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ME-WUK INDIAN COMMUNITY OF THE
WILTON RANCHERIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

WILTON MIWOK RANCHERIA, ITS MEMBERS and DOROTHY ANDREWS,

Plaintiffs,

v.

KENNETH L. SALAZAR, et al.

Defendants.

ME-WUK INDIAN COMMUNITY OF THE WILTON RANCHERIA,

Plaintiff,

v.

KENNETH L. SALAZAR, et al.,

Defendants.

Case No. C-07-02681 (JF) (PVT)
Case No. C 07-05706 (JF)

CONSOLIDATED OPPOSITION TO THE COUNTY OF SACRAMENTO AND THE CITY OF ELK GROVE'S MOTION FOR INTERVENTION AND MOTION TO RE-OPEN AND VACATE JUDGMENT AND TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

Date: October 30, 2009
Time: 9:00 a.m.
Courtroom: 3
Judge: The Honorable Jeremy Fogel

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INTRODUCTION

On August 5, 2009, the City of Elk Grove ("City") and the County of Sacramento ("County") (collectively "Movants") filed a post-judgment "Motion for Intervention" ("Motion to Intervene") and "Motion to Re-Open and Vacate Judgment and to Dismiss for Lack of Subject Matter Jurisdiction" ("Motion to Vacate") in the consolidated cases of *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Salazar, et al.* (C-075706) ("*Me-Wuk Community*") and *Wilton Miwok Rancheria, et al., v. Salazar, et al.* (C-072681) ("*Wilton Miwok*") on the grounds that the Court's final disposition harmed their interests – namely their ability to tax and regulate the unlawfully terminated lands of the Wilton Rancheria. The Court must deny the Motion to Intervene, and consequently deny the Motion to Vacate, on the grounds that: (1) the restored and judicially-inextinguishable sovereign nation of the Wilton Rancheria is a required party to this litigation that has not waived its sovereign immunity from Movants' attempted claims, and Supreme Court precedent dictates that this Court, in equity and good conscience, cannot proceed to rehear this matter in the Tribe's absence; (2) intervention at this abhorrently late stage is untimely; (3) Movants do not have a legally protected interest in this litigation and thus have not satisfied the requirements for mandatory intervention, and are not worthy candidates for permissive intervention; (4) the Court does not have jurisdiction to hear Movants' claims since they lack standing and their claims are not ripe for review; and (5) the Court is incapable of providing Movants with their requested relief, and, even if it could, it should not given the meritless nature of their claims.

PROCEDURAL HISTORY

This case originated on February 29, 2007, when then-counsel for *Me-Wuk Community* filed a complaint in the District for the District of Columbia alleging the Wilton Rancheria was unlawfully terminated by the federal government through the "California Rancheria Act," otherwise known as "An Act To Provide for the Distribution of the Land and Assets of Certain Indian Rancherias and Reservations in California, and Other Purposes," Pub. L. No. 85-671, 72 Stat. 619, amended by Pub. L. No. 88-419, 78 Stat. 390. *See Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, *et al.,* No. 07-00412 (D.D.C. Feb. 29, 2007), Docket No. 1. The case was reassigned to the Northern District on November 9, 2007, and consolidated with *Wilton Miwok* on November 27, 2007. *Me Wuk,* Docket Nos. 1, 7. Judge Fogel was selected to adjudicate this dispute due to his status as the judge in *Tillie*

Hardwick, et al. v. United States, et al. No, C 79-1710 JF (PVT) and familiarity with the issues raised by the Plaintiffs as former class Plaintiffs in that lawsuit. *See* Declaration of Little Fawn Boland in Support of Consolidated Opposition to Motion for Intervention and Motion to Re-Open and Vacate Judgment for Lack of Subject Matter Jurisdiction ("Boland Decl."), ¶ 31, Ex. Y and Z.

Following two-plus years of negotiation between the parties, on June 8, 2009, the Honorable Jeremy Fogel entered the mutually-agreed upon Stipulation for Entry of Judgment ("Stipulated Judgment") between the federal government and the attorneys for the *Me-Wuk Community* and *Wilton Miwok* members, formally recognizing that the Wilton Rancheria ("Tribe") is a federally recognized tribe and acknowledging that the Tribe's termination was unlawful. *Me-Wuk*, Docket No. 34; *Wilton Miwok*, Docket No. 62. The case was officially closed on that date. *Id.* The Stipulated Judgment is attached hereto as Exhibit 1 and is incorporated by reference as if set forth in full. Approximately two months later, on August 4, 2009, well in excess of two years from the initiation of the action, Movants filed their Motion to Intervene and Motion to Vacate with the Court. *Me-Wuk*, Docket Nos. 35-36.

ARGUMENT

I. The Court Should Deny the Motion to Intervene Because the Consequent Reopening of the Case Requires the Joinder of the Wilton Rancheria, a Sovereign Immune From Suit.

This Court should deny the Movant's post-judgment Motion to Intervene because resolution of the reopened case requires the joinder of the Tribe for the litigation to go forward. However, the Tribe is a sovereign entity immune from suit. *See Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (U.S. 2008) ("[a] case may not proceed when a required-entity sovereign is not amenable to suit . . . where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"). Federal Rule of Civil Procedure 19 ("Rule 19") governs the joinder of required parties. Rule 19's primary purpose is to afford a required absentee party the opportunity to join a lawsuit posing a potential threat to its legal interests. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005) ("Rule 19 provides for the joinder of parties who should or must take part in the litigation to achieve a '[j]ust [a]djudication'" (quoting *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-123 (1968))). This rule comports with the long-standing principle of due process that an affected party is

entitled to an opportunity to present its arguments concerning the matter before the court. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Rule 19 analysis is a three-step process.[1] First, Rule 19(a) requires a determination of whether the absentee party is a required party "who should normally be joined" according to the standards of the Rule as set forth below. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty v. State of California*, 536 F.3d 1034, 1041 (9th Cir. 2008) (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002))). Second, if the Court finds that the absentee party is required, it must then determine whether it can join the absentee party. *Id*. Third, if joinder is impossible, Rule 19(b) requires the Court to determine whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id*.

The Court should deny the Motion to Intervene and Motion to Vacate because (a) the Tribe under Rule 19(a) must be joined because neither the federal government nor the groups of individuals who are the original parties to the litigation can adequately represent the Tribe's interests, (b) the absentee Tribe cannot be joined because it is a sovereign entity with no government to waive its immunity if it even desired to do so, and (c) the Rule 19(b) factors overwhelmingly are in the Tribe's favor.

