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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILTON MIWOK RANCHERIA, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, *et al.*,

Defendants,

COUNTY OF SACRAMENTO, CALIFORNIA and CITY OF ELK GROVE, CALIFORNIA,

Proposed Intervenors.

Case No. C-07-02681-JF-PVT

NOTICE OF MOTION AND MOTION FOR INTERVENTION

HEARING DATE: Sept. 18, 2009
HEARING TIME: 9:00 a.m.
JUDGE: Hon. Jeremy Fogel
COURTROOM: 3

ME-WUK INDIAN COMMUNITY OF THE WILTON RANCHERIA, *et al.*,

Plaintiffs,

vs.

KENNETH L. SALAZAR, *et al*,,

Defendants,

COUNTY OF SACRAMENTO, CALIFORNIA and CITY OF ELK GROVE, CALIFORNIA,

Proposed Intervenors

Case No. C-07-05706 (JF)

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on September 18, 2009, at 9:00 a.m., or as soon thereafter as the parties may be heard, the COUNTY OF SACRAMENTO, CALIFORNIA, and the CITY OF ELK GROVE, CALIFORNIA, will move this Court, at the United States Courthouse located at 280 South 1st Street, San Jose, California, 95113, Courtroom #3, for an order that they may intervene as defendants in this action as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, allowing the COUNTY OF SACRAMENTO and the CITY OF ELK GROVE permissive intervention as defendants in this matter under Rule 24(b) of the Federal Rules of Civil Procedure.

This motion is based on the following documents: this Notice of Motion and the attached Points & Authorities; the Motion to Re-Open & Vacate the Judgment and to Dismiss for Lack of Subject Matter Jurisdiction, filed herewith; the Declaration of Cathy Christian, filed herewith; the Declaration of Paul Hahn, filed herewith; the Declaration of Susan Burns Cochran, filed herewith; the proposed Answers in Intervention, lodged herewith; and all the other papers, documents, or exhibits on file or to be filed in this action, and the argument to be made at the hearing on the motion.

CLAIMS & DEFENSES TO BE ASSERTED

By intervening in this action, the COUNTY OF SACRAMENTO and the CITY OF ELK GROVE seek to assert the following defenses to Plaintiffs' actions, set out more fully in the attached Answers-in-Intervention, the Points and Authorities below, and the other documents filed herewith:

1. This Court lacks subject matter jurisdiction over Plaintiffs' claims for relief, because the statute of limitations has long since run on those claims, and that statute of limitations is jurisdictional. This defense cannot be waived by the federal defendants, and must by considered by this court *sua sponte* or even on the

suggestion of a non-party if the parties themselves do not raise it.

2. The Secretary of Interior, Defendant Kenneth Salazar, lacks the authority to take land into trust on behalf of Plaintiffs pursuant to the United States Supreme Court's recent ruling in *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009).

3. The lands at issue are not properly characterized as the "restored lands or a restored tribe" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

RELIEF SOUGHT

The COUNTY OF SACRAMENTO and the CITY OF ELK GROVE request that the Court grant leave to intervene and order the attached Answer in Intervention to be filed by the Clerk. By another motion filed herewith, the County and City also seek to have the judgment re-opened and vacated under Federal Rule of Civil Procedure 60(b), and the case dismissed for lack of subject matter jurisdiction under Rule 12(h)(3).

POINTS AND AUTHORITIES

A. INTRODUCTION.

Plaintiffs in this action have alleged that their 1964 termination as a recognized Indian tribe under the California Rancheria Act was unlawful, and seek to have their recognition restored and, further, request that certain lands within the borders and jurisdiction of the COUNTY OF SACRAMENTO ("County"), and adjacent to lands owned by the CITY OF ELK GROVE ("City"), be taken into trust by the federal government.

Plaintiffs' claims suffer a fundamental jurisdictional defect: they are barred by the statute of limitations, which is jurisdictional and therefore deprives this court of subject matter jurisdiction over the action. The United States appears to have been aware of this defect. In its Answer it set up as a First Affirmative Defense the statute of limitations, and in the only case management statement filed in this action it further noted, "[s]ubstantial defects in jurisdiction of this Court

over Plaintiffs' claims exist, including but not limited to lack of standing and statute of limitations[,]" and informed the court it expected to file a motion to dismiss on this basis. Joint Case Management Statement at 2 & 7-8, *Wilton Miwok Rancheria v. Kempthorne*, Case No. 07-cv-02681-JF (N.D. Cal.) (Dkt. #19). Yet the federal defendants thereafter dropped the issue. No motion was ever filed; no discovery appears to have been conducted. Instead the government stipulated to the entry of a settled judgment completely favoring the tribe(s).[1] This it did not have the power to do. The law is settled that executive officers of the United States may not waive the statute of limitations in suits against the government.

