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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; RYAN ZINKE, in his official capacity as Secretary of the Interior; MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1 to 100, Defendants.	Case No. 16-cv-7189-LB **MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, MOTION 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

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on Thursday, May 25, 2017, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom C, 15th Floor, before the Honorable Laurel Beeler, Defendants, United States Department of the Interior, Ryan Zinke, in his official capacity as Secretary of the Interior, and Michael S. Black, in his official capacity as Acting Assistant Secretary-Indian Affairs of the United States Department of the Interior,[1] will move to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) or to transfer this case pursuant to 28 U.S.C. § 1406(a) to a district where it could have been brought. Plaintiff, who resides in the Eastern District of California, has filed this action to challenge a determination by the Department of the Interior in Washington, D.C. Thus, because this case does not have a connection to the Northern District of California, the Court should either dismiss or transfer this action to the U.S. District Court for the Eastern District of California or the District of Columbia. In the alternative, Defendants move pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing Plaintiff's complaint for failure to state a claim. Defendants base this motion on this notice, the accompanying memorandum of points and authorities, the Court's files and records in this matter, and other matters of which the Court takes judicial notice, and any oral argument that may be presented to the Court.

RELIEF SOUGHT

Defendants seek an order dismissing this action for lack of proper venue or an order of transfer to the United States District Court for the Eastern District of California or the District of Columbia. Alternatively, Defendants seek an order dismissing the claims asserted in Plaintiff's complaint for failure to state a claim.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Secretary of the Interior Ryan Zinke and Acting Assistant Secretary-Indian Affairs Michael S. Black are automatically substituted for former Secretary Sarah Jewell and former Deputy Assistant Secretary Lawrence S. Roberts, respectively, as the defendants in this action.

ISSUES TO BE DECIDED

1. Whether this action should be dismissed or transferred because Plaintiff has failed to establish that venue in the Northern District of California is proper.

2. Whether dismissal is appropriate because Plaintiff has failed to identify any agency action that is legally required.

3. Whether dismissal is appropriate because Plaintiff's claims are barred by the applicable statute of limitations.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this action, Plaintiff, Tsi Akim Maidu of Taylorsville Rancheria, purports to challenge a June 2015 letter from then-Assistant Secretary-Indian Affairs Kevin K. Washburn addressing the termination of the Federal relationship with the Plaintiff when the United States sold the Taylorsville Rancheria in 1966 pursuant to Congressional mandate. Although Plaintiff refers to itself as a California Indian Tribe, Plaintiff does not appear on the Department of the Interior's list of federally recognized Indian tribes and is not recognized as an Indian tribe by the United States. *See* 25 U.S.C. § 5131; 82 Fed. Reg. 4,915 (Jan. 17, 2017). Plaintiff seeks a writ of mandamus and declaratory and injunctive relief against the Department of the Interior, the Secretary of the Interior, and the Acting Assistant Secretary-Indian Affairs (collectively, "Defendants"), and asks this Court to compel Defendants to find that Plaintiff never lost its status as a federally recognized Indian tribe.

As Plaintiff's own pleading reflects, a substantial part of the events or omissions giving rise to Plaintiff's claims occurred "near," but not *in*, the Northern District of California. Because Plaintiff cannot otherwise establish that venue is proper in this district under 28 U.S.C. § 1391(e)(1), the Court should dismiss this case for improper venue or transfer it to the Eastern District of California or the District of Columbia.

In the alternative, dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is warranted. The crux of this action -- Plaintiff's claim that it is entitled to an order compelling Defendants to confer Federal recognition upon it -- is subject to dismissal for two

independent reasons. First, Plaintiff cannot identify any source of law that imposes upon the Department of the Interior a duty to add the Plaintiff to the list of federally recognized tribes and therefore has not plead any agency action that is wrongfully withheld. Moreover, Plaintiff's claims first accrued well outside the six-year statute of limitations applicable to civil actions brought against the United States, and are therefore barred. Accordingly, for the reasons explained below, Defendants respectfully request that the Court dismiss or transfer this action for improper venue or, in the alternative, dismiss this action for failure to state a claim.

