MATTHEW J. FRANKEL, State Bar No. 256633
mfrankel@nixonpeabody.com
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, California 94111-3600
Telephone: (415) 984-8200
Facsimile: (415) 984-8300

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

DAVID M. SCHRAVER (*admitted pro hac vice*)
dschraver@nixonpeabody.com
DAVID H. TENNANT, State Bar No. 132568
dtennant@nixonpeabody.com
NIXON PEABODY LLP
1300 Clinton Square
Rochester, New York 14604
Telephone: (585) 263-1000
Facsimile: (585) 263-1600

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY,

Plaintiff,

vs.

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

Defendant.

No. 5:09-cv-02502-JW

**INTERVENOR-DEFENDANTS COUNTY OF NAPA'S AND COUNTY OF SONOMA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF AMENDED MOTION TO DISMISS AMENDED COMPLAINT**

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

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

Intervenor-Defendants County of Napa and County of Sonoma respectfully submit this memorandum and accompanying Reply Affidavit of Stephan Dow Beckham ("Beckham Reply") in reply to the opposition papers filed on behalf of plaintiff and the federal defendants.

## ARGUMENT

### I. THE COUNTIES HAVE SIGNIFICANT INTERESTS IN THIS ACTION.

The federal defendants complain that "the Counties have taken an unnecessarily contentious stance that seeks to disrupt any further efforts toward a negotiated resolution." (Fed. Def. Br. at 6). This is a surprising and misguided assertion. As an initial matter, the Counties have been directly adverse to plaintiff since this Court granted the Counties' motion to intervene *as defendants*, by order of May 26, 2010 [Doc. 52]. Second, the instant motion comes as no surprise to either the federal defendants or plaintiff. The Counties argued, when pursing intervention, that (i) they have "significantly protectable" interests in the issues raised in this action (*see* Napa Mot. to Intervene [Doc. 41] at 8; Sonoma Mot. to Intervene [Doc. 38] at 8), and that disposition of this action could "dramatically impair or impede" those interests (*id.* at 10, 10-11); (ii) the issues of plaintiff's standing and the application of the relevant limitations period might not be addressed adequately in the absence of the Counties' participation (*id.* at 12, 13); and (iii) the Counties' interests would not be adequately protected by the federal defendants (*id.* at 11-13, 12-14). Moreover, Napa County filed a proposed answer in support of its motion [Doc. No. 43], which included the affirmative defenses of untimeliness, the non-justiciability of the plaintiff's restoration, and plaintiff's lack of standing, among others. Thus, plaintiff and the federal defendants have long been aware of the Counties' intent to defend vigorously against plaintiff's claims. With full appreciation of that intent, both plaintiff and the federal defendants consented to the Counties' intervention. The Counties' current stance is not "unnecessarily contentious;" it is perfectly appropriate and consistent with positions advanced nearly a year ago. Indeed, this motion comes only after the Counties expended substantial resources to engage in mediation. The Counties did not elect to discontinue settlement talks, but confidentiality prohibits further explanation.

**A. The Counties Have Standing to Contest All of the Relief Sought by Plaintiff.**

In asserting that the Counties lack standing to contest the restoration of plaintiff's federal recognition (Fed. Defs. Br. at 6), the federal defendants disregard three realities: (i) the federal defendants (and plaintiff) have already *conceded* the Counties' standing [Doc. Nos. 50, 51]; (ii) this Court entered an order granting the Counties' motion for intervention as defendants, placing no limitations on the Counties' participation; and (iii) this action is not simply about restoration of federal recognition; plaintiff seeks, *inter alia*, a change in the status of lands situated within the Counties, and the designation of those lands as "restored lands" under the Indian Gaming Regulatory Act ("IGRA") 25 U.S.C. §§ 2719 (2009), *et seq.*, (*see* Am. Compl. at 31, 32), telegraphing their plan to develop a large gaming facility in one or both counties.[1] In any event, given the Counties' obvious interests in (i) the uses to which all lands within their geographic bounds are put; (ii) the numerous impacts of those uses on all county residents and visitors; and (iii) the preservation of their world-class agricultural resources and viticulture, the Counties unquestionably have standing to participate in this action and contest each and all of plaintiff's claims. The federal defendants' suggestion that the Counties lack a protectable interest because plaintiff has "narrow[ed] the scope of the relief prayed for, to clarify that Plaintiff seeks . . . only land that may already be under federal jurisdiction" (Fed. Defs. Br. at 1) misses the point. The jurisdictional, environmental, economic, societal, and other impacts of this relief would be felt far beyond the boundaries of the particular parcels at issue. Moreover, plaintiff seeks a direction that the Secretary of Interior "identify and transfer to the tribe . . . public lands . . . ." (Am. Compl. at 31), outside the land-into-trust process under 25 U.S.C. § 465 (2009) and implementing regulations, 25 C.F.R. Part 151 (2009). Those regulations "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory" and require the Secretary to consider, among other things, "'[j]urisdictional problems and potential conflicts of land use which may arise.'" *City of Sherrill v. Oneida Indian*

