MATTHEW J. FRANKEL (SBN 256633)
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, California 94111-3600
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
mfrankel@nixonpeabody.com

MICHAEL S. COHEN (*admitted pro hac vice*)
NIXON PEABODY LLP
50 Jericho Quadrangle, Suite 300
Jericho, New York 11753-2728
Telephone: (516) 832-7500
Facsimile: (516) 832-7555
mcohen@nixonpeabody.com

DAVID M. SCHRAVER (*admitted pro hac vice*)
DAVID H. TENNANT (SBN 132568)
NIXON PEABODY LLP
1300 Clinton Square
Rochester, New York 14604
Telephone: (585) 263-1000
Facsimile: (585) 263-1600
dschraver@nixonpeabody.com
dtennant@nixonpeabody.com

Attorneys for Intervenor-Defendants
COUNTY OF NAPA and
COUNTY OF SONOMA

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY,

Plaintiff,

v.

KEN SALAZAR, in his capacity as Secretary of the Interior, *et al.*,

Defendants.

Case No. 5:09-cv-02502-JW

INTERVENOR-DEFENDANTS COUNTY OF NAPA'S AND COUNTY OF SONOMA'S AMENDED MOTION TO DISMISS AMENDED COMPLAINT

[Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3)]

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that, pursuant to the Order Granting Intervenor-Defendant Counties' Administrative Motion, entered in this action on January 21, 2011, on Monday, April 4, 2011, at 9:00 a.m., or as soon thereafter as the parties may be heard in the above-entitled court, located at the United States Courthouse at 280 South 1st Street, San Jose, California 95113, Courtroom No. 8, the Counties of Sonoma and Napa will move to dismiss the Amended Complaint in this action, pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3), on the grounds that (i) Plaintiff's claims are barred by applicable statutes of limitation; (ii) Plaintiff's claims are barred by the doctrine of laches; (iii) Plaintiff lacks standing to bring the claims asserted herein; and (iv) Plaintiff is not entitled to the relief it seeks – restoration of federal recognition as a tribe – for two independent reasons set forth in these moving papers.

This motion is based on this Notice of Motion and attached Points and Authorities, the accompanying Declaration of David H. Tennant, Esq., dated February 25, 2011 (and Exhibits attached thereto), the Affidavit of Stephen Dow Beckham, sworn to February 23, 2011 (and Exhibits attached thereto), and such other papers and documents on file or to be filed in this action, and the arguments to be made at the hearing on this motion.

POINTS AND AUTHORITIES

INTRODUCTION

Intervenor-Defendants County of Napa and County of Sonoma ("the Counties") respectfully request, pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3), that this Court dismiss, as to ***all defendants***, the Amended Complaint [Doc. No. 49] filed by the Mishewal Wappo Tribe of Alexander Valley.[1] Plaintiff seeks various remedies, including federal recognition for itself as a tribe, the transfer of lands into trust, and an order declaring that such lands are eligible sites for Indian gaming, based on what Plaintiff alleges was the improper termination of the Alexander Valley Rancheria in 1959. The Counties move against the Amended Complaint in its entirety on four separate grounds.

First, Plaintiff's claims are time-barred under 28 U.S.C. § 2401(a), which establishes an absolute, jurisdictional bar on claims filed after the six-year period of limitations has run. All of Plaintiff's causes of action are premised on the alleged impropriety of the termination occurring some fifty years ago. Thus, each cause of action accrued at that time, and the statute of limitations ran more than forty years before Plaintiff filed the instant action.

Second, Plaintiff's claims are barred under a traditional laches defense (based on delay and prejudice) as well as under the "*Sherrill* formulation" of laches as articulated by the Supreme Court in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). The "*Sherrill* formulation" of laches bars Indian claims for historic wrongs without requiring proof of unreasonable delay and prejudice, given the facially inordinate delays involved, and the inherent prejudice and disruption that

[1] The Counties, as defendants who successfully sought intervention as of right in this action, have standing to seek dismissal of the untimely claims against all defendants. *See Securities and Exchange Comm'n v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007) (permitting intervening defendant to contest jurisdiction because "[i]ntervention of right simply puts the intervenor into the position he would have been in had the plaintiff (or another party) properly named him to begin with."); *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F.Supp.2d 1194 (D. Nev. 2006) (granting motions of defendants and intervenors to dismiss two of plaintiff's claims as time-barred under 28 U.S.C. 2401). An intervening third party may assert an affirmative defense on behalf of the United States even if the United States chooses not to assert that defense. *See Hazel Green Ranch, L.L.C. v. United States Dep't of Interior*, No. 1:07-cv-00414-OWW-SMS, 2007 U.S. Dist. LEXIS 68728 at *41 (E.D. Cal. Sept. 5, 2007) (Sierra Club allowed to intervene and assert affirmative defense to developer's quiet title action against United States even though United States objected to intervention and intended not to assert affirmative defense), *subsequently dismissed on other grounds*, 2010 U.S. Dist. LEXIS 37733 (E.D. Cal. Apr. 5, 2010).

results from recognizing such historic claims decades or centuries after the alleged wrongs were committed. The Amended Complaint itself demonstrates that Plaintiff engaged in an unreasonable delay by waiting more than five decades to challenge the 1959 termination of the Alexander Valley Rancheria, during which time the tribe's alleged "ancestral lands" have been subjected to State and County taxing and regulatory jurisdiction and developed in accordance with the Counties' general plan, zoning, and other land use ordinances, goals, and objectives. Allowing Plaintiff to be "restored" as a federally-recognized tribe, to have lands taken into trust for its benefit, and to have those lands deemed "restored lands" under the Indian Gaming Regulatory Act, 25 U.S. C. § 2719(b)(i)(3) (Am. Compl. at 31, Prayer for Relief, ¶¶ A and E') all as an obvious predicate to establishing a large gaming facility in Sonoma and/or Napa County – is highly disruptive to the settled expectations of the Counties and their residents, including their expectations regarding preservation of the Counties' world-renowned agricultural assets.

Third, Plaintiff lacks standing to assert any claims on behalf of the "Indians of Alexander Valley Rancheria." Plaintiff is a modern creation and it has not alleged a factual connection sufficient to confer standing between Plaintiff and the Indians who long ago resided on the Rancheria.

