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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SARAH JEWELL, in her official capacity as Secretary of the Interior; LAWRENCE S. ROBERTS, in his official capacity as Principal Deputy Assistant Secretary for Indian Affairs of the United States Department of the Interior; and DOES 1 to 100, Defendants.	Case No. 16-cv-7189-LB **REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR TRANSFER OR, IN THE ALTERNATIVE, TO DISMISS FOR FAILURE TO STATE A CLAIM** Date: May 25, 2017 Time: 9:30 a.m. Place: Courtroom C, 15th Floor Hon. Laurel Beeler

Plaintiff seeks through this litigation a judicial declaration that "Plaintiff is a federally [sic] tribe" and that "Plaintiff's members are Indians whose status have not been vanquished." Compl. p. 7. But the acts alleged in Plaintiff's complaint do not bear any connection to the Northern District of California, and Plaintiff's opposition fails to show that venue is proper in this district under any of the provisions of 28 U.S.C. § 1391(e). As such, the Court should dismiss or transfer this action to either the Eastern District of California or the District of Columbia, where this action could have been brought. Alternatively, should the Court determine that venue is proper, the Court should dismiss this action for failure to state a claim because Plaintiff has failed to identify any statute or regulation requiring the Secretary to add Plaintiff to the list of federally recognized tribes, and any claim that Defendants have wrongly excluded Plaintiff from the list is barred by the six-year statute of limitations.

I. This Case Should Be Dismissed or Transferred to A Proper Venue

Plaintiff does not contest that Defendants do not reside in this district, that a substantial part of the events or omissions giving rise to this action did not occur in this district, or that Plaintiff does not reside in this district. *See* Opp'n at 4. Instead, in response to Defendants' argument that venue in this district is improper because none of the factors under 28 U.S.C. § 1391(e)(1) can be met, Plaintiff makes the bare assertion that "[m]embers of the Plaintiff predominantly live in the Northern District" and thus "venue in this district is conclusively proper." *See id.* Plaintiff's unsupported statement is insufficient to satisfy its burden of showing that venue has been properly laid in this district. *See Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). This action involves a single plaintiff whose self-identified county of residence is Plumas County.[1] *See* ECF No. 2. The Complaint is devoid of any factual allegations about Plaintiff's members, and instead attempts to establish venue by alleging that "a substantial part of the events or omissions giving rise to Plaintiff's claims occurred near this District." Compl. ¶ 2. Accordingly, dismissal pursuant to Rule 12(b)(3) or transfer pursuant to 28 U.S.C. § 1406(a) is warranted.

[1] In any event, for venue purposes, an unincorporated association is viewed as a resident of any district where it, rather than its individual members, resides. *See Denver & Rio Grande Western R.R. Co. v. Bhd. of Railroad Trainmen*, 387 U.S. 556, 559-60 (1967).

Nor does Plaintiff respond to Defendants' argument seeking transfer under 28 U.S.C. § 1406(a) to either the Eastern District of California or the District of Columbia, both districts where this action could have been brought. *See* Mot. to Dismiss at 6. Plaintiff instead urges that the balance of factors under 28 U.S.C. § 1404(a) counsels against transfer of this action to either the Eastern District or the District of Columbia. *See* Opp'n at 4-7. *See Abrams Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096, 1102 (C.D. Cal. 2001) (explaining that "(1) where venue is *improper,* a court must dismiss *or* transfer under 28 U.S.C. § 1406; (2) where venue is proper, the court may transfer to another district, for convenience, pursuant to 28 U.S.C. § 1404") (emphasis original). Because venue is not proper in this district for the reasons discussed above, Defendants have not sought transfer under Section 1404(a) on convenience grounds.

Even were the Court to find venue permissible in this district, the balance of factors weighs in favor of a discretionary transfer under Section 1404(a). In evaluating a transfer under Section 1404(a), "the court may consider (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones v. GNC Franchising, Inc*., 211 F.3d 495, 499 (9th Cir. 2000); *Earth Island Instit. v. Quinn*, 56 F. Supp. 3d 1110, 1117-20 (N.D. Cal. 2014). "No single factor is dispositive, and a district court has broad discretion to adjudicate motions for transfer on a case-by-case basis." *Park v. Dole Fresh Vegetables, Inc.*, 964 F. Supp. 2d 1088, 1093 (N.D. Cal. 2013). Here, Plaintiff argues that its choice of forum should be given "maximum deference" because "many members of the Plaintiff" live in this district, and Plaintiff has expended time and resources in preparing for this litigation. *See* Opp'n at 6. As Plaintiff acknowledges, its choice of venue is accorded less deference where, as here, the operative facts have not occurred within this district and this district has no special interest in the parties or subject matter. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (citing *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 953-54 (9th Cir. 1968)); *Sierra Club v. U.S. Dep't of State*, No. C 09-04086

