NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP
JAMES R. PARRINELLO, ESQ. (S.B. NO. 63415)
CHRISTOPHER E. SKINNELL, ESQ. (S.B. NO. 227093)
2350 Kerner Boulevard, Suite 250
San Rafael, California 94941
Telephone: (415) 389-6800
Facsimile: (415) 388-6874

NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR, LLP
CATHY A. CHRISTIAN, ESQ. (S.B. NO. 83196)
1415 L Street, Suite 1200
Sacramento, California 95814
Telephone: (916) 446-6752
Facsimile: (916) 446-6106

Attorneys for Intervenor-Defendants
COUNTY OF SACRAMENTO, CALIFORNIA
& CITY OF ELK GROVE, CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILTON MIWOK RANCHERIA, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, *et al.*,

Defendants,

COUNTY OF SACRAMENTO, CALIFORNIA and CITY OF ELK GROVE, CALIFORNIA,

Proposed Intervenors.

Case No. C-07-02681-JF-PVT

MOTION TO RE-OPEN & VACATE JUDGMENT AND TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [FRCP 12(h)(3), 60(b)]

HEARING DATE: Sept. 18, 2009
HEARING TIME: 9:00 a.m.
JUDGE: Hon. Jeremy Fogel
COURTROOM: 3

ME-WUK INDIAN COMMUNITY OF THE WILTON RANCHERIA, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, *et al,*,

Defendants,

COUNTY OF SACRAMENTO, CALIFORNIA and CITY OF ELK GROVE, CALIFORNIA,

Proposed Intervenors

Case No. C-07-05706 (JF)

TABLE OF CONTENTS

Page

///

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Other

NOTICE OF MOTION & RELIEF SOUGHT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on September 18, 2009, at 9:00 a.m., or as soon thereafter as the parties may be heard, the COUNTY OF SACRAMENTO, CALIFORNIA, and the CITY OF ELK GROVE, CALIFORNIA, will move the Court, at the United States Courthouse located at 280 South 1st Street, San Jose, California, 95113, Courtroom #3, as follows:

- That the Court should re-open and vacate the judgment for lack of subject matter jurisdiction (FRCP 60(b)(4)), and dismiss the action with prejudice for lack of subject matter jurisdiction of plaintiffs' claims (FRCP 12(h)(3));
- or alternatively the Court re-open and vacate the judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect" (FRCP 60(b)(1)) or because the interests of justice require it (FRCP 60(b)(6)), and permit the County and City to contest this action on its merits for the first time.

This motion is based on the following documents: this Notice of Motion and the attached Points & Authorities; the Motion to Intervene, filed herewith; the Declaration of Cathy Christian, filed herewith; the Declaration of Paul Hahn, filed herewith; the Declaration of Susan Burns Cochran, filed herewith; the proposed Answers in Intervention, lodged herewith; and all the other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at the hearing on the motion.

POINTS AND AUTHORITIES

A. INTRODUCTION.

The judgment should be vacated for want of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 60(b)(4), and the complaints

accordingly dismissed for lack of jurisdiction pursuant to Rule 12(h)(3). Alternatively, the judgment should be vacated for reason of "mistake, inadvertence, surprise, or excusable neglect," under Rule 60(b)(1), or in the interests of justice under Rule 60(b)(6) and the COUNTY OF SACRAMENTO ("County") and CITY OF ELK GROVE ("City") should be allowed to contest the merits of this action.

The settlement agreed to by the parties in these suits—which were desultorily contested at best—threatens significant harms to the County's taxing and regulatory jurisdiction and to the County's and City's economic and environmental interests, especially if, as anticipated, casino gaming is sought on the parcels that the federal government has improperly agreed to take into trust on behalf of plaintiffs. Yet the County and City never knew of the suits' pendency until after the settlement was already approved and judgment entered.

