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UNITED STATES DISTRICT COURT

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, Secretary of the Department of the Interior; et al., Defendants.	No. C 07-2681 JF (PVT) DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO RE-OPEN & VACATE JUDGMENT AND TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION Date: October 30, 2009 Time: 9:00 a.m. Ctrm: No. 3
ME-WUK INDIAN COMMUNITY OF THE WILTON RANCHERIA, Plaintiff, v. KENNETH L. SALAZAR, Secretary of the Department of the Interior; et al., Defendants.	No. C 07-05706 JF (PVT)

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INTRODUCTION

Effective June 8, 2009, this Court entered Judgment in this case, which restored the Wilton Miwok Rancheria (hereafter, "Wilton Tribe" or "Tribe") to the status of a federally recognized Indian Tribe. Notwithstanding this prior entry of Judgment, the matter is presented to the Court again because the County of Sacramento, California (hereafter, "County") and the City of Elk Grove, California (hereafter "City") (hereafter collectively referred to as "Petitioners") have petitioned the Court for an order allowing them to intervene in the case and to re-open and vacate the Judgment and to dismiss it based upon an alleged lack of subject matter jurisdiction.

The Federal relationship with and supervision of the Tribe, previously a federally- recognized Indian Tribe, was terminated pursuant to California Rancheria Act of 1958 ("Rancheria Act"), Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390, and the assets of the Rancheria distributed to individual Indians residing on the Rancheria or who were otherwise able to establish their right to participate in the distribution. A plan for the distribution of the assets was developed and approved by the Indians. In the spring of 1961, the Department of the Interior issued a letter indicating that the requirements of the Rancheria Act had been satisfied and revoked the Department of the Interior's approval of the Rancheria's Constitution and Bylaws. Notice that the Rancheria had been terminated was published in the Federal Register on September 22, 1964 (29 Fed. Reg. 13, 146).

During the late 1970s and early 1980s, a number of suits were filed in California on behalf of the individual distributees, their dependents, and minors challenging the sufficiency of the Department of the Interior's actions implementing the Rancheria Act. In one of those cases, *Tillie Hardwick v. United States*, No. C-79-1710 (N.D. Cal.) ("*Hardwick*"), the distributees of the Wilton Rancheria were initially included in the class certification but were dismissed without prejudice in 1983.

The Indian status of the minors and dependent members of the Wilton distributees was restored as a result of other litigation, *Knight v. Kleppe,* No. C-74-0005 and *Duncan v. Kleppe*, No. C-73-0034 (N.D. Calif.). 43 Fed. Reg. 42789, 42817 (Sept. 21, 1978).

LITIGATION BACKGROUND

On February 28, 2007, plaintiffs Me-wuk Indian Community of the Wilton Rancheria brought suit in the District of Columbia District Court. *See Me-wuk Indian Community of the Wilton Rancheria v. Kempthorne*, No. 07-412 (D.D.C). In that case, plaintiffs asserted that the defendants failed to execute the Wilton Rancheria Distribution Plan pursuant to the California Rancheria Act. Plaintiff Me-wuk Indian Community of the Wilton Rancheria (hereafter "Me-wuk") sought to be federally recognized and to have certain land taken into trust on their behalf. Because the former Wilton Miwok Rancheria was located in the Eastern District of California, the United States moved to transfer this action to the Eastern District of California on April 23, 2007.

While the Motion to Transfer was still pending, the Wilton Miwok Rancheria (hereafter, "Wilton") moved to intervene in the District of Columbia District Court action. In addition, on May 21, 2007, plaintiff Wilton filed suit in the Northern District of California. *Wilton Miwok Rancheria, et al., v. Kempthorne*, et al., No. C 07-2681. Plaintiff Wilton also asserted that the United States failed to fulfill the obligations set forth in the California Rancheria Act. That group's request for relief was similar in nature to the request made by the plaintiff Me-wuk in the action filed in the District Court of the District of Columbia. Namely, Wilton sought to be federally recognized and to have land taken into trust on its behalf. On May 23, 2007, Wilton's suit was reassigned to Judge Jeremy Fogel. Judge Fogel had previously presided over a portion of *Hardwick*. On May 29, 2007, Judge Fogel ordered the two cases to be related.

