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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NISENAN MAIDU TRIBE OF THE NEVADA CITY RANCHERIA, Plaintiff, v. KEN SALAZAR, et al., Defendants.	No. 5:10-cv-00270-JF **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO PROCEED IN THE, MATTER OF *TILLIE HARDWICK v. UNITED STATES* AND NOTICE OF MOTION AND DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: September 9, 2011 Time: 10:30 a.m. Dept.: Courtroom 3

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PLEASE TAKE NOTICE that the above-named defendants will move this Court on September 9, 2011, at 9:00 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Jeremy Fogel, United States District Court, 280 S. First Street, San Jose, California 95113, for an order dismissing the Complaint for Breach of the Rancheria Act, Breach of the Fiduciary Obligation, Declaratory and Injunctive Relief ("Complaint") [Dkt. No. 1] pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction.

This motion is based on this notice, the Complaint, the memorandum of points and authorities which follows, the Administrative Procedure Act, and all matters of record on file with the Court, and such other materials as may be submitted. The grounds for this motion to dismiss are that Plaintiff's Complaint is statutorily time-barred and this Court, therefore is without jurisdiction to hear Plaintiff's case.

A proposed form of order granting this motion is submitted herewith, pursuant to Civil Local Rule 7-2(c).

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO PROCEED IN THE MATTER OF *TILLIE HARDWICK V. UNITED STATES* AND MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

INTRODUCTION

In 2010, Plaintiff brought a lawsuit "to remedy unlawful agency action" — specifically, the termination of the Nevada City Rancheria's federal status, the sale of the Rancheria, and distribution of the proceeds to two individual Indians holding assignments on the Rancheria. Compl. for Breach of the Rancheria Act, Breach of Fiduciary Obligation, Decl. & Inj. Relief ("Compl.") ¶ 1. This agency action occurred at the latest in 1964 and Plaintiff's claim accrued at that time.

Perhaps recognizing that the statute of limitations bars this action, Plaintiff now seeks to proceed under *Hardwick v. United States*, Case No. 79-1710 (N.D. Cal.), filed July 12, 1979. *See* Motion to Proceed in the Matter of *Tillie Hardwick v. United States* [Dkt. No. 48] (hereinafter "Pl.'s Mot."). The *Hardwick* case, however, is over, having been settled with an order entering final judgment entered on December 27, 1983. Compl. ¶ 61.

Plaintiff's attempt to proceed in *Hardwick* should be denied for a number of reasons. First, Plaintiff has not alleged a valid means to reopen a case in which final judgment was entered 28 years ago. The case as a whole has been closed since 1992. Second, Plaintiff has not properly alleged, much less shown, that its members were class members in *Hardwick*. Third, even if Plaintiff's members were part of the *Hardwick* plaintiff class, their claims would have been dismissed without prejudice. Thus, proceeding under *Hardwick* does not benefit Plaintiff. Fourth, even if Plaintiff proceeds under *Hardwick*, its claims would be barred under the statute of limitations.

Moreover, Defendants move this Court to dismiss Plaintiff's claims in the *Nisenan Maidu* case because those claims challenge agency action that occurred in 1964, and are time-barred.

FACTUAL BACKGROUND

I. Termination of the Nevada City Rancheria Pursuant to the Rancheria Act

In 1906, Congress authorized the Bureau of Indian Affairs ("BIA") within the United States Department of the Interior ("Interior") to purchase land and water rights for the use of Indians in California who lived outside of reservations or who lived on reservations that did not contain land suitable for cultivation. Act of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325 (1906). Parcels of land, called Rancherias, were purchased under this authority, with approximately 82 rancherias eventually established throughout California. The Nevada City Rancheria was a 75-acre parcel of land set aside by Executive Order on May 6, 1913, "for the Nevada or Colony tribe of Indians residing near Nevada City."[1/] Compl. ¶ 16;[2/] Exec. Order No. 1772 (1913).

[1/]Unlike most rancherias, the Nevada City Rancheria was a homestead acquired by an individual Indian and placed into trust pursuant to the Executive Order. This aspect of the Rancheria is irrelevant for present purposes, however, as it has no bearing on either the termination of the Rancheria or, more importantly for the subject of Plaintiff's Motion, the proceedings in *Hardwick.*

[2/]While Defendants dispute many of the facts in Plaintiffs' Complaint, for the purposes of the motion to dismiss, those facts are assumed to be true.

By 1958, Congressional enthusiasm for rancherias reached its nadir, and the California Rancheria Act was enacted. Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619 ("Rancheria Act"), amended by the Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390. The Act provided authority for the termination of rancherias, including the Nevada City Rancheria. *Id.*, 78 Stat. 391. It established a procedure for the termination of the rancherias and the distribution of the land and other assets to eligible Indians in fee simple. *Id.* After termination, the lands would become subject to all state and federal taxes and the distributees and their dependents would lose their special federal status as Indians. *Id.*

According to the Complaint, after the passage of the Rancheria Act, BIA officials visited the Rancheria for the purpose of disposing of the property pursuant to the Rancheria Act. Compl. ¶ 33. BIA officials consulted only with the two Rancheria occupants at the time, Peter and Margaret Johnson, and did not consult with other tribal[3/] members living off the Rancheria but known to the BIA. *Id.* The BIA issued a public notice regarding the termination of the Rancheria, along with the plan for the disposition of the assets of the Rancheria, in 1959. *Id.* ¶ 44; *see* Exh. 1 [General Notice].[4/] The notice states: "Mr. Peter W. Johnson and his wife, Margaret, are the only Indians living on the rancheria and are recognized as the only people of the rancheria who hold assignments and are entitled to share in the distribution of the property."[5/]

[3/]The use of the word "tribe" in this brief merely echoes the language in Plaintiff's Complaint and other documents. Defendants do not concede that Plaintiff is a federally-recognized Indian tribe or that Indians not residing on the Rancheria at the time of termination were "members" of a "tribe."

