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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

WILTON MIWOK RANCHERIA, a formerly federally recognized Indian Tribe, 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 Nos. C-07-02681 (JF) (PVT) and C 07-05706 (JF)

**MEMORANDUM IN OPPOSITION TO MOTION TO RE-OPEN & VACATE JUDGMENT AND TO DISMISS**

**Hearing: October 30, 2009**
**9:00 a.m.**
**Courtroom 3**

**Judge: Hon. Jeremy Fogel**

Plaintiffs, Wilton Miwok Rancheria, its members, and Dorothy Andrews, (collectively "Plaintiffs") submit this Memorandum in Opposition to the Motion to Re-open & Vacate Judgment and to Dismiss for Lack of Subject Matter Jurisdiction filed by the Proposed Intervenors, the County of Sacramento, California, and the City of Elk Grove, ("Proposed Intervenors") in these cases. The Plaintiffs rely on the background and facts detailed within its Memorandum in Opposition of Proposed Intervenors' Motion to Intervene filed concurrently with this document.

## ARGUMENT

### I. THE PROPOSED INTERVENORS' MOTION TO DISMISS SHOULD BE DENIED ON ITS FACE AS IT WAS FILED BY A NON-PARTY WITHOUT STANDING TO INTERVENE OR APPEAL.

In *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006), the Supreme Court held that *a party* may raise the objection of subject matter jurisdiction at any time. However, the Proposed Intervenors have attempted to stretch the rule to require that parties should automatically be required to brief subject matter jurisdiction anytime a *non-party* raises such an objection, even if said objection comes after final judgment.[1] Because the Motion to Dismiss was made by a non-party, the Court should not entertain arguments in support or response to the Proposed Intervenors Motion to Dismiss, nor should the Proposed Intervenors be entitled to participate in any oral arguments with respect to subject matter jurisdiction in these cases.

Proposed Intervenors misstate the rule in their Opposition to Plaintiffs' & Defendants' Joint Motion to Postpone Briefing & Hearing on County & City's Motion to Re-Open by indicating that "the Ninth Circuit *has held* that a district court's lack of jurisdiction can be raised by a non-party." *See* Opposition to Joint Motion, p. 4 (*citing Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1440 (9th Cir. 1987). The holding in *Citibank* was more precise in that a motion to vacate filed by a non-party was properly *not* considered by the court. 809 F.2d at 1440. In *Citibank*, the court

[1] Plaintiffs recognize that subject matter could be raised by a party to the cases in the context of an appeal after final judgment. However, the Proposed Intervenors lack standing to intervene as a party, and thus may not file an appeal.

intimated in dicta that the Court *may consider* "a suggestion of lack of subject matter jurisdiction" filed by a non-party pursuant to Rule 12(h)(3). *Id*. However, the *Citibank* opinion does not require the Court to hear all motions on subject matter jurisdiction filed by a non-party, particularly those filed after the settlement or final judgment in a case. *Id.*

The Proposed Intervenors seek to assert that the Court should *sua sponte* consider subject matter jurisdiction anytime a non-party files a motion objecting to the same. Motion to Re-Open and Vacate, p. 9. Such an assertion is impractical and is not supported by case law or statutory law. While the Ninth Circuit may have suggested the possibility of such an outcome, Plaintiffs have been unable to identify any cases in which a *non-party* successfully required a *district court* to re-hear issues of subject matter jurisdiction *after the settlement of a case*.

Regarding the remands of cases for lack of subject matter jurisdiction, 28 U.S.C. Section 1447(c) provides that "[i]f at any time before the final judgment, it appears the district court lacks subject matter, the case shall be remanded." Even when the Court *sua sponte* considers the merits of an objection to subject matter jurisdiction raised by a non-party, those objections should be considered *before* the final judgment is entered. After the conclusion of a case, it is not necessary for the district court to reverse a finding of or assumption of subject matter jurisdiction, unless there is "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2nd Cir. 1986). *See also Lubben v. Selective Serv. Sys. Local Board No. 27*, 453 F.2d 645, 649 (1st Cir. 1972) ("[S]uch total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction.).

