

## **APPENDIX 2**

FILED

JUL 1 2004

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EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA VALLEY MIWOK TRIBE,  
formerly SHEEP RANCH OF ME-WUK  
INDIANS OF CALIFORNIA

Plaintiff,

NO. CIV. S-02-0912 FCD GGH

v.

UNITED STATES OF AMERICA,  
UNITED STATES DEPARTMENT OF  
THE INTERIOR, GAIL NORTON,  
SECRETARY OF THE INTERIOR,  
NEAL MCCALED, ASSISTANT  
SECRETARY OF THE INTERIOR FOR  
INDIAN AFFAIRS,

Defendants.

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This matter is before the court on motion to intervene  
filed by applicant Yakima Dixie ("applicant"). Plaintiff,  
California Valley Miwok Tribe, (the "Tribe" or "plaintiff")  
opposes applicant's intervention. Defendant, United States of  
America ("defendant"), does not oppose intervention.

1 BACKGROUND<sup>1</sup>

2 The underlying litigation in this matter concerns  
3 plaintiff's status as a federally recognized Indian Tribe.<sup>2</sup> In  
4 1916, pursuant to a federal statute which authorized the purchase  
5 of land for landless California Indians, the Bureau of Indian  
6 Affairs ("BIA") acquired in trust for plaintiff approximately two  
7 acres of land, subsequently referred to as the "Sheep Ranch  
8 Rancheria" (the "Rancheria"). In 1935, the Department of  
9 Interior ("DOI") conferred on plaintiff the status of a federally  
10 recognized tribe.

11 In the 1940's the federal government's policy toward small  
12 tribes changed in favor of terminating tribal status and  
13 transferring lands in fee to tribal members. After termination  
14 of federally-recognized tribal status, tribal members are no  
15 longer entitled to services based on their status as Indians.<sup>3</sup>  
16 Consistent with this policy, BIA contacted the Tribe to discuss  
17 termination of its tribal status and distribution of tribal  
18 lands. At that time, BIA listed Mabel Hodge Dixie as the only  
19 Indian living on the Rancheria. On February 9, 1966, the Tribe  
20 held an election at which Mabel Dixie voted in favor of

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21 <sup>1</sup> Because oral argument will not be of material  
22 assistance, the court orders this matter submitted on the briefs.  
23 See E.D. Cal. L.R. 78-230(h).

24 <sup>2</sup> Background facts regarding the underlying litigation  
25 are drawn primarily from plaintiff's Opposition to Motion to  
26 Intervene ("Opp'n") because applicant does not provide factual  
27 background regarding the litigation in his Motion to Intervene.  
Facts relating to the instant motion are drawn from applicant's  
Motion to Intervene. These facts are provided for background  
purposes only.

28 <sup>3</sup> Of modern significance, only federally recognized  
tribes are eligible to operate gaming facilities under the Indian  
Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.

1 distribution. Subsequently, the deed to the Rancheria was  
2 executed to Mabel Dixie and recorded in Calaveras County on April  
3 26, 1967. Pursuant to the California Rancheria Act, Pub. L. 85-  
4 671, 72 Stat. 619, the issuance of the deed and approval of the  
5 distribution plan terminated the Tribe's status as a Federally  
6 recognized Tribe as well as the trust status of the Rancheria  
7 property, which was then held in fee simple by Mabel Dixie.

8 According to plaintiff, BIA soon realized that termination  
9 of the Rancheria's trust status was a mistake. To rectify its  
10 error, BIA allegedly attempted to reestablish the trust by having  
11 Mabel Dixie execute a quitclaim deed in favor of the United  
12 States. These and subsequent events left uncertain plaintiff's  
13 status as a federally recognized tribe.

14 Through this litigation, plaintiff seeks to obtain a  
15 judicial determination that the Tribe is federally recognized and  
16 an injunction ordering defendant to purchase in trust reservation  
17 lands for the Tribe's benefit. Plaintiff does not seek to have  
18 the Rancheria reacquired as trust property; instead, plaintiff  
19 requests an order directing defendant to "accept in trust, as a  
20 restoration of the Reservation land to the [Tribe] . . . any fee  
21 interests in land in San Joaquin or Calaveras Counties,  
22 California owned by the Band on the date judgment is entered  
23 herein." (First Amended Compl. ("Comp.") at 15.)

