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, and, CALIFORNIA VALLEY MIWOK TRIBE Defendant-Intervenor	**Case No. 1:11-CV-00160-BJR** **Hon. Barbara Jacobs Rothstein**

INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF THE TRIBE'S MOTION TO EXPEDITE CONSIDERATION OF ITS MOTION TO DISMISS

I. INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully submits the following reply in support of its Motion to Expedite Consideration of the Tribe's Motion to Dismiss ("Motion to Expedite"). Through the numerous red herrings and misstatements of law and fact included in Plaintiffs' Opposition to the Motion to Expedite, filed on July 19, 2013 ("Opposition"), Plaintiffs demonstrate precisely why they lack standing to initiate this action in the first instance. The Tribe previously enjoyed a decade-long government-to-government relationship with the United States. It has lost the benefits of that relationship and eagerly anticipates the day when that relationship may resume. Plaintiffs, in contrast, have lost nothing as they ***have never*** – by the United States or any other entity – been recognized as being members in or otherwise having any interests in the Tribe. Thus, Plaintiffs remain unharmed by the delay in resumption of the Tribe's government-to-government relations with the United States while the Tribe suffers more harm with each passing day. Indeed, the reasons for granting expedited relief pursuant to 28 U.S.C. § 1657(a), are even more compelling than they were when the Court granted the Tribe's request for expedited relief in March 2012, in relation to its Motion to Intervene (Dkt. No. 52).

Since they have never been recognized as being Tribal members, the examples of "harm" experienced by the non-member Plaintiffs are both wholly irrelevant for purposes of the instant Motion, and completely unrelated to the impact of the final agency action issued by the Department of Interior on August 31, 2011 ("August 2011 Decision"). The August 2011 Decision did nothing to strip Plaintiffs of the rights and privileges associated with Tribal membership, as Plaintiffs never once enjoyed such benefits and a government-to-government relationship with the United States in the first instance.

Unable to demonstrate that the Tribe does not plainly meet the requirements of 28 U.S.C. § 1657(a), (as the Tribe clearly does), Plaintiffs instead use their Opposition as an opportunity to demean and disparage the legitimate Tribe and its members. Plaintiffs resort to mischaracterized facts, improper and irrelevant exhibits[1], and ultimately a shameful reliance on baseless accusations that have nothing to do with the instant Motion to Expedite. Plaintiffs' efforts to distract this Court through such conduct illustrate the frailty of their very legitimacy. It is unclear how Plaintiffs' "evidence" is even remotely relevant to the instant Motion to Expedite. What is clear, however, is Plaintiffs' effort to give an appearance of legitimacy to their "tribe" through their thinly veiled attempt to distract this Court off course, the non-member Plaintiffs conveniently (and tellingly) fail to include the fact that neither the Tribe nor the United States have ***ever once recognized the "hundreds" of the Plaintiffs "members."***[2]

Expedited consideration of the Tribe's Motion to Dismiss alone and prompt resolution of the instant action is both necessary and appropriate for three distinct and compelling reasons, all of which remain despite Plaintiffs' Opposition: (1) good cause exists pursuant to 28 U.S.C. § 1657(a), because the federal government is unable to fulfill its trust obligations to the Tribe while this action remains unresolved; (2) the legitimate Tribe and its members continue to experience debilitating and irreparable harm due to the disruption of the government to government relationship with the United States and cessation of rights guaranteed to Indian tribes and codified pursuant to Title 25 of the United States Code; and (3) as a matter of basic procedure, federal courts, as courts of limited jurisdiction, are ***necessarily required*** to resolve issues of

[1] For example, Plaintiffs' Opposition includes and relies upon a purported "Constitution," which was conveniently "voted upon" after the filing of the Tribe's Motion to Expedite. (Opposition, p.1). Plaintiffs also rely upon a July 11, 2013 letter to the Assistant-Secretary-Indian Affairs, Kevin Washburn, (not coincidentally, also ***after*** the filing of this Motion to Expedite) notifying the Department of Interior of the "vote" on the non-Tribal members' "Constitution." (Opposition, 1-2; Exhibit N, Affidavit of Robert J. Uram ("Uram Affidavit")).

