

1 STEVEN M. WOODSIDE #58684
County Counsel
2 BRUCE D. GOLDSTEIN #135970
Assistant County Counsel
3 JEFFREY M. BRAX #218601
Deputy County Counsel
4 County of Sonoma
5 575 Administration Drive, Room 105
Santa Rosa, CA 95403-2815
6 Telephone: (707) 565-2421
7 Fax: (707) 565-2624
bgoldste@sonoma-county.org
jbrax@sonoma-county.org

ROBERT WESTMEYER #54791
County Counsel
THOMAS CAPRIOLA #251472
Deputy County Counsel
County of Napa
1195 Third Street, Suite 301
Napa, CA 94559
Telephone: (707) 253-4521
Fax: (707) 259-8220
Thomas.Capriola@countyofnapa.org

8 Attorneys for Intervenor-Defendant
COUNTY OF SONOMA, CALIFORNIA

Attorneys for Intervenor-Defendant
COUNTY OF NAPA, CALIFORNIA

9 ANITA L. GRANT #1446032
County Counsel
10 LLOYD C. GUINTIVANO #242944
Deputy County Counsel
11 255 North Forbes Street
12 Lakeport, CA 95453
13 Telephone: (707) 263-2321
14 Fax: (707) 263-0702
Lloydg@co.lake.ca.us

15 Attorneys for Intervenor-Defendant
COUNTY OF LAKE, CALIFORNIA

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

18 THE MISHEWAL WAPPO TRIBE OF
ALEXANDER VALLEY,

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

19 Plaintiff,

20 v.

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

21 KENNETH SALAZAR, et. al,

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

22 Defendants,

23 COUNTY OF SONOMA, CALIFORNIA,

24 COUNTY OF NAPA, CALIFORNIA,

25 COUNTY OF LAKE, CALIFORNIA,

26 Intervenor-Defendants.
27 _____/

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
TABLE OF AUTHORITIES	ii
NOTICE OF MOTION	1
POINTS AND AUTHORITIES	1
INTRODUCTION	1
FACTUAL BACKGROUND	2
STANDARD OF REVIEW	5
ARGUMENT	6
I. PLAINTIFF’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.	6
II. PLAINTIFF’S CLAIMS ARE BARRED BY LACHES	11
CONCLUSION	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
17 F. Supp. 2d 818 (S.D. Ill. 1998)	12
<i>Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.</i> , 840 F.2d 1394 (9th Cir. 1987)	11
<i>Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of the U.S.</i> 497 F.3d 972 (9th Cir. 2007)	6
<i>Cedars-Sinai Med. Ctr. v. Shalala</i> 125 F.3d 765 (9th Cir. 1997)	10
<i>Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association</i> , 502 F.2d 1323 (9th Cir. 1974)	11
<i>City of Sherrill, N.Y. v. Oneida Indian Nation of New York</i> 544 U.S. 1057 (2005)	5, 12
<i>Costello v. U.S.</i> 365 U.S. 265 (1961)	11
<i>Felix v. Patrick</i> 145 U.S. 317 (1892)	12
<i>Felter v. Kempthorne</i> 473 F.3d 1255 (D.C. Cir. 2007)	8, 9, 11
<i>Georgalis v. U.S. Patent & Trademark Office</i> 296 Fed. Appx. 14 (Fed. Cir. 2008)	10
<i>Hartford-Empire Co. v. Glenshaw Glass Co.</i> 47 F. Supp. 711 (W.D. Penn. 1942)	12
<i>Hopland Band of Pomo Indians v. U.S.</i> 855 F.2d 1573 (Fed. Cir. 1988)	<i>passim</i>
<i>John R. Sand & Gravel Co. v. U.S.</i> 552 U.S. 130 (2008)	10
<i>Marley v. U.S.</i> 567 F.3d 1030 (9th Cir. 2009)	10
<i>Marshall v. Meadows</i> 921 F. Supp. 1490, 1493-1494 (E.D. Va. 1996)	11
<i>Miami Nation of Indians of Indiana, Inc. v. Lujan</i> 832 F. Supp. 253 (N.D. Ind. 1993)	9
<i>Miguel v. Country Funding Corp.</i> 309 F.3d 1161 (9th Cir.2002)	6

