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

THE MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY,

Plaintiff,

v.

KENNETH SALAZAR, et. al,

Defendants,

COUNTY OF SONOMA, CALIFORNIA,

COUNTY OF NAPA, CALIFORNIA,

COUNTY OF LAKE, CALIFORNIA,

Intervenor-Defendants.
_____/

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

**NOTICE OF MOTION AND MOTION TO DISMISS (FRCP 12(b)(1), 12(b)(6), 12(h)(3))**

Date: November 29, 2010
Time: 9:00 a.m.
Courtroom No.: 8
Judge: Hon. James Ware

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**NOTICE OF MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on Monday, November 29, 2010, at 9:00 a.m., or as soon thereafter as the parties may be heard in the above-entitled court, located at the United States Courthouse at 280 South 1st Street, San Jose, California, 95113, Courtroom No. 8, the Counties of Sonoma, Napa, and Lake (collectively "Counties") will move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). As set forth below, Plaintiff's causes of action are barred by the relevant statute of limitations and by laches.

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

**POINTS AND AUTHORITIES**

**INTRODUCTION**

The Counties respectfully request that the Court dismiss the action filed by The Mishewal Wappo Tribe of Alexander Valley ("Plaintiff") pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). Plaintiff alleges that the Secretary of the Interior's 1959 termination of the Mishewal Wappo Tribe of Alexander Valley did not comply with the California Rancheria Act (Pub. L. No. 85-671, 72 Stat. 619), a Congressional act authorizing the termination of the Mishewal Wappo Tribe and forty other specifically enumerated California rancherias. Am. Compl. at 3, ¶ 5; 4, ¶ 12; 23, ¶ 77; 30, ¶ 110. More than five decades after the fact, Plaintiff now asks the Court to reverse the 1959 termination, bypass Congress's exclusive authority over tribal recognition matters, and direct that Plaintiff be given immediate federal recognition, all available public lands within Plaintiff's "historically aboriginal land," and the right to conduct casino-style gaming on such "restored lands." Am. Compl. at 31-32, ¶¶ A, B, D, E.

As discussed below, Plaintiff's claims are first barred by 28 U.S.C. § 2401(a), which establishes an absolute and jurisdictional bar on claims filed after the six-year statute of

limitations. All of Plaintiff's claims and causes of action are premised on the alleged impropriety of the 1959 termination. Plaintiff's claims thus accrued at that time, and the statute of limitations ran more than 40 years before Plaintiff filed the instant action. Plaintiff has not alleged any facts to place their claims outside the bar of the statute of limitations, and thus cannot establish subject-matter jurisdiction in this Court, nor state a claim upon which relief can be granted.

Second, Plaintiff's claims are barred by laches. The Amended Complaint itself demonstrates that Plaintiff committed an unreasonable delay by waiting more than five decades to challenge the 1959 termination. Plaintiff's delay prejudices the ability of the federal government and Counties' to defend the 1959 termination now, and Plaintiff's requested relief would substantially prejudice the Counties' general plan, zoning, and other land use goals and objectives. As a result, Plaintiff's action should be dismissed.

## FACTUAL BACKGROUND

The gravamen of Plaintiff's action is its claim that the Department of the Interior improperly terminated the Mishewal Wappo Tribe of Alexander Valley in 1959, and has thereafter failed to include the tribe on the list of federally recognized tribes required by the Federally Recognized Indian Tribe List Act. *See* Am. Compl. at 1-2, ¶ 1; 3, ¶ 5 (claiming the federal government formally recognized the Mishewal Wappo Tribe until 1959); 13, ¶¶ 47-49 (claiming the 1959 termination was unlawful); 23, ¶ 74 (claiming the tribe must be recognized pursuant to the Tribe List Act because the termination was unlawful).

