PADRAIC I. MCCOY
MARK C. TILDEN
Tilden McCoy + Dilweg LLP
2334 Broadway, Suite D
Boulder, CO 80304
Telephone: (303) 323-1922
Fax: (303) 416-8707
Email: pmccoy@tildenmccoy.com
mctilden@tildenmccoy.com
Padraic I. McCoy, U.S. District Court for D.C. Bar application pending
Mark C. Tilden, Admitted to practice before the U.S. District Court for D.C. Bar No. 45005
Attorneys for Buena Vista Rancheria of Me-wuk Indians,
a federally-recognized Indian tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.: 1:05-cv-658 (RWR)
vs.	)	
	)	
KENNETH LEE SALAZAR, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE PARTIALLY OPPOSED MOTION OF THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS FOR LIMITED INTERVENTION TO MOVE FOR DISMISSAL OF THIS ACTION

I. INTRODUCTION

The Buena Vista Rancheria of Me-Wuk Indians of California (the "Tribe") moves the Court to allow its limited intervention for the sole purpose of moving to dismiss the First Amended Complaint for failure to join required parties (the Tribe and the State of California (the "State")) pursuant to Fed. R. Civ. P. 19 ("Rule 19"). The Tribe expressly does not consent to intervention generally or intervention exceeding the limited scope of consideration of the Rule

19 issue. The Tribe meets the requirements for intervention, and will suffer significant prejudice to its interests if the motion is denied. This action has been ongoing for six years but, unfortunately, remains at the initial stages. Faced with the United States' failure to rigorously represent the Tribe's interest in a rapid resolution of the matter, the Tribe requests this Court allow its limited intervention.

Recently, the District Court for the Eastern District of California dismissed a suit involving a citizen group and individuals bringing suit against the United States and State of California (and in the absence of the Tribe) on claims that are substantially similar to claims included in the instant action based on the specially-appearing Tribe's Rule 19 Motion to Dismiss. *Friends of Amador County et al. v. Kenneth Salazar et al.*, No. Civ. 2:10-348 WBS, 2011 WL 4709883 (E.D. Cal. Oct. 4, 2011).

The Tribe respectfully requests this Court grant its motion for limited intervention and Rule 19 motion.

II. FACTUAL BACKGROUND

The factual background is addressed more fully in the Tribe's [proposed] Memorandum of Points and Authorities in Support of Tribe's Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 19. As relevant here, the Tribe is a federally-recognized Indian tribe, listed as such on the government's formal list of Indian tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 50 Fed. Reg. 6055 (Feb. 13, 1985); *Id*. at 75 Fed. Reg. 60,810 (Oct. 1, 2010). The United States terminated the Buena Vista Rancheria and numerous other California tribes under the California Indian Rancheria Act of 1958, but the Tribe's status was expressly restored in 1983 pursuant to a negotiated settlement between a number of Rancheria tribes, including the Tribe, and the United

States entered as a stipulated judgment in the U.S. District Court. *Tillie Hardwick v. United States*, No. C79-1710-SW (D.N.D. Cal. 1983). In 1987, the Buena Vista Rancheria and the Plaintiff here, Amador County (the tax collector, County Assessor and Board of Supervisors), entered into a second Hardwick stipulation (the "1987 Hardwick Stipulation," Attachment A to Docket # 33, Memorandum of Points and Authorities in Support of United States' Motion to Dismiss First Amended Complaint) that ordered the original boundaries of the Buena Vista Rancheria restored and required Amador County and the United States to treat the Rancheria "as any other federally recognized Indian Reservation."

Plaintiff Amador County, California ("Plaintiff") seeks to prevent the Tribe from developing a casino on the Tribe's Indian reservation by attacking the federal government's approval of a contract to which only the Tribe and State of California are parties. The County further seeks to attack the status of the reservation under federal law and its qualification as Indian lands under the Indian Gaming Regulatory Act ("IGRA") despite these issue having been established by the 1987 Hardwick Stipulation and the 2005 NIGC Indian lands determination. *See* NIGC Indian Lands Opinion, June 30, 2005 ("NIGC Opinion"), Attachment B to Docket # 33, Memorandum of Points and Authorities in Support of United States' Motion to Dismiss First Amended Complaint.