[4/]This document will be part of the administrative record when it is filed. For the Court's convenience, documents (including the *Hardwick* pleadings) have been attached as exhibits to the Declaration of Devon Lehman McCune.

[5/]Plaintiff argues that distribution to the Johnsons was improper. That argument is not addressed here, as there are threshold matters, such as the Court's jurisdiction, that must be considered first and the current motions are not about the validity of the termination but procedural aspects of the case, such as whether Plaintiff may proceed in *Hardwick* and whether its claims in *Nisenan Maidu* are time-barred. Moreover, the waiver of sovereign immunity in this case is pursuant to the Administrative Procedure Act and review, therefore, should be conducted on the basis of an administrative record compiled by the agency. *See, e.g., Lands Council v. Powell*, 395 F.3d

Id. With the Johnsons' approval, the BIA sold the Rancheria in 1963, and distributed the proceeds to Peter Johnson, Margaret Johnson having died before the Rancheria was sold. Compl. ¶¶ 40, 45, 51. Interior published notice of the termination of the Nevada City Rancheria in the Federal Register on September 22, 1964. 29 Fed. Reg. 13,146 (Sept. 22, 1964); Compl. ¶ 50.

II. *Hardwick v. United States*

On July 12, 1979, individuals from thirty-six terminated Rancherias sought restoration of their status as Indians and entitlement to federal benefits, as well as the right to reestablish their tribes as recognized governmental entities. *Hardwick v. United States*, No. 79-1710 (N.D. Cal. filed July 12, 1979), Exh. 2 [First Am. Compl. for Declaratory and Inj. Relief and Damages (filed Oct. 14, 1982)]. On February 28, 1980, the court certified a plaintiff class consisting "of all those persons who receive[d] any of the assets of the following California Indian Rancherias pursuant to distribution plans purportedly prepared under the California Rancheria Act, Act of August 18, 1958 (72 Stat. 619), or as amended by the Act of August 11, 1964 (78 Stat. 390), any heirs or legatees of such persons and any Indian successors in interest to real property so distributed . . . ." Exh. 3 [Order Re: Class Certification (filed Feb. 28, 1980)] at 2. The list of thirty-four terminated Rancherias whose distributees were potentially in the class included the Nevada City Rancheria. *Id.*

1019, 1029–30 (9th Cir. 2005) (noting Supreme Court precedent that "courts reviewing an agency decision are limited to the administrative record"). The record has not been filed yet. Defendants, however, dispute that this distribution was improper. The Johnsons were the only assignment holders on the Rancheria and the Rancheria Act provided that the persons who may prepare the distribution plans were Indians who held formal or informal assignments on the rancheria or those Indians who had or claim to have had some special relationship to the particular rancheria. *See* Rancheria Act § 2(a) (noting that plan for distribution may be prepared after consulting with "[t]he Indians who hold formal or informal assignments on each reservation or rancheria"); 25 C.F.R. Pt. 242 (1959), 24 Fed. Reg. 4652–54; Answer ¶¶ 20, 51, 97. Thus, the Rancheria Act does not require the Secretary to consult with non-residents of a rancheria. Further, the regulations provided that notice of the plan of distribution be given by posting a copy of the plan in a public place on the rancheria and in the post office serving the rancheria. 25 C.F.R. § 242.4 (1959). The notice requirement was met. *See* Exh. 1.

On August 2, 1983, the parties filed a stipulation for entry of judgment (hereinafter "Stipulation"). Exh. 4 [Stip. for Entry of Judgment]. The Stipulation settled the claims with respect to the members of seventeen Rancherias, providing, *inter alia*, that the individuals' status "as Indians under the laws of the United States shall be restored and confirmed," Interior would recognize the restored Rancherias "as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act," and individuals holding former Rancheria lands could reconvey the lands to the United States to be held in trust. Stip. ¶¶ 3, 4, 6.

The stipulation also provided that the claims asserted "by or on behalf of any persons who received any of the assets of the Graton, Scotts Valley, Guideville, Strawberry Valley, Cache Creek, Paskenta, Ruffeys, Mark West, Wilton, El Dorado, Chico, or Mission Creek Rancherias are dismissed without prejudice to their being refiled in another action and defendants shall not assert any laches defense to any such subsequent action they could not have asserted prior to the date this action was filed." Stip. ¶ 14. Plaintiffs' counsel in *Hardwick* filed a certificate of counsel regarding the hearing on approval of settlement of class actions, which described this group as those class members from the rancherias where "[n]o class member from these rancherias currently owns real property within the original rancheria boundaries. The property was either sold to non-Indians when the rancheria was terminated and the proceeds of these sales distributed to rancheria members in lieu of deeds to individual parcels of property or all of the property originally distributed was subsequently sold to non-Indians." Exh. 5 [Certificate of Counsel Re: Hrg. on Approval of Settlement of Class Actions (filed Nov. 17, 1983) (hereinafter "Pls.' Cert.")] at 9. Plaintiffs' counsel stated that, as to this category, "the federal defendants are unwilling to re-assume responsibility for any of these rancherias without a final judicial determination of their obligation to do so." *Id.*

Finally, the stipulation dismissed certain class members' claims on res judicata grounds because they were the subject of prior law suits. Exh. 4 ¶¶ 15–19; Exh. 5 at 10.