Plaintiffs in this action have alleged that their 1964 termination as a recognized Indian tribe under the California Rancheria Act was unlawful, and seek to have their recognition restored and, further, request that certain lands within the borders and jurisdiction of the County, and adjacent to land owned by the City, be taken into trust by the federal government.

Plaintiffs' claims suffer a fundamental jurisdictional defect: they are barred by the statute of limitations, which is jurisdictional and therefore deprives this court of subject matter jurisdiction over the action. The United States appears to have been aware of this defect. In its Answer it set up as a First Affirmative Defense the statute of limitations, and in the only case management statement filed in this action it further noted, "[s]ubstantial defects in jurisdiction of this Court over Plaintiffs' claims exist, including but not limited to lack of standing and statute of limitations[,]" and informed the court it expected to file a motion to dismiss on this basis. Joint Case Management Statement at 2 & 7-8, *Wilton Miwok Rancheria v. Kempthorne*, Case No. 07-cv-02681-JF (N.D. Cal.) (Dkt. #19). Yet the federal defendants thereafter dropped the issue. No motion was ever filed; no

discovery appears to have been conducted. Instead the government stipulated to the entry of a settled judgment completely favoring the tribe(s).[1] This they did not have the power to do. The law is settled that executive officers of the United States may not waive the statute of limitations in suits against the government.

Nor was jurisdiction the only defect ignored by the federal defendants. In the first place, evidence in the record indicates the Secretary of Interior, Defendant Kenneth Salazar, lacks the authority to take land into trust on behalf of Plaintiffs as requested, pursuant to the United States Supreme Court's recent ruling in *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009), which was decided four months before the settlement was approved. The *Carcieri* decision makes clear that the Secretary of Interior lacks authority to take land into trust unless the tribes were under federal jurisdiction in 1934 at the enactment of the Indian Reorganization Act. Moreover, there is no record evidence to substantiate the tribes' claim that the lands in question are the "restored lands of a restored tribe" within the meaning of the Indian Regulatory Gaming Act, entitling it to conduct casino gaming on the parcels in question without meeting the normal requirements that it consult with state and local officials and obtain the approval of California's governor. 25 U.S.C. § 2719(b)(1)(A). Neither of these issues appears to have been actively contested by the government; indeed, the record fails to suggest they were ever seriously considered.

If the unlawful settlement is allowed to stand, and the lands in question are taken into trust as agreed, the effect would be to negate the regulatory and taxing authority the County exercises over those parcels; it would also threaten potential economic and environmental impacts to the County and City from anticipated Las Vegas-style casino gaming activities. Given these effects, the County and City

[1] The County and City recognize there are competing factions claiming to constitute the "real" Wilton Rancheria tribe, both of whom are parties to this case. Consequently, this motion refers to "tribes" throughout.

should have been joined as necessary parties to this action. (This issue is discussed at length in the County's and City's accompanying motion to intervene, and, in the interests of relative brevity is incorporated herein, rather than being repeated again in full.) Yet they were never joined as they should have been, *nor were they ever given any notice whatsoever* of the pendency of these actions until judgment was already entered. Even then, the "notice" the County and City did receive came in the form of press reports resulting from the plaintiff tribes' press release announcing the settlement.

Here again, the existing parties were aware that the County's and City's interests were implicated by the suit. In fact, when the Me-Wuk Community initially filed its suit in the District of Columbia, the United States filed a motion to transfer venue to the Eastern District of California in part based on the fact that "the state and its political subdivisions may wish to participate in this litigation,"[2] because

> [t]he use and control of the land at issue directly touches individuals in California. Plaintiff has requested that the Secretary of the Interior take certain land into trust, "with such lands to be considered 'Indian country' as defined in 18 U.S.C. § 1151. . . ." Pl.'s Compl., 25 (Prayer for Relief, ¶ C). If such a request is granted, the local and state government in California will no longer have civil regulatory jurisdiction over such lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).[3]

Yet here again, after initially raising the issue the United States did nothing more. Its motion was denied when the federal defendants stipulated to the transfer of venue to this court instead of the Eastern District of California, and the United States acquiesced to the continuing omission of the State of California and its local

---

[2] Def's Mot. to Transfer Venue, *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case No. 07-cv-00412-RCL (D.D.C.) (filed Apr. 20, 2007), p. 5.