In its motion to intervene in the Me-wuk case, Wilton stated that if permitted to intervene, it would seek to transfer the District of Columbia District Court action to the Northern District of California. Because of these events, the United States was persuaded that transfer of the Me-wuk suit to the Northern District rather than the Eastern District of California would be appropriate. On July 24, 2007, the United States provided notice to the Court that it would support such a request to transfer. On October 24, 2007, Judge Royce Lamberth, District Judge, granted plaintiff Wilton's request to intervene in *Me-wuk Indian Community of the Wilton Rancheria v. Kempthorne*. Judge Lamberth then transferred the case to the Northern District of

California. After its transfer, on November 27, 2007, Judge Jeremy Fogel ordered *Me-wuk Indian Community of the Wilton Rancheria v. Kempthorne* and *Wilton Miwok Rancheria, et al., v. Kempthorne* to be related cases.

On November 30, 2007, both cases were referred to mediation. The parties had agreed to mediate the cases jointly; and, at the case management conference, Judge Fogel ordered the mediation to proceed as such. In essence, it appeared that the two Indian groups, Me-wuk and Wilton (collectively, "Plaintiffs") claimed to have the same heritage and had staked their claims on the same land. Because the claims were intertwined, it was necessary to have all parties involved in any discussions regarding settlement of the two cases. On January 9, 2008, the parties participated in an initial mediation session. Over several months, the parties then exchanged a series of drafts of a proposed settlement agreement, finally agreeing to terms which were set forth in the Stipulation for Entry of Judgment (hereafter, "Stipulated Judgment"), which the Court then entered as the Judgment in the case, effective June 8, 2009. Among other provisions, the Stipulated Judgment provides that the Department of Interior "will accept in trust status any land within the boundaries of the former Rancheria" and/or "any land within and/or contiguous to the former boundaries of the Rancheria." Stipulated Judgment ¶¶ 7 and 8.

On August 4, 2009, the Petitioners moved to intervene in the above-captioned case[1] and also filed their Motion to Re-Open & Vacate Judgment and to Dismiss for Lack of Subject Matter Jurisdiction (hereafter referred to as "Motion to Vacate").

The United States opposes the Motion to Vacate and, in the points and authorities which follow, it demonstrates why the action was not time-barred and the reasons that Petitioners lack standing and/or grounds to maintain their Motion to Vacate under Rule 60(b), and why the Court should deny Petitioners' Motion to Vacate.

[1] Petitioners' motion to intervene is the subject of a separate motion and memorandum of points and authorities and the United States is filing a separate opposition to that motion, this date.

STATEMENT OF ISSUES TO BE DECIDED

A. Does the settlement of the case through the Stipulated Judgment render the entire case moot and not subject to Petitioners' Motion to Vacate?

B. Can the underlying claims for relief be challenged for lack of subject matter jurisdiction for limitations or otherwise, when the underlying claims for relief have been dismissed as moot?

C. In the alternative, is the Judgment subject to being vacated under Federal Rule of Civil Procedure 60(b)?

D. As non-parties to the action, do the Petitioners lack standing to seek and/or obtain relief under Rule 60(b)?

ARGUMENT

A. THIS CASE IS MOOT AND PETITIONERS' MOTIONS CANNOT BE SUSTAINED.

The Petitioners contend that the Judgment should be vacated because the Court never had jurisdiction over the subject matter of Plaintiffs' lawsuits due to the alleged expiration of the statute of limitations prior to the respective dates on which the two lawsuits were filed. However, as demonstrated below, because this matter has been settled via the Stipulated Judgment, the case is moot and not subject to Petitioners' intervention and/or the Motion to Vacate, on any grounds, including the alleged lack of subject matter jurisdiction over the original Complaint.