The parties "in consultation with each other," prepared "a mailing list showing the names and addresses of all those class members or persons or organizations likely to be in contact with class members which the parties can identify and locate through reasonable efforts." Exh. 6 [Stip. to Order Prescribing Notice of Proposed Class Action Settlement and Hrg. on Approval of Settlement and Order (filed Sept. 20, 1983)] at 4. Notice was sent to the court-approved mailing list of class members on October 28, 1983, and the notice was also posted in agreed-upon newspapers and locations on or near the rancherias. *Id.*; Exh. 7 [Fed. Defs.' Statement of Compliance of Order Filed Oct. 21, 1983]. No notices were sent to class members from the Nevada City Rancheria, as the only two class members listed on the mailing list, Peter and Margaret Johnson, were both deceased. Exh. 8 [Joint Rpt. of Resp. to Class Notice (filed Dec. 6, 1983)]; Exh. 9 [Mailing List of Class Members and Interested Persons/Organizations, Newspaper List, and Posting List and Order Approving Same (filed Oct. 21, 1983), Exh. A (Mailing List)]. The Notice stated that "CLASS MEMBERS WHO DO NOTHING IN RESPONSE TO THIS NOTICE will be bound by the judgment and/or have their claims dismissed as provided in the settlement, if the Court approves the settlement." Exh. 7 at 4. There was a hearing to determine whether the district court should approve the terms of the settlement and enter the stipulated judgment. Exh. 10 [Findings and Recommendation (filed Dec. 15, 1983)]. On December 22, 1983, the court entered an order "that judgment be entered for PLAINTIFFS, according to the stipulation filed by the parties on August 2, 1983." Exh. 11 [Order Approving Entry of Final Judgment in Action (filed Dec. 22, 1983) (hereinafter "Final Judgment")].

III. The *Nisenan Maidu* Litigation

Plaintiff brought its Complaint in this Court on January 20, 2010, "to remedy unlawful agency action wherein the Tribe's federal status was illegally terminated and the Tribe's rancheria . . . was illegally sold and distributed pursuant to the" Rancheria Act. Compl. ¶ 1. The Complaint relies upon the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702–03, as the basis for jurisdiction and the United States' waiver of sovereign immunity. *Id.* ¶ 6. In its

Complaint, Plaintiff asserts that "the Nevada City Rancheria and its members were not [] apprised of the *Hardwick* litigation and therefore were not a party thereto." *Id.* ¶ 61. Plaintiff also asserts that "the United States failed to provide notice to the Court or to the known members/descendants of the Nevada City Rancheria." *Id.* ¶ 62.

Plaintiff asserts six claims for relief. The first four claims are for breach of the Rancheria Act, alleging various failures to comply with provisions of the Rancheria Act, such as failing to seek and obtain the votes of all eligible Tribal members and to provide services as required by the Rancheria Act. *Id.* ¶¶ 75–86. Plaintiff's fifth claim alleges a breach of fiduciary duty from Interior's failure to include the Tribe on the statutorily mandated list of federally recognized tribes, making the Tribe ineligible for federal benefits available to Indian tribes by virtue of their status as tribes. *Id.* ¶¶ 87–92. Plaintiff's sixth claim for relief alleges agency action unlawfully withheld or unreasonably delayed for Interior's failure to publish a list of federally recognized tribes that includes the Tribe's name. *Id.* ¶¶ 93 –98.

ARGUMENT

Plaintiff's motion to proceed under *Hardwick* should be denied. Procedurally, Plaintiff has not alleged a means by which to reopen a case that was settled in full and in which final judgment was entered. Nor has Plaintiff shown that its members were class members in *Hardwick* and that it, therefore, has standing to proceed in that matter. In any event, however, even if Plaintiff were to show that its members were class members in *Hardwick*, it would not benefit them because their claims were dismissed without prejudice. Further, the statute of limitations bars Plaintiff's claims, whether it attempts to proceed in *Hardwick* or in the immediate case.

I. Plaintiff Does Not Allege a Valid Means to Reopen *Hardwick*.

First and foremost, Plaintiff does not allege a valid means to reopen a case (a) that was settled in its entirety, (b) in which final judgment was entered in 1983, and (c) was closed in 1992. It is not clear from Plaintiff's filing how it intends to proceed in *Hardwick*, particularly given that the case was closed.

Rule 60(b) of the Federal Rules of Civil Procedure might provide a means to reopen the final judgment, but Plaintiff has not made that case here. Nor should such a motion be granted. Rule 60(b) provides for relief from a final judgment, order, or proceeding in certain circumstances, such as "mistake, inadvertence, surprise, or excusable neglect." The rule, however, provides that a motion be made "within a reasonable time," and specifically provides that for several of the reasons listed in 60(b), the motion must be made within a year from the entry of judgment. Fed. R. Civ. P. 60(c)(1). Filing such a motion several decades after judgment was entered is not within a reasonable time.

Plaintiff may argue that this case falls into the category of 60(b)(6), which provides that a party can seek to be relieved from a final judgment for "any other reason that justifies relief." *Id.* This section, however, is used "'sparingly as an equitable remedy to prevent manifest injustice,'" and a party seeking relief under this section "must demonstrate 'extraordinary circumstances which prevented or rendered him unable to prosecute [his case.]'" *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993); *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)). Plaintiff here has made no effort to demonstrate such extraordinary circumstances or that manifest injustice would occur if *Hardwick* were not to be reopened. The declarations Plaintiff submitted with its filing show that the individuals knew about the termination and sale of the Rancheria. *See* Decl. of Robert R. Johnson in Supp. of Mot. to Proceed in the Matter of *Tillie Hardwick v. United States* [Dkt. No. 48-7] (noting he learned about the termination of the Nevada City Rancheria in approximately 1964); Decl. of Richard B. Johnson in Supp. of Mot. to Proceed in the Matter of *Tillie Hardwick v. United States* [Dkt. No. 48-8] (noting that Mable Fay Johnson (Hobbs) knew about the termination of the Rancheria in 1964). Further, Defendants published notice of the termination on September 22, 1964, and "[a]ctual knowledge of government action [] is not required for a statutory period to commence." *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990); 29 Fed. Reg. 13,146 (Sept. 22, 1964) (terminating Federal supervision of the Nevada City Rancheria). Publication in the

Register is "'legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.'" *Shiny Rock Mining Corp.*, 906 F.2d at 1364 (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667-68 (9th Cir. 1989)); *see also Gov't of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984) (barring claim under statute of limitations because Federal Register publication constituted "formal notice to the world"). In short, Plaintiff cannot demonstrate a valid reason that its claims have lain fallow for 28 years after judgment was entered in *Hardwick*, and for at least forty years after some of Plaintiff's members learned that the Rancheria had been terminated.

