UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CAYUGA NATION, by its Council of Chiefs and Clan Mothers; PAMELA TALLCHIEF; BRENDA BENNETT; SAMUEL GEORGE; WILLIAM JACOBS; AL GEORGE; KARL HILL; MARTIN LAY; and TYLER SENECA, Plaintiffs, v. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs and in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; WELDON "BRUCE" LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; and the BUREAU OF INDIAN AFFAIRS, Defendants, THE CAYUGA NATION COUNCIL, Intervenor-Defendant.	)	Civil Action No. 1:17-cv-01923 (CKK)

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION
OF CAYUGA NATION COUNCIL TO INTERVENE

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Plaintiffs seek to prevent the Cayuga Nation Council ("CN Council") − which was endorsed by more than 60 percent of adult Cayuga citizens as the proper governing body of the Cayuga Nation, in a process in which Plaintiffs participated − from being allowed to participate in this lawsuit, which directly concerns the composition of the governing body of the Cayuga Nation that is recognized by the United States for purposes of sovereign government-to-government relations. Plaintiffs present no valid reason why the Cayuga people's selected Council should be foreclosed from being heard. The motion to intervene should be granted.

ARGUMENT

I. The CN Council Has A Legally Protected Interest In This Action

This case is controlled by *California Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43 (D.D.C. 2012). As that case recognized, a tribal intervenor in an APA challenge to a Bureau of Indian Affairs ("BIA") leadership-recognition decision has legally protected interests in its government-to-government relationship with the BIA, its governmental integrity, and its financial resources, including its ability to be awarded federal funds. *Id.* at 47. Such interests of the CN Council, as selected by Cayuga citizens, and of the Cayuga Nation ("Nation") itself are threatened here. Plaintiffs cite no case denying intervention on similar facts.

If Plaintiffs were right that the agency decisions at issue only concern a narrow contract award for which the funds already have been paid and are no longer being sought by Plaintiffs, then Plaintiffs would have argued themselves out of court. They too would have no interest that remains. But Plaintiffs are wrong regarding the scope and significance of the decisions, for several reasons.

First, although certain funds awarded pursuant to the agency decisions at issue became available and have been drawn down, the Indian Self-Determination Act ("ISDA") contract shows that it is a multi-year contract through September 30, 2018, and additional disbursements could be

made. *See* Section 108 Model Agreement with the Cayuga Nation, Contract No. A17AV00153, Standard Form 26 & Optional Form 336 (4-86) (Exhibit A). The CN Council has an interest in any such disbursements, which plaintiffs presumably contend should be paid to them.

Second, the BIA Decision on its face shows that the agency determined a need to make a leadership recognition decision for at least five reasons beyond the immediate award of the ISDA contract:

- "[T]he Cayuga Nation has submitted a fee to trust application that is now pending before the Assistant Secretary–Indian Affairs."
- "[T]he Cayuga nation is eligible for other federal government programs besides the 638 Community Services program, and several of those have been in limbo pending a governmental recognition decision."
- "[T]he Halftown Council submitted a Liquor Control Ordinance at the same time it submitted a 638 Community Services Program proposal."
- "[A]spects of this dispute have been the subject of litigation in the Second Circuit regarding the right of the Nation to conduct Class II gaming on its territory."
- "[T]here have been some instances of unrest and even violence."

BIA Decision, at 3-4, attached as Ex. A to Complaint, ECF No. 1. All of these matters involve sovereign government-to-government interactions between the Cayuga Nation and the United States, and all of them will affect the concrete interests of the CN Council.

Although the federal government appropriately must allow a tribal nation to determine for itself how it will be governed, the federal government also has an obligation to "recognize" how a tribal nation has done that, even when challenged within the nation. Thus, for example, 28 U.S.C. § 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought

by any Indian tribe or band *with a governing body duly recognized by the Secretary of the Interior*, where the matter in controversy [raises a federal question.]" *Id.* (emphasis added); *see also Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) (ordering BIA to recognize "either the new or old council so as to permit the BIA to deal with a single tribal government"). This provision codifies *in statute* the significant effects of the challenged decision on the concrete interests of the Cayuga Nation and the CN Council.

Third, Plaintiffs' own recently filed motion for a preliminary injunction, filed after Plaintiffs' opposition to the motion to intervene, confirms that there clearly *are* matters beyond the ISDA contract award for which the challenged BIA Decision is having an impact, as the BIA recognized in its decision. In that motion, Plaintiffs themselves contend that the BIA Decision is affecting numerous other matters concerning the Cayuga Nation. Plaintiffs acknowledge that the BIA Decision impacts who has "access to [other sources of] federal and state funding, exclusive control over Nation resources and assets, and exclusive authority to speak for the Cayuga Nation regarding the Nation's government-to-government relationship with the United States." *See* ECF No. 22, Memorandum in Support of Motion for Preliminary Injunction, at 35 (filed Feb. 9, 2018). Ultimately, Plaintiffs contend the BIA Decision impacts who has the very "authority and ability to govern [the] Nation." *Id.*

And indeed, the BIA Decision should have significance beyond the immediate ISDA contract award then at issue. Once the United States has recognized the governing body of an Indian nation, affording due respect for the laws of the Indian nation and the will of its people − as the BIA did here − that recognition will not (and should not) change unless the Indian citizens themselves have changed the composition of the nation's governing body. Other federal and state

authorities often and appropriately look to the BIA's recognition decision as well, given the BIA's responsibility for and experience in dealing with Indian matters.