II. FACTUAL BACKGROUND

Plaintiff, Tsi Akim Maidu of Taylorsville Rancheria, claims to be a "California Indian Tribe" that is included in the Northeastern Maidu group (aka Mountain Maidu) in Plumas County. Compl. ¶ 18. Plaintiff occupied the American, Genesee, and Indian valleys in what is now Plumas County. *Id.*

In 1958, Congress enacted the California Rancheria Act, 72 Stat. 619, which authorized the Secretary to terminate federal recognition of 41 California Rancherias. Plaintiff was not specifically named as one of the 41 rancherias to be sold. *See id.* In 1964, Congress amended the California Rancheria Act to authorized the Secretary to sell vacant California Rancherias. 78 Stat. 390 (1964). The Act required the Secretary to sell vacant Rancherias held for California Indians generally, and deposit the money to the interest of California Indians. *See* Section 5(d), 78 Stat. 390, 391 (1964). The Act authorized the Secretary to sell vacant Rancherias held for "a named tribe, band, or group," with proceeds deposited to the credit of the named entity. *See id.* When the Secretary sold Taylorsville Rancheria in 1966, the proceeds were deposited to the credit of the California Indians, *see* Compl. ¶ 10, establishing that the Secretary did not consider the Indians associated with the Taylorsville Rancheria to be "a named tribe, band, or group."

In 1998, Plaintiff submitted a letter of intent to petition for acknowledgment as a federally recognized Indian tribe under the Department of the Interior's "Procedures for Establishing that An American Indian Group Exists As An Indian Tribe" set forth in 25 C.F.R. 83 ("Part 83 procedures"). Compl. ¶ 4. The Part 83 process is the uniform procedure instituted by the Department of the Interior by which an entity may seek formal federal recognition and sets forth the criteria necessary for

acknowledgment as a federally recognized Indian tribe. 25 C.F.R. § 83.11, 80 Fed. Reg. 37,889 (July 1, 2015). The regulations are applicable "only to indigenous entities that are not federally recognized Indian tribes." 25 C.F.R. § 83.3, 80 Fed. Reg. 37,888 (July 1, 2015). Plaintiff then sought clarification from the Department of the Interior about its status as a federally recognized Indian Tribe. Compl. ¶ 11. In a letter dated June 9, 2015, then-Assistant Secretary-Indian Affairs Washburn responded that Defendants had sold the Taylorsville Rancheria on November 4, 1966 to Plumas County pursuant to Section 5(d) of the amended California Rancheria Act as a vacant rancheria, and that the sale of the Taylorsville Rancheria was equivalent to Congressional termination of the federal relationship with the Plaintiff. *Id.* ¶ 25.

Plaintiff alleges that the sale of the Taylorsville Rancheria did not legally terminate its status as an Indian tribe. *Id.* ¶ 28. Plaintiff has brought this action claiming that Defendants violated its "statutory rights" by refusing to recognize Plaintiff's members as Indians, *id.* ¶¶ 26-30, unlawfully interpreted the California Rancheria Act, *id.* ¶¶ 31-36, and unlawfully denied the status of Plaintiff as a federally recognized tribe because of the alleged misinterpretation of the California Rancheria Act, *id.* ¶¶ 35-37.

III. ARGUMENT

A. This Case Should Be Dismissed or Transferred Because Venue in the Northern District of California Is Improper

1. Legal Standard

Federal Rule of Civil Procedure 12(b)(3) provides that a defendant may seek to dismiss an action for improper venue. Fed. R. Civ. P. 12(b)(3). The plaintiff bears the burden of demonstrating that venue is proper. *Munson v. California*, No. C 08-5053 SBA, 2009 WL 264838, at *1 (N.D. Cal. Feb. 4, 2009) (citation omitted). On a Rule 12(b)(3) motion, "the pleadings need not be accepted as true, and the court may consider facts outside of the pleadings," but the court must draw all reasonable inferences and resolve all factual conflicts in favor of the non-moving party. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). In an action against an agency of the United States or an officer or employee of the United States acting in his official capacity, venue is proper in any judicial district in

which: (A) a defendant resides; (B) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the action is situated; or (C) the plaintiff resides if no real property is involved in the action. 28 U.S.C. § 1391(e)(1). *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. CV 12-4407-SC, 2013 WL 120185, at *1-2 (N.D. Cal. Jan. 8, 2013).