In August 1958, Congress enacted the California Rancheria Act ("Act"), Pub. L. No. 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390. The Act provided for the termination of federal recognition of forty-one California Indian tribes, including the Mishewal Wappo Tribe. Am. Compl. at 4, ¶ 12. On July 6, 1959, the Secretary of Interior accepted a proposal to terminate the tribe and distribute the three-lot, 54-acre Alexander Valley Rancheria pursuant to the Act. Am. Compl. at 6-7, ¶¶ 18-19. The residents of the land voted to accept the distribution plan, and that it was finalized on September 25, 1959.

Am. Compl. at 7, ¶ 21. The Department of the Interior published a formal termination in the Federal Register on August 1, 1961. Am. Compl. at 11, ¶ 40.

Plaintiff states that in the late 1970s and early 1980s, various groups challenged other rancheria terminations in court, and found success when "the Secretary of the Interior conceded" rather than litigate the cases. Am. Compl. at 16, lines 18 and 23; 17, lines 10-11 ("the Secretary of the Interior again conceded"); 18, line 14 ("the Secretary of the Interior conceded"). The Mishewal Wappo Tribe and thirty-three other plaintiffs pursued this strategy in July 1979 via a class action suit filed in this court against the United States. Am. Compl. at 17-18, ¶ 57; *Tillie Hardwick v. U.S.*, Case No. C-79-1710-SW (N.D. Cal.). The Mishewal Wappo Tribe and other *Tillie Hardwick* plaintiffs asserted that the Secretary of the Interior violated the Rancheria Act by failing to satisfy various alleged obligations before terminating federal supervision and distributing trust land and assets. Am. Compl. at 17, ¶ 57. The Mishewal Wappo Tribe was dismissed from that action, Am. Compl. at 18, ¶ 58, but the Amended Complaint does not disclose the reason why.

Plaintiff claims that in January 2009, it submitted to the Secretary of the Interior a "request for administrative restoration." Am. Compl. at 23, ¶ 75. Plaintiff's request for a meeting was rejected on June 22, 2009 by Defendant and Assistant Secretary Larry Echo Hawk. Mr. Echo Hawk wrote to Plaintiff that

> Because the Rancheria Termination Act is still in full force and effect, the Department of the Interior does not have authority to restore your Tribe administratively. The only means by which your Tribe could be restored is through an act [of] Congress or the courts.

Document 49-2, attached to Am. Compl., at 1; *see also* 25 C.F.R. § 83.7(g) (barring administrative recognition where "congressional legislation [] has expressly terminated or forbidden the Federal relationship").

On April 2, 2009, The Mishewal Wappo Tribe of Alexander Valley registered itself as a corporation with the California Secretary of State. Two months later—and more than 50 years after agreeing to terminate federal recognition and more than 25 years after the Mishewal Wappo Tribe was dismissed from *Tillie Hardwick*—Plaintiff brought the instant

suit.

Plaintiff pleads five causes of action, all of which are grounded in Plaintiff's central claim that "[t]he purported termination of the Tribe was not lawfully effected." Am. Compl. at 23, ¶ 77. Plaintiff's first cause alleges that the "unlawful" termination violated a fiduciary duty the Secretary allegedly owes to Plaintiff. Am. Compl. at 23-26. The second alleges that the Secretary's failure to correct the 50-year-old termination constitutes a "failure to act" that violates the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"). Am. Compl. at 26-27. Plaintiff's third cause similarly claims that the Secretary's failure to correct the "unlawful" termination constitutes a "failure to conclude a matter" in violation of the APA. Am. Compl. at 28-29. The fourth similarly alleges that the Secretary has acted arbitrarily and capriciously in not reversing the 50-year-old termination and recognizing Plaintiff. Am. Compl. at 29-30. Finally, Plaintiff's fifth cause again alleges that the Secretary failed to comply with the Rancheria Act in terminating the Mishewal Wappo Tribe in 1959, and thus violated Plaintiff's possessory rights to the former rancheria. Am. Compl. at 30-31. All five causes allege that "the Tribe's purported termination was unlawful" or ineffective. Am. Compl. at 25, ¶ 84; 27, ¶ 93; 28, ¶ 98; 29, ¶ 104; 30-31, ¶ 110.

