**No. 13-5245**

**THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BUENA VISTA RANCHERIA OF ME-WUK INDIANS**,
*Movant-Appellant*,

v.

**AMADOR COUNTY, CALIFORNIA,**
*Plaintiff-Appellee*,

**UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,**
*Defendants-Appellees*.

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*On Appeal from the United States District Court for the District of Columbia*
*No. 1:05-CV-00658 Barbara J. Rothstein, United States District Judge*

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Oral Argument Not Yet Scheduled.

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# *APPELLEE AMADOR COUNTY'S OPPOSITION BRIEF*

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties, Intervenors and *Amici*

The parties appearing before the district court in this matter are Plaintiff Amador County, California; Defendants the United States Department of the Interior; Sally Jewell, Secretary of the Interior; Michael D. Olsen, Acting Principal Deputy Assistant Secretary for Indian Affairs; and Kevin Washburn, Assistant Secretary for Indian Affairs. The Buena Vista Rancheria of Me-Wuk Indians is a non-party below, having unsuccessfully moved to intervene for the limited purpose of seeking dismissal for failure to join the Tribe pursuant to Fed. R. Civ. P. 19(b).

The parties to this appeal are Plaintiff-Appellee Amador County, California; Defendants-Appellees the United States Department of the Interior, Secretary of the Interior Sally Jewell, and Assistant Secretary for Indian Affairs Kevin Washburn; and Movant-Appellant Buena Vista Rancheria of Me-Wuk Indians.

### B. Rulings Under Review

Movant-Appellant Buena Vista Rancheria of Me-Wuk Indians seeks review of the June 4, 2013 Memorandum Opinion and Order of the district court entered by United States District Judge Barbara J. Rothstein in case number 05-658. This ruling can be found in the Joint Appendix at pages JA 291-300.

## C. Related Cases

The case on review was previously before this Court in the matter of *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), No. 10-5240, decided May 6, 2011.

Movant-Appellant has identified as a related case an unpublished decision in the matter of *Friends of Amador County v. Salazar*, 2014 U.S. App. LEXIS 1802 (9th Cir. 2014), No. 11-17996, filed January 29, 2014, the ruling of which turned on a legal challenge to the federal recognition of the Buena Vista Rancheria of Me-Wuk Indians, seeking to reverse the Tribe's status as a tribe and terminate related services extended to the Tribe and its members. There is no challenge to the Tribe's federal status in this case. Consequently, Amador County respectfully submits that the *Friends of Amador County* litigation is neither related nor relevant to this case.

## D. Rule 26.1 Corporate Disclosure Statement

Plaintiff-Appellee Amador County, a political subdivision of the State of California, is a body corporate and politic governed by its publicly-elected Board of Supervisors.

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# GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| "Amended Compact" | The Tribal-State Class III Gaming Compact between the Tribe and the State deemed approved and published as approved in the Federal Register Dec. 20, 2004. |
| "BIA" | Bureau of Indian Affairs |
| "County" | County of Amador, California |
| "IGRA" | Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. § 2701, *et seq.* |
| "Interior" | United States Department of the Interior |
| "Tribe" | Buena Vista Rancheria of Me-Wuk Indians |
| "Secretary" | United States Secretary of the Interior |
| "State" | State of California |

## STATEMENT OF ISSUES

1. Whether the district court abused its discretion when it denied the Tribe's motion to intervene for the limited purpose of moving to dismiss for the absence of an indispensable party under Rule 19 due to the Tribe's failure to meet the threshold requirement of Rule 24 that any application for intervention must be timely.

2. Whether the district court abused its discretion in declining to find that the purported "Events of 2011" resulted in a new conflict between the interests of the Tribe and those of the United States such that the Tribe was no longer adequately represented in this litigation.

## STATUTES AND REGULATIONS

All applicable rules are contained in the Brief for Movant-Appellant Buena Vista Rancheria of Me-Wuk Indians.

## STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

### A. Factual Background

The Buena Vista Rancheria of Me-Wuk Indians ("Tribe") is a federally recognized Indian tribe occupying a 67-acre parcel of land known as the Buena Vista Rancheria which is located wholly within Amador County, California ("County"). On December 20, 2004, the United States Secretary of the Interior ("Secretary") approved a site-specific Tribal-State Class III Gaming Compact between the Tribe and the State of California ("State") by consciously declining to issue an approval or disapproval. *Notice of Approved Tribal State Class III Gaming Compact*, 69 Fed. Reg. 76,004 (Dec. 20, 2004) ("Amended Compact").

### B. Procedural Background

On April 1, 2005, the County filed its Complaint for Declaratory and Injunctive Relief against the Secretary; the Acting Principal Deputy, Assistant Secretary of Indian Affairs; and the United States Department of the Interior (together, collectively, the "Secretary"). (Docket from the Case Below (hereinafter "Docket") No. 1, JA 8.) The Complaint sought relief based on a clear allegation: "the Secretary's approval of the Amended Compact was made without regard to the intended gaming lands' failure to qualify as 'Indian lands' under IGRA . . . ." (*See, e.g.,* Compl. at ¶ 35, JA 15.) As relevant here, the County sought the following relief:

A. Declaring that the Secretary's purported approval of the Amended Compact, prior to the Amended Compact's effective date, was void *ab initio*.