---

[1] The federal defendants assert that the Counties lack standing "to object to a settlement that effects only a restoration of federally recognized tribal status." (Fed. Defs. Br. at 6). But the relevant point is that the Counties have standing to participate in this *action*, given the relief sought by plaintiff. There is no requirement that an intervenor demonstrate standing to object to a potential settlement. Moreover, unless and until a settlement is reached, this argument is premature.

*Nation of N.Y.*, 544 U.S. 197, 220, 221 (2005). If the Part 151 regulatory scheme is avoided, this action may present the only opportunity for consideration of the interests and concerns of the Counties and their residents.[2]

In *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States*, 921 F.2d 924 (9th Cir. 1990), the Ninth Circuit permitted the City of Chico to intervene in an action seeking to restore federal trust status of rancherias located near the City. One of the rancherias is only "partially located" within the City's municipal boundaries. *Id.* at 925. In addition to the City's direct interest in that portion of the rancheria located within its boundaries, the court noted that "the *remaining City property* may, as a practical matter, be affected by the City's inability to enforce land-use and health regulations" on the rancheria. *Id.* at 928 (emphasis added). The court thus recognized that the impacts of a trust acquisition would be felt beyond the trust parcels themselves. *See also*, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (intervention granted on basis of an intervenor's "interest in the preservation of birds and their habitats," despite the lack of any direct interest in the lands at issue); *Natural Resources Def. Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1344 (10th Cir. 1978) (intervenor's interest sufficient where it would be impaired by the outcome).

## II. THE STATUTE OF LIMITATIONS DEFENSE IS UNASSAILABLE.

Neither plaintiff nor the federal defendants offer any legitimate basis on which this Court should decline to apply the statute of limitations to dismiss each of plaintiff's claims.

### A. 28 U.S.C. § 2401(a) is a Jurisdictional Bar to Plaintiff's Claims.

The six-year limitations period of 28 U.S.C. § 2401(a) (2009) bars all the relief sought herein. *See* Moving Br. at Point I. Plaintiff's response is that § 2401(a) is not a jurisdictional bar, relying principally on *Wilton Miwok Rancheria v. Salazar*, No. C-07-2681-JF-PVT, 2010 U.S. Dist. LEXIS 23317 (N.D. Cal., Feb. 23, 2010). Pltf. Br. at 6. *Wilton Miwok* is distinguishable on several levels, however, including the fact that the federal defendants there *waived* their limitations defense under 28

[2] Plaintiff urges that "the positive resolution of the Plaintiff's case would not result in any immediate land acquisition," and that "25 C.F.R. Part 151 and 25 U.S.C. § 2719 provide multiple opportunities for the Intervenors to oppose land acquisition." Pltf. Br. at 14. This is contrary to plaintiff's own pleading, which demands a transfer of lands and makes no reference to Part 151.

U.S.C. § 2401(a) (*id.* at *16), and this Court (Judge Fogel) considered whether the waiver was permissible.[3] The federal defendants here have not waived that defense nor stated their intent to do so.[4] In the absence of a waiver (or attempted waiver) of the limitations defense here, plaintiff's argument is premature, and incorrect as well. The period created by 28 U.S.C. § 2401 is jurisdictional and cannot be waived. In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137-38 (2008), the Supreme Court held that the six-year limitations period of 28 U.S.C. § 2501 (2009), which governs claims for damages against the United States, brought in the Court of Federal Claims, is jurisdictional. This is significant because § 2501 is a companion statute to § 2401. *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) ("Section 2401(a) parallels the provisions of section 2501;" and it has been observed that "'there is certainly no distinction between the *companion statutes* of limitations found at section 2401(a) and section 2501.'") (emphasis added) (*citing Walters v. Sec'y of Def.*, 233 U.S. App. D.C. 148, 725 F.2d 107, 114 (D.C. Cir. 1983); *Hoffman v. United States*, 266 F.Supp.2d 27, 40 n.13 (D.D.C. 2003) ("Section 2501 and § 2401 have the same accrual language").