This action was dismissed by the Court on January 8, 2009 on the federal defendants' motion to dismiss for failure to state a claim, the Court concluding that the Secretary's decision to take no action on the Amended Compact was committed to agency discretion and therefore unreviewable under the Administrative Procedures Act ("APA"). The D.C. Circuit reversed and remanded, concluding that review of the so-called "no-action approval" is not precluded under the APA. *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

III. THE TRIBE'S LIMITED INTERVENTION IS PERMISSIBLE AND PROPER

As discussed below, (1) federal courts have permitted limited intervenors to bring motions to dismiss under Rule 19 and for other reasons; (2) the factors governing intervention weigh in favor of the Tribe's limited intervention here; (3) this Court possesses the authority and duty to consider Rule 19 matters *sua sponte*; and (4) sovereign immunity requires consideration of this motion.

A. Federal Courts Have Permitted Nonparty Participation as Limited Intervenors[1] for Purposes of Bringing a Motion to Dismiss and for Other Reasons.

In *Vann v. Kempthorne*, 534 F.3d 741, 745 (D.C. Cir. 2008), "[t]he district court [had] granted the Cherokee Nation leave to intervene for the limited purpose of challenging the suit under Federal Rule of Civil Procedure 19. The Cherokee Nation then moved to dismiss on the grounds that although it was a necessary and indispensable party, sovereign immunity barred its joinder." Ruling on the merits, the Circuit Court rejected the district court's holding that sovereign immunity was unavailable to the Nation, concluding instead that without an "express and unequivocal abrogation of tribal sovereign immunity," the Nation could not be joined. *Id*. at 749. As relevant here, the Circuit Court implicitly endorsed the posture of the Nation's

[1] Alternatively, this Court may construe the Tribe's existing motion as a motion for special appearance. *See Friends of Amador County*, 2011 WL 4709883 at *1. *See also MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 382 (2d Cir. 2006) (a court may construe a nonparty's attempt to move under Rule 19 as a motion to intervene under Rule 24); *Sw. Ctr. for Biological Diversity v. Babbitt*, No. Civ-95-2833, 1997 WL 817345 (D. Ariz. Dec. 11, 1997) (unreported) (District Court granted nonparty tribe's Rule 19 motion by "'special and limited appearance'"); *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153 (9th Cir. 1998) (reversing on grounds that tribe's interests were represented by federal and five city defendants, but leaving intact the tribe's special appearance motion); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 519-20 (9th Cir. 1998) (entertaining motions to dismiss of seven absent nonparty states "by special appearance" for failure to join them as required parties under Rule 19; while the substantive motions to dismiss were denied as moot, the use of "special appearance" was permitted by District Court and impliedly upheld by the Ninth Circuit); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, Nos. C-04-3955, C-05-1605, 2009 WL 4258550 (N.D. Cal. Nov. 24, 2009) (nonparty tribe's motion by special appearance to quash subpoenas granted); *United States v. Menominee Tribal Enters.*, No. 07-c-316, 2008 WL 2273285 (E.D. Wis. June 2, 2008) (unreported) (nonparty tribe's motion by special appearance to quash subpoenas granted); *In re Russell*, 293 B.R. 34, 36 n.5 (Bankr. D. Ariz. 2003) (because tribe's appearance limited to a special appearance to contest jurisdiction, no basis to suggest the tribe waived its immunity).

intervention and motion for dismissal. *Id*. at 745. *See also United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1319 (Fed. Cir. 2007) (affirming the district court's grant of Cherokee Nation of Oklahoma's motion to intervene for "sole purpose of filing a motion to dismiss under RCFC 19," but reversing on the merits); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1287 (D. Kan. 2002) (allowing State of Kansas to intervene pursuant to Rule 24(a)(2) for the limited purpose of moving to dismiss the case for failure to join Kansas as an indispensable party and for lack of subject matter jurisdiction); *Miami Tribe of Oklahoma v. Walden*, 206 F.R.D. 238, 239 (S.D. Ill. 2001) (allowing State of Illinois to intervene "for the limited purpose of moving to dismiss the suit for lack of jurisdiction").

A sovereign may seek and obtain limited intervention in litigation for the sole purpose of moving to dismiss the action on Rule 19 grounds, and such action consistently has been held not to effect a waiver of the sovereign's immunity for any other purpose. *Zych v. Wrecked Vessel Believed to be the Lady of Elgin*, 960 F.2d 665, 667-68 (7th Cir. 1992) (allowing State to intervene for limited purpose of moving to dismiss suit of lack of jurisdiction that did not result in a waiver of its immunity); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995, 1000 (W.D. Wis. 2004) *aff'd*, 422 F.3d 490 (7th Cir. 2005) (tribe's limited intervention for purpose of moving to dismiss suit for lack of jurisdiction and failure to join as indispensable party did not result in waiver of the tribe's immunity).