1. The Stipulated Judgment Rendered the Entire Case Moot.

With limited exceptions, a settlement involving all parties and all claims "also removes the necessary element of adversariness and moots the action." *See* 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.2 at 777 (3d ed. 2008), and cases cited therein. A federal courts' inability "to review moot case derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc*., 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394 n. 3 (1964) This principle is borne out in the case authorities.

In *Tosco Corp. v. Hodel*, 804 F.2d 590, 592 (10th Cir. 1986), after the court had entered judgment in favor of the claimants and while the Secretary of Interior's appeal was pending, the parties entered into a settlement agreement. Shortly thereafter, various non-party individuals and entities filed motions to intervene and for injunctive relief. The court found that, although the settlement agreement included executory terms, it constituted a final settlement of the dispute, and thus mooted the case, "depriving [it] of jurisdiction to consider motions for intervention and injunction, citing *Future Plastics, Inc. v. Ware Shoals Plastics, Inc.*, 407 F.3d 1042, 1046 (4th Cir. 1969) There being no "case or controversy" remaining because of the settlement, the court dismissed the motions to intervene and for injunction for want of jurisdiction. *Id*. Here, a similar situation is presented to this District Court because a Stipulated Judgment has been entered and constitutes a final settlement. This development has mooted the dispute between all the parties and ended the Court's jurisdiction over the matter for all purposes, including the Petitioners' Motion to Vacate. Stated more simply, this Court lacks jurisdiction and authority to either consider or rule on the Motion to Vacate, and it should follow the decision in *Tosco Corp.* and dismiss the Petitioners' Motion to Vacate for want of jurisdiction.

Decisions in both the Ninth Circuit Court of Appeals and the Northern District of California are in accord with the decision in *Tosco Corp*. For example, in *Gator.com Corp v. L.L. Bean, Inc.*, 398 F.3d 1125 (9th Cir. 2005)(*en banc*), even the settling parties themselves could not preserve a selected issue for additional litigation and resolution by the court. The Court of Appeals held that because the parties' settlement agreement had wholly eviscerated the dispute that prompted the plaintiff to initiate its suit, its request for declaratory relief no longer gave rise to an actual case or controversy, and the attempt to preserve one of the issues for determination by the court was rejected.

> "There is no live controversy before us because the parties' settlement agreement has resolved all facets of their dispute and has thereby mooted this appeal. If we were to reach the merits of the personal jurisdiction issue that remains before us, we would run squarely afoul of the Supreme Court's admonition "to avoid advisory opinions on abstract propositions of law."

Id. at 1132. Citing *Hall v. Beals*, 396 U.S. 45, 48, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969). *Id.* 1132; *see also, Lake Coal Company, Inc., v. Roberts & Schaefer Co.*, 474 U.S. 120, 106 S.Ct.

553 (1985); *Riverhead Sav. Bank v. National Mortg. Equity Corp.,* 893 F.2d 1109, 1112 (9th Cir. 1990). If the parties to a settlement agreement cannot themselves preserve an issue for resolution by the court, then certainly strangers to the lawsuit, such as the Petitioners here, cannot be allowed to intervene where no case or controversy exists and ask that the final settlement and judgment be vacated. Therefore, the Court should reject the Petitioners' Motion to Vacate.

The same rule was followed by this District Court in the case of *Trauner v. Rickards,* 698 F.Supp. 822, 824-25 (N.D.Cal.1988), where the plaintiffs, who were party to settlement agreements ending the case, subsequently moved for summary judgment for damages on certain claims. The court held that the settlement agreements had rendered moot all claims which were subject of the successful summary judgment motion, denied the motion for summary judgment on the additional damage claims and dismissed the matter. *See also*, *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1248 (9th Cir 1979). Once again, even a party to a settlement agreement will not be allowed to selectively pursue claims in a case that has previously been resolved by settlement because no case or controversy remains after the settlement of the matter. Here also, there is no reason that the claims of Petitioners, as non-parties and strangers to these settled cases, should be treated differently than the party who had actually been one of the plaintiffs in *Trauner*, and thus, the Motion to Vacate should be denied and the matter dismissed.