[3] Def's Reply In Support of Mot. to Transfer Venue, *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case Non. 07-cv-00412-RCL (D.D.C.) (filed May 15, 2007), p. 5.

governments.

By all appearances, plaintiffs have steered this case so as to avoid opposition to their efforts to remove these parcels from the regulatory jurisdiction of the County (and the State of California), which they had to know would be controversial, and to deprive the County and City of the opportunity to protect their significant interests by failing to name them as parties or even telling them about this lawsuit. And the United States has acquiesced.

Such major policy issues should not be decided (1) by a court that lacks subject matter jurisdiction, surely, but also (2) in a case that is anything but vigorously contested, when parties who face real negative consequences are excluded from the action, and never even informed of the actions' pendency. Under such circumstances vacating the judgment is appropriate.

B. FACTUAL BACKGROUND.

In 1958 Congress enacted the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390, which provided for the termination of various California Indian tribes' formal recognition by the federal government under specified terms. In 1964, plaintiff tribes were terminated pursuant to that Act. 29 Fed. Reg. 13,146 (Sept. 22, 1964). *See also* Complaint at 10-11 ¶ 28, *Wilton Miwok Rancheria v. Kempthorne*, Case No. 07-CV-02681-JF (N.D. Cal.) ("Wilton Complaint"); Complaint at 2 ¶ 5, *Me-wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case Nos. 07-CV-00412 (D.D.C.) and 07-CV-05706-JF (N.D. Cal.) ("Me-Wuk Complaint"). As part of the termination process, lands previously held in trust by the United States on the tribes' behalf were distributed to individual and communal landowners, and once distributed "[were] no longer [] exempt from any state and local laws, ordinances, or regulations." (Wilton Complaint, ¶ 22. *See also* Me-Wuk Complaint, ¶ 61.) Sacramento County has accordingly exercised local jurisdictional, taxing and regulatory authority over the affected lands for more than 40 years.

In 1979, a host of California tribes—including the Wilton Rancheria—filed suit in this court, seeking to challenge their termination under the Rancheria Act. (Wilton Complaint, ¶ 32; Me-Wuk Complaint, ¶¶ 68-69; *Tillie Hardwick v. United States*, Case No. C-79-1710-SW (N.D. Cal.).) In 1983, the Wilton Rancheria stipulated to their dismissal from the action. (Wilton Complaint, ¶¶ 41-43.)

Now, more than 20 years after being dismissed from the *Tillie Hardwick* action, and more than 40 years after being terminated under the California Rancheria Act, the various factions of the Wilton Rancheria community have renewed their challenge, bringing suit again alleging that their 1964 termination was unlawful, and requesting (among other things) that their recognition be restored, and that any territory owned by the tribes or their members be taken into trust by the United States.

Plaintiffs' claims are barred by the statute of limitations, as discussed more fully below. The United States has repeatedly recognized this fact, in letters predating the litigation, in its answer in this action, and in its case management statement, yet the federal defendants have nevertheless permitted judgment to be entered in plaintiffs' favor without regard to this defense. The federal defendants have also ignored the evidence in the record that the tribes were not organized until 1935, and that consequently the Secretary lacks authority to take the specified parcels into trust on behalf of the tribes pursuant to a recent decision of the Supreme Court, and have agreed that gaming can take place on the parcels without requiring any evidence in the record to substantiate the tribes' entitlement to gaming, *see* 25 C.F.R. §§ 292.11 and 292.12, or their status in 1934.