Fourth, the remedy of "tribal restoration" is unavailable as a matter of law for two independent reasons. To begin with, Plaintiff's demand for restoration rests impermissibly on a fiction that the Indians of Alexander Valley had a tribal existence that could be terminated in 1959. As set forth below, the Indians of Alexander Valley had no tribal organization and abandoned the Alexander Valley Rancheria before the federal government terminated the tribe. As a result, "restoring" Plaintiff to the status of a federally recognized tribe would confer upon this Plaintiff an unjustified windfall – bestowing upon it a status that the Indians of Alexander Valley did not have at the time of termination and did not lose because of termination. Moreover, because Plaintiff seeks tribal recognition without establishing a substantial factual connection to the Indians once residing on the Alexander Valley Rancheria, this action is actually in the nature of a request for tribal recognition by a group not previously federally-recognized. Such a request raises a political question that is

reserved to the executive branch, and Plaintiff must exhaust its administrative remedies before suing here.

FACTUAL BACKGROUND

A. Plaintiff And Its Relation To The Indians Of Alexander Valley

Plaintiff, identifying itself as the Mishewal Wappo Tribe of Alexander Valley, is a modern entity, "founded" in 2007 and registered as a California corporation in 2009. Declaration of David H. Tennant, dated February 25, 2011 ("Tennant Decl.") at ¶¶ 4-9, Exs B, C and D.[2] Attorneys for the Mishewal Wappo Tribe have acknowledged that the historic tribe lacked a governmental structure for many decades, including after the tribe's federal recognition was terminated in 1959. Tennant Decl. ¶ 11, Ex F (noting that tribal members gathered occasionally for funerals and social events in the 1950s and 1960s; started holding annual picnics in the 1970s, and only later adopted a tribal structure, including forming a tribal council and adopting a constitution in 1993). Moreover, as set forth in a report prepared for the Counties by ethno-historian and noted expert on Native Americans of the American West, Stephen Beckham, Ph.D., (the "Beckham Report") the small group of Indians who occasionally stayed on the Alexander Valley Rancheria did not have a tribal government or community governing body *at any point*, and largely abandoned the Rancheria a decade before the Rancheria's termination in 1959. (A copy of the Beckham Report is attached as Exhibit B to the accompanying Affidavit of Stephen Dow Beckham, Ph.D., sworn to on February 23, 2011.)[3]

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[2] These and other facts that go to Plaintiff's standing are properly considered on a motion to dismiss. *See Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Documents produced by the federal government show that the same or different group of Indians used the name "the Mishewal Wappo Tribe of Alexander Valley," and formed a tribal council and adopted a constitution on November 20, 1993. *See* Tennant Decl. ¶ 10, Ex. E. In any event, Plaintiff is a distinctly modern-day creation.

[3] The Beckham Report summarizes available historical records concerning the Alexander Valley Rancheria, and documents the absence of contemporaneous descriptions of a tribal government or organization on the Rancheria from 1917-1951. *See* Report at 9-11, 19, 24, 26, 27. Tellingly, the Alexander Valley Rancheria was *not* on a list prepared by BIA in 1940 that identified all Rancherias having an organized tribal government recognized by the federal government. *Id*. at 51. If the Alexander Valley Rancheria was not recognized by the BIA in 1934, then even if the Plaintiff were to be recognized now the Secretary would not be authorized to take land into trust for it under 25 U.S.C. § 465. *Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058 (2009).

The Alexander Valley Rancheria was created by the federal government for landless Indians living in Alexander Valley, and consisted of a 20-acre parcel purchased in 1909, and a 34-acre tract acquired in 1913. Beckham Report at 52. The Indians who sometimes lived on the Rancheria were part Pomo and part Wappo. *Id.* at 9, 13-14. Most of the Indians self-identified as Wappos, although a minority identified themselves as Pomos. *Id.* The Indians of Alexander Valley did not use the established Rancheria for farming; rather, they engaged in an itinerant life as agricultural laborers in Sonoma, Napa, and surrounding counties. *Id.* at 9-12. The Indians "squatted" at the Rancheria during the winter months when agricultural work was unavailable. *Id.* at 12. Census records show that numerous residents of the Rancheria moved away in the 1930s (*id.* at 44) and that four families with children left the Rancheria in 1940, leaving few families behind. *See id.* at 23, 25. By 1950, the Indians of Alexander Valley had fully and permanently dispersed into the surrounding communities. *Id.* at 25-26. No Indians from Sonoma County resided on the Rancheria as of April 1951. *Id.* at 27, 50. The Rancheria's sole occupants were Jim Adams, an individual of mixed Indian (neither Wappo nor Pomo) and Hawaiian ancestry, his non-Indian (white) wife and their children, and an African American squatter who lived in a shed. *Id.*

These non-Wappo, non-Indian inhabitants were the *only* occupants of the Alexander Valley Rancheria when Congress authorized the Department of Interior to terminate the Rancheria. *Id.* In connection with the proposed termination of the Alexander Valley Rancheria, the BIA sought to identify former residents of the Rancheria still living in the area. *Id.* at 27-28, 49. The BIA located the McCloud family, which included Indians of both Wappo and Pomo ancestry. *Id.* at 27-28, 48-49.

B. Termination of the Alexander Valley Rancheria

In August 1958, Congress enacted the California Rancheria Act ("Act"), Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390. The Act provided for the termination of federal recognition of forty-one California Indian tribes, including the Alexander Valley Rancheria. Am. Compl. at 4, ¶ 12. On July 6, 1959, the Secretary of the Interior accepted a proposal to terminate

the tribe and distribute the three-lot, 54-acre Alexander Valley Rancheria pursuant to the Act. Am. Compl. at 6-7, ¶¶ 19, 21. The two families claiming an interest in the land (Adams and McCloud) voted to accept the distribution plan, which was made final on September 25, 1959. Am. Compl. at 7, ¶ 22. The Department of the Interior published a formal termination in the Federal Register on August 1, 1961. Am. Compl. at 11, ¶ 41.