Nine years before *John R. Sand* the Ninth Circuit held, in *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), that the limitations period of 28 U.S.C. § 2401(a) is not jurisdictional. The ruling was predicated on the fact that § 2401(a) "makes no mention of jurisdiction but erects only a procedural bar, ('every civil action commenced against the United States *shall be barred* unless the complaint is filed within six years')." *Id.* (emphasis added) (*quoting* 28 U.S.C. § 2401(a)). The reasoning of the Ninth Circuit is no longer viable in light of *John R. Sand*, where the Supreme Court held the *virtually identical* language of 28 USC § 2501 ("Every claim . . . *shall be*

---

[3] The federal defendants in *Wilton Miwok* apparently also did not present a laches defense, an argument that the court lacked jurisdiction to rule on the inherently political question of tribal relations with the United States, or an assertion that the action presented no legitimate case or controversy.

[4] Unless and until the federal defendants abandon this defense, the Counties assume it will be pressed. *See* Moving Br. at 14, and n.6. The federal defendants purport to have some doubts about the viability of the defense, and advise that they may pursue settlement because of some unarticulated litigation risks. Fed. Defs. Br. at 5. The federal defendants do not face any risks in pressing the limitations defense. Settlement could always be pursued in the event the defense failed. In any event, the limitations period of §2401(a) is not waivable, *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), *infra,* so the federal defendants face no risk-reward dilemma.

*barred* unless the petition thereon is filed within six years after such claim first accrues") (emphasis added) to constitute a jurisdictional bar.[5] *John R. Sand* effectively overruled *Cedars-Sinai*.

Contrary to plaintiff's contention (Pltf. Br. at 6), *Wilton Miwok* does *not* provide authority to the contrary. There, Judge Fogel certified to the Ninth Circuit the question of whether *John R. Sand* effectively overruled *Cedars-Sinai* (2010 U.S. Dist. LEXIS 23317 at *41). He noted that certification was appropriate "because the Ninth Circuit has not ruled on the effect of *John R. Sand* on § 2401(a) and because its ruling in [*Marley v. United States*], with respect to § 2401(b) suggests that the Ninth Circuit might agree with the other circuits that have considered §2401(a) since *John R. Sand*." (*Id.* at *38). Those other circuits have held that *John R. Sand* compels the conclusion that, like 28 U.S.C. § 2501, §2401(a) is jurisdictional.[6] While the Ninth Circuit has not taken up the question certified by Judge Fogel, it has clearly cast doubt on the continued viability of *Cedars-Sinai*. *See Aloe Vera of America, Inc., v. United States*, 580 F.3d 867, 872 (9th Cir. 2009) ("To the extent that *Cedars-Sinai* is still valid after *John R. Sand* . . . ."); *Marley v. United States*, 567 F.3d 1030, 1038 (9th Cir. 2009) ("Section 2401(a) is not before us, so we need not decide here whether *Cedars-Sinai* can survive after *John R. Sand & Gravel*.") (citation omitted).[7]

Although Judge Fogel in *Wilton Miwok* cited several district court decisions that have declined to apply *John R. Sand* to actions under § 2401(a) (Pltf. Br. at 6), each of those actions was decided

---

[5] Although the word "jurisdiction" appears in 28 U.S.C. § 2501, it does so only in describing the claims to which its procedural bar applies ("Every claim of which the United States Court of Federal Claims has jurisdiction"). As to the limitations period it establishes, § 2501 describes it as a "bar," precisely as § 2401(a) does.

[6] *See W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 142 (D.D.C. 2008) (holding that *John R. Sand "forecloses"* prior analysis that distinguished §§ 2501 and 2401(a)); *Georgalis v. United States Patent & Trademark Office*, 296 Fed. App'x 14, 16 (Fed. Cir. 2008) (unpublished) (holding that "the Supreme Court's rationale [in *John R. Sand*] applies with equal force [to 28 U.S.C. § 2401(a)] because both are 'jurisdictional' statutes of limitations.").

[7] In *Marley*, the Ninth Circuit held that the statute of limitations period of 28 U.S.C. § 2401(b) is jurisdictional, and noted that "*John R. Sand & Gravel* itself is instructive." 567 F.3d at 1035, 1038.