B. Rule 24 Intervention

In determining whether intervention is appropriate, federal courts are guided primarily by "practical and equitable considerations. We generally interpret the requirements broadly in favor of intervention." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "Federal courts

should allow intervention where no one would be hurt and greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (internal quotations omitted).

Federal Rule of Civil Procedure 24(a) governs intervention as of right. In the D.C. Circuit, an applicant's right to intervene depends on: "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant 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; and (4) whether the applicant's interest is adequately represented by existing parties." *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 318 (D.D.C. 2007) (internal quotations omitted).[2] An intervenor applicant must also demonstrate standing. *Id*. These factors are taken in turn below.

1. The Tribe's Rule 24 Request is Timely.

"[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Akiachak Native Cmty. v. U.S. Dept. of Interior*, 584 F. Supp. 2d 1, 5 (D.D.C. 2008) (citing *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). "The critical factor is whether any 'delay in moving for intervention will prejudice the existing parties to the case.'" *Id*. (quoting 7C Charles

[2] Factors 2-4 governing intervention under Fed. R. Civ. P. 24 are substantially similar to the factors governing whether a party is necessary and required under Fed. R. Civ. P. 19. *See MasterCard Int'l Inc.*, 471 F.3d at 390 (Rule 19(a) and Rule 24(a)(2) "are intended to mirror each other"). The Tribe herein addresses the intervention factors, but also directs the Court's attention to the Rule 19 analysis in the Tribe's [proposed] Memorandum of Points and Authorities in Support of Tribe's Motion to Dismiss First Amended Complaint Pursuant to Fed. R. Civ. P. 19, which more comprehensively addresses these factors.

Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1916 (3d ed. 2007)).

Although this action was filed in 2005, this motion is timely, especially considering the litigation's posture. This litigation remains in the early stages. The action was filed in April of 2005, but the First Amended Complaint was filed on March 21, 2008, rendering moot all filings prior to that date. This Court then dismissed the action on January 8, 2009 for failure to state a claim. Amador County appealed the Court's dismissal to the D.C. Circuit, who only recently decided the matter and remanded it to this Court with instructions to "give the district court an opportunity to assess the merits in the first instance." *Amador County*, 640 F.3d at 384 (decided May 6, 2011).[3] On October 7, 2011, the Court issued a minute order requiring a joint status report and proposed schedule on which this case should proceed on remand. Weighed against the significant prejudice to the Tribe that will result if it is not allowed to defend its interests in asserting its sovereign immunity from suit and its sovereign right to govern and develop the Rancheria, the Tribe's intervention at this time—when the litigation has essentially just been restarted and the merits have not yet been addressed—does not prejudice the existing parties. *See Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (allowing tribe's post-judgment intervention); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("This case was filed in 2004, and after initial filings and discussions by the parties, the case was stayed for two years. … The Court has not issued any decisions on the merits of the claim, and no discovery has or will occur in this case, as it is based on the administrative record. … In viewing all of the relevant circumstances of this case, this Court finds that [the] motion is timely.").

[3] Further confirming that the litigation remains in the earliest (procedural) stages, the Circuit Court stated that "Amador County may well be bound by the Hardwick Judgment, in which case it will lose on the merits, but for the purposes of standing, we assume the merits in favor of the plaintiff." *Id.* at 378 (internal quotations omitted).

2. The Tribe claims an interest relating to the property or transaction which is the subject of the action.

Plaintiff seeks to invalidate the State and Tribe's Compact Amendment and, by implication, the 1987 Hardwick Stipulation to which the Tribe, County, and United States have agreed to be bound. The suit also challenges several other of the Tribe's fundamental and legally protected interests, including the Rancheria' status as Indian country pursuant to 18 U.S.C. § 1151, as an Indian reservation under federal law, and as "Indian lands" as IGRA defines that term, in addition to the Tribe's gaming rights, the Tribe's gaming revenues, the Tribe's ability to assert governmental authority over its reservation, and the Tribe's ability to enforce its laws (i.e., the Compact Amendment) there.

The Tribe has an obvious interest in both maintaining its authority over the Rancheria and in defending the validity of its Compact Amendment, to which only it and the State are parties. *See Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("Our conclusion that the NRD has constitutional standing is alone sufficient to establish that the NRD has 'an interest relating to the property or transaction which is the subject of the action'") (quoting Fed. R. Civ. P. 24(a)(2)). *See also Foster v. Gueroy*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("An intervenor's interest is obvious when he asserts a claim to property that is the subject matter of the suit"); *Akiachak Native Cmty.*, 584 F. Supp. 2d at 6 ("A government's loss of sovereignty over land within its jurisdiction is a legally protectable interest.").

