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11 **UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14
15 MISHEWAL WAPPO TRIBE OF
ALEXANDER VALLEY,

16 Plaintiff,

17 v.

18 KENNETH SALAZAR, in his capacity as
Secretary of the Interior,

19 Defendant.
20
21 _____/

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

Hon. James Ware

**NOTICE OF MOTION AND MOTION
FOR INTERVENTION**

Date: Monday, April 12, 2010
Time: 9:00 a.m.
Courtroom No.: 8

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that on Monday, April 12, 2010, at 9:00 a.m., or as soon thereafter
4 as the parties may be heard, the County of Sonoma ("County") will move this Court, at the
5 United States Courthouse located at 280 South 1st Street, San Jose, California, 95113,
6 Courtroom No. 8, for an order that the County may intervene as a defendant in this action as
7 a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure, or, in the
8 alternative, that the County may intervene as a defendant in this action as a matter of
9 permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

10 This motion is based on this Notice of Motion and attached Points & Authorities, and
11 all the other papers and documents on file or to be filed in this action, and the arguments to
12 be made at the hearing on this motion.

13
14 **POINTS AND AUTHORITIES**

15 **INTRODUCTION**

16 The County respectfully requests that the Court enter an order granting it status as an
17 intervenor-defendant as a matter of right or, in the alternative, as a matter of permissive
18 intervention, in this action filed by the Mishewal Wappo Tribe of Alexander Valley
19 ("Plaintiff") against Secretary of the Interior Ken Salazar ("Secretary"). The action seeks to
20 compel the Secretary to take actions that circumvent required procedures that would
21 otherwise accord the County of substantial rights and jurisdictional interests. Plaintiffs seek
22 to compel the Secretary to confer federal recognition on their group, circumventing the
23 administrative process that governs all other tribal groups seeking recognition. *See* 25 C.F.R.
24 part 83. The required recognition process would accord interested parties, including the
25 County, substantial opportunity to participate in the proceedings. *See, e.g.*, 25 C.F.R. §
26 83.10(i) (opportunity for interested parties to submit evidence and arguments to support or
27 rebut petition); *id.* § 83.10(j)(2) (opportunity to request and participate in formal meeting);
28 and *id.* § 83.11 (right to request reconsideration).

1 Plaintiffs also seek to compel the Secretary to immediately acquire in trust all lands
2 owned by Plaintiffs (who are not identified in the Complaint) within the historic aboriginal
3 territory of the Mishewal Wappo Tribe of Alexander Valley (also unidentified in the
4 Complaint), evading the regulatory process set forth in 25 C.F.R. part 151. That process
5 accords jurisdictional governments the right to participate in the trust process. *See* 25 C.F.R.
6 § 151.10 (providing jurisdictional governments notice of the trust request and requesting
7 comments regarding jurisdictional impacts and impact on tax rolls).

8 Plaintiffs go further still. They also seek to compel the Secretary to determine that all
9 unidentified lands immediately taken into trust qualify as “restored lands” as defined by 25
10 U.S.C. § 2719(b)(1)(B)(iii). Such action would make all lands immediately available to be
11 developed for casino-style gaming purposes, circumventing the prohibition on gaming on
12 lands acquired in trust after 1988. *See* 25 U.S.C. § 2719(a). Absent an exception (such as
13 the “restored lands” exception), post-1988 lands can be used for gaming purposes only if the
14 Secretary consults with appropriate State and local officials and determines, among other
15 things, that gaming would not be detrimental to the surrounding community, and the
16 Governor of the affected state concurs in that determination. *Id.* § 2719(b)(1)(A). Plaintiffs
17 thus seek to compel the Secretary to immediately take unidentified lands out of County
18 jurisdiction, into trust and federal jurisdiction, and allow development of casino-style
19 gaming, all with no review by the County or other affected parties.