Furthermore, as a practical matter, further consideration of the subject matter jurisdiction objection raised by the Proposed Intervenors is unduly burdensome. At this time, final judgment has been entered and the case closed, objections to subject matter jurisdiction would properly be raised before an appeals court. However, the Proposed Intervenors seek to raise these objections to

the Court as they recognize that they lack standing to be allowed to intervene and thus appeal the judgment. Moreover, Plaintiffs and Defendants spent nearly two years in settlement discussions with the assistance and guidance of a United States Magistrate Judge Trumbull. (Christina Kazhe Declaration ("Kazhe Decl.") at ¶¶ 9-10.) While the content of those negotiations are confidential, they did include the exchange of significant amounts of historical information, evidence, and analysis.[2] *Id.* As such, the parties had opportunity to address any potential jurisdictional hurdles during settlement negotiations.

## II. IN THE NINTH CIRCUIT, THE STATUTE OF LIMITATIONS CODIFIED AT 28 U.S.C. § 2401(a) REMAINS A NON-JURISDICTIONAL BAR TO SUIT.

The Proposed Intervenors assert that Plaintiffs' claims were barred by the six-year statute of limitations in 28 U.S.C. § 2401(a), and that this statute of limitations is thus a jurisdictional bar to recovery. Plaintiffs address the Proposed Intervenors claims with respect to the statute of limitations in Section IV of this Opposition; however, it is not necessary for the Court to reach the merits of the Proposed Intervenors' argument that the statute of limitations barred this action. By claiming that 28 U.S.C. § 2401(a) is a jurisdictional bar that cannot be waived by the federal Defendants, the Proposed Intervenors misstate the present state of the law in the Ninth Circuit. *See Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997) ("*Cedars-Sinai*").

In *Cedars-Sinai*, the Ninth Circuit Court of Appeals held that "[b]ecause the statute of limitations codified at *28 U.S.C. § 2401(a)* makes no mention of jurisdiction but erects only a procedural bar, . . .we hold that *28 U.S.C. § 2401(a)*'s six-year statute of limitations is not jurisdictional, but is subject to waiver." *Cedars-Sinai*, 125 F.3d at 770 (internal citations omitted).

[2] The Proposed Intervenors' imply in their Motion to Dismiss that the Defendants chose to ignore the subject matter jurisdiction defense. Motion to Dismiss, p. 6. While this assertion is more appropriately addressed by the Defendants, Proposed Intervenors wrongly assume that subject matter was never addressed in settlement negotiations. Moreover, the reference to letters by Dale Risling and Troy Burdick, Central California Agency, Bureau of Indian Affairs, for the "admission" that any appropriate statute of limitations had expired is without merit. *Id.* Neither Dale Risling nor Troy Burdick is an attorney. The letters in support of the Tribe were written without the benefit of settlement negotiations.

While the Proposed Intervenors make much of the Supreme Court's holding in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 753 (2008) ("Sand"), that 28 U.S.C. § 2501 is jurisdictional and cannot be waived, the Supreme Court did not address 28 U.S.C. § 2401(a). The Proposed Intervenors also indicate that the Ninth Circuit questioned the continuing viability of *Cedars-Sinai* in light of *Sand* in *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2008); however, the Ninth Circuit more accurately stated that it would not decide whether *Cedars-Sinai* was still good law after *Sand* because that question was not before the court. *Marley*, 567 F.3d at 1036, n.3.

