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THE MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY

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 official capacity as Secretary of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior; and DOES 1-50, inclusive

Defendants,

COUNTY OF NAPA, CALIFORNIA,

COUNTY OF SONOMA, CALIFORNIA,

Intervenor-Defendants.

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

Hon. James Ware

Brief in Opposition of the Intervenors' Motion to Dismiss

Date: April 25, 2011
Time: 9:00am
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Judge: James Ware

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STATEMENT OF ISSUES

The Intervenors' Motion to Dismiss ("Motion") requests that this Court decide whether: (a) the six-year statute of limitations at 28 U.S.C. § 2401 is a jurisdictional bar to Plaintiff's ("Tribe") claims despite the fact that the Ninth Circuit and this federal district Court has declined to so rule in the past; or (b) the defense of laches applies to Plaintiff's claims, or (c) the Plaintiff lacks standing. As set forth below, the Motion must be denied as:

1. 28 U.S.C. § 2401 is not a jurisdictional bar, and it is subject to equitable tolling doctrines.
2. Neither laches nor any form thereof applies as a defense to the Plaintiff's claims.
3. The Plaintiff's standing has already been established by Congress and the Bureau of Indian Affairs ("BIA").

STATEMENT OF FACTS

Plaintiff is a Native American Tribe consisting of Indian members and their descendants, and/or their Indian successors in interest, for whose benefit the United States acquired a parcel of land located in Sonoma County, California. First Amended Complaint ("FAC") ¶ 5. The Tribe was formally recognized as an Indian Tribe by the United States from at least 1851 until 1959, when it was purportedly terminated under the California Rancheria Act of August 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, ("CRA"). *Id.* at ¶ 5. Since the time of its purported termination, the Tribe has been continuously identified as a Native American Tribe and has maintained its existence as a distinct community from historical times to present. *Id.* at ¶ 5. The Tribe has also maintained autonomous political influence and authority over members of the group from historical times to present. *Id.* at ¶ 5. In 1908 and 1913 the BIA acquired two tracts of land equaling 54 acres in Sonoma County, California, for the benefit of the Tribe and held in trust by the United States for the benefit of the Tribe and its members. *Id.* at ¶ 9. Although the Tribe never adopted a formal Constitution, the Tribal membership did vote in 1935 to become a Tribe organized under the provisions in the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984. *Id.* at ¶ 11.

On August 18, 1958, Congress enacted the California Rancheria Act, which imposed

certain specific and mandatory conditions by which the Secretary of the Interior could accept the voluntary termination of the trust status of the lands and the status as Indian of the people of 41 specifically enumerated California Rancherias, including the Mishewal Wappo Tribe of Alexander Valley. *Id.* at ¶ 12. Under the California Rancheria Act, termination was to be the result of a process in which the Rancheria Indians of California could decide to accept termination in exchange for free title of Rancheria assets, and the provision of certain improvements and services aimed at providing the soon-to-be-terminated Indians with adequate infrastructure to subsist without treatment as Indians by the federal government. *Id.* at ¶ 13. The process for termination under the California Rancheria Act required the Secretary of the Interior, after consultation with the Indians of the Rancheria to be terminated, to prepare a Distribution Plan detailing the measures that would be undertaken to successfully achieve the requirements of the Act. *Id.* at ¶ 14. Before the distribution of Rancheria assets could be finalized and termination completed, section 3 of the California Rancheria Act specifically required the Secretary of the Interior to take certain actions to prepare the Rancheria for termination before conveying individual deeds to Distributees. *Id.* at ¶ 15. Section 8 of the California Rancheria Act instructed the Secretary of the Interior that before he could convey property pursuant to the Act, he was to "protect the rights of individual Indians who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction, or by such other means as he may deem adequate, without application from such Indians...." *Id.* at ¶ 16.

The Proposed Mishewal Wappo Tribe of Alexander Valley Distribution Plan was accepted by the Secretary of the Interior on July 6, 1959. *Id.* at ¶ 21. Induced by: 1) the promises of improvements set forth in the California Rancheria Act, 2) the benefits of the proposed Distribution Plan, and 3) the false implication that the BIA was going to cut off services eventually anyway, it was accepted. Only the actual residents of the Rancheria[1] were allowed to

[1] There were two individuals allowed to vote for termination. James Adams was one of them, but was never a member of the Tribe and his fraudulent vote makes the termination vote invalid as a matter of law. *See generally*, CRA.

vote to accept the Distribution Plan, instead of all the Indians "of" the Rancheria. *Id.* at ¶ 22. The Distribution Plan required the BIA to make certain improvements to the Rancheria such as roads, water system, including the installation of fire hydrants and water mains, and sanitation as well as provide special programs of education and training designed to help the Indians to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such programs should have included language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, and transportation to the place of training or instruction. *Id.* at ¶¶ 24-25, 29, 32, 34. Despite the failure to create and implement an adequate Distribution Plan in accordance with minimum standards as detailed above, the BIA declared the Rancheria infrastructure satisfactory and sought to complete the termination process. *Id.* at ¶ 38.

Further, the inadequate notice provided to the members of the Tribe by the BIA resulted in a lack of presence at the meeting to vote for the Distribution Plan. *Id.* at ¶ 39. Failure to properly notify members coupled with a failure to ensure that they would be present at said meeting resulted in an invalid vote.

Because only two residents attended the improperly noticed meeting, 2/3 of the Tribe's land was distributed to a known non-Wappo who only resided on the Rancheria by virtue of a prior relationship with a member that had moved away. *Id.* at ¶ 39. The BIA issued its Completion Statement for termination of the Mishewal Wappo Tribe of Alexander Valley and finalized the Distribution Plan on September 25, 1959 and failed to notify almost all of the Tribal members. *Id.* ¶ 40. The Secretary of the Department of Interior published a formal Termination of Federal Supervision proclamation in the Federal Register. *See* 26 Fed. Reg. 146, 6875-6876 (Aug. 1, 1961). FAC at ¶ 41. The Secretary of the Interior's failure to legally implement the California Rancheria Act was the basis of substantial subsequent litigation over the course of two decades that in each and every case resulted in the reinstatement of formal federal recognition of the Tribes terminated under the Act. In fact, the majority of those so terminated were restored via litigation. *Id.* at ¶ 52.