1	<i>Neitzke v. Williams</i> 490 U.S. 319 (1989)	6, 7
2	<i>Renne v. Geary</i> 501 U.S. 312 (1991)	5
3	<i>Shiny Rock Min. Corp. v. U.S.</i> 906 F.2d 1362 (9th Cir. 1990)	7
4	<i>Tillie Hardwick v. U.S.</i> Case No. C-79-1710 SW (N.D. Cal.)	3, 9, 12
5	<i>Trustees for Alaska Laborers v. Ferrell</i> 812 F.2d 512 (9th Cir. 1987)	11
6	<i>Vacek v. U.S. Postal Service</i> 447 F.3d 1248 (9th Cir. 2006)	5
7	<i>W. Va. Highlands Conservancy v. Johnson</i> 540 F. Supp. 2d 125, 138 (D.D.C. 2009)	10
8	<i>Wilton Miwok Rancheria v. Salazar</i> 2010 U.S. Dist. LEXIS 23317	10
9	<u>Statutes</u>	<u>Pages</u>
10	5 U.S.C. § 702	4
11	25 U.S.C. section(s):	
12	2719(b)(1)(B)(iii)	4
13	2719(a)	4
14	28 U.S.C. section(s)	
15	§ 2401(a)	<i>passim</i>
16	§ 2501	5, 10
17	California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 <i>amended by</i> Pub. L. No. 88-419, 78 Stat. 390	<i>passim</i>
18	<u>Regulations</u>	<u>Pages</u>
19	25 C.F.R. § 83.7(g)	3
20	<u>Rules</u>	
21	Fed. R. Civ. P. 12(b)(1)	1, 5, 7
22	Fed. R. Civ. P. 12(b)(6)	1, 6, 7
23	Fed. R. Civ. P. 12(h)(3)	1, 5, 7
24	<u>Codes</u>	
25	California Government Code	
26	Section 65300 et seq.	12
27	Section 65800 et. seq.	12
28		

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

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

12
13 **POINTS AND AUTHORITIES**

14 **INTRODUCTION**

15 The Counties respectfully request that the Court dismiss the action filed by The
16 Mishewal Wappo Tribe of Alexander Valley (“Plaintiff”) pursuant to Fed. R. Civ. P.
17 12(b)(1), 12(b)(6), and 12(h)(3). Plaintiff alleges that the Secretary of the Interior’s 1959
18 termination of the Mishewal Wappo Tribe of Alexander Valley did not comply with the
19 California Rancheria Act (Pub. L. No. 85-671, 72 Stat. 619), a Congressional act authorizing
20 the termination of the Mishewal Wappo Tribe and forty other specifically enumerated
21 California rancherias. Am. Compl. at 3, ¶ 5; 4, ¶ 12; 23, ¶ 77; 30, ¶ 110. More than five
22 decades after the fact, Plaintiff now asks the Court to reverse the 1959 termination, bypass
23 Congress’s exclusive authority over tribal recognition matters, and direct that Plaintiff be
24 given immediate federal recognition, all available public lands within Plaintiff’s “historically
25 aboriginal land,” and the right to conduct casino-style gaming on such “restored lands.” Am.
26 Compl. at 31-32, ¶¶ A, B, D, E.

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

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

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

13 14 **FACTUAL BACKGROUND**

15 The gravamen of Plaintiff's action is its claim that the Department of the Interior
16 improperly terminated the Mishewal Wappo Tribe of Alexander Valley in 1959, and has
17 thereafter failed to include the tribe on the list of federally recognized tribes required by the
18 Federally Recognized Indian Tribe List Act. *See* Am. Compl. at 1-2, ¶ 1; 3, ¶ 5 (claiming the
19 federal government formally recognized the Mishewal Wappo Tribe until 1959); 13, ¶¶ 47-
20 49 (claiming the 1959 termination was unlawful); 23, ¶ 74 (claiming the tribe must be
21 recognized pursuant to the Tribe List Act because the termination was unlawful).

22 In August 1958, Congress enacted the California Rancheria Act ("Act"), Pub. L. No.
23 85-671, 72 Stat. 619, *amended by* Pub. L. No. 88-419, 78 Stat. 390. The Act provided for the
24 termination of federal recognition of forty-one California Indian tribes, including the
25 Mishewal Wappo Tribe. Am. Compl. at 4, ¶ 12. On July 6, 1959, the Secretary of Interior
26 accepted a proposal to terminate the tribe and distribute the three-lot, 54-acre Alexander
27 Valley Rancheria pursuant to the Act. Am. Compl. at 6-7, ¶¶ 18-19. The residents of the
28 land voted to accept the distribution plan, and that it was finalized on September 25, 1959.

