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10

11 UNITED STATES DISTRICT COURT

12 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION
13

14 CALIFORNIA VALLEY MIWOK TRIBE, a
15 federally-recognized Indian tribe, THE
GENERAL COUNCIL, SILVIA BURLEY,
16 RASHEL REZNOR; ANGELICA PAULK; and
TRISTIAN WALLACE,

17 Plaintiffs,

18 v.

19 SALLY JEWEL, in her official capacity as
20 U.S. Secretary of Interior; LAWRENCE S.
ROBERTS, in his official capacity as Acting
21 Assistant Secretary of Interior - Indian Affairs;
MICHAEL BLACK, in his official capacity as
22 Director of the Bureau of Indian Affairs,

23 Defendants.
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Case No. 2:16-01345 WBS CKD

**INTERVENOR-DEFENDANT'S NOTICE
OF MOTION AND MOTION TO
INTERVENE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Judge: Hon. William B. Shubb
Date: Sept. 6, 2016
Time: 1:30 p.m.
Courtroom 5

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- Declaration of Gilbert Ramirez, Jr.
- Declaration of Antoinette Lopez
- Declaration of Iva Sandoval

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NOTICE OF MOTION AND MOTION TO INTERVENE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 6, 2016, at 1:30 p.m. or as soon thereafter as counsel may be heard by the above-entitled Court, located in Courtroom 5, 501 I Street, 14th Floor, Sacramento, California 95814, the Honorable William B. Shubb, United States District Court Judge, will hold a hearing on the motion to intervene in this action by the California Valley Miwok Tribe, its Tribal Council, and Council members Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Gilbert Ramirez, Jr., Antoinette Lopez and Iva Sandoval. As described in the Declaration of James Rusk, counsel for Defendants has stated Defendants do not oppose intervention. Counsel for Plaintiffs has not responded to inquiries whether Plaintiffs oppose intervention.

This motion is made pursuant to Rule 24 of the Federal Rules of Civil Procedure. The proposed Intervenors have significant protectable interests that relate directly to the Assistant Secretary – Indian Affairs’ decision challenged in this action. As a practical matter, resolution of this action without proposed Intervenors’ participation would impair their ability to protect their interests, which cannot be adequately represented by the existing parties.

Intervenors have filed their proposed Opposition to Plaintiffs’ Motion for an Order Staying AS-IA’s December 30, 2015 Decision concurrently with this motion. If the Court grants intervention, proposed Intervenors will file their Answer in Intervention within the time allowed for Defendants to answer the First Amended Complaint.

1 This motion is based on this Notice, the accompanying Memorandum of Points and
2 Authorities, the supporting Declarations of Robert Uram, James Rusk, Yakima Dixie, Velma
3 WhiteBear, Antonia Lopez, Michael Mendibles, Gilbert Ramirez, Jr., Antoinette Lopez, and Iva
4 Sandoval, on all matters which this Court may judicially notice, and on all other matters presented
5 at or before the hearing.

6
7 August 8, 2016

Respectfully submitted,

8 Robert J. Uram
9 James F. Rusk
10 SHEPPARD MULLIN RICHTER
11 & HAMPTON, LLP

Attorneys for Intervenor-Defendants

12 By /s/ James F. Rusk
13 JAMES F. RUSK

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The California Valley Miwok Tribe (Tribe) is a federally recognized Indian tribe located in
4 Sheepranch, California, in Calaveras County. The Intervenor Tribal Council represents the
5 approximately 200 adult members of the Tribe and their children. The Tribe’s membership
6 ratified the Tribal Council’s authority as the Tribe’s governing body in a Tribal election held on
7 July 6, 2013, in which the Tribe adopted a written Tribal constitution (2013 Constitution). The
8 Tribal Council has applied to the federal Bureau of Indian Affairs (BIA) for federal recognition as
9 the Tribe’s government based on the 2013 election. Decl. of R. Uram, Exhibit A (Recognition
10 Request). Individual Intervenors are the seven current members of the Tribal Council; they join
11 individually and as members of the Tribal Council.