*before* the Ninth Circuit signaled its doubts about the continued viability of *Cedars-Sinai* in *Marley v. United States*, *supra*.[8]

**B. The Doctrine of Equitable Tolling is Not Available to Plaintiff.**

Plaintiff also urges that its claims are salvaged by the equitable tolling doctrine. (Pltf. Br. at Point IB). This newly-adopted contention, which finds no support in the Amended Complaint, fails for three reasons. First, because § 2401(a) is jurisdictional, the equitable tolling doctrine is definitively unavailable. *See Marley v. United States,* 567 F.3d at 1035. Second, plaintiff has failed to plead any facts supporting application of this principle, as is required. *Rosal v. First Fed. Bank of California*, 671 F.Supp.2d 1111, 1124 (N.D. Cal. 2009). Third, the contents of plaintiff's brief do not come close to justifying the extraordinary remedy of equitable tolling. The Ninth Circuit "recognizes equitable tolling of deadlines . . . *when a petitioner is prevented from filing because of deception, fraud, or error*, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. Immigration & Naturalization Serv.,* 321 F.3d 889, 897 (9th Cir. 2003) (emphasis added). In *De La Torre v. United States*, No. C 02-1942 CRB, 2004 U.S. Dist. LEXIS 18500 at *40 (N.D. Cal. Sept. 10, 2004), this Court noted, in connection with a request for equitable tolling of the limitations period of 28 U.S.C. § 2401(a), that "plaintiff must establish that the United States' *misconduct* was in some way *designed to prevent plaintiffs from meeting the filing deadline*." (emphasis added). Plaintiff has not, however, accused the federal defendants of any misconduct, or an effort to lull plaintiffs beyond the statutory deadline for filing its claims. The absence of such allegations from the Amended Complaint dooms plaintiff's effort to invoke the doctrine. *See Rosal, supra*; *Sasser v. Amen*, No. C 99-3604 SI, 2001 U.S. Dist. LEXIS 9469 at *28 (N.D. Cal. July 2, 2001). Moreover, plaintiff fails to identify any wrongful act of the federal defendants (or anyone else for that matter) allegedly occurring during the six years following accrual of plaintiff's claim, which occurred no later than August 1961, when the Department of the Interior published the public notice of termination. *See* Am. Compl. at ¶ 41. A limitations period cannot be tolled on the basis of

[8] *See Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 U.S. Dist LEXIS 14819 (N.D. Cal. Feb. 25, 2009); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 3:06-cv-00657-LRH-RAM, 2008 U.S. Dist. LEXIS 98001 (D. Nev. Dec. 3, 2008); and *Pub. Citizen, Inc. v. Mukasey*, No. C 08-0833 MHP, 2008 U.S. Dist. LEXIS 81246 (N.D. Cal. Oct. 9, 2008)).

conduct occurring exclusively *after* expiration of the period. Yet plaintiff points to nothing at all prior to its involvement in the 1979 *Tillie Hardwick* litigation, by which time plaintiff's claim had already been barred for more than a decade.[9]

**C. Plaintiff Cannot Avoid the Application of Laches.**

Plaintiff likewise focuses exclusively on its alleged activities from 1978 through 2009 to try to avoid a finding of laches (Pltf. Br. at 13), ignoring entirely the 19-year period from accrual of its claims through 1978. In addition, the activities identified by plaintiff, consisting of vaguely-described, sporadic contacts with administrative agencies, lobbyists, and political representatives, simply cannot serve to avoid the application of laches. To avoid laches, a plaintiff must demonstrate that it acted with "reasonable diligence" in commencing litigation or otherwise advancing a claim. *Telink, Inc. v. United States*, 24 F.3d 42, 48 (9th Cir. 1994). Here, plaintiff's assertion that its intermittent communications in furtherance of its quest for restoration somehow excuses its failure to commence this action for a half century falls far short of the showing necessary to avoid a finding of inexcusable delay. *See e.g.*, *Equal Emp't Opportunity Comm'n v. Timeless Invs., Inc.*, 734 F.Supp.2d 1035, 1067 (E.D. Cal. 2010) (plaintiff's excessive workload rejected as excuse for delay).[10] Having participated in the *Tillie Hardwick* litigation, plaintiff was well-aware of the possibility of pursuing judicial relief for its grievances. It chose to pursue administrative and other relief, and its informed choice cannot bar application of this equitable principle.[11]

---

[9] In a classic bootstrap argument, plaintiff urges that because it was not properly terminated in 1959, the Department of the Interior continued to owe plaintiff a fiduciary duty at all times since, and that the limitations period thus has never run against plaintiff. Pltf. Br. at 8. In light of the Department's August 1, 1961 announcement of the "Termination of Federal Supervision" over the Indians of the Alexander Valley Rancheria (*see* 26 F.R. 6875 (1961)), the notion that some fiduciary relationship persisted (or *ever* existed) between the Department and this plaintiff should be rejected.