Plaintiff thus seeks an order compelling the Secretary to:

- include the Mishewal Wappo Tribe in a published list of federally recognized tribes. Am. Compl. at 31, ¶ B.
- transfer to Plaintiff as trust lands "all public lands held by the Department of the Interior which are not currently in use and are available for transfer that are within the Tribe's historically aboriginal land." Am. Compl. at 31-32, ¶ D.
- treat Plaintiff's future trust lands as "restored lands" as defined in 25 U.S.C. § 2719(b)(1)(B)(iii), which would make those lands immediately available for casino-style gaming purposes, and circumvent the prohibition on gaming on lands acquired after 1988. Am. Compl. at 32, ¶ E; *see* 25 U.S.C. § 2719(a).

On January 15, 2010 Defendant Ken Salazar filed an Answer to the Complaint that included five affirmative defenses. The fourth is that "[s]ome or all of Plaintiff's claims are

barred by the applicable statutes of limitations." Answer at 14. The fifth is that "[s]ome or all of Plaintiff's claims are barred by laches." Answer at 14.

Sonoma County filed a motion for intervention on March 5, 2010. Napa County followed suit on March 24, and Lake County on March 26. All three counties identified the statute of limitations and laches as immediate bars to Plaintiff's action. The court granted intervention on May 26, and thereafter extended to July 16 the time for the Counties to file responsive pleadings to Plaintiff's Amended Complaint.

On June 19, the parties filed a Joint Case Management Statement. In that Statement, Defendants Salazar and Assistant Secretary Larry Echo Hawk ("Defendants") noted that Plaintiff "alleges injury from actions or omissions occurring many decades ago; accordingly, some or all of Plaintiff's claims may be time-barred." Joint Case Management Statement at 4. Defendants therefore indicated that they may "move for judgment on the pleadings prior . . . regarding some or all of Plaintiff's claims, for lack of justiciability." Joint Case Management Statement at 5. The Counties similarly noted that they "intend to respond [to Plaintiff's Amended Complaint] by arguing that this case is barred by statutes of limitations, 28 U.S.C. § 2501, and laches, *see City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 1057 (2005)." Joint Case Management Statement at 5. The Counties therefore noted that they "may move for dismissal or judgment on the pleadings to narrow some or all of Plaintiff's claims." Joint Case Management Statement at 6, 9.

## STANDARD OF REVIEW

The Counties bring this motion in accordance with Fed. R. Civ. P. 12(b)(1) and 12(h)(3), the latter of which requires that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." It is presumed that federal courts lack jurisdiction, and Plaintiff bears the burden of proving that jurisdiction exists. *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted); *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir. 2006) ("It is to be presumed that a cause lies outside [federal] jurisdiction, and the burden of establishing the contrary rests upon the party asserting

jurisdiction") (citation omitted); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.2002) ("The party asserting federal jurisdiction has the burden of establishing it").

The Counties also bring this motion in accordance with Fed. R. Civ. P. 12(b)(6), which authorizes the court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citations omitted) ("Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable"). Instead, if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," Plaintiff's action must be dismissed. *Id.* at 327 (citation and internal quotation marks omitted). In reviewing Plaintiff's offer of proof, the court is not required to assume the truth of legal conclusions cast in the form of factual allegations, nor conclusory allegations that are contradicted by documents referred to in the complaint. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.*, 497 F.3d 972, 975 (9th Cir.2007).

## ARGUMENT

### I. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's claims are governed by 28 U.S.C. § 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This six-year statute of limitation applies to Indian tribes "in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

Plaintiff's claims have been foreclosed for decades by Section 2401(a). Plaintiff's claims are all grounded on the same operative fact—the Secretary's allegedly improper termination of the Mishewal Wappo Tribe in 1959. Plaintiff inveighs against the termination as, among other things, "unlawful," "erroneous," and "wrongful" in at least twenty-two separate paragraphs and all five causes of action of its Amended Complaint. Am. Compl. at 3, ¶ 5; 7, ¶ 21; 8, ¶¶ 27 and 29; 9, ¶ 31; 10, ¶ 37; 11, ¶ 38; 12, ¶ 45; 13, ¶¶ 48-49; 14, ¶ 50; 15, ¶ 51; 20, ¶ 67; 21-22, ¶ 70; 22, ¶ 73; 23, ¶¶ 74, 77; 25, ¶ 84; 27, ¶ 93; 28, ¶ 98; 29, ¶ 104;

