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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. SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, et al., Defendants.	Case No. 2:12-cv-01748-TLN-CMK **REPLY TO PLAINTIFFS' OPPOSITION TO THE PARTIALLY UNOPPOSED MOTION FOR PERMISSIVE INTERVENTION BY THE IONE BAND OF MIWOK INDIANS** **Fed. R. Civ. P. 24(b)** Date: July 25, 2013 (Hearing Off Ccalendar) Time: 9:30 a.m. Place: Courtroom No. 2 Hon. Troy L. Nunley

I. INTRODUCTION

Plaintiffs challenge the United States' authority and decision to grant the Ione Band of Miwok Indians' ("Tribe") request to take land into trust for the Tribe's benefit, as detailed in the May 24, 2012 Record of Decision (ROD) of the Bureau of Indian Affairs (77 Fed. Reg. 31871-73, May 30, 2012). They also challenge the government's determination that such lands qualify under the Indian Gaming Regulatory Act (IGRA) as restored lands for a tribe restored to federal recognition. In asserting these challenges, Plaintiffs attack the Tribe's status as a federally recognized Tribe both today and in the past, the Tribe's relationship with the United States, and the Tribe's right to exercise governmental authority with respect to its Indian lands.

If Plaintiffs were to prevail on their arguments relating to the Tribe's federal recognition and the government's land determination, the Tribe and all of its members would suffer

irreparable harm. Accordingly, to defend its interests, the Tribe seeks to permissively intervene in this case pursuant to Federal Rule of Civil Procedure 24(b). *See* Tribe's Notice of Partially Unopposed Motion for Permissive Intervention and Memorandum of Points and Authorities in Support thereof (Docket 35 and 35-1) ("Motion").

The Defendants in this case do not oppose the Tribe's Motion. *See* Tribe's Notice of Motion (Docket 35-1) at 1:25-26. A similar Tribal motion for permissive intervention in the related case *County of Amador v. U.S. Department of the Interior, et al.*, 2:12-cv-01710-TLN-CKD, is unopposed by all parties, including Amador County, where the lands are located. (Docket 47, 49 in that case.)

Here, Plaintiffs oppose the Tribe's Motion, but they fail to provide any valid reasons why the motion should be denied. *See* Plaintiffs' Opposition to the Tribe's Partially Unopposed Motion for Permissive Intervention (Docket 39) ("Opp'n").[1] Specifically, Plaintiffs fail to demonstrate that the grounds for permissive intervention are lacking. As explained in the Motion and below, the Tribe's Motion is timely, the Tribe's intervention 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. For the reasons set forth in the Motion and in this Reply, the Tribe respectfully requests that the Court grant its Motion for Permissive Intervention.

II. SUMMARY 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. In adjudicating intervention motions, courts are guided primarily by practical and equitable considerations, and the criteria for intervention are

[1] Plaintiffs' Opposition asks the Court to grant two requests for judicial notice of documents. *See* Opp'n at 2 n. 1 and 3 n. 33. The Tribe opposes these requests and asks that the Court deny them on the grounds that such requests require a statement of the grounds supporting the requests under Fed. R. Evid. 201(b), specific identification and copies of the documents to be noticed, and a clear explanation of the nature of the fact to be noticed, *id.*, all of which are lacking.

broadly interpreted in favor of intervention. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998).

In determining timeliness, courts consider several 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. *U.S. v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1986); *Yniguez v. Arizona*, 939 F.2d 727, 731, 734-35 (9th Cir. 1991). Timeliness, like other Rule 24 factors, is to be liberally interpreted in favor of intervention. *Westlands Water Dist. v. U.S.*, 700 F.2d 561, 563 (9th Cir. 1983). A party opposing intervention must allege and prove prejudice and delay, neither of which a court may assume. *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989). 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." *U.S. v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995).

Permissive intervention requires that the applicant have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). The existence of a "common question" is to be liberally construed. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002). Once the conditions for permissive intervention are met, intervention rests with a district court's discretion. *Id.* at 1109; *Donnelly*, 159 F.3d at 409, 412.