[2] With the exception of Yakima Dixie, who is an undisputed Tribal member.

jurisdiction prior to reaching the merits of a claim. Thus, for the reasons detailed below, the Tribe respectfully requests that the Court grant its Motion to Expedite so that the parties can move forward toward a swift resolution of this case.

II. ARGUMENT

Plaintiffs assert that the Tribe fails to meet the requirements of 28 U.S.C. § 1657(a) under a standard set forth by the United States Court of International Trade, because (1) the Tribe "has no authority" to seek benefits guarantees pursuant to federal statute and (2) "financial problems do not constitute extraordinarily hardship." (Opposition 4-5). First, 28 U.S.C. § 1657(a) plainly defines what is required for a showing of good cause, a standard which the Intervenor-Defendant clearly meets; therefore, it is not necessary or appropriate to follow a standard set forth by a tribunal for international disputes. As set forth in the Motion to Expedite, a showing of good cause may be made under 28 U.S.C. § 1657(a), "if a right under the Constitution of the United States or a Federal Statute…would be maintained in a factual context that indicates that a request for expedited consideration has merit." Nevertheless, even utilizing the standard used by Plaintiffs, the Tribe is still able to demonstrate good cause for the reasons set forth below.

A. The Tribe Has Demonstrated Good Cause Under 28 U.S.C. § 1657(a) On Multiple Independent Basis Where Only One is Necessary For Expedition.

1. Resumption of a Nearly Decade-Long Government to Government Relationship Is At Stake.

Plaintiffs claim the Tribe is unable to demonstrate good cause vis-à-vis the disruption of government-to-government relations with the United States and the cessation of the codified federal trust obligations owed to it because the Tribe "cannot rely on the [August 2011 Decision] to establish that it has a right to the Tribe's federal benefits." (Opposition, p.4). Plaintiffs' contentions have no basis in fact, and actually ignore some of the most significant facts. In summary, the Tribe has not – in its Motion to Expedite, or otherwise – relied upon the

indisputable findings of either the August 2011 Decision or the previously-issued December 2010 final agency action as a basis for its ability to maintain a government to government relationship with the United States and enjoy the federal statutory benefits of that relationship related thereto.

Unlike Plaintiffs, who, regardless of their purported size and composition, have ***never once*** enjoyed the benefits of tribal membership and a government to government relationship with the United States, the Tribe and its members, as recognized citizens of the Tribe, maintained a government-to-government relationship with the United States and realized statutory-mandated federal benefits through this relationship, ***for almost a decade before the August 2011 Decision was even issued*** and long before the Plaintiffs' "tribe" ever came to be. (*See* Declaration of Silvia Burley in Support of Motion to Expedite, hereinafter "Burley Dec."). Following the United States' acknowledgement of the Tribe's five (5) members and its form of government in ***September 1998***, the Tribe commenced its government-to-government relationship with the United States and began receiving federal grant monies ***in 1999*** under the Indian Self-Determination and Education Assistant Act (ISDEAA) (25 U.S.C. §450, *et seq.*) (Burley Dec; Exhibit D, Declaration of Robert Rosette in Support of Motion to Dismiss). The long-standing government-to-government relationship between the Tribe and the United States (in addition to fundamental principles of federal law and policy), served as the basis for the United States Department of Interior's ***reaffirmation*** of the Tribe's membership and governing body, in the first instance. To clarify where Plaintiffs have intentionally confused the facts – the August 2011 Decision did not vest upon Tribe and its citizens' ***new*** rights and authorities upon which the Tribe has relied for purposes of this Motion or its claims to entitlement of federal statutory benefits. Instead, as described above, it is the Intervenor-Defendant and the Intervenor-

Defendant alone that has been authorized to receive these federal benefits as the Tribe since 1998. The August 2011 Decision only ***reaffirmed*** that which had long-since been established. Further, it is the stay language contained in the August 2011 Decision, coupled with the delay in this action initiated by the Plaintiffs, that has prolonged ***resumption*** (i.e., not commencement) of the government-to-government relationship and the federal grant monies to which the Intervenor-Defendant has been entitled both long before and after the issuance of the August 2011 Decision. Though Plaintiffs allege that the Tribe has only experienced "financial hardship," the above demonstrates that the Tribe has, in fact, both lost and continues to lose much more through its ongoing lack of recognition as a sovereign nation.