B. Declaring that the Secretary cannot approve a tribal-state compact without first determining that the intended gaming activities will be conducted only on "Indian lands" as defined by IGRA.

C. Declaring that the Secretary's approval of the Amended Compact was unlawful, null and void, and of no force or effect.

D. Declaring that the Buena Vista Rancheria is not "Indian land" as defined by IGRA, and that Class III gaming activities cannot be authorized for, or conducted on, the Buena Vista Rancheria.

E. Directing the defendants to revoke and vacate the Secretary's approval of the Amended Compact.

F. Enjoining the defendants from authorizing or sanctioning the conduct of Class III gaming activities on the Buena Vista Rancheria.

G. Awarding plaintiff its costs, attorneys' fees, and all other expenses of this litigation.

H. Awarding plaintiff such other and further relief as the Court deems just and proper.

(Compl. at 11-12, JA 18-19.) Notwithstanding the allegations in the County's Complaint and the requested relief, the Tribe did not then seek to intervene.

On July 22, 2005, the Secretary filed a motion to dismiss the County's initial Complaint. (Docket No. 11.) Following full briefing by the parties with regard to the Secretary's motion, on August 23, 2005, the Tribe filed a Motion for Leave to

File an *Amicus Curiae* Brief. (Docket No. 18, JA 20.) In its motion, the Tribe acknowledged that the County "seeks to have the Secretary's approval revoked, thus rendering the [compact] legally ineffective under the Indian Gaming Regulatory Act . . . ." (*Id.* at 2.) The County opposed the Tribe's motion arguing, *inter alia*, that the Tribe was adequately represented by the United States. (Docket No. 19 at 2, JA 52.) By Minute Order dated March 30, 2006, the district court denied the Tribe's motion.

While the Secretary's Motion to Dismiss remained pending, on March 21, 2008, the County filed its First Amended Complaint for Declaratory and Injunctive Relief (the "Amended Complaint"). (Docket No. 30, JA 57.) The County's Amended Complaint included additional allegations of fact and two additional counts, but the County's substantive allegation remained untouched: "the Secretary's approval of the Amended Compact was made without regard to the intended gaming lands' failure to qualify as 'Indian lands' under IGRA . . . ." (*Id.* at ¶ 64, JA 67.) Moreover, the County's requested relief was *identical* to that requested in the County's initial Complaint. (*Cf* Compl. [Docket No. 1, JA 8] at 11-12 *with* Amended Compl. [Docket No. 30, JA 57] at 16-17.) Again, the Tribe did not at this time seek intervention.

On April 28, 2008, the Secretary filed a motion to dismiss the County's Amended Complaint. (Docket No. 32.) Over the County's opposition, on January

8, 2009, the district court granted the Secretary's motion to dismiss. (Docket No. 44, JA 85.)

On January 23, 2009, the County filed its Motion to Alter/Amend the Judgment. (Docket No. 46.) And on July 12, 2010, the district court issued an opinion and order denying the County's motion. (Docket No. 53, JA 86.)

On July 13 and July 16, 2010, the County filed, respectively, a Notice of Appeal and an Amended Notice of Appeal. (Docket Nos. 54 and 56.) Following full briefing and oral argument, this Court reversed and remanded, and a mandate was issued on June 23, 2011. (Docket No. 58, JA 94.)

At no time while the matter was pending before this Court did the Tribe seek to intervene.

On October 7, 2011, the district court issued a Minute Order requiring the County and the Secretary to confer, and file a Joint Status Report by November 7, 2011. On November 4, 2011 − three days before the filing of that Joint Status Report and 2,408 days after the filing of the County's Complaint − the Tribe filed its Motion to Intervene for the Limited Purpose of Moving to Dismiss. (Docket No. 59, JA 95.)

On November 7, 2011, the County and Secretary filed their Joint Status Report stating that, with the exception of the Tribe's belated motion to intervene, "this case is otherwise ready for oral argument and decision on the merits because

it has been fully briefed on the Federal Defendants' dispositive motion and no further briefing is either due or necessary." (Docket No. 60, JA 180-81.)

On June 4, 2013, following full briefing by the parties, the district court denied the Tribe's motion to intervene, deeming it untimely "[b]ecause the Tribe was aware of its asserted impairment-of-interests as early as [April] 2005." (Docket No. 65, JA 291-300.)

On August 2, 2013, the Tribe filed its Notice of Appeal of the district court's June 4, 2013 order denying the Tribe's motion to intervene. (Docket No. 69.)