A. The Wilton Rancheria Is A Required Party.

Rule 19(a) provides that an absentee party is required and must be joined in an action if: (1) the Court cannot grant complete relief to the original parties in its absence or (2) it has an interest in the subject matter of the action and the disposition of the action in its absence may (i) "as a practical matter impair or impede the person's ability to protect that interest" or (ii) leave one of the existing parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

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[1] In 2007, the Federal Rules of Civil Procedure Rules Committee modified the language of Rule 19. The Rules Committee made two changes relevant to this matter. First, it replaced the word "necessary" in Rule 19(a) with "required." Second, it deleted the word "indispensible" from Rule 19(b). Subsequent to the change, the Rules Committee issued a statement advising the legal community that the changes were "stylistic only." *See* Fed.R.Civ.P. 19 advisory comm. nn. (2008). The Supreme Court has since agreed with its interpretation of the changes. *Republic of Philippines*, 128 S. Ct at 2184.

In regard to the second prong of Rule 19(a), the absentee party whose joinder is required must provide the Court with evidence of an interest that will be "impaired" by the litigation as a "practical matter." *Am. Greyhound Racing*, 305 F.3d at 1023. According to the Ninth Circuit, this interest must be "legally protected." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). However, such interest need not rise to the status of property in the sense of the Due Process Clause, as an interest that is little more than a financial stake in the litigation will suffice. *Id*. The Wilton Rancheria has a significant interest in this litigation because the Movants seek to eradicate its very existence as a federally recognized tribe, thereby eliminating all the rights and benefits that accompany federal recognition. In addition, the Tribe has an interest in its sovereign immunity and concomitant "right not to have [its] legal duties judicially determined without consent." *Shermoen v. U.S.*, 982 F.2d 1313, 1317 (9th Cir. 1992) (quoting *Enter. Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989))). Other interests are identified in the Stipulated Judgment, such as immunity from federal and state taxation (Stipulated Judgment, Ex. 1, 8:10), receipt of services and technical assistance from the Department of the Interior and the Department of Health and Human Services (*Id*. at 8:16, 10:17-21), and the ability to take yet-identified land into trust in the future to replace the Tribe's unlawfully-terminated reservation, which Movants have improperly exercised taxing and regulatory authority over since the enactment of the California Rancheria Act (*Id*. at 9:25). Finally, the motions will prejudice an innumerable number of other interests not expressly stated in the Stipulated Judgment, such as the Tribe's right to govern and provide for its membership, maintain government-to-government relations with the federal and state governments, and protect its renewed cultural history. The scope of Tribal interests implicated by the motions clearly shows Wilton Rancheria is a required party to this litigation.

Furthermore, the disposition of this action in Wilton Rancheria's absence will impair its ability to protect these interests, and neither the United States nor the Plaintiff tribal groups can minimize this threat of harm by adequately representing the whole Tribe as a sovereign governmental entity. Generally, an existing party can adequately represent the interests of an absent party if (a) its interests in the suit "are such that it will undoubtedly make all" of the absent party's arguments, (b) it is "capable of and willing to make such arguments," and (c) the absent party does not offer a "necessary element to the proceedings" that the present party would neglect. *Shermoen*, 982 F.2d at 1318 (quoting *County of*

Fresno v. Andrus, 622 F.2d 436, 439 (9th Cir. 1980). The federal government is incapable of acting as a proxy because, in addition to its inherently adversarial posture in these litigations, it is conflicted. First, the federal government has a financial incentive to support intervention and walk away from the negotiating table – in plain and evident black and white terms, revoking federal recognition would enable the federal government to conserve immense amounts of federal tax dollars that would otherwise funnel to the Tribe through the auspices of various federal programs. Thus, the federal government's financial position raises the specter that it is incapable of adequately representing the Tribe if the Court were to reopen this case. Second, as set forth in greater detail in the section below, the federal government is wholly incapable of advocating for the Tribe, which currently has no elected government, has yet to even determine its membership, and is comprised of various groups with different views about the best interests of the Tribe.[2] For these reasons the Court should find that Plaintiffs cannot adequately represent the newly recognized Tribe's interests.

The Ninth Circuit previously held that tribal council members are unable to adequately represent their absent Tribe's interests. *Shermoan*, 982 F.2d at 1318. If a council member, authorized to act on their tribe's behalf and generally possessing a substantially higher degree of knowledge about tribal governance and legal affairs than a general tribal member, is incapable of serving as an adequate proxy for his or her absent tribe in a federal court proceeding, individual tribal members should certainly not be permitted to act in such a capacity either.

One of the reasons supporting this conclusion is the lack of a unified voice amongst the Plaintiffs – they have no elected government, there are decades of animosity amongst the Plaintiffs, and, because the Tribe has no government, it has not adopted a Constitution or enrollment ordinance necessary to establish tribal membership. The possibility of a myriad of different opinions not only renders the individual tribal members ill-suited for representing the Tribe, but puts the federal government, should it choose to contest intervention, into the unenviable and untenable position of ascertaining the viewpoint that best vindicates the whole Tribe's interests. This conflict further erodes its already questionable

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[2] Likewise, the *Me-Wuk* and *Wilton* groups as a whole cannot speak for the Tribe. The Central California Agency of the Bureau of Indian Affairs is presently determining who is eligible to be listed on the base Tribal roll. Presently, there is no evidence to support an argument that the present plaintiffs in this action will constitute a majority of that group.

ability to adequately represent the Tribe. *See Pit River Home & Agric. Coop. Ass'n v. U.S.*, 30 F.3d 1088, 1101 (9th Cir. 1994) (the Federal government cannot represent a tribe's interests when it could be subject to inconsistent duties and obligations). The Court should find the Wilton Rancheria is a required party who has significant interest in the outcome of the suit if it were to be reopened and who is not represented in the suit because neither the federal government nor the Plaintiff tribal members can adequately advance the whole Tribe's arguments nor are they allowed to because they do not represent the whole Tribe. Accordingly, the Court should move to the second step of the analysis.

B. The Newly Recognized Wilton Rancheria cannot and has not Waived its Sovereign Immunity and Therefore Cannot be Joined as a Party.

The doctrine of sovereign immunity cloaks an Indian tribe with the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). An Indian tribe can "assert immunity at any time during the judicial proceeding," including on appeal. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 724 (quoting *In re Jackson*, 184 F.3d 1046, 1048 (9th Cir. 1999)); *see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1990) ([s]overeign's assertion of immunity for the first time on appeal is valid). In the absence of an express, unequivocal Congressional abrogation or tribal waiver, a court has no choice but to recognize the tribe's sovereign immunity. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

The Court is unable to join the Wilton Rancheria because: (1) it is a federally-recognized Indian tribe with sovereign immunity from suit; (2) there is no evidence to indicate that Congress wanted to remove the immunity in regard to belated third party challenges to the Tribe's restoration; and (3) the Tribe has no elected government capable of waiving its sovereign immunity at this time. The Stipulated Judgment indicates federal restoration is complete once the Federal Register publishes a notice from the Department of the Interior stating that the Tribe was unlawfully terminated and that the federal government agrees to restore its federal recognition. Stipulated Judgment, Ex. 1; 12:1. On July 13, 2009, the Federal Register published this notice, which in pertinent part indicates "restoration is effective as of June 8, 2009." *See* Boland Decl., ¶ 33, Ex. BB. Thus, on June 8, 2009, the government affirmed that the Tribe was not lawfully terminated and as such it retained its status as a tribe and the

associated legal attributes of a federally recognized Indian tribe, one of which is the power to shield itself from claims in state and federal court.