III. REPLIES TO ARGUMENTS IN PLAINTIFFS' OPPOSITION

A. The Tribe's Motion is Timely; Plaintiffs Fail to Prove Undue Delay or Prejudice

1. The Proceedings Are At an Early Stage

Plaintiffs argue that the Tribe's Motion is not timely. First, they claim that "[o]ver the last year, this lawsuit has moved forward through a long and complex process," Opp'n at 5:9, and assert that on this basis the Motion should be denied. But Plaintiffs overstate their case. "[T]he critical inquiry [in adjudicating a motion to intervene] is: what proceedings **of substance** on the merits have occurred?" *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995) (emphasis added). "The mere lapse of time, without more,

is not necessarily a bar to intervention." *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 924 (9th Cir. 2004). In this case, substantively only a First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") and the Defendants' Answer have been filed and the Administrative Record lodged with the Court. Plaintiffs concede that most of the past year was devoted to procedural issues: "It took almost a year for the Federal Defendants to prepare the Administrative Record (AR).... And the finalization of the AR was delayed while the parties in [the related case *County of Amador*, in which the same AR was to be used] litigated a Freedom of Information Act (FOIA) issue. The resolution of the FOIA claim then led to the negotiation of stipulated protective orders in this case and the *Amador County* case . . . [which] . . . had to be finalized before the Federal Defendants would agree to lodge the AR." Opp'n at 5:13-20. All of the foregoing were procedural steps, not actions on the merits of the case, and their resolution delayed the commencement of the case in substance until May 8, 2013, when the AR was lodged. Less than a month later, on June 6, 2013, the Tribe filed its Motion. There was no delay.

In addition, Plaintiffs allege that the parties are just now considering whether dispositive motions or trial are even appropriate for the case. *See* Opp'n at 5:10-11.[2] And Plaintiffs obviously contemplate a further intervening time period for consideration and resolution of issues relating to the AR. *See* Updated Joint Status Report, Docket 38, p. 5:16-18 ("Plaintiffs recommend that the need for discovery cut-off dates and pre-trial and trial scheduling be re-evaluated after the content of [sic] Administrative Record is resolved…") Further, no discovery has occurred in this case. As in prior status reports, the parties' Updated Joint Status Report filed on July 11, 2013, does not propose any cut-off dates for discovery, law and motion, pretrial or trial. *See* Docket 38, p. 3-5.

In short, very little has occurred in this case on the merits and nothing of substance since the AR lodging in May. Therefore, the Tribe's intervention is timely and will cause no delay.

Plaintiffs do not specify, and the Tribe therefore cannot adequately address, the "several

[2] Based on federal Defendants' belief that the APA governs Plaintiffs' challenges to agency decision making and review is on the Administrative Record, the Defendants have stated in all three Joint Status Reports filed in this case that they do not believe a trial is appropriate.

procedural issues" Plaintiffs claim have been resolved over the last year that purportedly would have been negotiated and resolved differently if the Tribe had earlier intervened. *See* Opp'n at 5:21-28. If Plaintiffs are referencing the need for the Tribe to abide by the Stipulation and Protective Order Regarding Specified Documents to be Included in the Administrative Record, Docket 28, the Tribe consents to join and be bound by such Stipulation and Protective Order if it intervenes, as it has consented to do in the related *County of Amador* case. Thus, no undue burden or delay exists in connection with the protective order. Since Plaintiffs have not specifically alleged or proven delay or prejudice with regard to any specific "procedural issues," their opposition on this basis is unfounded. *See Venegas*, 867 F.2d at 530.

2. There is No Prejudice to the Plaintiffs

Plaintiffs make several incomplete, unexplained, and meritless arguments as to why intervention would prejudice the parties. First, they posit that "[t]he Ione Band is not a federal or public agency governed by the APA" and therefore the scope of the AR will have to be revisited. *See* Opp'n at 6:2-3. This argument is nonsensical. The AR in this APA action consists of those documents DOI considered at the time of its decision. The Tribe's inclusion as a defendant in this lawsuit – an event occurring after the ROD became final – can have no bearing on the AR.

