UNITED STATES COURT OF FEDERAL CLAIMS

WALTER J. ROSALES, et al.	)	**CASE NUMBER:** 98-860-LB
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	Judge Lawrence J. Block
	)	
	)	
Defendant.	)	
_____	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES' MOTION TO DISMISS,

RESPONSE MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CONSOLIDATING THIS ACTION WITH CASE NO. 08-512, AND

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES AND ATTACHED PROPOSED THIRD AMENDED COMPLAINT

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STATEMENT OF THE CASE

On November 5, 1999, the United States of America first moved to dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims ("RCFC") 12(b)(1) and 12(b)(4).[1/] (Doc. 31). On April 19, 2000, the Court stayed this case pending disposition of challenges to a 1996 amendment of the membership provisions of the Tribe's constitution and tribal elections of leaders conducted in accordance with that constitutional amendment. (Doc. 39). Following the D.C. Circuit Court's ruling in favor of the government, the stay in this case was lifted, and on January 7, 2009, this Court requested that the United States update and re-file its brief in support of its motion to dismiss and address two jurisdictional issues previously identified by the Court related to standing. (Doc. 81).

Consistent with the Court's order, the United States updated its motion to dismiss. The United States moved to dismiss on the grounds that Plaintiffs lack standing to raise any of their ten causes of action, each of which is premised on the erroneous assertion that they are the elected leadership of the Jamul Indian Village ("Tribe") and that the United States has been dealing with "non-members" of the Tribe. Def. Mem. at 2.[2/] The United States argued that none of the individual Plaintiffs has standing to bring suit in the Court of Federal Claims individually or on behalf of the Tribe, and that Plaintiffs' counsel was not authorized to represent the Tribe. *Id.* The United States argued further that Plaintiffs' claims require adjudication of matters not within this Court's subject matter jurisdiction, such as tribal membership, fail to demonstrate an

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[1/] In 2002, RCFC 12(b) was revised to bring it into conformity with the corresponding subdivision of the Federal Rules of Civil Procedure, and so the United States has moved to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). *See* Rules Committee Notice 2002 Revision.

[2/] Updated Brief in Support of United States' Motion to Dismiss ("Def. Mem."). (Doc. 82).

actionable case under the Tucker Act, or request declaratory and injunctive relief outside this Court's jurisdiction. *Id.* at 3.

The brief filed in response to the motion to dismiss makes no attempt to respond to the United States' arguments, and thus Plaintiffs concede the merits of such arguments. The brief does admit that only one of the original Plaintiffs, Walter Rosales, remains in this lawsuit as a plaintiff. Pl. Mem. at 1.[3/] However, the attempt to substitute Karen Toggery as a representative of her mother's estate ignores the requirements of the RCFC 25(a) that a motion for substitution must be made, and further even if a motion had been made, it is outside the time limitations of RCFC 25(a)(1), and therefore would have to be dismissed.

Plaintiff Walter Rosales seeks to avoid dismissal by attempting to amend the pleadings for a *third* time, stating he "voluntarily dismiss[es] those portions of their Second Amended Complaint, not contained in their proposed Third Amended Complaint, which focuses on the remaining claims, following the District of Columbia Circuit's decision in *Rosales v. United States*, Case No. 07-5140 [*Rosales VIII*]." Pl. Mem. at 2. Again, Plaintiff ignores the Court's rules, failing to comply with RCFC 15(a)(2) regarding the process to amend complaints, which requires a plaintiff to move for leave to amend a complaint once an amendment has already been taken as of right. Further, there are no claims that "remain" following *Rosales VIII*.

The memorandum, otherwise, utterly fails to respond to a single argument made by the United States in its motion to dismiss the Second Amended Complaint. Rather, Plaintiff's memorandum incorporates verbatim the memorandum filed in response to the United States'

[3/] Plaintiff's Memorandum of Points and Authorities in Support of Consolidating This Action with Case 08-512 and in Opposition to Defendant's Motion to Dismiss ("Pl. Mem."). (Doc. 83)

motion to dismiss filed in another matter, *Rosales v. United States*, No. 08-512 L (Fed. Cl.) ("*Rosales X*"), and does not even reference the proposed Third Amended Complaint in the body of the brief. Therefore, Plaintiff's attempt at "voluntary dismissal" should be rejected and the United States' motion to dismiss should be granted.