The Petitioners here must confront certain bedrock principles which, if followed, will result in denial of their Motion to Vacate because "Article III of the Constitution requires that [courts] only decide cases or controversies, and thus prohibits [them] from resolving hypothetical legal questions ... relevant only to the resolution of an already dismissed dispute." *Prier v. Steed*, 456 F.3d 1209, 1212 (10th Cir.2006). The entry of the settlement in the above-captioned case is not subject to dispute. Further, the only case and controversy concerning the subject matter that has been before this Court has already been settled. Therefore, the issues now alleged by Petitioners present only hypothetical legal questions which the Court cannot address because the litigation has been settled by the parties, and the case is now moot. Mootness arises in situations like this one because where "the underlying litigation [is] dismissed by agreement of the parties pursuant to [a] settlement, [ ] there is no longer any action in which to intervene." *Energy*

Transp. Group, Inc. v. Maritime Admin., 956 F.2d 1206, 1210 (D.C.Cir.1992) (citing *Tosco Corp. v. Hodel*, 804 F.2d 590, 592 (10th Cir.1986)). Likewise, since no case or controversy exists, there is no existing forum or jurisdiction for this Court to even consider the issues presented by Petitioners. Consequently, the Petitioners Motion to Vacate cannot be sustained, the Court should reject consideration of it and dismiss the entire matter.

2. Because the Case is Moot, Petitioners' Motion to Vacate is a Nullity.

Petitioners submitted a number of case authorities to support their theory that the case was time-barred, under the six year statute of limitations in 28 U.S.C. § 2401(a), and should be dismissed for lack of jurisdiction. However, they neglected to address the more important and over-arching jurisdictional issue, set forth above: the Stipulated Judgment and final Judgment entered in this case on June 8, 2009, mooted the case and ended the jurisdiction of the Court. Because the case is moot, this Court lacks jurisdiction to consider or apply the limitations of 28 U.S.C. § 2401(a) to the claims in the original Complaint. Also, due to the loss the Court's jurisdiction, it follows that the Stipulated Judgment is final and not subject to Petitioners' Motion to Vacate. Thus, the Court's lack of jurisdiction renders both the Petitioners' motion to intervene and Motion to Vacate nullities and of no legal or practical consequence to the parties and/or the Petitioners, themselves. Consequently, the Motion to Vacate should be denied and the matter dismissed at this time.

B. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER FED. R. CIV. P. 60(b)

1. Rule 60(b) Authorizes Relief for Parties to the Action, but Petitioners Are Not Parties.

As alternative grounds for relief in this case, Petitioners ask the Court to vacate the Judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect," Fed.R.Civ.P. 60(b)(1), or based upon "any other reason that justifies relief." Fed.R.Civ.P. 60(b)(6).[2]

[2] Rule 60(b)(6) applies only when there is, in fact, a "reason justifying relief "*other than* the reasons enumerated in Rule 60(b)(1) through (5), and there must always be a valid separate reason justifying relief from the judgment. See *Liljeberg v. Health Services Corp*., 486 U.S. 847, 863 n. 5, 108 S.Ct. 2194, 2204 (1988). As stated in 12-60 Moore's Fed. Prac.– Civ. §60.48 [1], "[i]f the reasons offered for relief from judgment could be considered under one of the more specific clauses of Rule 60(b)(1) through (5), those reasons will not justify relief under 60(b)(6)."