The holding in *Cedars-Sinai* regarding 28 U.S.C. § 2401(a) is distinguishable from the holding of *Sand* regarding 28 U.S.C. § 2501. At least three different district court judges in the Ninth Circuit, including two in the Northern District of California, have distinguished *Cedars-Sinai* from *Sand* and determined that *Cedars-Sinai* remains good law until the Ninth Circuit Court of Appeals addresses whether *Sand* has any application to *Cedars-Sinai*. *Sierra Club v. Johnson*, 2009 U.S. Dist. LEXIS 14819, *25 (N.D. Cal., Feb. 25, 2009) ("This order declines to find that *Sand* alters the Ninth Circuit's pronouncement that *Section 2401(a)* is not jurisdictional."); *Public Citizen, Inc. v.* Mukasey, 2008 U.S. Dist. LEXIS 81246, *24 (N.D. Cal., Oct. 9, 2008) (*Sand's* only mention of *28 U.S.C. § 2401(a)* is in a dissenting opinion, which itself is dicta and does not even attempt to apply the holding to the case to that statute, but merely notes that Courts of Appeals are divided on the waivable nature of *28 U.S.C. § 2401(a)*); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 2008 U.S. Dist. LEXIS 98001, *14 (D. Nev., Dec. 3, 2008) ("[T]his court declines to read *John R. Sand & Gravel Co.* as altering the Ninth Circuit's previous conclusion that *§2401(a)* is not jurisdictional in nature.").

## III. THE TRIBE'S CLAIMS ARE CONTINUING AND ARE THUS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs' claims for of unlawful termination and failure of the federal Defendants to recognize the Tribe resulted in injuries which fall within the continuing violation doctrine. Thus, the damages resulting from the government's failure to recognize the Tribe and the accompanying breach of trust claims that occurred within six years of the complaint would not be subject to any statute of limitations bar found in 28 U.S.C. § 2401(a). Had the Tribe been lawfully terminated, the continuing violation doctrine may not have been applicable here. However, Defendants have admitted that the Tribe was not lawfully terminated; thus, Defendants remain liable for continuing violations based on the failure to previously correct the Tribe's unlawful termination that occurred within the six years immediately preceding the Complaint.

Courts have identified "continuing violations" with respect to statutory requirements of the government because "where the statutory violation is a continuing one the staleness concern disappears." *Public Citizen, Inc.*, 2008 U.S. Dist. LEXIS 81246, *28 (*citing Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Public Citizen*, the court held that "an application of *Section 2401* would eviscerate a specific ongoing statutory obligation" with respect to the Attorney General's failure to comply with the Anti-Theft Improvements Act. *Public Citizen, Inc.*, 2008 U.S. Dist. LEXIS 81246 at *29. Moreover, the application of Section 2401 would have allowed "the Attorney General to avoid judicial oversight by merely delaying to long." *Id.*

The most obvious and primary of the statutory obligations to the Tribe by the federal Defendants, it is a requirement that the Department of Interior annually publish a list of federally-recognized tribes per the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §§ 479a and 479a-1. Under the continuing claim doctrine, courts have held that in cases "where payments are to be made periodically, each successive failure to pay gives rises to a new cause of action, even where the grounds or basis for the refusal to pay took place or where enacted more than 6 years

prior to the action." *Friedman v. United* States, 310 F.2d 381, 384-85 (Ct. Cl. 1962); *see also Burich v. United* States, 366 F.2d 984, 986-87 (Ct. Cl. 1966). Even assuming arguendo that the statute of limitations bars some violations related to the federal government's failure to recognize the federal status of the Tribe, the federal Defendants experience "continuing violation" each time the list was published in the federal register failing to include Wilton Rancheria.

In *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1581 (D.C. Cir. 1988), the court articulated that it assumed "the unlawful termination of the Band's status could result in certain injuries which fall within the 'continuing claim' doctrine, sufficient to remove claims for the resulting damages occurring within 6 years of the complaint from the bar of [the applicable statute of limitations]." As explained by the Ninth Circuit, among the "obvious rewards" of federal recognition are "the eligibility for federal money for tribal programs, social services and economic development." *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). Thus, each instance in which Defendants failed to recognize that the Tribe was not lawfully terminated and did not make determinations that the Tribe was eligible for federal programs, represented another example of the Tribe's continuing claims. (Declaration of Mary Tarango, ¶ 7.)

