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UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

MESA GRANDE BAND OF MISSION INDIANS, Plaintiff, v. KENNETH L. SALAZAR, Secretary of the United States Department of the Interior, and DOES 1–100, Defendants.	Case No. 08-cv-1544-LAB-NLS **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** Hearing Date: April 20, 2009 Hearing Time: 11:15am The Honorable Larry Alan Burns

Plaintiff bears the burden of establishing this Court's jurisdiction. *See DaimlerChrysler v. Cuno*, 547 U.S. 332, 342 (2006). Despite amending its complaint, Plaintiff has still failed to do so. Plaintiff has still not identified a valid waiver of the United States' sovereign immunity, and, even assuming the United States had consented to suit, Plaintiff's claims are barred by the applicable statute of limitations. Further, the Santa Ysabel Band remains an absent and indispensable party that cannot be joined. Defendants' motion to dismiss should therefore be granted.

I. DEFENDANTS' MOTION TO DISMISS IS PROPERLY APPLIED TO PLAINTIFF'S AMENDED COMPLAINT.

Plaintiff argues its Amended Complaint moots Defendants' motion to dismiss. *See* Pl.'s Resp. Mem. 6–7 (Dkt. No. 15). Plaintiff is simply incorrect. Not only is Plaintiff's argument directly contrary to the parties' joint motion for an extension of time to allow Plaintiff to make the amendment (*see* Joint Mot. ¶ 5 (Dkt. No. 9)), but Plaintiff ignores the Court's February 18, 2009, Order granting that motion. *See* Order Extending Time (Dkt. No. 10). There, the Court explicitly ordered that if Defendants chose not to withdrawal their motion, "the pending motion to dismiss will be construed as a motion to dismiss the amended complaint." Order Extending Time at 2.

Even absent the Court's Order, if an amended complaint fails to cure the original complaint's defects, there is no need for an existing motion's movant to file a new motion. *See Am. Int'l Speciality Lines Ins. Co. v. United States*, 71 Fed. Cl. 37, 39 (2006); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 641 n.1 (E.D. Pa. 1999) (quoting that "the court simply may consider the motion as being addressed to the amended pleading"). Requiring otherwise would unnecessarily waste the moving party's and the Court's resources. Here, Plaintiff's Amended Complaint did nothing to cure the original complaint's defects. Plaintiff did not add any additional causes of action or waivers of sovereign immunity.[1/] *Compare* Compl. ¶¶ 8–10, 19–33 (Dkt. No. 1) *with* Corrected Amend. Compl. ¶¶ 8–10, 20–30 (Dkt. No. 13). Plaintiff made no changes to its requested relief. *Compare* Compl. at Prayer for Relief *with* Corrected Amend. Compl. at Prayer for Relief. And Plaintiff still has not attempted to add—nor could it—the Santa Ysabel Band as a party. Defendants' motion to dismiss

[1/] Plaintiff's Amended Complaint drops entirely its previous claim under 25 U.S.C. § 345.

therefore applies to Plaintiff's Amended Complaint.

II. PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT IDENTIFIED A VALID WAIVER OF SOVEREIGN IMMUNITY.

Despite amending its complaint and providing a response to Defendants' motion, Plaintiff has not identified a valid waiver of the United States' sovereign immunity. Waiver of sovereign immunity is a pre-requisite to federal court jurisdiction over suits against the United States. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983). Thus, Plaintiff's Amended Complaint should be dismissed for lack for jurisdiction.

Though Plaintiff attempts to take refuge in the Administrative Procedure Act's waiver of sovereign immunity, 5 U.S.C. § 702, the waiver contained in the Quiet Title Act, 28 U.S.C. § 2409a(a), prevents that application. The Quiet Title Act (QTA) is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block v. North Dakota ex rel. Bd. of University & School Lands*, 461 U.S. 273, 286 (1983) (emphasis added). The waiver, however, explicitly withholds consent to suit for challenges involving lands the United States holds in trust for Indian Tribes. *See* 28 U.S.C. § 2409a(a). The United States holds Tracts One and Two for the Santa Ysabel Band, and therefore has not waived sovereign immunity for Plaintiff's suit.