C. The Modern Tribe's Amended Complaint

Plaintiff pleads five causes of action, all grounded in Plaintiff's central claim that "[t]he purported termination of the Tribe was not lawfully effected." Am. Compl. at 23, ¶ 78. The first cause alleges that the "unlawful" termination violated a fiduciary duty the Secretary allegedly owes to Plaintiff. Am. Compl. at 23-26. The second alleges that the Secretary's failure to correct the 50-year-old termination constitutes a "failure to act" that violates the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"). Am. Compl. at 26-27. Plaintiff's third cause similarly claims that the Secretary's failure to correct the "unlawful" termination constitutes a "failure to conclude a matter," in violation of the APA. Am. Compl. at 28-29. The fourth similarly alleges that the Secretary has acted arbitrarily and capriciously in not reversing the 50-year-old termination and recognizing Plaintiff. Am. Compl. at 29-30. Finally, Plaintiff's fifth cause again alleges that the Secretary failed to comply with the Rancheria Act in terminating the Mishewal Wappo Tribe in 1959, and thus violated Plaintiff's possessory rights to the former Rancheria. Am. Compl. at 30-31. All five causes allege that "the Tribe's purported termination was unlawful" or ineffective. Am. Compl. at 25, ¶ 85; 27, ¶ 94; 28, ¶ 99; 29, ¶ 105; 30-31, ¶ 111.

Plaintiff thus seeks an order compelling the Secretary to:

- include the Mishewal Wappo Tribe in a published list of federally recognized tribes. Am. Compl. at 31, ¶ B.
- transfer to Plaintiff as trust lands "all public lands held by the Department of the Interior which are not currently in use and are available for transfer that are within the Tribe's historically aboriginal land." Am. Compl. at 31-32, ¶ D.

- treat Plaintiff's future trust lands as "restored lands" as defined in 25 U.S.C. § 2719(b)(1)(B)(iii), which would make those lands immediately available for casino-style gaming purposes, and circumvent the prohibition on gaming on lands acquired after 1988. Am. Compl. at 32, ¶ E; s*ee* 25 U.S.C. § 2719(a).

D. The Amended Complaint Does Not Connect Plaintiff To The Indians Who Once Resided On The Alexander Valley Rancheria

The Amended Complaint does not articulate how Plaintiff is related, if at all, to the historic group of Alexander Valley Indians, who at one time lived on the Rancheria and allegedly voted on June 11, 1935, to accept the Indian Reorganization Act of June 18, 1934. *See* Am. Compl. at ¶ 5; Letter of Dale Risling to George Skibine, dated February 6, 2009, annexed to Am. Compl. [Doc. No. 49-1]. Instead, the Amended Complaint pleads vague generalities, including the statement that:

> Plaintiff is an American Indian tribe consisting of members and their descendants, and/or their Indian ancestors in interest, for whose benefit the United States created the Mishewal Wappo Tribe of Alexander Valley, a parcel of land located in Sonoma County, California.

Am. Compl. ¶ 5. This obtuse pleading reveals nothing about the relationship, if any, between this plaintiff and the group of Indians who once resided on the Alexander Valley Rancheria.

E. Mishewal Wappo Tribe's Prior Litigation Challenging 1959 Termination of Alexander Valley Rancheria

Plaintiff alleges that in the late 1970s and early 1980s, various groups challenged other rancheria terminations in court, and found success when "the Secretary of the Interior conceded" rather than litigate the cases. Am. Compl. at 16, lines 18 and 23; 17, lines 10-11 ("the Secretary of the Interior again conceded"); 18, line 14 ("the Secretary of the Interior conceded"). A group calling itself the "Mishewal Wappo Tribe" (apparently a predecessor entity to Plaintiff but without an organized tribal council or constitution) and thirty-three other plaintiffs pursued this strategy in July 1979, via a class action suit filed in this court against the United States. Am. Compl. at 17-18, ¶ 58; *Tillie Hardwick v. U.S.*, Case No. C-79-1710-SW (N.D. Cal.). The Mishewal Wappo Tribe and other *Tillie Hardwick* plaintiffs asserted that the Secretary of the Interior violated the Rancheria Act by failing to satisfy various alleged obligations before terminating federal supervision and distributing

trust land and assets. Am. Compl. at 17, ¶ 58. Plaintiff claims to have been dismissed from that action (Am. Compl. at 18, ¶ 59), and although the pleading does not disclose the reason, Plaintiff's letter of December 22, 2008 to the California Regional Office of the Bureau of Indian Affairs advises that "without living landholders of the former Rancheria, we did not meet the class requirements." *See* Tennant Decl. at ¶ 12, Ex. G (at p. 1).

F. Mishewal Wappo Tribe's Prior Petitions to Congress for Restoration

After failing to achieve restoration through court action, Plaintiff repeatedly petitioned Congress to reverse the loss of federal tribal recognition in 1959, including through proposed legislation in 1999. *Id.* Ex. G (at p. 5). In doing so, Plaintiff understood the political nature of the restoration request, and the fact that Congress – as the branch of government that terminated the Rancheria in 1959 – was the proper body to consider restoring it. None of these legislative efforts proved successful.

G. Mishewal Wappo Tribe's 2009 Request to Department of the Interior for Administrative Restoration of Federal Tribal Status – And The Department's Invitation to Be Sued

Plaintiff alleges that in January 2009, it submitted to the Secretary of the Interior a "request for administrative restoration." Am. Compl. at 23, ¶ 75. Plaintiff's request for a meeting was rejected on June 22, 2009 by Defendant and Assistant Secretary Larry Echo Hawk. Mr. Echo Hawk wrote to Plaintiff that:

> Because the Rancheria Termination Act is still in full force and effect, the Department of the Interior does not have authority to restore your Tribe administratively. The only means by which your Tribe could be restored is through an act [of] Congress or the courts.

Document 49-2, attached to Am. Compl., at 1; *see also* 25 C.F.R. § 83.7(g) (barring administrative recognition where "congressional legislation [] has expressly terminated or forbidden the Federal relationship").

On April 2, 2009, the Mishewal Wappo Tribe of Alexander Valley registered itself as a corporation with the California Secretary of State. Tennant Decl. ¶ 8, Ex. C. Two months later – and more than fifty years after agreeing to terminate federal recognition and more than twenty-five years

after the Mishewal Wappo Tribe was dismissed from *Tillie Hardwick* – Plaintiff brought the instant suit in keeping with the suggestion of the Department of the Interior.

H. Responses to Plaintiff's Complaint / Amended Complaint

On January 15, 2010 Defendant Ken Salazar filed an Answer to the initial complaint in this action, which included five affirmative defenses.[4] The fourth defense is that "[s]ome or all of Plaintiff's claims are barred by the applicable statutes of limitations." Answer [Doc. No. 22] at 14. The fifth is that "[s]ome or all of Plaintiff's claims are barred by laches." Answer at 14.