## SUMMARY OF ARGUMENT

The district court's denial of the Tribe's November 4, 2011 Motion to Intervene for Limited Purpose of Moving to Dismiss due to the Tribe's extraordinary and unexplained untimeliness was no abuse of discretion and should be affirmed. The district court correctly applied the four-factor test for intervention of right, holding that the Tribe failed to meet the threshold factor of timeliness by its unexplained delay of 6 1/2 years before intervening while clearly aware of any alleged risk to its rights.

The district court rejected the Tribe's argument that its motion was timely because of an allegedly newfound awareness of inadequacy of representation of its interests in this litigation by the United States. The district court concluded that

the Tribe's 2006 proposed *amicus* brief − which complained of the inadequacy of representation years before its proposed intervention ? "flatly contradicts" the Tribe's argument that it was unaware of a potential conflict. Nor did, as the Tribe unsuccessfully argued, Amador County's 2008 Amended Complaint "render moot" previous pleadings for the reason that the Amended Complaint was substantively identical to the original Complaint.

The Tribe's purported "Events of 2011," including the existence of a drastically different lawsuit challenging the Tribe's federal recognition, neither altered the adequacy of the representation of the Tribe's interests by the United States in the instant litigation nor placed the Tribe on any new notice of a potential conflict that would save its untimely intervention. The fact is that the Tribe admittedly waited until the tide of this litigation had turned against it, necessitating its effort to intervene despite resulting prejudice to existing parties.

Because timeliness is not only a balancing factor but a threshold question, the district court did not abuse its discretion in declining to fully address the Tribe's remaining concerns, including its "weighty" purpose for intervention: the ostensible denial of judicial review of any Secretarial decision affecting the Tribe.

Furthermore, the Tribe's interests are adequately represented by the United States in this action because both the Tribe's and the United States' interests lie in preserving the Secretary's decision to approve the Tribe's Class III Gaming

Compact by aggressively defending tribal claims that the Buena Vista Rancheria constitutes "Indian Land" as required by IGRA. The United States has zealously defended the Secretary's decision to approve the Compact and continues to do so.

Because the Tribe's motion failed to cross the threshold of timeliness, and because the United States adequately represents the Tribe's interests in this litigation, this Court should affirm the district court's denial of the Tribe's untimely Motion to Intervene.

## STANDARD OF REVIEW

This Court reviews determinations by the district court denying both permissive intervention and intervention as of right for abuse of discretion. *United States v. British Am. Tobacco Austl. Servs.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006); *United States v. ABA*, 118 F.3d 776, 779 (D.C. Cir. 1997). *See also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). This includes review of a district court's determination as to timeliness and adequate representation. *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972). Timeliness is to be determined from all the circumstances by the court in the exercise of its sound discretion; unless that discretion is abused, the lower court's ruling will not be disturbed on review. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Only an opinion relying on an incorrect legal standard or based on a factual finding that

was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record" constitutes an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

Permissive intervention under Rule 24(b) is discretionary by definition. *Hodgson,* 473 F.3d at 126. Reversal of a district court's denial of permissive intervention is a "very rare bird indeed." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d at 1048 (quoting *United States v. Pitney Bowes, Inc.,* 25 F.3d 66, 73 (2d Cir.1994)).

## I. INTRODUCTION

The Buena Vista Rancheria of Me-Wuk Indians is now pressing an appeal of an Opinion and Order rendered by the district court below that was both comprehensive and entirely within its discretion. The Honorable Barbara J. Rothstein literally considered every issue presented in the Tribe's Brief and summarily disposed of each in serial fashion. Because every element of the Tribe's argument was carefully considered by Judge Rothstein and summarily rejected, and because she was wholly within her discretion in doing so, this appeal must, respectfully, fail.

Amador County filed this litigation on April 1, 2005. The Tribe has been fully aware of the Complaint and the carefully-crafted issues presented literally since the day it was filed. Yet, it did not seek to participate through intervention

for more than 78 months! Every case relevant to this matter stands for the proposition that the Tribe's Motion for Intervention is simply not timely. While there is much to say, and this Opposition will cover that field in the pages to follow, the opinion below was clear and concise and every statement therein cited major case law authority of both this Court and the Supreme Court.

Judge Rothstein's findings and ultimate conclusions are as follows:

> For [the foregoing] reasons, the Tribe was in a position to challenge the County's claims at the outset of this litigation in 2005 and could have sought intervention well before now. (JA 299.)
>
> . . . .
>
> The Tribe's motion to intervene therefore is untimely and fails to satisfy the threshold requirement for intervention as of right under Rule 24(a). *See British Am. Tobacco,* 437 F.3d at 1230 ("Courts reach the other elements of Rule 24(a) only after the threshold question of timeliness" has been satisfied.) (JA 299.)
>
> . . . .
>
> Although the Tribe argues in the alternative that it should be permitted to intervene under Rule 24(b)… its failure to file a timely application likewise bars permissive intervention. (JA 299.)
>
> "Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rules 24(a) and Rule 24(b) that the application must be 'timely.'" *See NAACP v. New York,* 413 U.S. 345, 365 (1973). (JA 299-300.)
>
> . . . .