2. Dismissal Is Appropriate Because This District Is Not A Proper Venue

Here, Plaintiff cannot establish venue in the Northern District of California under 28 U.S.C. § 1391(e). To begin, Plaintiff suggests that venue is proper under § 1391(e)(1)(B) because "a substantial part of the events or omissions giving rise to Plaintiff's claims occurred *near* this District." Compl. ¶ 2 (emphasis added). The complaint further alleges that Plaintiff is "included in the Northeastern Maidu group (aka Mountain Maidu) in Plumas County" and that it "occupied the American, Genesee, and Indian valleys in what is now the Plumas County." *Id.* ¶ 18. The occurrence of events or omissions giving rise to Plaintiff's claims in proximity to this district -- specifically, in Plumas County in the neighboring Eastern District of California[2] -- does not confer venue in the Northern District of California. Nor can Plaintiff satisfy either of the other bases for venue under § 1391(e)(1). For purposes of § 1391(e)(1)(A), federal government defendants do not reside in every judicial district in which an agency has an office, but instead are generally deemed to reside in the District of Columbia. *Reuben H. Donnelly Corp. v. FTC*, 580 F.2d 264, 267 (7th Cir. 1978); *Williams v. United States*, No. C-01-0024, 2001 WL 1352885, at *1 (N.D. Cal. Oct. 23, 2001). As to § 1391(e)(1)(C), Plaintiff has identified on the Civil Cover Sheet its county of residence as Plumas County in the Eastern District of California. *See* ECF No. 2. Thus, the Northern District of California is not a proper venue under § 1391(e)(1) and, consequently, Plaintiff's complaint should be dismissed.

[2] *See* http://www.caed.uscourts.gov/caednew/index.cfm/cmecf-e-filing/jurisdiction-and-venue/ (last visited Apr. 17, 2017) ("All civil and criminal actions and proceedings of every nature and kind cognizable in the United States District Court for the Eastern District of California arising in . . . Plumas . . . counties shall be commenced in the United States District Court sitting [in] Sacramento, California, and in Redding, California, or other designated places within those counties as the Court shall designate when appropriate for Magistrate Judge criminal proceedings.").

3. In the Alternative, the Court Should Transfer This Case

If venue is improper, the district court has the discretion to either dismiss the case or, in the interests of justice, to transfer the case to a district where it could have been brought. *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992); 28 U.S.C. § 1406(a). This case could have been brought in either the Eastern District of California, where the Plaintiff resides, or the District of Columbia, where the Defendants reside and from where the June 9, 2015 letter issued. Accordingly, if the Court determines that the interests of justice would be served, the Court should transfer this case to the Eastern District of California or the District of Columbia.

B. Alternatively, the Court Should Dismiss This Action for Failure to State a Claim

1. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in a complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). To survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a pleading does not require "detailed factual allegations," it must do more than merely offer "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" without "further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 555). A complaint that consists only of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" is subject to dismissal under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Courts construe the allegations in the complaint in the light most favorable to the non-moving party and all material allegations in the

complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). However, a court is not required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, unreasonable inferences, or unwarranted deductions of fact. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

2. The General Jurisdiction Statutes Do Not Waive Sovereign Immunity

Through this action, Plaintiff seeks a writ of mandamus and declaratory and injunctive relief. In order to bring suit against the United States, a plaintiff must establish that the United States, as a sovereign, has consented to be sued on the particular claim or claims to be brought. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity is a jurisdictional prerequisite to suit which may be asserted at any stage of the proceeding. *Sherwood*, 312 U.S. at 586. Waivers of sovereign immunity must be unambiguously expressed, and consent will not be enlarged beyond what the language of the statute requires. *Dep't of Energy v. Ohio*, 503 U.S. 607, 614-16 (1992); *Mitchell*, 445 U.S. at 538; *United States v. Testan*, 424 U.S. 392, 399 (1976). Plaintiff bears the burden of establishing both the subject matter jurisdiction of the district court and a waiver of sovereign immunity applicable to its claim. *See Powelson v. United States*, 150 F.3d 1103, 1105 (9th Cir. 1998). Absent such a waiver, sovereign immunity bars both equitable and legal claims. *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 792 (9th Cir. 1986).