12 Plaintiffs in this action consist of Silvia Burley, her two daughters, and her granddaughter
13 (the Burleys). They claim they and one other person (Yakima Dixie) are the only members of the
14 Tribe and the Tribe is governed by a “general council” consisting of the Burleys.¹ The Burleys’
15 complaint seeks to overturn a December 30, 2015 decision by the Department of the Interior’s
16 Assistant Secretary – Indian Affairs, Kevin Washburn, rejecting their claims (2015 Decision).²
17 The Assistant Secretary issued the 2015 Decision on remand from a case in which the Intervenors
18 here were plaintiffs, and the Burleys intervened as defendants. *California Valley Miwok Tribe v.*
19 *Jewell*, 5 F.Supp.3d 86 (D.D.C. 2013) (*Miwok III*).

20 This action directly affects Intervenors’ interests. The 2015 Decision establishes that each
21 of the Tribe’s 200 adult members, including each of the Intervenor Tribal Council members, has a
22 right to participate in any process of “Tribal organization” — the creation of a majoritarian Tribal
23 government that the United States will recognize. It authorizes the BIA to evaluate submissions

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25 ¹ For litigation purposes, the Burleys currently count Yakima Dixie as the fifth member of the
26 Tribe, but they purported to “disenroll” him in 2005 and do not include him in their purported
tribal government. *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 201 (D.D.C. 2006)
(*Miwok I*).

27 ² Assistant Secretary Washburn, the top official within the BIA, has since been replaced in that
28 position by Acting Assistant Secretary Lawrence Roberts, who is named as a Defendant.

1 from the Tribe to determine whether the process that led to adoption of the Tribe's 2013
2 Constitution and Tribal Council was sufficiently inclusive to allow federal recognition of that
3 Tribal government.

4 If the Burleys succeed in overturning the 2015 Decision, each and every one of the Tribe's
5 members will be denied their right to a government that reflects the will of the Tribal community.
6 The Tribal Council will be denied the opportunity for federal recognition as the Tribe's governing
7 body. The Tribe itself will continue to lack a government-to-government relationship with the
8 United States, as it has for more than 10 years, and will not be eligible for benefits that flow from
9 such a relationship, including the availability of federal funding under Public Law 93-638 to fund
10 Tribal government services. The Tribe urgently needs such funding in order to provide its
11 members with essential services such as health care, legal assistance, and economic development
12 programs. Decl. of V. WhiteBear, ¶¶ 13-14.

13 The Tribe, its Tribal Council and its members have the required interest in the subject
14 matter of this litigation, and the relief the Burleys seek would greatly impair that interest. The
15 federal Defendants cannot adequately represent Intervenor's interest, because their institutional
16 interests may diverge from those of the Tribe, and as recently as 2011 they accepted the Burleys'
17 claim to be the only members of the Tribe and could do so again. This motion for intervention is
18 timely, as federal Defendants have not entered an appearance and no dispositive motions have
19 been filed. Intervention would be consistent with the court's ruling in *Miwok III*, first allowing
20 intervention by the Burleys and later joining them as a party defendant.

21 Intervenor meets the standard for intervention as of right under FRCP 24(a) and should be
22 allowed to intervene. In the alternative, Intervenor requests the Court allow permissive
23 intervention under FRCP 24(b).

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1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 The history of the Tribe is well documented in the published opinions resulting from the
3 Burleys' prior attempts to claim Tribal authority. See *California Valley Miwok Tribe v. USA*, 424
4 F.Supp.2d 197, 201 (D.D.C. 2006) (*Miwok I*), affirmed, *California Valley Miwok Tribe v. United*
5 *States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (*Miwok II*); *Miwok III*, supra, 5 F.Supp.3d 86.
6 Intervenor's proposed opposition to the Burleys' motion for stay, filed concurrently with this
7 motion, provides further details. For purposes of this motion, the relevant facts relate to the long-
8 running dispute between the Burleys and Intervenor's regarding organization of the Tribe.

