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MESA GRANDE BAND OF MISSION INDIANS

UNITED STATES DISTRICT COURT

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,

Defendant.

Case No. 08-CV 1544 LAB NLS

OPPOSITION TO MOTION TO DISMISS

Hearing Date: April 20, 2009
Hearing Time: 11:15 a.m.

The Honorable Larry Alan Burns

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This is a case where Defendant Kenneth L. Salazar (hereinafter the "Government") has repeatedly failed in its duties towards Plaintiff the Mesa Grade Band of Indians ("Mesa Grande"), a federally recognized Indian tribe, and continues to compound the harm by telling the Tribe it has no avenue for recourse.

Back in the 1890s, the Government made a mistake in issuing certain "patents" (or formal written rights of beneficial use) for tribal lands the Government holds in trust for the Mission Indians in southern California. Everyone involved recognized, however, that there was an error in the patents and that this error was merely technical, and then proceeded as though the patents had been correctly written, with the Mesa Grande enjoying full benefit and occupancy of the lands at issue. That is until more than 100 years later when the neighboring Santa Ysabel Band of Indians ("Santa Ysabel") began exploiting this technical mistake and asserting that it was in fact the possessor of the land.

It is the Government's responsibility to protect the Mesa Grande from the impacts of these admitted errors. The Mesa Grande has repeatedly brought its concerns to the Department of the Interior, asking for it to remedy its error. The Department of the Interior has failed to do so, and the Tribe is now incurring significant harm on a daily basis. Based on the Government's failure to do its job, the Mesa Grande's is unable to improve existing housing and maintain roads, to obtain grants for new housing projects for tribal elders, or even to access to its ancestral grounds and burial sites.

This inequity and nonfeasance must have a remedy. The Government seeks to continue shirking its duty based on technicalities and tortured interpretations of inapplicable statutes. However, the jurisdiction of federal courts to valid Indian trust claims and Administrative Procedure Act claims is clear. There are no grounds for the Government's motion, and this Court should deny it and all fully consider the legal merits of the Mesa Grande's action.

SUMMARY OF ARGUMENT

Certain tribal lands historically used by the Mesa Grande were erroneously included by the United States (acting through the Smiley Commission) in the patents for the Santa Ysabel

Reservation. The Government knew about this error and yet did nothing to correct it. Until recently, the Government treated this error as a minor technicality and Mesa Grande continued to use its lands as it always had. This state of events has now changed, and the Mesa Grande seeks to compel the Government to correct this error so that these tribal lands (known as Tracts One and Two) would formally come under its control, as these lands have been treated for decades by all involved.

Rather than accept its responsibilities to the Mesa Grande and fix its mistakes, the Government moves to dismiss the Mesa Grande's claims against it. However, the Government has failed to file a proper response to the operative complaint. On December 30, 2008, the Government filed a Motion to Dismiss the Mesa Grande's original Complaint. The Mesa Grande then amended its Complaint to respond to the Motion to Dismiss, filing a First Amended Complaint on March 3, 2009. Instead of reviewing the revised pleading and basing its response on the operative document, the Government seeks to proceed on the earlier filed motion. This is improper. The Court should disregard the pending motion as moot and require the Government to respond to the operative complaint with either an answer or other proper responsive filing.

Even if the arguments in the Motion to Dismiss were properly before this Court (which they are not), the Government's arguments have no legal merit. The Government argues that this Court lacks subject matter jurisdiction over the present matter because the Government has not waived its sovereign immunity. Yet, the Mesa Grande brings this action under the Administrative Procedure Act ("APA"), which contains a clear waiver of sovereign immunity. The Government also claims that Mesa Grande's claims are time-barred under statute of limitations and laches theories. These arguments are not only without merit based on the Government's continual failure to perform its duty, but they are also not properly before the Court on Rule 12(b)(1) motion to dismiss.

The Government also argues that the case should be dismissed for failure to join an indispensable party, the Santa Ysabel, which cannot be joined because of reasons of sovereign immunity. This argument is unpersuasive. This case challenges the exercise of the Government's discretion under the APA—the Santa Ysabel's involvement is not necessary to

achieve the goals of administratively correcting this technical error. This is particularly significant given that the Mesa Grande would be left without recourse if the Santa Ysabel's involvement were deemed indispensable.