In attempts to evade the QTA's explicit preservation of sovereign immunity for challenges involving Indian lands, Plaintiff relies exclusively on the fact that it does not challenge the United States' actual title to Tracts One and Two. *See* Pl.'s Resp. Mem. at 10. In so arguing, however, Plaintiff offers no explanation for—indeed, entirely ignores—extensive Ninth Circuit precedent holding the QTA's waiver, and its Indian lands exception, applies to "suits involving plaintiffs who, while not seeking quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." *Alaska v. Babbitt*, 38 F.3d 1068, 1074 (9th Cir. 1994). Plaintiff here intends to do precisely that: invalidate the present Tract One and Two patents and, in the process, eviscerate the Santa Ysabel Band's current equitable title in the property. *See* Pl.'s Resp. Mem. at 10; Corrected Amend. Compl. at Prayer for Relief. The Ninth Circuit has repeatedly held the QTA to be the only potential waiver of sovereign immunity in identical situations. *See Alaska*, 38 F.3d at 1074; *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 141 (9th Cir.

1987).

Plaintiff argues *Metropolitan Water District* is not applicable because the case involved the Secretary of the Interior's authority to allocate land. *See* Pl.'s Resp. Mem. at 10. The argument is misplaced. The QTA's waiver of sovereign immunity applies to any civil action over "disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Thus, it is the property, not a plaintiff's legal theory, that triggers the QTA as the exclusive means to suit. In *Metro. Water Dist.* the Ninth Circuit held: (1) the plaintiff's challenge would impact a Tribe's interest in the lands; (2) the QTA's waiver therefore applied; and (3) the district court lacked jurisdiction because the waiver withheld consent for challenges involving Indian lands. *See Metropolitan Water District*, 830 F.2d at 143–44. Similarly, the QTA's Indian lands exception withholds the United States' consent to suit here.

Nonetheless, Plaintiff attempts to argue the APA's waiver of sovereign immunity applies to this suit. *See* Pl.'s Resp. Mem. at 8–10. Plaintiff acknowledges that the APA's waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See* Pl.'s Resp. Mem. at 9 (quoting 5 U.S.C. § 702(2)). Plaintiff, however, argues "the Government cites to no statute that forbids the relief the Mesa Grande seeks in its First Amended Complaint." Pl.'s Resp. Mem. at 9–10. This statement, of course, ignores the large portion of Defendants' opening brief discussing the QTA. *See* Defs.' Mem. 6–8 (Dkt. No. 8-2). As the Supreme Court recognizes, the QTA is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Block*, 461 U.S. at 286 (emphasis added). The United States, however, has not extended the QTA's waiver to challenges involving Indian lands. *See* 28 U.S.C. § 2409a(a). Thus, the QTA expressly forbids the relief Plaintiff seeks here—invalidation of the Santa Ysabel's beneficial interest—by maintaining the United States' sovereign immunity, and the APA's waiver is inapplicable. Plaintiff simply "cannot avoid the [QTA's] Indian lands exception by obtaining jurisdiction under the Administrative Procedure Act." *Alaska v. Babbitt*, 182 F.3d 672, 674 (9th Cir. 1999).

Plaintiff's reliance on *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), and *Southern Utah Wilderness Alliance ("SUWA") v. Norton*, 301 F.3d 1217 (10th

Cir. 2002), does not change this conclusion. *Pyramid Lake* involved a challenge to a water allocation regulation. *See* 354 F. Supp. at 254. But Congress did not extend the QTA's waiver, and thus also not its Indian lands exception, to civil actions challenging water rights. *See* 28 U.S.C. § 2409a(a). Plaintiff's citation to the Tenth Circuit's *SUWA* decision is even a further reach. In addition to that case not involving questions of property rights, the Supreme Court later overturned the Tenth Circuit, holding that the plaintiff did not have a claim under the APA. *See Norton v. SUWA*, 542 U.S. 55, 64–72 (2004).