> If, as here, an application is untimely, that is the end of the story. *See id.* (Emphasis supplied.) (JA 300.)

The Tribe cannot ignore the governing case law and cannot show that the district court abused its discretion in deeming the Tribe's motion untimely. And, as Judge Rothstein so succinctly stated, "that is the end of the story!"

## II. ARGUMENT

The Tribe unsuccessfully argued below for both intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). The district court correctly identified the four factors required for intervention of right: (1) timeliness, (2) a cognizable interest, (3) impairment of that interest and (4) lack of adequate representation by existing parties. (Underlying Decision, JA 295.) The district court also confirmed that the three requirements of Article III standing – (1) injury-in-fact, (2) causation and (3) redressability – must be shown by a non-party seeking intervention. *Id*. Applying this analysis, the district court found that the Tribe satisfied the standing requirements, which required the conclusion that the Tribe also satisfied two of the factors: cognizable interest and a potential impairment of that interest. However, the district court correctly held that the Tribe failed to demonstrate that (a) its motion was timely and (b) its interests are not adequately represented by existing parties, and denied the Tribe's motion to intervene. Because the district court did not abuse its discretion in determining

that the Tribe's motion failed to cross the threshold of timeliness and that the Tribe's interests are adequately represented by the United States, this Court should affirm the decision below.

## A. The District Court Appropriately Deemed Untimely Movant-Appellant's Limited Motion To Intervene.

### 1. Plaintiff's April 4, 2005 Complaint Placed The Tribe On Notice Of Any Alleged Risk To Its Rights.

As this Court has repeatedly held, "timeliness is a prerequisite to any claim for intervention under Rule 24 …." *United States v. British Am. Tobacco Austl. Servs.,* 437 F.3d 1235, 1239 (D.C. Cir. 2006) (quoting *Hodgson v. United Mine Workers of Am.,* 473 F.2d 118, 129 (D.C. Cir. 1972)). The point in time at which the Tribe became aware of the potential impact of this litigation is central to a determination of whether its motion is timely. *See Roeder v Islamic Republic of Iran*, 195 F. Supp. 2d 140, 156 (D.D.C. 2002), *aff'd,* 333 F.3d 228 (D.C. Cir. 2003).

The Complaint, filed in April 2005, sought injunctive relief directing the Secretary and Department to revoke approval of the Amended Compact between the State of California and the Tribe. (Comp., JA 18-19.) The County additionally sought declaratory relief affirming, *inter alia,* that "[t]he Secretary's approval of the Amended Compact was unlawful, null and void, and of no force or effect," and

that "[t]he Buena Vista Rancheria is not 'Indian Land' as defined by IGRA …." (Compl., JA 18.)

The Tribe now claims that the Complaint did not adequately provide it with notice that its interests could be adversely affected. However, as the district court found, the record "flatly contradicts the Tribe's argument. (Underlying Decision, JA 291, 298-299.) Specifically, the district court located ample evidence in the record that the Tribe "has known both that its rights would be directly affected and that there was a question as to whether the United States adequately represented the Tribe's interests from the outset of this litigation." (Underlying Decision, JA 297) (emphasis added). As noted by the district court, the Tribe, in its August 25, 2005 motion seeking *amicus* status, argued shortly after the filing of the initial Complaint that "[t]he presence of the United States in this case does not fully protect the Tribe's interests … [because] the United States does not face the same … harm as does the Tribe if [the County] is granted the relief it requests." (*See* Underlying Decision, JA 293; Tribe's Proposed Amicus Br., JA 38.)

In other words, the record plainly shows that the Tribe had notice of the implications of the instant litigation for six-and-one-half years before it first sought to intervene. While the amount of time that has elapsed since the litigation began is not itself the ultimate determinative, a district court's denial of intervention has repeatedly been upheld as within the court's discretion where the moving party

failed to offer a meaningful reason for the elapsed time. *See League of United Am. Citizens v. Wilson,* 131 F.3d 1297, 1304 (9th Cir. 1997) ("[T]he real fly in [applicant's] intervention ointment is the third timeliness factor: the length of and the reason for its delay. … Even more damaging … than the twenty-seven month delay itself, however, is [the applicant's] failure to adequately explain … the *reason* for its delay."); *Donovan v. United Steelworkers of Am.,* 721 F.2d 126, 127 (3d Cir. 1983) (affirming denial of intervention where district court "found that appellant offered no meaningful justification" for a thirteen month delay). Stated differently, an applicant's failure to adequately explain its delay, regardless of other factors, is a proper basis for a district court to deny intervention. *See Arrow v Gambler's Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995) (affirming denial of intervention where Yankton Sioux tribe sought to intervene after "monitoring" the suit for two years without explanation, and stating that "[e]ven if the Tribe's proposed intervention would not have subjected the existing parties to the added expenses of reopening settlement negotiations and preparing for trial, we cannot say that the district court … abused its discretion, in denying the motion.") (emphasis added).