For the foregoing reasons, the Court should deny the Government's Motion to Dismiss in its entirety and allow the Mesa Grande's case to proceed to allow full consideration of the merits as favored by law.

BACKGROUND

I. FACTUAL BACKGROUND

On December 27, 1875, President Ulysses S. Grant issued an executive order to set aside approximately 15,000 acres for the Mission Indians known as "Santa Ysabel—including Mesa Grande." ((First Amended Complaint ("FAC") ¶ 11.) This was followed by another executive order in 1883, which set aside a 120-acre tract for the "Mesa Grande Indian Reservation." (FAC ¶ 11.) On January 12, 1891, Congress enacted a statute, entitled "An act for the relief of the Mission Indians in the State of California," that established a three-person commission to select "a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians." (FAC ¶ 12.) The selection of each reservation would be valid when approved by the President and the Secretary of the Interior. 26 Stat. 712, § 2.

Based on the 1891 act, the Smiley Commission was charged with determining where the Mission Indian Bands were living. (FAC ¶ 13.) The resulting report was approved by President Benjamin Harrison by executive order dated January 29, 1891, and authorized patents for more than 15,000 acres (known as Tracts One, Two, and Three) to the Santa Ysabel Band, "including the Mesa Grande," and for 120 acres solely for Mesa Grande. (FAC ¶ 13.) The patents were issued on February 10, 1893. (FAC ¶ 13.)

The patents for the Santa Ysabel Band created by the Smiley Commission were a mistake and did not accurately reflect the intentions of the United States to issue patents for Tracts One and Two to the Mesa Grande. (FAC ¶ 14.) Almost from the start, the Smiley Commission's

conclusions were called into question by the Mesa Grande and the federal government. (FAC ¶ 1.) Indeed, in correspondence from 1925 to 1971, the Government acknowledged that the land belonged to the Mesa Grande, admitting that the land patents were made erroneously, in that the Tracts One and Two were historically occupied and used by the Mesa Grande, not the Santa Ysabel. (FAC ¶ 14.)

Congress also expressed its understanding that the Mesa Grande was the proper patentee for Tracts One and Two by twice granting land to Mesa Grande, in 1926 and 1988, adjacent to the tracts. 44 Stat. 496; 102 Stat. 2938. Indeed, in 1926, Congress granted 80 acres to the Mesa Grande "for the occupancy and use of the Indian of the Mesa Grande Reservation, known also as Santa Ysabel Reservation Numbered 1." 44 Stat. 496. The Mesa Grande has consistently occupied this land and viewed it as Mesa Grande tribal land. Furthermore, all area maps refer to the land as "Mesa Grande" and both the Department of Housing and Urban Development and the Bureau of Indian Affairs have treated the land as belonging to the Mesa Grande when disbursing funds. Those entities have acknowledged that the land belongs to the Mesa Grande in letters to the tribe. (FAC ¶ 14.)

Despite widespread recognition that the Mesa Grande is the rightful beneficial owner and occupant of Tracts One and Two, and in direct contradiction with the past treatment of the property by the federal government, the Mesa Grande was informed by the Bureau of Indian Affairs in 1992 that it could not make improvements on Tracts One and Two without the approval of the Santa Ysabel. (FAC ¶ 15.) Even then, this appeared to be a finding without any direct impact or consequence as the Mesa Grande was not prevented from continuing their use and enjoyment of their tribal lands, and the federal government and other entities continued to treat the Mesa Grande as the rightful occupiers of such lands, as they had for decades before. (FAC ¶ 15.) As a result, until recently, the Mesa Grande had no reason to believe that the Government's technical error would result in any tangible impacts or harm to its interests. (FAC ¶ 15.)