INTRODUCTION

The Intervenor/Defendants County of Napa and County of Sonoma's ("Intervenors") Motion to Dismiss ("Motion") asks this Court to dismiss the Mishewal Wappo Tribe of Alexander Valley's (the "Tribe") FAC on four separate grounds, none of which have merit. First, both parties agree that the claims in this case are governed by 28 U.S.C. § 2401. Established Ninth Circuit law establishes that Section 2401 is not jurisdictional and is therefore subject to equitable tolling, among other defenses. The Tribe's FAC adequately alleges facts sufficient to support equitable tolling of the statute and therefore, Intervenor's statute of limitation argument fails. Next, the Tribe's claims are not barred by any formulation of laches. The Tribe's FAC again adequately alleges sufficient facts to refute the Intervenor's laches arguments. The application of laches to this case is, at best, a hotly contested factual issue that is inappropriate for resolution based on the Intervenors' motion.[2] Next, the Tribe has provided ample support with this opposition demonstrating that it has proper standing to bring this case. Intervenors' argument to the contrary is based on the inaccurate and incomplete report of their hired expert that embraces one of the factual disputes at the heart of the merits of this case. Although factual evidence can be heard in the context of jurisdictional challenges, it should not be heard where the jurisdictional question is intertwined with the merits of the dispute. Intervenors' motion is therefore both factually and procedurally improper. The remainder of Intervenors' arguments are little more than a repackaging of the standing argument discussed above and are equally without merit. Intervenors' motion should be denied in its entirety.

ARGUMENT

I. The Statute Of Limitations Is Not A Basis For Granting The Motion.

A. Statute Of Limitations Found In 28 U.S.C. §2401 Is Not A Jurisdictional Bar.

Intervenors' argument boils down to the following syllogism:

[2] *Menominee Indian Tribe v. United States*, 614 F.3d 519, 532 (D.C. Cir. 2010).

If the Supreme Court has conclusively determined that 28 U.S.C. § 2501 ("§ 2501") is a jurisdictional bar and is not subject to equitable tolling[3] then because there is similar language found in 28 U.S.C. § 2401 ("§ 2401") this statute also must be a jurisdictional bar to Plaintiff's claims.

The fatal flaw with this argument, is that neither the Supreme Court nor this Court has made the determination that § 2401 is to be applied in the same manner as § 2501. As implied by the Court in *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 134 (2008), the Court must make a more in-depth consideration of the purpose and goal of a limitation statute in order to assess whether a particular statute of limitations is a jurisdictional bar. Since cases brought under § 2401 are not aimed at the facilitation of administering claims nor is there a specific prohibition of judicial discretion in its application, the fairest interpretation of §2401 is not an absolute jurisdictional bar.

The language of the two statutes illustrates the different purposes. § 2501 which is directed to the administration of claims states: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." § 2401 provides not only two exceptions to the general rule but is not court specific: "Except as provided by the Contract Disputes Act of 1978, 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. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

Further, the Supreme Court noted that the words "has jurisdiction" were added to § 2501 in 1948. *John R. Sand*, 552 U.S. at 135. This added language served as the specific statutory language changing the Court's interpretation of the limitations statute from a rebuttable

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[3] *John R. Sand & Gravel Co. v. United States* 552 U.S. 130, 134 (2008) (stating that "[t]his Court has long interpreted the court of claims limitations statute as setting forth this second, more absolute, kind of limitations period."). This statement followed a detailed opinion in which the Court noted that most limitations seek to guard against stale claims and are treated as an affirmative defense. These limitations are typically subject to "special equitable considerations." *Id.* at 133. However, other limitations statutes seek to "achieve broader system-related goals, such as facilitating the administration of claims . . ." *Id.*

presumption to an unexceptional bar of jurisdiction. *Id.* at 137-138. This distinction is important as the current law of this Circuit, and specifically the Northern District of California recognizes the different purpose of the two statutes and have not applied § 2401 in the same manner as § 2501 and have refused to interpret § 2401 as a jurisdictional bar to Plaintiff's claims. Rather, the U.S. District Courts for Northern California have applied § 2401 as a rebuttable affirmative defense subject to tolling. In the most factually and legally relevant and recent case on point, *Wilton Miwok Rancheria v. Salazar*, Nos. C-07-02681-JF-PVT, C-07-05706-JF, 2010 WL 693420 (N.D. Cal. Feb. 23, 2010), the Court held that § 2401 was not a jurisdictional bar. In *Wilton*, like the instant case, a California Tribe that had been a plaintiff in the *Tillie Hardwick* litigation[4] sought restoration to federal recognition status. The case was dismissed after the U.S. defendant and the Tribe reached a settlement. However, the City of Elk Grove ("Elk Grove") and Sacramento County ("Sacramento") successfully petitioned the District Court to reopen the case and intervened. Elk Grove and Sacramento's subsequent Motion to Dismiss filed for alleged lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2401 was rejected by the District Court. The District Court certified the determination for interlocutory appeal. The Ninth Circuit declined the appeal.

In ruling to reject the Motion to Dismiss for lack of subject matter jurisdiction, the District Court cited three other recent Ninth Circuit cases that also declined to apply the *Sands'* § 2501 interpretation to § 2401. *See Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 WL 482248 at *9 (N.D. Cal. Feb. 25, 2009); *see also Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 306-CV-00657-LRH-RAM, 2008 WL 5111036 at *14 (D. Nev., Dec. 3, 2008); *Public Citizen, Inc. v. Mukasey*, No. C 08-0833-MHP, 2008 WL 4532540, *8 (N.D. Cal., Oct. 9, 2008).

Interveners' argument that § 2501 and § 2401 should be interpreted in the exact same manner is fundamentally misleading. Intervenors cite *Hopland Band of Pomo Indians v. U.S.*,

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[4] *Tillie Hardwick v. United States*, No. C-79-1710-SW (N.D. Cal. 1983) was a class action case brought by 34 of the Tribes terminated under the California Rancheria Act. In a Stipulated Judgment, 17 of the Tribes were immediately restored while 17 were not due to lack of proper documentation. The Court retained jurisdiction of the remaining Tribes to bring another action once they were able.