The United States also moves to strike Plaintiff's Memorandum of Points and Authorities to the extent that it is unresponsive to the United States' motion to dismiss, attaches a proposed Third Amended Complaint, and responds instead to a motion in another case. Finally, this Court should deny Plaintiff's "request" to consolidate this case with *Rosales X*, as no claims remain. Plaintiff again ignores this Court's rules, fails to submit a motion requesting the two cases be consolidated in either this case or in *Rosales X* as required by RCFC 42.1, and further, fails to provide this Court with any reason why such a "request" should be granted. Additionally, even if this Court were to consider consolidating the two actions, the bar set by the statute of limitations in *Rosales X* would still apply.

ARGUMENT

I. PLAINTIFF'S SECOND AMENDED COMPLAINT MUST BE DISMISSED

A. Plaintiff Fails to Establish Standing to Bring the Suit

This Court posed two jurisdictional questions for briefing by the parties. The first jurisdictional question is "[w]hether any of the individual plaintiffs - Walter Rosales, Jane Dumas, Sarah Aldamas, Val Mesa, Joe Comacho, Bernice Mesa, Vivian Flores, Marie Toggery, Leslie A. Mesa, Gerald Mesa, Robert M. Mesa, and William Mesa - have standing to bring suit in the Court of Federal Claims individually or on behalf of Jamul Indian Village." *See* Order, dated March 15, 2000. (Doc. 36). The second jurisdictional question is whether Mr. Webb has

the authority to represent the Tribe in this litigation. *See id.* Plaintiff's memorandum of law fails to acknowledge, let alone address, either of these questions, and does not dispute the facts and arguments relied on by the United States in its motion. Therefore, this Court should find that the only remaining Plaintiff, Walter Rosales, does not have standing to bring this suit and should grant the United States' motion to dismiss.

1. Plaintiff Does Not Have Standing As an Individual to Bring This Case

a. Walter Rosales Is the Only Remaining Plaintiff In this Case

According to the memorandum of law, of the twelve individuals originally named as plaintiffs in this lawsuit, only one remains, Walter Rosales.[4/] *See* Pl. Mem. at 1. The memorandum of law also lists Karen Toggery, as the personal representative of the estate of Marie Toggery, as a plaintiff. However, under RCFC 25(a), in order to substitute for a deceased party, a motion for substitution must be made. Here, no such motion has been made. Further, if Plaintiff actually were to make such a motion, it must be denied.

RCFC 25(a)(1) requires that a motion for substitution be made "90 days after service of a statement noting the death." If that motion is not made within 90 days, "the action by the decedent *must be dismissed*." *Id.* (emphasis added). While Plaintiff has not served a statement noting the death of Marie Toggery in this case, Plaintiff Rosales, as represented by Mr. Webb, in 2007, instituted *Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. 2007) ("*Rosales IX")*. The case caption lists the "Estate of Marie Toggery" as a plaintiff. *See id.* Such action constitutes the "*formal* suggestion of death" that triggers the 90 day clock. *See Grass Valley*

[4/] As such, this memorandum refers to "Plaintiff" in the singular.

Terrace v. United States, 69 Fed. Cl. 506, 509 (2006).[5/] As this Court has stated, a formal suggestion is required for the purpose of informing "all interested persons of a party's death so that they may take appropriate action to preserve the decedent's claim." *Id.* at 509-10. Here, Plaintiff made that formal suggestion at least in 2007 by bringing a suit on behalf of Marie Toggery's estate, a fact that was reflected time and time again in that lawsuit, as well as in the *Rosales v. United States*, No. 08-512 ("*Rosales X*"), a related action before this Court filed in July 2008. As Plaintiff made the formal suggestion of death in 2007 as required under RCFC 25(a), but failed to take a motion for substitution within 90 days, this Court should find that Karen Toggery is not substituted for Marie Toggery and that Plaintiff Rosales is the only remaining plaintiff in this case.[6/]

b. Plaintiff Fails to Assert Standing to Bring His Claims

Plaintiff fails to establish standing to bring this suit, and therefore, the Second Amended Complaint should be dismissed.[7/] When challenged, the party invoking federal jurisdiction bears the burden of establishing the necessary elements of standing. *Lujan v. Defenders of Wildlife,*

[5/] This Court in *Grass Valley Terrace* stated that a "diligent attorney" would file a notice "shortly after" the death. *See* 69 Fed. Cl. at 508 n.3. There, the United States objected to a motion for substitution as untimely. *See id.* at 508. The Court, however, granted the motion, finding that information regarding a party's death that appeared in exhibit 16 to a fifty page long reply brief with a 474 page appendix did not satisfy the formal suggestion of death. *See id.* at 509. In contrast, here, such information was far more prominently displayed in the caption of the case filed by Plaintiff Rosales in *Rosales IX*.