20 On these facts, the County meets each of the four criteria for intervention as of right.
21 The County timely filed this motion after first learning of this litigation (and the intended
22 settlement of the same) not from Plaintiff or the Secretary, but through a January 2010
23 newspaper article. The County also has significant, protectable interests that may be
24 impaired or impeded by disposition of this action, and are not adequately represented by the
25 existing parties. The Ninth Circuit has held, on identical facts, that an order compelling
26 tribal restoration and the taking of land into trust would eliminate County sovereignty and
27 impair its tax, land use and zoning, and other significant interests. *Scotts Valley Band of*
28 *Pomo Indians of Sugar Bowl Rancheria v. U.S.*, 921 F.2d 924, 926-28 (9th Cir. 1990). The

1 Ninth Circuit further held that “[t]he United States and its officials . . . do not directly share
2 the [County’s] municipal interest,” and thus are “not in a position to protect” or adequately
3 represent them. *Id.* at 926-27.

4 The Ninth Circuit’s decision in *Scotts Valley* controls here, and has been followed in
5 analogous federal trust cases from across the country. It also elevates the importance of the
6 municipal interests at stake in this litigation. The court explained that “[m]unicipal
7 governments perform essential tasks in regulating property within their borders,” including
8 the maintenance of health, safety, welfare, and land use compatibility. 921 F.2d at 927-28.
9 If Plaintiff succeeds at compelling the Secretary to take County land into trust, it will be
10 removed from local sovereignty, the County will lose jurisdiction, and the remaining lands
11 within the County “may, as a practical matter, be affected by the [County’s] inability to
12 enforce land-use and health regulations.” *Id.* at 928. In addition, absent intervention, the
13 County “will never have an opportunity to present its interests Its claims will go
14 unheard and its interests unprotected.” *Id.* As in *Scotts Valley*, the protection of these
15 interests and values compels a grant of intervention as of right or, in the alternative,
16 permissive intervention.

17 18 **FACTUAL BACKGROUND**

19 This Factual Background includes citations to relevant portions of Plaintiff’s
20 Complaint for Declaratory and Injunctive Relief (“Complaint”), but does not accept as true
21 any allegations stated therein.

22 Plaintiff’s Complaint claims that in 1908 and 1913, the federal Bureau of Indian
23 Affairs (“BIA”) acquired 54 acres in Sonoma County for the benefit of the Mishewal Wappo
24 Tribe of Alexander Valley. Compl. at 4, ¶ 8. Due to federal ownership, this land was not
25 taxable by the County (Compl. at 13, ¶ 50(c)), nor subject to any “local building and sanitary
26 codes.” Compl. at 14, ¶ 50(H).

27 Passed in 1958, the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619,
28 amended by Pub. L. No. 88-419, 78 Stat. 390, provided for the termination of formal federal

1 recognition of 41 separate California Indian tribes, including the Mishewal Wappo Tribe.
2 See Compl. at 4, ¶ 11. The Secretary of the Interior accepted a proposed distribution plan for
3 the Mishewal Wappo Tribe on July 6, 1959 (Compl. at 6, ¶ 20), and the Tribe’s members
4 voted to accept the distribution plan on September 25, 1959. Compl. at 7, ¶ 21. Upon
5 termination, the federal trust lands were distributed to Indians living on the Rancheria (the
6 “distributees”). The distributed lands became taxable by the County (Compl. at 13, ¶ 50(c)),
7 and the distributees were “forced to comply with local building and sanitary codes” (Compl.
8 at 14, ¶ 50(H)), like all other property owners in the County. As a result, the County has
9 exercised local jurisdictional, taxation, and regulatory authority over the affected land for
10 more than 50 years.

11 On July 10, 1979, a number of distributees from thirty-four rancherias whose federal
12 supervision had been terminated under the Rancheria Act brought a class action suit in this
13 Court against the United States. Compl. at 16-17, ¶ 57; *Tillie Hardwick v. U.S.*, Case No. C-
14 79-1710-SW (N.D. Cal.). The *Tillie Hardwick* plaintiffs asserted that the United States
15 violated the Rancheria Act by failing to satisfy various alleged obligations before terminating
16 federal supervision and distributing trust land and assets. Plaintiff states that the claims filed
17 by several groups of distributees, including members of the Mishewal Wappo Tribe, were
18 dismissed from the action, which eventually resulted in restoration of seventeen tribes.
19 Compl. at 17, ¶ 58.