Similarly, Plaintiff's attempt to avoid the Indian Claims Commission Act's statutory bar on suit is unavailing. Plaintiff argues the bar is inapplicable because Plaintiff's claims did not accrue before 1946. *See* Pl.'s Resp. Mem. at 11. Yet, at the same time, Plaintiff admits it had knowledge of a potential error in the land patents as early as 1925. *See* Pl.'s Resp. Mem. at 4. Thus, Plaintiff has "known the facts upon which [its] claims are based" since well before 1946. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir. 1990). The United States' limited waiver of sovereign immunity for those claims has therefore expired. *See United States v. Lower Sioux Indian Cmty. in Minn.*, 519 F.2d 1378, 1383 (Ct. Cl. 1975) (quoting the Indian Claims Commission Act). For this reason, and those stated above, this Court lacks jurisdiction over Plaintiff's case and Defendants' motion to dismiss should be granted.

III. PLAINTIFF'S CLAIMS ARE BARRED BY STATUTES OF LIMITATIONS.

Even if Plaintiff properly had a claim under the QTA, that claim would be barred by the QTA's statute of limitations. Plaintiff's response does not dispute that its claims accrued in 1992, at the latest, and even admits facts that place claim accrual as early as 1925. *See* Pl.'s Resp. Mem. at 4. Those admissions alone are enough to bar Plaintiff's claims under the QTA's twelve-year statute of limitations. *See* 28 U.S.C. § 2409a(g); *Cheyenne Arapaho Tribes of Okla. v. United States*, No.07-5399, __ F.3d __, 2009 WL 692118 *3 (D.C. Cir. Mar. 17, 2009) (noting that a claim under the QTA accrues when the plaintiff "knew or should have known" of the claim to the property).

Plaintiff's only response to the QTA's statute of limitations is to again argue that its claims properly lie under the APA. *See* Pl.'s Resp. Mem. at 12–13. The structure of the United States' waiver of sovereign immunity, however, prevents that conclusion. But even assuming Plaintiff was

correct, the general statute of limitations in 28 U.S.C. § 2401(a) would prevent Plaintiff's claims here. Section 2401(a) bars all non-contract civil actions against the United "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Again, Plaintiff admits, and Defendants provide public record evidence to support, that Plaintiff had actual knowledge of what it believed to be errors in the patents well before six years prior to suit.[2/]

Plaintiff is incorrect that Defendants should have brought their statute of limitations arguments under Rule 12(b)(6) for failure to state a claim. *See* Pl.'s Resp. Mem. at 12. In suits against the United States, the applicable statute of limitations is a condition of the United States' waiver of sovereign immunity. *See Sisseton-Wahpeton*, 895 F.2d at 592. "[P]laintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action." *Id.* (citations omitted). Rule 12(b)(1) is therefore the appropriate vehicle through which to make the challenge.

The jurisdictional character of the statutes of limitations here also means Plaintiff's attempts to limit the Court's ability to consider evidence outside the pleadings is misplaced. *See* Pl.'s Resp. Mem. at 7–8 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)) (Dkt. No. 14). "[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence . . . to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)). The Court may therefore consider the exhibits attached to Defendants' opening brief as evidence that Plaintiff has had actual knowledge of its claims since at least 1973. That accrual falls well outside the QTA's and APA's respective statute of limitations, and this Court therefore lacks jurisdiction.

[2/] Even assuming the APA applied here, Plaintiff's attempt to avoid the APA's statute of limitations by couching its claims as "continuing violations" incorrectly interprets the APA's two separate causes of action (5 U.S.C. §§ 706(1) and 706(2)). *See* Pl.'s Resp. Mem. at 12–13. As the Supreme Court stated in overruling one of the very cases to which Plaintiff cites, a cognizable claim under Section 706(1) requires Plaintiff to assert the Department of the Interior failed to take a "discrete agency action" required by statute or regulation. *See Norton v. SUWA*, 542 U.S. at 64–65. Plaintiff has identified no such statute or regulation. Instead, Plaintiff's claims would lie under 5 U.S.C. § 706(2) for review of "final agency action," and 28 U.S.C. § 2401(a) would bar those claims.