Therefore, by the time Movants filed their Motions, the only way they could proceed against the Tribe is with an express and unequivocal waiver of sovereign immunity from the Tribe or Congress.[3] Yet, the Tribe itself has not provided this, as the general membership has yet to organize or elect a legislative body capable of speaking on the Tribe's behalf. Furthermore, there is no evidence that Congress has specifically authorized Movants' attempted suit. In fact, the Stipulated Judgment states "Notwithstanding the foregoing, reinstatement of this action shall have no effect on the Tribe's federally recognized status which is effective upon the Department of the Interior's transmittal to the Federal Register for publication a notice that states . . . the Tribe is restored to the status as a federally recognized Indian Tribe." *See* Stipulated Judgment, Ex. 1, 12:1. Moreover, under the Stipulated Judgment, a third party's ability to challenge the Tribe's restoration is prohibited by paragraphs 15 and 16, which expose the Tribe to involuntary suit only to resolve disputes between itself and the federal government concerning compliance with the terms of the Stipulated Judgment. *Id*. at 12:8. Thus, the Stipulated Judgment indicates that the federal government did not intend for localities to be involved in restoration cases following their completion.

C. The Court, in equity and good conscience, must deny the Motion to Intervene.

Rule 19(b) sets forth a four part test for determining whether a case should proceed without the involvement of a required party. The four factors are: (1) "the extent to which a judgment rendered in

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[3] Under this well established doctrine, federally recognized tribes are immune from judicial process and therefore not subject to jurisdiction unless the tribe clearly and unequivocally expresses a waiver of its immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("to relinquish its immunity, a tribe's waiver must be 'clear.'"); *Kiowa Tribe of Okla. v. Mfr. Techs., Inc.*, 523 U.S. 751, 754, 756 (1998) ("[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. . . ."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'" (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976))). "Sovereign immunity involves a right which Courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . which is within the discretion of the Court." *California ex rel Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). Courts therefore must recognize a tribe's inherent immunity from suit irrespective of the merits of the alleged claims. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989).

the person's absence might prejudice the person or the existing parties," (2) "the extent to which any prejudice cold be lessened or avoided by… protective provisions in the judgment;… shaping the relief; . . . or other measures," (3) "whether a judgment rendered in the person's absence would be adequate," and (4) "whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder." Fed. R. Civ. P. 19(b).

As to the first factor, the Wilton Rancheria will suffer irreparable prejudice if the Court grants the motions because it will peel away the Tribe's sovereign immunity, terminate the Tribe's federal status, and, among other things, jeopardize the Tribe's ability to govern its members and its lands. *See Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir, 1991) (Prejudice found where judgment may "alter the [tribe's] existing authority to govern the reservation"). Despite this, Movants are unable to counterbalance this harm with an equivalent showing of lawful, personal harm. As the Stipulated Judgment indicates, the Tribe's termination was unlawful and the localities should never have had taxing or regulatory authority over the Tribe's former reservation. *See Smith v. United States*, 515 F.Supp. 56 (N.D. Cal. 1975) ([u]nlawfully terminated Rancheria lands should not have been subject to taxation); *Accord Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977).

As explained in detail below in Sections III and IV (regarding the Movants' lack of interest in the subject matter of the suit, lack of Article III standing and the lack of ripeness of the dispute), Movants present no evidence to indicate that the Wilton Rancheria is currently capable of owning land, owns any land, or has initiated the land into trust process for any land, let alone any land located within either of Movants' jurisdictions. Thus, Movants' claims of harm ring hollow, and the Court should not allow speculative harms or the cessation of the Movants' illegal taxation and regulation to constitute harm that weighs in favor of granting their intervention.

Moreover, this Court should find that the threat of harm to the interests posed by Movants to the required absentee Wilton Rancheria is sufficient to deny the motions. The Supreme Court recently reprimanded the Ninth Circuit for not affording enough weight to a required party's interest in its sovereign immunity when balancing the parties' prejudices under the first prong of Rule 19(b). The case in question involved a class action by human rights victims against Ferdinand Marcos, the former President of the Republic of the Philippines, which ultimately resulted in a $2 billion verdict. *Republic*

of Philippines, 128 S. Ct. at 2185. In the suit's aftermath, Merrill Lynch, the holder of a significant sum of Marcos' investments, filed an interpleader action amongst the plaintiffs, the Republic of the Philippines ("Republic"), the Philippine Presidential Commission on Good Governance ("Commission"), and other interested parties. *Id*. at 2186. Both the Republic and the Commission asserted sovereign immunity and moved to dismiss the action under Rule 19. *Id*. Ultimately, the Ninth Circuit refused to grant their motions, finding that, even though they were required parties, their claims had such a small likelihood of success that the case could continue in their absence. *Id*. at 2187.

Upon appeal, the Supreme Court overturned the Ninth Circuit's decision, finding that "[t]he Court of Appeals erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity." *Id*. at 2189. Analyzing sovereign immunity law in relation to foreign governments and the United States, the Court opined on the ability of litigants or would-be litigants to proceed with a case where a required sovereign entity of any type refuses to waive its immunity: "A case may not proceed when a required-entity sovereign is not amenable to suit . . . where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id*. at 2191. Here, as is previously detailed, Movant's filings pose more than just the potential for injury. Given the requested remedy, injury is certain as the motions will require this Court to terminate the tribe and commence this litigation anew, with no assurance that the Tribe will ever regain its federal recognition. Further, the damages are not limited simply to the forfeiture of federal recognition; rather, granting intervention will sacrifice everything that comes with it, including the ability to conduct government-to-government relations, federal assistance and funding, the right to Revenue Sharing Trust Fund payments from the State of California, and that multitude of services and benefits flowing to the future Tribal membership. Under *Republic of Philippines*, the required absentee sovereign's exposure to such harm warranted denial of the motions without even considering the remainder of the Rule 19(b) subsections.