Sonoma County filed a motion for intervention on March 5, 2010 [Doc. No. 38]. Napa County followed suit on March 24, 2010 [Doc. No. 41]. The Counties sought, *inter alia*, intervention as of right, and identified the statute of limitations and laches as immediate bars to Plaintiff's action. This Court granted intervention on May 26, 2010 and thereafter extended to July 16 the time for the Counties to file responsive pleadings to Plaintiff's Amended Complaint.

On June 19, the parties filed a Joint Case Management Statement [Doc. No. 56]. In that Statement, Defendants Salazar and Assistant Secretary Larry Echo Hawk ("Defendants") noted that Plaintiff "alleges injury from actions or omissions occurring many decades ago; accordingly, some or all of Plaintiff's claims may be time-barred." Joint Case Management Statement at 4. Defendants therefore indicated that they may "move for judgment on the pleadings prior . . . regarding some or all of Plaintiff's claims, for lack of justiciability." Joint Case Management Statement at 5. The Counties similarly noted that they "intend to respond [to Plaintiff's Amended Complaint] by arguing that this case is barred by statutes of limitations, 28 U.S.C. § 2501, and laches, *see City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. [197] (2005)." Joint Case Management Statement at 5. The Counties therefore noted that they "may move for dismissal or judgment on the pleadings to narrow some or all of Plaintiff's claims." Joint Case Management Statement at 6, 9.

[4] No answer to the Amended Complaint (filed on May 10, 2010) has yet been filed by the federal defendants.

APPLICABLE LAW

In accordance with Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure, the Counties seek dismissal of this action based on the lack of subject-matter jurisdiction. It is presumed that federal courts lack jurisdiction, and plaintiff bears the burden of proving jurisdiction exists. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006) ("It is to be presumed that a cause lies outside [federal] jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction") (citation omitted); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.2002) ("The party asserting federal jurisdiction has the burden of establishing it").

Rule 12(b)(6) authorizes the court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) ("Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable") (citations omitted). Instead, if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," plaintiff's action must be dismissed. *Id.* at 327 (citation and internal quotation marks omitted). In reviewing Plaintiff's offer of proof, the court is not required to assume the truth of legal conclusions cast in the form of factual allegations, nor conclusory allegations that are contradicted by documents referred to in the complaint. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d 972, 975 (9th Cir.2007).

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's claims are governed by 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This six-year statute of limitations applies to Indian tribes "in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

Plaintiff's claims have been foreclosed for decades by Section 2401(a). Plaintiff's claims are all grounded on the same operative fact – the Secretary's allegedly improper termination of the Mishewal Wappo Tribe in 1959. Am. Compl. at 3, ¶ 5; 6-11, ¶ 19-41; 12 ¶ 46; 13, ¶¶ 49-50; 14, ¶ 51; 15, ¶ 52; 20, ¶ 68; 21-22, ¶ 71; 22-23, ¶¶ 74-74; 23-24, ¶77; 25, ¶ 85; 27, ¶ 94; 28, ¶ 99; 29, ¶ 105; 30-31, ¶ 111. Plaintiff's action would not exist but for the termination, and Plaintiff cites no other fact or circumstance justifying restoration, the provision of "restored lands," or the other relief it requests.

The challenged termination was proposed and voted on *five decades ago* and announced in the Federal Register in 1961. *See* Am. Compl. at 7, ¶ 22 (conceding that the residents of the Rancheria voted for termination in 1959); 11, ¶ 41 (acknowledging 1961 Federal Register proclamation). Plaintiff's action thus accrued in 1959, and certainly no later than 1961. *See Hopland*, *supra*, 855 F.2d at 1577 ("[A] claim first accrues when all the events have occurred which fix the alleged liability of the defendant and entitle the Plaintiff to institute an action") (citations and internal quotation marks omitted). Actual notice of government action triggers the statute of limitations but is not required; accrual also occurs upon publication of a notice in the Federal Register. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364-65 (9th Cir. 1990).

Section 2401(a)'s six-year limitations period thus ran no later than 1967, more than forty years before Plaintiff filed the instant action. This issue is dispositive, and Plaintiff's claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *Neitzke*, *supra*, 490 U.S. at 326 ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Plaintiff's failure to timely file also means this Court lacks subject matter jurisdiction, and "must dismiss the action." Fed. R. Civ. P. 12(h)(3), 12(b)(1).

This case is analogous to *Hopland* and other cases dismissing late claims brought by terminated tribes. *Hopland* concerned the 1961 termination of the Hopland Rancheria in Mendocino County (which borders Sonoma and Lake Counties) via the identical California Rancheria Act. 855 F.2d at 1574. In 1976, the Hopland Band of Pomo Indians filed suit against the United States claiming, as here, that the government's alleged "unlawful termination" of the Hopland Rancheria

and the Band's federal status had deprived them of benefits and services available to recognized tribes. *Id.* at 1576. The Federal Circuit rejected this claim, and remanded with instructions to dismiss for lack of jurisdiction. *Id.* at 1574. The court held that "Congress has explicitly provided a plaintiff 6 years in which to file his action and no more." *Id.* at 1577-78. The court held that plaintiff's claims had accrued in the 1960s, upon termination, approval of the distribution plan, and sale of the relevant parcels. *Id.* at 1578, 1579. As here, the court had been:

> shown no valid reason why a [] suit on behalf of the Hopland Band of Pomo Indians could not have been brought to challenge the legality of its termination immediately following the improper termination occurring in this case.

Id. at 1580.

The court in *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007), similarly held that Section 2401(a) required dismissal of a 2002 claim by former members and descendants of the Ute Indian Tribe alleging – as here – that the federal government breached its fiduciary duty by improperly terminating their status as federally recognized Indians. 473 F.3d at 1256.[5] As here, the termination and resulting asset distribution occurred in the 1950s and 1960s (*id.* at 1259), and thus had not "occurred within the six years prior to the filing of the complaint in 2002." *Id.* at 1259 (citing *Hopland*, *supra*, 855 F.2d at 1578-79). The court rejected plaintiffs' attempt to "recharacterize [their] claim by asserting that Interior's failure to rectify its past illegal termination constitutes a current breach of trust." *Id.* at 1259. The court also rejected the application of the continuing violation doctrine, which "typically pertains to employment discrimination claims." *Id.* at 1260. Assuming *arguendo* that the doctrine applies, the court held that plaintiff:

> alleges no acts committed by the defendants within the statute of limitations that could constitute a continuing violation. Although [plaintiffs] do assert that their termination and the loss of their lands and other trust assets, all of which happened in the 1950s and 1960s, continues to have lasting effects on the lives of all "mixed-blood" Utes, [they] assert[] no new acts committed by Interior since that time. As we have held, "[a] lingering effect of an unlawful act is not itself an unlawful act."