Moreover, if Plaintiff wishes to proceed under *Hardwick*, it should be required to show why that case should not be dismissed either for failure to prosecute or on laches grounds. Rule 41 of the Federal Rules of Civil Procedure provides that a case may be subject to involuntary dismissal if a plaintiff fails to prosecute its case. Certainly, a failure to prosecute the case since at least 1983 is unreasonable delay. *See Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir. 2010) (noting that a "Rule 41(b) dismissal 'must be supported by a showing of unreasonable delay'" (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986))). A district court should weigh several factors in determining whether a dismissal for a failure to prosecute should be granted: "'(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions.'" *Id.* (quoting *Henderson*, 779 F.2d at 1423). In this case, the factors would favor dismissal. Such a lengthy delay would harm the public's interest in expeditious resolution of litigation, as well as the court's need to manage its docket. Defendants here are prejudiced by the failure to prosecute because such a length of time has gone by that the evidence is lost, the attorneys and staff familiar with the case have moved on to other ventures, and memories have faded. The documents indicate that both parties and the court intended to dispose of the case in its entirety. *See, e.g.*, Exh. 10 at 2–3 (noting that "the settlement affects 17 of thirty-four rancherias," "[c]lass members from twelve other rancherias would dismiss without prejudice their claims," and "class

members from the remaining five rancherias . . . would dismiss with prejudice their actions"). Reopening the judgment so long after entry would not serve the public's interest in either expeditious resolution of litigation or the finality of judgments.

Laches should also bar Plaintiff from proceeding in *Hardwick.* Laches is an equitable defense and requires proof of (1) lack of diligence by Plaintiffs and (2) prejudice to Defendants. *See New Jersey v. New York*, 523 U.S. 767, 806 (1998); *United States v. Dang*, 488 F.3d 1135, 1144 (9th Cir. 2007) (citing *Costello v. United States*, 365 U.S. 265, 282 (1961)). Prejudice typically means that evidence is no longer available or that the party asserting laches has "altered its [behavior] in reliance on a plaintiff's inaction." *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1412 (9th Cir. 1993).

In this case, Plaintiff asserts that it was properly part of the *Hardwick* action and was never dismissed or the subject of a final determination or judgment. Accordingly, Plaintiff argues that it "was, is and continues to be a class member in *Tillie Hardwick*," and that the *Hardwick* case lay fallow between the 1983 entry of the stipulated judgment and 2011. Pl.'s Mot. at 7. Certainly, this shows a lack of diligence on Plaintiff's part. Even if the individual class members were unaware of the *Hardwick* action, the class was represented by attorneys that had an obligation to represent the class. Lawyers' actions generally are imputed to their client. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962); *Lal*, 610 F.3d at 524.

Further, there can be no question that Defendants are prejudiced by Plaintiff's delay. The documents indicate that the parties believed the case was settled in full. Had Defendants been aware that some tribes would attempt to revive their claims decades later, the settlement may have been structured differently or may not have been approved. As Plaintiff's papers also prove, evidence is no longer available. Plaintiff has tried to piece together evidence that would explain why the Nevada City Rancheria was not listed in the Stipulated Judgment, but evidence is lost, memories have faded, and we cannot be sure exactly what events transpired. Allowing Plaintiff to reopen *Hardwick*, which has long since concluded, would allow Plaintiff to profit

from this lapse of time and evidence. Accordingly, the doctrine of laches should bar Plaintiff's attempt to reopen *Hardwick*.[6/]

II. Plaintiff has not Shown that it has Standing to Proceed in *Hardwick*.

In any event, however, Plaintiff's motion to proceed under *Hardwick* should be denied because Plaintiff has not shown that its members are part of the class in *Hardwick*. The plaintiff class certified in *Hardwick* is not terminated Rancherias, but individuals. Specifically, the plaintiff class is "all those persons who receive[d] any of the assets of the following California Indian Rancherias pursuant to distribution plans purportedly prepared under the California Rancheria Act, Act of August 18, 1958 (72 Stat. 619), or as amended by the Act of August 11, 1964 (78 Stat. 390), any heirs or legatees of such persons and any Indian successors in interest to real property so distributed." Exh. 3 at 2.

Plaintiff has not shown that any of its members are within the *Hardwick* class. Plaintiff's filings indicate that none of the tribe's current members received any of the Nevada City Rancheria assets. It is possible that some of the members (specifically, Richard and Robert Johnson) are heirs or legatees of the distributees, Peter and Margaret Johnson, but Plaintiff has not so asserted, much less proven that fact. Further, the *Hardwick* settlement was focused on members who owned land that was formerly part of a rancheria. For example, the notice of hearing on approval of the proposed class action settlement states that an Indian person is a member of the class represented in the law suit and will have his or her legal rights affected by the settlement if s/he: "1. Received a property interest in any of the Rancherias listed below when deeds to rancheria property were distributed under the Rancheria Act; or 2. Ha[d] acquired title to any such Rancheria property by inheritance, gift, purchase or other means after deeds to Rancheria property were distributed under the Rancheria Act." *See* Exh. 6 at 1.[7/] Under this

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[6/]The Stipulated Judgment provides that Defendants will not assert laches against Rancherias whose claims were dismissed without prejudice, but that assertion applies to separate suits brought by the rancherias.

[7/]It appears that the actual notice mailed by first-class mail and posted in newspapers and local post offices may not have listed the Nevada City, Mooretown, or Mission Creek Rancherias as

definition, none of Plaintiff's members would have been part of the class because it is undisputed that the Nevada City Rancheria was sold and no deeds were distributed to Indians as part of the termination. Compl. ¶¶ 51, 52.