30-31, ¶ 110. Plaintiff's action would not exist but for the termination, and Plaintiff cites no other fact or circumstance justifying restoration, the provision of "restored lands," or its other requested relief.

The challenged termination was proposed and voted on *five decades ago* and announced in the Federal Register in 1961. *See* Am. Compl. at 7, ¶ 21 (conceding that the residents of the Rancheria voted for termination in 1959); 11, ¶ 40 (acknowledging 1961 Federal Register proclamation). Plaintiff's action thus accrued in 1959, and certainly no later than 1961. *See Hopland*, *supra*, 855 F.2d at 1577 ("[A] claim first accrues when all the events have occurred which fix the alleged liability of the defendant and entitle the Plaintiff to institute an action") (citations and internal quotation marks omitted). Actual notice of government action triggers the statute of limitations but is not required; accrual also occurs upon publication of a notice in the Federal Register. *Shiny Rock Min. Corp. v. U.S.*, 906 F.2d 1362, 1364-65 (9th Cir. 1990).

Section 2401(a)'s six-year statute of limitations thus ran no later than 1967, more than 40 years before Plaintiff filed the instant action. This issue is dispositive, and Plaintiff's claims must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6). *Neitzke*, *supra*, 490 U.S. at 326 ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Plaintiff's failure to timely file also means that the court lacks subject matter jurisdiction, and "must dismiss the action." Fed. R. Civ. Proc. 12(h)(3), 12(b)(1).

This case is analogous to *Hopland* and other cases dismissing late claims brought by terminated tribes. *Hopland* concerned the 1961 termination of the Hopland Rancheria in Mendocino County (which borders Sonoma and Lake Counties) via the identical California Rancheria Act. 855 F.2d at 1574. In 1976, the Hopland Band of Pomo Indians filed suit against the United States claiming, as here, that the government's alleged "unlawful termination" of the Hopland Rancheria and the Band's federal status had deprived them of benefits and services available to recognized tribes. *Id.* at 1576. The Federal Circuit rejected this claim, and remanded with instructions to dismiss for lack of jurisdiction. *Id.* at 1574. The court held that "Congress has explicitly provided a plaintiff 6 years in which to file his

action and no more." *Id.* at 1577-78. The court held that plaintiff's claims had accrued in the 1960s, upon termination, approval of the distribution plan, and sale of the relevant parcels. *Id.* at 1578, 1579. As here, the court had been

> shown no valid reason why a [] suit on behalf of the Hopland Band of Pomo Indians could not have been brought to challenge the legality of its termination immediately following the improper termination occurring in this case.

*Id.* at 1580.

The court in *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007), similarly held that Section 2401(a) required dismissal of a 2002 claim by former members and descendants of the Ute Indian Tribe alleging—as here—that the federal government breached its fiduciary duty by improperly terminating their status as federally recognized Indians. 473 F.3d at 1256.[1] As here, the termination and resulting asset distribution occurred in the 1950s and 1960s (*id.* at 1259), and thus had not "occurred within the six years prior to the filing of the complaint in 2002." *Id.* at 1259 (citing *Hopland*, *supra*, 855 F.2d at 1578-79). The court rejected plaintiffs' attempt to "recharacterize [their] claim by asserting that Interior's failure to rectify its past illegal termination constitutes a current breach of trust." *Id.* at 1259. The court also rejected the application of the continuing violation doctrine, which "typically pertains to employment discrimination claims." *Id.* at 1260. Assuming *arguendo* that the doctrine applies, the court held that plaintiff

> alleges no acts committed by the defendants within the statute of limitations that could constitute a continuing violation. Although [plaintiffs] do assert that their termination and the loss of their lands and other trust assets, all of which happened in the 1950s and 1960s, continues to have lasting effects on the lives of all "mixed-blood" Utes, [they] assert[] no new acts committed by Interior since that time. As we have held, "[a] lingering effect of an unlawful act is not itself an unlawful act."

