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IONE BAND OF MIWOK INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 2:12-cv-01748-TLN-CMK **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PARTIALLY UNOPPOSED MOTION FOR PERMISSIVE INTERVENTION BY THE IONE BAND OF MIWOK INDIANS Fed. R. Civ. P. 24(b)** Date: July 25, 2013 Time: 9:30 a.m. Place: Courtroom No. 2 Hon. Troy L. Nunley

I. INTRODUCTION

This case challenges the existence and nature of the relationship between the United States of America and the Ione Band of Miwok Indians ("Tribe"), the Tribe's right to exercise governmental authority with respect to its Indian lands, and the United States' authority and decision to grant the Tribe's request to take land into trust for the Tribe's benefit. The Tribe's application for intervention is timely, will not unduly prejudice or delay adjudication of the existing parties' rights, and the Tribe's defenses share common factual and legal questions with the main action. Disposition of the instant matter without the Tribe's participation could adversely affect the Tribe's governmental, social and economic interests. *See Sagebrush*

Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983); Declaration of Chairperson Yvonne Miller (hereinafter "Miller Dec.") at ¶¶ 4-6.

Although the rights of the Tribe are directly affected, it has not been named as a party to the action. The Defendants do not oppose this motion for the Tribe's permissive intervention under Federal Rule of Civil Procedure 24(b). In addition to obtaining the Defendants' consent, the Tribe requested Plaintiffs' consent by contacting its counsel of record prior to filing this Motion. Counsel for Plaintiffs stated that they would wait to decide whether to oppose the motion until after it had been filed. *See* Declaration of Frank Lawrence at ¶ 4 and Exhibit 1 thereto.

A similar motion by the Tribe for permissive intervention in the related case of Amador County v. U.S. Department of Interior, 2:12-cv-01710-TLN-CKD, is unopposed by all parties to that case. That unopposed motion to intervene was filed May 24, 2013, docket number 47.

For these reasons, the Tribe respectfully requests that the Court grant its Partially Unopposed Motion for Permissive Intervention.

II. DISCUSSION OF RULE 24(b) FACTORS

Federal Rule of Civil Procedure 24(b) provides for permissive intervention on a timely motion where the moving party's claim or defense and the main action involve a common question of law or fact, and allowing intervention will not unduly delay or prejudice the adjudication of the existing parties' rights. *See* Fed. R. Civ. P. 24(b). In adjudicating intervention motions, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998).

As the following discussion demonstrates, the Tribe's Motion meets the standards for permissive intervention.

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A. The Tribe's Partially Unopposed Motion Is Timely and Intervention Will Not Prejudice Adjudication of the Existing Parties' Rights

In determining timeliness, courts consider a variety of factors, including: the stage of the proceedings; prejudice to the existing parties from the applicant's delay in seeking intervention; the reasons for any delay in moving to intervene; and the length of any delay in moving to intervene. *See, e.g., United States v. Washington*, 86 F.3d 1499, 1502 (9th Cir. 1986). Timeliness is a factor addressed to the Court's sound discretion. *See Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). Timeliness, like the other Rule 24 factors, is to be liberally interpreted in favor of the party seeking intervention. *See Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983). A court must consider all the circumstances relating to timeliness in a particular case. *See United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994).

A party opposing intervention must allege and prove prejudice and delay. *See Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). A court should not assume that those two requirements exist, absent such allegation and proof. *See id.* The relevant question is whether the existing parties will be prejudiced by a delay in moving to intervene, "not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995). Indeed, were it otherwise, intervention would never be allowed because it necessarily adds a party to the case.

This case is in the very earliest stages, which weighs heavily in favor of granting the Tribe leave to intervene. *Cf. State of Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (intervention by class members to appeal an order denying certification of a class is timely as a mater of law if made within the time allowed to appeal a final judgment). This Court entered a protective order on April 30, 2013, Docket Entry 28, paving the way for the Defendants to lodge the Administrative Record, which they did on May 3, 2013. *See* Docket Entry 31.