[5] The court remanded with instructions to consider the import of the Department of the Interior and Related Agencies Act, which does not apply here. 473 F.3d at 1260.

Id. (citations omitted).

As in *Hopland* and *Felter*, Plaintiff here challenges a rancheria termination that Plaintiff claims resulted in a variety of harms and loss of benefits accorded to federally recognized tribes. *See* Am. Compl. at 14-15, ¶ 51 (listing alleged harms to Plaintiff from termination); 25, ¶ 86 (alleging that "the Tribe has been and continues to be ineligible for the 'protection, services and benefits of the Federal government available to Indian tribes'"); 27, ¶ 94 (same); 28, ¶ 100 (same). Plaintiff failed to bring its claims within six years after the claims accrued, and its action must be dismissed. *Hopland*, 855 F.2d at 1580; *Felter*, 473 F.3d at 1259; *see also Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F. Supp. 253, (N.D. Ind. 1993) (dismissing claim where plaintiff tribe "waited far too long to bring this claim," challenging 1897 withdrawal of federal recognition).

Plaintiff may not evade the statute of limitations by alleging that the government fraudulently or deliberately concealed material facts and thus tolled the statute of limitations until 2004 or later. *See Hopland*, 855 F.2d at 1577. Instead, Plaintiff concedes that it was aware of and protested the termination as early as 1979, when it joined the *Tillie Hardwick* action. Am. Compl. at 18, ¶ 59. Plaintiff simply missed the statutory deadline, and may not overturn the 1959 termination through the courts.

Nor may Plaintiff evade the statute of limitations by mischaracterizing its claims as challenging current harms. Even if the "continuing claims" doctrine applies outside the employment discrimination context (*see Felter*, 473 F.3d at 1260), Plaintiff alleges only "lasting *effects*" from actions that occurred "in the 1950s and 1960s." *Felter*, 473 F.3d at 1260. As in *Miami Nation*, "lack of formal recognition is the gravamen of the plaintiff[]'s complaint," and application of the continuing claims doctrine "would eradicate the statute of limitations by preserving their cause of action until it becomes moot." 832 F. Supp. at 257. As a result, the alleged "lingering effects" of the allegedly unlawful termination "is not itself an unlawful act" sufficient to preserve Plaintiff's late claims. *Felter*, 473 F.3d at 1260.

As in *Hopland*, Congress has provided a six-year window and "no more" and Plaintiff has shown "no valid reason why a [] suit . . . could not have been brought to challenge the legality of its termination immediately following the improper termination occurring in this case." 855 F.2d at 1577-78, 1580. Plaintiff has waited several decades too long to prosecute its action, and the court is "without jurisdiction to expand th[e] period explicitly provided by Congress." *Hopland*, 855 F.2d at 1578. Plaintiff's action must be dismissed.

This court should not view dismissal as an unexpected or harsh result. The Secretary advised Plaintiff more than a year ago that the Department of the Interior has no restoration authority so long as the Rancheria Act remains in force and effect, and the Plaintiff's best bet is an act of Congress. Document 49-2, attached to Am. Compl. The federal government and the Counties have informed Plaintiff repeatedly that the relevant statute of limitations is an obvious and complete bar to their action. *See* Answer at 14; Joint Case Management Statement at 4, 5.[6] The statute of limitations barred analogous claims in *Hopland* and *Felter*, and likely would have barred many earlier Rancheria Act lawsuits (*see* Am. Compl. at 15-18) had the issue been addressed. As a result, dismissal here would merely return Plaintiff to the *status quo* of needing Congressional approval for its desired federal recognition and other relief.

II. PLAINTIFF'S CLAIMS ARE BARRED BY LACHES.

Plaintiff's claims are barred under a traditional laches defense because Plaintiff delayed unreasonably in asserting a known right, which delay prejudiced the Counties, as well as under the "*Sherrill* formulation" of laches that bars tribal claims for historic wrongs because of the inordinate delays and inherent prejudice that characterize such claims.

[6] The federal defendants have not attempted to waive the statute of limitations defense, and the Counties assume they will continue to assert this meritorious jurisdictional bar. Should that not prove to be the case, the Counties will address in their reply the case law that properly deems this defense non-waivable, as well as explain why such a purported waiver renders the proceeding a collusive lawsuit (to achieve a political result that cannot be achieved by executive or congressional action) and deprives this Court of a live case or controversy.

A. Traditional Laches Defense

Laches is appropriately raised on a motion to dismiss where, as here it is apparent from the face of the complaint. *See Hays v. Port of Seattle*, 251 U.S. 233 (1920); *Russell v. Thomas*, 129 F.Supp. 605, 606 (S.D. Cal. S. Div. 1955); *Young v. S. Pac. Co.*, 34 F.2d 135, 137 (5th Cir. 1929); *see also Espino v. Ocean Cargo Line, Ltd.*, 382 F.2d 67, 68 (9th Cir. 1967)(generally acknowledging that laches may be raised on a motion to dismiss).[7] Laches requires proof only of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 f.2D 1394, 1405 (9th Cir. 1987) (citing *Trustees for Alaska Laborers v. Ferrell*, 812 f.2D 512, 518 (9th Cir. 1987)); *Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association, 502 F.2d 1323, 1325 (9th Cir. 1974) (citing Costello v. U.S.*, 365 U.S. 265, 282 (1961)). Where the delay is lengthy – like the five-decade-long delay here – a lesser showing of prejudice is required. *Ory v. Country Joe McDonald*, NO. CV 01-8177 NM, 2003 U.S. Dist. LEXIS 24383, at *23 (C.D. Cal. Aug. 5, 2003) if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required").