Other evidence demonstrates that there were no class members from the Nevada City Rancheria. The *Hardwick* court approved a mailing list showing class members listed by rancheria, as well as their last known addresses. Exh. 6. For the Nevada City Rancheria, the only class members listed are Peter and Margaret Johnson, both deceased as of August 14, 1966. Further, the parties submitted a Joint Report of Responses to Class Notice (filed Dec. 6, 1983). Exh. 8. This report shows how many notices, listed by rancheria, were mailed and returned as undelivered. *Id.* at 3. No notices were sent to Nevada City Rancheria class members. *Id.* at 3. This further supports a finding that there were no *Hardwick* class members from the Nevada City Rancheria.

Accordingly, Plaintiff has not shown that its members have standing to proceed in *Hardwick.*

III. If Plaintiff's Members Were Properly Part of the *Hardwick* Class, Their Claims Were Dismissed Without Prejudice.

Even assuming, however, that Plaintiff has members that were properly part of the *Hardwick* class, they should not now be allowed to proceed in *Hardwick* because their claims were dismissed without prejudice. The *Hardwick* settlement broke the terminated Rancherias into three categories. The first category consists of the 17 rancherias who, as part of the *Hardwick* settlement, had their status as Indians restored. Those rancherias are specifically listed in the stipulation. Exh. 4 at 2. The second category was those class members from the rancherias where "[n]o class member from these rancherias currently owns real property within the original rancheria boundaries. The property was either sold to non-Indians when the rancheria was terminated and the proceeds of these sales distributed to rancheria members in lieu

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being included in the settlement. *See* Exh. 7. However, the mailing list for class members does not show any Nevada City Rancheria class members. The list shows only Peter and Margaret Johnson, both of whom were deceased by the time *Hardwick* was filed. *See* Exh. 9.

of deeds to individual parcels of property or all of the property originally distributed was subsequently sold to non-Indians." Exh. 5 at 9. These class members "would be dismissed from this action without prejudice to their right to refile another action or other actions on their behalf." *Id.* As Plaintiffs' counsel's statement supporting the settlement indicates, the government was unwilling to reassume responsibility for these rancherias without a judicial order obligating them to do so. *Id.* The third category includes class members whose claims were dismissed on res judicata grounds because they were the subject of prior law suits. *Id.* at 10. In fact, the parties jointly submitted a "Stipulation to Order Prescribing Notice of Proposed Class Action Settlement and Hearing on Approval of Settlement and Order." This Stipulation specifically stated that the parties filed an executed Stipulation for Entry of Judgment to settle the class claims:

> Under that stipulation the class claims are divided into three categories: 1) claims asserted by class members from specified rancherias who will receive specified relief under the proposed judgment and who will dismiss with prejudice their damages claims against the federal defendants. Upon entry of judgment, the class definition will be narrowed to include only these Rancherias; 2) claims asserted by class members from specified rancherias whose claims will be dismissed without prejudice to their right to file subsequent actions asserting those claims; and 3) claims asserted by class members from specified rancherias whose claims are dismissed based on res judicata grounds.

Exh. 6 ¶ 2.

All filings, including the statement of counsel for both parties regarding the hearing on approval of settlement of class actions, indicate that the stipulation was meant to fully resolve the case and dispose of all class members' claims. *See id.*, Exh. 12 [Defs.' Statement Supporting Approval of Settlement] at 1 (stating that the Stipulation provides equitable relief to class members of 17 Rancherias and "further provides for the dismissal without prejudice of all claims as to the remaining Rancherias except in the few instances where the claims of individual Indians are to be dismissed on the grounds of res judicata"); Exh. 5 at 7–10.

Any Nevada City Rancheria class member would have fallen in the second group: those whose claims were dismissed without prejudice. *See* Exh. 5 at 7–10. At the time of *Hardwick*, no class member owned real property within the Rancheria boundary. Compl. ¶¶ 51, 52 (noting

that land was sold by the federal government and "the majority, if not all, of the Tribe's land has passed out of tribal and Indian ownership into non-Indian ownership"). As part of the distribution plan, the Rancheria was sold and the proceeds distributed. *Id.* Although Nevada City is not listed in the Stipulation,[8/] it clearly falls into the group of class members whose claims were dismissed without prejudice. In fact, a draft stipulation specifically names the Nevada City Rancheria as part of this group. Exh. 13 [Stip. for Entry of Judgment (Draft)] ¶ 14. If the Rancheria was not specifically listed in the Stipulation and there were valid Nevada City Rancheria class members, it is clear their claims were disposed of in the settlement. Accordingly, if Plaintiff has any members who were properly part of the *Hardwick* plaintiff class, proceeding under *Hardwick* does not benefit Plaintiff because all those type of claims were dismissed without prejudice.

Further, to the extent Nevada City Rancheria class members "fell through the cracks," the fault does not lie with the United States. All class members were represented by Plaintiffs' attorneys. The parties jointly prepared a mailing list of class members. Given that the class members were represented by counsel, it would have been improper for the attorney representing the United States to do an investigation into finding class members. *See, e.g., United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000) (noting the "the venerable rule in legal ethics prohibiting ex parte contacts with represented parties" and discussing sanctions imposed by district court against United States Attorney for contacting represented party); *United States v.*

[8/] The reason the Nevada City Rancheria is not listed is unknown. Plaintiff argues that Nevada City "fell through the cracks," but it cannot be known at this date if they were intentionally or unintentionally not mentioned in the settlement. While Plaintiff has submitted declarations that support this argument, it is not clear that the declarants reviewed all documents in the case (other than those specifically mentioned in the declarations) or even clearly recall events that transpired so long ago. In fact, Mr. Locke's declaration specifically states that he reviewed only five specified documents from the *Hardwick* case and had "no recollection as to why Nevada City Rancheria was listed as a class member in the Complaint, First Amended Complaint and the February 29, 1983 Order, but was not listed or referenced in the Stipulation for Entry of Judgment." *See* Locke Decl. [Dkt. No. 38]. Accordingly, the declarations cannot be read as definitive proof that the Nevada City Rancheria is not listed on the Stipulation as the result of an inadvertent error.