To begin the analysis of this argument, the Court should assess and determine whether Petitioners have standing to even bring a motion to vacate the Judgment based upon Rule 60(b). Fed.R.Civ.P. states that "[o]n motion and just terms the court may relieve a *party* or its legal representative from a final judgment" (emphasis added) for one of the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct; (4) the judgment being void; (5) satisfaction or release of judgment, reversal or vacation of another judgment on which the judgment relied, or it becoming inequitable that the judgment should have prospective application; or (6) any other reason justifying relief.

Based upon its plain language and the foregoing summary of the rule, Federal Rule of Civil Procedure 60(b) applies to "a party" subject to a final judgment. Fed.R.Civ.P. 60(b). The Ninth Circuit has held that nonparties generally cannot seek relief from a judgment under Rule 60(b) because they are not parties within the meaning of the Rule. *See Citibank International v. Collier-Traino, Inc.*, 809 F.2d 1438,1440-41 (9th Cir. 1987); *see also Ericsson Inc. v. InterDigital Comms. Corp.*, 418 F.3d 1217, 1224 (Fed. Cir. 2005) (the plain language of Rule 60(b) only allows relief to be given to a party to the litigation (citing cases); *Popovich v. United States*, 661 F.Supp. 944, 951 (C.D. Cal. 1987) (courts have been quite strict in construing Rule 60(b) and have limited relief under it to those who are unquestionably parties); *In re Lovitt*, 757 F.2d 1035, 1040 (9th Cir. 1985) (finding that Rule 60 did not govern a situation in which the movant was not a party or a party's privy to the original proceeding).

When a nonparty makes a motion to vacate a judgment, the district court applies the same standards used when a nonparty attempts to appeal the judgment itself, i.e., "exceptional circumstances" must be demonstrated. *Citibank*, 809 F.2d at 1441 (dismissing nonparty's motion to vacate because no exceptional circumstances were presented to require grant of standing). Thus, whether a non-party has standing to challenge a judgment on appeal is the proper inquiry here. *See id.*

A nonparty has standing to appeal a district court's decision only in exceptional circumstances. *Id.* Moreover, hearing an appeal by a nonparty is discretionary. *EEOC v. Pan*

American World Airways, Inc., 897 F.2d 1499, 1504 (9th Cir. 1990) (allowing a non-party to appeal a consent decree due to the preclusive nature of the judgment and petitioners pecuniary interest in the suit); Nonparties cannot appeal unless they actually participated in proceedings before the district court and the equities weigh in favor of hearing the appeal. *Id.* at 1504 (citations omitted). A nonparty must also have a personal stake in the outcome of the litigation discernible from the record. *Id.* Petitioners, here, have neither alleged nor demonstrated any "exceptional circumstances" to satisfy that requirement, and there is nothing in the record to justify granting them, as non-parties, standing to challenge the Stipulated Judgment.

Similarly, the equities do not favor the Court entertaining or granting Petitioners' Rule 60(b) motion. Unlike the petitioners in *Pan American*, the Judgment entered by this Court does not bar these Petitioners from future litigation. Here, the Judgment that Petitioners seek to re-open, dismiss, and vacate does not place specific land into trust, but rather merely grants the Tribes the right to petition to place certain land into trust, i.e. land that was within the boundaries of the former Rancheria, and/or land within and/or contiguous to the former Rancheria. Stipulated Judgment, ¶¶ 7 and 8. Further, Petitioners have no direct interest in the Judgment, were not due notice, and are not in privity with Defendants. Considering all the circumstances, the Petitioners lack standing to move the District Court for relief under 60(b). Therefore, the Court should deny their Motion to Vacate.