[6/] Even if Plaintiff were not required to take any action while the case was stayed, as the stay was lifted on September 26, 2008, the 90 days would have run on December 26, 2008.

[7/] If this Court were to find that Karen Toggery has been properly substituted or that any of the other individually named plaintiffs still remain in the lawsuit, the same arguments would apply, as none of the plaintiffs named in the caption of this case or the Estate of Marie Toggery have attempted to assert standing to bring this case.

504 U.S. 555, 560 (1992). To satisfy Article III standing, a plaintiff must demonstrate that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Here, Plaintiff utterly fails to establish the necessary elements of standing to bring his claims. Indeed, a discussion of standing cannot be found *anywhere* in the memorandum in response to the motion to dismiss.

The Court was very clear in its January 7, 2009 order that in addition to updating the motion to dismiss, the parties were to address the two jurisdiction issues identified for supplemental briefing in the March 15, 2000 Order. *See* Doc. 81. The standing questions posed by the Court are whether any of the individual plaintiffs have standing to bring this suit individually or on behalf of the Tribe and whether counsel properly has been authorized to represent the Tribe. *See* Doc. 36. As discussed in detail in the United States memorandum of law, the answer to both of these questions is resoundingly no.

The sole surviving Plaintiff does not have standing as an individual to bring the suit. Each of the ten causes of action are based on his alleged status as the tribal leadership and on the assertion that the United States is dealing with purported "non-members," premises that have been repeatedly rejected by other tribunals, including the D.C. Circuit Court. Further, Plaintiff Walter Rosales is not a member of the Tribe. *See* Declaration of Kenneth Meza ("Meza Decl."), ¶ 9, attached to Def. Mem. Finally, even if he were a member, Plaintiff would be barred by the doctrine of collateral estoppel from asserting that he is the leadership of the Tribe, on the basis

of, *inter alia*, the holding by the D.C. Circuit Court in *Rosales v. United States*, 477 F. Supp. 2d 213 (D.D.C. 2007), *aff'd* 275 Fed. Appx. 1 (D.C. Cir. 2008) ("*Rosales VIII*"). *See* Def. Mem. at 15-19. Plaintiff offers *no* response to this argument, thus leaving uncontested the fact that he is not the leadership of the Tribe and that the 1996 vote to amend the membership criteria in the tribal constitution is binding.

Plaintiff fails to allege any injury to a legally protected interest as an individual, and indeed offers no response to the United States' argument in this regard. Plaintiff cites no duty that runs to him as an individual rather than to the Tribe as a whole through its elected officers. Individuals, even if members of the Tribe, lack standing to claim an injury to tribal property, tribal assets, or any tribal interests. This is because tribal property interests and governmental authority are tribal claims, secured to recognized Indian tribes as distinguished from individual Indians. *See* Def. Mem. at 19-20. As the United States explained in detail, each and every claim asserted in the second amended complaint rests upon the same foundation presented in *Rosales II-IV* and *Rosales VIII, i.e.*, allegations of wrongdoing flowing from the 1996 amendment to the tribal constitution and the subsequent elections of tribal leaders pursuant to that amendment. *See* Def. Mem. at 21-25. Once again, Plaintiff offers *no* response to this argument, leaving this key point undisputed, namely that each claim asserted in the Second Amended Complaint is a tribal claim that Plaintiff does not have standing to bring. Therefore, the Second Amended Complaint should be dismissed.

2. Plaintiff Does Not Represent the Tribe in This Litigation and Mr. Patrick Webb Is Not Authorized to Represent the Tribe in This Litigation

Plaintiff does not dispute the fact that he has no standing to bring this action on behalf of the Tribe and does not dispute that Mr. Webb is not authorized to bring a suit on behalf of the

Tribe. *See* Def. Mem. at 26-28. Therefore, the Second Amended Complaint must be dismissed.

Indeed, it is clear that Plaintiff concedes that the Tribe is not a plaintiff, as the first sentence of the response brief listing the only "remaining surviving Plaintiffs" does not include the Tribe. *See* Pl. Mem. at 1. Nor does the remaining plaintiff, Walter Rosales, attempt to assert standing on behalf of the Tribe. As this case is no longer purported to be brought on behalf of the Tribe, this Court no longer needs to consider the question of whether Plaintiff has standing to bring this suit on behalf of the Tribe. Likewise, the Court no longer needs to consider the second jurisdictional question of whether Mr. Webb has authority to represent the Tribe in this litigation, a claim denied by the Tribe, *see* Meza Decl., ¶ 4, and not disputed in Plaintiff's response brief. Since the Tribe is not a party and since Plaintiff has alleged no injury as an individual, the Second Amended Complaint must be dismissed.