2. The Tribe's Extraordinary Hardship Involves Financial, Emotional, Medical, and Identity Harm.

Plaintiffs' mischaracterization of the requirement of "extraordinary hardship" and the Tribe's inability to demonstrate the same is without merit. First, as stated above, 28 U.S.C. § 1657(a) contains a clear definition of "good cause" within the statute, and nowhere in the statute do the terms "extraordinary hardship" appear. However, even utilizing the "test" set forth in *Ontario Forest Industries Ass'n v. U.S*, 444 F.Supp. 2d 1309, 1319 (CIT. 2006), the Tribe is still able to demonstrate good cause. In detailing the profound harm it has suffered at the cessation of the government-to-government relationship with the United States, above, the Tribe does not solely specify economic harm to support its showing of good cause. Rather, the Tribe's harm entails emotional, mental, medical/physical harm, and, most significantly ***harm to the government-to-government relationship the Tribe previously enjoyed with the United States.*** Surely, this type of harm suffered by a sovereign nation is the most unique and compelling time of "extraordinary harm."

3. There Is a Significant Public Interest In Resolving This Matter.

In addition, the Intervenor-Defendant is able to meet good cause under a separate standard set forth in *Ontario Forest*, "actions where the public interest in enforcement of the statute is particularly strong." *Id.* Congress has repeatedly recognized the significant public interest in fulfilling its special trust obligations to Indian nations. For example, "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. §1601 (1). "The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that…the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people…" 25 U.S.C. § 450(1). There is no instance where the public interest is more compelling and the showing of good cause is more significant than where, ***as here,*** the federal trust obligations owed ***and previously provided*** to an Indian tribe have ***ceased and cannot resume*** until determination of the Tribe's Motion to Dismiss and resolution of the instant action.

B. Plaintiffs' Disparagement of the Tribe and its Long-Ago Federally-Recognized Citizens Is Both Inappropriate and Wholly Irrelevant to the Determination of Whether There Is Good Cause for Expedition of This Matter.[3]

[3] In keeping with Plaintiffs' refusal to address the standard of good cause for the purposes of this Motion to Expedite, Plaintiffs' Opposition contains lengthy discussion of two cases, both of which involve facts and legal issues very similar to those at hand: *Timbisha Shoshone Tribe, et al., v. Salazar, et al*., 678 F.3d 935 (D.C. Cir. 2012) ("*Timbisha – DC*") and *Timbisha Shoshone Tribe, et al. v. United States Department of the Interior, et al.,* No. 2:11-cv-00995, 2013 WL 1451360 (ED CA, April 9, 2013) ("*Timbisha – CA*"). The Timbisha Shoshone Tribe, like this Tribe, has been plagued by internal tribal leadership disputes. Also, like the instant action, former Assistant-Secretary Echo Hawk issued a final agency action which deferred to the tribe and its internal tribal processes for resolution of internal tribal disputes. *See Timbisha – DC* at 937. Plaintiffs attempt to distinguish Timbisha-DC from the instant action by once again pointing to the "stay" language contained in the August 2011 Decision. However, this stay language is irrelevant not only for purposes of the Court's findings in *Timbisha – DC* but also for determining that the Plaintiffs' lack standing in the instant action as argued in the Tribe's Motion to Dismiss. As stated above, the Intervenor-Defendants' rights and benefits associated with the Tribe and the federal government's trust obligations owed related thereto, stand separate and independent from the August 2011 Decision and its ***reaffirmation*** of the Tribe's decade-long governing body and citizenship. Just as the plaintiffs in *Timbisha – DC* lacked standing for reasons independent of the Assistant Secretary's final agency action - reasons strictly

Having ignored the fact that the Tribe had a nearly decade-long government-to-government relationship with the United States, Plaintiffs' next resort to name-calling, disparagement of Tribal citizens and distortion of fact. Such actions are nothing more than a desperate attempt to portray Intervenor-Defendant as illegitimate and undeserving of tribal status.