9 The Tribe is a federally recognized Indian tribe which in 1935 accepted the application of
10 the Indian Reorganization Act (IRA), 25 U.S.C. § 476. *Miwok III*, 5 F.Supp.3d at 89. The IRA
11 authorizes tribes to "organize" by adopting a constitution and government through a majoritarian
12 process, but the Tribe did not organize at that time. *Id.* The Burleys maintain they organized the
13 Tribe in 1998 through adoption of a document, "Resolution #GC-98-01" (the 1998 Resolution),
14 signed by two people, and that the 1998 Resolution grants them exclusive authority to govern the
15 Tribe and determine its membership. *Id.* at 90-91.

16 Although the BIA recognized Ms. Burley for a time as the head of an "interim Tribal
17 Council" under the 1998 Resolution for the purpose of involving the Tribal community in Tribal
18 organization, it rescinded that recognition in 2005 after it became clear that the Burleys had no
19 intention of doing so and sought to limit Tribal membership to themselves. *Id.* at 93-94. The BIA
20 informed the Burleys that it did not recognize any government for the Tribe and could only
21 recognize a Tribal government that reflected the participation and consent of the entire Tribal
22 community. *Id.* at 94. The Burleys sued, seeking to force the BIA to recognize their Tribal
23 government, but the district court upheld the BIA's decision, *Miwok I*, 424 F.Supp.2d 197. The
24 D.C. Circuit affirmed, holding that tribal organization "must reflect majoritarian values" and
25 Burley's "antimajoritarian gambit deserves no stamp of approval from the Secretary." *Miwok II*,
26 515 F.3d at 1267-1268.

27 Following the court's decision, the Tribal Council conducted extensive outreach to the
28 Tribal community and worked to involve all interested individuals in the process of drafting a

1 Tribal constitution to organize the Tribe. *See* Recognition Request, p. 2. The Burleys opposed
2 that process, filing administrative appeals to stop the BIA from assisting the Tribe. *Miwok III*,
3 5 F.Supp.3d at 94-95. The appeals led to a referral to the Assistant Secretary, who issued a
4 decision on August 31, 2011 (2011 Decision) adopting the Burleys’ position that the Tribe was
5 limited to five members and governed by a “general council” created under the 1998 Resolution.
6 *Id.* at 95.

7 The Intervenors in this action filed suit challenging the 2011 Decision, and the Burleys
8 intervened. *See id.* While that case, *Miwok III*, was pending, the Tribal Council persevered in its
9 efforts to organize the Tribe, culminating in a July 6, 2013 Tribal election in which the Tribe
10 ratified the 2013 Constitution by a vote of 90-10. Recognition Request, p. 7.

11 On December 13, 2013, the district court in *Miwok III* found the 2011 Decision arbitrary
12 and capricious and remanded to the Secretary of the Interior for reconsideration. 5 F.Supp.3d at
13 98-99, 101. On remand, the Assistant Secretary issued the 2015 Decision, which determined the
14 Tribe’s membership is not limited to five people and the United States does not recognize the
15 Burleys’ “general council” as representing the Tribe. It determined the United States could only
16 represent a Tribal government adopted with the participation and consent of the entire Tribal
17 community and identified three “Eligible Groups” of individuals, descended from known
18 historical Tribal members, who make up that community along with the descendants of
19 individuals named on a “1929 Census.” Decl. of M. Corrales, ECF No. 11, Exhibit 4, pp. 4-5
20 (2015 Decision).

21 The 2015 Decision invited the Tribal Council to submit information to demonstrate that the
22 Tribe’s 2013 election was consistent with the standard articulated in the 2015 Decision. On
23 April 18, 2016, the Tribal Council provided that information and asked the BIA to recognize the
24 2013 Constitution and Tribal Council as the Tribe’s government. Recognition Request at 1. The
25 Tribal Council’s Recognition Request shows that, of 200 Eligible Group members and 1929
26 Census descendants eligible to participate in the 2013 election, 183 (92 percent) were members of
27 the Eligible Groups and the other 17 were 1929 Census descendants. More than half (104) of the
28 eligible voters participated in the 2013 election, consisting of 95 Eligible Group members and

1 nine 1929 Census descendants. They ratified the 2013 Constitution and Tribal Council by an
2 overwhelming 90-10 majority with 4 abstentions. Recognition Request pp. 3-4, Attachment 2
3 pp. 3-4, 7. The 2013 Constitution recognizes all Eligible Group members and all 1929 Census
4 descendants as eligible for membership in the Tribe. Recognition Request, Attachment 1, pp. 3-4.