Nor was jurisdiction the only defect ignored by the federal defendants. In the first place, the record evidence in this case supports the conclusion that the Secretary of Interior, Defendant Kenneth Salazar, lacks the authority to take land into trust on behalf of Plaintiffs as requested, pursuant to the United States Supreme Court's recent ruling in *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009), which was decided four months before the settlement was approved. Moreover, there is no record evidence to substantiate the tribes' claim that the lands in question are the "restored lands of a restored tribe" within the meaning of the Indian Gaming Regulatory Act, entitling it to conduct casino gaming on the parcels in question. 25 C.F.R. §§ 292.11 and 292.12. Neither of these issues appears to have been actively contested by the government; indeed, the record fails to suggest they were ever seriously considered.

If the unlawful settlement is allowed to stand, and the lands in question are taken into trust as agreed, the effect would be to negate the regulatory and taxing authority the County exercises over those parcels; it would also threaten potential economic and environmental impacts to the County and City from anticipated Las

[1] The County and City recognize there are competing factions claiming to constitute the "real" Wilton Rancheria tribe, both of whom are parties to this case. Consequently, this motion refers to "tribes" throughout.

Vegas-style casino gaming activities. Given these effects, the County and City should have been joined as necessary parties to this action. Yet they were never joined as they should have been, *nor were they ever given any notice whatsoever* of the pendency of these actions until judgment was already entered. Even then, the "notice" the County and City did receive came in the form of press reports resulting from the plaintiff tribes' press release announcing the settlement.

Here again, the existing parties were aware that the County's and City's interests were implicated by the suit. In fact, when the Me-Wuk Community initially filed its suit in the District of Columbia, the United States moved to transfer venue to the Eastern District of California in part based on the fact that "the state and its political subdivisions may wish to participate in this litigation,"[2] because

> [t]he use and control of the land at issue directly touches individuals in California. Plaintiff has requested that the Secretary of the Interior take certain land into trust, "with such lands to be considered 'Indian country' as defined in 18 U.S.C. § 1151. . . ." Pl.'s Compl., 25 (Prayer for Relief, ¶ C). If such a request is granted, the local and state government in California will no longer have civil regulatory jurisdiction over such lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).[3]

Yet here again, after initially raising the issue the United States did nothing more, stipulated to the transfer of venue to this court instead of the Eastern District of California, and acquiesced to the continuing omission of the State of California and its local governments.

By all appearances, plaintiffs have steered this case so as to avoid opposition to their efforts to remove property from the regulatory jurisdiction of the County,

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[2] Def's Mot. to Transfer Venue, *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case No. 07-cv-00412-RCL (D.D.C.) (filed Apr. 20, 2007), p. 5.

[3] Def's Reply In Support of Mot. to Transfer Venue, *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case Non. 07-cv-00412-RCL (D.D.C.) (filed May 15, 2007), p. 5.

which they had to know would be controversial, and to deprive the County and City of the opportunity to protect their significant taxing, regulatory, environmental and economic interests by failing to name them as parties or even telling them about this lawsuit. And the United States has acquiesced.

Having now belatedly learned that (1) these actions exists, (2) the existing parties have entered an unlawful settlement of the claims raised, and (3) the settlement will be detrimental to the County and City, the County and City now seek to intervene in an effort to protect their interests. Those interests include preventing nullification of their jurisdictional, taxing and regulatory authority over certain parcels within the County and adjacent to lands owned by the City that the Secretary agreed to take into trust on behalf of the plaintiffs, and preventing significant economic and environmental impacts to the County and City from potential development of property within a rural area of the County including the potential for Las Vegas-style gaming facilities on these parcels. The Ninth Circuit has recognized, on facts virtually identical to these, that such interests justify intervention.

On the other hand, if intervention is denied the County and City will suffer significant detriments to their governmental, environmental and economic interests, without having any other means of recourse to protect their rights.

Given that the parties should have appropriately included the County and City in this litigation from the beginning, or at least advised them of the existence of this action so intervention could be sought sooner, and given that no notice whatsoever was provided prior to entry of judgment, the parties ought not to be rewarded for their failure to comply with joinder requirements to the detriment of the County and City. Under such circumstances intervention of right is appropriate.