Plaintiff has brought this action under 28 U.S.C. § 1331 (federal question jurisdiction), § 1362 (jurisdiction over civil actions brought by any Indian tribe); the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-703; the Mandamus Act, 28 U.S.C. § 1361, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* *See* Compl. ¶ 1. "A statute may create subject matter jurisdiction yet not waive sovereign immunity." *Powelson*, 150 F.3d at 1105. Plaintiff has cited general jurisdiction statutes, 28 U.S.C. § 1331 and 28 U.S.C. § 1362, that do not provide a waiver of the sovereign immunity of the United States and its officers. *See Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994) (holding that 28 U.S.C. § 1331, the general grant of federal question jurisdiction, does not waive the sovereign immunity of the United States and its officers); *Assiniboine*,

792 F.2d at 792 (explaining that 28 U.S.C. § 1362 is a general jurisdictional provision and does not provide a waiver of sovereign immunity). The mandamus statute, 28 U.S.C. § 1361, similarly does not waive sovereign immunity. *See Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999). Furthermore, 28 U.S.C. § 2201 is also inapplicable because it provides only the remedy of a declaratory judgment and neither grants subject matter jurisdiction nor waives sovereign immunity. *See United States v. King*, 395 U.S. 1, 5 (1969); *Morongo Band of Mission Indians v. Calif. State Bd. of Equalization*, 858 F.2d 1376, 1382 (9th Cir. 1988) (finding that the Declaratory Judgment Act merely creates remedy in cases otherwise within the court's jurisdiction, but does not constitute an independent basis for jurisdiction); *Jarret v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970) (stating that the Declaratory Judgment Act does not waive the federal government's sovereign immunity). Thus, Plaintiff has not identified an applicable waiver of sovereign immunity in the general jurisdiction statutes or the Declaratory Judgment Act.

3. Plaintiff's Complaint Does Not Implicate Any Agency Failure to Act

The complaint also cites the APA's authorization of actions against federal agencies and officers as conferring jurisdiction upon this Court. Plaintiff's claim fails, however, to state a claim to relief under the APA. The APA generally waives the Government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. The APA provides relief for an agency's failure to act in § 706(1), which directs courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As the Supreme Court has explained, the only agency action that can be compelled must be "discrete" as well as "legally required." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004); *Hells Canyon Preserv. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). That is, the agency's legal obligation "is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Preserv. Council*, 593 F.3d at 932.

Here, Plaintiff purports to bring this action under the APA, alleging that Defendants erroneously determined that the sale of the Taylorsville Rancheria pursuant to the California Rancheria Act

terminated Plaintiff's status as an Indian tribe and that Defendants unlawfully interpreted the California Rancheria Act to deny that its members are Indians whose status was "never terminated." Compl. ¶¶ 28, 29, 33. Tellingly, Plaintiff's requested relief is not to ask the Court to review the Department's interpretation of the California Rancheria Act or otherwise enforce any discrete federal responsibility or statutory duty.[3] Rather, Plaintiff asks the Court to compel the Department to confer upon it federal recognition as an Indian tribe. *See id.* ¶¶ 36-37 & Prayer for Relief. Plaintiff does not, and cannot, identify any statute or regulation that imposes upon the Secretary a duty to add Plaintiff to the list of federally recognized tribes.

Plaintiff also alleges that it filed a "letter of intent to petition for acknowledgment as an Indian tribe under the Part 83 process" in 1998. *Id.* ¶ 4. But Plaintiff does not elsewhere allege that it actually submitted a petition, or that a decision has been made on any such petition. Absent an actual petition under Part 83, upon which the Department rendered a final determination, a mere statement of intent does not confer any legal responsibilities on the Department so as to confer APA jurisdiction.

Finally, courts have held that federal recognition of a tribe, with a government-to-government relationship with the United States, may only be conferred by the political branches of government. *See Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1031 (E.D. Cal. 2012); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) (observing that "a suit that sought to direct Congress to federally recognize an Indian tribe would be non-justiciable as a political question"). As the Supreme Court has stated: "[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." *United States v. Holliday*, 70 U.S. 407, 419 (1865). In *Robinson*, the plaintiffs sought a judicial determination that they were present-day embodiment of an ancient tribe. *Robinson*, 885 F. Supp. 2d at 1011-12. The court denied the plaintiffs' request, holding that "[w]hile plaintiffs argue that they do not seek federal recognition through this litigation, their claims necessarily require the court place the Kawaiisu on the List and thus to inject the Court in processes

[3] As discussed *infra*, such a request would be barred by the applicable statute of limitations in any event.

expressly left to the province of the Executive, as delegated by Congress." *See id.* at 1031. Plaintiff here seeks the same relief sought by the Kawaiisu in *Robinson* -- a court order compelling the Secretary to add Plaintiff to the list of federally recognized tribes -- and, unlike the Kawaiisu, does so explicitly. Plaintiff's claim should accordingly be dismissed for failure to state a claim and as unreviewable.