The facts of this case are similar to those presented in an earlier case before this Court which also involved the restoration of Indian status for a terminated tribe, entitled *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria, et al. v. United States of America, et al.*, No. C 86-3660 VRW, N.D. Cal., Oct. 27, 2003. Copy attached hereto as Exhibit A. In *Scotts Valley*, a group made up of five businesses and two public interest groups moved the court for an order (1) allowing them to intervene in the action pursuant to Rule 24, Fed.R.Civ.P.; and (2) to modify or vacate the stipulated judgment in that action pursuant to Rule 60, Fed.R.Civ.P. Both motions were opposed by the original parties to the case who, in 1991, had signed a stipulated judgment, which the court then entered, resolving all issues in the lawsuit. The court ultimately found that the petitioners did not qualify as parties to the case under either Rule 60 or Rule 24,

and therefore the petitioners in that case were not entitled to bring a motion to correct, modify, or vacate the judgment under Rule 60(b). Consequently, the petitioners' motion was denied. *Id.*, at page 37. For the same reasons, the Petitioners' motions before this Court should be denied.

Notwithstanding their lack of standing as parties, the Petitioners contend that they are entitled to relief by alleging that the Judgment in this case constituted a "surprise" to them and their non-action was subject to "excusable neglect" under Rule 60(b)(1), citing *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 695-96 (9th Cir. 2001), which quotes a passage from *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489 (1993). Petitioners' Motion, at p. 14. The *TCI Group* case is distinguishable from the facts before this Court because it (as well as the *Pioneer* Case) involved a request for relief from a default judgment. Indeed, all three of the cases cited by Petitioners in their argument in support of relief under Rule 60(b) involved relief from default judgments. Obviously, the Judgment entered in this case is not a default judgment. More importantly, the entity seeking relief in *TCI Group* case, had been an actual party to that lawsuit. So also, in all the other cases involving default judgments cited by Petitioners, the persons or entities seeking relief under Rule 60(b) had been actual parties in the respective cases, whereas Petitioners were never parties to the instant case.

Petitioners also cite, *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88 (B.A.P. 9th Cir. 2004), which is distinguishable from the facts before this Court for even more reasons. In addition to being another case involving an actual party to the lawsuit seeking relief from a default judgment, *Beneficial* concerned an appeal of a bankruptcy proceeding, not a 60(b) motion to dismiss or vacate a judgment, as presented to this Court. Clearly, as non-parties to this action, Petitioners cannot advance their interests or claim support for their Motion to Vacate based upon the decisions in either the *Beneficial*, *TCI Group,* or *Pioneer* Cases.

Petitioners, as non-parties, appear to recognize their lack of status for relief under Rule 60(b). To compensate, they argue that "they were not only excluded from these actions---despite being *necessary parties*---but they were not even get (*sic*) notice, formal or informal, of the actions' existence until after the settlement was approved." Petitioners' Motion, at p.14, ll.14-

17; see also, p. 17, l. 28 (emphasis added). However, Petitioners offer no evidence or authority to establish the meaning of "necessary parties" in the context of this case, and that they were, in fact, necessary parties and/or entitled to receive notice of the actions because of their alleged status as necessary parties. Accordingly, Petitioners have not and cannot support their assertion of "status" as necessary parties, and they have provided no other grounds to establish their standing to seek relief under Rule 60(b). Consequently, since the Petitioner were never parties to the case, their motion for relief under Rule 60(b) should be rejected by the Court.

2. The Petitioners Alleged Defenses to the Complaints Lack Any Merit Whatsoever.

a. The Secretary Has Authority to Accept Land Into Trust for the Tribe.

Even though the Petitioners have failed to cite any factual or legal authority to establish their standing to bring their Motion to Vacate, they nevertheless urge on the Court the alleged "merits" of their proffered defenses to the Plaintiffs' Complaint in this case. First, they contest the authority of the Secretary of the Interior (hereafter, the "Secretary") to take land into trust on behalf of the Plaintiffs based upon the decision in *Carcieri v. Salazar*, 555 U.S.__, 129 S.Ct. 1058, 172 L.Ed.2d (2009). *Carcieri* held that the Secretary's authority under the Indian Reorganization Act (IRA) to take land into trust for Indians is limited to Indian tribes that were under federal jurisdiction when the IRA was enacted. *Id*., at 1061. In that case, the court found that the Narraganset tribe was not under federal jurisdiction when the IRA was enacted and the Secretary lacked the authority to take the parcel, at issue, into trust.