Moreover, Indian tribes have a legally protected interest in preserving their sovereign immunity. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent.").

The District Court for the Eastern District of California recently concluded that, in a substantially similar suit, the Tribe has numerous "substantial" and "legally protected" interests that are implicated in an action seeking, among other things, to invalidate the Compact, prevent the Tribe from engaging in class III gaming, and reverse the already-determined "Indian lands" status of its Rancheria. *Friends of Amador County*, 2011 WL 4709883 at *3.

3. The Tribe 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.

Plaintiff's challenge to the Compact Amendment, the 1987 Hardwick Stipulation, and the multiple other fundamental interests in the absence of the Tribe will impair and impede the Tribe's ability to protect its interests. *See Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49, 53 (D.D.C. 1999) ("It is quite true that the parties to a contract generally have been considered indispensable parties to a lawsuit challenging the validity of the contract."); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) ("[t]he interests of the tribes in their compacts are being impaired and, not being parties, the tribes cannot defend those interests."). *See also Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000) ("The practical effect, however, of what she seeks in having the 1974 statute invalidated would be the undoing of the Agreements to the substantial prejudice of the Hopi Tribe."); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974) ("As lessor of the lease agreement entered into with Sangre, the Pueblo will certainly be affected if the lease is cancelled.").

The Tribe also has a legally protected interest in engaging in gaming under IGRA and in otherwise exercising its governmental authority over its reservation, and in being free of State and County jurisdiction. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458-59 (9th

Cir. 1994) (tribe a necessary party because the suit "implicate[d] [its] governing status" over the land and reservation in question).

Plaintiff's action here challenges the validity of the Compact Amendment in the absence of the parties to that agreement and implicates the validity and enforceability of the 1987 Hardwick Stipulation. The Tribe's ability to protect its interests in the validity of the Compact Amendment and the 1987 Hardwick Stipulation and the concomitant benefits and recognition of rights will be impaired or impeded in the absence of the Tribe. The action also seeks to prevent the Tribe's use of its own Rancheria for economic development, which impedes the Tribe's right to engage in class III gaming, and could more fundamentally impair the Tribe's ability to exercise its sovereignty. *See Friends of Amador County*, 2011 WL 4709883 at *3 ("This suit implicates several of the Tribe's legally protected interests that will be impaired or impeded if the suit continues" including the Tribe's "right under federal law to engage in class III gaming," the Tribe's legally protected interest in the compact approval, the Tribe's "substantial interest" in the "already-determined 'Indian lands' status of its Rancheria, its ability to govern that land, its ability to enforce its laws, its status as a federally-recognized Indian tribe, the two stipulated judgments that restored the Tribe and Rancheria, and its sovereign immunity not to have its interests adjudicated without its consent.").

4. The Tribe's interest is not adequately represented by existing parties.

A showing that existing representation is inadequate "is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir.1986). "The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Id*. (citations omitted). "The District of Columbia Circuit has often concluded that

government entities do not adequately represent the interests of aspiring intervenors." *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) (internal quotations omitted).

In *Friends of Amador County*, the court agreed with the Tribe that although the United States has a generic trust responsibility toward Indian tribes, that obligation nowhere includes a general statutory duty to represent the specific interests of an Indian tribe in the context of litigation. *Friends of Amador County*, 2011 WL 4709883 at *3-4. *See also Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264, 1274, 1276-77 (D.Wyo. 2009). In addition, the *Friends of Amador County* court noted that the United States had demonstrated a litigation strategy that diverged from the Tribe's interests because of the United States' apparent interest in promoting judicial review. *Friends of Amador County*, 2011 WL 4709883 at *3-4 (federal defendants' "failure to move this court to dismiss this case and their refusal to take a position on [the] motion [to dismiss] appears to conflict with the Tribe's interest in protecting their tribal status and not having their interests litigated in their absence."). For instance, here, as in *Friends of Amador County*, the United States has failed to raise the Rule 19 argument that the Tribe and the State are necessary and required parties and that the litigation should not proceed in the absence of both (or either) such entities.