20 The Mishewal Wappo Tribe of Alexander Valley registered itself as a corporation
21 with the California Secretary of State on April 2, 2009. Two months later, and more than 50
22 years after agreeing to terminate federal recognition and more than 25 years after the
23 Mishewal Wappo Tribe was dismissed from *Tillie Hardwick*, Plaintiff brought the instant suit
24 again alleging that termination was unlawful. The Complaint states that Plaintiff “consist[s]
25 of Indian members and their descendants,” but does not identify any individuals with a legal
26 interest in the previously-terminated land that is the subject of this action. Plaintiff
27 nevertheless seeks an order compelling the Secretary to:

28 ///

- 1 • formally recognize its group by including it in a published list of federally
2 recognized tribes. Compl. at 1-2, ¶ 1, and 28, ¶ A.
- 3 • “immediately take into trust” lands that are designated by Plaintiff and located
4 within “the historically aboriginal territory of the Mishewal Wappo Tribe of
5 Alexander Valley.” Compl. at 2, ¶ 1, and 29, ¶ C.
- 6 • transfer to Plaintiff as trust lands “all public lands held by the Department of
7 the Interior which are not currently in use and are available for transfer that are
8 within the Tribe’s historically aboriginal land.” Compl. at 26, ¶ D.
- 9 • treat Plaintiff’s future trust lands as “restored lands” as defined in 25 U.S.C. §
10 2719(b)(1)(B)(iii). Compl. at 26, ¶ C. As noted above, such action would
11 make all lands immediately available to be developed for casino-style gaming
12 purposes, and circumvent the prohibition on gaming on lands acquired in trust
13 after 1988. *See* 25 U.S.C. § 2719(a).

14 The Complaint does not identify the amount of land Plaintiff would like taken into
15 trust, nor the “historically aboriginal territory of the Mishewal Wappo Tribe of Alexander
16 Valley.” The latter presumably includes the referenced Alexander Valley area of Sonoma
17 County, and potentially other areas of the County (and possibly other counties) as well.

18 Plaintiff thus seeks to effectuate a dramatic change in its relationships with the
19 County, State, and Secretary in one fell swoop. Plaintiff seeks immediate federal recognition
20 of its unidentified members, the mandatory acquisition of trust land for its benefit anywhere
21 within its unidentified “historically aboriginal territory,” and casino-style gaming on that
22 land, all while minimizing or eliminating opportunities for public review and consultation. It
23 is curious, then, that neither Plaintiff, the Secretary, nor any of their counsel advised the
24 County or any other potentially interested parties of the lawsuit. The County did not learn of
25 the lawsuit until it was mentioned in a newspaper article published on Friday, January 15,
26 2010. Once the County learned of the lawsuit, staff moved quickly to investigate the relevant
27 facts and identify the status of the case, and to consult with the County Board of Supervisors,
28 which authorized the instant Motion for Intervention. On January 27, 2010, the County also

1 filed an application to appear at an upcoming conference call between the parties. The
2 County advised the Court at that time that it would file the instant Motion for Intervention as
3 soon as possible.

4 5 **ARGUMENT**

6 **I. THE COUNTY OF SONOMA IS ENTITLED TO INTERVENTION AS A 7 MATTER OF RIGHT.**

8 **A. Legal Standard.**

9 Rule 24 traditionally receives “liberal construction in favor of applicants for
10 intervention.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003); *Donnelly v.*
11 *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Rule 24(a)(2) states that on timely motion, the
12 Court must permit anyone to intervene who “claims an interest relating to the property or
13 transaction that is the subject of the action, and is so situated that disposing of the action may
14 as a practical matter impair or impede the movant’s ability to protect its interest, unless
15 existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

16 As a result, a party seeking to intervene as of right need only meet four requirements:
17 (1) the applicant must timely move to intervene; (2) the applicant must have a significantly
18 protectable interest relating to the property or transaction that is the subject of the action; (3)
19 the applicant must be situated such that the disposition of the action may impair or impede
20 the party’s ability to protect that interest; and (4) the applicant’s interest must not be
21 adequately represented by existing parties. *Arakaki*, 324 F.3d at 1083.

22 The County meets all four requirements.

23 **B. The County’s Motion Is Timely.**

24 The Ninth Circuit has directed that courts be lenient in applying the timeliness
25 requirement where, as here, intervention is sought as a matter of right. *U.S. v. State of Or.*,
26 745 F.2d 550, 552 (9th Cir. 1984). The Court’s leniency is applied in evaluating three
27 factors: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the
28 prejudice to other parties; and (3) the reason for and length of the delay.” *U.S. ex rel.*

1 *McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir.1992) (quotations
2 omitted). All three factors militate in favor of finding that the County's motion is timely.