24 Applicant, the son of Mabel Dixie, claims that he is the  
25 "hereditary Chief by lineal descent" of the Tribe. (Motion to  
26 Intervene ("Mot.") at 5.) For a period of years, applicant acted  
27 as Chairperson of the Tribe, which, at the time had only one  
28 member. In or about 1996, applicant approved enrollment of

1 Silvia Burley ("Burley") and her daughters as members of the  
2 Tribe. (Mot. at 5) Plaintiff alleges that Burley, as part of a  
3 conspiracy with agents of BIA to usurp his position as  
4 Chairperson, forged his signature on a resignation letter. (Mot.  
5 at 5-6.) BIA now recognizes Burley as Chairperson of the Tribe.  
6 (Mot. at 5.)

7 According to applicant, Burley has used her position as  
8 Chairperson to enrich herself and her family, to his detriment.  
9 (Mot. at 6.) Applicant asserts that he contacted BIA in an  
10 effort to overturn its decision to recognize Burley as  
11 Chairperson and "is now in the process of launching by himself a  
12 formal appeal with BIA." (Mot. at 6.) Applicant seeks to  
13 intervene in the instant matter because "this litigation . . .  
14 may have substantive impact on [applicant's] appellate  
15 proceedings at the BIA. . . and the possession of his ancestral  
16 tribal real estate and large amounts of money that should accrue  
17 to him by right . . . would be impaired if he were not allowed to  
18 participate as Co-plaintiff in this case." (Mot. at 6.)

#### 19 STANDARD

20 Federal Rule of Civil Procedure 24 provides two grounds for  
21 intervention in federal court: intervention as of right and  
22 permissive intervention.<sup>4</sup>

23 Rule 24(a) governs applications for intervention as of  
24 right.<sup>5</sup> In the absence of a statute conferring an unconditional

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25  
26 <sup>4</sup> All further references to the Rules are to the Federal  
Rules of Civil Procedure, unless otherwise noted.

27 <sup>5</sup> Rule 24(a)(2) provides: "Upon timely application anyone  
28 shall be permitted to intervene in an action . . . when the  
applicant claims an interest relating to the property or  
transaction which is the subject of the action and the applicant

1 right to intervene, the applicant must demonstrate that: (1) the  
2 application is timely; (2) the applicant has an interest in the  
3 subject matter of the litigation; (3) absent intervention,  
4 applicant's interest will be impaired; and (4) the existing  
5 parties inadequately represent the applicant's interests. League  
6 of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302  
7 (9th Cir. 1997). The focus of the court's inquiry should be the  
8 effect on the applicant, not on other parties to the litigation.  
9 See 6 William Moore's Federal Practice 3d Ed. § 24.03(1)(c)  
10 (2003).

11 Applicants also may seek permissive intervention under Rule  
12 24(b), which provides:

13 "Upon timely application, anyone may be  
14 permitted to intervene in an action . . . when  
15 an applicant's claim or defense and the main  
16 action have a question of law or fact in common.  
17 . . . In exercising its discretion, the court shall  
18 consider whether the intervention will unduly  
19 delay or prejudice the adjudication of the  
20 rights of the original parties."

21 Unlike intervention as of right, permissive intervention focuses  
22 on possible prejudice to the original parties to the litigation,  
23 not the intervenor. See Moore's Federal Practice 3d Ed. §  
24 24.10(1) (2003).

25 In reviewing a motion to intervene, the court generally  
26 should accept as true the allegations and evidence submitted by  
27 the applicant. Southwest Center for Biological Diversity v.  
28 Berg, 268 F.3d 810, 819-820 (9th Cir. 2001).

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is so situated that the disposition of the action may as a  
practical matter impair or impede the applicant's ability to  
protect that interest, unless the applicant's interest is  
adequately represented by existing parties."

1 ANALYSIS

2 I. Intervention as of Right

3 Plaintiff first asserts that he should be permitted to  
4 intervene as of right under Federal Rule of Civil Procedure  
5 24(a).