Plaintiffs make much of the fact that the Tribe has always had a recognized membership of five (5) individuals (*See* Opposition, pp. 1, 3, 5, 7). What they fail to acknowledge, however, is that the federal trust responsibility owed by the United States is equally applied to all federally-recognized tribes, regardless of their size in citizenship.[4] There simply is no basis for Plaintiffs' contention that there is strength in numbers for a group of individuals that simply call themselves a tribe and hold "elections" when convenient for purposes of frivolous litigation against the United States. If that was the case, ***any*** given group of people with the magic number of purported members, could claim to be a tribe with entitlements to federal benefits. More importantly, if Plaintiffs' magic number standard had any basis in reality, a plethora of federally-

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pertaining to the operation of tribal law (the results of a tribal election) – Plaintiffs here lack standing because the Tribe's laws and the Tribe's laws alone govern the mechanisms for enrollment into the Tribe. Plaintiffs here have ***never*** been recognized as members, unlike in *Timbisha – DC* where former tribal council members and undisputed members of the Timbisha tribe were ***still*** found by the Court to lack standing to assert claims on behalf of the tribe.

In *Timbisha Shoshone – CA,* the Court once again ruled against the Kennedy faction and granted the defendant tribal council's motion to dismiss, without leave to amend, for failure to join a necessary and indispensable party under Rule 19, recognizing that the legitimate tribal governing body could not be joined due to sovereign immunity. *See Timbisha – CA* at 12. Indeed, while *Timbisha Shoshone – CA* involved important tribal leadership matters, this case involves issues that lie even closer to the core of the Tribe's sovereignty and very identity – Tribal membership.

[4] By way of example, on one end of the spectrum are the Navajo Nation and the Cherokee Nation, two of the largest Indian tribes in the United States, comprised of almost 300,000 members. (*See* https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf). On the other end is the Augustine Band of Cahuilla Indians, a federally-recognized tribe receiving federal and state benefits, which, for many years was comprised of only ***one tribal member*** and now has a membership of eight. (*See* http://www.augustinetribe.org; http://indiancountrytodaymedianetwork.com/ictarchives/2002/07/30/eight-member-augustine-tribe-opens-casino-87922). Quite simply, the number of members is wholly irrelevant to the legitimacy of a tribe and its government under any standard. Plaintiffs' reliance on this argument only demonstrates the complete absence of support for their position.

recognized Indian tribes comprised of a small number of citizens could easily be displaced by non-tribal individuals who have no ties to the tribe, simply because they were larger in size and claim affiliation. Such a notion is grossly contrary to the fundamental principles of federal Indian law and insulting to the expertise of the Executive Branch and its respect for legitimate Indian nations.

Plaintiffs remaining allegations – that the Tribe and its members somehow misappropriated and misused federal and state benefits for their own personal gain – are untrue and not worthy of a detailed response. Plaintiffs' unfounded allegations skate dangerously on offensive stereotypes of Indian tribes and, if believed, would require that one also accept the (mistaken) conclusion that federal and state governmental monies can be spent with free reign and no oversight whatsoever. In making such allegations, Plaintiffs once again demonstrate their gross ignorance and lack of experience with the rigors and procedural requirements of the government-to-government relations between Indian tribes and the United States. In contrast, Intervenor-Defendant has formally operated as a Tribal government since its membership and governing body was first recognized by the Bureau of Indian Affairs in 1998. Such operation has included the completion of financial audits for tribal accounts for every single year that federal and state monies were received. Indeed, the Tribe received "Mature Status" for its ISDEAA, P.L. 638 monies only after successfully completing three (3) consecutive years of financial audits, as reviewed and approved by the Office of the Inspector General.[5] Therefore,