3 First, the County has filed its motion at a very early stage of the proceeding. Plaintiff
4 filed its Complaint in June 2009, but did not serve the Secretary until August 11, 2009. The
5 docket suggests that Plaintiff did not perfect proof of service until either October 21 or 27,
6 2009. The Secretary did not file his answer until January 15, 2010, the date the County first
7 learned of the suit. Plaintiff and the Secretary have filed case management statements and
8 stipulated to mediation, but the Court has never substantially engaged the issues via a
9 temporary restraining order or motion for preliminary injunction, other motions for
10 intervention, motion to dismiss, or motion for summary judgment. The timing of the
11 County's motion thus compares favorably with the many Ninth Circuit opinions upholding
12 *postjudgment* motions as timely. *See, e.g., U.S. ex rel. McGough*, 967 F.2d at 1395; *Yniguez*
13 *v. Ariz.*, 939 F.2d 727, 734-35 (9th Cir. 1991); *Officers for Justice v. Civil Serv. Comm'n*,
14 934 F.2d 1092, 1095-96 (9th Cir. 1991).

15 Second, the timing of the County's motion does not prejudice to the parties, much less
16 result in the type of "serious prejudice" necessary to bar intervention. *U.S. ex rel. McGough*,
17 967 F.2d at 1395 (reversing the denial of a post-judgment motion to intervene and
18 distinguishing cases in which intervention would result in "serious prejudice"). As noted
19 above, the existing parties have filed the Complaint, Answer, and case management
20 statements, but have not advanced the litigation. No discovery has taken place or dispositive
21 motions considered. Plaintiff and the Secretary may be displeased that a party with a distinct
22 interest seeks intervention, but they have not suffered any prejudice from the *timing* of the
23 County's motion. *See Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994,
24 999 (8th Cir. 1993) (distinguishing the type of prejudice that "always exists when a party
25 with an adverse interest seeks intervention").

26 Third, there was no "improper delay" before the County filed the instant motion. *See*
27 *U.S. ex rel. McGough*, 967 F.2d at 1395-96. Neither Plaintiff nor the Secretary notified the
28 County of the lawsuit (or their potential settlement of the same), even though it seeks to

1 immediately remove County lands from County jurisdiction, place them in federal trust for
2 the benefit of Plaintiff, and designate them “restored lands” eligible for full casino gaming.
3 The County did not learn of the underlying action until it was the subject of a newspaper
4 article published on Friday, January 15, 2010. The County then moved expeditiously to
5 investigate the relevant facts and identify the status of the case. Staff scheduled a closed
6 session with the County Board of Supervisors, which authorized the instant Motion for
7 Intervention. On January 27, 2010, the County filed an application to specially appear at an
8 upcoming case management conference and alternative dispute resolution conference call.
9 The County advised the Court at that time that it would file the instant Motion. The County
10 has filed its Motion approximately one month after it became aware of both the litigation and
11 the fact that its interests would not be protected by the parties.

12 The instant Motion was filed at a very early stage of the proceedings, without any
13 improper delay, and without causing any prejudice to the existing parties. The Motion is
14 timely and, as set forth below, the County meets the remaining requirements for intervention
15 as well.

16 **C. The County Has a Significantly Protectable Interest Relating to the**
17 **Property or Transaction at Issue.**

18 The requirement of a significantly protectable interest is satisfied when “the interest is
19 protectable under some law, and that there is a relationship between the legally protected
20 interest and the claims at issue.” *Arakaki*, 324 F.3d at 1084. The Court’s inquiry is
21 “practical,” and “[n]o specific legal or equitable interest need be established.” *Forest*
22 *Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995) (quotations
23 omitted).

