Dennis J. Whittlesey (D.C. Bar No. 053322)
DICKINSON WRIGHT PLLC
1875 Eye Street NW - Suite 1200
Washington, D.C. 20006
Telephone: (202) 659-6928
E-mail: dwhittlesey@dickinsonwright.com
Counsel for Amador County

Scott R. Knapp, Esquire *(Pro Hac Vice)*
DICKINSON WRIGHT PLLC
215 South Washington Square - Suite 200
Lansing, Michigan 48933
Telephone: (517) 487-4762
Email: sknapp@dickinsonwright.com

Counsel for Amador County

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA	)	
	)	No. 1:05-cv-00658 (RWR)
Plaintiff,	)	
vs.	)	
	)	
KENNETH SALAZAR, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE PARTIALLY OPPOSED MOTION OF THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS FOR LIMITED INTERVENTION

Plaintiff Amador County, California (the "County"), by and through its undersigned attorneys, hereby files its Memorandum of Law in Opposition to the Partially Opposed Motion of the Buena Vista Rancheria of Me-Wuk Indians for Limited Intervention.

I. INTRODUCTION

On April 1, 2005 -- *six and a half years ago* -- the County filed suit against, *inter alia*, then-Secretary of the Interior, Gale A. Norton (the "Secretary") challenging the Secretary's approval of an amended gaming compact between the State of California and the Buena Vista Rancheria of Me-Wuk Indians of California (the "Tribe"). During the course of those six and a half years, the County and the Secretary have litigated the issues in this Court; briefed, argued, and received an appellate decision from the D.C. Circuit; and returned to this Court (upon remand) for final decision. Never during those six and a half years -- until November 4, 2011 -- did the Tribe seek to intervene.

Thus, the Tribe cannot show that its motion is timely, a necessary prerequisite to intervention. Moreover, the United States has, for the past six and a half years, adequately represented, and continues to adequately represent the Tribe's interests in this litigation. That fact likewise, and separately, precludes intervention. For these reasons, and as set forth more fully below, this Court must, respectfully, deny the Tribe's motion to intervene.

II. RELEVANT PROCEDURAL HISTORY

On April 1, 2005, the County filed its initial Complaint for Declaratory and Injunctive Relief (the "Complaint") 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 No. 1.) The crux of the initial Complaint was the County's allegation that "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.*, Complaint at ¶ 35.) As relevant here, the County sought, *inter alia*, the following relief:

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. . . .

(Complaint at 11-12.) 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.) 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.) By Minute Order dated March 30, 2006, this 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.) Though the County's Amended Complaint added additional

allegations of fact and two additional counts, the crux of the County's allegations remained: "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.) Moreover, the County's requested relief was *identical* to that requested in the County's initial Complaint. (*Cf* Complaint [Docket No. 1] at 11-12 *with* Amended Complaint [Docket No. 30] 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, this Court granted the Secretary's motion to dismiss. (Docket No. 44.)

On January 23, 2009, the County filed a motion to alter/amend the judgment. (Docket No. 46.) And on July 12, 2010, this Court issued an opinion and order denying the County's motion. (Docket No. 53.)

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 argument in the D.C. Circuit, that Court reversed and remanded, and a mandate issued on June 23, 2011. (Docket No. 58.) At no time while the matter was pending before the D.C. Circuit did the Tribe seek to intervene.

On October 7, 2011, this 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.

III. ARGUMENT

A. Standard For Intervention.

There are four prerequisites to intervention this Court must consider in evaluating a request to intervene:

> (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.

Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 66 (D.D.C. 2004) (citation omitted). In the absence of even one of these four prerequisites, the motion to intervene must be denied. *See Linton by Arnold v. Comm. of Health and Env., State of Tenn,* 973 F.2d 1311, 1317 (6th Cir. 1992) ("[a] proposed intervenor must prove each of the four factors" and "failure to meet one of the criteria will require that the motion to intervene be denied.").

B. This Court Should Deny The Tribe's Motion To Intervene.

1. The Tribe's Motion is Untimely.

In an effort to minimize its extraordinary delay in bringing the instant motion, the Tribe argues that 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." (Tribe's Brief at 7.) As an initial matter, it should be noted that the Tribe cites no authority for its assertion that an amended complaint "renders moot" all prior filings -- because that's simply untrue. But more to the point, the relief requested by the County in 2005 (in the initial Complaint) was *exactly the same* as the relief requested by the County in 2008 (in the Amended Complaint). Thus, while the Tribe asks this Court to deem its motion timely because it's "only three and a half years late," there is

simply no legal basis to ignore the fact that the relief requested by the County -- which allegedly affects important Tribal interests -- has remained unchanged for six and a half years.

Denial of intervention for lack of timeliness is in the discretion of the District Court. *United States v. British Am. Austl. Servs.,* 437 F.3d 1235, 1238 (D.C. Cir. 2006) (citation omitted). 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. *Id.* (citations omitted).