6 A. Timeliness

7 Timeliness is "the threshold requirement" for intervention  
8 as of right. United States v. Oregon, 913 F.2d 576, 588 (9th  
9 Cir. 1990). If the court finds "that the motion to intervene was  
10 not timely, [it] need not reach any of the remaining elements of  
11 Rule 24." Wilson, 131 F.3d at 1302 quoting United States v.  
12 Washington, 86 F.3d 1499, 1503 (9th Cir. 1996). In determining  
13 whether a motion is timely, the court considers: (1) the stage of  
14 the proceedings; (2) the prejudice to other parties; and (3) the  
15 reason for and length of the delay. United States ex rel.  
16 McGough v. Covington Techs., 967 F.2d 1391, 1394 (9th Cir. 1992).  
17 "[A]ny substantial delay weighs heavily against intervention."  
18 Wilson, 131 F.3d at 1302. (citations omitted).

19 Here, the action was filed on April 20, 2002, but remains in  
20 its early stages. Parties have twice stipulated to amend the  
21 court's scheduling order and postpone deadlines. Discovery is  
22 not completed, and no dispositive motions have been filed. There  
23 is no evidence that intervention by applicant will prejudice  
24 either existing party. Moreover, applicant submits that he was  
25 not aware of the proceedings and filed the motion to intervene  
26 "as soon as [he] discovered the existence of this litigation."<sup>6</sup>

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28 <sup>6</sup> Plaintiff disputes this assertion, but does not provide  
any basis for its position. (Opp'n at 8.)

1 (Mot. at 4.) Accordingly, the court finds that applicant's  
2 motion to intervene was timely filed.

3 **2. Interest in the Subject Matter**

4 In addition to filing a timely motion, applicant must show  
5 that he has an interest in the subject matter of the litigation.  
6 Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir.  
7 1983). Plaintiff does not dispute that applicant has an interest  
8 in the subject matter of this litigation. (Opp'n at 8.) He is a  
9 member of the California Valley Miwok Tribe (the "Tribe"), and as  
10 such, has an interest in whether the Tribe obtains the relief  
11 requested in the instant litigation, specifically federal  
12 recognition and Tribal trust lands.

13 **3. Impairment of Applicant's Interest**

14 Applicant next must demonstrate that, absent intervention,  
15 his interests in the litigation will be impaired. Id. Applicant  
16 asserts that "the proceeding of this litigation . . . may have  
17 substantive impact on [applicant's] appellate proceedings at the  
18 [Bureau of Indian Affairs]," and that "possession of his  
19 ancestral tribal real estate and large amounts of money that  
20 should accrue to him by right . . . would be impaired if he were  
21 not allowed to participate as co-plaintiff." (Mot. at 6.)  
22 Applicant's assertions are based entirely on the erroneous  
23 assumption that this litigation will resolve or somehow impact  
24 applicant's ongoing dispute with Burley over leadership of the  
25 tribe.<sup>7</sup> First, these proceedings will not impact applicant's

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26  
27 <sup>7</sup> Applicant asserts that he "is not asking the court to  
28 make any judgment or determination about who is the rightful  
Chairperson of the plaintiff, and he is not asking the court to  
substitute him for Sylvia Burley. Rather he is asking the court

(continued...)

1 appeal to BIA regarding Tribal leadership.<sup>8</sup> That administrative  
2 appeal will proceed independently, and applicant may appeal any  
3 adverse decision to the district court when his administrative  
4 remedies are exhausted. The outcome of this trial has no bearing  
5 whatsoever on whether Burley or applicant is recognized by BIA as  
6 the Tribe's representative.

7 Second, applicant's alleged entitlement to Tribal real  
8 estate will not be impaired by this litigation.<sup>9</sup> The "historic  
9 Tribal lands" were transferred in fee simple to applicant's  
10 mother, Mabel Dixie, on April 11, 1967. That land is no longer  
11 owned by, or held in trust for, the Tribe, and therefore will not  
12 be impaired by this litigation.<sup>10</sup> As to the issues actually  
13 being litigated in the instant case, plaintiff's interests are  
14 identical to plaintiff here, namely obtaining a declaratory  
15

16  
17 <sup>7</sup>(...continued)  
18 to allow him to participate as co-plaintiff." (Mot. at 3.)  
19 However, the interests applicant alleges will be impaired both  
20 turn on whether he is rightful Chairperson, not on the issues  
21 raised in this litigation - whether the Tribe is federally  
22 recognized and whether defendant should be ordered to place lands  
23 in trust for the Tribe.

