir. 1960) (noting that the admission of well pled facts "does not, of course, embrace sweeping legal conclusions cast in the form of factual allegations"). Accordingly, Plaintiffs' lack constitutional standing to bring the instant action and their Amended Complaint must be dismissed.

As demonstrated by their Opposition, Plaintiffs concede the significant issues of causation and redressability as they make no mention of these critical components in the standing inquiry. Plaintiffs have not and cannot demonstrate a "fairly traceable connection" between their purported injuries and the August 2011 Decision. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998). Plaintiffs simply cite as a basis of "causation" that they "will be injured" because the August 2011 Decision will allow the Tribe to "divert funds" intended for the Plaintiffs. (Opposition at 20). Such a statement begs the question of how Plaintiffs would have any rights or interests in funds held in the name of the ***Tribe*** in the first instance. Indeed, Plaintiffs fail to make such a connection between the August 2011 Decision and their conjured injuries because no such connection exists. The non-member Plaintiffs and their fictitious "council" have never been eligible to receive federal funding intended for the benefit of federally-recognized Indian tribes. Nor have Plaintiffs at any point in history had ***any form*** of government-to-government with the United States from which their basis from injury could possibly stem. The August 2011 Decision made no determination with respect to Plaintiffs'

eligibility for membership – it merely decided that the federal government lacked authority over such internal enrollment issues and that the Tribe was the proper entity with which to make such decisions. As such, Plaintiffs failed to prove that the August 2011 Decision was the basis for their injuries.

Plaintiffs further fail to demonstrate how any of their alleged "injuries" are redressable by this Court. This Court has no jurisdiction to redress the injuries sought by the Plaintiffs – forcible enrollment in this Tribe and entitlements to Tribal benefits. Even if this court were to invalidate the August 2011 Decision and remand it for ***even further*** consideration, such judgment would not, in any way, change the Plaintiffs' status as non-members of this Tribe. Plaintiffs would still be ineligible for federal and state Tribal monies held in the name of the ***Tribe***. Thus, as Plaintiffs have failed to demonstrate both causation and redressability, Plaintiffs lack constitutional standing to bring this action *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 936-37* (D.C. Cir. 2004) (lack of redressability alone defeats plaintiffs' standing to sue).

i. Plaintiffs Do Not Have Prudential Standing to Bring the Instant Action.

Under the principles of prudential standing, "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). "[I]t is well-established that whether a claim is within the zone of interests protected by a statute is to be evaluated 'not by reference to the overall purpose of the Act in question, ... but by reference to the particular provision of law upon which the plaintiff relies." *Am. Canoe Ass'n, Inc. v. Dist. of Columbia Water & Sewer Auth*., 306 F. Supp. 2d 30, 37

(D.D.C. 2004) (citing *Bennett v. Spear,* 520 U.S. 154, 175–76, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

According to their Opposition, Plaintiffs' prudential standing is grounded solely in the Indian Reorganization Act of 1934 ("IRA"). (Opposition at 24). However, neither Plaintiffs' Opposition nor their Amended Complaint reference any specific provision of the IRA or how Plaintiffs would fall within the zone of interest of such provision. Further, Plaintiffs' Amended Complaint fails to even cite violation of the IRA as a separate cause of action under which they are seeking Administrative Procedure Act ("APA")[2] review, as they do with the U.S. Constitution and the Indian Civil Rights Act of 1968 ("ICRA")[3]. (Amended Complaint, ¶¶ 111-119). Instead, Plaintiffs' make the broad assertion that their "fundamental rights" have been violated under "the U.S. Constitution, the Indian Civil Rights Act, the IRA, the Department's trust responsibility to the Tribe and its members, and other federal laws." (Amended Complaint, ¶ 16). Thus, the "zone of interest" test for prudential standing could not even be triggered in this instance as Plaintiffs have utterly failed to cite a single statutory provision under which they could attempt to seek APA review.