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

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

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

19
20 Because the Rancheria Termination Act is still in full force and effect, the
21 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.

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

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

1 suit.

2 Plaintiff pleads five causes of action, all of which are grounded in Plaintiff's central
3 claim that "[t]he purported termination of the Tribe was not lawfully effected." Am. Compl.
4 at 23, ¶ 77. Plaintiff's first cause alleges that the "unlawful" termination violated a fiduciary
5 duty the Secretary allegedly owes to Plaintiff. Am. Compl. at 23-26. The second alleges that
6 the Secretary's failure to correct the 50-year-old termination constitutes a "failure to act" that
7 violates the Administrative Procedure Act, 5 U.S.C. § 702 ("APA"). Am. Compl. at 26-27.
8 Plaintiff's third cause similarly claims that the Secretary's failure to correct the "unlawful"
9 termination constitutes a "failure to conclude a matter" in violation of the APA. Am. Compl.
10 at 28-29. The fourth similarly alleges that the Secretary has acted arbitrarily and capriciously
11 in not reversing the 50-year-old termination and recognizing Plaintiff. Am. Compl. at 29-30.
12 Finally, Plaintiff's fifth cause again alleges that the Secretary failed to comply with the
13 Rancheria Act in terminating the Mishewal Wappo Tribe in 1959, and thus violated
14 Plaintiff's possessory rights to the former rancheria. Am. Compl. at 30-31. All five causes
15 allege that "the Tribe's purported termination was unlawful" or ineffective. Am. Compl. at
16 25, ¶ 84; 27, ¶ 93; 28, ¶ 98; 29, ¶ 104; 30-31, ¶ 110.

17 Plaintiff thus seeks an order compelling the Secretary to:

- 18 • include the Mishewal Wappo Tribe in a published list of federally recognized
19 tribes. Am. Compl. at 31, ¶ B.
- 20 • transfer to Plaintiff as trust lands "all public lands held by the Department of
21 the Interior which are not currently in use and are available for transfer that are
22 within the Tribe's historically aboriginal land." Am. Compl. at 31-32, ¶ D.
- 23 • treat Plaintiff's future trust lands as "restored lands" as defined in 25 U.S.C. §
24 2719(b)(1)(B)(iii), which would make those lands immediately available for
25 casino-style gaming purposes, and circumvent the prohibition on gaming on
26 lands acquired after 1988. Am. Compl. at 32, ¶ E; *see* 25 U.S.C. § 2719(a).

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

1 barred by the applicable statutes of limitations.” Answer at 14. The fifth is that “[s]ome or
2 all of Plaintiff’s claims are barred by laches.” Answer at 14.

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

8 On June 19, the parties filed a Joint Case Management Statement. In that Statement,
9 Defendants Salazar and Assistant Secretary Larry Echo Hawk (“Defendants”) noted that
10 Plaintiff “alleges injury from actions or omissions occurring many decades ago; accordingly,
11 some or all of Plaintiff’s claims may be time-barred.” Joint Case Management Statement at
12 4. Defendants therefore indicated that they may “move for judgment on the pleadings prior .
13 . . regarding some or all of Plaintiff’s claims, for lack of justiciability.” Joint Case
14 Management Statement at 5. The Counties similarly noted that they “intend to respond [to
15 Plaintiff’s Amended Complaint] by arguing that this case is barred by statutes of limitations,
16 28 U.S.C. § 2501, and laches, *see City of Sherrill, N.Y. v. Oneida Indian Nation of New York*,
17 544 U.S. 1057 (2005).” Joint Case Management Statement at 5. The Counties therefore
18 noted that they “may move for dismissal or judgment on the pleadings to narrow some or all
19 of Plaintiff’s claims.” Joint Case Management Statement at 6, 9.