Should this Court weigh the remaining factors, those too favor the Tribe. Regarding the second factor, the Court cannot "shape" the requested relief to reduce the prejudice to the Wilton Rancheria. Any remedy that is suitable to Movants would require either the re-termination of the Tribe or the elimination or restriction of the United States' ability to take land into trust for the Tribe. If the Court

were to craft a compromise and for example allow for the recognition to stand but restrict the Tribe's ability to establish trust lands, the Court would be in essence creating two classes of tribes (one that has the right to have land into trust on its behalf and one that does not) which raises equal protection concerns. Again, such a compromise is not within the Court's power, only congress can do so. Movants' requested relief subverts tribal sovereignty to the interests of localities that have already reaped substantial illegal financial gains at the Tribe's expense. Thus, the second factor also weighs in favor of denying Movants' intervention and request to vacate the Stipulated Judgment.

In regard to the third factor – whether a judgment rendered without the absent party's involvement would be adequate – the analysis ultimately turns on the legal definition of "adequacy." According to the Supreme Court, "adequacy" refers to the "public stake in settling disputes by wholes, whenever possible," *Provident Bank*, 390 U.S. at 111; so as to promote "the social interest in the efficient administration of justice and the avoidance of multiple litigations," *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-738 (1977). The parties have already settled the whole of the dispute, and granting the Motion to Intervene would create the extreme inefficiency the Supreme Court decries, as it would allow parties with an attenuated interest in the litigation (*see* Sections IV(A) and (B), *infra*, regarding standing and ripeness) to recommence the restoration process, essentially creating an entirely new litigation. Whereas, a court order denying the motions would advance the public interest in the efficient administration of justice.

Finally, while the forth factor may on first blush appear to weigh in Movants' favor because they may not have another forum in which to litigate their claims,[4] the federal courts have continuously recognized that a party's interest in litigating its claim must give way to a tribe's sovereign immunity rights. *See Pit River*, 30 F.3d at 1102 ("[i]n this case, the Council's interest in maintaining its sovereign immunity outweighs the Association's interest in litigating its claim"); *Quileute Indian Tribe v. Babbit*, 18 F.3d 1456, 1460 (9th Cir. 1994) (Plaintiffs' interest in litigating their claim did not outweigh tribe's interest in maintaining its sovereign immunity, despite lack of alternative forums); *Confederated Tribes*,

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[4] The Me-Wuk group questions whether or not this Court can, or should, weigh Movants' interests under this factor as they are attempting to intervene in this action as defendants and the rule specifically inquires only as to "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."

928 F.2d at 1500 ("[c]ourts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity"). As will be explained below, in the future when and if the Tribe does initiate the land into trust process there will be ample opportunities for the Movants to seek enforceable mitigation of any adverse effects caused by the taking of any land into trust. Thus, their ability to specifically have a voice regarding the United State's future taking of land into trust is not foreclosed if they are not permitted to intervene. Because Movants' belated motion seeks to pierce through the Wilton Rancheria's sovereign immunity, terminate the Tribe's federal existence, strip the Tribe and its members of the rights of federally-recognized Indians, and create an interminable litigation, the Court should find that the fourth factor weighs in the Tribe's favor, and, in equity and good conscience, deny Movants' request.

II. Movants' Motions are Untimely Under Rules 24 Because they are Post-Judgment, Seek to Delay Relief from a Long-Standing Inequity, and Should Have Been Brought at a Much Earlier Stage of the Proceeding.

The Court should deny a post-judgment motion for intervention where intervention will prejudice the parties and Movants had reason to know of the circumstances necessitating intervention. Rule 24 sets forth the requirements for intervention of right, Rule 24(a),[5] and permissive intervention, Rule 24(b).[6] Both subsections require the applicant to make a timely motion. *NAACP v. New York*, 413

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[5] Rule 24(a), relating to intervention of right, states:
Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situation that the disposition of the action may as a practical matter impair or impede his ability to protect the interest, unless the applicant's interest is adequately represented by existing parties.

[6] Rule 24(b), relating to permissive intervention, states:
Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

U.S. 345, 365 (1973). Timeliness is the threshold requirement for intervention. *United States v. State of Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). If the applicant's motion to intervene is untimely, the court need not reach any of the remaining Rule 24 elements. *United States v. State of Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996). The timeliness analysis requires consideration of (1) the stage of the proceedings at which the applicant sought intervention, (2) the prejudice the existing parties would experience if the Court grants intervention, and (3) the applicant's reasons for and length of delay. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986).

A. The Ninth Circuit Reserves Post-Judgment Intervention for Exceptional Cases.

Despite Movants' attempt to manipulate controlling precedent by arguing post-judgment intervention is permissible, the Ninth Circuit has routinely stated that the appropriate rule is that intervention following entry of judgment is reserved only for very unusual cases. *County of Orange*, 799 F.2d at 538. These unusual cases tend to be discrimination suits where the applicant wishes to participate in the remedial phase of the litigation. *State of Oregon*, 913 F.2d at 588. Even then, intervention is conditioned upon the applicant actually participating in that phase of the litigation, not attacking or thwarting the court's remedy. *United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004). Similarly, the court will generally refuse to re-litigate previously decided issues. *Oregon*, 913, F.2d at 588. While these rules may seem contrary to the purpose of the intervention of right doctrine, they serve its underlying policy of the efficient administration of justice. As Judge Ferguson of the seminal *Blue Chip Stamp* case wrote, "the interest in expeditious administration of justice does not permit litigation interminably protracted through continuous reopening. A motion to intervene after entry of the decree should therefore be denied in other than the most unusual circumstances." *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432, 436 (C.D. Cal. 1967), *aff'd sub nom*.

This Court should not decide the Motion to Intervene and the Motion to Vacate according to the rare exceptions to the rule cited by Movants, or their proffered misstatement that a post-judgment motion to intervene is timely if filed within the time for appeal, as this rule applies only when the applicant seeks to intervene for purposes of the appeal, not re-litigating the underlying lawsuit at the district court level. *See United States ex rel. McGough v. Covington Technologies Company*, 967 F.2d 1391, 1395 (9th Cir. 1992) ("*Covington*"). Rather, this Court should look to the abundance of case law

from this and other circuits unequivocally holding that post-judgment motions to intervene are untimely except in unusual cases, which this case is not. *See Covington*, 967 F.2d at 1395; *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 658 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) ([m]otion to intervene filed seventeen days after consent decree was untimely); *Tesseyman v. Fisher*, 231 F.2d 583 (9th Cir. 1955) ([p]ost-trial motion to intervene is untimely); *McDonald v. E. J. Lavino Co.,* 430 F.2d 1065, 1071 (5th Cir. 1971); *NRLB v. Shurtenda Steaks, Inc.*, 424 F.2d 192, 194-195 (10th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C. Cir. 1969). Indeed, the Ninth Circuit has found motions to intervene untimely at even earlier stages of a proceeding, such as the eve of settlement, *Aleut Corp. v. Tyonek Native Corp*., 725 F.2d 527, 530 (9th Cir. 1984), or after the substantive engagement of the issues, regardless of whether that occurs before or during trial, *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997) (Court denies motion to intervene as of right where "a lot of water [has] passed under [the] litigation bridge").