Even assuming, *arguendo,* that Plaintiffs did cite a specific provision of the IRA in their Amended Complaint (which they did not), Plaintiffs would still not fall under the "zone of interest" of the IRA provision that their Amended Complaint vaguely references. In repeatedly (and nonsensically) alleging that the August 2011 Decision denied Plaintiffs "the rightful opportunity to participate in the organization and governance of the Tribe," one can assume that Plaintiffs are referencing Section 476(a) of the IRA which pertains to a tribe's right to organize

[2] 5 U.S.C. § 701, *et seq.*

[3] 25 U.S.C. § 1301, *et seq.*

and adopt a constitution. (Amended Complaint, ¶ 108; 25 USC § 476(a)). As individuals that have never *once* been recognized by the United States , the Department of Interior, or the BIA as being the Tribe or Tribal members or having any of the rights and privileges related thereto, Plaintiffs' claims could not possibly fall within Section 476's congressionally-limited right to judicial review; therefore, their claims fall outside this Section's zone of interest.

First, Section 476 plainly speaks to the rights of tribes. *See e.g.* 25 USC § 476(a) ("[a]ny Indian tribe shall have the right to organize"); 476(c)(1)(A) ("after the receipt of a tribal request for an election"); 476(c)(2)(A) ("assistance as may be requested by the tribe"); 476(a)(3) ("the Secretary shall notify the tribe"). The section *does not* speak to rights that may or may not exist for others that are outside a tribe.[4]

Second, only a tribe has a right to seek judicial review under Section 476 of the IRA. Section 476 provides that "[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal district court" 25 U.S.C.A. § 476(d)(2). By adding the foregoing language, Congress intended that only a tribe have the right to seek judicial review under Section 476. *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 793-95 (D.D.C. 1990). This Court has recognized that there is "nothing to suggest . . . that . . . Congress was consenting to suit by "other affected factions or groups" because "the legislative history of the 1988 amendments to the IRA makes clear that Congress consented to suit only by the tribe submitting its proposed constitution for ratification by the tribe and approval by the Secretary under the

[4] Importantly, the 2011 Decision is not what excluded Plaintiffs from the Tribe. The Plaintiffs have <u>never</u> been recognized by the United States, the Department of Interior or the BIA as being the Tribe or members of the Tribe.

IRA."[5] *Id*. Permitting suits by those other than the Tribe would "open the door to needless litigation by any related, neighboring, or other tribe somehow affected by the new tribe's status, frustrating the original intent of the IRA . . . [and] would be so 'inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id*. (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

Plaintiffs simply have no legally protectable interest guaranteed by Section 476. They have cited no basis under the IRA for claiming that the Bureau of Indian Affairs ("BIA") is required to forcibly alter a federally-recognized tribe's existing form of government and expand its membership against the tribe's will. "[T]he only agency action that can be compelled under the APA is action legally required." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). As this Court has stated, "[a] trust responsibility can only arise from a statute, treaty, or executive order." *N. Slope Borough v. Andrus*, 486 F. Supp. 332, 344 (D.D.C. 1980) *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980). The IRA provides no duty such as that claimed by Plaintiffs to be prospective members.

Moreover, the cases cited by Plaintiffs are inapplicable to the instant action. *Cherokee Nation of Oklahoma v. Babbitt* determined that the Cherokee Tribe had Article III and prudential standing to challenge the Secretary's formal recognition of the Delaware Tribe of Indians, a tribe that had been "incorporated" into the Cherokee Tribe. 117 F.3d 1489, 1492, 1494, 1503 (D.C. Cir. 1997). The Cherokee Tribe brought suit against the Secretary under the APA for violation

[5] The Secretary's duty to become involved is triggered when upon "the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or . . . after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws." 25 U.S.C. § 476(c). Although the California Valley Miwok Tribe originally requested the Secretary call an election, the Tribe later decided not to organize under the IRA's constitutional and election provisions.

of 25 C.F.R. Part 83, which governs tribal recognition. *Id*. at 1495. The court found that the Cherokee fell within 25 C.F.R. Part 83's definition of who was an "interested party" because the Secretary's action impacted "the authority of the Cherokee Nation over the Delawares." *Id*. at 1496, n. 9. Unlike in *Cherokee Nation of Oklahoma*, Plaintiffs do not have a current right of authority over the California Valley Miwok Tribe because the Tribe has not been incorporated by the Secretary into the Plaintiffs' unrecognized group. Also unlike in *Cherokee Nation of Oklahoma*, Section 476 does not show a Congressional purpose or intent to include Plaintiffs within Section 476's "zone of interest." Rather, Congress limited Section 476's judicial review provisions, thus *excluding* Plaintiffs from its "zone of interest."