Plaintiffs further assert that revisiting the AR will become necessary "if the Ione Band wants to include its federal recognition claims as part of this lawsuit." Opp'n at 6: 3-4; 6:17-19. Plaintiffs have confused themselves. It is the *Plaintiffs themselves* who have claimed – as one of the means for challenging the ROD – that the Tribe is not federally recognized. *See, e.g.,* Amended Complaint, Docket 10, p. 11, ¶ 28, ("The Ione Indians were not a recognized tribe under federal jurisdiction in 1934 and are not a federally recognized tribe now."); p. 12, ¶ 33 ("The Indians at Ione are not currently a federally recognized tribe."); p. 23, ¶ 84 ("The Ione Indians are not a 'restored tribe' for the purpose of IGRA. They were never federally recognized or terminated."). The Tribe will indeed respond to Plaintiffs' claims, as will the other Defendants, but Plaintiffs' assertion that the Tribe's presence in the case will introduce that issue is belied by Plaintiffs' own pleadings. In any event, the AR will not be affected.

Plaintiffs likewise assert that if the Tribe intervenes, the scope of the protective order will

have to be reexamined. Opp'n at 6:4-5. It is unclear what Plaintiffs mean or intend to argue. In any case, the Tribe consents to join and be bound by the Stipulation and Protective Order governing documents in the AR, as it has done in the related *County of Amador* case.

Finally, Plaintiffs claim that if the Tribe intervenes discovery will be "wide open" and resolution of the case will be delayed. Opp'n at 6:15-16. Regardless of intervention, this case is still an APA challenge and as such is based on the AR before a federal agency, not outside discovery. The federal Defendants have asserted that discovery is not appropriate in this case, and Plaintiffs contest that assertion. *See* Joint Status Reports and Opp'n. The Plaintiffs also reserved the right to conduct discovery on what they deem to be their non-APA claims. These are the current contentions of the parties, so the Tribe's intervention will not affect whether or not discovery is appropriate or should be pursued. Plaintiffs have not explained how these matters would be impacted by the Tribe's intervention, as is required to show prejudice from permissive intervention.

3. Reasons for the Delay

Plaintiffs incorrectly claim that the Tribe waited almost a year to intervene and that the reason for this delay is that the Tribe filed its own lawsuit challenging the ROD. First, there was no "delay" in filing the Motion. The initial Complaint in this case was filed on July 2, 2012, but no responsive answer or dispositive motion was ever filed. The Amended Complaint was only filed in October 2012, and the Defendants did not serve an answer until December 10, 2012. The Joint Status Report filed that same day said the Defendants anticipated lodging the AR by March 29, 2013, until which nothing of substance could occur. That date was continued by the parties until the AR was finally lodged on May 8, 2013. The Tribe filed its Motion less than a month later, far in advance of any substantive proceedings.

Second, the timeliness for intervention is not measured based purely on length of time taken to intervene, but rather in relation to what actions of substance on the merits have taken place in the case. *See Mountain Top Condo. Ass'n*, 72 F.3d at 369. In that regard, no delay has occurred.

Finally, the Plaintiffs' assertion that the Tribe "delayed" in filing its Motion because it

was busy filing a different lawsuit is simply wrong. Opp'n at 7:9-10. The Tribe never filed such suit.[3] *See* Declaration of Tribal Chairperson Yvonne Miller in Support of Reply to Opposition to Partially Unopposed Motion for Permissive Intervention by the Ione Band of Miwok Indians ("Miller Reply Dec.") at 2:27 - 3:4. Plaintiffs misleadingly reference a lawsuit filed by a Tribal member in his individual capacity, who claims incorrectly to be the Tribe's "Chief" and who has no authority to act for, or on behalf of, the Tribe. *Compare*, Opp'n at 9:5-8 (alleging "[T]he Ione Band on June 29, 2012 filed a separate lawsuit challenging the ROD in the United States District Court for the District of Columbia. *Villa v. Kenneth Salazar, Secretary of the Interior et al*. Case No. 12-1086 RMC.") *with* Complaint for Declaratory and Injunctive Relief at 2, ¶ 4, *Nicolas Villa, Jr. v. Salazar*, No. 1:12-cv-01086 (D.D.C. filed June 29, 2012) ("Plaintiff Nicolas Villa, Jr., … brings the [sic] action in his individual capacity as one living nearby the Plymouth Tracts which the Department has approved for acquisition in trust and for gaming[.]"); *see also* Miller Reply Dec. at 2:4-19, 2:27-3:4. In sum, the Tribe's Motion is timely and the existing parties will not be prejudiced by the Tribe's intervention. Plaintiffs fail to prove otherwise.