Plaintiff delayed unreasonably by failing to timely object to or challenge the 1959 termination under the California Rancheria Act. Am. Compl. at 7, ¶¶ 21-22; 11, ¶¶ 40-41. Plaintiff did not object until *Tillie Hardwick* in 1979, more than twenty years after the 1959 termination. Am. Compl. at 17-18, ¶¶ 58-59. Then, after Plaintiff was appropriately dismissed from *Tillie Hardwick*, Plaintiff waited another twenty-five years before seeking any administrative relief. Am. Compl. at 23, ¶ 76.[8]

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[7] *But see Italia Marittima, S.P.A. v. Seaside Trans. Services, L.L.C.*, No. C 10-0803 PJH, 2010 U.S. Dist LEXIS 92771 (N.D. Cal. Sept. 7, 2010). The court held that laches was not properly the subject of a motion to dismiss as there was no evidence on the face of the complaint or answer of prejudice suffered by the party claiming laches. *Id.* at *16. This is fundamentally different from the case at hand, in that it is apparent from the face of Plaintiff's complaint that the Counties will be prejudiced if the relief Plaintiff seeks is granted. It should also be noted that *Italia Marittima* sounds in maritime (*id.* at *1), and clearly did not purport to address the specific laches rules in federal Indian law, as articulated by the Supreme Court in *Sherrill*.

[8] In addition, unlike the plaintiff-tribe in *Wilton Miwok Rancheria v. Salazar*, No. C-07-02681-JF-PVT & C-07-05706-JF, 2010 U.S. Dist. LEXIS 23317 (N.D. Ca. Feb. 23, 2010), which claimed that its dismissal from *Tillie Hardwick* was premised on the erroneous belief that there were

Plaintiff's five-decade-long delay unquestionably prejudices the Counties. Plaintiff seeks the taking into trust of "historically aboriginal land" (Am. Compl. at 31-32, ¶ D) that is situated within the geographic boundaries of the Counties, and a declaration that such lands are "restored lands" under IGRA (Am. Compl. at 32, ¶ E), thereby setting the stage for the development of Indian gaming within one or both Counties. During Plaintiff's lengthy delay, lands located in the Counties have gone through substantial changes in development and ownership. Pursuant to California law, the Counties have implemented general plans and zoning ordinances after the September 25, 1959 termination date. *See* Calif. Government Code §§65300 et seq. and 65800 et seq. Zoning laws designed to preserve agricultural land and open space are among the many local laws that govern use and development of the former Rancheria and whatever other lands may constitute Plaintiff's "historically aboriginal land" (Am. Compl. at 31-32). Napa County, for example, created the first agricultural preserve in the Nation in 1968, and two decades later adopted, through a voter initiative, a unique, long-term agricultural preservation law. Tennant Decl. ¶ 20, Ex. I. Under this voter-approved initiative, no existing agricultural land may be re-designated for another purpose from the date of enactment (1990) for thirty years, unless another vote is taken to permit it. *See id.* (and California Supreme Court decision cited therein). In this way, the citizens of Napa County have imposed a long-term restriction on development that is intended to preserve agricultural and open space needed to sustain the County's wine-growing industry and heritage.

Plaintiff's request for recognition and restored lands would come at the expense of the Counties' jurisdiction, planning, and significant expenditures predicated on that planning. Removing land from the Counties' sovereign authority is highly disruptive, stripping the Counties' taxing and regulatory authority and subjecting adjoining landowners to the negative effects of unbridled development of the "restored land" for gaming (Am. Compl. at 31-32, ¶¶ D-E) or other new uses not allowed under Counties' zoning laws. These forms of prejudice fully support invoking the traditional

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no Miwok distributees who continued to own property within the former Rancheria boundaries as of the date of the 1983 *Tillie Hardwick* settlement, Plaintiff here makes no such assertion. In fact, Plaintiff concedes that its dismissal from *Tillie Hardwick* resulted from its lack of any "living landholders of the former Rancheria." Tennant Decl. ¶ 12, Ex. G (at p. 1)

defense of laches. *See Felix v. Patrick*, 145 U.S. 317, 329 (1892) (laches bars establishment of constructive trust over land that had been platted, recorded, and subsequently sold to purchasers).

Plaintiff's immediate demand for "all public lands held by the Department of the Interior which are not in use and are available for transfer that are within the Tribe's historically aboriginal land" (Am. Compl., at 31-32, ¶ D) raises the prospect of direct and immediate jurisdictional and regulatory conflict if Plaintiff uses the property to develop its stated gaming plans or otherwise puts the land to uses beyond those currently made by the federal government or permitted by local law. Indeed, a map of Napa County (attached as Exhibit H-1 to the Tennant Decl.), shows the federal government has substantial landholdings in Napa County (noted in green on color map). Existing federal surplus lands are marked in pink; possible surplus lands are marked by an alternating yellow/black border. A decision to transfer into trust some or all of the actual or possible federal surplus lands would create the kind of jurisdictional checkerboarding problem condemned in *Sherrill*. *See* 544 U.S. at 219-220 ("A checkerboard of alternating state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches.") (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994). Allowing Plaintiff's action to proceed would impair the Counties' ability to enforce its zoning and development on county lands, including those that are adjacent to the "restored lands" sought by Plaintiff, and would impair the rights of adjoining landowners and others.

Longstanding observances and settled expectations should be prime considerations when a party belatedly asserts a right. Given the settled expectations of the Counties and their residents, especially with respect to the preservation of the Counties' invaluable vineyards, farmlands and other open space, Plaintiff's claims are properly barred under a traditional laches defense.

B. *Sherrill* Formulation of Laches

The Supreme Court has adopted a specific, delay-based equitable bar for Indian claims, drawn from the equitable doctrines of laches, acquiescence and impossibility. See *Sherrill*, 544 U.S. at 216-221. This rule acknowledges the inherent prejudice in allowing litigation of long-dormant claims by Indian tribes, given the intervening changes to the ownership, governance, character and value of the

land. *Id* at 217-218 (finding that city had a justifiable expectation that its sovereignty would not be disrupted by tribal claims). The Second Circuit has referred to this Indian claim-specific laches rule as the "*Sherrill* formulation" – distinguishing it from the traditional laches defense (*Cayuga Indian Nation of N.Y. v Pataki*, 413 F.3d 266, 275 (2d Cir. 2005)) – and applied it independent of the traditional laches defense in dismissing Indian land claims. *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 610 F.3d 114, 126-128 (2d Cir. 2010).