Courts have consistently held that where there is a conflict between the United States and a tribe, the United States cannot be seen to be adequately representing that tribe's interests. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1000 *modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) ("In this case, [United States] Defendants have a duty to implement national Native American policy. The Shawnee, on the other hand, have an interest in receiving the funds at issue in this case. The two interests are not necessarily the same."); *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) ("When there is a conflict between the interest of the United

States and the interest of Indians, representation of the Indians by the United States is not adequate."). Additionally, absent the government's ownership or elaborate control of tribal property as imposed by statute, no fiduciary obligation exists on the government's part with respect to that property. *See United States v. Mitchell*, 463 U.S. 206, 224 (1983); *see also Hardin*, 600 F. Supp. 2d at 16 (explaining that the D.C. Circuit allows private companies to intervene on the side of the government "even if some of their interests converge" because the Circuit "has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit.") (collecting cases).

That this litigation is now in its sixth year, and that the merits have not yet been addressed and the case resolved further demonstrates that the United States has inadequately represented the Tribe's interests. The Justice Department pursued the previous stages of the case—before this Court and the D.C. Court of Appeals—with regrettable emphasis on defending the Secretary's no-action alternative. But this strategy has resulted in the abandonment of the Tribe's interests.

5. The Tribe has standing.

The standing analysis requires the applicant intervenor to show injury in fact, a causal connection between the injury and the conduct complained of, and that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992). If this Court grants the relief Plaintiff seeks, the Tribe would suffer the actual and concrete injuries of: (1) losing its ability as a sovereign nation to make its own laws and be ruled by them through the invalidation of the Compact Amendment, an agreement between the Tribe and the State; (2) potentially losing the ability to develop class III gaming and pursue the sovereign right of economic development through the Plaintiff's challenge to the Indian lands status of the

Rancheria. *See Fund for Animals*, 322 F.3d at 733. Plaintiff's proposed relief would directly cause these potential injuries, and these injuries can only be redressed through joinder of the Tribe in order for it to protect its interests.

The Tribe also is within the zone of interests test for prudential standing. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). IGRA contemplates the protection of tribes' interests; indeed, only tribes, states, and the federal government may sue under IGRA.

C. In the Alternative, the Tribe Requests Permissive Intervention.

"On a timely motion, the court may permit anyone to intervene who … has 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). "An applicant for permissive intervention must establish the threshold requirements of: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and, (3) a claim or defense that has a question of law or fact in common with the main action." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 9-10 (D.D.C. 2007) (citing *E.E.O.C. v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C.Cir.1998)).

As explained above, at subsection B(1), this motion is timely. And the requirements for permissive intervention are met because of the Tribe's demonstrated interests in the subject matter of this suit, as explained in subsections B(2)-(4) above.

D. This Court Possesses the Authority and Duty to Consider Rule 19 Matters *Sua Sponte*.

The Supreme Court has announced that a court with proper jurisdiction may "consider *sua sponte* the absence of a required person and dismiss for failure to join." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008). As well, the Ninth Circuit has said that the absence of a necessary party "may be raised by reviewing courts *sua sponte*. The issue can be properly raised at any stage in the proceeding." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928

F.2d 905, 911-12 (9th Cir. 1991) (citations omitted); *see also MasterCard Int'l Inc.*, 471 F.3d at 382-83 ("Because Rule 19 protects the rights of an absentee party, both trial courts and appellate courts may consider this issue sua sponte even if it is not raised by the parties to the action.") (collecting cases).[4] *See also Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1415-16 and n.1 (D.D.C. 1983) (construing defendant's special appearance to contest jurisdiction as "equivalent to a motion to dismiss" and reasoning that "the case is now in a posture requiring the Court to consider, sua sponte, whether it in fact has jurisdiction over the subject matter of this action."). As *Wright & Miller* explain, "[a] number of federal courts have raised the failure to join a party on their own motion." 5C Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, *Federal Practice and Procedure* § 1359 (3d ed. 2011) (citing several cases, including *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) and further explaining that a federal court may also raise the issue via Fed. R. Civ. P. 12(b)(7) ("Rule 12(b)(7)") for failure to join a party under Rule 19 "on its own as a matter of discretion").