Similarly, the scope of the current action and the postures of the original parties make intervention untimely. "When the potential scope of an action is narrowed by . . . court order . . . the court may consider the case as restructured rather than on the original pleadings in ruling on the motion to intervene." *United States v. City of Los Angeles*, 228 F.3d 391, 399 (9th Cir. 2002). In *City of Los Angeles*, the Court allowed a police association to intervene prior to the entry of a consent decree between the original parties on the basis that the decree had not been entered, and, even if it had, one of the parties to the agreement retained the power of rescission enabling it to re-litigate the merits of the action pursuant to the original complaint.

The present case stands in stark contrast to *City of Los Angeles*. The Court entered judgment on June 5, 2009, and the federal government's compliance with the Court's Order resulted in the Wilton Rancheria's restoration as a federally-recognized tribe on June 8, 2009 and the case was closed on that date. *See* Stipulated Judgment, Ex. 1; Boland Decl., ¶¶ 33-34, Exs. BB and CC. Despite this, Movants seek to terminate a federally-recognized tribe. However, federal courts lack the authority to strip tribes of their federal recognition, and, as paragraph 14 of the Stipulated Judgment expressly acknowledges, the executive branch similarly lacks the ability to do this through the reinstatement of the action. Stipulated Judgment, Ex. 1, 12:1 ("Notwithstanding the foregoing, reinstatement of this action shall

have no effect on the Tribe's federally-recognized status which is effective upon the Department of the Interior's transmittal to the Federal Register for publication a notice that states… the tribe is restored to the status of a federally-recognized Indian Tribe").

As paragraphs 15 and 16 of the Stipulated Judgment make clear, the present scope of this action is limited to the resolution of disagreements between the original parties and nothing more. *Id*. at 12:8 (Provisions describing how the Tribe and the federal government are to resolve any dispute over compliance with any of the terms of the Stipulated Judgment). As such, the belated complaints of third parties, particularly ones asking for a remedy the Court is unable to grant should not be considered (as further explained in Section V(A) below regarding futility, "[o]nce a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts." *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 166 (2nd Cir. 2003), *citing United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1865). The structure of the case prevents Movants from obtaining their requested remedy. Consequently, the Court should deny their Motions. *See United States v. Radio Corp. of America*, 186 F.Supp. 776 (E.D. Pa. 1960), *appeal dismissed*, 364 U.S. 518 (Court denies attempted intervention following entry of consent decree where federal government accepted the terms of the consent decree, court retained jurisdiction only to hear the original parties requests for further orders or directions, and intervention would not further the orderly administration of justice).

B. The Parties Will Suffer Extreme Prejudice If The Court Grants Intervention.

Movants cite the Eighth Circuit case of *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) for the proposition that the second timeliness criterion is ultimately concerned with whether or not the existing parties are prejudiced by the lapse of time that occurs from the date the movant states it became aware of suit until the date it moved to intervene. However, this is not the appropriate inquiry. The Ninth Circuit asks whether intervention would delay "relief from long-standing inequities." *Alaniz*, 572 F.2d 659. This inquiry is one of the "most important" factors in the timeliness determination. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). At least one court has held it is the single most important timeliness consideration. *Petrol Stops Northwest v. Cont'l Oil Co*., 647 F.2d 1005, 1010 (9th Cir, 1981). Ninth Circuit courts have repeatedly found prejudice where an

attempted intervention threatened a complex and delicately-negotiated stipulated judgment. *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (denying intervention as untimely where it would "threaten the parties settlement, and further delay cleanup and development of the [Landfill]"); *County of Orange,* 799 F.2d at 538 (denying post-judgment intervention as untimely where district court held that "there's no doubt in my mind that the possibility of this settlement unraveling is so prejudicial that to allow the City of Irvine to intervene at this late would be tantamount to disaster"); *Alaniz*, 572 F.2d at 659 (denying post-judgment intervention on the ground that countermanding the stipulated judgment "would create havoc and postpone the needed relief").

This case presents an analogous situation, as intervention would eviscerate the Stipulated Judgment and postpone relief from an inequity the Tribe has endured since 1958 for an indefinite, and potentially infinite, period of time. To preserve the Stipulated Judgment, which is the result of over two years of delicate and complex negotiations between the parties and 40 years worth of Tribal struggles, the Court should find that intervention will prejudice the existing parties and deny the Motions.

C. Movants Substantially Delayed In Moving To Intervene And Have Not Adequately Justified Their Delay.

Movants attempt to attribute their delay in filing to the existing parties' failure to dutifully inform them of the suit's existence. "Knowledge that the action was pending is not by itself relevant in determining timeliness." *NAACP*, 413 U.S. at 366-267. Rather, a court looks to the date when the proposed movant "knew or should have known of the circumstances which would give rise to the need to intervene." *Alisal*, 370 F.3d 915, 923 (9th Cir. 2004). On February 28, 1980, the distributees of the Wilton Rancheria were certified as plaintiffs in the *Tillie Hardwick* class action, a litigation brought by the distributees of thirty-four (34) rancherias claiming the federal government's termination of their respective tribe was unlawful. *See* Boland Decl., ¶ 10; Order Re: Class Certification (Feb. 28, 1980) (attached to the original Complaint in *Wilton Miwok Rancheria v. Salazar et al*, Civ. Case No. 07-02681, Docket No. 1-1, 5:28). Since 1980 the Movants should have known that the Wilton Rancheria would be seeking restoration of the Tribe. This knowledge should also have arisen prior to this action when the Congressionally-established Advisory Council on California Indian Policy ("ACCIP") issued a public report to Congress in September 1997 recommending that the legislature immediately restore the

Wilton Rancheria. *See* Boland Decl., ¶ 16, Ex. L. Congress made overtures of accomplishing this in April 2000, when House Representative George Miller drafted a publicly-available bill that would have restored the Wilton Rancheria and five other California-based tribes. *Id*., ¶ 18, Ex. N.