5 The Burleys have filed a motion for stay seeking to stop the BIA from acting on the
6 Tribe's Recognition Request. *See* Motion for Stay, ECF No. 12.

7 **III. THE COMPLAINT AND RELIEF SOUGHT**

8 The Burleys filed the First Amended Complaint on June 16, 2016. ECF No. 4 (FAC). In
9 summary, the complaint alleges the 2015 Decision was arbitrary and capricious because it does
10 not recognize the Tribe as limited to five members and does not recognize the Burleys' general
11 council as the Tribe's government. It asks the Court to set aside the Decision and direct the BIA
12 to recognize and resume government-to-government relations with that general council. The
13 complaint also seeks to enjoin Defendants from implementing the 2015 Decision — including any
14 action to allow anyone but the Burleys to participate in Tribal organization, any grant of federal
15 funds to anyone other than the Burleys' general council, and any recognition of the Tribe's 2013
16 Constitution and Tribal Council. *See* FAC, pp. 44-45; Motion for Stay.

17 **IV. ANALYSIS**

18 The proposed Intervenors and the Burleys share a similar interest in this litigation: the
19 interest in obtaining federal recognition as the Tribe's government and in securing the benefits that
20 flow from that recognition. The two sides differ primarily in that the Burleys seek to limit those
21 benefits to themselves, while Intervenors maintain that all members of the Tribal community
22 should share in the benefits. Because the relief the Burleys seek would necessarily impair
23 Intervenors' interest, and the federal Defendants cannot adequately represent that interest,
24 intervention should be allowed.

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1 **A. Legal Standard for Intervention**

2 In the absence of a federal statute conferring an unconditional right to intervene, Rule 24 of
3 the Federal Rules of Civil Procedure governs intervention in federal court.³ As relevant, Rule
4 24(a)(2) provides:

5 On timely motion, the court must permit anyone to intervene who: ...
6 [¶] claims an interest relating to the property or transaction that is
7 the subject of the action, and is so situated that disposing of the
8 action may as a practical matter impair or impede the movant’s
9 ability to protect its interest, unless existing parties adequately
10 represent that interest.

11 Rule 24 “is construed broadly in favor of the applicants” for intervention. *Idaho Farm*
12 *Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *Citizens for Balanced Use v.*
13 *Montana Wilderness Assn.*, 647 F.3d 893, 897 (9th Cir. 2011). Courts in the Ninth Circuit apply a
14 four-part test to determine whether to grant a motion to intervene:

15 (1) the motion must be timely; (2) the applicant must claim a
16 ‘significantly protectable’ interest relating to the property or
17 transaction which is the subject of the action; (3) the applicant must
18 be so situated that the disposition of the action may as a practical
19 matter impair or impede its ability to protect that interest; and (4) the
20 applicant’s interest must be inadequately represented by the parties
21 to the action.

22 *Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*) (citation
23 omitted). This test is applied to allow for the “efficient” resolution of issues and to “broaden
24 access to the courts.” *United States v. Los Angeles*, 288 F.3d 391, 397-398 (9th Cir. 2002)
25 (quotation marks and citation omitted).

26 **B. The district court in *Miwok III* found it appropriate
27 to include both parties to the Tribal dispute.**

28 The district court in *Miwok III*, confronting an analogous (albeit mirror image) situation,
determined both parties to the Tribal dispute should be part of that litigation. In *Miwok III*, the
proposed Intervenors in this case filed suit challenging the 2011 Decision, which recognized the
Burleys’ tribal government and allowed them to exclude the rest of the Tribal community.
5 F.Supp.3d at 95. The Burleys sought to intervene, and the court ruled that intervention was

³ Unless otherwise stated, all rule references are to the Federal Rules of Civil Procedure.