Even more, the D.C. Circuit Court has described a court's responsibility to raise Rule 19 as a duty. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1500 n.3 (D.C. Cir. 1995) ("this court has a *duty* to raise sua sponte the issue of whether [an absentee] is an indispensible party") (emphasis added); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 772 n.6 (D.C. Cir. 1986) ("even if no party raised the issue [of Rule 19 indispensability], we have an *independent duty* to raise it sua sponte") (emphasis added). The Tenth Circuit has similarly held. *See, e.g., Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 892-93 (10th Cir. 1989) ("a reviewing court has 'an independent *duty*

[4] Additionally, the language of Rule 19(b) appears to place onus on courts to consider Rule 19 issues *sua sponte*. Rule 19(b) provides that, where a required party cannot be joined, "the court *must* determine, whether in equity and good conscience, the action should proceed among the existing parties or should be dismissed." (Emphasis added).

to raise [the absence of a required party] sua sponte.'") (emphasis added) (collecting cases). Thus, as informed by the Tribe's briefing on the issue, this Court may *sua sponte* consider the Rule 19 (or Rule 12(b)(7)) implications of the absence of the Tribe, the State, and the sixteen other California Indian tribes whose rancherias were restored to federal recognition by way of stipulated judgments similar or substantially similar to the 1987 Hardwick Stipulation challenged in the Plaintiff's First Amended complaint.[5]

E. The Tribe's Intervention in this Matter is Limited to Preserve Its Sovereign Immunity.

The Tribe's request for limited intervention is the result of a fundamentally jurisdictional concern: sovereign immunity. "Federally recognized Indian tribes enjoy sovereign immunity from suit … and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) (citations omitted). "The issue of tribal sovereign immunity is jurisdictional in nature." *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989). In *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 327 F. Supp. 2d at 999-1000, the court rejected the plaintiffs' argument that the tribe waived its sovereign immunity by moving to intervene, and held instead that entities with sovereign immunity "may intervene for a limited purpose such as moving to dismiss the lawsuit for failure to join an

[5] Federal courts, according to *Wright & Kane*, have "an 'inherent power' to control their dockets and the people appearing before them. This power is traced from Article III [of the U.S. Constitution] itself." Charles Allen Wright and Mary Kay Kane, *Federal Practice and Procedure: Federal Practice Deskbook* § 74 (v. 20, 2002). The Tribe's request for limited intervention is well within the Court's inherent equitable power to control the parties before it. *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011) ("Once invoked, the scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies.") (internal quotations omitted). Further, the U.S. Supreme Court has explained that "[i]t has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotations omitted). *See also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) ("equitable powers are an inherent part of the 'judicial power' committed to the federal courts by Article III"). Given this Court's broad, inherent, and equitable powers, it possesses the authority to grant the Tribe's motion for limited intervention here.

indispensable party without waiving their sovereign immunity." *See also Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) ("[T]he Council's failure to appear specially does not waive its sovereign immunity, since sovereign immunity is a jurisdictional defect that may be asserted by the parties at any time or by the court sua sponte."). As explained above, the Tribe consents only to intervention here for purposes of bringing the related motion to dismiss.

F. The Tribe's Sovereign Immunity Requires a Grant of the Tribe's Motion for Limited Intervention and Consideration of its Motion to Dismiss.

Sovereign immunity means not only protection from a suit in which the immune sovereign is named, but also protection from a suit, such as this one, that implicates the immune sovereign's interests but that fails to name it. *See*, *e.g.*, *Shermoen*, 982 F.2d at 1317 ("the absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have their legal duties judicially determined without their consent") (citations omitted). *Friends of Amador County*, 2011 WL 4709883 at *3 (Tribe has "a substantial interest" in "its sovereign immunity not to have its interests adjudicated without its consent").

Finally, the U.S. Supreme Court has announced the following rules with respect to Rule 19 and a government's immunity from suit:

> A case may not proceed when a required-entity sovereign is not amenable to suit. … where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign. … [The] privilege [of sovereign immunity] is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.

Republic of Philippines, 553 U.S. at 867, 868-69. Here, the Tribe again asserts that its sovereign immunity not only protects it against Plaintiff's suit but also weighs heavily in favor of this Court's granting the Tribe's immediate Motion for Limited Intervention.

Respectfully submitted this 4th day of November, 2011.

/s/ PADRAIC I. MCCOY
PADRAIC I. MCCOY
Tilden McCoy + Dilweg LLP
2334 Broadway, Suite D
Boulder, Colorado 80304
(303) 323-1922
pmccoy@tildenmccoy.com
(D.D.C. Bar application pending)

/s/ MARK C. TILDEN
MARK C. TILDEN
Tilden McCoy + Dilweg LLP
2334 Broadway, Suite D
Boulder, Colorado 80304
(303) 323-1922
mctilden@tildenmccoy.com
(D.C. Bar #45005)

Attorneys for Buena Vista Rancheria of Me-Wuk Indians