If the requested lands are taken into trust, the jurisdictional, taxing and regulatory powers exercised by the County over the parcels in question will be nullified—a fact expressly recognized by the Wilton Complaint, which requested, among other things, relief in the form of declarations that "[t]he lands comprising Wilton Miwok Rancheria were and still are 'Indian Country' and that such lands

now or in the future to be acquired by the Tribe are immune from local property taxation, assessement [sic] or other civil regulatory jurisdiction . . . ," and more specifically that "[t]he lands comprising the Wilton Miwok Rancheria are not subject to the jurisdiction of Sacramento County, and further that the lands would not be subject to county regulation and taxation . . . ." (Wilton Complaint, Prayer ¶ (1)(vii) & (viii). *See also* Me-Wuk Complaint, ¶ 61 & Prayer ¶ (c); 25 U.S.C. § 465; 25 C.F.R. § 151.10(f).)

The parcels are also immediately adjacent to lands that are currently owned by the City of Elk Grove to mitigate habitat loss for endangered and threatened species, including the Swainson's Hawk. (Declaration of Elk Grove City Attorney Susan Burns Cochran, filed herewith, ¶ 10.) Moreover, pursuant to the City's general plan as updated in 2005 (two years before these actions were filed), Elk Grove filed an application with the Local Agency Formation Commission in May 2008 (more than a year before it learned of this lawsuit) to have these parcels adjacent to the proposed Rancheria taken into the City's sphere of influence. (*Id.*, ¶ 12.) Inclusion in the City's sphere of influence signals the City's expectation that the land in question will eventually be annexed to the City, and it requires consultation between the County and the City regarding land use decisions on the affected parcels. (*Id.*) The County and City have also been negotiating a Memorandum of Understanding regarding future development standards for the affected area. (*Id.*, ¶ 13.) That MOU anticipates the creation of a greenbelt for environmental protection and habitat for endangered and threatened species that would include the Rancheria lands themselves. (*Id.*) Having the Rancheria in the middle of the greenbelt, but exempt from the environmental terms of the MOU, could make the greenbelt less secure and more subject to other development pressures. (*Id.*) Thus, Elk Grove has significant regulatory interests in these parcels as well. These interests, too, will be nullified if the parcels are taken into trust.

Moreover, the tribes have urged, and the government has stipulated, that when these lands are taken into trust they will be eligible for casino gaming under the Indian Gaming Regulatory Act. Stipulation for Entry of Judgment, ¶¶ 3 & 10; 25 U.S.C. § 2719(b)(1)(B)(iii). It is no secret that large commercial developments—like casino gaming—typically have significant effects on the surrounding local governments. (Burns Cochran Decl., ¶¶ 5-13; Declaration of Paul Hahn, filed herewith, ¶ 10. *See also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 140 & 142 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 541 U.S. 974 (2004) [summarizing detrimental economic and environmental impacts of proposed casino to surrounding community].) That is why, in the normal case, local officials must be consulted before gaming can be conducted on property tribes acquire after October 17, 1988, and the State's governor must give his approval. 25 U.S.C. § 2719(b)(1)(A). The unlawful settlement in this action, however, seeks to improperly bypass these procedural protections for state and local governments' taxing, regulatory, economic and environmental interests. The County and City will not have another forum to protect these interests if intervention is denied.

Despite the significant governmental, environmental and economic interests the County and City have in the parcels in question, neither the County nor the City were named as parties to this action. Indeed, the local jurisdictions were not even given any notice—formal or informal—of the pendency of these actions. (Hahn Decl., ¶ 2; Burns Cochran Decl., ¶ 14.) The County and City first learned that the suits existed in mid-June 2009, after the plaintiff tribes apparently issued a press release announcing the settlement (in other words, once judgment was already entered). (*Id.*) In fact, counsel for one of the plaintiff tribes flatly acknowledged to the Elk Grove city attorney at a meeting after the settlement was approved that notice had not been provided. (Burns Cochran Decl., ¶ 14.) And finally, it is worth noting that these actions have been conducted in Washington, D.C., and in San

Jose—far from Sacramento and outside the Eastern District of California where the County and City are situated, and where they might conceivably have learned of these actions independently.