1 warranted as a matter of right, applying the same four factors that govern here. *CVMT v. Salazar*,
2 281 F.R.D. 43 (D.D.C. 2012).⁴

3 The court found the Burleys' motion was timely, because it was filed less than two months
4 after the complaint and before defendants had filed their answer. *Id.* at 47. It found the Burleys'
5 interest in being recognized as the Tribe's government, and potentially receiving federal funds,
6 was a legally protected interest that would be impaired if the Tribal Council (proposed Intervenor
7 in this case but plaintiffs in *Miwok III*) succeeded in overturning the 2011 Decision. *Id.* The court
8 found the federal defendants could not adequately represent the Burleys' interest because,
9 although both parties shared the ultimate objective of upholding the 2011 Decision, the United
10 States did not share the Burleys' interest in recognition of their government and access to federal
11 funds. *Id.* at 47-48.

12 As discussed below, intervention is warranted in this case for the same reasons.

13 **C. The motion to intervene is timely.**

14 Timeliness is the "threshold requirement" for intervention as of right. *United States v.*
15 *Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). In determining whether a motion to intervene is
16 timely, courts consider three factors: "(1) the stage of the proceeding at which an applicant seeks
17 to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay."
18 *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). This motion is timely,
19 coming less than two months after the complaint was filed and approximately five weeks after the
20 Burleys provided the Tribe with notice of this action. See *CVMT v. Salazar, supra*, 281 F.R.D.
21 at 47. The named Defendants have not filed an answer or any other response. The administrative
22 record has not yet been compiled. The case remains in the nascent stages. *Northwest Forest*

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24 _____
25 ⁴ The court later denied the Burleys' motion to dismiss, which claimed they were an indispensable
26 party and could not be joined because of sovereign immunity. The court ruled the Burleys could
27 not exercise the Tribe's sovereign immunity but found them a necessary party for the same
28 reasons that intervention was warranted and ordered them joined as a party defendant. *CVMT v.*
Salazar, 967 F.Supp.2d 84 (D.D.C. 2013).

1 *Resource Council v. Glickman*, 82 F.3d 825, 836-837 (9th Cir. 1996); *see also* 7C Wright, *et al.*,
2 *Federal Practice and Procedure* §1916.

3 Intervention will not cause delay or prejudice. The only pending motion is the Burleys’
4 Motion for Stay that the Court will hear on September 6, 2016 — the same date this motion is set
5 for hearing. Intervenors have filed their proposed Opposition to the Motion for Stay concurrently
6 with this motion and, if allowed to intervene, are prepared to file their Answer in Intervention
7 within the time allowed for Defendants to answer. Intervenors do not seek to introduce new
8 claims or inject issues unrelated to the Burleys’ challenge to the 2015 Decision. Defendants have
9 agreed to Intervention. Counsel for the Burleys has ignored requests for consent to intervene.
10 (Rusk Decl. ¶¶ 4-7.)

11 **D. Intervenors have the required interest in the subject of this action.**

12 The Tribal Council has the required “interest relating to the property or transaction that is
13 the subject of the action.” Rule 24(a)(2). As in *Miwok III*, the Tribal Council (including each of
14 the individual Council members) has a legally protectable interest in upholding the sovereignty of
15 its Tribal government, the opportunity for recognition of the Tribal Council by the United States,
16 and access to federal funding that is available for this Tribe.⁵ *CVMT v. Salazar*, *supra*, 281 F.R.D.
17 at 47. The 2013 Constitution ratifying the Tribal Council’s authority represents years of effort to
18 involve the Tribe’s members in the process of Tribal organization, as detailed in the Tribal
19 Council’s Recognition Request. Recognition Request, Attachment 2, pp. 1-5.