In *Sherrill*, the tribe sought "declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to the state and local taxation for generations." 544 U.S. at 214. The Supreme Court rejected the tribe's claim based on standards of federal Indian law and the equitable doctrines of laches, acquiescence and impossibility. *Id*. at 213-214, 221. The *Sherrill* Court was primarily concerned that the relief sought by the tribe would "seriously disrupt the justifiable expectations of the people living in the area" (*Id.* at 215, internal citations and quotations omitted) and "the governance of . . . counties and towns" in the area. *Id*. at 202.

The same considerations that led the Supreme Court to reject the tribe's claim in *Sherrill* are present here: generations have passed since tribal members owned or occupied the "historically aboriginal land" (allegedly in the Counties, but not identified in the Amended Complaint, *see* Am. Compl., 31-32) during which time non-Indians have owned and developed the area (*Sherrill*, 544 U.S. at 202); members of the tribe have long resided elsewhere and the character of the area and its inhabitants has long been non-Indian (*id*.); the tribe's long delay in seeking judicial relief (*id*.); and the regulatory authority constantly exercised by the state, counties and other local governments (*id*.). In light of the relief sought and Plaintiff's half-century delay in challenging the termination of the Alexander Valley Rancheria, and the settled expectations of the Counties and their residents with respect to the governance of these lands, including with respect to preservation of agricultural land and open space to protect the Counties' winegrowing industry and heritage, the *Sherrill* equitable bar applies here to bar Plaintiff's claims, even if the traditional laches defense does not.

III. PLAINTIFF LACKS STANDING TO BRING THIS ACTION.

Article III standing is an "essential, core component of the case or controversy requirement." *San Diego Cnty. Gun Rights Comm'n v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (citations, quotations omitted). Standing is determined at the time the lawsuit is commenced. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) ("standing is to be determined as of the commencement of suit"); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002) ("standing is determined as of the commencement of litigation") (citing *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000)).

A plaintiff has the burden to plead and prove facts sufficient to show: (1) that it has "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) that there is "a causal connection between the injury and the conduct complained of;" and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. These requirements apply to tribal plaintiffs. *See Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001). In the specific context of a modern tribe seeking remedies for wrongs allegedly done to Indians of an earlier era, the tribal-plaintiff has the burden to show a substantial and meaningful connection to the Indians who were allegedly harmed. *See United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 n.2 (10th Cir. 2001) (observing that modern tribe, in order to show it suffered an "injury in fact" for purposes of Article III standing, must show it has a sufficient genealogical or other connection to the historic tribe to be able to sue on its behalf). As the analysis shows, Plaintiff has failed to meet its burden to demonstrate standing to bring this action.

Plaintiff's Amended Complaint contains no particularized allegations as to the genealogical relationship or other connection between Plaintiff and the Indians of Alexander Valley who at one time occupied the Alexander Valley Rancheria. Indeed, given the content of Prof. Beckham's report concerning the identity and ethnicity of the Indians who once resided on the Alexander Valley Rancheria (Beckham Report at 8-25), and what is known about Plaintiff despite its refusal to disclose its membership (*see id.* at 52-53 and genealogical summary for Salsedo family; Tennant Decl. ¶ 6,

Ex. A at p. 3), Plaintiff does not appear to be able to allege such facts. There is no indication that Plaintiff, as constituted on June 5, 2009 when it filed the complaint in this action, had standing to do so. In any event, the obtuse and generalized allegations regarding the relationship between the putative modern tribe and the Indians who once resided on the Alexander Valley Rancheria (Complaint ¶ 5, Am. Compl. ¶ 5) are deficient as a matter of law and the Amended Complaint should be dismissed. *See Shawnee*, 253 F.3d at 548.

IV EVEN IF PLAINTIFF HAS STANDING TO SUE, THE REMEDY OF RESTORATION IS UNAVAILABLE AS A MATTER OF LAW.

A. Plaintiff Improperly Seeks Restoration Of Tribal Status Based On The Fiction That The Indians Of Alexander Valley Had A Tribal Existence In 1959.

A plaintiff is not entitled to a remedy for a harm not suffered, which is precisely the result sought here by this Plaintiff. The historical record demonstrates that the Indians from Alexander Valley had abandoned the Rancheria by 1950, if not earlier. Beckham Report at 46-48, 51. The BIA's record in 1940 did not even list the Alexander Valley Rancheria as among the rancherias recognized by the federal government. *Id*. at 24, 51. Ten years later, prompted by the passage of the Rancheria Act in 1958, the BIA searched for Indians who had once lived on the Rancheria. *Id*. at 27-28, 49. The BIA had no lists of such people, a fact that in itself reveals that the former residents of the Rancheria had no tribal organization, were not under federal supervision, and were living dispersed among the surrounding non-Indian communities. *Id*. at 51. The BIA located only one part-Wappo family. *Id*. at 49. The historical record thus supports the conclusion that the Indians of Alexander Valley Rancheria not only had abandoned the Rancheria by 1951 but also did not exist as a tribe, lacking any tribal organization or structure.

As a result, Plaintiff's request for tribal restoration based on the allegedly wrongful termination of the Rancheria seeks a remedy for a harm not suffered because of termination, and instead seeks to confer benefits on Plaintiff based on alleged harm to a non-existent entity. The law does not permit that outcome, which would produce a windfall to Plaintiff. Two cases illustrate why. First, in *Miami Nation of Indians of Ind., Inc. v. United States Dep't of Interior*, 255 F.3d 342 (7th

Cir. 2001), the Seventh Circuit explained in the context of a request for federal recognition, "if a nation doesn't exist, it can't be recognized." *Id*. at 350. The Seventh Circuit rejected a recognition claim by a group purporting to be the lineal descendants of the Miami Indians, with whom the federal government entered into a treaty in 1854. The Seventh Circuit noted that the "Miami Nation had ceased to be a tribe in any reasonable sense" by 1940, and certainly by 1992 when the Nation sought judicial review. *Id*. The court made the following specific observations about the purported tribe: "It had no structure. It was a group of people united by nothing more than common descent, with no territory, no significant governance, and only the loosest of social ties." *Id*. at 350-351. Noting that "federal benefits for the sake of which recognition is sought are extended to tribes, not to individuals," the court concluded that "if there is no tribe, for whatever reason, there is nothing to recognize." *Id* at 351 (citing *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995) and FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (Rennard Strickland ed. 1982)). The court further observed that where a tribe no longer exists, "it has no rights to be divested of; there are no rights without a rights holder. That is the case of the Indiana Miamis." *Id*. And in words that apply equally to Plaintiff's request for "restoration," extending federal recognition "in such a case would merely confer windfalls on the members of a nonexistent entity." *Id.*