4. Plaintiff's Claims Are Also Barred by the Statute of Limitations

In seeking an order compelling Defendants to find that Plaintiff never lost its status as a federally recognized Indian Tribe and to declare Plaintiff a "federally [recognized] tribe," *see* Compl. p. 7, Plaintiff's claims necessarily imply that Defendants have wrongly excluded Plaintiff from the list of federally recognized tribes. Plaintiff's complaint is barred by the applicable statute of limitations in 28 U.S.C. § 2401(a), which provides that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a); *Mishewal Wappo Tribe of Alexander Valley v. Jewell*, 84 F. Supp. 3d 930, 935 (N.D. Cal. 2015). The Ninth Circuit has found § 2401(a) is not jurisdictional in nature. *See Cedars-Sinai Medical Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997); *Wilton Miwok Rancheria v. Salazar*, Nos. C-07-02681-JF-PVT, C-07-05706-JF, 2010 WL 693420, at *5 (N.D. Cal. Feb. 23, 2010).

A cause of action generally accrues "when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1238 (E.D. Wash. 2010) (citing *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)). In *Shiny Rock*, the Ninth Circuit held that the statute of limitations period began once the plaintiff had constructive notice through publication in the Federal Register of the agency's action. *See Shiny Rock*, 906 F.2d at 1364; 44 U.S.C. § 1507.

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act"), which requires the Secretary of the Interior to publish annually a list of all federally recognized tribes eligible for federal services and benefits. Pub. L. No. 103-454 § 104, 108 Stat. 4792 (1994), codified at 25 U.S.C. § 5131 (previously, at 25 U.S.C. § 479(a)-(b)). The List Act prohibits the Secretary from removing or omitting tribes once placed on the list and underscores that Congress has the sole authority to terminate the relationship between a tribe and the United States. *See Muwekma Tribe v. Babbitt*, 133

F. Supp. 2d 30, 37-38 (D.D.C. 2000). Prior to the List Act, the Department had since 1979 published a list of tribal entities approximately every three years as required by the original regulations governing the Part 83 process. *See* 43 Fed. Reg. 39,362-363 (Sept. 5, 1978). *See also Muwekma Tribe*, 133 F. Supp. 2d at 38 n.6. The Department's publication of the first list in 1979 was in conjunction with its adoption of the Part 83 acknowledgment regulations. 44 Fed. Reg. 7,235 (Feb. 6, 1979).

Here, Plaintiff's claims stem from a common allegation: that its status was unaffected by the purchase or sale of the Taylorsville Rancheria and that the Department misinterpreted the California Rancheria Act to find that the sale had the legal effect of terminating the government-to-government relationship with the Plaintiff. *See* Compl. ¶¶ 27-37. Under this theory, Plaintiff could, and should, have presented its legal challenge within six years of the initial publication in 1979 of the list of federally recognized tribes. *See, e.g.*, *Villa v. Jewell*, No. 2:16-CV-00503-KJM-KJN, 2017 WL 1093938, at *3 (E.D. Cal. Mar. 22, 2017) (finding that statute of limitations barred Indian group's suit against Department for failing to recognize group as an Indian tribe when alleged federal actions took place 20 years prior to filing); *Mishewal Wappo Tribe*, 84 F. Supp. 3d at 943 (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 were therefore untimely under 28 U.S.C. § 2401(a)); *Miami Nation of Indians v. Lujan*, 832 F. Supp. 253, 256-57 (N.D. Ind. 1993) (holding that statute of limitations barred Indian group's suit alleging Department's wrongful withdrawal of group's federal acknowledgment in 1897).