It should be noted that the Narragansett tribe had been placed under the Colony of Rhode Island's formal guardianship in 1709 and had relinquished its tribal authority and sold all but two acres of its remaining reservation land in 1880. However, afterward it began trying to regain its tribal land and tribal status. From 1927 to 1937, federal authorities declined to give the tribe assistance because they considered the tribe to be under state, not federal jurisdiction. Later, the tribe received title to 1800 acres of land and finally gained formal recognition from the federal government in 1983. The Secretary accepted 1800 acres into trust in 1988. Subsequently, the tribe purchased an additional 31 acres of land to comply with local regulations for construction of housing. A dispute arose over those additional acres and, while litigation was pending, the

Secretary accepted the 31 acre parcel into trust. The Supreme Court held that since the tribe was not under federal jurisdiction when the IRA was enacted in 1934, the Secretary lacked authority to take the 31-acre parcel into trust. *Carcieri*, pp. 1063-1068. The facts surrounding the Tribe in this case and the Narragansett tribe are not similar, in any respect. Consequently, the holding in *Carcieri* is not applicable to the Plaintiffs in this case.

The Tribe before this Court was never subject to state jurisdiction, and its tribal organization was recognized by the federal government many years before the Narragansett tribe gained recognition in 1983. The Tribe's long history of federal recognition is reflected in an official publication of the United States Indian Service (now the Bureau of Indian Affairs) entitled, "Ten Years of Tribal Government Under IRA," Theodore H. Haas, 1947 (hereafter, "IRA Publication"). See copy attached as Exhibit 1to the Request for Judicial Notice, filed herein this date.

Two parts of the IRA Publication are significant for purposes of this case and the Petitioners' attempt to deprive the Tribe of its status. First, in Table A, entitled, "Indian Tribes, Bands and Communities which Voted to Accept or Reject the Terms of the **Indian Reorganization Act**, the Dates When Elections Were Held, and the Votes Cast" (at p. 13) (emphasis added), the Wilton Tribe is included on page 16 (in upper quarter of page). Second, in Table B, entitled "Indian Tribes, Bands and Communities under Constitution and Charters as Approved by the Secretary of the Interior in accordance with the **Indian Reorganization Act**, Oklahoma Indian Welfare Act, Alaska Reorganization Act, Revised October 10, 1946 (at p. 21)(emphasis added), the Wilton Tribe is included on page 26 (near mid-page). Without question, the IRA Publication included the Wilton Tribe among the Indian people who were subject to and operating under the IRA since the mid-1930s through 1946, at a minimum. This fact distinguishes the Wilton Tribe's status from that of the Narragansett tribe, the subject of *Carcieri*.[3]

[3] In contrast to the status of the Wilton Tribe, the IRA Publication's record of lists of tribes subject to and operating under the IRA does not include the Narragansett tribe.

Section 25 USC 478 of the IRA required the Secretary to hold election on reservations to give the residents an opportunity to reject the application of the IRA,[4] and the IRA Publication demonstrates that that the Tribe had held such an election and voted in favor of becoming subject to the application of the IRA.

The IRA Publication establishes that the Secretary conducted an election for the Wilton residents and that, thereafter, they reorganized under authority of the IRA. This constitutes prima facie evidence that the Wilton Tribe was subject to the IRA, including the application of federal jurisdiction, at that time. Cut-off dates aside, at a minimum, the IRA Publication provides facts which drastically distinguish the Wilton Tribe from the tribe subject of the *Carcieri* decision. In sum, the circumstances of the Wilton Tribe have nothing in common with the background of the Narragansett tribe, and there is no basis to conclude that the decision in *Carcieri* could or should be applied to the Wilton Tribe to invalidate the Secretary's decision to restore its tribal status and agree to accept its land into trust. Consequently, nothing in the record indicates that it would be productive grant the relief Petitioners seek, i.e. to vacate the Judgement so that they could "be permitted to advance this issue as a defense," and the motion should be denied.

b. The Secretary Has Authority to Declare That Wilton is a "Restored Tribe."