The Tribe has offered no explanation for its delay of approximately 78 months. The district court correctly recognized that, as shown by its *amicus* motion, "[t]he Tribe was in a position to challenge the County's claims at the outset

of this litigation in 2005 and could have sought intervention well before now." (Underlying Decision, JA 299. ) Because the Tribe "could and should have moved for intervention several years ago," "neither the Court nor the existing parties 'should be hindered by [the Tribe's] delay,'" and the district court's determination should be upheld as within its discretion. (*See* Underlying Decision, JA 298 (citing *British Am. Tobacco,* 437 F.3d at 1239)).

**2. The Allegations Of Plaintiff's March 21, 2008 First Amended Complaint Were Substantively Identical To The Original Complaint And The Relief Sought Therein Was Identical Verbatim To The Relief Sought In the Original Complaint.**

The Tribe states that the County's filing of its First Amended Complaint in 2008 "render[ed] moot all filings prior to that date." (Tribe's Opening Br. at 39-40.) The filing of the Amended Complaint, however, does not excuse the Tribe's delay—instead, it only serves to crystallize the fact that the Tribe has no valid explanation for waiting until 2011 to finally seek intervention. Apart from adding additional factual details supporting the lack of the Rancheria's "Indian lands" status, the County's Amended Complaint simply reiterated its assertion that the Rancheria did not constitute "Indian lands" and reiterated its request that the Secretary's approval of the Amended Compact be revoked. In short, the relief requested by the County in 2005 (in the initial Complaint) was verbatim the same as the relief requested by the County in 2008 (in the Amended Complaint).

The Tribe acknowledges that "timeliness is to be judged in consideration of all the circumstances …." (*See* Tribe's Opening Br. at 20-21 (quoting *British Am. Tobacco,* 437 F.3d at 1238)). But the "circumstances" of this litigation necessarily include the history from its inception in April 2005. *See Citizens Against Casino Gambling in Erie Cnty v. Hogen,* 704 F. Supp. 2d 269, 281-82 (W.D.N.Y. 2010) (denying intervention to Indian Tribe based on delay of only three and one-half years in view of Tribe's knowledge of two separate existing actions in which the same issues had been raised regarding qualification of parcels as "Indian land" under IGRA in which Tribe had also failed to seek intervention). While a delay of three years without explanation should in any case be adequate support for denial, the relevant "circumstances" here do not begin with a review of the First Amended Complaint. *Id.* The issues and relief sought in that pleading were unchanged from those in the original Complaint.

In sum, the Tribe cannot deny that it had knowledge of the potential adverse impact on its rights for more than half of a decade before it finally sought to intervene. Its inexplicable delay thus renders its motion untimely, and the district court did not abuse its discretion in so concluding.

**3. The Purported "Events Of 2011" Presented No Changed Circumstances; The Tribe Has Been Aware Of All Relevant "Circumstances" Since The April 2005 Complaint Was Filed.**

The Tribe's "Events of 2011" are a thinly veiled attempt to shift the operative date of a timely intervention from the April 1, 2005 Complaint to the June 29, 2011 remand. The "Events" ostensibly include (a) this Court's reversal and remand to the district court, (b) a newfound awareness that the United States did not represent the Tribe's interests as allegedly "demonstrated" by statements of United States counsel in unrelated litigation, and (c) the failure of the United States to move for dismissal. (Tribe's Opening Br. at 26-28.)

The Tribe states: "Facially, the matter here could not have become a real concern to the Tribe's interests until the dismissal was reversed and remanded by this Court on June 29, 2011… The Tribe's motion to intervene was filed on November 4, 2011, just before the joint status report; thus, the Tribe's request was filed promptly in relation to the remand." (Tribe's Opening Br. at 27-28.) Amazingly, the Tribe highlights the fact that it sat on its rights for six years, waiting for the matter to be dismissed, appealed, and remanded (via a 3-0 vote by a distinguished panel of this Court) before it moved to intervene because, up to that point, "its interests had been protected [by the United States] because the suit imperiling its jurisdiction and sovereign right to operate gaming on its Rancheria had been dismissed." (*Id.* at 27.) This statement is at war with the Tribe's current position that the United States cannot adequately represent its interests. The Supreme Court has held that a proposed intervenor may not "wait and see if the

trial's outcome leaves intervention desirable with its attendant risk of undoing what the trial court has already done." *Plain v. Murphy Family Farms*, 296 F.3d 975, 980-81 (10th Cir. 2002). The Tribe waited until the tide of this litigation had turned against it and it became advantageous to intervene, regardless of prejudice to the existing parties. This delay does not constitute a "tolling" as the Tribe suggests. (Tribe's Opening Br. at 26.) It documents a conscious, but failed, strategy. The Tribe now wants this Court to ignore what the Tribe affirmatively did, and did not, do.