Here, however, Plaintiff was not included on the initial List of federally-recognized Indian tribes published in 1979, nor has the Plaintiff been included on any of the subsequently published lists (either before or after the 1994 passage of the List Act). Thus, Plaintiff's claim that Defendants have erroneously denied it federal recognition is a fact of which Plaintiff has had at least constructive notice since the initial publication of the List in 1979.[4] *See* 44 Fed. Reg. 7,235 (Feb. 6, 1979); *see also Shiny*

[4] Indeed, the first publication of the list following passage of the List Act in 1994 would have been the latest point in time when Plaintiff was on notice of its non-inclusion. Certainly, Plaintiff was aware of its status in 1998 when it filed its "letter of intent to petition for acknowledgment as an Indian tribe under the Part 83 process." *See* Compl. ¶ 4.

Rock, 906 F.2d at 1364 ("'Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.'").

Because Plaintiff's challenge to the Department's determination regarding the termination of its federally recognized status first accrued well outside of the statute of limitations period, this action is untimely and should therefore be dismissed.

IV. CONCLUSION

For the reasons set forth 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: April 20, 2017

Respectfully submitted,

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/s/ *Michelle Lo*
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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; RYAN ZINKE, in his official capacity as Secretary of the Interior; MICHAEL S. BLACK, in his official capacity as Acting Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1 to 100, Defendants.	Case No. 16-cv-7189-LB **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR TRANSFER AND, IN THE ALTERNATIVE, MOTION TO DISMISS** Date: May 25, 2017 Time: 9:30 a.m. Place: Courtroom C, 15th Floor Hon. Laurel Beeler

This action having come before the Court on the motion of Defendants, United States Department of the Interior, Ryan Zinke, in his official capacity as Secretary of the Interior, and Michael S. Black, in his official capacity as Acting Assistant Secretary-Indian Affairs of the United States Department of the Interior, to dismiss or transfer for improper venue or to dismiss for failure to state a claim, and the parties having been afforded an opportunity to be heard, the Court having considered the respective pleadings and the arguments thereon, and the entire matter having been duly submitted after the Court was fully advised thereon, it is hereby ordered that Defendants' motion is GRANTED.

Federal Rule of Civil Procedure 12(b)(3) provides that a defendant may seek to dismiss an action for improper venue. Fed. R. Civ. P. 12(b)(3). The plaintiff bears the burden of demonstrating that venue is proper. *Munson v. California*, No. C 08-5053 SBA, 2009 WL 264838, at *1 (N.D. Cal. Feb. 4, 2009) (citation omitted). On a Rule 12(b)(3) motion, "the pleadings need not be accepted as true, and the court may consider facts outside of the pleadings," but the court must draw all reasonable inferences and resolve all factual conflicts in favor of the non-moving party. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). In an action against an agency of the United States or an officer or employee of the United States acting in his official capacity, venue is proper in any judicial district in which: (A) a defendant resides; (B) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of the property that is the subject of the action is situated; or (C) the plaintiff resides if no real property is involved in the action. 28 U.S.C. § 1391(e)(1).

Plaintiff has not established that venue lies in the Northern District of California under 28 U.S.C. § 1391(e). The allegation that venue is proper under § 1391(e)(1)(B) because "a substantial part of the events or omissions giving rise to Plaintiff's claims occurred near this District," *see* Compl. ¶ 2, is insufficient to confer venue in the Northern District of California. Nor can Plaintiff satisfy either of the other bases for venue under § 1391(e)(1). Thus, the Northern District of California is not a proper venue under § 1391(e)(1). If venue is improper, the district court has the discretion to either dismiss the case or, in the interests of justice, to transfer the case to a district where it could have been brought. *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992); 28 U.S.C. § 1406(a). The Court will transfer this case to either the Eastern District of California or the District of Columbia.

Defendants have made an alternative motion to dismiss this action for failure to state a claim should this Court decline to dismiss or transfer this action for improper venue in the interest of justice.

As an initial matter, Plaintiff has not identified an applicable waiver of sovereign immunity in the general jurisdiction statutes upon which it relies. Plaintiff has cited general jurisdiction statutes, 28 U.S.C. § 1331 and 28 U.S.C. § 1362, that do not provide a waiver of the sovereign immunity of the United States and its officers. *See Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994); *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 792 (9th Cir. 1986). The mandamus statute, 28 U.S.C. § 1361, similarly does not waive sovereign immunity. *See Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999). Furthermore, 28 U.S.C. § 2201 is also inapplicable because it provides only the remedy of a declaratory judgment and neither grants subject matter jurisdiction nor waives sovereign immunity. *See United States v. King*, 395 U.S. 1, 5 (1969); *Morongo Band of Mission Indians v. Calif. State Bd. of Equalization*, 858 F.2d 1376, 1382 (9th Cir. 1988) (finding that the Declaratory Judgment Act merely creates remedy in cases otherwise within the court's jurisdiction, but does not constitute an independent basis for jurisdiction).