Elapsed time alone may not make a motion for intervention untimely, but elapsed time coupled with the moving party's failure to justify its delay is sufficient to establish untimeliness. *See League of United Am. Citizens v. Wilson,* 131 F.3d 1297, 1304 (9th Cir. 1997) (finding that more than the delay itself, intervention was inappropriate because of "[t]he applicant's] failure to adequately explain ... the *reason* for delay"); *Iowa State Univ. Research Found., Inc. v. Honeywell, Inc.,* 459 F.2d 447, 449 (8th Cir. 1972) (intervention properly denied where motion was untimely because absentee knew of its potential rights long before moving to intervene and provided no valid reason why it did not assert right to intervene at a much earlier time).

When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention. *State of Oklahoma v. Tyson Foods, Inc.,* 619 F.3d 1223, 1232 (10th Cir. 2010) (quoting 7C Charles A. Wright et al., Federal Practice & Procedure § 1916, at 539-40 (3d ed. 2007))." Timeliness is measured from when the prospective intervener 'knew or should have known that any of its rights would be directly affected by the litigation.'" *Roeder v. Islamic Republic of Iran,* 333 F.3d 228, 233 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004). Where an intervener "[can]not

point to some event shortly before it moved to intervene that could explain a sudden effort to intervene," "on this basis alone," a court can "properly find an unjustified delay ... in seeking to intervene." *See Tyson Foods, Inc.*, 619 F.3d at 1235 (upholding the district court's denial of a motion to intervene where the moving party waited until four years after the litigation was initiated and did not justify delay). *See also Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995) (upholding district court's denial of motion to intervene where Yankton Sioux Tribe sought to intervene after "monitoring" the suit for two years, and where no explanation for the delay was offered, stating that "[e]ven if the Tribe's proposed intervention would not have subjected the existing parties to the added expense of reopening settlement negotiations and preparing for trial, we cannot say that the district court improperly weighed the relevant considerations, and thus abused its discretion, in denying the motion.").

Here, the Tribe has cited no recent change of circumstance which justifies its six and a half year delay in seeking to intervene. The Tribe had knowledge of the instant litigation from the outset. Moreover, the Tribe sought, and was denied, *amicus* status in this matter almost six years ago. *See* Minute Order dated March 30, 2006. No change has occurred in the intervening six years with respect to the Tribe's interests in this case or the United States' representation of the Tribe's position such that the Tribe's lengthy delay would be now warranted. "If the [Tribe] wanted to participate in the litigation, it should have moved to intervene when the suit was filed, or shortly thereafter." *See Sokaogon Chippewa Community v. Babbit,* 214 F.3d 941, 948 (7th Cir. 2000).

The Tribe seeks to intervene at a point in the litigation where the 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." (Docket No. 60 at 2). The parties have expended substantial time, effort, and resources in moving this case towards its oral argument and a decision on the merits. It would be unfair to the parties to allow intervention now, when the Tribe could have intervened in this action as early as April 1, 2005, but instead chose to remain on the sidelines for the better part of a decade without explanation.

As the Tribe has offered no explanation for its delay, and intervention would cause prejudice to the parties, it is manifestly within the Court's discretion to find the Tribe's motion untimely, and deny intervention.

2. The Tribe's Interests Are Adequately Protected By The United States.

Assuming, *arguendo*, that the Tribe has timely filed its motion for intervention, the Tribe must also independently establish that its interests are not adequately represented by the Secretary. *See* Fed. R. Civ. P. 24(a)(2); *Envtl. Def.,* 329 F. Supp. 2d at 66 (D.D.C. 2004). In this regard, the Tribe has the burden of overcoming the "preum[ption] of adequate representation" that exists because the Secretary "seeks the same objectives" as the Tribe. *See, e.g., Sierra Club . Leavitt,* 488 F.3d 904, 910 (11th Cir. 2007) (denying the State of Florida intervention in an Administrative Procedure Act case because it failed to establish inadequate representation by the federal agency defendant); *see also* 7C Charles A. Wright et al., Federal Practice & Procedure § 1909, at 393 (3d ed. 2007) ("The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties."). This presumption is "ratcheted upward" because the Secretary is a government body defending its own actions. *Public Service Co. of New Hampshire v. Patch,* 136 F.3d 197, 207 (1st Cir. 1998); *see also State v. Director, U.S. Fish and Wildlife Service*, 262 F.3d 13, 19 (1st

Cir. 2001) (presuming that "the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervener").