[10] Plaintiff urges also that those communications "demonstrate the tribe's diligence in trying to be restored . . . ." (Pltf. Br. at 13). But overcoming laches here requires a showing of "reasonable diligence" in commencing *this litigation*, not in pursuing a non-judicial remedy.

[11] Application of the *Sherrill* formulation of laches also renders plaintiff's claims untimely. *See* Moving Br. at 17-18. *Sherrill* bars stale historical Indian claims, whether measured in a single generation or multiple generations. Contrary to plaintiff's cabined reading of *Sherrill*, that decision does provide an alternate basis for finding plaintiff's claims time-barred. Even plaintiff recognizes that the teaching of *Sherrill* is not limited to the facts presented there, but has been applied in other circumstances. *See* Pltf. Br. at 15, and fn. 11.

**D. The Continuing Violations Exception is Not Applicable.**

Plaintiff cites only a single decision, *Nat'l Fair Housing Alliance v. A.G. Spanos Constr., Inc.*, 542 F.Supp.2d 1054 (N.D. Cal. 2008), to support the contention that its claims set forth "continuing" violations and therefore fall within the six-year limitations period. *See* Pltf. Br. at 9-11. *Nat'l Fair Housing* concerned a private party dispute in which plaintiff alleged a continuing violation of the Fair Housing Act resulting from a "continuous pattern and practice of discrimination." *Id.* at 1062. That decision sheds no light whatsoever on whether the allegedly wrongful termination of an Indian tribe under the CRA could produce a "continuing violation."[12]

The cases which dispose of that question were cited in the Counties' moving brief (at 12, 13), *i.e.*, *Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F.Supp. 253, 257 (N.D. Ind. 1993); *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007); and *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577-78, 1580 (Fed. Cir. 1988). To these authorities the Counties now add a reference to *Wilton Miwok Rancheria v. Salazar*, No. C-07-02681-JF-PVT, 2010 U.S. Dist. LEXIS 23317 at *36 (N.D. Cal. Feb. 23, 2010), in which Judge Fogel rejected, as "unpersuasive," plaintiff's argument that "the government's failure to recognize the tribe constitutes a series of 'continuing violations.'"

**E. Plaintiff's APA Claim Does Not Avoid The Time Bar.**

Re-styling 50-year-old time-barred claims as a current violation of the Administrative Procedure Act does not make them timely. Plaintiff's reliance on *American Canoe Ass'n, Inc. v. Envtl. Protection Agency*, 30 F. Supp. 2d 908 (E.D. Va. 1998), is misplaced. There the district court addressed specific delay-based claims under the Clean Water Act (CWA). The CWA requires the EPA to engage in a "continuing planning process" with States, including acting on information supplied by any state within 30 days of receipt. *Id.* at 914. The CWA also requires the EPA to review the submissions on an ongoing basis – from "time to time" – "to ensure that they remained consistent with the CWA's requirements." *Id.* Plaintiff alleged the EPA had failed to act within the specific statutory framework including during the ongoing review period. *Id.* at 925. The district

[12] The continuing nature of the wrongs in *Nat'l Fair Housing Alliance* was alleged explicitly in that plaintiff's complaint. No allegation of a continuing wrong appears in the instant pleading.

court concluded the six-year statute of limitations should not bar the plaintiff's claims, reasoning that "it would mean that EPA could immunize its allegedly unreasonable delay from judicial review simply by extending that delay for six years." The court noted that "EPA's delay is better understood as a continuing violation, which plaintiffs may challenge at any time provided the delay continues." *Id.* However, because the Secretary of the Interior is not placed under an equivalent statutory duty to update and review submissions on a continuing basis, the legal and factual justifications in *American Canoe* for treating a claim as a "continuing violation" do not exist here.[13] Moreover, contrary to plaintiff's argument (Pltf. Br. at 12) plaintiff's APA claims are expressly and directly rooted in the purported "unlawful termination" of the tribe in 1959 (Am. Compl. at ¶¶ 51, 58, 71, 75). And as noted above, the Secretary's alleged failure to act, every year since 1959, does not give rise to a continuing violation because the continued inaction is nothing more than a consequence of the decision to terminate the Rancheria fifty years ago. See Point IID., *supra*.

## III. PLAINTIFF HAS FAILED TO MEET ITS BURDEN TO PLEAD AND PROVE ARTICLE III STANDING TO BRING THIS ACTION.

Every plaintiff, including this one, is required to show "an injury in fact" to establish Article III standing to commence an action in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992). *See Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001) (*Lujan* standing requirements apply to tribes); *Delorme v. United States*, 354 F.3d 810, 815-816 (8th Cir. 2004) (*Lujan* standing requirements applied to "hereditary chief" suing on behalf of band). This is a threshold jurisdictional requirement that may be raised *sua sponte* by the court at any time. *Delorme*, 354 F.3d at 815. Thus, even if the Counties were not participating as intervenor-defendants, this Court would be obliged to dismiss the Amended Complaint if plaintiff cannot meet the constitutional and prudential requirements for standing.