This rush of federal political activity should have put Movants on notice that the parties would agree in the coming years to restore the Tribe in order to right a substantial inequity. Moreover, in addition to legislative efforts to restore the Wilton Rancheria, the circumstances giving rise to the need to intervene also come from: (a) local newspaper articles concerning the Tribe's restoration efforts that were published in the years immediately preceding and the months comprising the infancy of the suit, *see* Boland Decl., ¶¶ 25-27, Exs. U-W; (b) the filings concerning the suit itself, which have been publicly available since February 28, 2007, the date the *Mi-Wuk* Tribal members instituted their District of Columbia action, *see Me-Wuk*, No. 07-00412, Docket No. 1; and (c) evidence of activities in the community, various public notices in newspapers, the creation of a website describing the lawsuit, and other evidence cited in the Boland Declaration. *See* Boland Decl., ¶¶ 24, 28-29, Exs. T and X. Taken together, this information should have apprised reasonable, interested third-parties of the circumstances necessitating intervention, and relieved the litigating parties of any affirmative duty to actively inform all persons or entities that may someday claim a speculative interest in their litigation of the status of the proceedings. In addition, the County was aware of the Rancheria when those parcels were added to the tax rolls and then they unlawfully taxed them for over 40 years.

III. Movants Do Not Have a Sufficient Interest in this Suit to Warrant Intervention Because the Tribe has not Identified Potential Lands to be Taken into Trust, the Stipulated Judgment Does Not Confine the Potential Restored Lands To Movants' Jurisdictions, and even if the Tribe Chooses Lands Therein, Movants' Sole Interest is the Continued Unlawful Taxation and Regulation of Said Land.

One of the four mandatory intervention requirements is "a significant protectable interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a). A significant protectable interest exists if (1) the applicant "asserts an interest that is protected under some law," and (2) "there is a relationship between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). In *Scotts Valley*, the Scotts Valley Band of Pomo Indians sought to place a parcel of land within the municipal boundaries of Chico into federal trust. *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir.

1990). The City, which collected property taxes on the land in the amount of $3,300 per annum, sought intervention to protect its taxing authority over the land. *Id*. The District Court denied intervention, but the Ninth Circuit ultimately reversed, finding that the City had a protectable interest in the removal of property from its civil jurisdiction. *Id*. at 927-28. Here, on a fundamental level, the present case is distinguishable because the Wilton Rancheria has not identified property within either of Movants' jurisdictions that it wishes to place in federal trust. *See Id*. at 926 ("The Indian Bands seek to restore the trust status of certain real property . . . located near the City of Chico, California . . . One of the Rancherias, Chico Rancheria, is partially located within the City's municipal boundaries"). In fact, the Tribe hasn't even accomplished the prerequisite task of assembling the tribal membership and electing a governing body capable of undertaking those actions. Moreover, the Stipulated Judgment does not confine the area in which the Tribe's may select lands for restoration to the jurisdictions of either the City or the County. Thus, presently the *Wilton Miwok* and *Me-Wuk Community*Tribal members are currently in a position where once they assemble and form a Tribal government, the Tribal Council may or may not elect to take yet-identified lands into trust, which may or may not be situated in the County.

Additionally, even if the Wilton Rancheria decides to take land within one of these jurisdictions into federal trust, neither of Movants has an interest sufficient to permit intervention because the federal government has now acknowledged that the termination of the Tribe was unlawful. *See Scotts Valley*, 921 F.2d at 928 n.3 (the City has a legally protected interest in property within its jurisdiction that a tribe sought to place into federal trust where the Court had not yet entered federal government's acknowledgement that it unlawfully terminated the tribe). A contrary finding would be tantamount to a judicial recognition that a party can have a legally protected interest in criminal conduct, i.e. unlawful taxation, and would contravene Northern District precedent. *See Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977); *Smith v. United States*, 515 F.Supp. 56 (N.D. Cal. 1975). In addition, the concerns of the Movants will be addressed sufficiently later if the Tribe decides to try take land into trust after it is sufficiently organized to do so. The Movants will have separate and more appropriate venues to have their concerns heard as part of the land into trust process and NEPA process that specifically allow localities the right to litigation and to enforceable mitigation measures for any impacts to such localities.

Intervening and challenging the Tribe's wrongful termination is not the proper place to address the Movants' concerns regarding the environment or the loss of tax revenue.

IV. The Court Does Not Have Jurisdiction To Grant Intervention Because Movants Lack Article III Standing And Their Alleged Interests Are Not Ripe For Review.

Even assuming Movants could establish intervention of right pursuant to Rule 24, which they cannot, their motion also fails because they fail to meet two basic thresholds required to join any action: standing and ripeness.

A. Movants Lack Standing To Intervene.

Article III, Section 2, of the Constitution restricts the judicial power of federal courts to cases and controversies. U.S. Const. Art. III, § 2. Federal courts have interpreted this language to require that a party has standing to pursue its claims before the court can assume jurisdiction over the case. *Altman v. Bedford Cent. School Dist.*, 245 F.3d 49 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 68 (U.S. 2001). While Movants may argue that they are not intervening as plaintiffs, "the 'case or controversy' requirement of Article III also qualifies an applicant's right to intervene post-judgment," as is the situation here. *Yniguez v. Mofford*, 939 F.2d 727, 731 (9th Cir. 1991) ("although intervenors are considered parties entitled, among other things, to seek review . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."), citations omitted.

To establish standing, the plaintiff, or intervenor, carries the burden of alleging specific facts to prove three requirements. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). First, a party must allege a personal "injury in fact." An "injury in fact" requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, the injury must be personal to the plaintiff and distinguish it from the general public. *Id.* A mere "interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to show an injury. *Sierra Club. v. Morton*, 405 U.S. 727, 739 (1972). Second, the injury must have been caused by the complained-of conduct. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Causation requires a "fairly traceable connection" between the plaintiff's

claim and the defendant's conduct, and not the independent action of a third party that is not before the Court. *Id*.; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 (1998). Lastly, the requested relief must likely redress the plaintiff's alleged injury. *Id*. at 45-46.

Movants cannot identify any particularized injury or "injury in fact." Nor can they show a legally protected interest that is harmed by the federal recognition of the Tribe, or that any harm of which they complain can be redressed by this Court. This conclusion is supported by the fact that nowhere in Movants' motion do they describe any harm that would befall them as a result of the Wilton Rancheria's federal recognition alone. Instead, the motion focuses exclusively on harms that may occur when the Wilton Rancheria has land taken into trust for it by the United States in the future allegedly within Movants' jurisdiction or if Wilton is able to conduct gaming within their borders in the future. These issues are distinct from that of whether the Wilton Rancheria is a federally recognized Tribe (and are not ripe for adjudication at this stage of the process, as set forth more fully below). While the prospect of acquiring trust land and conducting gaming thereon are two issues that can only result from federal recognition, such status also affords the Tribe recognition as a sovereign nation by the United States and re-establishes a trust relationship that allows the Tribe and its members the benefits of a myriad of federal programs including those related to health care, education and emergency services. Movants fail to articulate any harm arising as a direct result of the federal recognition of the Wilton Rancheria, and any harm related to the future land into trust process or any future gaming thereon is purely conjectural and hypothetical at this point. *See* Section IV(B), *infra,* regarding ripeness.