C. THIS COURT NEVER HAD JURISDICTION OVER THESE ACTIONS, BECAUSE THE STATUTE OF LIMITATIONS—WHICH IS JURISDICTIONAL—HAD LONG SINCE EXPIRED WHEN THE SUITS WERE FILED.

Notwithstanding that the County and City are movants, the plaintiffs bear the burden of establishing that jurisdiction exists. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). In effect, the court presumes lack of jurisdiction unless the asserting party can prove otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

As the United States Supreme Court has held, "[t]he objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, *even after trial and the entry of judgment*. Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (emphasis added).[4]

As acknowledged by the plaintiffs in this action, the Wilton Rancheria was terminated under the Rancheria Act more than four decades ago, on September 22, 1964. (Me-Wuk Complaint, ¶ 51; Wilton Complaint, ¶ 28.) *See also* 29 Fed. Reg. 13,146 (Sept. 22, 1964).

Accordingly, as the United States Department has *expressly* acknowledged, in letters cited by the Me-Wuk Complaint and attached to the Wilton Complaint,

[4] The lack of subject matter jurisdiction may also be raised by a non-party pursuant to Rule 12(h)(3) (in the unlikely event that the County and City are denied intervention in this action). *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1440 (9th Cir. 1987); *Canadian St. Regis Band of Mohawk Indians v. New York*, 388 F. Supp. 2d 25, 36 (N.D.N.Y. 2005).

"*[t]he tribe's recourse in challenging their termination* on the premise of being illegal or wrongful *through a Federal court action has long expired*, leaving the Wilton Rancheria with limited options to seek relief." (Letter from Dale Risling, Sr., Superintendent, Bureau of Indian Affairs, Central California Agency (Aug. 24, 2004), p. 1, attached to Wilton Complaint as Exhibit J [emphasis added]. *See also* Letter from Troy Burdick, Superintendent, Bureau of Indian Affairs, Central California Agency (Sept. 12, 2006), p. 1 (acknowledging same, in virtually identical language), attached to Wilton Complaint as Exhibit J.) In accordance with this understanding, the United States initially raised the statute of limitations in its answer as its First Affirmative Defense, and subsequently advised the Court that it anticipated filing a motion to dismiss on that basis. Then, the United States fell silent on this issue and acquiesced to the entry of judgment in the tribes' favor. This it could not lawfully do; nor, respectfully, may the Court authorize it.

The tribes' challenge to their termination under the Rancheria Act was subject to the six-year statute of limitations in 28 U.S.C. § 2401(a). *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (D.C. Cir. 1988) (applying 28 U.S.C. § 2501—"companion statute" to Section 2401(a)—to unlawful Rancheria Act termination claim for money damages).[5] This statute of limitations is *jurisdictional* and cannot be waived by executive officials of the United States; it consequently *requires* dismissal of an action by a federal court *even if not raised by the United States*. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 753 (2008) (requiring *sua sponte* consideration of jurisdiction under 28 U.S.C. § 2501);[6] *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2008)

[5] "Section 2401(a) parallels the provisions of section 2501, and provides, in pertinent part, that 'every civil action commenced against the United States shall be barred unless the complainant is filed within six years after the right of action first accrues'. . . . 'there is certainly no distinction between the companion statutes of limitations found at section 2401(a) and section 2501.'" *Hopland Band*, 855 F.2d at 1577 n.3 (quoting *Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983), *reh'g denied*, 737 F.2d 1038 (1984)).

[6] *See* footnote 5, *supra*.

(applying *John R. Sand & Gravel Co.* to conclude that limitations under 28 U.S.C. § 2401(b) are jurisdictional and nonwaivable except by Congress).[7]

The present actions were filed more than 40 years after the tribes' termination under the Rancheria Act. Any cause of action the tribes had for illegal termination accrued, and the statute of limitations also consequently expired, *decades ago*.