24 The County has substantial sovereignty, taxation, land use, regulatory, and other
25 interests in the property subject to Plaintiff’s action, and in the requested transaction (i.e.,
26 compelling the Secretary to immediately take land into trust and consider it “restored lands”
27 eligible for gaming). The County exercises sovereignty and civil regulatory jurisdiction over
28 all lands in the unincorporated County. That jurisdiction would cease if Plaintiff succeed in

1 compelling the Secretary to take certain parcels into trust. *See Governor of Kan. v.*
2 *Kemphorne*, 516 F.3d 833, 842-44 (10th Cir. 2008); 28 U.S.C. §2409a(a) (Quite Title Act
3 waiver of sovereign immunity does not apply to Indian trust lands). The County would lose
4 taxation authority over those parcels. 25 U.S.C. § 465 (trust lands “shall be exempt from
5 State and local taxation”). The County General Plan, zoning ordinance, and health and safety
6 regulations would no longer apply. *See* 25 C.F.R. § 1.4(a). The County would no longer be
7 able to exercise its sovereign power of eminent domain. *See People v. Super. Ct. of San*
8 *Bernardino County*, 10 Cal.2d 288, 295 (1937) (“It is a well established legal principle that . . .
9 . the power of eminent domain is inherent in sovereignty”). Indeed, Plaintiff explicitly admit
10 that they filed this action for exactly these reasons; the Plaintiff group desires lands in trust to
11 remove County taxation authority (Compl. at 13, ¶ 50(C)), exempt lands from “local building
12 and sanitary codes” (Compl. at 14, ¶ 50(H)), and cancel County license, inspection, and
13 eminent domain powers. Compl. at 14, ¶ 50(H).

14 The Ninth Circuit has held on identical facts that these interests are “significantly
15 protectable” and support intervention as of right. In *Scotts Valley Band of Pomo Indians of*
16 *Sugar Bowl Rancheria v. U.S.*, 921 F.2d 924 (9th Cir. 1990), the court considered a motion to
17 intervene filed by the City of Chico, California, in a lawsuit filed by Indian tribes that, as
18 here, challenged a termination under the California Rancheria Act and sought to restore the
19 federal trust status of property near the City. 921 F.2d at 926. The court noted that the city
20 collected property taxes and enforced land use and health regulations on the parcels. *Id.* The
21 Ninth Circuit further held that

22 the City’s tax and regulatory concerns are sufficient . . . to establish a
23 protectable interest in the Indian Bands’ action and to allow intervention by the
24 City. Municipal governments perform essential tasks in regulating property
25 within their borders. If the Chico Rancheria is removed from municipal
jurisdiction, as the Indian Bands’ action seeks, the City will lose tax revenue
and the remaining city property may, as a practical matter, be affected by the
City’s inability to enforce land-use and health regulations.

26 921 F.2d at 927-28.

27 Other courts have reached the identical result in similar circumstances. *See Mille*
28 *Lacs*, 989 F.2d at 997-98 (finding that counties’ tax and land use interests could be affected

1 by outcome of litigation by tribe); *Akiachak Native Cmty. v. Dep't of the Interior*, 584 F.
2 Supp. 2d 1, 6 (D.D.C. 2008) (granting intervention as a matter of right where acceptance of
3 land into trust would affect State of Alaska's sovereign right to tax and enforce land use and
4 public safety regulations); *Miami Tribe of Okla. v. Walden*, 206 F.R.D. 238, 242 (S.D. Ill.
5 2001) (affirming that a governmental body's sovereign interest in exercising power in its
6 territory "is the type of direct, significant, and legally protectable interest" that justifies
7 intervention); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 468 (D.D.C. 1978)
8 (finding that "the diminishment of the tax base and impairment of municipal law and zoning
9 enforcement" through the taking into trust of land within city limits were legally protectable
10 interests).

11 The County shares the sovereign, taxation, land use and zoning, and other interests
12 that were deemed significantly protectable in the cases identified above. Moreover, the
13 County has separate but equally protectable interests that are implicated by the unique nature
14 of the relief sought here. As noted above, Plaintiff seeks not only federal recognition but a
15 Court order compelling the Secretary to consider future trust lands "restored lands" under 25
16 U.S.C. § 2719(b)(1)(B)(iii), which would expedite and authorize Las Vegas-style casino
17 gaming on future trust lands in the County. Casino gaming can cause substantial adverse
18 impacts to aesthetic, air, water, biological, and other environmental resources. *See Forest*
19 *Conservation Council*, 66 F.3d at 1497 (reversing denial of intervention based on
20 environmental health and other non-economic interests). It can also impose massive new
21 obligations on local law enforcement and other public services while simultaneous
22 decreasing the relevant tax base. These interests are similarly protectable, and separately
23 justify intervention as a matter of right.