Starting a few years ago, this all changed. Based on the Government's failure to remedy the patent error, the Santa Ysabel tribe has recently taken action to physically assert ownership of

the Mesa Grande's land and deprive the Mesa Grande of its use of the property. (FAC ¶ 16.) Thus, the Government's breach of trust has caused hardship on the Mesa Grande, including but not limited to the following:

- The Santa Ysabel has expressly prohibited the Mesa Grande from conducting any projects on Tracts One and Two, including, but not limited to, Housing Improvement Program ("HIP") housing, road maintenance, Housing and Urban Development housing, Indian Health Service water and sewer services, woodcutting of any kind, and any type of economic development. (FAC ¶ 16.)
- Since 2003, the Mesa Grande has been unable to obtain HIP homes for tribal members, including some of the tribal Elders, because the Santa Ysabel has been unwilling to agree to appropriate lease terms. (FAC ¶ 16.)
- The Santa Ysabel has repeatedly denied the Mesa Grande access to ancestral grounds, including areas where tribal members are buried. (FAC ¶ 16.)
- Since 2005, the Santa Ysabel has been directing additional members to Tracts One and Two for their occupancy, contrary to the interests of the Mesa Grande.
- Mesa Grande members living on Tracts One and Two have been unable to make improvements to their homes or construct fencing for their livestock due to interference by the Santa Ysabel. (FAC ¶ 16.)

The Mesa Grande is unable to occupy and possess its lands or to take action to improve its lands, and, thus, has been deprived of the benefits of ownership and quiet enjoyment. (FAC ¶ 16.) The Santa Ysabel asserts its rights to this land based on the Government's widely acknowledged drafting error. (FAC ¶ 16.)

The Government has been aware of the recent impacts of its error on the Mesa Grande as detailed in the FAC, but has failed to take any action to remedy its actions. (FAC ¶ 17.) Specifically, the Government has the power and obligation to reform the patents to remedy their errors and to ensure the proper exercise of its trust duties. (FAC ¶ 17.) The Mesa Grande has requested repeatedly, without success, that the Government to comply with its obligations and redress the breaches of trust herein complained of. (FAC ¶ 17.) The Government has, thus,

failed to exercise its mandatory duties in the manner required by law. As a consequence of these and other acts of mismanagement in breach of trust and errors committed by the Government, the Mesa Grande has been continuously prohibited from full use, possession, control, and enjoyment of its tribal lands, cumulating in efforts beginning in 2003 that would physically deprive the Mesa Grande of the use of its ancestral home. (FAC ¶ 17.) This harm to Mesa Grande is ongoing and continues to this day. (FAC ¶ 17.)

The Mesa Grande has sought informal resolution of this matter through conversations with both the Santa Ysabel and the federal government—all to no avail. Obtaining no relief elsewhere, the Mesa Grande turns to this Court.

II. PROCEDURAL HISTORY

On August 21, 2008, the Mesa Grande filed its Complaint. (Dkt. #1.) Upon the request of the Government, the parties filed, and the Court granted, a joint motion to extend time for responding to the Original Complaint to December 30, 2008.[1] (Dkt #7.) On that date, the Government filed a motion to dismiss the Complaint as permitted by Rule 12. (Dkt. #8.) The Mesa Grande then amended its Complaint to modify the claims asserted and supplement the factual background. After a stipulation to extend time, the Mesa Grande filed its First Amended Complaint on March 3, 2009. (Dkt. #13.)

LEGAL ARGUMENT

I. THERE IS NO RESPONSE TO THE OPERATIVE COMPLAINT

An amended complaint supersedes the original complaint. *See King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); *Carver v. Condie*, 169 F.3d 469, 472 (7th Cir. 1999). As a response was required to the original pleading, another response would be required to an amended complaint. *See Nelson v. Adams USA, Inc.*, 529 US 460, 466 (2000); *see also* 1 William E. Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial* §§ 8:431-

[1] In the Southern District, court approval is required for any extension of time to answer or move to dismiss the complaint. (Local Rule 12.1.)

8:435 (The Rutter Group 2008). Under Rule 15, the responding party typically has ten days to file a responsive pleading or motion to the new complaint. Fed. R. Civ. P. 15(a)(3).