IV. PLAINTIFF'S SUIT SHOULD BE DISMISSED BECAUSE THE SANTA YSABEL BAND IS AN INDISPENSABLE PARTY THAT CANNOT BE JOINED.

Plaintiff's Amended Complaint, like its original, cannot move forward in the absence of the neighboring Santa Ysabel Band. In fact, Plaintiff does not dispute that Santa Ysabel is a necessary party, nor that Santa Ysabel's joinder is impossible absent its consent. *See* Pl.'s Resp. Mem. at 13–15. Plaintiff presents nothing to suggest that the Santa Ysabel Band has waived its sovereign immunity. Thus, the only remaining issue under Rule 19 is whether Santa Ysabel is an "indispensable party" whose absence requires dismissal. *See* Fed. R. Civ. Pro. 19(b). Plaintiff's arguments that the suit should continue in Santa Ysabel's absence are unavailing.

Plaintiff correctly recognizes the four Rule 19(b) factors the Court should consider in determining if dismissal is appropriate absent the necessary Santa Ysabel Band.[3] *See* Pl.'s Resp. Mem. at 14. Plaintiff, however, wholly ignores the first two of these factors and the vast Ninth Circuit precedent recognizing their importance. There can be no doubt that each of those factors—whether judgment will prejudice any party or the absent party, and the extent to which that prejudice could be avoided by tailoring the judgment—weigh heavily in favor of dismissal here.

The Ninth Circuit recently reached an identical conclusion under very similar circumstances. *See Rosales v. United States*, 73 Fed. Appx. 913, 2003 WL 21920015 (9th Cir. 2003). In *Rosales*, the Ninth Circuit upheld the district court's Rule 19 dismissal where a non-party Tribe "ha[d] claimed jurisdiction over the parcel of land at issue in [the] action since at least 1981." *Id.* at 914. The absent Tribe's "interest would be impaired if Appellants were declared to be the beneficial owners of the land, and relief cannot be shaped to avoid this prejudice." *Id.* at 915. The absent Tribe's sovereign immunity, however, prevented its joinder. *See id.* at 914; *see also Rosales v. United States*, No. 07-cv-0624, 2007 WL 4233060 *6 n.6 (S.D. Cal. Nov. 28, 2007) ("Under controlling Ninth Circuit precedent, the United States cannot be an adequate representative in an

[3] Plaintiff provides no citation for its statement that a Rule 19 motion requires an evidentiary showing. *See* Pl.'s Resp. Mem. at 14. In any event, all necessary evidence lies in Plaintiff's Amended Complaint. Plaintiff admits Santa Ysabel currently holds the patents (*see* Corrected Amend. Compl. ¶¶ 13, 14) and requests those patents be invalidated (*see* Corrected Amend. Compl. at Prayer for Relief).

intertribal dispute."). The absent Tribe was therefore "a necessary and indispensable party, without whom [the] action cannot proceed." *Rosales*, 73 Fed. Appx. at 915.

Plaintiff's assertions here fail for the same reasons. First, Plaintiff seeks to invalidate the current patents for Tracts One and Two. A judgment granting that relief, however, directly impacts the current equitable title holder: the Santa Ysabel Band. Such a result will certainly prejudice the Santa Ysabel. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (reaching identical conclusion where neighboring Tribe would lose property interest). Further, any judgment in favor of Plaintiff could not be tailored to avoid that prejudice. Reissuing the patents in Plaintiff's name first requires taking them away from the Santa Ysabel. That necessary step cannot be avoided. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (noting that a reshaping of relief will not lessen prejudice where there is "not enough pie to satisfy all"). Given these facts alone, the Court should not move forward without the indispensable Santa Ysabel Band.

Plaintiff, however, chooses to ignore how its suit would prejudice the Santa Ysabel Band, and instead argues only that equity requires the suit to move forward. *See* Pl.'s Resp. Mem. at 15. Plaintiff's focus on its own interests, however, ignores the fact that the Santa Ysabel Band's interest in preserving its sovereign immunity outweighs Plaintiff's interest in a federal court forum, even if no other forum exists. *See Quileute*, 18 F.3d at 1460–61; *see also Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) (holding that plaintiffs could not "do an end run around tribal immunity . . . by bringing suit against the government, rather than the tribe itself").

CONCLUSION

Based on the foregoing and Defendants' opening brief, Plaintiff's Amended Complaint should be dismissed.

Respectfully submitted this 23rd day of March, 2009,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2009, Defendants' Reply in Support of Defendants' Motion to Dismiss was filed with the United States District Court for Southern District of California's electronic filing system, to which the following attorneys are registered to be noticed:

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