Feezor v. Babbitt, a case in which members of a federally recognized tribe brought an APA challenge under Section 476 of the IRA to the Secretary's approval of an adoption ordinance, held that plaintiffs were intended beneficiaries under the IRA because their tribe's constitution expressly included a provision for Secretarial approval of the tribe's ordinances. 953 F. Supp. 1, 3 (D.D.C. 1996). *Feezor* did not, however, discuss what opposition, if any, was made to tribal members asserting rights for the Tribe. Even so, unlike in *Feezor*, Plaintiffs are not members of the Tribe recognized by the Secretary or the BIA, but only purport to be members. As discussed, the Plaintiffs have not produced one single document demonstrating that they are Tribal Members. Plaintiffs refuse to even submit applications for membership to the Tribe, instead citing to "personal genealogies" as the basis for their membership. (Amended Complaint, ¶ 104(a)).

The key difference between this case and the cases of *Cherokee Nation of Oklahoma* and *Feezor* is that in both of those cases, it was undisputed by the Secretary whether the plaintiffs were federally recognized members of the Tribe. Consistent with these decisions, the Courts

find that Indians who are not recognized as Tribal Members by the Secretary or BIA lack standing. *See Displaced Elem Lineage Emancipated Members Aliance v. Sacramento Area Director, BIA*, 34 IBIA 74, 77 (1999); *Bingham v. Massachusetts*, 2009 WL 1259963 (D. Mass. 2009); and *Chris C. White v. Acting Muskogee Area Dir., BIA*, 29 IBIA 39, 41 (1996). Similarly here, regardless of the August 2011 Decision, the Plaintiffs are not recognized as Tribal members in this case by the United States or Secretary, and they cannot point to any document that demonstrates otherwise.

Plaintiffs unconvincingly cite to *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 125, 137-140, 145-46 (D.D.C. 2002) and *Sac & Fox Tribe of the Mississippi in Iowa v. United States*, 264 F.Supp.2d 830, 833-835 (N.D. Iowa 2003), to stand for the proposition that the United States' lack of recognition of Plaintiffs' fictitious government should pose no jurisdictional hurdle to this Court. However, in *Seminole Nation of Oklahoma*, the plaintiffs were members of the Seminole Nation of Oklahoma who were duly elected pursuant to tribal laws that were subsequently voided by the BIA. Thus, the case involved around two competing groups consisting of federally-recognized tribal members. In the instant action, Plaintiffs' group has never previously been recognized by the United States as being tribal members or having any of the benefits or privileges related thereto. *Sac & Fox Tribe of the Mississippi in Iowa* involved claims brought by an elected tribal council and appointed council over the appointed tribal council's taking control of tribal facilities which resulted in a closure order of the tribe's casino by the National Indian Gaming Commission. The district court in this case granted the United States' motion to dismiss and held that it lacked subject matter jurisdiction over the appointed council's request for a temporary restraining order. This case not only involved claims that were much stronger than those furthered by Plaintiffs in that they were brought by a federally-

recognized group of ***tribal members***, but even accounting for this fact, the court in that action ***still dismissed the entire action***, holding that it lacked subject matter jurisdiction, as this Court should similarly find in this case.