Though it concerned a motion to dismiss under Fed. R. Civ. P. 19 for failure to join an indispensible party, *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1118 (E.D. Cal. 2002), is particularly instructive. There, in a case challenging the validity of the then-existent California compacts—including the Buena Vista Tribe's original compact—the district court determined that Indian tribes were not necessary parties because their legal interests were adequately represented by the Secretary. *Id* at 1118. And on appeal, the Ninth Circuit rejected the *amicus*' attempt to raise the same issue that the Tribe seeks to make here:

> In the district court, *amicus curiae California Nations Indiana Gaming Association argued that Plaintiffs' complaint must be dismissed for failure to join California's Indian Tribes as indispensable parties under Federal Rule of Procedure 19. In the absence of exceptional circumstances, which are not present here, we do not address issues raised only in an amicus brief.* ... We note, however, that this case is distinguishable from an earlier challenge to the validity of the gaming compacts entered into by the Governor of Arizona pursuant to IGRA. ... We held there that the State of Arizona could not adequately represent the tribes because their interests were potentially adverse and because the state owed no trust responsibility to Indian Tribes. ... *By contrast, the Secretary is a party to this case. The Secretary's interests are not adverse to the tribes' and the Department of the Interior has the primary responsibility for carrying out the federal government's trust obligation to Indian tribes.*

Artichoke Joe's California *Grand Casino v. Norton,* 353 F.3d 712, 719 n.10 (9th Cir. 2003) (citations omitted) (emphasis added). *See also, e.g., Southwest Center for Biological Diversity v. Babbitt,* 150 F.3d 1152, 1154 (9th Cir. 1998) ("The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe.").

The Ninth Circuit's reasoning should be followed here. If an Indian tribe is not an indispensable party to an action challenging tribal-state compacts on the basis that the Secretary

adequately represents the tribe's interests, the tribe is also adequately represented in an action challenging only the Secretary's approval of an amendment to a tribal-state compact. *See, e.g., Ramah Navajo School Board, Inc., v. Babbit,* 87 F.3d 1338, 1351 (D.C. Cir. 1996 (citation omitted) ("Even if ... the nonparty Tribes *did* have a legally protected interest ... the United States may adequately represent that interest so long as no conflict exists between the United States and the nonparty beneficiary.").

The Tribe has cited no conflict with the Secretary or defect in the Secretary and Tribe's co-alignment of interest in this case, and cannot as both the Secretary and Tribe seek the same result: an upholding of the Secretary's "no-action approval" of the compact amendment permitting the development of a casino. The Tribe's only argument that the Secretary does not represent its interests is "[t]hat this litigation is now in its sixth year, and ... the merits have not been addressed." (Docket No. 59-1 at 12). Nothing in the disposition of either the Tribe or the Secretary has changed in the intervening six years which would now create a conflict of interest, and in fact, the Secretary and the County have stated in their recent joint status report that "this case is otherwise ready for oral argument and decision on the merits." (Docket No. 60 at 2). The Secretary, with an explicit commitment to protecting tribal interests, is already arguing the Tribe's position strongly. If the Secretary prevails, the Tribe's interests as described by the Tribe itself in seeking intervention, will also be vindicated.

The County and Tribe have already argued the issue of whether the Secretary adequately represents the Tribe. (Docket No. 19 at 2). That earlier briefing resulted in this Court *denying* the Tribe's motion to file an *amicus* brief nearly six years ago. *See* Minute Order dated March 30, 2006. Nothing has changed with respect to the Secretary's co-alignment of interests with the Tribe in the intervening time. Given that the Tribe has already been denied *amicus* status in this

case, it would be strange indeed if the Tribe were to be permitted to intervene in the action six years later, especially where the Secretary continues to prosecute this action in keeping with the Tribe's interest.

IV. CONCLUSION

The Complaint of April 1, 2005, articulated the very factual allegations and requested relief which the Tribe now cites as justifying intervention. The late date for intervention is simply not justified. Moreover, there is no foundation for claims that the Secretary is not adequately representing the Tribe's interests. To the contrary, the County's claims have been fully and aggressively opposed by the Secretary in defending the agency action at issue. Tribal intervention in *this case* is neither appropriate nor justified.

For the foregoing reasons, Plaintiff Amador County, California respectfully requests that this Honorable Court deny the Tribe's Motion for Limited Intervention.

Dated: November 18, 2011.

Respectfully submitted,

s/ Dennis J. Whittlesey
Dennis J. Whittlesey (D.C. Bar No. 053322)
DICKINSON WRIGHT PLLC
1875 Eye St. NW - Suite 1200
Washington, D.C. 20006
Telephone: (202) 659-6928
E-mail: dwhittlesey@dickinsonwright.com

Scott R. Knapp, Esquire *(Pro Hac Vice)*
DICKINSON WRIGHT PLLC
215 South Washington Square - Suite 200
Lansing, Michigan 48933
Telephone: (517) 487-4762
Email: sknapp@dickinsonwright.com

Counsel for Amador County

OF COUNSEL:

Gregory Gillott, Esquire
County Counsel
AMADOR COUNTY
810 Court Street
Jackson, California 95642

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