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B. FACTUAL BACKGROUND.[4]

In 1958 Congress enacted the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390, which provided for the termination of various California Indian tribes' formal recognition by the federal government under specified terms. In 1964, plaintiff tribes were terminated pursuant to that Act. 29 Fed. Reg. 13,146 (Sept. 22, 1964). *See also* Complaint at 10-11 ¶ 28, *Wilton Miwok Rancheria v. Kempthorne*, Case No. 07-CV-02681-JF (N.D. Cal.) ("Wilton Complaint"); Complaint at 2 ¶ 5, *Me-wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, Case Nos. 07-CV-00412 (D.D.C.) and 07-CV-05706-JF (N.D. Cal.) ("Me-Wuk Complaint"). As part of the termination process, lands previously held in trust by the United States on the tribes' behalf were distributed to individual and communal landowners, and once distributed "[were] no longer [] exempt from any state and local laws, ordinances, or regulations." (Wilton Complaint, ¶ 22. *See also* Me-Wuk Complaint, ¶ 61.) Sacramento County has accordingly exercised local jurisdictional, taxing and regulatory authority over the affected lands for more than forty years.

In 1979, a host of California tribes—including the Wilton Rancheria—filed suit in this court, seeking to challenge their termination under the Rancheria Act. (Wilton Complaint, ¶ 32; Me-Wuk Complaint, ¶¶ 68-69; *Tillie Hardwick v. United States*, Case No. C-79-1710-SW (N.D. Cal.).) In 1983, the Wilton Rancheria stipulated to their dismissal from the action. (Wilton Complaint, ¶¶ 41-43.)

Now, more than 20 years after being dismissed from the *Tillie Hardwick* action, and more than 40 years after being terminated under the California Rancheria Act, the various factions of the Wilton Rancheria community have renewed their challenge, bringing suit again alleging that their 1964 termination

[4] "[A] district court is required to accept as true the non-conclusory allegations made in support of an intervention motion" and a proposed complaint or answer. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001).

was unlawful, and requesting (among other things) that their recognition be restored, and that any territory owned by the tribes or their members be taken into trust by the United States.

Plaintiffs' claims are barred by the statute of limitations, which is jurisdictional and cannot be waived by executive officials. 28 U.S.C. § 2401(a); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S. Ct. 750, 753 (2008) (statutes of limitations in suits against the United States are jurisdictional and cannot be waived); *Marley v. United States*, 567 F.3d 1030 (9th Cir. 2008) (applying *John R. Sand & Gravel Co.* to conclude that limitations under 28 U.S.C. § 2401(b) are jurisdictional and nonwaivable except by Congress).[5] The United States has repeatedly recognized this fact, in letters predating the litigation, in its answer in this action, and in its case management statement, yet the federal defendants have nevertheless agreed that judgment be entered in plaintiffs' favor without regard to this defense. The federal defendants have also ignored the Secretary's lack of authority to take the specified parcels into trust on behalf of the tribes without requiring any evidence in the record to substantiate the tribes' entitlement to such property and have agreed that gaming may occur on such property without similar evidence in the record to substantiate the tribes' entitlement to gaming or their status in 1934 as required by the Supreme Court.

If the requested lands are taken into trust, the jurisdictional, taxing and regulatory powers exercised by the County over the parcels in question will be nullified—a fact expressly recognized by the Wilton Complaint, which requested, among other things, relief in the form of declarations that "[t]he lands comprising Wilton Miwok Rancheria were and still are 'Indian Country' and that such lands now or in the future to be acquired by the Tribe are immune from local property taxation, assessement [sic] or other civil regulatory jurisdiction . . . ," and more

[5] For more detailed discussion of this issue, see the Motion to Re-Open and Vacate Judgment and Dismiss for Lack of Jurisdiction, filed herewith.

specifically that "[t]he lands comprising the Wilton Miwok Rancheria are not subject to the jurisdiction of Sacramento County, and further that the lands would not be subject to county regulation and taxation . . . ." (Wilton Complaint, Prayer ¶ (1)(vii) & (viii). *See also* Me-Wuk Complaint, ¶ 61 & Prayer ¶ (c); 25 U.S.C. § 465; 25 C.F.R. § 151.10(f).)