[5] Moreover, in arguing that Chairperson Burley's corresponding declaration lacks information, Plaintiffs, in their Opposition, attempt to shift the onus on the Intervenor-Defendant (again, inappropriately, in the context of an opposition to a Motion to Expedite), to demonstrate that they are a legitimate Tribe comprised of a legitimate membership. No such burden exists, however, as the Intervenor-Defendant is the only entity and membership that has ever been recognized as the Tribe by the United States and with whom the federal government has ever maintained trust relations. It is the Plaintiffs, rather, that have the burden of proving that they have standing in the instant action when no correspondence in the history of the Tribe's existence – from the United States or otherwise, stayed, reversed, rescinded, or any other status – has ever acknowledged these individuals as having any claims to

good cause for expedition clearly exists based upon the Tribe's properly functioning and well-documented government-to-government relationship with the United States.

C. Basic Rules of Federal Civil Procedure Mandate That Jurisdictional Issues Be Determined Prior to Consideration of Arguments on the Merits

In their Opposition, Plaintiffs' nonsensically argue that this Court cannot determine jurisdictional issues and rule upon the Tribe's Motion to Dismiss "without reaching the merits of Plaintiffs' claim," and also ruling on Plaintiffs' Motion for Summary Judgment. In so arguing, Plaintiffs inexplicably disregard some of the most basic and fundamental rules of federal procedure (Opposition, p.14). It is well-established that "a federal court may not rule on the merits of a case ***without first determining*** that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem Int'l Co. v. Malay Int'l Shipping Corp., 549* U.S. 422, 430-31 (2007) (emphasis added). Indeed, '"[w]ithout jurisdiction the court cannot proceed at all in any case;' ***it may not assume jurisdiction for the purpose of deciding the merits of the case***." *Id* (*quoting Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998) (emphasis added). And, of course, "'[a] motion for summary judgment represents a decision on the merits,' [such that] a court cannot grant a motion for summary judgment until jurisdiction is established." *(Wright v. Foreign Serv. Griev. Bd*., 503 F. Supp. 2d 163, 172 (D.D.C. 2007)(*quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Plaintiffs repeatedly claim that the Tribe's Motion to Dismiss is "inextricably intertwined" with the validity of the August 2011 Decision (Opposition pp. 2, 14). Plaintiffs' claims are without merit. In its Motion to Dismiss, the Tribe raises three distinct compelling grounds for dismissal pursuant to Fed. R. Civ. P. 12(1), 12(b)(6) and 19 – grounds which are

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this Tribe whatsoever. This includes the very final agency action (the August 2011 Decision) from which the instant action and Plaintiffs' grievances stem.

jurisdictional in nature and wholly separate and independent of the merits of the August 2011 Decision (Dkt. No. 58). Indeed, in granting the Tribe's request to intervene in this case, this Court recognized the difference in strategy with regard to the Tribe's raising of jurisdictional defects in Plaintiffs' Amended Complaint with that of the Federal Defendants' strategy to defend the merits of the August 2011 Decision. (Dkt. No. 52, p.14). Therefore, in addition to the fact that the Motion to Dismiss was filed and briefed before Plaintiffs' Motion for Summary Judgment, it goes without saying that this Court is required to consider whether it even has jurisdiction over Plaintiffs' claims, in the first instance, prior to entertaining its arguments on the merits.

III. CONCLUSION

For the reasons set forth above and in the Tribe's Motion to Expedite Consideration of its Motion to Dismiss Plaintiffs' Amended Complaint, the Tribe respectfully requests that this Court expedite resolution of this matter in the procedurally appropriate fashion to allow for the resumption of federal trust obligations owed and previously afforded to the Tribe.

Respectfully submitted this 26th day of July, 2013.

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CERTIFICATE OF SERVICE

I certify that on July 26, 2013, I caused a true and correct copy of the foregoing INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF THE TRIBE'S MOTION TO EXPEDITE ITS MOTION TO DISMISS to be served on the following counsel via electronic filing:

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