Villanueva-Diaz, 634 F.3d 844, 851 (5th Cir. 2011) ("The rule that contact with a represented party should be through his lawyer is so well established in American jurisprudence that attorneys are generally prohibited by ethical rules from contact with the opposing party if represented by counsel" (citing the Model Rules of Prof'l Conduct R. 4.2 (2002))).

To the extent that the Nevada City Rancheria was not mentioned by name in the Stipulation, any potential claims by Nevada City Rancheria class members were dismissed without prejudice to refile a separate lawsuit. Final judgment was entered and the case was closed.

IV. Even if Plaintiff Proceeds Under *Hardwick*, the Statute of Limitations Bars its Claims.

Plaintiff's claims are time-barred, even if it proceeds in *Hardwick* because any cause of action based on termination of the Rancheria accrued in 1964. The United States is immune from suit unless it consents to be sued. Congress alone may consent to suit, and its consent — which is in effect a waiver of sovereign immunity — must be "unequivocally expressed" in the statutory text. *United States v. Idaho, ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of" the terms of the United States' consent. *United States v. Dalm*, 494 U.S. 596, 608 (1990). The statutory time bar for civil actions 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." 28 U.S.C. § 2401(a); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132–36 (2008); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712–13 (9th Cir. 1991).

A cause of action generally accrues "'when the plaintiff is aware of the wrong and can successfully bring a cause of action'" based on that wrong. *Shiny Rock Mining Corp.*, 906 F.2d at 1364 (quoting *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986)). In *Shiny Rock*, the Ninth Circuit held that the statutory period began once the plaintiff had constructive notice after the agency published notice in the Federal Register preventing mining

on the land. *Id.* at 1365. Actual notice likewise triggers the statutory limitations period. *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 590, 592–93 (9th Cir. 1990).

The termination of the Nevada City Rancheria was finalized in 1964, and Plaintiff's claim accrued at that time. Defendants published notice of final termination of the Nevada City Rancheria in the Federal Register notice was published on September 22, 1964. 29 Fed. Reg. 13,146. Publication in the Register is "legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Shiny Rock Mining Corp.*, 906 F.2d at 1364*; Friends of Sierra R.R.*, 881 F.2d at 667–68; *see also Gov't of Guam*, 744 F.2d at 701 (holding that Federal Register publication constituted "formal notice to the world" and barring claim under statute of limitations).

Although "[a]ctual knowledge of government action [] is not required for a statutory period to commence," *Shiny Rock Mining Corp.*, 906 F.2d at 1364; 29 Fed. Reg. 13,146 (Sept. 22, 1964) (terminating Federal supervision of Nevada City Rancheria), the declarations submitted with Plaintiff's Motion to Proceed in *Hardwick* show that Plaintiff in fact had actual knowledge. *See, e.g.*, Decl. of Robert R. Johnson in Supp. of Mot. to Proceed in the Matter of *Tillie Hardwick v. United States* [Dkt. No. 48-7] (noting he learned about the termination of the Nevada City Rancheria in approximately 1964); Decl. of Richard B. Johnson in Supp. of Mot. to Proceed in the Matter of *Tillie Hardwick v. United States* [Dkt. No. 48-8] (noting that Mable Fay Johnson (Hobbs) knew about the termination of the Rancheria in 1964). Even before the Rancheria's termination was published in the Register, Defendants posted a public notice at the Nevada City Rancheria post office and at the gate post of the Rancheria on June 16, 1959. *See* Exh. 1. On September 29, 1959, the Sacramento Bee published an article about the planned sale of the Rancheria. *See* Exh. 1 to Decl. of Shelly Covert [Dkt. No. 49-1] ["Sale of Rancheria Will End Colorful Chapter," Sacramento Bee, September 29, 1959]. Plaintiff also submitted a letter from the Sacramento Area Office of the Bureau of Indian Affairs to Mr. Robert R. Yemie from November 10, 1959, which referred to Mr. Yemie's letter of November 4 regarding the Nevada City Rancheria. *See* Exh. 4 to Covert Decl. [Dkt. No. 49-7] at 2. The letter states that a plan was

prepared for distribution of the asserts of the Rancheria and was posted on June 16, 1959. This letter shows that at least some of Plaintiff's members had knowledge of the Rancheria's termination in 1959.

Therefore, whether one relies upon the constructive notice in the Federal Register or actual notice, it is undisputed that Plaintiff had notice of the termination long before the filing of this suit. The withdrawal of federal recognition was enough to give Plaintiff all the facts necessary for suit. *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) (noting that plaintiff could have brought a challenge to "the legality of its termination immediately following the improper termination occurring in this case"). The cause of action accrued, therefore, in 1964.

The statute of limitations in § 2401(a) should be construed as jurisdictional and an absolute bar to Plaintiff's claims. *See Marley v. United States*, 567 F.3d 1030, 1036 (9th Cir. 2009) (noting that when court did not have jurisdiction, doctrines of equitable estoppel or equitable tolling could not be applied), cert. denied, 130 S. Ct. 796 (2009); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (noting that sovereign immunity is jurisdictional in nature, and a waiver of sovereign immunity is necessary before a court can entertain jurisdiction over a suit against the United States); *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (same).