Although cited in their Amended Complaint, Plaintiffs apparently do not believe prudential standing exists under the ICRA or the U.S. Constitution, as their Opposition is silent as to these sources of law. However, even giving Plaintiffs the benefit of their doubtful Amended Complaint and Opposition, they have no interests that would even touch upon the above-mentioned legal statutes. First, Plaintiffs cannot allege that the August 2011 Decision stripped them of their due process rights, as Plaintiffs were never recognized as Tribal members to begin with, nor have Plaintiffs even submitted enrollment applications for consideration. Further, Plaintiffs are not seeking a writ of habeas corpus challenging detention, which is the only manner by which a federal court could entertain a claim under ICRA, 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66-67 (1978). Thus, in light of their blatant lack of both constitutional and prudential standing, this Court must dismiss Plaintiffs' Amended Complaint.

b. Plaintiffs Failed to Establish That This Court Has Jurisdiction to Preside Over an Internal Tribal Membership/Enrollment Dispute.

In an effort to convince this Court that it has subject matter jurisdiction over a delicate tribal enrollment matter, Plaintiffs resort to distorting the foundation of this case, despite a well-established administrative record demonstrating the contrary. In its January 28, 2010 ruling (from which the August 2011 Decision and the instant action stems), the Interior Board of Indian Appeals ("IBIA") held: "Understood in the context of the history of this Tribe, and BIA's dealings with the Tribe since approximately 1999, this case is properly characterized as an enrollment dispute." *California Valley Miwok Tribe v. Pacific Regional Director, BIA*, 51 IBIA

103, 122 (January 28, 2010) (*citing Vedolla v. Acting Pacific Regional Director*, 43 IBIA 151, 155 (2006)(Board lacked jurisdiction over what is, at its core, a tribal enrollment dispute, notwithstanding an appellant's characterization to the contrary; matter referred to the Assistant Secretary)); *Walsh v. Acting Eastern Area Director*, 30 IBIA 180 (1997) (dismissing appeal from alleged actions and inactions regarding the development of a proposed final base membership roll for the Catwba Indian Tribe of South Carolina and referring matter to Assistant Secretary); *Deardorff v. Acting Portland Area Director,* 18 IBIA 411 (1990)). Thus, with regard to the precise issues involved in *this case*, the IBIA held that because it "lack[ed] jurisdiction to adjudicate tribal enrollment disputes," it was referring the case to the Assistant Secretary. *California Valley Miwok Tribe*, 51 IBIA at 122. Upon review of this matter, the Assistant Secretary, on numerous occasions, recognized the issues in this case for what they were – those pertaining to matters of internal tribal governance. (RAR Dec. Ex. L, p.1 (December 2010 Decision); Ex. (April 8, 2011 Decision); Ex. P, p. 5 (August 2011 Decision)).

A challenge under the APA does not magically recharacterize the nature of this dispute as Plaintiffs so urge. *See Williams v. Gover*, 490 F.3d 785, 790 (9th. Cir. 2007) (rejecting an APA claim against the BIA and Assistant Secretary, stating that "[u]nder *Santa Clara Pueblo,* [the tribe] had the power to squeeze the plaintiffs out, because it has the power to define its own membership. It did not need the BIA's permission and did not ask for it, and the BIA never purported to tell it how to define its membership… And given a tribe's sovereign authority to define its own membership, it is unclear how the BIA could have any such policy.").

Moreover, the cases to which Plaintiffs cite in their Opposition are not only unavailing, but they are detrimental to their own position in this case. The Plaintiffs cite to *Seminole Nation v. United States*, 316 U.S. 286 (1942), to argue that the Interior Department would breach its

trust obligation to Tribal members if it remitted funds to a Tribal Council without integrity. However, the Seminole Nation challenged the United States pursuant to payment obligations owed under the Treaty of August 7, 1856, 11 Stat. 699, 702. The Supreme Court focused on the Government's fiduciary obligation over the interests of the "tribe and its members." In this case, the Plaintiffs cannot point to one United States document that demonstrates Plaintiff are the Tribe or Tribal members. In fact, the only entity that is owed a trust obligation by the United States is the Tribe and Tribal members, which do not include the Plaintiffs. Therefore, such fiduciary obligations would not be owed to the non-member Plaintiffs or their never-recognized "tribe." Further, despite Plaintiffs' efforts to lend credence to their status by falsely claiming to be members of this Tribe, as individuals that have never once in all of the Tribe's history been recognized as such by the Secretary or the BIA, they are not beneficiaries of the Secretary's trust duties under the legal bases cited in the Opposition.