B. The Tribe's Defenses Share Common Questions of Law and Fact with the Main Action

In trying to support their allegation that common questions of law and fact are lacking, Plaintiffs make three separate arguments, all of which must fail. First, Plaintiffs argue the Tribe lacks a sufficient interest. While Plaintiffs concede that the Tribe has a strong interest in the outcome of this case, Opp'n at 8:2, they argue that intervention is improper because the Tribe does not own the land and therefore "lacks the requisite interest in the subject matter of this lawsuit to support its request for intervention[,]" Opp'n at 8:3. To support this argument Plaintiffs cite *Westlands Water Dist. v. U.S.*, 700 F.2d 561 (9th Cir. 1983).

Plaintiffs' argument completely misses its mark. First, for purposes of permissive intervention the strength of the movant's interests in the lawsuit is inapposite. Although the Tribe does have a significant, protectable and material interest in the outcome, a significant protectable interest is not required for intervention under Rule 24(b), only a question of fact or

[3] The notion that the Tribe would file a lawsuit challenging a governmental decision to *grant* the Tribe's own request to take land into trust is absurd on its face.

law in common with the main action. *Kootenai Tribe,* 313 F.3d at 1108-09; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977); *Bureerong v. Uvawas,* 167 F.R.D. 83, 85 (C.D. Cal. 1996). In the case cited by Plaintiffs, *Westlands Water District* the portion of that case dealing with the sufficiency of the movant's interests addressed intervention under Rule 24(a), for which a significant protectable interest is required. Intervention under Rule 24(b) has no such requirement. In addition, Plaintiffs are simply wrong about the Tribal interests implicated in this lawsuit. Plaintiffs claim, among other things, that "[t]he Ione Indians were not a recognized tribe under federal jurisdiction in 1934 and are not a federally recognized tribe now" and that "[t]he Ione Indians are not a 'restored tribe' for the purpose of IGRA." Amended Complaint, Docket 10, ¶¶ 28, 84. Were Plaintiffs to prevail on these arguments, the Tribe would lose substantial rights under federal law because the Tribe's federal recognition is critical to its ability to participate in federal programs, receive federal assistance, and meaningfully function as a government. *See* Miller Dec., Docket 35-2, ¶ 3. Accordingly, the Tribal interests at stake in this litigation are significant.

Further, if Plaintiffs prevail in this lawsuit the government's decision to take the land into trust for the Tribe's benefit would be overturned. It would leave the Tribe without a permanent land base and divest it of its only meaningful opportunity to provide critical services to Tribal members, including healthcare, housing, education, employment and elder and child care. *Id.* at ¶ 4. The Tribe's interest in ensuring that the ROD remains valid is thus substantial.

Plaintiffs' second argument – that the case does not implicate the Tribe's status as a federally recognized Indian Tribe – is contradicted by the Plaintiffs' own pleadings. As explained above, Plaintiffs explicitly claim that the Tribe is not now, nor was it in the past, a federally-recognized Tribe. These claims (and others like them) underlie Plaintiffs' challenge of the ROD and of the restored lands decision, and their causes of action. Thus, the case implicates the Tribe's status as a federally-recognized tribe, and the Tribe has defenses that share common questions of law and fact with the main action.

Plaintiffs' third argument – that the Tribe filed and voluntarily dismissed a separate lawsuit that would have been the proper venue for the Tribe's defenses is simply based on an

erroneous statement. The Tribe did not file any such lawsuit, as explained herein. Given the Tribe's substantial interests in this case and the common questions of law and fact its defenses share with the main action, the Tribe's Motion should be granted.