No discovery has occurred in this case. The parties' Updated Joint Status Report filed on May 3, 2013 does not propose any cut-off dates for discovery, law and motion, pretrial or trial,

and do not suggest any special procedures. *See* Docket Entry 30 at p. 5, lines 1-7. Instead, the parties reported that they would file a further Joint Status Report following the lodging of the Administrative Record. *See id.* at p. 4, lines 14-17. The case is in its infancy as to the merits, with only a First Amended Complaint, the Defendants' Answer, and the Administrative Record having been filed. *See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995) ("[T]he critical inquiry [in adjudicating a motion to intervene] is: what proceedings of substance on the merits have occurred?"). Furthermore, Defendants do not oppose the Tribe's permissive intervention, Plaintiffs have not indicated that they oppose the intervention , and the Tribe has not delayed in seeking leave to intervene.

Given that the Administrative Record was just lodged on May 3, 2013, and nothing substantive has occurred since, the Tribe's intervention will cause no delay. In sum, this Partially Unopposed Motion for Permissive Intervention is timely and the existing parties will not be prejudiced by the Tribe seeking to intervene.

B. The Tribe Has Defenses That Share Common Questions of Law and Fact With the Main Action

Permissive intervention is most commonly granted where the "applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). The existence of a "common question" is to be liberally construed. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002). A significant protectable interest is not required for intervention under Rule 24(b) since all that is necessary is a question of fact or law in common with the main action. *See id.*; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977); *Bureerong v. Uvawas,* 167 F.R.D. 83, 85 (C.D. Cal. 1996).

The Tribe is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 78 Fed. Reg. 26384, 26386 (May 6, 2013); Miller Dec. at ¶ 1. "Federal acknowledgement or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship

between the tribe and the federal government." F. Cohen, *Handbook of Federal Indian Law*, at § 3.02[3] (LexisNexis 2005 ed.). Federal recognition is "a prerequisite to receiving the services provided by the Department of the Interior's Bureau of Indian Affairs (BIA), and establishes tribal status for all federal purposes." H.R. Rep. No. 103-781, 103d Cong., 2d Sess., at 3 (1994). Federal recognition confers legal status that is critical to the Tribe's ability to participate in federal programs, receive federal assistance, have land taken into trust, and otherwise engage in government-to-government relations with the federal government. *See id.*; Miller Dec. at ¶¶ 3, 5. It is also a threshold requirement for the Tribe to engage in certain economic development activities, including the operation of a gaming facility under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. Indeed, the Tribe's ability to sustain itself and its members as a self-sufficient governmental entity depends on its recognition by the federal government. *See* Miller Dec. at ¶¶ 5-6.

The Tribe's status as a federally recognized Indian tribe and as a restored tribe for purposes of 25 U.S.C. § 2719(b)(1)(B)(iii) are at stake in this litigation. *See* Miller Dec. at ¶ 5. The First Amended Complaint attacks the Tribe's status as a federally recognized tribe that has been restored to federal recognition. *See, e.g.*, First Amended Complaint at ¶¶ 3, 55, 84 . It questions the Secretary of Interior's authority to take federal Indian land into trust for the Tribe. *See id.* at ¶¶ 2, 3, 50-70. It also challenges the government's conclusion that the Tribe was restored to federal recognition. *See id.* at ¶ 84. The Tribe's governmental interests, including its existence as a governmental entity that is recognized by the United States and as a restored tribe with restored trust land, will be adversely affected if Plaintiff's requested relief is granted. *See, e.g., id.* at Prayer for Relief, ¶ A (requesting that the Court declare illegal the Department of Interior's determination to take land into trust for the Tribe); *id.* at Prayer for Relief, ¶ G (seeking a declaration reversing the Department's determination that the Tribe is a restored tribe); *id.* at Prayer for Relief, ¶ H (seeking a declaration that the lands are not restored lands for a restored tribe); *id.* at Prayer for Relief, ¶ I (seeking an injunction barring the Department from taking land into trust for the Tribe); *see also* Miller Dec. at ¶¶ 5-6.

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The Tribe is currently without a permanent land base, having no reservation and no land held in trust for its benefit. *See id.* at ¶ 4. Because the Tribe lacks a land base, and thus a sustainable economic base over which to exercise its governmental authority, it has been unable to provide for its members as do virtually all other Indian tribes and governments. *See id.* Without trust land, the Tribe has not had – and will continue to lack – any realistic opportunity for successful economic development and true self-governance. Because "[t]ribal sovereignty contains a significant geographical component," the lack of a reservation or other land held in trust for its benefit also poses a significant limitation on the Tribe's ability to exercise its inherent governmental authority. *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987); *see also New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 335 (1983); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151 (1978); Miller Dec. at ¶¶ 4-6.