---

[13] The same analysis holds true for the only other case cited by Plaintiff, *Pub. Citizen, Inc. v. Mukasey*, No. C. 08-0833 MHP 2008 U.S. Dist. LEXIS 81246 (N.D. Cal. October 9, 2008) (Pltf. Br. at 12), which addressed the Attorney General's obligations under the National Motor Vehicle Title Information System to establish a national database for vehicle identification numbers. The statute imposed specific deadlines for the Attorney General to Act and the government admitted it had failed to take action within statutory time frame. *Id.* at *3-4. The district court concluded the six-year limitations period under the APA did not apply because the Attorney General's admitted breach of the statutory deadlines was ongoing and thus should be deemed a continuing violation. *Id.* at*29.

For a tribal plaintiff seeking judicial redress for alleged ancient wrongs committed against its historic forbearers, the burden is two-fold. The tribal plaintiff must plead and prove facts that show a compensable injury was inflicted on the historic tribe, and then show that the modern tribal plaintiff is meaningfully related by genealogy to the ancient tribe, such that it is appropriate to allow the modern tribe to sue on behalf of the historic tribe. *See United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 n.2 (10th Cir. 2001); *see also Delorme, 354 F.3d* at 816 (hereditary chief claiming to represent "the descendants of a Band of Indians called the Little Shell," was required to produce evidence that the band he represents was one of three Little Shell groups litigating before the Indian Claims Commission in 1970s). Plaintiff's opposing affidavits do not provide any factual support for either part of this two-pronged test. [14]

**A. The Historic Wappo/Pomo Group Suffered No Injury.**

The group of Indians who occasionally resided on the Alexander Valley Rancheria abandoned it years before Congress passed the California Rancheria Act ("CRA") in 1958. *See* Beckham Report at 11, 50. Moreover, the historical record shows the historic group lacked a tribal organization or government for at least two decades before termination.[15] For many years before termination, the former residents of the Rancheria, who lived among the surrounding white population, did not seek benefits or services from the BIA, and thus were unknown to the BIA. Based on these historical facts, about which there is no genuine dispute, it is clear that the CRA did not cause any injury to the historic group that once resided on the Rancheria.[16] Specifically, the distribution of the Rancheria

[14] Because plaintiff cannot satisfy the standing requirements in *United Tribe of Shawnee*, plaintiff argues those requirements do not apply to it. (Pltf. Br. at 19) But plaintiff does not (and cannot) explain why the different histories of plaintiff and the Shawnee tribe, and their different paths to restoration, change in the slightest the Article III test for standing.

[15] BIA records document no sort of tribal organization on the Alexander Valley Rancheria at any time. Beckham Aff. at ¶9, Report at 9-11, 19, 24, 26-27, 51. Apparently fourteen Indians assembled in 1935 to vote in favor of the Indian Reorganization Act. That is the only evidence of collective action by any of the Indians on the Alexander Valley Rancheria. This action apparently had no effect on the comings and goings of Indians from the Rancheria in the latter half of the 1930s and throughout the 1940s. Beckham Report at 17, 18. The historic group of Wappo/Pomo Indians abandoned the Rancheria by 1951 and thereafter had no relationship with the BIA.

[16] Plaintiff argues that the historical record is irrelevant because neither Congress nor the BIA has determined "the Tribe" has ceased to exist. Pltf. Br at 19. This argument conflates the creation (and termination) of a Rancheria, with the establishment (and cessation) of tribal recognition. Those two events are independent of each other. The historic group of Wappo/Pomo Indians who occasionally resided on the 54-acre Rancheria (a parcel of land), were entitled to federal benefits and services

land in 1961 did not cause any member of the historic group to become landless (they had already abandoned the land); and the formal end to the federal relationship did not deprive any members of the historic group of federal benefits or services because they were receiving none. In the case of the Alexander Valley Rancheria, then, the process of termination did not produce the ill effects decried by Indian advocates such as the Advisory Council on California Indian Policy. (*See, e.g.*, ACCIP Termination Report, Administrative Record, Exhibit 16, Attachment C at 3 ("the termination process discouraged Indian people from remaining on their former lands and removed the incentive to continue to maintain a formal governing structure"); *see id.* at 15-18 (identifying termination-related harms including the loss of lands because the federal government allegedly failed to prepare the property distributees to handle state taxation and regulation post-termination).[17] Without proof of an "injury in fact" to the specific historic group that once resided on the Alexander Valley Rancheria, plaintiff lacks standing to sue the United States for any alleged mis-steps in implementing the CRA.