*Id.* (citations omitted).

As in *Hopland* and *Felter*, Plaintiff here challenges a Rancheria termination that Plaintiff claims resulted in a variety of harms and loss of benefits accorded to federally recognized tribes. *See* Am. Compl. at 14-15, ¶ 50 (listing alleged harms to Plaintiff from

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[1] The court remanded with instructions to consider the import of the Department of the Interior and Related Agencies Act, which does not apply here. 473 F.3d at 1260.

termination); 25, ¶ 85 (alleging that "the Tribe has been and continues to be ineligible for the 'protection, services and benefits of the Federal government available to Indian tribes"); 27, ¶ 93 (same); 28, ¶ 100 (same). Plaintiff failed to bring its claims within six years after it accrued, and its action must be dismissed. *Hopland*, 855 F.2d at 1580; *Felter*, 473 F.3d at 1259; *see also Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp. 253, (N.D. Ind. 1993) (dismissing claim where plaintiff tribe "waited far too long to bring this claim" challenging 1897 withdrawal of federal recognition).

Plaintiff may not evade the statute of limitations by alleging that the government fraudulently or deliberately concealed material facts and thus tolled the statute of limitations until the 2004 or later. *See Hopland*, 855 F.2d at 1577. Instead, Plaintiff concedes that it was aware of and protested the termination as early as 1979, when it joined the *Tillie Hardwick* action. Am. Compl. at 18, ¶ 58. Plaintiff simply missed the statutory deadline, and may not overturn the 1959 termination through the courts.

Nor may Plaintiff may evade the statute of limitations by mischaracterizing its claims as challenging current harms. Even if the "continuing claims" doctrine applies outside the employment discrimination context (*see Felter*, 473 F.3d at 1260), Plaintiff alleges only "lasting *effects*" from actions that occurred "in the 1950s and 1960s." *Felter*, 473 F.3d at 1260. As in *Miami Nation*, "lack of formal recognition is the gravamen of the plaintiff[]'s complaint," and application of the continuing claims doctrine "would eradicate the statute of limitations by preserving their cause of action until it becomes moot." 832 F. Supp. at 257. As a result, the alleged "lingering effects" of the allegedly unlawful termination "is not itself an unlawful act" sufficient to preserve Plaintiff's late claims. *Felter*, 473 F.3d at 1260.

Finally, Defendants have not attempted to waive the statute of limitations, and any such waiver would be ineffective because the statute is jurisdictional and absolute. Defendants identified the flaw in Plaintiff's action in both their Joint Case Management Statement and the Answer filed by Defendant Salazar. *See* Answer at 14 ("Some or all of Plaintiff's claims are barred by the applicable statutes of limitations"); Joint Case Management Statement at 4 ("[S]ome or all of Plaintiff's claims may be time-barred").

In addition, the Supreme Court recently confirmed that the nearly identical language of 28 U.S.C. § 2501 creates an absolute, jurisdictional bar that is not subject to waiver. *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 133-34, 139 (2008). The Court held that Section 2501, which mirrors Section 2401(a) by requiring that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues," creates an "absolute" and jurisdictional bar that is not subject to waiver. *Id.* at 133-34.

There is "no distinction between the companion statutes of limitations found at section 2401(a) and section 2501." (*Hopland Band*, 855 F.2d at 1577, fn.3), and multiple courts have applied and extended *John R. Sand* to Section 2401(a). *See Georgalis v. U.S. Patent & Trademark Office*, 296 Fed. Appx. 14, 16 (Fed. Cir. 2008) (holding that "the Supreme Court's rationale applies with equal force" because sections 2401(a) and 2501 "are 'jurisdictional' statutes of limitations"); *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 138 (D.D.C. 2009) (Section 2401(a) contains "nearly identical" language and serves the same purpose as Section 2501); *see also Marley v. U.S.*, 567 F.3d 1030, 1036 (9th Cir. 2009) (holding that Section 2401(b) is jurisdictional).