20 Each of the individual Council members, and each of the 200 adult members (and their
21 children) whom the Tribal Council represents, has an interest in being allowed to participate in
22 Tribal organization as guaranteed by the 2015 Decision, and in enjoying the rights and
23 responsibilities of Tribal membership. WhiteBear Decl., ¶¶ 13-14; Decl. of G. Ramirez, Jr., ¶¶ 13-

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25 _____
26 ⁵ The 2015 Decision does not recognize the Tribal Council as the Tribe’s government, but it
27 establishes criteria that must be met for that recognition to occur and directs the BIA’s Pacific
28 Regional Director to receive additional submissions for the purpose of determining whether the
2013 Constitution and Tribal Council should be recognized as the Tribe’s government. 2015
Decision at 6.

1 14; Decl. of Antonia Lopez, ¶¶ 13-14; Decl. of M. Mendibles, ¶¶ 13-14; Decl. of I. Sandoval,
2 ¶¶ 13-14; Decl. of Antoinette Lopez, ¶¶ 13-14; Decl. of Y. Dixie, ¶¶ 13-14.

3 The Tribe itself has a strong interest in restoring government-to-government relations with
4 the United States and in protecting its sovereign right to define its membership without
5 interference from the Burleys. See *CVMT v. Salazar*, 281 F.R.D. at 47. Its interest in upholding
6 majoritarian values and ensuring the United States “deals only with a tribal government that
7 actually represents the members of [the] tribe” is paramount. *Miwok I*, 424 F.Supp.2d at 201.
8 The Tribe, the Tribal Council and its members all have an interest in protecting the rights secured
9 through the litigation they successfully brought in *Miwok III* to overturn the 2011 Decision.

10 “[T]here is a relationship between the legally protected interests and the claims at issue.”
11 *Wilderness Society, supra*, 630 F.3d at 1179 (quotation marks and citation omitted). The Burleys
12 claim the 2015 Decision, which affirms the right of all Tribal community members to participate
13 in Tribal organization, is invalid. They ask the Court to overturn the 2015 Decision and enjoin the
14 BIA from recognizing or providing funds to any government except their general council. They
15 also seek a declaration that the Tribe’s membership is limited to five people—*i.e.*, that none of the
16 Tribal Council members or the hundreds of people the Tribal Council represents are Tribal
17 members. FAC pp. 44-45. Intervenors’ interest in defending the viability of the 2015 Decision
18 easily satisfies the first prong of the test for intervention as of right.

19 **E. Disposition of the lawsuit would impair Intervenors’ interests.**

20 Disposition of this lawsuit without proposed Intervenors’ participation would impair their
21 ability to protect their interests. The standard for impairment is a practical one: “If an absentee
22 would be substantially affected in a practical sense by the determination made in an action, [the
23 absentee] should, as a general rule, be entitled to intervene.” *Southwest Center for Biological*
24 *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Rule 24 advisory committee note to
25 1966 amendment). If the Burleys obtain the relief they seek, the Tribal Council members and
26 other members will lose the right to participate in Tribal organization that is secured by the 2015
27 Decision, the Tribal Council will lose the opportunity for federal recognition and access to federal
28 funding for Tribal government, the Burleys will be recognized as the Tribe’s government, and all

1 members will lose their right to Tribal membership. FAC pp. 44-45. Thus, Intervenor “will
2 suffer a practical impairment of [their] interests as a result of the pending litigation” without
3 intervention. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006); *see*
4 *CVMT v. Salazar*, 281 F.R.D. at 47.

5 The ability to file separate litigation challenging future BIA actions would not prevent the
6 harm that will occur if the 2015 Decision is overturned, and may be limited in any event by the
7 potential *stare decisis* effect of the decision in this case. *Sierra Club v. EPA*, 995 F.2d 1478, 1486
8 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d
9 1173 (9th Cir 2011).

10 **F. Federal defendants cannot adequately represent Intervenor’s interests.**

11 Although proposed Intervenor bear the burden of showing that the existing parties may
12 not adequately represent their interests, *Southwest Center for Biological Diversity*, 268 F.3d at
13 823, that burden is “minimal” and requires only a showing that representation of those interests by
14 existing parties “may be” inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10
15 (1972).