## IV. EVEN IF THE COURT HAD IMPROPERLY EXERCISED JURISDICTION, THE COURT WOULD NOT BE REQUIRED TO VACATE AS THERE WAS AN ARGUABLE BASIS FOR SUBJECT MATTER JURISDICTION IN THESE CASES.

Even assuming arguendo that there was a lack of subject matter jurisdiction here, the Court should not consider the Motion to Re-Open and Vacate filed by a non-party to the cases. The Ninth Circuit Court of Appeals has previously held that a district court should properly refuse to consider a motion to vacate when it is filed by a nonparty. *Citibank*, 809 F.2d at 1440. Moreover, even if the Proposed Intervenors were parties to these actions and they could make a colorful claim that the court lacked subject matter jurisdiction in this case, they would be unable to meet the requisite

requirements for showing that the District Court had a nondiscretionary duty to grant relief their requested relief in these cases.

Pursuant to Rule 60(b)(4), the court *may* relieve a *party* from a final judgment if the judgment is void. While a judgment may sometimes be rendered void by a court's lack of subject matter jurisdiction, this is not always the case. *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980); *Marshall v. Board of Ed., Bergenfield, N.J.*, 575 F.2d 417, 422 (3rd Cir. 1978); *Lubben*, 453 F.2d 645, 649-50. In fact, "this occurs only when there is a plain unsurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City Southern Ry. Co.*, 624 F.2d at 825. Unsurpation of the court's power may be found when there exists "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer*, 793 F.2d at 65.

Based upon arguments put forth within this Opposition, it is clear that in these cases the Court had an arguable basis for finding subject matter jurisdiction. Thus, it would be inappropriate for the Court to vacate the Stipulation for Entry of Judgment in this case based upon challenges by the Proposed Intervenors.

## V. THERE ARE NO VALID "OTHER" GROUNDS FOR VACATING THE SETTLEMENT AGREEMENT AND FINAL JUDGMENT APPROVING THE SAME IN THESE CASES[3]

### A. *Carcieri* Is Not Applicable to Wilton Rancheria.

The County and City assert the Secretary of Interior has no authority to take land into trust on behalf of Wilton Rancheria because a "question" exists as to whether the Tribe was "under federal jurisdiction when the IRA [Indian Reorganization Act] was enacted in June 1934" citing

[3] Plaintiffs note arguendo that even if the arguments detailed within this section and the bases for the provisions contained within the Stipulation for Entry of Judgment were to fail, it would be inappropriate for the court to vacate the Stipulation for Entry of Judgment on any of these grounds. "[I]t is a well established principle that '[a] judgment is not void merely because it is erroneous.'" *United States v. Berke*, 170 F.3d 882, 888 (9th Cir. 1999) (citing 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2862 (2nd ed. 1995).

*Carcieri v. Salazar*, 555 U.S. ____, 129 S. Ct. 1058, 1061. While the Supreme Court did not consider the meaning of "under federal jurisdiction" in the IRA, it is axiomatic that every federally recognized Indian tribe, by virtue of recognition, falls under federal jurisdiction and the plenary authority of Congress. Certainly any Indian tribe with a federal reservation before 1934 would also be considered "under federal jurisdiction" within the meaning of the IRA.

No other fact is more compelling in demonstrating "under federal jurisdiction," then the United States purchasing and holding title to land for the exclusive use and benefit of the Indians of Wilton Rancheria. In 1927, the Commissioner of Indian Affairs and the Department of the Interior began the process of purchasing 38.77 acres from the Cosumnes Company for use and occupancy of the homeless Indians living near Wilton, California. (Kazhe Decl. ¶ 4; Complaint ¶ 13.) The United States land purchase was completed in 1928. Numerous other facts exist confirming the Tribe was under federal jurisdiction in 1934 including but not limited to signatories of un-ratified treaties, federally prepared census rolls, federal correspondence with the Tribe, use of federal funds for the Tribe's benefit, and the Bureau of Indian Affairs asserting jurisdiction over tribal members. There is no merit to the City's and County's assertion of *Carcieri* as a defense or basis for vacating the Stipulated Judgment.