In *Feezor*, as explained above, the Court examined the claims of ***tribal members*** relating the IBIA's decision to overturn the BIA's disapproval of an adoption ordinance. 953 F. Supp. at 3. In doing so, the Court noted due process concerns in the IBIA refusing the ability for the ***tribal members*** to be involved in the appeals process. *Id.* at 5. No similar circumstances exist here. Plaintiffs have never been recognized as Tribal members. Plaintiffs attempt to distinguish *Feezor* by arguing that *Feezor* dealt with resolving an election dispute, which is an intra-tribal matter. However, the Court in *Feezor* was "mindful of the difference" of reviewing BIA actions under APA standards and reaching the merits of sensitive intra-tribal disputes. This case deals with the make-up of Tribal membership. In this case, similar to *Feezor*, reviewing the merits of this action and the basis of the August 2011 Decision would *necessarily involve* examining sensitive issues of Tribal governance and membership. This Court should be mindful of this

difference and recognize that it is without jurisdiction to reach the merits of a classic Tribal membership dispute.

In *Ransom v. Babbit* , the court held that the BIA and IBIA arbitrarily and capriciously refused to review "tribal procedures surrounding the adoption of a tribal constitution" and refused to recognize "the clear will of the Tribe's people" as reflected in tribal elections. 69 F. Supp. 2d 141, 143 (D.D.C. 1999). Importantly, the Secretary and the BIA recognized the plaintiffs in *Ransom* as Tribal members of the Tribe, which is unlike the Plaintiffs in this case. The court also held it was arbitrary and capricious to recognize the authority of the tribe's court, which apparently was operating without authority and/or otherwise acting invalidly. *Id*. The court noted that the Department itself recognized it had "both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." *Id*. at 150 (quoting *Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 80 (June 4, 1992)). In the case of the California Valley Miwok Tribe, unlike *Ransom v. Babbitt*, the Secretary has *never* once, in the entire history of the United States, recognized the Plaintiffs as Tribal members of the California Valley Miwok Tribe. In *Ransom*, there was a clear understanding that the Secretary and BIA were dealing with the Tribal members of the Tribe. Simply put, the Secretary does not have the authority and responsibility to supervise the Tribe's organization without request from the Tribe, or, in accordance with longstanding jurisprudence, cannot assert authority or responsibility in Tribal membership issues

The Plaintiffs also point to *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976) to attempt to provide jurisdiction in this case. However, *Harjo* is inapplicable in this case because *Harjo* involved a dispute involving the Chief of the Creek Nation and elected officials of the Creek National Council relating to a funding agreement between the United States and the Creek

Nation, which provided the Secretary with control over disbursements and cash flow arising out of an allotment. Again, in this case, the Secretary recognized all parties to the dispute as valid Tribal members of the Tribe. Accordingly, *Harjo* concerned the "propriety of tribal actions" amongst entities all recognized as Tribal members. This is completely distinguishable to the case at hand, where the Secretary has *never once* in United States history recognized Plaintiffs as Tribal members or the Tribe.

Without authority, this Court cannot interfere in the internal affairs of an Indian tribe. *See Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171, 1185 (E.D. Cal. 2009) (declining jurisdiction over disenrollment dispute because such issues "are central to Indian self-determination and self-government") (citing *Milan v. U.S. Dep't of Int*., 10 Indian L. Rep. 3013, 3015 (D.D.C. 1982) (disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of the federal courts.") Thus, because this Court lacks jurisdiction over what is now and always has been an internal tribal issue, Plaintiffs' Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Considering that the United States, the Department of Interior, or the BIA has never recognized the Plaintiffs as Tribal members or as being the Tribe, it is easy to recognize that this is a classic case where a group of people, Plaintiffs, are attempting to acquire membership in a Tribe. In their Opposition, Plaintiffs were completely unable to distinguish *Lincoln v. Saginaw Chippewa Indian Tribe of Mich*., 967 F. Supp. 966 (E.D. Mich. 1997) where the Tribe had plaintiffs complaining of being denied from membership with an established, organized government, and where the Interior Department had previously provided the Tribe with funding. Similarly, in this case, the plaintiffs in their Opposition claim their desire to gain "[a]ccess to federal funds, as well as more than nine million dollars that the State of California holds in trust