855 F.2d 1573, 1577 n.3 (Fed. Cir. 1988) to support its contention that § 2401 should be interpreted as a jurisdictional bar the same as § 2501: "There is 'no distinction between the companion statutes of limitations found at section 2401(a) and section 2501'" (*Intervenors' Motion to Dismiss,* page 10, line 8-9). The cited language is misleading in two aspects and this misdirection is critical to the Intervenors' position on §2401:

First, the language cited is not from the *Hopland* Court but rather it is the *Hopland* Court quoting *Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983). Second, the *Hopland* Court qualified their use of the cited language by stating that they were "[a]ware of no reason to disagree with the observation for the purposes of this case . . ."

The *Hopland* opinion touched on the issue for the very limited purpose of supporting its citation of *Spannus v. U.S. Dep't of Justice*, 824 F.2d 52 (D.C. Cir. 1987) as a discussion of statutes of limitations and the six year limit, which in that case was § 2401. In order to make that citation relevant, the *Hopland* Court cited *Walters.* Significantly, the *Hopland* Court did not reach the conclusion that § 2401 was a jurisdictional bar.

The Northern District of California has concluded that § 2401 is not a jurisdictional bar statute but rather a rebuttable affirmative defense subject to equitable tolling and as such, this Court can exercise jurisdiction over Plaintiff's claims.

B. Statute Of Limitations Should Be Tolled Due To Equitable Tolling Doctrine.

The Doctrine of Equitable Tolling requires that the party asserting the doctrine allege: 1) their diligence in pursuit of their rights, and 2) that some extraordinary circumstance prevented that pursuit. *Socop-Gonzalez v. Immigration & Naturalization Serv.*, 272 F.3d 1176, 1193-1194 (9th Cir. 2001). The Plaintiff's FAC alleges facts that warrant equitable tolling of the statute of limitations. While the Plaintiff was a party to *Tillie Hardwick*, the Tribe was not a party to the Settlement. However, immediately following the *Tillie Hardwick* case, the BIA took administrative actions that the Plaintiff relied on to believe it would be restored. As alleged in the FAC, the BIA formed a committee in 1987 and ultimately recommended a negotiated restoration. *See* FAC ¶ 70. In 1997, ACCIP completed a report in which the Tribe again believed would lead to its restoration. *Id.* at ¶ 68. In 1999, the BIA launched an initiative to draft

Congressional legislation to restore the Tribe. *Id.* at ¶ 73. In 2000, the Assistant Secretary of the BIA, Kevin Gover, made a statement to Congress that the Tribe should be immediately restored which provided more evidence for belief that the Tribe would be restored. In 2009, the Tribe completed a historical documentary that met the criteria for restoration as set out by Assistant Secretary Kevin Gover and submitted it to the BIA Regional Office. Despite the BIA Regional Offices recommendation to restore the Tribe, the new Assistant Secretary, Larry Echo Hawk, denied the request. *Id.* at ¶ 75.

The Plaintiff, relying on representations of the BIA as to their restoration, had diligently pursued their rights in what they believed to be a partnership with the BIA. It is reasonable to conclude that the reliance of the Plaintiff on the BIA to restore its recognition status, given the BIA's actions, caused the Tribe to fail to file the present action within six years of *Tillie Hardwick*. It would be an iniquitous act of tragic proportions to allow the same fiduciary partner to now deny any role in the Plaintiff's forbearance by asserting that the clock had run out.

Further, the Plaintiff alleges that since the federal government did not properly terminate the Tribe[5] and that evidence of the continued recognition exists, the BIA owed and continues to owe a fiduciary duty to the Plaintiff.[6] *Id.* at ¶¶ 67-73. Therefore, the general rule that a statute of limitations does not run against a fiduciary until the relationship has been terminated applies here, *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973); *Hopland Band of Pomo Indians v. United States*, 855 F. 2d 1573 (1988); *Cobell v. Norton*, 283 F. Supp. 2d 66, 261 (D.D.C. 2003) (citing *Manchester Band of Pomo Indians*, 363 F. Supp. at 1249), however, it must be clear that under the CRA, the fiduciary relationship could only be terminated or repudiated under specific conditions, so unlike typical fiduciary

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[5] The Plaintiff alleges and the Intervenors admit that it is a fact that James Adams was not Wappo or a member of the Tribe at any time, yet he was permitted to vote for termination. *Intervenors' Amended Motion to Dismiss*, page 5-6; *see also*, *Beckham Report*, pp. 24-25, 31. This fact voids the vote to terminate thereby rendering the termination void itself. *California Rancheria Act*, Section 2, Pub. L. 85-671 (August 18, 1958) (stating that the ". ..Indian of such reservation or rancheria . . . shall prepare a plan for [distribution] . . .").

[6] *Smith v. United States*, 515 F. Supp. 56, 62 (N.D. Cal. 1978)("Since the Rancheria has not been lawfully terminated, and should not be treated as terminated, the United States still owes a fiduciary obligation to the Indian people of the Rancheria . . ."; *see Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 260-261 (N.D. Cal. 1981)("The revocation of the Band's federally recognized status was not accomplished pursuant to the Rancheria Act . . .[t]hus the Table Bluff Band retains its status . . .").

terminations or repudiations, the termination of an Indian tribe had to have been performed in a certain way. The facts that the fiduciary duty owed to the Plaintiff was not properly terminated[7] and that the BIA, as the fiduciary, led the Tribe to believe it would be restored[8], provide the extraordinary circumstances necessary to rebut the statute of limitations as an affirmative defense.