In *John R. Sand*, the Supreme Court held that the statute of limitations found in 28 U.S.C. § 2501 is jurisdictional. 552 U.S. at 135. In a case decided prior to *John R. Sand*, a panel of the Ninth Circuit held that the statute of limitations in 28 U.S.C. § 2401(a) was not jurisdictional and was subject to waiver. *Cedars-Sinai Med Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997); *but see Sisseton-Wahpeton Sioux*, 895 F.2d at 592 ("The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action."); *Nesovic v. United States*, 71 F.3d 776, 777–78 (9th Cir. 1995) (same). The continued validity of *Cedars-Sinai* is in question due to the Supreme Court's decision in *John R. Sand*. *See Aloe Vera of Am., Inc. v. United States*, 580 F.3d 867, 872 (9th Cir. 2009) (noting question of *Cedars-Sinai*'s continued validity); *Marley*, 567 F.3d at 1036 n.3 (noting that "we need not

decide here whether *Cedars-Sinai* can survive after *John R. Sand & Gravel*"); *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1237 (E.D. Wash. 2010) ("The statute of limitations is one such term that operates to narrow the waiver of sovereign immunity, and failure to sue the United States within the limitations period is not merely a waivable defense but operates to deprive federal courts of jurisdiction."); *but see Wilton Miwok Rancheria v. Salazar*, No. C-07-02681, C-07-5706, 2010 WL 693420 at *4–5 (N.D. Cal. Feb. 23, 2010) (declining to find that *John R. Sand* alters Ninth Circuit's ruling that § 2401(a) is not jurisdictional); *Vietnam Veterans of Am. v. C.I.A.*, No. C-09-0037, 2010 WL 291840 at *4 (N.D. Cal. Jan. 19, 2010); *Sierra Club v. Johnson*, No. C-08-1409, 2009 WL 482248 at *9 (N.D. Cal., Feb. 25, 2009); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, No. 3:06-cv-657, 2008 WL 5111036 at *5 (D. Nev., Dec. 3, 2008); *Public Citizen, Inc. v. Mukasey*, No. C-08-0833, 2008 WL 4532540 at *8 (N.D. Cal., Oct. 9, 2008). It also is not consistent with other circuits' holding. *See, e.g.*, *Hardin v. Jackson*, 625 F.3d 739, 740 n.1 (D.C. Cir. 2010) (noting that the D.C. Circuit "has long held that section 2401(a) creates 'a jurisdictional condition attached to the government's waiver of sovereign immunity'" (quoting *Spannatas v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987))); *Georgalis v. U.S. Patent & Trademark Office*, 296 Fed. Appx. 14, 16 (Fed. Cir. 2008); *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006) (per curiam).

As another district court has noted, the language of § 2501 and § 2401(a) is nearly identical. *See* 28 U.S.C. § 2501 ("Every 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."); 28 U.S.C. § 2401(a) ("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"); *W. Va. Highlands Conserv. v. Johnson*, 540 F. Supp. 2d 125, 142 (D.D.C. 2008) (holding that § 2401(a) is jurisdictional in light of the similarities with § 2501). Further, this circuit has held that 28 U.S.C. § 2401(b) is jurisdictional. *Marley*, 567 F.3d at 1036 n.3. Given that the Supreme Court has held § 2501 to be jurisdictional, and the Ninth Circuit has held

§ 2401(b) to be jurisdictional, and the language of those two sections is substantively indistinguishable from § 2401(a), this court should conclude that 28 U.S.C. § 2401(a) is also jurisdictional. *See W. Va. Highlands*, 540 F. Supp. 2d at 142. As such, Plaintiff's claims would be barred.

Even if the *Cedars-Sinai* panel view remains viable and § 2401(a) is not jurisdictional, however, Plaintiff's claims in *Hardwick* still should be considered time-barred. The Supreme Court has stated:

> [S]tatutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974) (quoting *Order of RR Tel. v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944). This case provides the perfect example of why statutes of limitations exist. Here, any relevant actions were taken long ago. All parties believed *Hardwick* was settled in its entirety. *See* Exh. 12 at 1 ("The stipulation further provides for the dismissal without prejudice of all claims as to the remaining Rancherias except in the few instances where the claims of individual indians are to be dismissed on the grounds of res judicata."); Exh. 10 at 3 (noting that settlement affected 17 rancherias, 12 rancherias would have their claims dismissed without prejudice, and "the five remaining rancherias" would dismiss their claims with prejudice). Witnesses have disappeared. *See* Vinding Decl. ¶ 11 [Dkt. No. 48-1] ("I attempted to contact others involved, but after further search, I concluded that there were no other living persons who could competently testify to the issue of class members, having learned, for example, that Judge Spencer Williams was deceased."). Evidence is lost. *See id*. ¶ 13 (describing "year long legal-journey" searching for files and witnesses in *Hardwick*). Memories have faded. The statute of limitations, therefore, should bar Plaintiff's claims. *See Aloe Vera*, 580 F.3d at 871 (noting that statutes of limitations that may be equitably tolled "'seek primarily to protect defendants against stale or unduly delayed claims'" (quoting *John R. Sand*, 522 U.S. at 133)).

For the foregoing reasons, Plaintiff's motion to proceed in the *Hardwick* matter should be denied. There is no procedural basis for allowing Plaintiff to reopen a case in which judgment was entered 28 years ago. Moreover, Plaintiff either had no members that were class members in the *Hardwick* litigation or, if it did have any class members, those members were represented by counsel and their claims were dismissed without prejudice. In any event, however, Plaintiff's claims in *Hardwick* are barred by the statute of limitations.