20 21 **STANDARD OF REVIEW**

22 The Counties bring this motion in accordance with Fed. R. Civ. P. 12(b)(1) and
23 12(h)(3), the latter of which requires that “[i]f the court determines at any time that it lacks
24 subject-matter jurisdiction, the court must dismiss the action.” It is presumed that federal
25 courts lack jurisdiction, and Plaintiff bears the burden of proving that jurisdiction exists.
26 *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted); *Vacek v. U.S. Postal Service*,
27 447 F.3d 1248, 1250 (9th Cir. 2006) (“It is to be presumed that a cause lies outside [federal]
28 jurisdiction, and the burden of establishing the contrary rests upon the party asserting

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

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

13 ARGUMENT

14 I. PLAINTIFF’S CLAIMS ARE BARRED BY THE STATUTE OF 15 LIMITATIONS.

16 Plaintiff’s claims are governed by 28 U.S.C. § 2401(a), which provides that “every
17 civil action commenced against the United States shall be barred unless the complaint is filed
18 within six years after the right of action first accrues.” This six-year statute of limitation
19 applies to Indian tribes “in the same manner as against any other litigant seeking legal redress
20 or relief from the government.” *Hopland Band of Pomo Indians v. U.S.*, 855 F.2d 1573,
21 1576 (Fed. Cir. 1988).

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

1 30-31, ¶ 110. Plaintiff’s action would not exist but for the termination, and Plaintiff cites no
2 other fact or circumstance justifying restoration, the provision of “restored lands,” or its other
3 requested relief.

4 The challenged termination was proposed and voted on *five decades ago* and
5 announced in the Federal Register in 1961. *See* Am. Compl. at 7, ¶ 21 (conceding that the
6 residents of the Rancheria voted for termination in 1959); 11, ¶ 40 (acknowledging 1961
7 Federal Register proclamation). Plaintiff’s action thus accrued in 1959, and certainly no later
8 than 1961. *See Hopland, supra*, 855 F.2d at 1577 (“[A] claim first accrues when all the
9 events have occurred which fix the alleged liability of the defendant and entitle the Plaintiff
10 to institute an action”) (citations and internal quotation marks omitted). Actual notice of
11 government action triggers the statute of limitations but is not required; accrual also occurs
12 upon publication of a notice in the Federal Register. *Shiny Rock Min. Corp. v. U.S.*, 906 F.2d
13 1362, 1364-65 (9th Cir. 1990).

14 Section 2401(a)’s six-year statute of limitations thus ran no later than 1967, more than
15 40 years before Plaintiff filed the instant action. This issue is dispositive, and Plaintiff’s
16 claims must be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6). *Neitzke, supra*, 490 U.S. at
17 326 (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of
18 law”). Plaintiff’s failure to timely file also means that the court lacks subject matter
19 jurisdiction, and “must dismiss the action.” Fed. R. Civ. Proc. 12(h)(3), 12(b)(1).

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

1 action and no more.” *Id.* at 1577-78. The court held that plaintiff’s claims had accrued in the
2 1960s, upon termination, approval of the distribution plan, and sale of the relevant parcels.

3 *Id.* at 1578, 1579. As here, the court had been

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

6 *Id.* at 1580.

7 The court in *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007), similarly held that
8 Section 2401(a) required dismissal of a 2002 claim by former members and descendants of
9 the Ute Indian Tribe alleging—as here—that the federal government breached its fiduciary
10 duty by improperly terminating their status as federally recognized Indians. 473 F.3d at
11 1256.¹ As here, the termination and resulting asset distribution occurred in the 1950s and
12 1960s (*id.* at 1259), and thus had not “occurred within the six years prior to the filing of the
13 complaint in 2002.” *Id.* at 1259 (citing *Hopland, supra*, 855 F.2d at 1578-79). The court
14 rejected plaintiffs’ attempt to “recharacterize [their] claim by asserting that Interior’s failure
15 to rectify its past illegal termination constitutes a current breach of trust.” *Id.* at 1259. The
16 court also rejected the application of the continuing violation doctrine, which “typically
17 pertains to employment discrimination claims.” *Id.* at 1260. Assuming *arguendo* that the
18 doctrine applies, the court held that plaintiff

19 alleges no acts committed by the defendants within the statute of limitations
20 that could constitute a continuing violation. Although [plaintiffs] do assert that
21 their termination and the loss of their lands and other trust assets, all of which
22 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.”

23 *Id.* (citations omitted).

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

27
28 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.

1 termination); 25, ¶ 85 (alleging that “the Tribe has been and continues to be ineligible for the
2 ‘protection, services and benefits of the Federal government available to Indian tribes”); 27, ¶
3 93 (same); 28, ¶ 100 (same). Plaintiff failed to bring its claims within six years after it
4 accrued, and its action must be dismissed. *Hopland*, 855 F.2d at 1580; *Felter*, 473 F.3d at
5 1259; *see also Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp. 253, (N.D.
6 Ind. 1993) (dismissing claim where plaintiff tribe “waited far too long to bring this claim”
7 challenging 1897 withdrawal of federal recognition).