Nevertheless, Plaintiffs seek to reverse the federal government's decision to place into trust approximately 228 acres of land for the Tribe's benefit, a decision that is amply supported by the Administrative Record and is of vital importance to the ability of the Tribe to undo years of having been deprived of its historical land and economic base. Through the self-sufficiency that the Tribe can now foresee from the Defendants' decision, it will be able to generate revenue for governmental purposes as Congress intended in IGRA, *see* 25 U.S.C. § 2710(b)(2)(B), including assisting the Tribe and its members in obtaining affordable housing, healthcare, child care, education, job training, and other tribal governmental services. *See* Miller Dec. at ¶ 6. Crucial Tribal interests are thus at stake.

Plaintiffs also challenge a related determination by the Defendants that the land should be properly classified as "restored land" under federal law, acknowledging the correct historical land rights and governmental status of the Tribe. *See, e.g,* First Amended Complaint at ¶ 41. Under 25 U.S.C. § 2719(b)(1)(B)(iii), the Tribe will finally regain its rightful place among the hundreds of other tribes within the country.

The main action in this case involves claims and defenses addressing the Tribe's federal recognition, its existence as a tribal government, and its status as a restored tribe with a right to restored federal Indian lands. *See generally,* First Amended Complaint *passim*; Miller Dec. at

¶¶ 5-6. In short, both the Tribe's rights under federal law and its legally protected economic and governmental interests stand to be irreparably impaired if Plaintiffs' requested relief is granted. *See* Miller Dec. at ¶¶ 5-6. If the Plaintiffs' requested relief is granted, the Tribe's economic and governmental interests will be significantly, and most likely irreparably impaired, as will the interests of its Tribal members. *See id.* This case directly implicates the Tribe's very governmental and economic existence, and therefore its interest in participating in its determination is critical.

For these reasons, the Tribe will present defenses that share common questions of both fact and law with the parties' pleadings. This requirement of Rule 24(b)(2) is satisfied.

C. Additional Consideration

Finally, judicial economy can also be a consideration in deciding a motion for permissive intervention. *See Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989). Given that Plaintiffs' claims go directly to the Tribe's existence as a federally recognized tribal government and as a restored tribe, *inter alia*, judicial economy will be best served by adjudicating those claims with the relevant parties all before this Court. Intervention under Rule 24 allows a court to resolve lawsuits "by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (*quoting Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

Once the conditions for permissive intervention are met, intervention rests with a district court's sound discretion. *See Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

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III. CONCLUSION

For these reasons, the Tribe respectfully requests that the Court grant its Partially Unopposed Motion for Permissive Intervention.

Respectfully submitted,

Dated: June 5, 2013

HOLLAND & KNIGHT LLP

By: */s/ Frank Lawrence*
Jerome L. Levine
Frank R. Lawrence
Zehava Zevit
Timothy Q. Evans

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IONE BAND OF MIWOK INDIANS

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 South Hope Street, 8th Floor Los Angeles, California 90071.

On **June 6, 2013**, I caused the foregoing document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PARTIALLY UNOPPOSED MOTION FOR PERMISSIVE INTERVENTION BY THE IONE BAND OF MIWOK INDIANS** to be served on the interested parties in this action as follows:

(SEE ATTACHED SERVICE LIST)

By Electronic Transfer to the CM/ECF System

In accordance with Federal Rules of Civil Procedure 5(d) (3), Local Rule 5-4, and General Order 07-08, I uploaded via electronic transfer a true and correct copy scanned into an electronic file in Adobe "pdf" format of the above-listed documents to the United States District Court Central District of California's Case Management and Electronic Case Filing (CM/ECF) system on this date. It is my understanding that by transmitting these documents to the CM/ECF system, they will be served on all parties of record according to the preferences chosen by those parties within the CM/ECF system. The transmission was reported as complete and without error.

[X] **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

Executed on **June 6, 2013**, at Los Angeles, California.

Bobbette Mack

No Casino In Plymouth and Citizens Equal Rights Alliance vs. The United States Department of the Interior, et al.
(EDCA Case No. 2:12-cv-01748-TLN-CMK)

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