16 Given the past proceedings involving these parties, there is no question that federal
17 Defendants may not adequately protect the interests of the Tribe, the Tribal Council and its
18 members. As in *Miwok III*, federal defendants share an interest in upholding the 2015 Decision
19 but do not share the Tribal Council’s interest in federal recognition or access to federal funds.
20 *CVMT v. Salazar, supra*, 281 F.R.D. at 47-48. Federal defendants also do not share the Tribe’s
21 interest in restoring government-to-government relations with the United States or in defining its
22 membership. *Id.* at 47.

23 The BIA’s history of reversals involving this Tribe reinforces the inadequacy of federal
24 representation. After rejecting the Burleys’ claims for years, the BIA made a “180-degree change
25 of course” in the 2011 Decision. *Miwok III*, 5 F.Supp.3d at 99. Although it has now returned to
26 its prior insistence that Tribal organization must reflect majoritarian values, it could change course
27 again. This case is analogous to *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499
28 (D.C. Cir. 1997), which the district court relied on in *Miwok III*:

1 “[A]lthough the Delawares and the Department currently take the same position
 2 regarding the Delawares' sovereignty, and to that extent their interests are the same,
 3 the Department has twice reversed its position regarding the Delawares since
 4 1940.... [T]he Department may reverse itself again. Moreover, even were the
 5 Department vigorously to represent the Delawares ... in the district court, the
 6 Department might decide not to appeal any unfavorable decision.” That this
 7 precedent controls this case is self-evident.

8 *CVMT v. Salazar, supra*, 967 F.Supp.2d at 94 (quoting 117 F.3d at 1497).

9 Ninth Circuit precedent confirms this divergence of interests warrants intervention. *E.g.*,
 10 *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001); *Californians for*
 11 *Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998).

12 Proposed Intervenors are also in a unique position to present evidence of the harms that
 13 would be caused by overturning or enjoining the 2015 Decision, which federal Defendants cannot
 14 be expected to offer. *See, e.g.*, WhiteBear Decl. ¶¶ 13-14.

15 **G. In the alternative, proposed Intervenors satisfy**
 16 **the standard for permissive intervention.**

17 Alternatively, the 2013 Tribal Government meets the standard for permissive intervention
 18 under Rule 24(b), which provides as relevant that, on “timely motion, the court may allow anyone
 19 to intervene who . . . has a claim or defense that shares with the main action a common question of
 20 law or fact.” Rule 24(b)(1). “Unlike Rule 24(a), a ‘significant protectable interest’ is not required
 21 by Rule 24(b) for intervention; all that is necessary for permissive intervention is that intervenor’s
 22 claim or defense and the main action have a question of law or fact in common.” *Kootenai Tribe*
 23 *of Idaho v. United States Forest Service*, 313 F.3d 1094, 1108 (9th Cir. 2002), *abrogated on other*
 24 *grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir 2011). Here Intervenors
 25 seek to participate so they can defend the validity of the 2015 Decision, which is the core issue
 26 raised by the Burleys’ suit.

27 Intervenors also have standing to participate in this lawsuit because they would be injured
 28 by a decision setting aside the 2015 Decision, and upholding the decision would prevent that

1 injury. *See CVMT v. Salazar, supra*, 967 F.Supp.2d at 90-91; *CVMT v. Salazar, supra*, 281 F.R.D.
2 at 46-47. Intervention also will not unduly delay or prejudice the adjudication of the original
3 parties' rights, *see* Rule 24(b)(2), because the proposed intervention is timely for the reasons
4 explained above and proposed Intervenors do not seek to expand the issues beyond those raised in
5 the Burleys' complaint. *See generally Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd*,
6 495 U.S. 82, 110 S.Ct. 1679 (1990).

7 **V. CONCLUSION**

8 Proposed Intervenors ask the Court to grant the motion to intervene as of right or, in the
9 alternative, to allow intervention with the permission of the Court.

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11 Dated: August 8, 2016

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