for the Tribe, is also at stake." (Opposition at 2). Similar to *Lincoln,* the Plaintiffs seek cash as non-Tribal members even though the United States has never recognized them as Tribal members, and even though the United States, also similar to *Lincoln,* recognized the current Tribal membership through the September 1998 final agency action, and subsequent final agency actions issued on February 2000 and March 2000, which reaffirmed the authority of the Tribe, and allowed for the Tribe to subsequently receive P.L. 638 funding contracts directly from the BIA.

c. Plaintiffs Fail to Overcome The Fact That Their Claims Are Time-Barred, Precluding This Court's Jurisdiction.

In their Opposition, Plaintiffs state nothing to rebut the fact that their current action and challenge to the Tribe's long-standing form of government and well-established membership is a clear effort to seek judicial review of past BIA determinations that initially recognized the Tribe's government and membership, and is therefore, statutorily time-barred pursuant to 28 U.S.C. § 2401(a). Failing to address how their Amended Complaint is not, in effect, a challenge to past BIA determinations, despite explicit statements in the Amended Complaint to the contrary, Plaintiffs simply gloss over this major jurisdictional hurdle by stating that it is "highly specious." (Opposition at 29).

As stated above, the August 2011 Decision did not, for the first time, recognize the existence of the Tribe's governing body and membership for purposes of a government-to-government relationship with the United States. Rather, the September 1998 Final Agency Action first recognized the Tribe's five member citizenship and their authority to establish a Tribal government. (RAR Decl., Ex. D). In challenging this final agency action, Plaintiffs' Amended Complaint alleges that with this September 1998 action, the BIA acted "erroneously," and that the determination made therein as to the Tribe's membership "was and is incorrect."

(Amended Complaint, ¶¶ 4-7). The Plaintiffs in their Opposition again complain, "[t]he Department erroneously told Mr. Dixie that he had the authority to accept the Burleys into the Tribe and he agreed to do so. The Department thereafter treated the Burleys as Tribal members, although their enrollment was invalid without Tribal consent." (Opposition at 10). The Plaintiffs further complain that, [t]he BIA erroneously told Mr. Dixie that the people entitled to participate in the initial organization of the Tribe were determined by the distribution plan that had been prepared in 1966 as part of the unsuccessful attempt to terminate the Tribe under the California Rancheria Act. The BIA concluded that these people included Mr. Dixie and his brother Melvin . . . and the Burleys . . . and those individuals were entitled to decide who else might participate in Tribal organization." (Opposition at 10-11). The Plaintiffs, however, did not challenge either the 1966 Final Agency Action or the 1998 Final Agency Action. (RAR Decl. Exs. A and D) The Plaintiffs complain that the BIA should not have accepted that, "the 1998 Resolution established a legitimate government now consisting of five people, to which the United States must defer . . .." (Opposition at 12; RAR Decl. Ex. C). The Plaintiffs however, did not challenge the BIA's recognition of the 1998 Resolution either.

In 1998, neither the Non-Members, (who, apparently had yet to discover their "membership" at that time and were nowhere to be found), nor Mr. Dixie ever challenged any of these final agency actions. Nor did Plaintiffs challenge subsequent BIA final agency actions issued on February 2000 and March 2000, which reaffirmed the authority of the Tribe's governing body, pursuant to Resolution #GC-98-01, and its five federally recognized members. (RAR Decl., Exs. C, E and F thereto). By this APA action, Plaintiffs seek to challenge the underlying holdings of the 1998 Final Agency Action, the February 2000 Final Agency Action and the March 2000 Final Agency Action, including the validity of the Tribe's governing

document itself which had, up until the present action, never been challenged. The August 2011 Decision was in fact based upon these prior Final Agency Actions. Plaintiffs cannot and should not be permitted to bring statutorily time-barred challenges to the well-settled and undisturbed BIA determinations pertaining to the membership and government of the Tribe. As such, this Court lacks subject matter jurisdiction over Plaintiffs' time-barred claims.