V. The *Nisenan Maidu* Action Should Be Dismissed Because Plaintiff's Claims are Time-Barred.

Similarly, the *Nisenan Maidu* case should be dismissed because the statute of limitations bars Plaintiff's claims. Plaintiff alleges that the United States has waived its sovereign immunity by virtue of the APA and "the United States' fiduciary and trustee obligations owed to the Nevada City Rancheria and its members." Compl. ¶ 6. Plaintiff alleges jurisdiction based on 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. § 1362, and the APA, 5 U.S.C. § 702–03. *Id.* It is well-established that 28 U.S.C. § 1331 does not waive the United States' sovereign immunity. *United States v. Park Place Assoc.*, 563 F.3d 907, 924 (9th Cir. 2009) (noting that "28 U.S.C. § 1331 grants district courts original jurisdiction over 'all civil actions arising under the Constitution, laws or treaties of the United States,' but it does not waive sovereign immunity"). Nor do 28 U.S.C. § 1361 or § 1362 waive sovereign immunity. *Paiute-Shoshone Indians of Bishop Cmty. v. City of Los Angeles*, 637 F.3d 993, 999–1000 (9th Cir. 2011) (holding that 28 U.S.C. § 1362 does not provide an independent waiver of sovereign immunity over actions brought by Indian tribes against the United States, but "merely grants jurisdiction to the district courts to adjudicate civil actions by Indian tribes so long as no other jurisdictional bar prohibits the courts from hearing those actions"); *Smith v. Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir. 1976) (noting that § 1361 does not waive immunity). Moreover, the United States' general "fiduciary and trustee obligations" to recognized tribes does not provide a waiver of sovereign immunity. *See, e.g., United States v. Navajo Nation*, 556 U.S. 287, 129 S. Ct. 1547, 1551 (2009) (holding that tribe must point to specific statutes and regulations that give the government fiduciary duties before Indian Tucker Act's waiver of sovereign immunity applies); *United States v. Mitchell*, 445

U.S. 535, 542 (1981) (noting that limited trust relationship between United States and Indian allottees did not provide waiver of sovereign immunity).

Accordingly, the APA, 5 U.S.C. §§ 701–706 provides the only waiver of sovereign immunity available to Plaintiff. The APA is a limited waiver of sovereign immunity that provides for judicial review of federal agency actions for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The general statute of limitations for actions against the government applies to APA actions. *Wind River*, 946 F.2d at 713–14.

Here, because Plaintiff did not file a complaint against Defendants until forty-seven years after Defendants published notice of the distribution of the Rancheria's land in the Federal Register, Plaintiff is barred from now bringing this action. 29 Fed. Reg. 13,146 (Sept. 22, 1964). Moreover, as discussed above, Plaintiff had actual notice of the termination. Its claim accrued in 1964, well before this action was filed. *See Hopland Band of Pomo Indians*, 855 F.2d at 1573 (noting that plaintiff could have brought a challenge to "the legality of its termination immediately following the improper termination occurring in this case").

As noted above, it is the United States' position that § 2401(a) is jurisdictional and cannot be waived by defendants; as such, it is an absolute bar to Plaintiff's claims. Whether or not § 2401(a) is waivable, however, it bars Plaintiff's claims because Defendants properly invoked the time-bar defense here. After the Ninth Circuit's decision in *Cedars-Sinai*, the case was remanded to the district court to determine whether the government had waived the statute of limitations defense. *Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126 at 1128 (9th Cir. 1999) ("*Cedars-Sinai II*"). The district court found defendants had raised the time-bar defense in § 2401, and the Ninth Circuit affirmed dismissal. *Id.* at 1130. The rule from *Cedars-Sinai*, even if this Court were to find it still bound by that rule, therefore, is that the statute of limitations defense is equitable and subject to possible waiver. Defendants in this case raised the time-bar jurisdictional defense in their Answer in this case, and, accordingly, have not waived that defense. *See Cedars-Sinai*, 125 F.3d at 770 (distinguishing *Nesovic*, 71 F.3d 776 (9th Cir. 1995),

where waiver was not an issue because government had asserted the limitations defense in district court); Answer [Dkt. No. 13] at 14.

Moreover, Plaintiff cannot demonstrate extraordinary circumstances that would justify tolling the statute of limitations. Under the doctrine of equitable tolling, Plaintiff must show it has diligently pursued its rights and that "extraordinary circumstances" prevented the Tribe from timely filing a claim. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Given the circumstances of this case, Plaintiff cannot meet either of these two conditions.

Neither can Plaintiff show that the continuing violation doctrine applies. Pursuant to the continuing violation doctrine, a victim of "systematic discrimination" may "recover for injuries that occurred outside the applicable limitations period." *Grimes v. City and Cty. of San Francisco*, 951 F.2d 236, 238 (9th Cir. 1991). However, as is the case here, the "continuing impact from past violations is [by itself] not actionable." *Id.* (quoting *Reed v. Lockheed Aircraft Corp*., 613 F.2d 757, 760 (9th Cir. 1980)). The Ninth Circuit has stated that "the 'continuing violations' doctrine 'is not applicable in the context of an APA claim for judicial review.'" *Hall v. Regional Transp. Comm'n*, 362 Fed. Appx. 694, 695 (9th Cir. 2010) (quoting *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1229 n.3 (D. Mont. 2004); *San Luis Unit Food Producers v. United States*, 772 F. Supp.2d 1210, 1228 (E.D. Cal. 2011) (noting *Hall* holding). Further, the continuing violation doctrine has been rejected in similar contexts. *See, e.g., Wilton Miwok*, 2010 WL 693420 at *5 n.5 (rejecting reliance on continuing violation doctrine in rancheria termination case) (citing *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007)). Here, any injury from termination occurred at the time of termination, in 1964, and the continuing violation doctrine does not apply.

In short, Plaintiff failed to challenge Defendants' actions within the six-year statute of limitations, and Plaintiff is barred from now bringing this action.

CONCLUSION

In conclusion, Plaintiff's motion to proceed in the *Hardwick* matter should be denied. Plaintiff has not asserted a procedural mechanism for reopening a case in which judgment was

entered in 1983. Moreover, Plaintiff has not shown that its members were class members in the *Hardwick* action. If Plaintiff's members were class members in the *Hardwick* action, their claims were dismissed as part of the stipulated judgment in that case. And, in any event, Plaintiff's claims, which accrued in 1964, are barred by the statute of limitations whether it proceeds in *Hardwick* or in the above-captioned case. Accordingly, Defendants respectfully request that this Court deny Plaintiff's motion and grant Defendants' motion to dismiss Plaintiff's claims.

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Respectfully submitted,

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