C. The Tribe is Not Estopped from Intervening in This Case

Plaintiffs claim that the Tribe should be estopped from intervening in this case because it supposedly filed a separate lawsuit challenging the ROD. *See* Opp'n at 9:5-13. But the *Villa* lawsuit was not filed by or on behalf of the Tribe, as stated above. It was filed by and in the name of a single Tribal member, Nicolas Villa, Jr as an individual plaintiff. *See* Complaint for Declaratory and Injunctive Relief at 2 ¶ 4, *Nicolas Villa, Jr. v. Salazar*, No. 1:12-cv-01086 (D.D.C. filed June 29, 2012). The Tribe was not named as a party, nor did it ever participate. And Mr. Villa lacks authority to act for, or otherwise bind, the Tribe. *See* Miller Reply Dec. at 2:4-19, 2:27-3:4. The Tribe cannot be bound by statements made in that action for purposes of judicial estoppel or otherwise. *See New Hampshire v. Maine,* 532 U.S. 742, 749-750 (2001) (the doctrine of judicial estoppel works by "prohibiting **parties** from deliberately changing positions according to the exigencies of the moment," quoting *U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)); *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996) ("Judicial estoppel … precludes a **party** from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.") (emphasis added). Further, the Ninth Circuit courts hold that a court must adopt the position presented for judicial estoppel to apply. *Masayesva for and on Behalf of Hopi Indian Tribe v. Hale,* 118 F.3d 1371, 1382 (9th Cir. 1997); *Milgard Tempering, Inc. v. Selas Corp.,* 902 F.2d 703, 716 (9th Cir.1990). That has not occurred here.

D. The Necessity of the Tribe's Intervention Is Not A Required Element for Consideration of Permissive Intervention

Plaintiffs maintain that Ione's motion for intervention should be denied because it is unnecessary. Opp'n at 9. Necessity is not a consideration in granting a motion for permissive intervention under Rule 24(b). Permissive intervention only requires a timely motion, a common question of law or fact between the moving party's claim or defense and the main action, and no resulting undue delay or prejudice as to the adjudication of the existing parties' rights. Necessity

is beside the point. *See Kootenai Tribe*, 313 F.3d at 1108-09; *Stallworth* 558 F.2d at 265; *Bureerong,* 167 F.R.D. at 85. However, for the record it must be noted that the two paragraphs Plaintiffs devote to arguing about necessity are riddled with errors and unsubstantiated and/or irrelevant legal and factual claims. For example, Plaintiffs cite *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), for the proposition that the Tribe "must rely on the federal government to defend its interests in this process" (Opp'n at 9:23-24) – but *Cherokee Nation* does not in any way relate to federal representation of tribal interests. Plaintiffs claim that "[t]he Ione Band is not an independent, separate entity[.]" But the Supreme Court has repeatedly recognized the contrary. *See, e.g., U.S. v. Mazurie*, 419 U.S. 544, 557 (1975) (finding Indian tribes to possess "attributes of sovereignty over both their members and their territory…; they are a 'separate people' possessing 'the power of regulating their internal and social relations ….' ") (internal citations omitted). Plaintiffs also make unsupported factual allegations regarding federal Defendant Amy Dutschke, based on the declaration of their attorney who has no personal knowledge of purported facts and apparently based his "knowledge" on news stories. Plaintiffs further maintain that because Defendant Dutschke is also a Tribal member, the Tribe's interests are adequately represented. But Defendant Dutschke is sued in her official, not personal, capacity and as such represents the federal government's interests, not her own or the Tribe's. In any event, Ms. Dutschke has been recused from Tribal-related matters *since March 2001*. *See* Federal Defendants' Statement of Non-Opposition to the Tribe's Intervention Motion at 2 n.1. As such, she would have been unable to undertake the actions alleged by Plaintiffs.

IV. CONCLUSION

The Tribe respectfully requests that the Court grant its Partially Unopposed Motion for Permissive Intervention.

Respectfully submitted,

Dated: July 18, 2013

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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 **July 18, 2013**, I caused the foregoing document described as **REPLY TO PLAINTIFFS' OPPOSITION TO THE 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(b)(2)(E) and Local Rule 135, 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/Eastern 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 **July 18, 2013**, at Los Angeles, California.

Samantha Holloway

No Casino In Plymouth and Citizens Equal Rights Alliance vs. Sally Jewell, in her official capacity as Secretary of the U.S. Department of the Interior, et al.
(EDCA Case No. 2:12-cv-01748-TLN-CMK)

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