Here, after the Mesa Grande filed its First Amended Complaint on March 3, 2009, the Government had ten days—until March 13, 2009—to file an answer or to file another motion to dismiss. *See id.* Yet, as of the date of this Opposition, the Government has yet to file *any* response to the First Amended Complaint, which is the operative pleading on file. Instead of filing a new motion to dismiss correlated to the now operative pleading—the First Amended Complaint—the Government announced its intention of proceeding with the December 30, 2008, Motion to Dismiss directed at the superseded Complaint. Not only does this decision leave the Mesa Grande responding to a motion that has not taken into account substantial changes to the operative pleading, but it means that the Government has not properly responded to the pleading on file in this case, subjecting it to default under Rule 55.

The Government's failure to follow the proper procedure for responding to the operative pleading is indicative of its behavior throughout the history of this dispute. The Government's Motion to Dismiss is moot and the arguments raised therein are not properly before this Court. The Mesa Grande respectfully urges this Court to deny the Motion and require the Government to file a proper response to the First Amended Complaint or enter a default judgment, as provided by law.

II. THE COURT HAS JURISDICTION OVER THE MESA GRANDE'S CLAIMS, DEFEATING THE GOVERNMENT'S RULE 12(B)(1) MOTION

A. The Standard of Review under Federal Rule of Civil Procedure 12(b)(1)

In considering a 12(b)(1) motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). As a result, the Court must consider all factual allegations as alleged in the First Amended Complaint as true and must make all factual inferences in favor of the plaintiff. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). However, a court may not look beyond the four corners of the complaint on factual matters that are essential to the elements of a cause of action; these are left to the trier of contested fact. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). For this reason, in ruling on a motion to dismiss, a district court generally "may not consider any material beyond the pleadings." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

To the extent that the Court deems there is any merit to the motion, "[l]eave to amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure shall be freely granted when justice so requires, and as a general matter amendments are favored 'to facilitate a proper decision on the merits.'" *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 573 (S.D.N.Y. 1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

B. The United States has Waived Sovereign Immunity

The Government argues that this matter is not properly before this Court because of a lack of subject matter jurisdiction. (Mot. at 5-10.) Specifically, the Government argues that it cannot be subject to suit because it has not waived its sovereign immunity. (Mot. at 5.) This argument is without merit.

1. The Mesa Grande Properly Brought this Case Under the Administrative Procedure Act

In general, a trust relationship exists between the United States and Indian Nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Federal courts have jurisdiction over breach of trust claims against the executive branch seeking specific relief, such as equitable and injunctive relief. Three essential predicates must be met to seek specific relief against the federal government for breach of trust: subject matter jurisdiction; a statutory consent to suit; and the existence of a claim upon which relief can be granted. *Cohen's Handbook of Federal Indian law* § 5.05[1][a] (2005 ed.) (hereinafter "*Cohen*"). The trust relationship is a doctrine originating in

common law and expressed in numerous treaties and statutes. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 225, (1983); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

The Administrative Procedure Act ("APA") is the chief vehicle for bringing breach of trusts claims. *See Cohen, supra,* § 5.05[1][a]. This flows directly from the language of the Act, and the statute contains a clear waiver of sovereign immunity. 5 U.S.C. § 702. The APA waives sovereign immunity for claims alleging that a federal agency has taken action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 701, which includes violations of statutes, treaties, and common law. *See, e.g., Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

The Government acknowledges that the APA contains a waiver of sovereign immunity. (Mot. at 5.) The Government is in error, however, in asserting that this waiver does not apply to the matter currently before the Court. Section 702 of the Administrative Procedure Act explains that where "a person [has] suffer[ed] a legal wrong because of agency action, or [has been] adversely affected or aggrieved by agency action" that person is entitled to judicial review, but may not seek money damages. 5 U.S.C. § 702. The Mesa Grande seeks declaratory relief regarding its rights to the land and the Government's violations of the APA and its trust duties. (FAC at 8-9.) The Mesa Grande also seeks injunctive relief compelling the Government to comply with the law and correct the patents regarding the subject land, thereby preventing any interference with the tribe's exercise of its rights regarding its possession and ownership of the subject land. (*Id.*)

The Government makes much out of the fact that this section does not confer authority on the Court "to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702(2). For this provision to prevent the current suit from going forward, the Government must demonstrate that another statute forbids the relief being sought. *Id.* This is not the case—the Government cites no statute that forbids the relief the

Mesa Grande seeks in its First Amended Complaint. Thus, under the APA, the United States has waived its sovereign immunity. *See id.*

There are no statutes that prevent the tribe from seeking this relief. The Mesa Grande has properly brought its claim under the APA and the Government's Motion should be denied..