**B. The Modern "Mishewal Wappo Tribe" Has Come Forward With No Evidence of a Genealogical Connection To The Historic Wappo/Pomo Group.**

Plaintiff offers no evidence that its tribal rolls include even a single member who is related by blood to even one member of the historic group that once resided on the Alexander Valley Rancheria – which, of course, would not be legally sufficient to establish standing. *See United Tribe of Shawnee Indians*, 253 F.3d at 548 n.2; *Delorme*, 354 F.3d at 816. In contrast, the Counties have

---

because of the Rancheria's existence -- without regard to that group's tribal organization (or lack of it). The CRA likewise said nothing about that historic group's organizational status at that time of termination, and simply made clear that after the Rancheria was terminated, and the lands distributed, the federal government would have no further obligations with respect to that property or any Indians living on the land. Plaintiff thus is incorrect in arguing that the creation of the Rancheria established federal tribal recognition for the Indians then living on the Alexander Valley Rancheria, and that the allegedly unlawful termination left undisturbed the federal government's tribal recognition. The Alexander Valley Rancheria was established and terminated without regard to whether the historic Wappo / Pomo group was a distinct community with a politically autonomous form of government and otherwise met the standards for federal recognition as a tribe.

[17] The ACCIP was established in 1992 to provide advice to Congress. President George (H.W.) Bush signed the bill with the understanding the Council would serve only an advisory role because "the members of the Council created under this Act are effectively selected by various California Indian tribes . . . ." *See The American Presidency Project*, http://www.presidency.ucsb.edu/ws/index.php?pid=21616#axzz1JA1MaNy8. ACCIP has advocated for relaxed restoration and recognition standards, including for the Mishewal Wappo Tribe of Alexander Valley. *See* ACCIP Termination Report at 3, 5.

submitted expert affidavits and a report based on U.S. census and BIA records that cast substantial doubt on whether plaintiff could come forward with proof of a meaningful connection to the historic group. The Counties' genealogical evidence is the *only* evidence of its kind before this Court.[18]

Plaintiff seeks to avoid its burden to come forward with evidence by asserting that it has provided its membership rolls to the federal government, and that these rolls will satisfy the government. (Pltf. Br. at 18).[19] This effort to "hide the ball" should not be countenanced. First, by suing the United States for an alleged violation of federal law that occurred, if at all, more than fifty years ago with regard to a group of Indians of which few, if any, members remain living, plaintiff should be held to have waived its right to privacy regarding its tribal membership rolls – at least with respect to litigating the threshold jurisdictional issue of standing to sue. Much greater claims to privacy are deemed waived by a plaintiff's commencement of suit, including waiver of medical records and waiver of the psycho-therapist privilege when the plaintiff's condition is placed in issue. *See, e.g., Rhodes v. Cnty. of Placer*, No. 2:09-CV-00489 MCE KJN PS, 2011 U.S. Dist. LEXIS 6248 (E.D. Cal. Jan, 14, 2011). Second, it is plaintiff's burden to satisfy *this Court*, and not the federal government, that Article III standing exists. Third, even the federal defendants are not convinced that plaintiff has standing to sue, even after seeing plaintiff's membership rolls. *See* Fed. Defs. Br. at 7, n. 10.

Because plaintiff has failed to provide evidence of a meaningful genealogical relationship with the historic group of Wappo/Pomo Indians who once resided on the Rancheria, this Court should

---

[18] Plaintiff's affidavits (Ned, Gabaldon and Castillo) contribute nothing to the standing question, because none speaks to any facts about the historic tribe's experience on the Rancheria, much less demonstrates that the historic group suffered harm as a result of the Rancheria's termination. Nor do these affidavits factually support plaintiff's claimed relationship to that historic group. Ned and Gabaldon try to explain away evidence showing the Mishewal Wappo Tribe of Alexander Valley adopted a constitution in 1993 and engaged more recently in formative organizational activity. But no matter what date is selected for the establishment of the modern plaintiff-tribe, the three affidavits provide no factual support for a continuous tribal existence between the historic group and plaintiff, as plaintiff alleges.