Movants will have the right in the future through the land into trust process to be consulted before land within their jurisdiction can be taken into trust and it is correct that the Secretary cannot do so without considering "evidence" regarding the Wilton Rancheria's former tribal lands. The United States before it can take land into trust must notifying neighboring jurisdictions. However, those activities will take place after the Tribe submits an application for land to be taken into trust which triggers the process. They do not create standing now. Moreover, there is no land to take into trust now and the provisions of the Stipulated Judgment only require the Secretary of Interior to take lands into trust that are within or contiguous to the Tribe's former Rancheria, upon "application by the Tribe"

pursuant to "established procedures." Stipulated Judgment, Ex. 1, ¶¶ 9-10.[7] As Movants are well aware, the fee-to-trust application, which the Wilton Rancheria has not yet commenced, starts the process by which the Secretary of the Interior takes land into trust for a tribe, and part of that process will involve submitting evidence regarding the Tribe's historical land base, allowing comment from localities such as the Movants here, and assessment and mitigation of any environmental impacts including property taxes. *See* 25 U.S.C. § 461 *et seq.*; 25 C.F.R. § 151. Thus, federal law, specifically the Indian Restoration Act ("IRA"), provides a mechanism to address Movants' concerns raised in their motions.[8]

While Movants rely heavily on *Scotts Valley* to allege that they have a protectable interest at stake with respect to their tax base, they ignore an important distinction here. The Court in *Scotts Valley* expressly noted that the issue of whether the tribe was wrongfully terminated had not yet been determined, even though the United States admitted in discovery that it did not contend that such termination was lawful. *Scotts Valley,* 921 F. 2d at 927. The opposite is true here where the Stipulated Judgment states that the Tribe "was not lawfully terminated" and that its assets were unlawfully distributed. Stipulated Judgment, Ex. 1, ¶¶ 1-2. The restoration of the Wilton Rancheria as a federally recognized tribe redresses a wrong committed by the United States against the Wilton Rancheria and its members, whose land and tribal status should never have been extinguished in the first instance. Thus, Movants have no standing to challenge any federal decision to restore land to the Wilton Rancheria that was wrongfully subsumed into their tax base over 40 years ago because they have no legally protected interest in continuing to unlawfully tax the Wilton Rancheria's trust land.

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[7] This fact alone makes this situation distinguishable from *Scotts Valley* because no judgment had been entered at the time of the City of Chico's intervention, and the Court assumed that the tribe would never submit an application for trust land pursuant to the IRA if the plaintiff tribe's requested relief was granted (an order compelling the Secretary of Interior to take certain lands into trust). *Scotts Valley,* 921 F. 2d at 928.

[8] The Secretary must consider, among other things, "(b) The need of the individual Indian or the tribe for additional land; (c) The purposes for which the land will be used; (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs; (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; [and] (f) Jurisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10.

Logic dictates that the causation element of standing also fails as a result. Any harm resulting in the loss of Movants' tax base is not caused by the "complained of conduct," the Stipulated Judgment, but by the United States' wrongful distribution of the Tribe's assets, which improperly placed such assets within the Movants' jurisdiction.[9] In short, Movants have no legally protected interest in any restored tribal land base that never rightfully belonged to them. As federal law provides Movants with a mechanism to address their concerns later, they have no standing to do so here now where the only the redress of the Wilton Rancheria's wrongful termination has been settled.

B. The Proposed Intervenors' Claims Are Not Ripe For Adjudication.

"Ripeness" refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The harm alleged by Movants is harm that will occur in the future if land is taken into trust by the United States for the Wilton Rancheria and if and when gaming is conducted on such land and if such land is in Movants' jurisdiction. These issues are not ripe for review. According to the United States Supreme Court, the ripeness doctrine is designed to prevent the "premature adjudication" of an issue, delaying a court's ability to hear an issue until the challenging party has felt its effects in some concrete way. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967) ("*Abbot*"). This prevents a court from considering claims regarding "contingent future events that may not occur as anticipated" or may not occur at all. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985) (quoting 13A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). Ultimately, the ripeness inquiry turns on (a) the fitness of the issues for review and (b) the hardship the parties will experience if the court refuses to hear the case. *Abbot*, 387 U.S. at 149.

The Supreme Court further refined the ripeness requirements into three sub-categories: (1) "whether delayed review would cause hardship to the plaintiff," (2) "whether judicial intervention would inappropriately interfere with further administrative action;" and (3) "whether the courts would benefit

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[9] This lack of standing is further evidenced by the fact that the relief sought will not redress Movants' alleged injury because the Tribe's federally recognized status cannot now be undone by this Court, as set forth more fully below in Section V(A).

from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

These factors weigh against a finding of ripeness. Issues related to land into trust and when or if gaming will be conducted on such land are not yet fit for review because no determination on these subjects has been made pursuant to the IRA and the IGRA. Indeed, there is no land even purchased yet, no govern to own such land, and no land into trust applications pending. For this reason, judicial intervention at this point will inappropriately interfere with the federally mandated procedures that take place under these statutes, during which Movants will have opportunity to comment, demand enforceable mitigation of impacts and even litigate pursuant to NEPA. Without exhausting their remedies through these procedures, the Court at this juncture will not have a complete factual record of the issues presented. Moreover, because of the premature nature of Movants' concerns, no one knows precisely what potential trust land will be at issue. Again, this fact distinguishes the instant case from *Scotts Valley*, where the plaintiff tribe sought specific land to be taken into trust. Here, the tribal government has not yet been organized or formed and no decisions have been reached as to what land to purchase or seek to be transferred into trust status. Further, as set forth more fully below, Movants will not be prejudiced by delayed review of these issues because the Court cannot grant the requested relief and rescind the federal government's recognition of the Wilton Rancheria. *See* Section V(A), *infra*, regarding tribal termination. Movants' interests will best be served by providing their input as part of the land into trust process, after which time a Court will be better able to determine if in fact Movants suffered any harm to a legally protected interest or whether their concerns were adequately addressed during these procedures. Lack of ripeness presents yet another reason why the instant motions should both be denied.

V. Because The Proposed Claims And "Defenses" Raised By Movants Are Without Merit, Their Post-Judgment Intervention Should Be Denied As Futile.

Further compounding the infirmities in Movants' post-judgment intervention attempt, any intervention and effort to re-open this action would be futile because they: (1) present no basis upon which the relief sought can be granted; and (2) cannot show that the Court's jurisdiction was improper.

A. Because the Wilton Rancheria Is Now A Federally-Recognized Tribe, This Status Can Only Be Removed By The Federal Government.