C. Statute Of Limitations Should Be Tolled By The Continuing Violations Exception.

The continuing violations doctrine, which serves to toll a statute of limitations, provides in relevant part that, "a plaintiff's complaint will not be time-barred if the Defendant's related wrongful acts continue in the statute of limitations time frame. As a consequence, the statute of limitations only begins to run … upon the last act in a series of related wrongful acts." *National Fair Housing Alliance v. A.G. Spanos Constr., Inc.,* 542 F. Supp. 2d 1054 (N.D. Cal. 2008) (citing *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 500 n.10 (E.D. Va. 2002)). The rationale underlying the doctrine, "is that it prevents the defendant from escaping all liability for its wrong and thus 'acquiring a right' to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress." *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1581 (Fed. Cir. 1988).

The Plaintiff alleges that the Secretary of the Bureau of Indian Affairs ("Secretary") committed continual violations of its breach of fiduciary duty to the Tribe by denying the Tribe benefits when the Secretary knew, or should have known, that the Tribe was not properly terminated. The FAC alleges, in detail, that the Secretary failed to carry out its duties under the provisions of the California Rancheria Act. *See* FAC at ¶¶ 8-49. The FAC also alleges that the Secretary knew or at least should have known, by virtue of the volume of unlawful termination cases, that the termination of the Tribe was unlawful. *Id.* at ¶ 58; *Knight v. Kleppe*, Civ. No. C-74-005 WTS (N.D. Cal. 1976); *Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977); *Smith v.*

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[7] *Duncan v. Andrus*, 517 F. Supp. 1, 6 (N.D. Cal. 1977)(stating the Secretary's obligations under the California Rancheria Act and noting that he had "fallen far short" of them).

[8] *Dodge v. United States*, 362 F.2d 810, 813 (Ct. Cl. 1966) (describing the existence of a duty albeit not technical in nature).

United States, 515 F.Supp. 56 (N.D. Cal. 1978); *Upper Lake Pomo Ass'n v. Watt*, No. C-75-0181 (N.D. Cal. 1979); *Table Bluff Band of Indians v. Andrus*, 532 F.Supp. 255 (N.D. Cal. 1981); *Tillie Hardwick v. United States*, No. C-79-1710-SW (N.D. Cal. 1983); *Scott's Valley Band of Pomo Indians v. United States*, No. C-86-3660-WWS (N.D. Cal 1991); and *Wilton Miwok Rancheria v. Salazar*, 2010 WL 693420..Since 27 of the 41 Tribes terminated in California by the Secretary were restored in 8 separate cases, the Secretary should have known that the Plaintiff, also a Plaintiff in *Tillie Hardwick* was improperly terminated. Plaintiff further alleges that the Secretary knew of the unlawful termination and sought to reverse the Tribe's unlawful termination. *Id.* at ¶¶ 67-74. Although not explicitly stated in the FAC, the facts alleged indicate that despite the forewarning of numerous similar cases and in indifference to recommendations from its local staff to restore the Tribe, the Secretary continued to treat the Tribe as terminated and deny its members entitlements. Plaintiff separately enumerates the continued and "lasting effects" of the unlawful termination from those actions it argues are continuous acts in violation of federal statutory fiduciary duties owed by the Secretary to the Tribe. *Id.* at ¶¶ 50, 61-66, 75. Since the Secretary was advised to restore the Tribe on numerous occasions by BIA officials[9], but continued to deny the Tribe benefits on an annual basis, it cannot be reasonably argued that the only alleged offense occurred in 1961. It may be true that all the claims for damages stem from the initial wrongful act, but the subsequent acts alleged were done with knowledge that the Plaintiff was not properly terminated and should be restored.

Even the case that the Intervenors' Motion cites heavily, *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) acknowledges that "if the 'continuing claim' doctrine were deemed applicable to the present facts, the Band's suit could be maintained as to those denied statutory benefits which the band could have applied for . . . However, the 'continuing claim' doctrine could only have had possible application as long as the underlying wrong remained uncorrected." *Id.* at 1581-82.

[9] The Plaintiff asked the Assistant Secretary of the Bureau of Indian Affairs to restore its federal recognition status because it knew that BIA Assistant Secretary Ada Deer had restored the Ione Band of Miwok Indians on March 22, 1994 and that BIA Assistant Secretary Kevin Gover restored the Koi Nation on December 29, 2000. These two examples demonstrate the Assistant Secretary's authority to restore a Tribe administratively.

The *Hopland* case involved the restored Tribe of Hopland Band of Pomo Indians suing the United States for money damages related to the unlawful conveyance of its property when it was terminated. The first claim, brought in the Federal Court of Claims was determined to be barred by § 2501. *Id.* at 1580. The *Hopland* Court articulated the current Plaintiff's argument precisely when it stated that, "[w]hile the wrong common to all of the Band's claims in this case was the unlawful termination of the Band's federal status, it would appear incorrect to conclude that all claims, resulting from the termination of the Band as a Tribe, including the termination itself, would be unreviewable unless challenged within 6 years of the termination date." *Id.* at 1581.

The Intervenors also rely on *Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F. Supp. 253 (N.D. Ind. 1993) to argue that where termination of federal status is the underlying claim, application of the continuing claims doctrine would defeat the purpose of the statute of limitations. *MTD* at page 9, lines 18-20. However this argument is also misguided. The *Miami* Court was referring to the *Hopland* Court's rejection of the argument that a terminated Tribe could only bring a lawsuit for wrongful termination once the government had admitted to wrongful termination. The Plaintiff in *Hopland* had made that argument as a basis for excusing its late filing. This is not an argument made, implied, or applicable to this case.

Finally, the Intervenors seek further support against the application of the continued violations doctrine in *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007). The *Felter* Court stated that, "[a] lingering effect of an unlawful act is not itself an unlawful act." *Id.* at 1260. However, the *Felter* Court also found that the Plaintiff in the case "alleges no acts committed by the defendants within the statute of limitations that could constitute a continuing violation." *Id.* at 1260. In fact, the Plaintiff in *Felter* only alleged that the government had violated its duty in 1961 and that this violation continued. Unlike the Plaintiff in *Felter,* the FAC states that the Secretary has breached its duty on numerous occasions to restore the Tribe and to deliver entitlements directed by Congress in a variety of statutes. FAC at ¶¶ 61-77. Thus, the Plaintiff's FAC does state facts that allege continuing violations.