Thus, the BIA Decision at issue here is significant − just as the decision of the Cayuga people to resolve a longstanding leadership dispute, in a process in which Plaintiffs themselves participated, was significant. And that is why the governing body *chosen* by the Cayuga people has a direct and immediate interest in this case, in which Plaintiffs ultimately challenge that expression of views by the Cayuga people, as supposedly contrary to Plaintiffs' views of Cayuga oral traditions. Whatever the outcome of this case may be, the Cayuga people − speaking through the leaders they selected − certainly have a legally cognizable interest in that outcome. Just as Plaintiffs contend a right to be heard in this case, so too does the Cayuga Nation Council selected by more than 60% of the Cayuga people.

For these reasons, the decision in *California Valley* controls, and decisions about tribal standing to contest discretionary agency funding decisions cited by Plaintiffs are inapposite.

II. Federal Defendants Do Not Adequately Represent The CN Council's Interests

To intervene as of right, the CN Council need only "show[] that representation of [its] interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). This is a "minimal burden." *Forest County Potawatomi v. United States*, 317 F.R.D. 6, 15 (D.D.C. 2016). And it is especially easy to make that showing when the existing parties are governmental entities. *Funds for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003).

The CN Council stands in a fundamentally different position from the Federal Defendants. Two competing governmental bodies claiming authority within the Cayuga Nation came before the agency, each with a direct interest in a recognition decision the federal government was obligated to make. One of those factions was the CN Council, who had been endorsed by more

than 60% of Cayuga citizens, in a process in which Plaintiffs participated. In the decision at issue, the BIA recognized that expression of views by the Cayuga people, as consistent with Cayuga law, represents the Cayuga Nation and its citizens. Having prevailed below, the CN Council now has a "distinct and weighty interest in protecting its governance structure and its entitlement and access to federal grant monies." *California Valley*, 281 F.R.D. at 47.

By contrast, the Federal Defendants seek to defend their decision, but they do not share the CN Council's direct interest. By definition, their interest is to represent the interests of the United States. *See Forest County*, 317 F.R.D. at 15. Indeed, for them to instead advance the Cayuga Nation's direct interest would be to "shirk [their] duty." *Fund for Animals*, 322 F.3d at 737; *see also California Valley*, 281 F.R.D. at 47-48.

That difference can manifest itself in different ways. For instance, given Plaintiffs' failure to seek a stay of the decisions under review, the Federal Defendants have no particular need to care about the pace of this litigation, and Defendants indeed have sought multiple extensions of time. However, the CN Council is attempting to govern in accordance with the will of the Cayuga citizens, including by taking possession of valuable property that is owned by the Nation, but occupied by Plaintiffs. In state court litigation, Plaintiffs have pointed to the instant litigation as a reason not to respect or afford finality to the BIA Decision. As a result, the CN Council has a substantial interest in ensuring the just and prompt resolution of this suit, and it has submitted a motion to dismiss it seeks to file if allowed to intervene. But the broader point is that the CN Council and the United States are distinct sovereigns, and their interests are also distinct. *Cf. California Valley*, 281 F.R.D. at 48 (recognizing that the tribal intervenor's and the federal defendant's different litigation strategies were the product of "the [tribal] intervenor's [different] conceptualization of the action").

There is another way in which the Federal Defendants cannot adequately represent the interests of the CN Council. One of Plaintiffs' fundamental contentions in this lawsuit is that the process through which more than 60% of the Cayuga people endorsed the CN Council as the governing body of the Cayuga Nation was invalid under Cayuga oral traditions. *See, e.g.*, Complaint, ECF No. 1, at ¶ 42. Although both the BIA and the ASIA rejected that contention based on their review of Cayuga law, *see* BIA Decision, at 6-8, 9-11 (attached to Complaint, ECF No. 1, as Exhibit A); ASIA Decision, at 12-14 (attached to Complaint as Exhibit B), the federal government is not in the same position to address Plaintiffs' incorrect assertions of Cayuga law as is the CN Council, which is composed of longstanding leaders of the Cayuga Nation (just as Plaintiffs claim to be).

Plaintiffs' recent motion for injunction further underscores the difference between Proposed Intervenor and the Federal Defendants. Plaintiffs request that this Court immediately obstruct the day-to-day functioning of the Nation. *See* ECF No. 22, Mem. in Support of Mot. for Prelim. Injunction, at 31-33. In defense of their request, Plaintiffs assert that "[t]he Department will not be disadvantaged by the issuance of a preliminary injunction." *Id.* at 38. But the CN Council and the Nation certainly will.

III. In The Alternative, Permissive Intervention Is Also Appropriate In This Case

For the reasons set forth above, the CN Council should be allowed to intervene as of right. However, in the alternative, the Court should exercise its discretion to grant permissive intervention. The CN Council raises questions of law and fact common to the main action. Moreover, the governing body of the Nation as chosen by the Cayuga people themselves, the CN Council, is best positioned to respond to some of Plaintiffs' claims, such as those involving interpretation of the Nation's laws. Finally, the CN Council's presence will not delay this

litigation, as the CN Council does not seek to introduce new claims or request additional discovery. *See Butte County v. Hogen*, No. 08-519, 2208 WL 2410407, at *3 (D.D.C. June 16, 2008).

IV. The CN Council Will Coordinate Efforts With the Federal Defendants

If the CN Council is permitted to intervene, the CN Council will coordinate with the Federal Defendants to the extent possible to avoid repetition. However, as explained above, the CN Council's interests and knowledge of Cayuga law differ from that of the Federal Defendants. Accordingly, the CN Council respectfully submits that it would add unnecessary complexity to this case to require consolidated filings. *See Forest County*, 317 F.R.D. at 15 ("[C]onditions should be tailored to fit the needs of the particular litigation, the parties, and the district court.").

CONCLUSION

For the foregoing reasons, the CN Council respectfully requests that the Court grant its motion to intervene.

Respectfully submitted,

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Date: February 12, 2018