**B. Wilton Rancheria Meets Restored Lands Criteria.**

The City and County also dispute whether the former Rancheria may be deemed "restored land" within the meaning of the Indian Gaming Regulatory Act ("IGRA") citing 25 U.S.C. Section 2719(b)(1)(B)(iii). The restored lands analysis under the IGRA is comprised of two steps. The first, threshold step asks whether a tribe is considered "restored." *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 158 (D.D.C. 2002), *aff'd.*, 348 F.3d 1020 (D.C. Cir. 2003); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty.*, 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002) ("Grand Traverse II"), *aff'd.* 369 F.3d 960, 964 (6th Cir. 2004) ("Grand Traverse III"). To show it

is "restored," a tribe must demonstrate: (i) a period of federal recognition, followed by (ii) a period of non-recognition, followed by (iii) a period of renewed recognition. *Grand Traverse III*, 369 F.3d at 967. If a tribe is found to be "restored," then the analysis must proceed to consider the tribe's historic, cultural, and temporal relation to the land in question. *Grand Traverse II*, 198 F.Supp.2d at 936.

Here, the Stipulated Judgment provides that *"[l]and taken into trust for the benefit of the Tribe* that is *within or contiguous*, as defined by 25 C.F.R. § 292.2, *to the Rancheria* shall be 'restored land' as defined by 25 U.S.C. § 2719(b)(1)(B)(iii)." (Stipulation, ¶ 10.) (Emphasis added). There is no disputing land that the former Rancheria or land that is contiguous to the former Rancheria meets all the criteria of "restored land" – this was land that was used and occupied by the Tribe as a reservation.[4] The former Rancheria and the lands contiguous thereto clearly have significant historical connection to the Tribe. (Complaint, ¶¶ 13, 21-31, 42, and 45.) The land was purchased by the United States solely for their use and benefit in 1927. (Kazhe Decl. ¶ 4.) Several tribal members, including the last surviving distributee, still resides on the former Rancheria. (Complaint, ¶ 42.) There is no doubt that the land within or contiguous to the former Rancheria would be considered restored land.

**CONCLUSION**

Therefore, based upon the foregoing arguments, Plaintiffs respectfully request that the Court deny the Proposed Intervenors' Motion to Re-Open and Vacate Judgment and to Dismiss for Lack of Subject Matter Jurisdiction. As non-parties to these actions, the Proposed Intervenors

[4] *See* Indian Land Opinions, National Indian Gaming Commission, http://www.nigc.gov/ReadingRoom/IndianLandOpinions, *Upper Lake Rancheria*, November 21, 2007 (land one (1) mile from former Rancheria declared restored land); *Cloverdale Rancheria*, December 12, 2008 (land within and contiguous to former Rancheria declared restored land); *Bear River Band of Rohnerville Rancheria*, August 5, 2002 (land six miles from former Rancheria declared restored land); *Elk Valley Rancheria*, July 13, 2007 (land located one mile from former Rancheria declared restored land); *Mechoopda Indian Tribe of Chico Rancheria*, March 14, 2003 (land located ten (10) miles from former Rancheria declared restored land); *Mooretown Rancheria*, October 25, 2007 (land fifteen (15) miles from former Rancheria declared restored land).

improperly request that the Court consider motions which it lacks standing to offer. Furthermore, the final judgment entered by the Court on June 8, 2009, in which it approved the Stipulation of Entry of Judgment entered into by all of the parties, was subject to no jurisdictional defects.

Dated: October 9, 2009

Respectfully submitted,

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