The Tribe's concern that the United States could have independently moved for dismissal for failure to join the Tribe did not materialize in 2011; rather, the United Stated could have moved to dismiss these claims on that basis in 2005, but elected to seek dismissal on other grounds. Furthermore, regardless of the Tribe's failure to raise the issue in a timely fashion, that concern is meritless as discussed below in Section B.

Finally, the Tribe's concerns purportedly raised by statements of counsel for the United States in the *Friends of Amador County* litigation regarding adequacy of representation are exaggerated and limited to that matter, as also discussed below in Section B.

The Tribe fully briefed these issues below (*See* JA 201-204) and it was no abuse of discretion for the district court to reject the Tribe's arguments and deny the intervention for untimeliness.

**4. The Tribe's Purpose For Seeking Intervention − To File A Motion To Dismiss − Does Not Negate The Untimeliness Of Its Proposed Intervention.**

The district court noted that "the Tribe cites no authority for the proposition that special consideration is warranted where intervention is sought for the purpose of filing a Rule 19 motion." (Underlying Decision, JA 297.) The district court further noted that, while existing parties may raise Rule 19 issues at any time, "there is no indication that non-parties should be afforded similar deference in a timeliness analysis under Rule 24." *Id.*

In its Opening Brief, the Tribe argues that this Court should "especially weigh" the movant's purpose for intervention. The Tribe deceptively and selectively quotes this Court's decision in *United States v. British Am. Tobacco*, stating "First, the timeliness analysis itself (and the cases discussing it) explicitly requires consideration of 'all the circumstances, especially weighing' the purpose for which intervention is sought (and other factors)." (Tribe's Opening Br. at 24) (emphasis in original). The full quote from this Court's opinion in that case reads differently from the Tribe's elided version:

> We have previously stated that timeliness 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.

437 F.3d 1235, 1238 (2006) (emphasis added). Far from giving primacy to the "purpose factor," this Court in *British American Tobacco* emphasized timeliness by presenting it as the first factor for consideration – and, in fact, a threshold question – stating "Courts reach the other elements of Rule 24(a) only after the threshold question of timeliness." 437 F.3d at 1239 (emphasis added). Furthermore, this Court affirmed the district court's denial of intervention in that case, holding that the proposed intervenor knew of the risk to its rights for "as much as a year" before it acted, and declining to review other factors due to the failure of the intervenors to cross the threshold of timeliness. *Id*. In this case, the Tribe was on notice of any risk to its rights when the Complaint was filed on April 11, 2005 – six-and-one-half years prior to its motion to intervene. Shortly after the filing of the County's initial Complaint, the Tribe demonstrated its knowledge of that risk when it raised the issue in its failed 2006 *amicus* brief: a fact that the district court held "flatly contradicts the Tribe's argument that it only recently learned of the supposed conflict of interest." (JA 302.) The district court did not abuse its discretion in denying intervention due to the Tribe's untimeliness and finding that "the Tribe could and should have moved for intervention several years ago." *Id*.

In Judge Rothstein's words, "If, as here, an application is untimely, that is the end of the story." (JA 304.)

### B. Relevant Interests Of Movant-Appellant Are Identical To, And Adequately Represented By, The United States.

The district court's finding that the Tribe's application to intervene was untimely, a threshold consideration, ended its analysis. However, even had the Tribe's application been timely, it should nonetheless have been denied because the Tribe's interests in this matter are adequately represented by the United States. The United States is forcefully defending the Secretary's no-action approval of the Tribal-State Compact, and thus concomitantly defending the precisely identical interest of the Tribe in this matter.

#### 1. The Recent *Friends Of Amador County* Opinion Is Irrelevant To This Matter Due To The Materially Different Scope Of That Litigation.

The Tribe seeks to transplant its success in its Ninth Circuit *Friends of Amador County et. al. v. Salazar* litigation into this matter by asserting that the dismissal of that case mandates a dismissal here. However, *Friends of Amador County* is an entirely different matter in which the Tribe (a) had a far greater interest in the outcome of that case, challenging its very existence as a federally-recognized tribe and (b) did not sit on its rights to intervene for an inexplicable length of time.

As discussed *passim*, the relief requested in the April 1, 2005 Complaint and the March 21, 2008 Amended Complaint is identical. (*See* JA 8; JA 57.) Both filings requested invalidation of the Secretary's approval of the Tribal-State Compact on the basis that the Buena Vista Rancheria is not "Indian Land" as required by IGRA, a determination entrusted to the Secretary's interpretation but subject to judicial review. (*See* JA 18; JA 72.)