D. Statute Of Limitations Does Not Apply To Plaintiff's APA Claims.

Plaintiff also claims that the Defendant violated the Administrative Procedures Act by: 1) unreasonably delayed and unlawfully withheld agency action of listing the Tribe on the list of recognized Tribes, 2) failing to conclude a matter, i.e. listing the Tribe on the list of federally recognized Tribes, within a reasonable time, and 3) arbitrarily and capriciously denying, without rationale, administrative restoration of the Tribe. *See* FAC at ¶¶ 90-94, 96-99, 104-106. One averment in the FAC common to all three causes of action is that the Secretary, who the Plaintiff alleges does recognize the existence of the Tribe, has failed to perform his duty under 25 U.S.C. § 479a-1, which states, "[t]he Secretary shall publish in the Federal Register a list of all Indian Tribes which the Secretary recognizes . . ." The Plaintiff alleges that it will be able to prove that the Secretary recognizes the Tribe's existence and the unlawful nature of the termination, but has failed to act to correct the error. Therefore, Plaintiff is not relying upon the unlawful termination as the basis for its Administrative Procedures Act claims, but rather the failure of the Secretary to take action he knows to be due the Tribe under statute. This failure, as alleged, has occurred each time the Defendant published the List of Federally Recognized Tribes. In the event that the Court determines that this failure, despite the Defendant's failure to act with prior knowledge in each occasion, is a mere impact of the 1961 termination, the Plaintiff has also alleged that its petition effort in 2009 in accordance with the criteria set forth by Assistant Secretary Kevin Gover, is timely and warrants the tolling of the affirmative statute of limitations defense.

The Ninth Circuit has previously held that "there is no limitations period specifically applicable to unreasonable or unlawful delay claims under the APA. *See, e.g.*, *American Canoe Ass'n, Inc. v. EPA*, 30 F. Supp. 2d 908, 925 (E.D. Va. 1998) (holding that Plaintiff's APA claim under 5 U.S.C. § 706(1) is not time-barred, since "application of a statute of limitations to a claim of unreasonable delay is grossly inappropriate"). *See also Public Citizen v. Mukasey*, 2008 WL 4532540 at *7. Therefore, the Plaintiff's claims are not time barred under the APA.

II. The Defense Of Laches Is Inapplicable to the Instant Motion.

Laches applies when there is "(1) lack of due diligence by the party whom the defense is asserted, and (2) prejudice to the party asserting the defense." *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002). This defense fails as a matter of fact. Besides, as noted previously, laches is not appropriate affirmative defense for a motion to dismiss. *See Menominee Indian Tribe v. United States*, 614 F.3d 519, 524 n.2 (D.C. Cir. 2010). Assuming arguendo, Plaintiff alleges sufficient facts, which taken as true, demonstrate both the tribe's diligence in trying to be restored of its rights as a Tribe, and the lack of prejudice to the Intervenors who have no damages or interest that are not too tenuous to be relevant in the instant case.[10]

A. The Plaintiff's Claims Are Not Unreasonably Delayed.

Contrary to the claims that the Plaintiff ". . . waited another twenty-five years before seeking administrative relief." *Motion*, page 12, lines 19-20, the Plaintiff's efforts to achieve restoration are well documented and cited in the FAC, see for example *FAC* 18 ¶¶ 67-70, which describes multiple efforts over the years to achieve restoration through the BIA and Congress after *Tillie-Hardwick*. Plaintiff's actions seeking restoration in summary by years are: (a) 1978 - 1983 participation in the Tillie-Hardwick case, (b) 1985 - 1987 provided documents and information to the BIA with the belief that the BIA would be restoring Tribes, (c) 1997 participation with the Advisory Council on California Indian Policy to have Congress restore the Tribe, (d) 1999 subject of Congressional legislation for restoration, (e) 2002-2006 attempts to get new legislation submitted to Congress to achieve restoration through Senator Barbara Boxer and U.S. Representative Mike Thompson, 2009 submitted historical and (f) submitted historical and administrative documents to the BIA requesting administrative restoration. *See id. at passim.*

Indeed, at every turn, the Government appears to have strongly supported the Tribe's efforts to obtain restoration without the need for litigation. It was not until 2009 that the

[10] Thus, the question is begged: Why are the Intervenors still present in this case when the subject matter of the Complaint alleges no injury and relief, if granted, would result in no injury. Intervenors have taken advantage of the Plaintiff, Defendant, and the Court by using their Henny Penny analysis of imaginary damages as a Trojan horse to get into this case but hide their real interest, which is to prevent the Tribe from having a fair consideration of its restoration.

Defendant reversed course and indicated it would not follow its past actions of administrative restoration. This suit was filed shortly thereafter. The facts alleged show that the Tribe has not sat idly by.

B. The Intervenors Are Not Prejudiced By The Plaintiff's Claims.

Since the Intervenors were not part of the California Rancheria Act nor in the Court and Congressional restorations that followed, there is no evidence that they could bring forward challenging what is a purely federal issue. Further, the positive resolution of the Plaintiff's case would not result in any immediate land acquisition, so the Intervenors' claim that the Plaintiff's case would cause a loss of jurisdiction is without merit. Further, 25 C.F.R. § 151 and 25 U.S.C. § 2719 provide multiple opportunities for the Intervenors to oppose land acquisition. However, this process is not at issue in the instant case.

The gravamen of the Intervenors' "prejudice" argument is that "[a]llowing Plaintiff's action to proceed would thus substantially prejudice the Counties' ability to enforce its zoning and development on any county lands that are within, contiguous, or adjacent to the 'restored lands' sought by Plaintiff." Again, the instant case would not result in any of the prejudices stated. Even if Plaintiff were granted all the relief it requests, the prejudices would not occur. Taking land into trust is completely a federal law methodology that varies depending on circumstance and parties involved. *See, e.g.*, 25 C.F.R. § 151. If the Intervenors have complaints about the federal law construct, said complaints should not be raised in the present action as they are irrelevant to the merits of the Plaintiff's case.