2. The Quiet Title Act Does Not Bar this Case.

The Government also argues that this suit is barred by the Quiet Title Act. (Mot. 8.) This makes no sense, as this lawsuit is not a quiet title action.

As the Government itself notes, the Quiet Title Act is the vehicle for challenging the United States' *title* to real property, but does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a(a). By its very terms, this law does not apply here. *Id.* The Mesa Grande is not challenging that the land in question is owned by the United States. (*See* FAC ¶ 21). Rather, the Mesa Grande seeks for the Government to fix the patents that formally note that these lands are being held in trust for the Mesa Grande. (FAC 8-9.) This is not an issue of title, which is retained by the United States. The correction is more technical, stemming from the Smiley Commission's confusion regarding the different bands of Mission Indians. (FAC ¶¶ 13-14.) Despite instructions to delineate the boundaries of land belonging to the different bands and villages, the Smily Commission lumped the Mesa Grande and the Santa Ysabel together, with conflicting language regarding the allocation of various parcels. (*Id.*) The Government has breached its duty by failing to assist the tribe in protecting its rights in the land and correcting this error. (FAC ¶ 16-17.) The Mesa Grande has asked the Government to remedy these mistakes and secure its rights to the land, including rights related to housing programs and land development. (FAC ¶ 17.) This case is about asking the Government to do its job—a job that it has elsewhere acknowledged it should do. Such actions properly fall under the APA. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252 (D.D.C. 1972).

The Government cites *Metropolitan Water District (MWD) v. United States*, 830 F.2d 139 (9th Cir. 1987), in support of its argument that this is a quiet title action. That case is inapposite. It involved a challenge to the Secretary of the Interior's authority to allocate land. Here, the Mesa Grande is acknowledging and indeed relying upon the Secretary's allocation duties. (FAC ¶¶ 12-

17.) This case seeks the correction of a technical error to reflect the parties' long-standing recognition of Mesa Grande's use of the property, not a reconsideration and redistribution of property rights. (FAC 8-9.) The APA is the proper vehicle for doing so. *See S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1232 (10th Cir. 2002)

In passing the Quiet Title Act, Congress explained that the purpose of the act is to enable the Government to fulfill its trust obligation. *MWD*, 830 F.2d at 144 (citing H.R. Rep. No. 1539, 92nd Conf. 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-67). Ironically, the Government invokes this very provision here in an attempt to circumvent fulfillment of its trust obligations. Nothing in the statutes prevents this lawsuit and this Court should not condone the Government's misguided efforts to shirk its responsibilities. This is not a ground for denying the Mesa Grande their day in court and the Government's Motion to Dismiss should be denied.

3. The Indian Claims Act Does Not Bar This Case

The Government also argues that Mesa Grande's claims are barred by the Indian Claims Act. (Mot. at 10.) Yet, the Government acknowledges that statute only bars claims accruing before 1946. (*Id.*) No event triggering the statute occurred before 1946 in this case.

Under the Indian Claims Act, "a cause of action does not accrue until the claim is 'perfected,' and statutes of limitations do not commence running until plaintiffs knew or should have known the facts upon which their claims are based . . . ." *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir. 1990). In this case, the only events that could conceivably fall under the statute occurred long after the applicability of the law expired. As set forth in the First Amended Complaint, although the errors in the patents are old, the Mesa Grande had no reason to believe that acknowledged error would impede any of their rights. Despite the flawed patent, Mesa Grande, the Government, and others all continued to behave as though the land belonged to Mesa Grande. (FAC ¶¶ 14-15.) Only recently did the neighboring tribe begin to invoke this mistaken patent as a justification for interfering with Mesa Grande's rights. (FAC ¶ 16.) Failure to fix the patents after those events resulted in the Government breaching its duties to Mesa Grande. (FAC ¶ 17.) Consequently, the Indian Claims Act has no application to this case. The Government's Motion should be denied.