The Petitioners' second suggested defense to Plaintiff's Complaint is that "the federal government has agreed that the lands to be taken into trust under the settlement constitute 'restored lands of a restored tribe' amenable to gaming under Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(ii), without consultation with local governments and the approval of California's governor." Motion to Vacate, p. 16, ll. 19-23. However, Petitioners have misrepresented the content of the Stipulation for Judgment. *Id.* ¶ 3, l. 9, and ¶ 10, ll 8-10. That is, the Stipulated Judgment does not say that the federal government agrees "that the lands

[4] Section 25 USC 478 provides: "This 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 June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice."

to be taken into trust under the settlement [are] amenable to gaming under Section 20 of the Indian Gaming Regulatory Act, . . . etc." Indeed, there is no language within the Stipulated Judgment which even refers to any land as "amenable to gaming under Section 20 of the Indian Gaming Regulatory Act . . . etc."

In the context of this argument by Petitioners, it bears emphasizing that the land that will be eligible for designation as "restored land" is identified and restricted by the terms of the Stipulated Settlement to the "land within the boundaries of the former Rancheria" and/or the "land within and/or contiguous to the former boundaries of the Rancheria." Stipulated Judgment ¶¶ 7 and 8. Thus, the lands that can be designated as "restored lands," pursuant to the Stipulated Judgment, are restricted to a limited area, both geographically and quantitatively.[5]

While it is true that both 25 U.S.C.§ 2719(b)(1)(B)(iii) and 25 C.F.R. 292.10(c) deal with restored tribes and restored lands, the Miwok Tribe has yet to request that any land be taken into trust, and no such request is contained in the Stipulated Judgment. Also, should the Tribe seek trust status for newly acquired land pursuant to 25 C.F.R. 292.11(c) and 292.12, it is also true that the Tribe would likely need to meet the criteria quoted in Petitioners' Motion, at page 17. That said, however, the Petitioners' arguments with regard to these points, i.e., that "the record contains no evidence these criteria are met, [and] the complaints . . . do not even sufficiently allege them" are specious for the same reason cited above: no request to take any land into trust has yet been made by the Miwok Tribe and, consequently, there is no "record" of the acceptance of land into trust for the Miwok Tribe, whatsoever. Therefore, until such a request is made by the Tribe, and action is taken by the Secretary, there will be no record of compliance with the criteria in 25 C.F.R. § 292.12 of any kind and consideration of any issues associated with that process would be purely speculative, at this point.

Petitioners' suggestion that, had they been allowed to participate in the above-captioned case, they would have presented a defense based upon the alleged failure of the Secretary to

[5] Petitioners' concerns regarding gaming and public input fail to take into account the process for acquiring land under the Stipulated Judgment and Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21, limitations on gaming. See Defendants' Response to Petitioners' Motion to Intervene, Part B, filed this date.

require compliance with 25 C.F.R. § 292.11(c) and 292.12 lacks any merit, whatsoever, because no request for trust status of land has been submitted. Accordingly, this alleged grounds to vacate the Judgment should be summarily rejected.

CONCLUSION

Without doubt, as a result of the settlement and entry of judgment in this case, it is moot, the Court no longer has jurisdiction, and the Petitioners' contentions based upon the statute of limitations are without meaning or effect, at this time. Similarly, Petitioners were never party to this action and lack standing to seek any relief from the judgment under Rule 60(b), Fed.R.Civ.P. For all of these reasons, the Petitioners' Motion to Vacate should be denied and dismissed.

Respectfully submitted,

Dated: October 9, 2009

/s/
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