That the tribes and their members may have been insufficiently diligent in assessing relevant facts in pursuing the *Tillie Hardwick* litigation, and therefore mistakenly agreed to allow themselves to be dismissed from the settlement in that action, does not excuse compliance with the statute of limitations. "[A] plaintiff does not have to possess actual knowledge of all the relevant facts in order for a cause of action to accrue." *Ingrum v. United States*, 560 F.3d 1311, 1314-15 (Fed. Cir. 2009). Notwithstanding the lack of a plaintiffs' actual knowledge, "the accrual date of a cause of action [against the United States] will be suspended in only two circumstances: '[the plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was "inherently unknowable"' at the time the cause of action accrued." *Id.* at 1315 (quoting *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc)).[8] There is no allegation in either complaint of fraud or

[7] It is true that, prior to the decision in *John R. Sand & Gravel Co.*, the Ninth Circuit had held that § 2401(a)—the provision applicable here—*was* waivable. *See Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). But, as the Ninth Circuit recognized in *Marley*, the continuing vitality of *Cedars-Sinai* is exceedingly doubtful in light of *John R. Sand & Gravel Co. Marley*, 567 F.3d at 1035 n.3.

[8] "It is sometimes stated that the accrual of a claim against the United States will be suspended until the claimant "knew or should have known" that the claim existed. *See Kinsey v. United States*, 852 F.3d 556, 557 n.* (Fed. Cir. 1988). That articulation of the rule is not meant to set forth a different test, as the two standards have been used interchangeably. *See Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). However, the 'concealed or inherently unknowable' formulation . . . is both more common and more precise, and we therefore continue to endorse that formulation as the preferable one for 'accrual suspension' cases." *Ingrum*, 560 F.3d at 1315 n.1.

deliberate concealment of material facts by the United States that would bring these actions within the statute of limitations.

In addition, the complaints themselves *admit* that a tribal member, Jane Martinez Brown, owned Rancheria land at the time of the *Tillie Hardwick* litigation, knew of the existence of that litigation in which the Wilton Rancheria challenged its termination under the Rancheria Act, and even proposed to make a statement to the court until learning that the Wilton Rancheria had allowed itself to be dismissed out of the action. (Wilton Complaint, ¶¶ 42-43.)

Thus, *at the latest* the Wilton Rancheria tribes unquestionably knew or should have known that it had a (potential) cause of action in its favor in 1979, when it initially joined in the *Tillie Hardwick* litigation. (*See* Wilton Complaint, ¶ 32; Me-Wuk Complaint, ¶¶ 68-69). Its cause of action began to accrue *at the latest* at that point. And the statute of limitations ran on the claims asserted in this law suit *at the latest* in 1985.

The Risling and Burdick letters, quoted above, properly recognize that *Congress* is the appropriate authority at this point for restoring the Wilton Rancheria to recognition. But now the federal government, by its silence with respect to the statute of limitations bar it recognized as recently as its Answer and case management statement, has stipulated to a judgment that bypasses the proper channels of tribal recognition and usurps congressional power. This it cannot legitimately do; nor, respectfully, may the Court authorize it.

D. BECAUSE THE COURT LACKED JURISDICTION OVER THE CLAIMS IN THESE ACTIONS, IT HAS A NONDISCRETIONARY DUTY TO VACATE THE JUDGMENT & DISMISS THE COMPLAINTS WITH PREJUDICE.

Federal Rule of Civil Procedure 60(b)(4) authorizes a district court to vacate a judgment if "the judgment is void." A judgment is void, for purposes of Rule 60(b)(4), if "the court that considered it *lacked jurisdiction*, either *as to the subject matter of the dispute* or over the parties to be bound, or acted in a manner

inconsistent with due process of law." *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999) (emphasis added).