24
25 **D. Disposition of the Action May Impair or Impede the County's Ability to
Protect Its Interests.**

26 An applicant satisfies this requirement "if the resolution of the plaintiff's claims
27 actually will affect the applicant." *Arakaki*, 324 F.3d at 1084.

28 Disposition of the action could dramatically impair or impede the County's ability to

1 protect its jurisdictional, taxation, land use, and other regulatory interests. As noted above,
2 Plaintiff has explicitly asked that the Court order the Secretary to immediately take into trust
3 lands owned by the Tribe. Compl. at 29, ¶ C. The acceptance of land into trust would
4 remove the relevant parcels from all of the County’s civil regulatory jurisdiction. The
5 County would lose taxing authority over the parcels. 25 U.S.C. § 465 (trust lands “shall be
6 exempt from State and local taxation”). No zoning or other land use regulations would apply
7 (25 C.F.R. § 1.4(a)), and the parcels could be developed out of compliance with the County
8 General Plan, zoning ordinance, and health and safety rules. The County would not be able
9 to exercise its sovereign power of condemnation. Indeed, as noted above, Plaintiff’s action
10 explicitly seeks this exact result—the elimination of the County’s jurisdiction (Compl. at 13,
11 ¶ 50(C)) and the application of “local building and sanitary codes,” inspections, and eminent
12 domain powers. Compl. at 14, ¶ 50(H).

13 The Ninth Circuit and other courts have found on identical facts that Plaintiff’s
14 requested relief would impair or impede municipal interests. In *Scotts Valley*, for example,
15 the Ninth Circuit held that the removal of trust lands from municipal jurisdiction would cause
16 the relevant city to lose tax revenue and eliminate its ability to enforce land use and health
17 regulations, adversely affecting other property in the city. 921 F.2d at 928. The court further
18 held that where, as here, a tribe seeks to *compel* the Secretary to acquire land to be held in
19 trust, the discretion contemplated the existing administrative scheme will not apply, and “the
20 City will never have an opportunity to present its interests under” 25 C.F.R. § 151.10. *Id.* As
21 a result, allowing the County to intervene “is the only practical means of protecting its taxing
22 and regulatory interests.” *Id.*; *see also Akiachak*, 584 F. Supp. 2d at 7 (“Because trust status
23 would abrogate Alaska’s taxing and regulatory authority over the trust land under 25 U.S.C.
24 465 and 25 C.F.R. § 1.4, Alaska’s interest may be impaired by the outcome of this
25 litigation”); *Miami Tribe*, 206 F.R.D. at 243 (granting intervention where tribal claim for
26 land ownership would leave Illinois “unable to exercise its claimed sovereignty” and
27 “[un]able to tax the Indian lands or regulate the individuals and entities on those lands in the
28 same manner and to the same extent that it does now”).

1 In addition, an order compelling the Secretary to treat trust lands as “restored lands”
2 subject to casino gaming would impair the County’s interest in environmental preservation.
3 *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (granting
4 intervention as of right to the Audubon Society where an adverse decision “would impair the
5 society’s interest in the preservation of birds and their habitats”). Finally, if intervention is
6 denied and relief granted, the County would be forever precluded from challenging certain
7 future actions because of Plaintiff’s and the Secretary’s sovereign immunity. *See, e.g., Cook*
8 *v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

9 As in the cases identified above, allowing intervention is the “only practical means”
10 for the County to protect its regulatory and other municipal interests. Intervention as of right
11 should be granted.

12 **E. The County’s Interests Are Not Adequately Represented by the Existing**
13 **Parties.**

14 An applicant’s burden in showing inadequate representation “is minimal: it is
15 sufficient to show that representation *may* be inadequate.” *Forest Conservation Council*, 66
16 F.3d at 1498. Courts consider three factors: (1) whether the existing parties will
17 “undoubtedly” make all the County’s proposed arguments; (2) whether the parties are
18 capable and willing to make such arguments; and (3) whether the County would offer any
19 necessary elements to the proceeding that other parties would neglect. *Arakaki*, 324 F.3d at
20 1086; *Sagebrush*, 713 F.2d at 528. The Ninth Circuit has emphasized that there is “no
21 presumption that one governmental entity represents another” (*U.S. v. Carpenter*, 298 F.3d
22 1122, 1125 (9th Cir. 2002) (per curiam)), and “[t]he most important factor in determining the
23 adequacy of representation is how the interest compares with the interests of existing
24 parties.” *Arakaki*, 324 F.3d at 1086.