C. Claims are Not Barred by the Statute of Limitations

The Government argues that the Mesa Grande's APA claim is barred by the statute of limitations. (Mot. at 11-13.) This argument is to no avail.

At the outset, this argument is not properly before this court on a 12(b)(1) motion. Where the facts and dates alleged in the complaint indicate the claim is barred by the statute of limitations, a motion to dismiss for failure to state a claim lies under Rule 12(b)(6). *See Jablon v. Dean Witter & Co*., 614 F2d 677, 682 (9th Cir. 1980). The Government did not bring a 12(b)(6) motion for failure to state a claim and, thus, it is not properly raised here..

Alternatively, where the running of the statute cannot be determined from the face of the complaint, asserting the claim is barred by the statute of limitations is a substantive affirmative defense that should be raised in an *answer*.[2] "A contention that the statute of limitations bars an action is an affirmative defense, meaning that the plaintiff is not required to negate it in its complaint." *United States v. Tech Refrigeration*, 143 F. Supp. 2d 1006, 1007 (N.D. Ill. 2001) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). The Court is only required to dismiss a complaint on statute of limitations grounds if "the complaint alleged facts demonstrating that a tolling provision does not apply." *Id.* (citing *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993)).

The Government does not make such an argument here. Actions under the APA are generally governed by a six-year statute of limitations. *See* 28 U.S.C. § 2401(a). However, there is an exception to this rule for continuing violations. *See Wilderness Soc'y v. Norton*, 434 F.3d 584, 589 (D.C. Cir. 2006) (indicating that § 2401(a) would not time-bar actions to rectify government agency inaction in violation of a nondiscretionary duty because such suits do not complain about what the agency has done but rather about what the agency has yet to do); *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1232 (10th Cir. 2002) (noting that "an agency's failure to act as statutorily mandated should be considered an ongoing failure to act, resulting in

[2] The Government also raised a laches argument. (Mot. at 13.) Again, this is an affirmative defense that should appear in an answer and therefore is not properly before the Court at this time. *See Maksym v. Loesch*, 937 F.2d 1237, 1247-48 (7th Cir. 1991).

an ever-green cause of action for failure to act"); *Nat'l Parks Conservation Ass'n*, 480 F.3d at 416-17 (6th Cir. 2007); *S. Appalachian Biodiversity Project v. U.S. Fish and Wildlife Serv.*, 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) ("The statute of limitations commences to run anew each and every day that the Service does not fulfill the affirmative duty required of it.")

Here, the Government continues to breach its trust obligation to the Mesa Grande, so that the Tribe's claim accrues each day that the Government's nonfeasance continues. (FAC ¶ 17.) The Mesa Grande remains unable to occupy and possess its lands or to take action to improve its lands. (FAC ¶ 16.) The Santa Ysabel continues to exploit the Government's error. (FAC¶ 16.) Although aware of the Santa Ysabel's claims and the hardship to the Mesa Grande, the Government continues to fail to take any action to remedy the errors in the patents. (FAC ¶ 17.) Accordingly, the First Amended Complaint does not show that a tolling provision does not apply, but rather clearly alleges the opposite. As this Court must accept those allegations as true (*see Safe Air for Everyone*, 373 F.3d at 1039), there is no basis for the Government's arguments and the Motion must be denied.

III. THE GOVERNMENT'S MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES ALSO FAILS

A. The Standard of Review under Federal Rule of Civil Procedure 12(b)(7)

Rule 12(b)(7) permits defendant to challenge (by pre-answer motion or as an affirmative defense in the answer) the complaint's failure to join "persons whose presence is needed for a just adjudication" under Rule 19. A Rule 12(b)(7) motion to dismiss for failure to join a party will be granted only if the court determines: (1) joinder of the party is not possible, and (2) the party is, in fact, "indispensable." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). If the party is merely "necessary," the court must deny the 12(b)(7) motion to dismiss "except in the most exceptional cases" even if the necessary party cannot be joined. *Shelton v. Exxon Corp.*, 843 F.2d 212, 216 (5th Cir. 1988). "Indispensable" refers to a party whose participation is so important to resolution of the case that, if not joined, the suit must be dismissed. *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867, n.5 (9th Cir. 2004); *see also Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 393–394 (5th Cir. 2006) (noting that Rule 19

inquiry is "highly practical" and "fact-based"). The burden of proof is on the party moving to dismiss for failure to join an indispensable party. *Ilan-Gat Eng'rs, Ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 240 (D.C. Cir. 1981). A Rule 19 objection to non-joinder of parties requires an evidentiary showing (e.g., affidavits, discovery materials) as to the reasons why the absent party's presence is necessary for a just adjudication. No such showing is made here.