C. The Decision In *Sherrill* Does Not Apply To This Case.

Intervenors' argue that the *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 1057 (2005), creates a "specific, delay-based equitable bar for Indian claims." (Intervenors' Motion to Dismiss, page 17, line 24.) This statement is incorrect both in its interpretation and application of the Supreme Court's decision. *Sherrill* involved an Indian Tribe acquiring lands in fee that it had sold hundreds of years prior. The tribe contended that since they had reacquired the land, they should not have to pay local taxes on the reacquired property. The *Sherrill* Court parsed several equitable doctrines together to achieve a result approximating laches. While the *Sherrill* Court

presented a novel formulation of fact and equitable considerations in determining that the tribe's claim was barred under those specific facts and for the specific claim involved, the *Sherrill* Court did not announce a new "specific, delay-based, equitable bar for Indian claims." Since the instant action is not based on an Indian land claim among other specific factual differences from both *Sherrill* and *Cayuga*, the Intervenors' interpretation and application of *Sherrill* is incorrect.[11]

III. The Intervenors' Exhibits And Historical Report Are Not Properly Before the Court.

The Intervenor's attack on the Tribe's standing is little more than an attempt to litigate, in the context of an abbreviated and limited motion to dismiss, the merit of the Tribe's claims. While the Court may consider facts in limited circumstances when addressing a challenge to subject matter jurisdiction, the Intervenor's claims here lack foundation, are largely based on hearsay and evidence of questionable validity and are firmly rebutted by the Tribe's own evidence. The merits of this dispute will be and should be resolved in the normal and ordinary course of this litigation, not in the abbreviated and incomplete fashion that the Intervenor's motion proposes.

The Motion to Dismiss presents both facial and factual challenges. Decl. of David H. Tennant at page 2, ¶ 5. The facial challenges are represented by the statute of limitations arguments addressed above. The standing argument, however, appears to be a factual challenge. In addressing a motion to dismiss, courts generally view the facts alleged in the complaint as true for purposes of the motion. However, where there are factual challenges to subject matter jurisdiction, the courts do not apply the same presumption. *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000); *see generally* 5C Fed. Prac. & Proc. Civ. § 1363 (3d ed.) Ch. 4, Pleadings and

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[11] Intervenors reference *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 275 (2nd Cir. 2005) as an application of the so called *Sherrill* form of laches, however that Court only applied and extended the *Sherrill* holding to Indian **land** claims. *Cayuga*, 413 F.3d at 273, 275. In fact, the Court in *Quapaw Tribe v. Blue Tee Corp.*, 653 F. Supp. 2d 1166 (N.D. Okla. 2009) noted that the *Cayuga* interpretation of Sherrill applied to "Indian land claims" and that the Quapaw case was not ". . . a case where an Indian Tribe is attempting to assert its own sovereignty in a dispute against a state or federal government over possession of property historically belonging to an Indian Tribe." *Id.* at 1192.

Motions. Once the moving party has presented factual evidence challenging jurisdiction, the opposing party must come forward with evidence establishing subject matter jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-1040 (9th Cir. 2004) (quoting *Bell v. Hood*, 327 U.S. 678 (1946)).

However, courts should not engage in factual determinations of disputed facts where a jurisdictional question and the substantive issues in the case are intertwined such that the jurisdictional issue is dependent upon resolving factual issues going to the merits of the dispute. *Id.* at 1039. In this case, the purported "evidence" relied upon by the Intervenors is largely inadmissible and insubstantial. Moreover, these alleged factual disputes are inextricably intertwined with the merits of this case and therefore are inappropriate for resolution in this motion. Finally, even if it was an appropriate subject for this motion, the Tribe has adequately rebutted the purported evidence submitted by the Intervenors. *See* Yvonne Ned Affidavit, Scott Gabaldon Affidavit, Ed Castillo Affidavit and Joseph L. Kitto, Declaration.

IV. The Plaintiff Meets The Necessary Standing Requirements.

A. The Beckham Report Is Tainted And Factually Incorrect.

If the Court is inclined to permit Intervenors to introduce new hearsay information by way of declaration, certainly the case law restricts such introduction to public and administrative records, not self-serving, self-proclaimed expert testimony. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (noting that a court may look at matters of public record in evaluating a motion to dismiss), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (listing the types of documents reviewed outside the filings as matters of public record). The report generated by Dr. Beckham and relied upon by the Intervenors is not a public record or an administrative document or any source that can be considered unbiased and available to the public. Although Dr. Beckham may have used a few public documents, certainly his manner of organizing them and formulating opinion is not the kind of extrinsic information allowed prior in a factual challenge.

Dr. Beckham's own rendition of the assignment he was given demonstrates that his report is tainted with bias in that he states that he was asked to show "the relationships (if any) between the residents of the Rancheria and the Plaintiff, representing to be a modern Mishewal Wappo Tribe." Aff. of Stephen Dow Beckham, page 2, ¶ 5. This foundational inquiry is flawed in that it presumes that the Plaintiff is a modern day entity rather than a continuation of descendents of the Tribe. Not unexpectedly, Dr. Beckham concludes that the Plaintiff is a modern day construct of a group that ceased to exist. STEPHEN DOW BECKHAM, ALEXANDER VALLEY RANCHERIA, SONOMA COUNTY CALIFORNIA: A HISTORY 52 (2011). Dr. Beckham creates a standard that holds if a Tribe did not have a government and did not reside on a Rancheria; it must have ceased to exist. *See generally id.* Neither Congress nor the Bureau of Indian Affairs has ever established such a standard.

Dr. Beckham's affidavit states that he is Dr. Robert B. Pamplin, Jr. This error would not normally be noteworthy.[12] However, given the nature of the report and the error, Dr. Beckham's failure to correctly identify himself is troubling on several levels. Either Dr. Robert B. Pamplin is Dr. Beckham's alter-ego[13] or, his affidavit was a sloppy[14] error made because he cut and pasted using an affidavit used by Dr. Pamplin in the past. This error deserves notice since his misidentification of his own name, illustrates the problem with his report; it is a shoddy reflection of a partial record from which self-serving conclusions are made and then presented to this Court in a narrow window under factual challenge of the Plaintiff's standing.[15]

The grim reality of this effort by Dr. Beckham is that his credentials may cause a document that was prepared hastily and under questionable circumstances to be widely circulated

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[12] An example of an error not worth noting would be where the Intervenors, in the section of their Motion marked "Factual Background" mistakenly state that the Secretary of the BIA conceded (presumably settled) the prior termination cases rather than litigate. This obvious error would be not worth noting.