25 The County has met its “minimal” burden here. It cannot be said that Plaintiff or the
26 Secretary will “undoubtedly” make all the County’s proposed arguments, or that they are
27 capable and willing to do so. The Secretary did not notify the County or any other potentially
28 interested parties of the lawsuit and, as in past cases involving other Indian groups, is

1 negotiating toward a settlement rather than actively litigating the case. The Secretary's
2 Answer to the Complaint ("Answer") omits applicable defenses (*see* Answer at 14), and the
3 existing parties' January 22, 2010 Updated Joint Case Management Statement states that
4 although "Plaintiff alleges factual matters going back to the turn of the 20th Century," the
5 Secretary does not plan to conduct any discovery. Parties' Updated Joint Case Management
6 Statement at 1, ¶ 2(B) and 3, ¶ 8. The Secretary has not mentioned Article III standing, even
7 though Plaintiff has not identified any individuals with an interest in the land that is the
8 subject of this action and the termination under the Rancheria Act. The Secretary has not
9 mentioned 28 U.S.C. § 2501, which appears to establish a six-year statute of limitations on
10 Plaintiff's claims. Nor is the Secretary likely to dispute that it (rather than Congress) has the
11 authority to grant the relief Plaintiff seeks.

12 More importantly, the Secretary does not share the County's interests in this matter.
13 *See Arakaki*, 324 F.3d at 1086 ("[The most important factor in determining the adequacy of
14 representation is how the interest compares with the interests of existing parties"). To the
15 contrary, the Secretary's interest is directly opposed to that of the County. Plaintiff seeks an
16 order that would remove lands from the County's jurisdiction, and place them in the
17 jurisdiction of the Secretary. The Secretary is directly opposed to the County's interest in
18 municipal jurisdiction, and stands to gain jurisdiction at the County's expense. Nor does the
19 Secretary have an interest in preserving the County's taxation authority, ability to enforce
20 local health and safety regulations, and other protectable interests. As a result, the Ninth
21 Circuit has held on analogous facts that

22 the federal Government and federal officials [] are *not* in a position adequately
23 to protect any of the City's municipal interests. The United States and its
24 officials, because they do not directly share the City's municipal interest, will
not necessarily act to protect that interest.

25 *Scotts Valley*, 921 F.2d at 926-27 (emphasis added); *see also Arakaki*, 324 F.3d at 1087-88
26 (citing cases and granting intervention where the federal government is required to represent
27 a broader view than the interests of a state or local government).

28 ///

1 Intervention is thus necessary to allow the County to defend its jurisdiction over lands
2 in the County, and represent its land use, regulatory, taxation, and other significantly
3 protectable interests. The existing parties do not share these interests, and would benefit
4 from the taking of land out of County jurisdiction and into federal jurisdiction. The existing
5 parties' representation of the Counties certainly "may be inadequate," and thus meets the
6 minimal test for intervention as of right.

7
8 **II. IN THE ALTERNATIVE, THE COUNTY IS ENTITLED TO PERMISSIVE INTERVENTION.**

9 The Court may grant permissive intervention under Rule 24(b) to any party that files a
10 timely motion and "has a claim or defense that shares with the main action a common
11 question of law or fact."

12 The County meets these requirements. The instant Motion is timely, as set forth
13 above; the County filed it at a very early stage of the proceedings, without any improper
14 delay, and without causing any prejudice to the existing parties. In addition, the County's
15 claims and defenses share the same nucleus of laws and facts—the Secretary's termination
16 actions, the actions of the distributees in response, and the applicability of Plaintiff's
17 requested relief. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir.
18 2002) ("[I]f there is a common question of law or fact, the requirement of the rule has been
19 satisfied"). The County also has a substantial interest in the outcome of this litigation, and its
20 participation would "significantly contribute to full development of the underlying factual
21 issues in the suit and to the just and equitable adjudication of the legal questions presented."
22 *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Permissive
23 intervention should be granted.