24  
25 <sup>8</sup> The status of applicant's BIA appeal is not clear from  
26 the pleadings.

27  
28 <sup>9</sup> Applicant also alleges an entitlement to "large amounts  
of money that should accrue to him by right." (Mot. at 6.)  
Because applicant does not identify the source of these funds,  
the court cannot determine whether the applicant's alleged  
interest will be impaired. To the extent that applicant refers  
to funds that will accrue to the Tribe and its members upon a  
judicial determination that the Tribe is federally recognized,  
applicant's interests parallel those of the Tribe and will be  
adequately represented by the Tribe in this litigation.

29  
30 <sup>10</sup> The Rancheria appears to be part of the estate of Mabel  
Dixie, which remains in probate. (Opp'n at 6-7.) Presumably,  
applicant's interest in the Rancheria land will be determined by  
the probate court.

1 judgment that the Tribe is federally recognized and an injunction  
2 ordering defendant to place in trust lands for the benefit of the  
3 Tribe. Because his interests in the actual subject matter of  
4 this litigation are completely consonant with those of plaintiff,  
5 applicant's interests will not be impaired absent intervention.  
6 Accordingly, applicant is not entitled to intervene as of right.

7 **B. Permissive Intervention**

8 Applicant may also seek permissive intervention. In order  
9 to intervene permissively, applicant first must identify a common  
10 question of law or fact with the original matter.<sup>11</sup> Fed. R. Civ.  
11 P. 24(b). Here, applicant alleges that his interest in the  
12 Rancheria will be affected by this litigation. Specifically,  
13 applicant asserts that "the entire litigation appears centered  
14 around bifurcating me and my Tribe from its [sic] ancestral  
15 land." (Applicant's Answer to Plaintiff's Opposition to Motion  
16 To Intervene ("Reply") at 4.) However, as noted above, ownership  
17 of the Rancheria is not before the court. The Tribe no longer  
18 has a legal interest in that property, and is not seeking through  
19 this litigation to obtain any such interest. (Opp'n at 9.)  
20 Despite his protestations to the contrary, it appears that  
21 applicant's real motivation for intervention is to import into  
22 this litigation his claim that Sylvia Burley illegally usurped  
23 his position as Tribal Chairperson.<sup>12</sup> This does not raise a

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25 <sup>11</sup> Timeliness also is a prerequisite for permissive  
26 intervention. The court has found applicant's motion timely.  
27 See Section IA, above.

28 <sup>12</sup> Applicant asserts as his first "claim" that plaintiff  
"does not have full and proper standing without his  
participation." (Mot. at 2.) This is nothing more than a

(continued...)


1 common question with the plaintiff's claims in this case:  
2 declaratory relief that plaintiff is a federally recognized tribe  
3 and an injunction ordering defendant to accept in trust  
4 reservation lands for the benefit of the Tribe. Accordingly,  
5 plaintiff has not satisfied the requirements for permissive  
6 intervention.

7 **CONCLUSION**

8 For the reasons stated above, applicant's motion to  
9 intervene is DENIED.

10 IT IS SO ORDERED.

11 DATED: December 20, 2004.

12   
13 FRANK C. DAMRELL, JR.  
14 United States District Judge  
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27  
28 <sup>12</sup>(...continued)  
restatement of applicant's argument that he, and not Sylvia  
Burley, is the rightful representative of the Tribe.

daw

United States District Court  
for the  
Eastern District of California  
January 21, 2004

\* \* CERTIFICATE OF SERVICE \* \*

2:02-cv-00912

CA Valley Miwok

v.

USA

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 21, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: 

United States District Court  
for the  
Eastern District of California  
January 26, 2004

\* \* CERTIFICATE OF RE-SERVICE \* \*

2:02-cv-00912

CA Valley Miwok

v.

USA

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 26, 2004, I RE-SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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by: Deputy Clerk