The parcels are also immediately adjacent to lands that are currently owned by the City of Elk Grove to mitigate habitat loss for endangered and threatened species, including the Swainson's Hawk. (Declaration of Elk Grove City Attorney Susan Burns Cochran, filed herewith, ¶ 10.) Moreover, pursuant to the City's general plan as updated in 2005 (two years before these actions were filed), Elk Grove filed an application with the Local Agency Formation Commission in May 2008 (more than a year before it learned of this lawsuit) to have these parcels adjacent to the proposed Rancheria taken into the City's sphere of influence. (*Id.*, ¶ 12.) Inclusion in the City's sphere of influence signals the City's expectation that the land in question will eventually be annexed to the City, and it requires consultation between the County and City regarding land use decisions on the affected parcels. (*Id.*) The County and City have also been negotiating a Memorandum of Understanding regarding future development standards for the affected area. (*Id.*, ¶ 13.) That MOU anticipates the creation of a greenbelt for environmental protection and habitat for endangered and threatened species that would include the Rancheria lands themselves. (*Id.*) Having the Rancheria in the middle of the greenbelt, but exempt from the environmental terms of the MOU, could make the greenbelt less secure and more subject to other development pressures. (*Id.*) Thus, Elk Grove has significant regulatory interests in these parcels as well. These interests, too, will be nullified if the parcels are taken into trust.

Moreover, the tribes have urged, and the government has stipulated, that when these lands are taken into trust they will be eligible for casino gaming under

the Indian Gaming Regulatory Act. Stipulation for Entry of Judgment, ¶¶ 3 & 10; 25 U.S.C. § 2719(b)(1)(B)(iii). It is no secret that large commercial developments—like casino gaming—typically have significant effects on the surrounding local governments. (Burns Cochran Decl., ¶¶ 5-13; Declaration of Paul Hahn, filed herewith, ¶ 10. *See also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 140 & 142 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 541 U.S. 974 (2004) [summarizing detrimental economic and environmental impacts of proposed casino to surrounding community].) That is why, in the normal case, local officials must be consulted before gaming can be conducted on property tribes acquire after October 17, 1988, and the State's governor must give his approval. 25 U.S.C. § 2719(b)(1)(A). The unlawful settlement in this action, however, seeks to improperly bypass these procedural protections for state and local governments' taxing, regulatory, economic and environmental interests. The County and City will not have another forum to protect these interests if intervention is denied.

Despite the significant governmental, environmental and economic interests the County and City have in the parcels in question, neither the County nor the City were named as parties to this action. Indeed, the local jurisdictions were not even given any notice—formal or informal—of the pendency of these actions. (Hahn Decl., ¶ 2; Burns Cochran Decl., ¶ 14.) The County and City first learned that the suits existed in mid-June 2009, after the plaintiff tribes apparently issued a press release announcing the settlement (in other words, once judgment was already entered). (*Id.*) In fact, counsel for one of the plaintiff tribes acknowledged to the Elk Grove city attorney after the settlement was approved that notice was not provided. (Burns Cochran Decl., ¶ 14.) Finally, it is worth noting that these actions have been conducted in Washington, D.C., and San Jose—far from Sacramento and outside the Eastern District of California where the County and City are situated, and where they might conceivably have learned of these actions independently.

C. THE PARTIES SHOULD NOT COMPLAIN ABOUT THE EFFORTS OF SACRAMENTO COUNTY AND THE CITY OF ELK GROVE TO INTERVENE, AS THE COUNTY AND CITY SHOULD HAVE BEEN JOINED IN THIS SUIT AS NECESSARY PARTIES FROM THE BEGINNING, OR AT THE VERY LEAST GIVEN NOTICE OF ITS PENDENCY.

Under Federal Rule of Civil Procedure 19(a)(1)(B), "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

There can be no question that the County and City "claim an interest relating to the subject of the action." As the government recognized, in the passage quoted above, and as the Wilton Rancheria recognized in their complaint, if lands are taken into trust by the federal government as requested by the plaintiffs, "the local and state government in California will no longer have civil regulatory jurisdiction over such lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)." *See also* 25 C.F.R. § 1.4(a) (Indian trust lands exempt from local zoning and regulatory requirements). They will likewise lose taxing authority over the parcels. 25 U.S.C. § 465. Moreover, if the lands are deemed "restored lands" subject to gaming, the County and City will lose the consultation rights guaranteed to them under Section 20 of IGRA before gaming may be conducted, 25 U.S.C. § 2719(b)(1)(A) & (b)(1)(B)(iii), and the lack of consultation places the County and City at risk of suffering severe economic and environmental impacts from the gaming operations resulting from this action without any other forum to protect their interests.