Further confirmation may come from the Ninth Circuit. On different facts, Judge Fogel recently noted that a case decided more than a decade before *John R. Sand* held that Section 2401(a) is not jurisdictional, and is thus subject to waiver. *Wilton Miwok Rancheria v. Salazar*, 2010 U.S. Dist. LEXIS 23317, *14 (citing *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997)). Judge Fogel authorized an interlocutory appeal to allow the Ninth Circuit to decide whether *Cedars-Sinai* remains good law, *id.* at *41 (noting that "[t]he jurisdictional issue is important not only for the Parties but to future litigants who may be similarly situated"), but the Ninth Circuit declined to address the matter by interlocutory appeal. Judge Fogel's ruling does not bind this court, and is contrary to the great weight of other authority. *Hopland Band*, 855 F.2d at 1577, fn.3; *Georgalis*, 296 Fed. Appx. at 16; *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 138; *Marley*, 567 F.3d at 1036. It should neither prevent nor disrupt dismissal of Plaintiff's action.

As in *Hopland*, Congress has provided a six-year window and "no more" and Plaintiff has shown "no valid reason why a [] suit . . . could not have been brought to challenge the legality of its termination immediately following the improper termination occurring in this case." 855 F.2d at 1577-78, 1580. Plaintiff has waited several decades too long to prosecute its action, and the court is "without jurisdiction to expand th[e] period explicitly provided by Congress." *Hopland*, 855 F.2d at 1578. Plaintiff's action must be dismissed.

The court should not view dismissal as an unexpected or harsh result. The Secretary advised Plaintiff more than a year ago that the Department of the Interior has no restoration authority so long as the Rancheria Act remains in force and effect, and the Plaintiff's best bet is an act of Congress. Document 49-2, attached to Am. Complaint. The federal government and the Counties have repeatedly informed Plaintiff that the relevant statute of limitations is an obvious and complete bar to their action. *See* Answer at 14; Joint Case Management Statement at 4, 5. The statute of limitations barred analogous claims in *Hopland* and *Felter*, and likely would have barred many earlier Rancheria Act lawsuits (*see* Am. Compl. at 15-18) had the issue been addressed. As a result, dismissal here would merely return Plaintiff to the status quo of needing Congressional approval for its desired federal recognition and other relief.

## II. PLAINTIFF'S CLAIMS ARE BARRED BY LACHES.

Laches is established whenever a plaintiff has committed an inexcusable delay in asserting a known right and prejudiced the party asserting laches. *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1407 (9th Cir. 1987) (citing *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987)). Laches requires proof only of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association*, 502 F.2d 1323, 1325 (9th Cir. 1974) (citing *Costello v. U.S.*, 365 U.S. 265, 282 (1961)).

Laches is an appropriate issue for a motion to dismiss, *Marshall v. Meadows*, 921 F. Supp. 1490, 1493-1494 (E.D. Va. 1996), and is properly raised where laches is apparent from the face of the complaint. *See Arclar Co. v. Gates*, 17 F. Supp. 2d 818, 823 (S.D. Ill. 1998). Where the allegations of time and place are averred in a pleading, both statute of limitations and laches bars may be determined on a motion to dismiss. *Hartford-Empire Co. v. Glenshaw Glass Co.*, 47 F. Supp. 711, 714 (W.D. Penn. 1942).

Where the delay is lengthy—like the five decade delay here—a lesser showing of prejudice is required. *Ory v. Country Joe McDonald*, 2003 U.S. Dist. LEXIS 24383, *23 (C.D. Cal. Aug. 5, 2003) ("If only a short period of time has elapsed since the accrual of the claim, the magnitude of prejudice required before the suit should be barred is great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of prejudice will be required"). Intervening changes to the value and character of land that result from the passage of time further strengthen the defense of laches. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-218 (2005) (finding the city had a justifiable expectation that its sovereignty would not be disrupted by tribal claims).