The complaint also cites the APA's authorization of actions against federal agencies and officers as conferring jurisdiction upon this Court. Plaintiff's claim fails, however, to state a claim to relief under the APA. The APA generally waives the Government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. The APA provides relief for an agency's failure to act in § 706(1), which directs courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As the Supreme Court has explained, the only agency action that can be compelled must be "discrete" as well as "legally required." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004); *Hells Canyon Preserv. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). That is, the agency's legal obligation "is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Preserv. Council*, 593 F.3d at 932.

Here, Plaintiff purports to bring this action under the APA, alleging that Defendants erroneously determined that the sale of the Taylorsville Rancheria pursuant to the California Rancheria Act terminated Plaintiff's status as an Indian tribe and that Defendants unlawfully interpreted the California Rancheria Act to deny that its members are Indians whose status was "never terminated." Plaintiff's requested relief is not to ask this Court to review the Department's interpretation of the California Rancheria Act or otherwise enforce any discrete federal responsibility or statutory duty, but rather to ask for an order to compel the Department to confer upon it federal recognition as an Indian tribe. Plaintiff has not identified any statute or regulation that imposes upon the Secretary a duty to add Plaintiff to the list of federally recognized tribes.

This action is also subject to dismissal because Plaintiff's claims are barred by the applicable statute of limitations in 28 U.S.C. § 2401(a), which provides that civil actions against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a); *Mishewal Wappo Tribe of Alexander Valley v. Jewell*, 84 F. Supp. 3d 930, 935 (N.D. Cal. 2015). A cause of action generally accrues "when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1238 (E.D. Wash. 2010) (citing *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)). In *Shiny Rock*, the Ninth Circuit held that the statute of limitations period began once the plaintiff had constructive notice through publication in the Federal Register of the agency's action. *See Shiny Rock*, 906 F.2d at 1364; 44 U.S.C. § 1507.

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act"), which requires the Secretary of the Interior to publish annually a list of all federally recognized tribes eligible for federal services and benefits. Pub. L. No. 103-454 § 104, 108 Stat. 4792 (1994), codified at 25 U.S.C. § 5131 (previously, at 25 U.S.C. § 479(a)-(b)). The List Act prohibits the Secretary from removing or omitting tribes once placed on the list and underscores that Congress has the sole authority to terminate the relationship between a tribe and the United States. *See Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37-38 (D.D.C. 2000). Prior to the List Act, the Department had since 1979 published a list of tribal entities approximately every three years as required by the original regulations governing

the Part 83 process. *See* 43 Fed. Reg. 39,362-363 (Sept. 5, 1978). *See also Muwekma Tribe*, 133 F. Supp. 2d at 38 n.6. The Department's publication of the first list in 1979 was in conjunction with its adoption of the Part 83 acknowledgment regulations. 44 Fed. Reg. 7,235 (Feb. 6, 1979).

Here, Plaintiff's claims stem from a common allegation: that its status was unaffected by the purchase or sale of the Taylorsville Rancheria and that the Department misinterpreted the California Rancheria Act to find that the sale had the legal effect of terminating the government-to-government relationship with the Plaintiff. *See* Compl. ¶¶ 27-37. Plaintiff's claims first accrued in 1979 with the initial publication of the list of federally recognized tribes. Because Plaintiff's challenge to the Department's determination regarding the termination of its federally recognized status first accrued well outside of the statute of limitations period, this action is untimely and will be dismissed. *See Villa v. Jewell*, No. 2:16-CV-00503-KJM-KJN, 2017 WL 1093938, at *3 (E.D. Cal. Mar. 22, 2017) (finding that statute of limitations barred Indian group's suit against Department for failing to recognize group as an Indian tribe when alleged federal actions took place 20 years prior to filing); *Mishewal Wappo Tribe*, 84 F. Supp. 3d at 943 (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 were therefore untimely under 28 U.S.C. § 2401(a)).

IT IS SO ORDERED.

DATED:

Hon. Laurel Beeler
United States Magistrate Judge