Nor can there be any question the County and City's interests will be, as a practical matter, impaired by disposing of this action without their involvement. Numerous courts have held that that Quiet Title Act, 28 U.S.C. § 2409a, entirely precludes a plaintiff's suit to the extent it seeks to nullify an Indian trust acquisition. *See, e.g., Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975). Consequently, any challenge to taking the land into trust must be made *before* the lands are taken into trust, a step that may well be imminent in this case. *See Restoration of Wilton Rancheria*, 74 Fed. Reg. 33468 (July 13, 2009). If intervention is not permitted here, the ability to challenge the United States's agreement to take the specified parcels into trust will, as a practical matter, be virtually non-existent.

Moreover, if the County and City were to challenge the trust acquisition in a separate suit, the United States may seek to defend on the grounds that the Tribe is an indispensable party in light of this action that cannot be joined because of its sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Absent Congressional action, consent or waiver, an Indian tribe may not be subject to suit in state or federal court.").[6]

Wyandotte Nation v. City of Kan. City, 200 F. Supp. 2d 1279 (D. Kans. 2002), is instructive on this point. In that case an Indian tribe sought to quiet title over certain parcels for use in casino gaming. On a motion by the State of Kansas, the court held that the State *was* a necessary party to action, because it recognized that "if plaintiff prevails and title to the land is quieted in the tribe, Kansas would lose the taxation, regulatory, and jurisdictional powers it exercises over these

[6] The County and City do not concede that the Tribe would be an indispensable party to such suit—just that the defense may be raised. But if that defense is not successful the other basis for the County and City being a necessary party is implicated: filing a separate suit challenging the trust acquisition would "leave [the United States] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . ." They will be bound by the judgment in this action to take the land into trust, but also potentially subject to another action by the County and City seeking to prevent them from doing so.

lands." The same is true here. If the County is not permitted to challenge the settlement in this case then it will lose the "taxation, regulatory, and jurisdictional powers it exercises over these lands."

Also instructive is *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 140 & 142 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub nom. Citizens for Safer Cmtys. v. Norton*, 541 U.S. 974 (2004). In that case, the district court for the District of Columbia held that municipalities have significant interests that support their challenging the economic and environmental impacts of potential casino gaming under IGRA, even if the parcels on which the casino will be built are outside the cities' boundaries.

D. SACRAMENTO COUNTY AND THE CITY OF ELK GROVE ARE ENTITLED TO INTERVENE OF RIGHT PURSUANT TO FRCP 24(a).[7]

Ninth Circuit case law requires "an applicant for intervention as of right to demonstrate that '(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.'" *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). "Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir.), *cert. denied sub nom. Hoohuli v. Lingle*, 540 U.S. 1017 (2003). The City and County easily meet these criteria.

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[7] In the alternative, if intervention of right is denied to one or both parties, permissive intervention would be appropriate here. There are common questions of law and fact related to the court's subject matter jurisdiction, and to the Secretary's authority to take land into trust on behalf of the plaintiffs, and allowing intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Proc. 24(b).

1. The County and City have significant protectable interests in these actions.

There can be no question that the County and City have significant protectable interests in this action in protecting their governmental authority over the parcels that plaintiffs seek to have taken into trust, and their economic and environmental interests threatened by the possibility of casino gaming on the parcels in question.

Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States, 921 F.2d 924 (9th Cir. 1990) ("*Scotts Valley*"), is directly on point. In that case the City of Chico moved to intervene of right to defend its taxing and regulatory interests in a suit demanding reinstatement by a tribe after unlawful termination under the California Rancheria Act—*exactly the facts at issue here.* The trial court denied intervention, and the Ninth Circuit reversed, holding that a local jurisdiction has a significant protectable interest, sufficient to support intervention of right, in protecting its taxing and regulatory powers over a parcel when there is a risk those powers will be nullified by having lands improperly taken into trust. *See also Miami Tribe of Okla. v. Walden*, 206 F.R.D. 238 (S.D. Ill. 2001) (threat to State of Illinois's taxing and regulatory jurisdiction sufficient to warrant intervention in an action by a tribe claiming ownership and sovereign control over land in the State).

And again, the courts have also recognized that the economic and environmental impacts of potential casino gaming under IGRA are appropriately challenged by municipalities, even if the parcels on which the casino will be built are outside the cities' boundaries. *See City of Roseville*, 219 F. Supp. 2d at 140 & 142.