[13] Minor research has shown that Dr. Beckham is in fact a Dr. Pamplin fellow at Lewis & Clark College.

[14] Erroneous fact finding such as stating that the instant case was initiated in 2010 (page 49, finding 21) when the record is clear that the case was filed in 2009 is nothing less than sloppy.

[15] The Motion states on page 5 line 13 that "the Rancheria's sole occupants were Jim Adams, an individual of mixed Indian (neither Wappo nor Pomo). . ." and on page 5, line 16 the Motion states, "These Non-Wappo, non-Indian inhabitants were the *only occupants* . . ." The obvious error is that although James Adams was not Wappo, he was Indian, so the Motion's first statement contradicts the second. This lack of factual clarity would make Dr. Beckham's report questionable in its usage by the Intervenors' counsel, if not for the aforementioned reasons as well.

thereby polluting the stream of history. In any case, the fact remains that Dr. Beckham's report is not the kind of extrinsic information acceptable to be submitted when factually challenging a complaint. *See Mack,* supra at page 1282. Pursuant to Local Rule 7-3(a), the Plaintiff objects to the evidence offered in the Beckham report because his conclusions lack foundation, are hearsay and are simply not admissible.

B. The Plaintiff Need Not Prove Genealogical Connection For Standing.

The Tribe is confident that the facts it has presented, will demonstrate that it satisfies the proper standard for standing in this case. The Plaintiff has submitted its membership records to the Bureau of Indian Affairs Regional Office since the suit was filed. The Plaintiff, if successful, would still have to show that its initial membership consists of descendents of the Tribe. The current membership is descended from the 1940 Census.

The Intervenors' Motion argues that the Plaintiff must show a genealogical connection between its members and the residents of the former Rancheria. [16] Intervenors Motion to Dismiss, page 19, line 22-24. The Intervenors cite *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 n.2 (10th Cir. 2001) for the proposition that the Plaintiff must show a ". . . substantial and meaningful connection to Indians who were allegedly harmed." However, the facts at issue in *United Tribe of Shawnee Indians (UTSI)* are that the Tribe sought a declaration that it was a recognized tribe and that it be placed on the federal list of recognized tribes. The UTSI argued that it was de facto recognized by a treaty in 1854 and a court case recognizing it as a tribe in 1866. Further, the UTSI argued that the BIA was without authority to deny its request to put it on the list of federally recognized tribes. The Court found that the UTSI failed to even allege facts that it was the modern day descendents of the Tribe recognized in the

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[16] However, the Intervenors have ridden the line of violating the confidentiality agreement of the Court ordered mediation by referring to a request made during mediation for the Tribe's membership list. The statement clearly makes a negative implication towards the Plaintiff by characterizing our refusal of such request with the language "despite its [Plaintiff] refusal to disclose its membership" *Intervenors' Motion to Dismiss*, at page 19, line 26-27. The Plaintiff is under no obligation to provide a list of information protected by the Privacy Act to a non-federal entity, especially when the exclusive purview of the BIA is the determination of initial membership as delegated by Congress. The Plaintiff is confident that since the Intervenors claim that the Tribe ceased to exist prior to 1950, no current membership roll would be acceptable and the Intervenor would no doubt attempt to put the Court in the position of interpreting genealogy. Nonetheless, the implication that the Plaintiff is hiding who its members are is not only untrue, it refers to a request made during a period of confidential communications between the parties.

Treaty of 1854 and the case of 1866. *Id.* at 548. The instant action is entirely factually different. The Plaintiff has alleged facts that it is the descendent embodiment of the Tribe unlawfully terminated. FAC at ¶ 5. The Plaintiff has offered evidence that in 1979 it was recognized by a U.S. District Court in *Tillie Hardwick*, in 1987 it was evaluated by the BIA as eligible for restoration, in 1997 the Congressionally formed Advisory Council on California Indian Policy ("ACCIP") recommended restoration for it as a Tribe, in 1999 the BIA testified as to the same and, in 2009 the BIA again recommended to the Secretary that the Tribe should be recognized. This level of proof that the Plaintiff is the same group of people and their descendents as the Tribe that was unlawfully terminated is beyond reproach. Finally, the Intervenors contention that the Plaintiff lacks standing because it cannot show it has connection to the Tribe unlawfully terminated is disingenuous as the Intervenors also argue that the Tribe ceased to exist prior to the unlawful termination itself, which would make the Plaintiff's proof of connection moot. Plaintiff can demonstrate with competent evidence a historical connection to the terminated tribe and has alleged so in the FAC.

C. Neither Congress Nor The Bureau Of Indian Affairs Has Determined That The Tribe Has Ceased To Exist.

The Mishewal Wappo Tribe of Alexander Valley has never ceased to exist according to any records of Congress or the BIA. The fact that Dr. Beckham could not find the Tribe's name on a cherry picked BIA document does not prove that the Tribe ceased to exist or that the BIA ever made such a determination. In fact, if Dr. Beckham had simply read the Administrative Record provided by the Defendant, he would have found that the ACCIP, noted that they had "direct knowledge" that the Mishewal Wappo Tribe of Alexander Valley met the 6 criteria used by the federal government in evaluating a tribe's eligibility for restoration. The two criteria most relevant to Dr. Beckham's findings are that the ACCIP found that there was an "existing, ongoing, identifiable community of Indians who are members of the formerly recognized tribe or who are their descendents", and "the tribe has continued to perform self-governing functions either through elected representatives or in meetings of their general membership."

Administrative Record ("Record"), Exhibit 16, Attachment C, ACCIP Termination Task Force, page 2.