B. Plaintiffs Failed to Demonstrate That The Tribe Is An Unnecessary and Dispensable Party. As Such, This Case Must Be Dismissed Under Fed. R. Civ. P. 19(a).

In their Opposition, Plaintiffs unpersuasively attempt to convince this Court that the only entity with whom the United States has ever maintained government-to-government relations is not a necessary party to a litigation challenging its very existence. "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) (finding the non-party Tribe was necessary, and going on to further find that it was indispensable, necessitating dismissal of the complaint under FRCP 19(b), even though this ruling effectively denied plaintiffs a forum in which to have their grievances heard.).

In its March 26, 2012 Memorandum and 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, p. 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). Aside from resorting to name-calling and mischaracterizing the status of the Tribe before this Court as a "rogue faction," Plaintiffs have failed to put forth any arguments whatsoever that would require this Court to reverse its previous findings. (Opposition, p. 32).

As it is evident that the Tribe is a necessary party to this litigation under Rule 19(a)(2)(i), Plaintiffs next unconvincingly attempt to argue in the Opposition that the Tribe, the only federally-recognized entity with whom the United States has maintained government to government relations, has somehow been stripped of its sovereign immunity, and, therefore, can be joined as a party to this action. Despite Plaintiffs' far-fledged assertions and blatant distortions of federal Indian law, the inherent sovereign status of an Indian nation does not dissipate by virtue of tensions in relations with the federal government. *See United States v. Wheeler*, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished*.)" (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945 ed.)).

Moreover, a change in recognition of tribal leadership does not affect whether a tribe possesses inherent sovereign immunity from suit. At a minimum, the dispositive factor of whether a tribe has sovereign immunity is whether the Tribe is recognized by the federal government. 25 C.F.R. § 83.2 ("Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." *Muwekma Tribe v. Babbitt,*

133 F. Supp. 2d 30, 31 (D.D.C. 2000); *Burt Lake Band of Ottawa & Chippewa Indians*_v. *Norton*, 217 F. Supp. 2d 76, 77-78 (D.D.C. 2002)).[6]

In this case, the Tribe's form of government and membership has never been disrupted or even eliminated. Indeed, the Tribe's existence and sovereign power has remained intact through its entire United States history. The 2006 BIA decision and subsequent *Ledger Dispatch* Public Notice from which the August 2011 Decision stems, which attempted to reorganize an existing Tribal government and membership, marked the true "180 degree reversal" that Plaintiffs so frequently reference in their Opposition. Even so, such an overreaching decision would not even come close to altering the Tribe's ***inherent sovereign status***. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Moreover, despite the nonsensical contentions made in the Opposition, the Tribe has never cited to the August 2011 Decision as the basis for its sovereign immunity. Indeed, the August 2011 Decision did as much to restore the Tribe's sovereign status as the challenged 2006 BIA determination and Public Notice did to remove it. As stated above, similar to its membership and governing body, the sovereign status of the California Valley Miwok Tribe never ceased by virtue of BIA attempts to forcibly expand the Tribe's membership, nor was it magically restored by the federal government's declination to proceed with such intrusive actions. For the Plaintiffs to attempt to represent otherwise would turn the fundamental principles of federal Indian law on their head.

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[6] Tribal sovereignty survives even the dissolution of a tribal government. *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1502 (D.C. Cir. 1997) (citing *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations. *See Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257-58, 67 L.Ed.2d 493 (1981). Moreover, "a tribe is immune from federal court jurisdiction in disputes regarding challenges to membership in the tribe." *St. Pierre v. Norton*, 498 F.Supp. 2d 214, 220 (D.D.C. 2007) (citing *Santa Clara Pueblo v. Martinez*, 436, U.S. 49, 51, 98 S.Ct. 1670, 56 Led.2d 107 (1978)). As such, the Tribe is both a necessary and indispensable party to this litigation under Rule 19(b), whose absence fundamentally impairs this litigation from proceeding.