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2. The disposition of these action "may, as a practical matter, impair or impede the [the County and City]'s ability to protect [their] interest[s]."

With respect to this criterion, too, *Scotts Valley* is directly on point. In that case the Ninth Circuit recognized that a tribe's attempt to evade the Secretary's land-into-trust regulations, which require consideration of a local jurisdiction's taxing and regulatory interests, and to force the Secretary to take land into trust by litigation instead, means the local jurisdiction's "claims will go unheard and its interests unprotected." *Scotts Valley*, 921 F.2d at 928. As in that case, "allowing the [County and] City to intervene in this action is the only practical means of protecting [their] taxing and regulatory interest[s]." *Id.*

Moreover, even this does not fully state the degree to which denying intervention would deprive the County and City of a means to protect their interests, because it does not address the draconian effect of the Quiet Title Act, 28 U.S.C. § 2409a, discussed above, which will absolutely preclude a suit challenging the land's trust status once title is transferred to the federal government. Nor does it address the potential difficulties a subsequent lawsuit would face in light of tribal sovereign immunity. If intervention is not permitted here, the ability to protect the County and City's regulatory, taxing, environmental and economic interests by challenging the United States's agreement to take the specified parcels into trust will, as a practical matter, be virtually non-existent.

3. This motion is timely.

"There is no bright-line rule delineating when a motion to intervene is or is not timely." *Bridge v. Air Quality Tech. Servs.*, 194 F.R.D. 3, 8 (D. Me. 1999). "Timeliness is to be determined from all the circumstances," *NAACP v. New York*, 413 U.S. 345, 366 (1973). In determining whether a motion is "timely," a court generally evaluates three factors: (1) the stage of the proceedings, prejudice to existing parties, and the length of, and reason for, any delay in seeking to

intervene. *California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002). Courts assess these criteria, and the issue of timeliness, especially "leniently" when intervention is sought of right, because of the "likelihood" of "serious harm." *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (overturning denial of State of Idaho's motion to intervene as untimely).

a. Stage of proceedings. Post-judgment intervention is permissible. *Yniguez v. Arizona*, 939 F.2d 727, 734-35 (9th Cir. 1991) (upholding trial court's decision to permit post-judgment intervention); *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1095-96 (9th Cir. 1991) (reversing denial of motion to intervene brought 16 years after lawsuit filed and *10 years after consent decree entered by court*); *United States v. Coffee County Bd. of Educ.*, 134 F.R.D. 304 (S.D. Ga. 1990) (motion to intervene was timely though filed 20 years after desegregation decree entered, and six months after school board adopted plan to modify consent decree); *Wilson v. Southwest Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983) (allowing intervention as timely filed 54 days after judgment entered).

In fact, the Ninth Circuit has repeatedly held there is a "general rule that a post-judgment motion to intervene is timely if *filed* within the time allowed for the filing of an appeal." *Yniguez,* 939 F.2d at 734 (emphasis added); *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394-95 (9th Cir. 1992) (overturning denial of post-judgment intervention as abuse of discretion). In this case, the time for an appeal to be filed has not yet run as of the date of this filing, and will not do so until August 7. Fed. R. App. Proc. 4(a)(1)(B) (60 days for any party to appeal when United States is a party to the action).

The courts have recognized that post-judgment intervention is especially appropriate when "it is the only way to protect the intervenor's rights." *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 294 (N.D. Cal. 1976). In this case, intervention is the only way, as a practical matter, to protect the County's and

City's taxing, regulatory, economic and environmental interests. Again, the Quiet Title Act precludes a challenge to trust acquisitions on behalf of an Indian tribe once the land has already been taken into trust, and a subsequent suit would face joinder difficulties on the basis of tribal immunity. Consequently, this action is the only practical vehicle for the County and City to challenge the United States agreement to take land into trust on behalf of Plaintiffs.

b. Lack of prejudice to existing parties. In addressing this criterion, the relevant question "is whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995). *See also McGough*, 967 F.2d at 1395 ("Industrial Indemnity's position following intervention is essentially the same as it would have been had the government intervened earlier.").

In this case, the parties can hardly complain about the County and City's failure to intervene before judgment was entered. The County and City should have been joined as defendants in this action as necessary parties. But not only were they not named, the County and City were not even given notice that the actions were pending until the Band distributed a press release announcing the settlement in mid-June of this year. Therefore, any prejudice the parties experience is attributable to their own failure to properly join the County and City—or to at least notify them of the pendency of this action, which they knew would affect their governmental interests—and most certainly should not be held against the County and City. *See United States v. Alcan Aluminum*, 25 F.3d 1174, 1182 (3d Cir. 1994) ("timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening.").