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

14 Nor may Plaintiff may evade the statute of limitations by mischaracterizing its claims
15 as challenging current harms. Even if the “continuing claims” doctrine applies outside the
16 employment discrimination context (*see Felter*, 473 F.3d at 1260), Plaintiff alleges only
17 “lasting effects” from actions that occurred “in the 1950s and 1960s.” *Felter*, 473 F.3d at
18 1260. As in *Miami Nation*, “lack of formal recognition is the gravamen of the plaintiff[]’s
19 complaint,” and application of the continuing claims doctrine “would eradicate the statute of
20 limitations by preserving their cause of action until it becomes moot.” 832 F. Supp. at 257.
21 As a result, the alleged “lingering effects” of the allegedly unlawful termination “is not itself
22 an unlawful act” sufficient to preserve Plaintiff’s late claims. *Felter*, 473 F.3d at 1260.

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

1 In addition, the Supreme Court recently confirmed that the nearly identical language of 28
2 U.S.C. § 2501 creates an absolute, jurisdictional bar that is not subject to waiver. *John R.*
3 *Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 133-34, 139 (2008). The Court held that Section
4 2501, which mirrors Section 2401(a) by requiring that “[e]very claim of which the United
5 States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is
6 filed within six years after such claim first accrues,” creates an “absolute” and jurisdictional
7 bar that is not subject to waiver. *Id.* at 133-34.

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

17 Further confirmation may come from the Ninth Circuit. On different facts, Judge
18 Fogel recently noted that a case decided more than a decade before *John R. Sand* held that
19 Section 2401(a) is not jurisdictional, and is thus subject to waiver. *Wilton Miwok Rancheria*
20 *v. Salazar*, 2010 U.S. Dist. LEXIS 23317, *14 (citing *Cedars-Sinai Medical Center v.*
21 *Shalala*, 125 F.3d 765 (9th Cir. 1997)). Judge Fogel authorized an interlocutory appeal to
22 allow the Ninth Circuit to decide whether *Cedars-Sinai* remains good law, *id.* at *41 (noting
23 that “[t]he jurisdictional issue is important not only for the Parties but to future litigants who
24 may be similarly situated”), but the Ninth Circuit declined to address the matter by
25 interlocutory appeal. Judge Fogel’s ruling does not bind this court, and is contrary to the
26 great weight of other authority. *Hopland Band*, 855 F.2d at 1577, fn.3; *Georgalis*, 296 Fed.
27 Appx. at 16; *W. Va. Highlands Conservancy*, 540 F. Supp. 2d at 138; *Marley*, 567 F.3d at
28 1036. It should neither prevent nor disrupt dismissal of Plaintiff’s action.

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

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

18

19 **II. PLAINTIFF’S CLAIMS ARE BARRED BY LACHES.**

20 Laches is established whenever a plaintiff has committed an inexcusable delay in
21 asserting a known right and prejudiced the party asserting laches. *Barona Group of the*
22 *Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840
23 F.2d 1394, 1407 (9th Cir. 1987) (citing *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d
24 512, 518 (9th Cir. 1987)). Laches requires proof only of (1) lack of diligence by the party
25 against whom the defense is asserted, and (2) prejudice to the party asserting the defense.
26 *Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association*, 502
27 F.2d 1323, 1325 (9th Cir. 1974) (citing *Costello v. U.S.*, 365 U.S. 265, 282 (1961)).

28

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

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

16 Plaintiff committed unreasonable delay by failing to timely object or challenge the
17 1959 termination under the California Rancheria Act. Am. Compl. at 7, ¶ 20-22; 11, ¶ 40.
18 Plaintiff did not object until *Tillie Hardwick* in 1979, more than twenty years after the 1959
19 termination. Then, after Plaintiff was dismissed from *Tillie Hardwick*, Plaintiff waited
20 another twenty-five years before seeking any administrative relief. Am. Compl. at 23, ¶ 76.

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

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

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

18 19 CONCLUSION

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

22 Dated: July 16, 2010

FOR INTERVENOR-DEFENDANT
 COUNTY OF SONOMA, CALIFORNIA

23
24 */s/ Jeffrey M. Brax*

25
26 JEFFREY M. BRAX
 County of Sonoma
 Office of the County Counsel

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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

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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