Where a judgment is entered without proper jurisdiction, it is void, and a "District Court ha[s] a nondiscretionary duty to grant relief" from the judgment under Rule 60(b)(4). *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). *See also Bank One, Tex., N.A. v. Taylor*, 970 F.2d 16, 33-34 (5th Cir. 1992) (district court abused its discretion in refusing to grant relief to post-judgment intervenor where subject matter jurisdiction challenged by FRCP 60(b) motion).

"There is no time limit on a Rule 60(b)(4) motion to set aside a judgment as void." *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

Once the judgment is vacated, the complaints should be dismissed with prejudice. "Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.'" *Arbaugh*, 546 U.S. at 506 (emphasis added). No amendments to the complaints can overcome the fundamental jurisdictional defect.

E. ALTERNATIVELY, THE JUDGMENT SHOULD BE VACATED FOR MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT, OR IN THE INTERESTS OF JUSTICE, BECAUSE THE PARTIES IMPROPERLY EXCLUDED THE CITY & COUNTY FROM THIS LITIGATION AFFECTING THEIR INTERESTS, AND FAILED EVEN TO INFORM THE COUNTY AND CITY OF THE PENDENCY OF THE ACTIONS.

Federal Rule of Civil Procedure 60(b) allows a final judgment to be vacated on the basis of "mistake, inadvertence, surprise, or excusable neglect," Fed. R. Civ. Proc. 60(b)(1), or for "any other reason that justifies relief." Fed. R. Civ. Proc. 60(b)(6). A motion to vacate under Rule 60(b)(1) must be brought within a year of

the judgment being entered—a deadline easily met in this case. A motion under Rule 60(b)(6) is subject to no hard and fast deadline; the motion must simply be "made within a reasonable time," Fed. R. Civ. Proc. 60(c)(1), a deadline also met in this case.

The judgment in this case is the very definition of "surprise" when it comes to the County and the City, or at the very least of "excusable neglect." This latter "concept, the Supreme Court has made clear, is a general equitable one, not necessarily reserved for extraordinary circumstances, and takes account of factors such as 'prejudice, the length of the delay and impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993)." *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001).

As extensively detailed above, and in the motion to intervene filed herewith, the County and City were not only excluded from these actions—despite being necessary parties—but they were not even get notice, formal or informal, of the actions' existence until after the settlement was approved.

Instructive on this point is case law regarding default judgments. Relief from defaults are often granted under Rule 60(b)(1) where there is good cause. As the Ninth Circuit has held,

> Rule 60(b) is "remedial in nature and ... must be liberally applied." *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam). More specifically, in applying the general terms of Rule 60(b) to default judgments, this Court has emphasized that such judgments are "appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Falk*, *supra*, 739 F.2d at 463. Put another way, where there has been *no* merits decision, appropriate exercise of district court discretion under Rule 60(b) requires that the finality interest should give way fairly readily, to further the competing interest in reaching the merits of a dispute.

TCI Group Life Ins. Plan, 244 F.3d at 695-96.

To be entitled to relief from a default judgment under Rule 60(b), a movant must show three factors: "Those factors are: whether the defendant's culpable conduct led to the default; whether the defendant has a meritorious defense; and whether reopening the default judgment would prejudice the plaintiff." *Id.*

As to culpability, vacation of the judgment is even more appropriate in this case than in the case of a default judgment. At least when a default judgment is entered it is done based on the presumption that the defendant has been properly served with process—that it has received *some* kind of notice. *See Beneficial Cal., Inc. v. Villar (In re Villar),* 317 B.R. 88, 94 (B.A.P. 9th Cir. 2004) ("Before a court can enter a default judgment, the service of process must be effective. . . . [A]n order granted without adequate notice does not satisfy the requirements of due process of law and is therefore inevitably void."). In this case, *no notice* was received by the County and City, despite the threat to their regulatory, taxing, environmental and economic interests, and despite the fact that the United States expressly recognized that state and local governments would have an interest in participating in this lawsuit (before acquiescing to their continued exclusion).