Residency and government are not requirements for tribal recognition and never have been.[17] For example, the Cloverdale Rancheria of Pomo Indians was restored to federal recognition status via the stipulated settlement in the *Tillie Hardwick* case in 1983. Between 1984 and 1991 the Tribe had no land, thus there were no Rancheria residents and there was no established government. *Jefferey Alan-Wilson, Sr. v. Sacramento Area Dir., BIA*, 30 IBIA 241, 244-246 (1997). Nonetheless, Cloverdale has remained a federally recognized Tribe. There are still landless Tribes that were restored in *Tillie-Hardwick* and *Scott's Valley* where residency could not be shown. Record, Exhibit 16, Attachment C, ACCIP Termination Task Force, page 20. In fact, the Indian Reorganization Act[18] was passed ". . . *to extend to Indians the right to form business and other organization*" which clearly demonstrates that Congress found there was a severe lack of tribal organization in mainstream terms. Not having a formalized government has never been a basis for the determination that a Tribe ceased to exist, except in Dr. Beckham's report. Finally, there are at least six facts that undisputedly contradict Dr. Beckham's conclusion that the Plaintiff simply ceased to exist by 1950. First, the California Rancheria Act[19], passed by Congress, specifically names Alexander Valley as one of the California Tribes subject to voluntary termination. This is conclusive proof that on August 18, 1958 the legislative branch of the federal government, who has plenary power over Indian affairs, did recognize the existence of the Plaintiff. Second, in 1979 the United States District Court for the Northern District of California did recognize the Plaintiff as a Tribe in the class action case, *Tillie Hardwick. See Tillie,* C-79-1710 SW (N.D. Cal. 1983) . Third, in 1987, the BIA formed a committee to evaluate the terminated but not yet restored Tribes against a set of criteria and ultimately did recommend

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[17] The Intervenors cite *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001) as support for their claim that if the Plaintiff had no formal government or land, presumably land with all its members living on, it ceased to be a Tribe. This case fails to support Intervenors' argument because: 1) it is distinguished by *California Valley Miwok Tribe v. Cal. Gambling Control Comm'n*, No. D054912, 2010 WL 1511744 at *7-8 (Cal. Ct. App. Apr. 16, 2010) as applying only to Tribes who seek ". . . initial *federal recognition* . . ." and, 2) it is directly contradicted by the aforementioned ACCIP report language.

[18] 25 U.S.C. § 461

[19] Public Law 85-671 (72 Stat. 619)(Aug. 18, 1958)

Alexander Valley be restored. Administrative Record, Exhibit 16, Attachment A. Fourth, in 1997, the Advisory Council on California Indian Policy presented its report to Congress wherein it recommended that the Tribe be immediately restored. Administrative Record, Exhibit 16, Attachment C, ACCIP Termination Task Force, page 5, ¶ 5. Fifth, the BIA Assistant Secretary reported his recommendation to Congress that the Plaintiff should be immediately restored. Sixth, in 2009 both the BIA Regional and Headquarters recognized the Plaintiff as descendents of the Tribe.

As this discussion demonstrates, the jurisdictional question of standing is based on facts that are inextricably intertwined with the factual question of whether the Tribe is entitled to restoration under the standards established by Congress. Thus, under *Safe Air for Everyone*, these are not disputed factual questions that this Court should resolve in the context of this motion. *See Safe Air for Everyone*, 373 F.3d at 1039. Moreover, even if the Court could reach the issue, the facts and evidence presented by the Intervenors are inadmissible and lack proper foundation. Dr. Beckham's report is inaccurate, employs incorrect assumptions and legal standards, and fails to adequately contest the facts supporting the Tribe's standing. Finally, the Tribe has provided ample support for the Court to find that it has factually demonstrated that it does have standing in this case. The Intervenors' Motion to Dismiss on this point is without merit.

D. The Intervenors' Arguments Regarding Political Question And Exhaustion Of Administrative Remedies Are Inapplicable.

Congress' authority over Indian Tribes is plenary. *Cherokee Nation v. Georgia*, 30 U.S. 1, 44 (1831). In the situation of an initial recognition of an Indian Tribe, Congress has delegated that authority to the BIA Office of Federal Acknowledgment. 25 C.F.R. § 83. In the case of Tribes that have already been recognized, the courts have authority to determine whether the BIA has performed its duties properly via the Administrative Procedures Act and other statutes passed by Congress concerning Indian Tribes, e.g. Indian Self Determination and Education Assistance Act, Indian land Consolidation Act, Indian Health Care Improvement Act, etc.

It may be a political question as to whether Congress itself has recognized or terminated a Tribe, but in the instant case, where the CRA delegated responsibility to the BIA, there can be no argument that the Court may hear a challenge of that responsibility without violating the separation of powers doctrine.[20] Thus, the political question doctrine is irrelevant in the instant case.

Equally irrelevant, but more disturbing is the argument that the Plaintiff must exhaust administrative remedies by submitting a petition as a new tribe seeking initial recognition through the Office of Federal Acknowledgment under 25 C.F.R. § 83. The Plaintiff has fulfilled the requirement of exhausting administrative remedies by seeking administrative restoration. The Intervenors would ask the Court to rearrange the Plaintiff's case, discount every fact alleged and convert the Plaintiff from an unlawfully terminated tribe into a never recognized tribe. The assertion deserves no more comment than has been made thus far.

CONCLUSION

For the foregoing reasons stated above, the Plaintiff respectfully requests that this Court deny the Intervenors' Motion to Dismiss.

Dated: April 4, 2011

Respectfully Submitted,

THE RYAN LAW FIRM

/s/ Kelly F. Ryan
Kelly F. Ryan
Attorneys for Plaintiff
The Mishewal Wappo Tribe of Alexander Valley

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[20] This especially true where the courts in this Circuit and in fact, this District have heard unlawful termination cases from *Smith v. U.S.* to *Tillie Hardwick*, to *Wilton Rancheria* just last year.

CERTIFICATE OF SERVICE

I, Kelly F. Ryan, hereby certify that on April 4, 2011, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 4, 2011 at Pasadena, California.

By: /s/ Kelly F. Ryan