The lack of notice is highly relevant to the question of prejudice to the parties. In addressing this criterion the Ninth Circuit has recognized that intervention "has been granted after settlement agreements were reached in cases

where the applicants had no means of knowing that the proposed settlements was [sic] *contrary to their interests.*" *United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) (emphasis added). *See also Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) ("For the purpose of determining whether an application for intervention is timely, the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention *as soon as he knew or should have known of his interest in the case.*" (emphasis added)).

As for the period between the entry of judgment (and the corresponding press reports) in June, when the County and City learned of the settlement, the parties' "position following intervention is essentially the same as it would have been had the [County and City] intervened earlier." *McGough*, 967 F.2d at 1395. There have been no further developments in the litigation since that time.

The County and City should have been included in this action from the start. The existing parties ought not to have their failure to do so rewarded by now claiming they will be prejudiced by the County and City's actions prior to this time.

c. Length of delay and reason for delay. In addressing this prong, the courts consider the length and reason for delay from the time the movant "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.'" *Cal. Dep't of Toxic Substances Control*, 309 F.3d at 1120 (quoting *United States v. State of Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)). Again, the County and City did not learn of the pendency of these actions until mid-June 2009, after judgment had already been entered.

Upon learning of the settlement, the County and City moved expeditiously to seek intervention. County and City officials immediately began investigating the relevant facts, circumstances and implications regarding the settlement and the history of this litigation. (Burns Cochran Decl., ¶ 15(a); Hahn Decl., ¶¶ 2 & 4.)

The Elk Grove City Council then adopted a resolution on June 24, 2009—at

the first Council meeting at which the settlement could be addressed consistent with state open meeting laws—"expressing its concern with the manner of the settlement, and urging the State of California to intervene in these actions to challenge the settlement." (Burns Cochran Decl., ¶ 15(a); Christian Decl., ¶ 2; Hahn Decl., ¶ 4.) The City contacted County staff about the resolution, and sought County support for its efforts. (Hahn Decl., ¶ 4.)

The County Board of Supervisors was then on a four-week, pre-planned summer recess, as a consequence of which no Board meetings were held during the four weeks between June 16 and July 14, 2009. (Hahn Decl., ¶ 3). The Board could not be consulted about formally intervening in the litigation at that point. (*Id.*) Only the County Board of Supervisors may authorize initiate litigation on behalf of the County, or intervention in litigation. (*Id.*)

Nevertheless, to protect the land use jurisdiction of the County, and concerned about the impacts of any development project in this area of the County, the County began consulting with the City to request intervention by the State of California to set aside the settlement. (Hahn Decl., ¶¶ 4-5.) Two days after the City adopted its resolution, on June 26, 2009, the City and the County sent a joint letter to Governor Arnold Schwarzenegger requesting that the State of California intervene in this matter. (Hahn Decl., ¶ 5. *See also* Burns Cochran Decl., ¶ 15(c); Christian Decl., ¶ 2.)

On July 1, 2009, the City retained the law firm of Nielsen, Merksamer, Parrinello, Mueller & Naylor as special counsel to assist the City in addressing this matter, because the firm has considerable experience and specialized knowledge in federal Indian law and the law governing Indian gaming. (Christian Decl., ¶ 1; Burns Cochran Decl., ¶ 15(d).)

On July 2, 2009, representatives of the County and City, accompanied by special counsel in this action, Cathy Christian, met with representatives of Governor Arnold Schwarzenegger. (Christian Decl., ¶ 3; Burns Cochran Decl., ¶

15(e); Hahn Decl., ¶ 6.) The purpose of the meeting was to further inquire whether the State of California intended to challenge the land use aspects of the Stipulation, because it proposes to remove certain land from state and local jurisdiction. (*Id.*) The Governor's representatives indicated that they also only recently learned of the Stipulation as well but were immersed in budget discussions and had few resources to devote to this issue at that time. They indicated that they would get back to the City and the County after further consideration. (*Id.*) No subsequent communication from the Governor's office has been received. (*Id.*)

Around the same time special counsel also spoke with representatives of the California Attorney General's office about whether the Attorney General might initiate action challenging the Stipulation, but was informed that the Attorney General acts on matters such as this only upon request of the Governor. (Christian Decl., ¶ 4.)