B. Plaintiff Fails to Respond to the Remaining Grounds for the United States' Motion to Dismiss

In addition to not having standing to bring this case, Plaintiff fails to rebut, or indeed even respond to, any of the other grounds upon which the United States based the motion to dismiss. First, Plaintiff does not dispute that any remaining claims based upon a tribal membership dispute are within the exclusive sovereignty of the Tribe and outside the jurisdiction of this Court. *See* Def. Mem. at 28-30. Second, Plaintiff does not dispute that he has failed to demonstrate an actionable case under the Tucker Act.[8/] *See* Def. Mem. at 30-34. Third, Plaintiff

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[8/] The memorandum submitted by Plaintiff attempts to argue that Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, serves as the basis for jurisdiction for Tucker Act claims. *See* Pl. Mem. at 9-24. However, the arguments presented in the memorandum are clearly not in response to the arguments set forth by the United States in this motion to dismiss. Rather, such arguments are presented in response to the United States' motion to dismiss filed in *Rosales X*. Further, Section 5 of the IRA is not one of the "predominate" statutes "supporting

does not dispute that this Court does not have jurisdiction to grant the type of injunctive relief requested and that the United States is the only proper defendant in the Tucker Act claim.[9/] *See* Def. Mem. at 34-35.

Nor does the Second Amended Complaint assert beneficial ownership over Parcel 04. As the Second Amended Complaint clearly states, this case concerns land that is a "reservation" or a "federal Indian Reservation real property," and not property that is held in trust for individuals. *See, e.g.*, Second Amended Complaint, ¶¶ 23, 28, 41, 53; *see* Def. Mem. at 24-25. Further, in Plaintiff's Non-Opposition to Motion to Transfer the case to Judge Damich in *Rosales X* (Doc. 10), Plaintiff clarified that this action involves claims "concerning approximately 1.37 acres," acquired in trust in 1982. Since Parcel 04 is 4.66 acres and was acquired in 1978, it is clear that Parcel 04 is not at issue here. Plaintiff does not, and indeed cannot, dispute this, and any arguments presented based on the proposed Third Amended Complaint must be disregarded, as discussed below in Section II. Therefore, this Court should grant the United States' motion to dismiss Plaintiff's Second Amended Complaint.

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jurisdiction" alleged in ¶ 6 of the Second Amended Complaint, although the IRA in general is referenced elsewhere in that paragraph. Therefore, the United States does not respond to such arguments in this reply brief. Rather, as discussed below, the United States moves to strike Plaintiff's memorandum.

[9/] The memorandum submitted by Plaintiff concedes that this Court does not have jurisdiction to grant injunctive relief and that the United States is the only appropriate defendant in Tucker Act claims before this Court. *See* Pl. Mem. at 51. However, again, the arguments presented in the memorandum are clearly not in response to the arguments set forth by the United States in this motion to dismiss. Rather, such arguments are presented in response to the United States' motion to dismiss in *Rosales X*. Therefore, the United States does not respond to such arguments in this reply brief. Rather, as discussed below, the United States moves to strike Plaintiff's memorandum.

II. PLAINTIFF'S RESPONSE BRIEF, INCLUDING THE ATTACHED PROPOSED THIRD AMENDED COMPLAINT SHOULD BE STRICKEN

A Joint Status Report submitted by the parties following the denial by the D.C. Circuit Court of Plaintiff's motion for rehearing *en banc* in *Rosales VIII* recommended that the stay in this case should be lifted and this case should "*proceed on the basis of this Court's March 15, 2000 Order with the Parties submitting supplemental briefing on the jurisdictional questions posed by the Court in that Order*." Joint Status Report, dated September 25, 2008 at 3 (emphasis added). (Doc. 74). The jointly proposed briefing schedule for the supplemental briefing on the jurisdictional question of standing was subsequently adopted by the Court. *See id.* at 3; Order, dated September 26, 2008. The Court then requested an updated brief in support of the motion to dismiss (Doc. 81), which the United States filed. (Doc. 82).