[19] Plaintiff asserts that the Counties improperly discussed plaintiff's failure to produce its membership rolls in mediation, and in doing so "have ridden the line of violating the confidentiality agreement." Pltf. Br. at 18 n.16. The Counties did requested plaintiffs' membership rolls from the federal government under FOIA. The Counties' brief cited explicitly to the *government's* refusal to disclose the membership rolls because of plaintiff's claim to privacy (*see* Moving. Br. at 19-20 (citing Tennant Decl. [Doc. No. 135-1] § 6 and Exhibit A thereto at page 3) – not to *plaintiff's* failure to turn the material over in mediation.

find that plaintiff has failed to meet the second prong of the standing test, and dismiss the Amended Complaint. There is no basis in the record on which this Court could conclude that plaintiff, as constituted when this action was commenced on June 5, 2009, had standing to sue.

**C. Conclusory Assertions are Insufficient to Establish Standing.**

The Amended Complaint ¶ 5 contains a cryptic allegation regarding the relationship between the historic tribe and plaintiff:

> Plaintiff is an American Indian Tribe consisting of Indian members and their descendants, and/or their Indian successors in interest, for whose benefit the United States acquired and created the Mishewal Wappo Tribe of Alexander Valley, a parcel of land located in Sonoma Valley . . . . Since the time of its purported termination, the Tribe has been continuously identified as an American Indian tribe and has maintained its existence as a distinct community from historical times to present. The Tribe has also maintained autonomous political influence and authority over members of the group from historical times to present.

Besides describing the Mishewal Wappo Tribe as a parcel of land, the obtuse phrasing of the first sentence reveals little. It does not show that Plaintiff is " the descendent embodiment of the Tribe unlawfully terminated." Pltf. Br. at 19. Significantly, the balance of the paragraph acknowledges plaintiff's burden to prove the continuous existence of a distinct community, and continuous maintenance of autonomous political authority, from historic times to present. But plaintiff's legal conclusions are unsupported by evidence and are contradicted directly by official BIA and Census records, as explained by Prof. Beckham. Beckham Report at 8-25; 41-53.

**D. Attacking Prof. Beckham Does Not Meet Plaintiff's Evidentiary Burden.**

Plaintiff attacks Prof. Beckham personally and professionally, leveling a bizarre accusation of plagiarism or "alter ego" duplicity, based on the contention that "Dr. Beckham's affidavit states that he is Dr. Robert B. Pamplin, Jr." Pltf. Br. at 17. But as Prof. Beckham explains in his reply affidavit, these accusations stem from plaintiff's counsel's remarkable misreading of the first line of his affidavit – where Prof. Beckham correctly identifies himself: "I am the Robert B. Pamplin, Jr., Professor of History," an endowed professorship at Lewis & Clark College. Beckham Reply at 4-5. That plaintiff's counsel would make such a gross reading error, adhere to it even after supposedly checking Prof. Beckham's credentials on the internet (Br. at 17 n. 13), and then elevate it to a primary argument in the brief – speaks volumes about plaintiff's opposition.

**E. Prof Beckham's Expert Report Is Properly Considered On This Motion.**

Contrary to plaintiff's view that only a limited category of "public records" may be considered on a Rule 12(b)(1) fact-based challenge to standing (Pltf. Br. at 15-16), the decision in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004) instructs otherwise. There, the Ninth Circuit endorsed the use of "affidavits or other evidence properly brought before the court" in fact-based Rule 12(b)(1) motions, stressing that after such evidence is introduced by the moving party, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* at 1039. *See United Tribe of Shawnee*, 253 F.3d at 547 (district court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)") (quoting *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995)). The affidavits and report of Prof. Beckham are just the kind of evidentiary material that moving parties are entitled to submit. And because plaintiff's bare-bones affidavits do not genuinely dispute any of the documented, historical facts reported by Prof. Beckham, this is not a case where deciding the standing issues somehow intrudes on the merits. To the contrary, with no evidence in opposition to Prof. Beckham's affidavits and report, the record on this motion is devoid of any evidence either that (i) the historic group of Wappo/Pomo Indians who once resided on the Alexander Valley Rancheria suffered an actual injury as a result of the CRA; or (ii) plaintiff is connected, genealogically or otherwise, to the historic group such that it should be permitted to sue on behalf of the historic group.

Likewise, plaintiff's conclusory evidentiary challenges to Prof. Beckham's opinions (Pltf. Br. at 16, 21) – unsupported by any case law or reasoning – are without merit. Prof. Beckham makes clear that the underlying official government records are materials typically relied on by historians – and plaintiff's historian reviewed the same official records. (Beckham Reply at ¶¶ 6, 18.)

///

///

///

///

///

## CONCLUSION

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

DATED: April 11, 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*