As for the merits of the County's and City's defenses, the local governments contest—based on a United States Supreme Court case decided four months before the settlement was approved, *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009)—that the Secretary has the authority to take land into trust on behalf of plaintiffs—a primary form of relief sought by the complaints, to the detriment of the County and City.

In *Carcieri* the United States Supreme Court held that Section 19 of the Indian Reorganization Act, 25 U.S.C. "§ 479 limits the Secretary [of Interior]'s authority to taking land into trust for the purpose of providing land to members of a tribe *that was under federal jurisdiction when the IRA was enacted in June 1934*." 129 S. Ct. at 1061 (emphasis added).

Documents authored by the federal government, and attached to the Wilton Miwok Rancheria's complaint (as Exhibit J), themselves call into question the legitimacy of taking land into trust on behalf of the plaintiffs:

> "The recognition of this band of Me-wuk Indians, as a tribe took place when they were provided the opportunity to vote as a tribe whether to accept or reject the Indian Reorganization Act (IRA) of 1934, as the Statute with which to formally organize the tribe. Pursuant to Section 16 of the IRA, the tribe did on *November 6, 1935*, ratify a Constitution and By-laws which effectively formally organized this tribe."

(Letter from Dale Risling, Sr., Superintendent, Bureau of Indian Affairs, Central California Agency (Sept. 17, 2004), p. 1 (emphasis added).)

> Pursuant to section 16 of the IRA, the tribe ratified a constitution and bylaws on *December 7, 1935*, and the Secretary of the Interior approved the constitution on *January 15, 1936*, which effectively formally organized the tribe."

(Letter from Troy Burdick, Superintendent, Bureau of Indian Affairs, Central California Agency (June 14, 2006), p. 1 (emphasis added).)

There is no evidence in the record of this case to suggest that the impact of *Carcieri* was ever actively considered by the existing parties. The County and City should be permitted to advance this issue as a defense.

Additionally, the federal government has agreed that the lands to be taken into trust under the settlement constitute "restored lands of a restored tribe" amenable to gaming under Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(ii), without consultation with local governments and the approval of California's governor. But the government appears to have made no effort to require evidence that the current tribes have met the various requirements to establish their qualification under that exception. For example, when a tribe's federal acknowledgment is restored pursuant to court order, the tribe must establish that the lands it proposes to treat as "restored lands" meet the following criteria:

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

25 C.F.R. §§ 292.11(c) and 292.12. Not only does the record contain no evidence these criteria are met, the complaints in this action do not even sufficiently allege them.

Finally, with respect to prejudice to the parties, the tribes and the United States can hardly complain of the prejudice they will suffer by virtue of their own failure to name the County and City as necessary parties—as they should have—or

at a minimum to inform the County and City of the pendency of these actions. The tribes knew or should have known that the County and City, whose interests would be adversely affected by the relief sought, would therefore be expected to put up a fight and oppose the relief sought. The United States, for whatever reasons, acquiesced in the tribes' exclusion of the County and City. Neither can now justly complain of prejudice from the County and City seeking to protect the interest they should have been able to defend of right months, if not years, ago.

F. CONCLUSION.

The judgment in this action should be vacated and dismissed for lack of subject matter jurisdiction, in light of the fact that all of plaintiffs' claims are long since barred by a jurisdictional statute of limitations. Alternatively, the judgment should be vacated on the basis of "mistake, inadvertence, surprise, or excusable neglect," or because the circumstances of this case provide "other reason[s] that justifies relief," Fed. R. Civ. Proc. 60(b)(1),(6), and the County and City should be allowed to contest this action vigorously, on the merits, as not been done by the United States.

Dated: August 4, 2009

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By: /s/James R. Parrinello
James R. Parrinello

By: /s/Cathy A. Christian
Cathy A. Christian

By: /s/Christopher E. Skinnell
Christopher E. Skinnell

Attorneys for Intervenor-Defendants
SACRAMENTO COUNTY, CALIFORNIA & CITY OF ELK GROVE, CALIFORNIA