In sharp contrast to the County's pleadings, the *Friends of Amador County* pleadings went much further, seeking outright revocation of the federal recognition of the Buena Vista Rancheria as an Indian tribe. Specifically, the February 10, 2010 *Friends of Amador County* Complaint requested the district court to "declare that Defendant Secretary's tribal acknowledgement of the putative tribal entity calling itself the 'Buena Vista Rancheria of Me-Wuk Indians'… was unlawful, and a recognition and acknowledgment or approval obtained by fraud…" *Friends of Amador* Compl. at 48.[1]

[1] The Tribe extensively cites the *Friends of Amador County* litigation in its Brief – to the point of proposing that it is a "Related Case" – and even included materials from that litigation in the Joint Appendix herein. However, the Complaint was not part of the Joint Appendix. In support of the quote above from that Complaint, the County has attached that pleading to this Opposition Brief as "Exhibit 1." In support of this inclusion, the County respectfully submits that the D.C. Circuit can take judicial notice of the pleading, even though it is not part of the record on appeal. To this point, the following discussion is submitted in support of the County's inclusion of that Complaint as an exhibit.

At no time has Amador County requested any judicial relief which would have even impugned, let alone eviscerated, the Tribe's status as a federally-recognized Indian tribe and all attendant rights to federal and state benefits. In determining that the Tribe had an interest in the action sufficient to make it a required party, the *Friends of Amador County* district court reasoned that the Tribe had "a substantial interest in the already-determined 'Indian lands' status of its

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WRIGHT & MILLER, FEDERAL PROC. AND PRAC: Civil 3d §2409 described the basic rule that courts can take judicial notice of lower court records in other cases:

> [Courts may] "take judicial notice of the records of a court inferior to it, and in appropriate circumstances could take notice of the proceedings in other courts, both within and without the federal judicial system."

In *T.V.T. Corp. v. Basiliko*, 257 F.2d 185 (D.C. Cir. 1958), this Court noted that "the files and records of the previous litigation are not in the record on this appeal." *Id.* at 187. However, the Court expressly held that it may "take judicial notice of court records not specifically presented to us by the parties" concerning "files of the District Court in collateral litigation," provided those records are identified by a party. *Id.* (numerous citations omitted). *See also United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases").

Other federal courts of appeals have specifically held that they may take judicial notice of complaints filed in other lower court actions. See *Jacques v. United States R.R. Retirement Bd.*, 736 F.2d 34, 40 (2d Cir. 1984) ("[T]he complaint is a pleading and official court record of an inferior court in our jurisdiction in a case that is related to this one." "Thus, we can take judicial notice of it") (citations omitted); *Travis v. Pennyrile Rural Elec. Co-Operative*, 399 F.2d 726, 729 (6th Cir. 1968) (taking judicial notice of a complaint in a separate district court action).

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." (JA 287) (emphasis added). It is beyond dispute that adjudication of the Tribe's federal status as a recognized Indian tribe without the Tribe's presence would prejudice its interests, and it is not surprising that the Ninth Circuit affirmed the dismissal of the *Friends of Amador County* case. However, the instant case is clearly distinguishable because the Tribe's federal status has been neither placed at issue nor even questioned by inference.

Furthermore, the Tribe's intervention in the *Friends of Amador County* litigation was timely. In that case, the plaintiff filed its complaint on February 10, 2010. The Tribe requested a limited intervention to move for dismissal pursuant to Rule 19 on August 16, 2011. The six years the Tribe deliberated before intervening in this case makes the Tribe's year-and-a-half delay in *Friends of Amador County* expeditious by comparison.

**2. Movant-Appellant's Indispensable Party Argument Effectively Would Preclude APA Review Of Any Secretarial Decision Involving An Indian Tribe, And Thus Eviscerate The Statute.**

The Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, provides a right of review to those aggrieved by decisions of the Secretary of Interior. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved

by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The right to judicial review does not end when an Indian tribe claims an interest in the matter. Even where a court has determined that an absent party is a necessary party pursuant to Rule 19(a), "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b) (emphasis added). The Rule's requirement of an equitable analysis stands in sharp relief to the idea that invocation of tribal interest requires automatic dismissal of every APA complaint, divesting the courts of judicial review of agency action granted by Congress.

Accordingly, this Court has held that an APA action involving the interests of an absent Indian tribe may proceed in its absence. In *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), this Court declined to dismiss an APA action by the Navajo tribe challenging the Secretary of the Interior's allocation of Indian Self-Determination Act contract support funds on the basis that interests of other Indian tribes would be adjudicated in their absence. This Court held that, even if the absent Tribes did have a protected interest in the Secretary's allocation of contract support funds, those Tribes were not indispensable, as this Court found no conflict between the Secretary's interest and the interest of the nonparty Tribes because "the United States would have the Court construe the law in essentially the

same fashion as the Tribes and therefore the United States can adequately represent the Tribes' interests." 87 F.3d at 1351 (citing *Cassidy v. United States,* 875 F. Supp. 1438, 1445 (E.D. Wash. 1994)). Moreover, this Court noted its recent affirmation of the "strong presumption that Congress intends judicial review of administrative action." *Ramah*, 87 F.3d at 1343.