As appropriately recognized in this Court's recent Memorandum Opinion, this case could have grave implications for the Tribe's form of government and relations with the United States. Any adverse rulings could reverse decades of history between the Tribe and the United States and undermine the Tribe's sovereign authority to make membership determinations. *St. Pierre*, 498 F. Supp at 221. Despite this fact, Plaintiffs attempt to argue that "a judgment invalidating the 2011 Decision would not prejudice the [Tribe]." (Opposition at 34). Nothing could be further from the truth. Indeed, the relief that Plaintiffs seek from this Court to "[d]irect the [Assistant Secretary] and the BIA [to] establish government-to-government relations only with a Tribal government that reflects the participation of the entire Tribal community," including the Non-Members, would run in direct contravention with the Tribe's right to self-determination and self-governance (Amended Complaint, ¶ F, p. 30). Degrading the Tribe's history and the fact that it did not establish a formal government until 1998 also does nothing to help Plaintiffs' contention that the Tribe would not be prejudiced by a judgment rendered in its absence.

The only appropriate forum for Plaintiffs' current efforts seeking membership in the Tribe is to the Tribe's governing body – its General Council – and Plaintiffs are not stripped of

an alternate adequate remedy merely because Plaintiffs dislike the alternative and proper forum. Accordingly, because the Tribe is a necessary and indispensable party who cannot be joined in this litigation, this action must be dismissed pursuant to Rule 19.

C. As This Court Is Without Authority to Provide The Relief Requested In Plaintiffs' Amended Complaint, This Case Must Be Dismissed Under Fed. R. Civ. P. 12(b)(6).

In their Opposition, Plaintiffs, through regurgitation of irrelevant case law and re-characterization of the relief sought in their Amended Complaint, unconvincingly attempt to argue that this matter should not be dismissed pursuant to Fed. R. Civ. P 12(b)(6). However despite Plaintiffs' procedurally improper attempt to amend the allegations made and relief in its Amended Complaint, by way of its Opposition, it is clear that the relief sought by Plaintiffs – the intrusion into internal tribal affairs – cannot be granted by the Court, and, therefore, Plaintiffs' Amended Complaint must be dismissed pursuant to Fed. R. Civ. P 12(b)(6).

It is well-established that "[i]nternal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government…" *Timbisha*, 687 F.Supp at 1185. Indeed, as the United States Supreme Court has recognized, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 n. 32 98 S.Ct. 1670, 1684 n. 32., 56 L.Ed.2d 106 (1978). Plaintiffs have not and cannot dispute the plain language of their Amended Complaint which boldly requests relief from this Court "[d]irecting the [Assistant Secretary] and the BIA to establish government-to-government relations only with a Tribal government" which includes the Plaintiffs. (Amended Complaint, ¶ F, p. 30). The claims made and relief sought in Plaintiffs' Amended Complaint ***necessarily require*** this Court to delve into and decipher tribal

membership issues which are well-established as being beyond any federal court's jurisdiction.

Plaintiffs also fail to address (and therefore concede), the issues as to how this Court could possibly declare violations of ICRA and of their Constitutional rights. As stated above, relief cannot be sought by way of the U.S. Constitution as there have been no due process rights of Plaintiffs implicated here. The August 2011 Decision could not possibly have stripped Plaintiffs of Constitutional rights pertaining to membership and participation in the Tribe that Plaintiffs never had in the first instance. Moreover, this Court cannot grant Plaintiffs' requested relief under ICRA as it is well established that the only method of seeking relief under ICRA from any federal court through the filing a writ of habeas corpus challenging detention. 25 U.S.C. § 1303; *Santa Clara Pueblo*, 436 at 66-67. Because Plaintiffs' allege claims and seek relief that this Court is unable to provide, Plaintiffs' Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, the Intervenor-Defendant respectfully requests that this Court dismiss Plaintiffs' Amended Complaint in its entirety.

Respectfully submitted this 27th day of April, 2012,

By: /s/ Robert A. Rosette

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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' FIRST AMENDED COMPLAINT (RELATED TO DOCKET NOS. 58 AND 59) to be served on the following counsel via electronic filing:

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