A. Plaintiff's Response Brief Should be Stricken

Instead of responding to the jurisdictional questions posed by the Court or any of the arguments made by the United States as to why Plaintiff does not have standing, Plaintiff instead submits a brief that attaches as an exhibit a proposed Third Amended Complaint, stating that he "voluntarily dismiss[es] those portions of the[] Second Amended Complaint, not contained in the[] proposed Third Amended Complaint, which focuses on the[] remaining claims, following the District of Columbia Circuit's decision in *Rosales v. United States*, Case No. 07-5140 [*Rosales VIII*]." Pl. Mem. at 2.

Plaintiff also states that he wishes to consolidate his amended claims with those made in *Rosales X*, and therefore, he "incorporates" the memorandum of law previously submitted in opposition to the United States' motion to dismiss filed in *Rosales X*. *See* Pl. Mem. at 2. Indeed, Plaintiff's brief is virtually identical to the brief submitted in opposition to the United States'

motion to dismiss in *Rosales X*, down to the Table of Contents, with the exception of several paragraphs in the introduction and a discussion of a recent Supreme Court case on page 46 of the brief.

The brief submitted by Plaintiff references a Complaint that is the Complaint in *Rosales X* and clearly not the Second Amended Complaint or even the proposed Third Amended Complaint in this case. *See, e.g.*, Pl. Mem. at 22; 35; 37 (stating the Complaint was filed on July 15, 2008); 51 (referring to a second cause of action for a taking). It also refers to a memorandum submitted by "Defendants" that is clearly not the Updated Brief in Support of United States' Motion to Dismiss, but rather is the memorandum of law submitted in support of the motion to dismiss Plaintiffs' Complaint in *Rosales X*. *See, e.g.*, Pl. Mem. at 4 (referring to arguments allegedly made by Defendants regarding statute of limitations and the application of California law, neither of which were argued in this case); *see also id.* at 35; 38. The memorandum also contains an eleven-page section that exclusively discusses the Native American Grave Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3002, *et seq*. *See* Pl. Mem. at 24-35. NAGPRA, however, is not even mentioned, let alone discussed, in either Plaintiffs' Second Amended Complaint or in the proposed Third Amended Complaint that is attached to Plaintiff's memorandum. The memorandum also includes a four page section discussing the application of the statute of limitations to the case, *see* Pl. Mem. at 35-39, an argument that has not been raised by the United States in this case. To the extent that this brief is unresponsive to the United States' motion, attaches a proposed Third Amended Complaint, and responds instead to a motion in another case, it should be stricken.

B. The Proposed Third Amended Complaint Should be Stricken.

Further, Plaintiff does not actually move for leave to amend his pleadings, for a third time, pursuant to RCFC 15(a)(2). As the Southern California District Court found in *Jamul Indian Village v. Hunter*, No. 95-cv-0131 (S.D. Cal.) ("*Dumas*"), where this same tactic was used, merely attaching a proposed amended complaint to a briefing does not serve to cure this defect. *See* Exhibit 3 to Def. Mem. at 6-13. In that litigation, just as here, the plaintiff proffered a new amended complaint in response to the government's motion to dismiss, but did not formally request leave to file it. The court found that a claim that an amended complaint has been filed does not make it so, and thus disregarded the majority of the plaintiff's argument in opposition to the government's motion to dismiss that depended on the proposed amended complaint as "simply irrelevant and obfuscating." *See id.* at 6-7. The court noted first that a plaintiff cannot file a second amended complaint as a matter of course under Fed. R. Civ. P. 15(a). *See* Ex. 3 to Def. Mem. at 7-10. The court also went on to find that proffering a second amended complaint is not the functional equivalent of filing it and that proffering a second amended complaint in conjunction with opposition to the government's motion to dismiss is not an adequate substitute for a formal motion for leave to amend the complaint. *See id.* at 10-12. The court concluded then that the current complaint before the court was the first amended complaint, and subsequently granted the government's motion to dismiss. *See id.* at 13-28.

This Court has similarly recognized that merely submitting an amended complaint without an accompanying motion for leave to amend the complaint does not comply with the requirements of RCFC 15(a). *See, e.g., Walton v. United States*, 80 Fed. Cl. 251, 257 n.6 (2008). Further, Plaintiff cannot amend the second amended complaint as of right. Rather, he must move

for leave to do so. He has failed to do so. Therefore, the proposed Third Amended Complaint attached to Plaintiff's memorandum should be stricken.