Second, the decision in *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005) barred a plaintiff-tribe from receiving an unjustified windfall in connection with the tribe's claim for damages based on delayed recognition by the federal government. After finally securing federal recognition, the Samish sued the United States for damages under the Indian Self-Determination and Education Assistance Act (ISDA). The ISDA is "intended to remove the financial burden incurred by tribes and tribal organizations when implementing federal programs under self-determination contracts." 419 F.3d at 1367. It does so by reimbursing tribes for costs incurred in supporting the federal contracts. *Id*. The Samish argued that because the government had erroneously denied them federal recognition in 1969, the tribe was entitled to lost benefits for the period from 1969 until the tribe was formally recognized in 1996. The Federal Circuit held that, in spite of the government's error in failing to recognize the Samish earlier, the tribe was not entitled to

the claimed damages because the Samish never obtained a self-determination contract in the years at issue and thus "never incurred any administrative costs." *Id.* ("The Samish have not suffered the harm Congress intended to remedy with the support cost provisions.") The Federal Circuit noted that permitting the Samish "such a damage remedy . . . would provide them nothing but a windfall." *Id.*

Similarly, "restoring" federal recognition to Plaintiff would give its members greater rights than were enjoyed by any of the former residents of the Rancheria, based on a non-existent harm to a non-existent entity. That is the definition of a windfall, and is not permitted as a matter of law.

B. Federal Recognition Of An Indian Tribe Is A Political Question.

The political question doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative – the so-called 'political' branches of the federal government." *Miami, supra,* 255 F.3d at 347. The issue of federal recognition, *i.e.*, whether a government-to-government relationship should exist between the United States and a purported Indian tribe is a non-justiciable political question committed to the political branches of the United States. *See Samish Nation, supra,* at 1370 ("As a political determination, tribal recognition is not justiciable."); *United States v. Holliday*, 70 U.S. 407, 419 (1866) ("[I]t is the rule of this court to follow the action of the executive and other political departments ... whose more special duty it is to determine such affairs.") *see also, Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition ... broad congressional power over Indian affairs justifies its continuation"); *Winnemem Wintu Tribe v. United States*, 725 F.Supp. 2d 1119, 1132 (E.D. Cal. 2010) (claim for declaration that plaintiffs have been federally recognized as a tribe and that Congress never terminated that status dismissed on grounds that claim presented non-justiciable political question).

The Department of the Interior acknowledged this well-settled rule of law when it advised Plaintiff on February 6, 2009 that "the Bureau of Indian Affairs, Pacific Region, supports the Tribe's efforts for restoration, *either through legislation or administrative action" See* Am. Compl. at ¶ 70;

Letter of Dale Risling to George Skibine, dated February 6, 2009, annexed to Am. Compl, [Doc. No. 49-1] (emphasis added). Unable to secure legislative or administrative action on its request for tribal restoration, Plaintiff took up Assistant Secretary Echo Hawk's alternative suggestion to file suit against the Department of the Interior (*see* Letter of Larry Echo Hawk to Scott Gabaldon, dated June 22, 2009, annexed to Am. Compl. [Doc. No. 49-2]) – apparently intended to be a cooperative effort between Plaintiff and the federal defendants to present an agreed-upon restoration package for endorsement by this Court.

But Plaintiff's end-run on Congress is inappropriate because Congress terminated the Alexander Valley Rancheria by enacting and implementing the California Rancheria Act of 1958. Congress can pass a law at any time to withdraw that termination and permit Plaintiff to have a government-to-government relationship with the United States or direct Plaintiff to pursue the Part 83 process (25 C.F.R. Part 83) overseen by the Department of the Interior's Office of Federal Acknowledgement. That administrative process is the best avenue for addressing Plaintiff's request for political acknowledgment if Plaintiff is deemed to be making an initial application for recognition because Plaintiff has not shown (and may not be able to show) the necessary genealogical connection to entitle it to sue on behalf of the Indians of the Alexander Valley Rancheria.

Interior informed Plaintiff that the Part 83 regulations are unavailable to it, evidently relying on the provisions of 25 C.F.R. § 83.7(g) that requires a group petitioning for acknowledgment to establish that "[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." (*See* letter from Larry Echo Hawk to Scott Gabaldon, dated June 22, 2008, attached to Am. Compl., at 1). Interior's advice, however, presumes that Plaintiff constitutes, or acts on behalf of, the Indians who once resided on the Alexander Valley Rancheria. At a minimum, Plaintiff should be obliged to exhaust its administrative remedy by petitioning for acknowledgment, pursuant to 25 C.F.R. Part 83, and then appealing from a final agency determination in the event that the petition is denied. *See James v. United States Dep't of Health and Human Servs.*, 824 F.2d 1132, 1133 (D.C. Cir. 1987) ("where Congress has delegated certain initial decisions to the Executive Branch, exhaustion of available administrative remedies is

generally a prerequisite to obtaining judicial relief for an actual or threatened injury."); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550 (10th Cir. 2001) (citing with approval *James* court's view against judicial intervention prior to completion of acknowledgment process). Thus, a decision to extend federal recognition to Plaintiff as an Indian tribe is a political question for the political branches of the government to decide – Congress in the case of request for "restoration" of federal recognition and the Executive Branch for other recognition requests. It is not a question for this Court to determine, at least not without Plaintiff first exhausting its administrative remedies.

CONCLUSION

For the foregoing reasons, the Intervenor-Defendants County of Napa and County of Sonoma respectfully request that this Court enter the enclosed Order dismissing this action in its entirety, with prejudice, as to all defendants.

DATED: February 25, 2011

NIXON PEABODY LLP

By: */s/ David H. Tennant*
David H. Tennant
Michael S. Cohen
Matthew J. Frankel

Attorneys for Intervenor-Defendants
COUNTY OF NAPA and
COUNTY OF SONOMA

ATTESTATION REGARDING E-SIGNATURE AND PERMISSION TO FILE

Pursuant to General Order 45, Section (X), I hereby certify, under penalty of perjury under the laws of the United States of America, that I received the permission of David H. Tennant to affix his e-signature hereto and to file this document.

/s/ Matthew J. Frankel