Plaintiff committed unreasonable delay by failing to timely object or challenge the 1959 termination under the California Rancheria Act. Am. Compl. at 7, ¶ 20-22; 11, ¶ 40. Plaintiff did not object until *Tillie Hardwick* in 1979, more than twenty years after the 1959 termination. Then, after Plaintiff was dismissed from *Tillie Hardwick*, Plaintiff waited another twenty-five years before seeking any administrative relief. Am. Compl. at 23, ¶ 76.

Plaintiff's delay unquestionably prejudices the Counties. Plaintiff seeks "historically aboriginal land" (Am. Compl. at 31-32, ¶ D) and "restored lands" (Am. Compl. at 32, ¶ E) that are currently within the Counties' jurisdiction. During the Plaintiff's decades-long delay, lands located in the Counties have gone through substantial changes in development and ownership. *See Felix v. Patrick*, 145 U.S. 317, 329 (1892) (laches bars establishment of constructive trust over land that had been platted, recorded, and subsequently sold to purchasers). Pursuant to California law, the Counties have implemented general plans and zoning ordinances after the September 25, 1959 termination date. *See* Calif. Government

Code Sections 65300 et seq. and 65800 et seq. While Plaintiff has failed to identify the specific locations of property they wish held in trust and developed as "restored lands," Plaintiff's requested relief would certainly come at the expense of the Counties jurisdiction, planning, and significant expenditures predicated on that planning. Plaintiff's action also threatens to impair the current owners and neighbors of the properties that may be detrimentally affected and prejudiced by the subsequent development of adjacent "restored lands." Am. Compl. at 31-32, ¶¶ D-E. Allowing Plaintiff's action to proceed would thus substantially prejudice the Counties' ability to enforce its zoning and development on any county lands that are within, contiguous, or adjacent to the "restored lands" sought by Plaintiff.

Longstanding observances and settled expectations should be prime considerations when a party belatedly asserts a right. Plaintiff's complaint clearly acknowledges its decades-long lapse of time, as well as its desire for "restored lands" within its "historically aboriginal land." Am. Compl. at 31-32, ¶¶ D, E. The provision of any such lands would negatively affect the Counties' general plan, zoning ordinances, and other plans and projects established after the 1959 termination. Laches thus bars Plaintiff from maintaining this action.

## CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court enter the enclosed Order dismissing this action.

Dated: July 16, 2010

FOR INTERVENOR-DEFENDANT
COUNTY OF SONOMA, CALIFORNIA

/s/ *Jeffrey M. Brax*

JEFFREY M. BRAX
County of Sonoma
Office of the County Counsel

Dated: July 16, 2010

FOR INTERVENOR-DEFENDANT
COUNTY OF NAPA, CALIFORNIA

/s/

THOMAS S. CAPRIOLA
[Concurrence obtained per General Order 45.X]
County of Napa
Office of the County Counsel

Dated: July 16, 2010

FOR INTERVENOR-DEFENDANT
COUNTY OF LAKE, CALIFORNIA

/s/

LLOYD GUINTIVANO
[Concurrence obtained per General Order 45.X]
County of Lake
Office of the County Counsel

**ATTORNEY ATTESTATION OF CONCURRENCE**

I hereby attest that I have obtained concurrence in this filing of this document from the above signatories, on behalf of Intervenor-Defendant County of Napa, California, and Intervenor-Defendant County of Lake, California. Concurrence is indicated by a "conformed" signature ("/s/") within this e-filed document.

Dated: July 16, 2010

/s/ *Jeffrey M. Brax*

JEFFREY M. BRAX
Office of the Sonoma County Counsel

**CERTIFICATE OF SERVICE**

I, Jeffrey M. Brax, hereby certify that on July 16, 2010, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 16, 2010, at Santa Rosa, California.

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