The United States reserves the right to object to any attempt by Plaintiff to amend the pleadings for a third time at this late date in the proceedings, but notes that since Plaintiff does not dispute in his response that all ten causes of action are based on the assertions rejected in other courts concerning membership, leadership of the Tribe and that the tribal constitution was not amended, nothing remains of this litigation.[10/] Further, Plaintiff's brief in no way relies on or even references the proposed Third Amended Complaint. Instead, it references only the Complaint filed in *Rosales X* and the United States' motion to dismiss that complaint. Therefore, the proposed Third Amended Complaint should be stricken.

III. PLAINTIFF'S REQUEST FOR CONSOLIDATION SHOULD BE DENIED

This Court should also deny Plaintiff's "request" to consolidate this case with *Rosales X*. First, Plaintiff does not actually submit a motion requesting the two cases be consolidated in either this case or in *Rosales X* as required by RCFC 42.1. Rather, Plaintiff "requests" consolidation and submits a memorandum in support of this "request." *See* Pl. Mem. at 2; *see Rosales X*, Doc. 24. Second, Plaintiff does not provide specific reasons why the "request"

[10/] Under RCFC 15(a), a party may only amend a pleading once as a matter of course. Here Plaintiff proposed a Third Amended Complaint. All subsequent amendments to a complaint are within the discretion of the trial court. *See* RCFC 15(a); *see also Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989). A motion to amend under RCFC 15(a) may be denied on several grounds, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1260 (Fed. Cir.1991) (emphasis omitted); *see also Mitsui Foods, Inc.*, 867 F.2d at 1401-04.

should be granted or explain why at this point in the proceedings a change to the status of the two cases is warranted, especially given that both cases are considered to be related cases before this Court on the basis of notices filed by the United States pursuant to RCFC 40.2. *See* Order, Dated October 1, 2008. (Doc. 75). Indeed, in response to the United States' motion to transfer, Plaintiff submitted a Non-Opposition to Motion to Transfer Case to Judge Damich in *Rosales X*, but argued then that the cases should *not* be consolidated. In that submission, Plaintiff pointed out that the two cases should not be consolidated because they involve distinctly different parcels of real property and because the 2008 action is based on events that took place eight years after this case was filed. Plaintiff stated:

> Plaintiffs do not oppose the proposed transfer, so long as the two cases are not consolidated. The actions should not be consolidated, since they involve distinctly different parcels of real property, and the second complaint arises from events that took place eight years after the original complaint was filed in this Court.
>
> The first action involves the Plaintiffs' claims concerning approximately 1.37 acres, known as parcel 597-080-05 . . . .
>
> This second action involves distinctly non-tribal property, 4.66 acres, known as parcel 597-080-04.

Rosales X, Non-Opposition to Motion to Transfer Case to Judge Damich at 1-2. (Doc. 10).

Further, since briefing on the United States' motion to dismiss all ten causes of action in this proceeding is complete, if the Court were to grant the pending motion, there is nothing left in this case to consolidate.

Finally, even if Plaintiff had complied with the requirements of RCFC 42.1, and the Court were to grant such a motion, it would not change the filing date for the claims stated in *Rosales X*, as Plaintiff implies would happen. *See* Pl. Mem. at 2. As this Court has recognized,

consolidation is simply a procedural device. *See Southern California Federal Savings & Loan Ass'n v. United States*, 51 Fed. Cl. 676, 678 (2002). It "does not merge two cases into a single claim, nor does it change or expand the parties' rights." *Id.* Further, this Court's jurisdiction cannot "be enlarged by rule." *Id.* For example, in *Southern California Federal Savings & Loan Ass'n*, this Court upheld a ruling that dismissed a complaint that had been consolidated with an earlier filed action as time-barred because it had been filed after the six-year statute of limitations provided in 28 U.S.C. § 2501 had run. *Id.*, 51 Fed. Cl. At 678; *see also Benzoni v. Goldman*, 54 F.R.D. 450, 453 (S.D.N.Y. 1972) (consolidation under the Federal Rules of Civil Procedure 42 does not preclude a defendant from setting up a statute of limitations defense). Similarly here, consolidation cannot serve to resurrect any claims that are barred by the statute of limitations. Therefore, such a "request" should be denied.

CONCLUSION

For the foregoing reasons, this Court should: (1) grant the United States' motion to dismiss Plaintiff's Second Amended Complaint; (2) grant the United States' motion to strike Plaintiff's response memorandum, including the attached proposed Third Amended Complaint; and (3) deny Plaintiff's request for consolidation.

Dated this 3rd day of April, 2009.

Respectfully submitted,

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