24
25 **III. THE COUNTY HAS SET OUT THE CLAIMS AND DEFENSES FOR WHICH INTERVENTION IS SOUGHT.**

26 The Ninth Circuit has instructed that intervention should be granted so long as the
27 petition states the legal and factual grounds for intervention; an applicant need not file a
28 separate pleading setting out the claims or defenses for which intervention is sought.

1 *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992). Other circuits are in
2 accord. *See Providence Baptist Church v. Hillendale Comm., Ltd.*, 425 F.3d 309, 314 (6th
3 Cir. 2005) (citing cases and noting that the Fourth, Fifth, Sixth, Eleventh, and District of
4 Columbia circuits also favor a permissive approach to Rule 24(c)).

5 The instant motion “describes the basis for intervention with sufficient specificity to
6 allow the district court to rule,” and nothing more is required. *Beckman*, 966 F.2d at 475. In
7 this Motion, however, the County has also identified claims and defenses for which
8 intervention is sought, and that would be part of a responsive pleading timely filed after the
9 grant of intervention. The County would assert several claims and defenses, including but
10 not limited to the following:

11 First, this case is barred by statutes of limitations, 28 U.S.C. § 2501, and laches, *see*
12 *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 1057 (2005). Federal
13 superintendence over the people and lands of the Mishewal Wappo Tribe was terminated
14 more than 50 years ago. Plaintiff first filed suit more than 25 years ago, but failed to pursue
15 any claims since that time. Longstanding observances and settled expectations should be
16 prime considerations when a party belatedly asserts a right.

17 Second, the question of federal recognition of tribes is a nonjusticiable political
18 question. Courts have acknowledged that the decision to acknowledge an Indian tribe is
19 fundamentally a political rather than a legal question (for the purposes of establishing a
20 government-to-government relationship) and is therefore not justiciable, except to the extent
21 that a decision under 25 C.F.R. part 83 is challenged pursuant to the Administrative
22 Procedure Act. *Shinnecock Indian Nation v. Kempthorne*, not reported in F.Supp.2d, 2008
23 WL 445599, *9 (E.D.N.Y. 2008).

24 Third, Plaintiff has not demonstrated any legally protectable interest in the lands
25 terminated under the Rancheria Act or to the services promised thereto under the Act.
26 Plaintiff has not identified any relationship to the distributees whom they allege were
27 deprived of land improvements guaranteed under the Rancheria Act. Accordingly, Plaintiff
28 has not demonstrated that it has Article III standing to pursue these claims.

1 Fourth, the Secretary lacks the authority to designate a group of Indians a
2 federally-recognized tribe outside of the administrative process set forth in 25 C.F.R. part 83,
3 if he has the authority at all after Congress has terminated federal supervision. To the extent
4 that Congress authorized the Secretary to recognize Indian tribes, that authority is found in
5 the Indian Reorganization Act, pursuant to which the Department promulgated procedures
6 for acknowledgment in 25 C.F.R. part 83. The Secretary has no authority independent of the
7 IRA to recognize Indian tribes.

8 Finally, the Secretary lacks the authority to acquire lands in trust outside of the
9 administrative process set forth in 25 C.F.R. part 151, and cannot acquire lands in trust for
10 any tribe that was not under federal jurisdiction in 1934. *See Carcieri v. Salazar*, 129 S.Ct.
11 1058, ___ U.S. ___ (2009).

12 13 CONCLUSION

14 For the foregoing reasons, the County respectfully requests that the Court enter the
15 enclosed Order granting intervention as a matter of right or, in the alternative, granting
16 permissive intervention.

17 Dated: March 5, 2010

STEVEN M. WOODSIDE, County Counsel

18
19 /s/ Jeffrey M. Brax

20 _____
21 JEFFREY M. BRAX
22 Deputy County Counsel
23 Attorneys for County of Sonoma
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CERTIFICATE OF SERVICE

I, Jeffrey M. Brax, hereby certify that on March 5, 2010, I caused the foregoing to be served upon counsel of record through the Court's electronic service system and upon additional counsel at the address below by U.S. Mail:

Kelly F. Ryan
Susan X. Romero
The Ryan Law Firm
80 South Lake Avenue, Ste. 500
Pasadena, CA 91101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 5, 2010, at Santa Rosa, California.

By: /s/ Jeffrey M. Brax
Jeffrey M. Brax