Intervention should be denied because the relief sought by Movants, and the whole purpose behind their intervention and motion to vacate, cannot be granted by this Court. The Wilton Rancheria has now been acknowledged as a federally recognized Indian tribe in two Federal Register Notices. Boland Decl., Exs. AA and BB. "Once a tribe has been recognized, the removal of that recognition, like reservation diminishment or disestablishment, is a question for other branches of government, not the courts." *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 166 (2nd Cir. 2003), *citing United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1865). The Court has no jurisdiction upon which to rescind the Tribe's federally recognized status after the fact. Thus, granting intervention or re-opening the case at this juncture is futile, a waste of judicial resources, and burdensome for the parties.

B. The Court's Jurisdiction Was Proper, And Movants Present No Basis For Re-Opening The Action.

Movants cite nothing that divests this Court of jurisdiction to hear the original action, much less provide a basis to re-open the case. First, under federal law, no statute of limitations applies to claims brought by Indians regarding their property rights. Second, *Carcieri* is not applicable to the Tribe.

1. No Statute of Limitations Bars the Tribe's Claims at Issue.

Congress expressly prohibited any limitations period for actions brought by the United States on behalf of a tribe "to establish the title to, or right of possession of real or personal property." 28 U.S.C. § 2415(c). Federal courts have concluded that this prohibition extends to such actions brought by tribes themselves. *See County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 244 (1985) (holding that no federal statute of limitations applies to Indian actions to enforce property rights and borrowing any state statute of limitations would be inconsistent with federal policy expressed in Section 2415); *Mille Lacs Band of Chippewa Indians v. Minnesota,* 853 F. Supp. 1118, 1125 (D. Minn. 1994) (limitations period prohibition of Section 2415(c) applies to suits brought by tribes to protect property rights).

In *Mille Lacs Band,* the Tribe bought suit against the State seeking declaratory relief regarding its hunting and fishing rights pursuant to an 1837 treaty. *Mille Lacs Band,* 853 F. Supp. at 1123. Rejecting the State's argument that the Tribe's claims were barred by Minnesota's six-year statute of limitations governing contract actions, the Court held that no statute of limitations applied in light of the

Congressional intent expressed in 28 U.S.C. § 2415(c) "to exclude suits by Indians for property rights from any statute of limitations" *Id.* at 1125. *See Ute Distribution Corp. v. Sec'y of Interior,* 934 F. Supp. 1302 (D. Utah 1996) (declining to apply any statute of limitations to suit by tribe regarding water rights based on policies expressed in § 2415(c)); *see also Ottawa Tribe v. Speck,* 447 F. Supp. 2d 835, 843 (N.D. Ohio 2006) (similarly extending policies underlying § 2415(c) in declining to apply statute of limitations to suit brought by tribe regarding hunting and fishing rights).

As recognized in the Stipulated Judgment, lawsuit was brought to vindicate harm to the Tribe's property rights, among others, when the Tribe's assets were not distributed according to the terms of the Rancheria Act. As Movants concede, the suit for restoration of federal recognition is the first step in recovering an extinguished tribal land base. As the Wilton Rancheria is now a federally-recognized tribe, the Secretary of Interior is authorized to acquire lands in trust for the Tribe's benefit. 25 U.S.C. § 465. Thus, the instant suit was brought seeking redress of property rights. It is therefore within the purview of the Congressional policy considerations underlying § 2514(c) and the subsequent decisions applying it to circumstances akin to those here, where no statute of limitations should bar a tribe's claims to its ancestral property rights. Accordingly, Movants' arguments advancing any statute of limitations bar as grounds for granting intervention and re-opening the case should be dismissed.

2. *Carcieri v. Salazar* is Inapplicable to the Tribe.

Earlier this year, the Supreme Court decided the case of *Carcieri v. Salazar,* 129 S. Ct. 1058 (U.S. 2009). The Court held that the Secretary of the Interior did not have the authority to accept and hold land into trust for a tribe using the authority granted by the Indian Reorganization Act, unless it was federally recognized by the United States at the time the Indian Reorganization Act was enacted in June of 1934. However, this case has no effect on the Stipulated Judgment because at the time of the IRA's passage, the Wilton Rancheria was recognized by the federal government.

The Wilton Rancheria's federal recognition prior to the IRA is well-documented. From October 31, 1927 to April 19, 1928, the government purchased 38.77 acres of land from the Cosumnes Company in exchange for $5,000 for the Wilton Rancheria. Boland Decl., ¶ 2, Ex. A, ¶ 21, Ex. Q, and ¶ 22, Ex. R.

Congress enacted the IRA on June 18, 1934 and in Section 18 it stated:

> [t]his Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior shall vote against

> its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days notice.

Per the terms of Section 18 of the IRA, numerous documents reflect both that the Wilton Rancheria was federally-recognized in 1934 and that the Tribe accepted the IRA within one year of its passage. *See* Boland Decl., ¶ 5, Ex. D (June 4, 1935 document entitled "Approved List of Votes for Indian Reorganization Act of Wilton Rancheria," listing eleven Wilton Rancheria tribal members); *id.,* ¶ 6, Ex. E (June 26, 1935 document entitled the "Revised Tabulation of Election Returns on the Indian Reorganization Act, From the Rancheria under the Jurisdiction of the Sacramento Indian Agency, California, Listed In the Order in which such Returns were Received at the Sacramento Office," listing the Wilton Rancheria tribal members as having voted in favor of the IRA by a vote of twelve (12) to zero (0)); *id.,* ¶ 7, Ex. F (September 9, 1935 document showing that an "Acting Field Agent in the Indian Re-organization" identifies the Wilton Rancheria as a group of seven families living on 38.90 acres of land about "twenty-five miles south of Sacramento."); *Id.,* ¶ 8, Ex. G (1947 document by Theodore Haas on behalf of the U.S. Indian Service and the Department of the Interior entitled, "Ten Years of Tribal Government under the IRA," which, in Table A, shows under the "Sacramento Agency" heading that "Wilton" was one of the 195 tribes that voted on the IRA, and that Wilton Rancheria accepted it by a vote of 12 to 0 on June 15, 1935 less than one year from the IRA's passage). Wilton Rancheria's federally-recognized status in 1934 is further substantiated by several pieces of evidence attached to and described in the Boland Declaration. *See* Boland Decl., ¶ 3, Ex. B; ¶ 4, Ex. C; ¶ 21, Ex. Q, and ¶ 22, Ex. R. In light of this evidence showing federal recognition dating before 1934, *Carcieri* does not impact the Wilton Rancheria or any part of the Stipulated Judgment.

VI. CONCLUSION

For the reasons states herein Plaintiff, the Me-Wuk Indian Community of the Wilton Rancheria, respectfully requests that this Court deny the Movants' pending motions.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

By: /s/ Little Fawn Boland

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