By contrast, the district court for the Eastern District of California's order dismissing the *Friends of Amador County* action determined that the Tribe was indispensable to that action, reasoning that "[a]ny adjudication of the Federal Defendants' review of the Compact or the Tribe's federal status would prejudice the Tribe's interests." (*Friends of Amador Cnty* Mem. and Order at 11, JA 288) (emphasis added). The Ninth Circuit opinion affirming the dismissal of *Friends of Amador County* relied heavily on its own earlier opinion in *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990), which held that other Columbia River Indian tribes were indispensable to an action by an Indian Tribe seeking an increase in its own allocation of salmon. This Court's opinion in *Ramah* noted the Ninth Circuit's necessary party analysis in *Makah,* but then departed from that Court's holding that the Tribes were indispensable to the action. This Court's prior analysis rejects the Ninth Circuit's reflexive dismissal of APA actions involving Indian tribes in favor of preserving the judicial review of agency action granted by Congress in the APA.

### 3. The Tribe's Representation As To Statements Of United States Counsel Regarding Adequacy Of Representation Misrepresents Both The Context And Substance Of Those Statements.

The Tribe states in its brief that "United States counsel in the separate but similar matter of *Friends of Amador County* made statements at the October 12, 2010 hearing first suggesting the United States' conflict of interest in that matter," and "[a]t the September 26, 2011 hearing on that motion, United States counsel once again demonstrated that the United States was no longer adequately representing the Tribe's interests." Tribe's Opening Br.. at 27-28. These statements grossly misstate the United States' position regarding adequacy of representation.

At the October 12, 2010 oral argument on the State's Motion to Dismiss in the *Friends of Amador County* litigation, U.S. Department of Justice Attorney Judith Rabinowitz indicated the importance of preservation of judicial review as a policy interest of the United States, and stated that the United States must balance "the interests in maintaining the integrity of the judicial process and the availability of judicial review of agency decision making against the very strong interests in the integrity of tribal sovereignty, including tribal sovereign immunity from suit." (JA 171.)

The district court in that case cited Attorney Rabinowitz's statements at oral argument in finding that such "balancing presents a conflict of interest with the Tribe and suggests that its legal interests may not adequately be protected [in this

case] if it remains an absent party." *Friends of Amador Cnty* Mem. and Order re: Mot. to Dismiss at 9 (JA 287.)

In fact, Ms. Rabinowitz simply told the district court that the United States did not represent the interests of a Tribe in a separate case, *Kickapoo Tribe of Indians v. Babbitt*, 827 F.Supp. 37 (D.C. Cir. 1993) , in which the Tribe sued the Secretary for failure to approve a Compact, and the Tribe and the Secretary had a direct conflict. Attorney Rabinowitz could not ethically represent both the tribal plaintiff and the federal defendants in that contested litigation.

It is important to note that at no time in the oral argument transcript cited by the Tribe did Ms. Rabinowitz state that she generally does not adequately represent the interests of the Buena Vista Rancheria. (JA 168-163.) To the contrary, when pressed by the Court at subsequent oral argument to admit a position that "you cannot adequately represent the interests of the tribe in this case," she pointedly refused to do so. Instead she replied that "[o]ur position is essentially that we do not have a position." (JA 178.) Furthermore, Ms. Rabinowitz took pains to limit any conflict of interest between the Tribe and the federal government perceived by the Court to the specific claims of that case – precisely the claims that are absent from this litigation – stating "to the extent that claims are presented that call into question the composition of the tribe, the membership of the tribe, I would just

note that I would agree that this is not the right forum for consideration of those issues. There's been no exhaustion of tribal remedies…" (JA 173.)

Amador County in this case does not question the membership or federal acknowledgement of the Tribe. Accordingly, the colloquy between Ms. Rabinowitz and the district court regarding adequacy of representation when tribes are directly challenging Secretarial action or when tribal recognition is at stake is simply irrelevant to this matter. In fact, Attorney Rabinowitz is here aggressively defending the Secretarial actions in favor of the Tribe.

C. **Intervention At This Late Stage Would Disrupt The Litigation.**

Both the County and the Secretary have agreed that "this case is otherwise ready for oral argument and decision on the merits because it has been fully briefed on the Federal Defendants' dispositive motion and no further briefing is either due or necessary." (JA 181.) The County and the federal defendants have both expended substantial time, effort and resources at the expense of their respective taxpayers to seek a decision resolving this question in both the district court and this Court. Reversing the district court's denial of the Tribe's belated application to allow the Tribe to seek intervention to dismiss this case would delay the resolution of this litigation, which is ripe for oral argument and resolution.

## III. CONCLUSION

For the foregoing reasons, and because the district court did not abuse its discretion in denying the Tribe's motion for intervention, the district court order should be affirmed.

Respectfully submitted this 3rd day of March 2014.

s / Dennis J. Whittlesey
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## CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of 14,000 words set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. This brief contains 6,945 words.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 3, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia via the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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