B. Santa Ysabel is Not an Indispensable Party

The Government argues that Santa Ysabel is an indispensable party and this matter should not proceed in its absence. (Mot. at 13-16.) There is not merit to this contention.

Whether an absent party is indispensable is a "pragmatic and equitable judgment, not a jurisdictional one." *Gonzalez v. Metro. Transp. Auth.*, 174 F.3d 1016, 1019 (9th Cir. 1999). In determining whether a party is indispensable, a court considers the following factors:

- The extent to which its judgment may prejudice the absent party or the parties already before the court;
- The extent to which such prejudice may be lessened or avoided by protective provisions in the judgment, or other measures;
- Whether a judgment rendered in such person's absence will provide an adequate remedy to the parties before the court; and
- Whether, if the action is dismissed for nonjoinder, plaintiff will have an adequate remedy elsewhere.

Fed. R. Civ. P 19(b); *Pit River Home & Agric. Co-op Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994); *Owens-Illinois, Inc. v. Meade*, 186 F3d 435, 442 (4th Cir. 1999). None of these factors is determinative; nor is the list exclusive. Rather, the matter is determined by the Court after balancing the interests involved; i.e., to determine whether "in equity and good conscience" the action should continue in the party's absence. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 US 102, 108 (1968); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006).

Here, these factors weigh heavily against finding Santa Ysabel to be an indispensable party and in favor of allowing this matter to proceed. Furthermore, in considering the equities

and "in good conscience," this Court should recognize the right of Mesa Grande to proceed with this suit to remedy the Government's harmful error.

"Adequacy" of a judgment rendered without the absent party refers to the "public stake in settling disputes by wholes, whenever possible . . . the societal interest in the efficient administration of justice and the avoidance of multiple litigation." *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2193 (2008). Here, a judgment rendered in this Court without Santa Ysabel's present will provide adequate remedies to the parties before the Court. Mesa Grande is seeking correction of a technical error by the Government. (FAC ¶ 14.) The Government has the power, and indeed the obligation, to correct this error without consultation or involvement with Santa Ysabel. Accordingly, this Court has the power to render an adequate judgment in the absence of Santa Ysabel.

Lack of an alternative forum also weighs heavily against dismissal of a suit for inability to join an indispensable party. *Pasco Int'l (London), Ltd. v. Stenograph Corp.*, 637 F2d 496, 501, n.9 (7th Cir. 1980). If this action is dismissed for nonjoinder, the Mesa Grande will be left without a remedy. The Mesa Grande has sought redress from the agency to no avail. (FAC ¶¶ 16-17.) Mesa Grande also sought resolution from an administrative proceeding and was specifically instructed to take this matter to federal court. Therefore, this Court should deny the Government's motion and allow this matter to proceed to full consideration.

The Mesa Grande's claims are against the Government for its failure to remedy errors in the patents subject to this cause of action. (FAC ¶ 16-17.) The Government now argues that the case must be dismissed because the Mesa Grande has not named the Santa Ysabel as a defendant, something the Government acknowledges that the Mesa Grande could not do because of the sovereign immunity of the Santa Ysabel. There is nothing requiring the Mesa Grande to name every person or entity who might be affected by the outcome of this case. The Motion to Dismiss should be denied.

CONCLUSION

As there is no response to the operative pleading—the First Amended Complaint—this Court should deny the pending motion to dismiss or strike it as improper. Alternatively, if the

Court decides to proceed on the merits of the Government's motion, that motion should be denied for the reasons set forth above. Finally, if the Court determines striking one or both claims of the First Amended Complaint would be proper, Mesa Grande requests leave to amend its Complaint.

Oral argument requested.

Dated: March 16, 2009

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