After more than a week without a response from the Governor, the City authorized its special counsel to research and consider direct intervention by the City in the litigation to protect its interests. Special counsel undertook a comprehensive review of the record in these suits and the relevant case law regarding the protection of the City's interests. (Christian Decl., ¶ 5; Burns Cochran Decl., ¶¶ 15(f) & (g); Hahn Decl., ¶ 7.)

The City urged the County to join it in litigation. (Burns Cochran Decl., ¶ 15(f).) Though the County Board of Supervisors was then still in recess, to protect the County's interests County Counsel retained special counsel to also advise the County as to its legal options, including intervention in this matter so as to set aside the judgment, pending Board approval. (Hahn Decl., ¶ 7; Christian Decl., ¶ 6.)

Upon completion and review of special counsel's research and analysis, the County and City authorized Nielsen Merksamer to prepare pleadings in intervention, which it promptly did. (Christian Decl., ¶ 7; Burns Cochran Decl., ¶

15(g); Hahn Decl., ¶ 7-8.) Special counsel provided intervention pleadings to the County and City for review and approval on or about August 1, 2009. (Hahn Decl., ¶ 8; Christian Decl., ¶ 7; Burns Cochran Decl., ¶ 15(g).)

With no answer forthcoming from the State, and with the clock ticking, the County and City elected to proceed on their own, while the time to appeal is still open. *See McGough*, 967 F.2d at 1395 (when government filed post-judgment motion to intervene within time to appeal, denial of intervention was abuse of discretion and was reversed). Final authorization to file the pleadings was received August 4, 2009, and the pleadings are being filed the same day. (Hahn Decl., ¶ 9; Christian Decl., ¶ 7; Burns Cochran Decl., ¶ 15(g).)

United States v. Carpenter, 298 F.3d 1122, 1125 (9th Cir. 2002) (per curiam), is instructive. In that case, the Ninth Circuit held that the trial judge abused his discretion in denying intervention as untimely when the intervenors moved to intervene after 18 months of litigation, six months of court-ordered mediation and four days of settlement proceedings, and on the eve of approval of the final judgment, when they had *had no notice* that the proposed settlement was contrary to their interests until it was submitted to the court for approval and publicly disseminated.

Also instructive is *Officers for Justice*, 934 F.2d at 1095-96, in which intervention was sought *10 years* after a consent decree was entered in the action, because until that time the intervenor had no notice that his union was taking a position contrary to his interests.

And in *Wilson v. Southwest Airlines Co.*, 98 F.R.D. 725 (N.D. Tex. 1983), the court held that a post-judgment motion to intervene was timely where the union sought to intervene two months after judgment was entered (almost exactly the time lapsed here), but where the union had also delayed intervention for *three* months from the time the time a settlement was approved by the court and the union should have known its interests were threatened. *Id.* at 730. In this case, the

County and City had no reason to know that its interests were threatened until judgment was already entered.

4. The parties do not adequately represent the County's and City's interests.

"In assessing whether a present party will adequately represent an intervenor-applicant's interests, [courts must] 'consider several factors, including whether [a present party] will undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.' [Citation.] *The burden of showing inadequacy of representation is minimal and 'is satisfied if the applicant shows that representation of its interests "may be" inadequate . . . .'" Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (emphasis added)).

Yet again, *Scotts Valley* is on point. In that case, the Ninth Circuit held, "the remaining defendants to the action, the federal Government and federal officials only, are not in a position adequately to protect any of the City's municipal interests. The United States and its officials, because they do not directly share the City's municipal interest, will not necessarily act to protect that interest." *Scotts Valley*, 921 F.2d at 926-27. *See also Carpenter*, 298 F.3d at 1125 (per curiam) ("there is no presumption that one governmental entity represents another.").

In this case, the inadequacy of representation is even less speculative than in *Scotts Valley*. Here, the United States *has not* advanced the arguments that the County and City propose to advance, and *has not* represented the County's and City's interests. This unquestionably meets the "minimal" burden placed on the County and City under this prong.

E. CONCLUSION.

In light of (1) the County's and City's significant interests in this litigation,

(2) the failure of the parties to join the County and City as necessary parties, (3) the failure to even notify the County and City of the pendency of these actions, (4) the fundamental defects of subject matter jurisdiction in this case, which cannot be waived by the parties and must be considered by the court *sua sponte* if need be, and the other significant defects with the settlement that threaten the County's and City's interests, intervention of right (or alternatively by permission) should be granted.

Dated: August 4, 2009

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