SI, 2009 WL 3112102, at *3 (N.D. Cal. Sept. 23, 2009) (declining to accord significant deference to plaintiff's choice of forum where "[n]one of the operative facts occurred in this district" and the district "has little interest in the parties or subject matter, other than the single plaintiff (Sierra Club) whose headquarters are located in San Francisco"). The additional factors that Plaintiff cites -- convenience of the parties and witnesses and local interest in the controversy -- likewise weigh in favor of transfer. The convenience of the parties and witnesses is not typically a factor in cases involving a challenge to agency action. *See Earth Island*, 56 F. Supp. 3d at 1117 (noting that the "availability of witnesses and proof is unlikely to be a factor in a NEPA record review case, since the relevant agency action will be reviewed on a paper record"). As to the local interest in the controversy, Plaintiff has not identified any way in which its claims relate specifically to the Northern District, whereas a central allegation in the Complaint -- the effect of the Government's sale of the Taylorsville Rancheria -- directly relates to actions that occurred in the Eastern District and Washington, D.C. *See id.* Thus, should the Court find venue proper, it should nonetheless transfer this case to the Eastern District or the District of Columbia.

II. In the Alternative, Dismissal Is Appropriate Because Plaintiff's Claims Are Barred by the Statute of Limitations and There Is No Agency Failure to Act

In opposition to Defendants' alternative motion to dismiss for failure to state a claim, Plaintiff contends that (1) its claims fall within the exception to the six-year statute of limitation recognized in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991); and (2) it "is neither explicitly nor implicitly seeking to obtain status" as a federally recognized tribe, but is instead asking the Court to review whether the sale of the Taylorsville Rancheria affected its status. *See* Opp'n at 7-10. Plaintiff's arguments are unavailing.

To begin, Plaintiff's reliance on *Wind River Mining* is misplaced. In that case, the Ninth Circuit reviewed a challenge to an agency action as exceeding its statutory authority and found that "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." *See Wind River Mining*, 946 F.2d at 716. The Court observed that "[t]he government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before

anyone discovered the true state of affairs." *Id.* at 715. Unlike the mining company in *Wind River* which challenged an agency action applying an earlier promulgated rule, Plaintiff cannot plausibly claim that the June 9, 2015 letter from the Assistant Secretary-Indian Affairs constituted the application of the Agency's decision on Plaintiff's status as a federally recognized tribe. As Defendants explained in their motion, the decision that Plaintiff would not be included on the list of federally recognized tribes was first applied in 1979, and Plaintiff has not been included on any of the subsequently published lists, either before or after the 1994 passage of the List Act. *See* Mot. to Dismiss at 11-12. Thus, Plaintiff's interest in being included on the list of federally recognized tribes was immediate and specific with the initial publication of the list of federally-recognized Indian tribes in 1979. *See Elim Church of God v. Harris*, 722 F.3d 1137, 1141-42 (9th Cir. 2013) ("Typically, publication of a document in the Federal Register is 'sufficient to give notice of the contents of the document to a person subject to or affected by it.'") (quoting 44 U.S.C. § 1507). Accordingly, because Plaintiff has been on notice since 1979 that it is not a federally recognized tribe -- and undeniably had actual notice of its status by 1998 at the very latest when it filed its "letter of intent to petition for acknowledgment as an Indian tribe under the Part 83 process," *see* Compl. ¶ 4 -- Plaintiff's claim is barred by the statute of limitation. *See Mishewal Wappo Tribe of Alexander Valley v. Jewell*, 84 F. Supp. 3d 930, 943 (N.D. Cal. 2015), *aff'd*, No. 15-15993, 2017 WL 1433323, at *2 (9th Cir. Apr. 24, 2017) (finding that plaintiff's claims accrued no later than 1961 based upon publication of notice of the Rancheria's termination in the Federal Register, and therefore dismissing claims as untimely under 28 U.S.C. § 2401(a)).

Plaintiff next asserts that its complaint seeks a review of the June 9, 2015 letter from the Assistant Secretary-Indian Affairs and that "Plaintiff is neither explicitly nor implicitly seeking to obtain status." *See* Opp'n at 9-10. Plaintiff's own pleading suggests otherwise. The Complaint asks the Court to declare that "Plaintiff is a federally [sic] tribe," as well as declare that the "Plaintiff's members are Indians whose status have not been vanquished" pursuant to the California Rancheria Act. *See* Compl. p. 7. Although Plaintiff disclaims that it is seeking federal recognition through this litigation, as did the plaintiff in *Robinson v. Salazar*, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), its complaint asks the Court to wade into a process reserved for the political branches of government and declare that it has a

government-to-government relationship with the United States. As in *Robinson*, Plaintiff's claims should be dismissed. *See id.* at 1031.

III. Conclusion

For the reasons set forth in their opening brief and above, Defendants respectfully request that the Court dismiss or transfer this action for lack of proper venue or, in the alternative, dismiss the action for failure to state a claim.

Dated: May 11, 2017

Respectfully submitted,

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/s/ *Michelle Lo*
Michelle Lo
Assistant United States Attorney

Counsel for Defendants