No. 12-17360

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY,
Appellee,

v.

KEN SALAZAR, in his official capacity as Secretary of the Interior, and LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior, and DOES 1-50, inclusive,
Appellees,

and

COUNTY OF NAPA and COUNTY OF SONOMA,
Appellants-Intervenors-Defendants.

APPELLANTS' REPLY BRIEF

Michael S. Cohen, Esq.
David H. Tennant, Esq. (SBN 132568)
Matthew J. Frankel, Esq. (SBN 256633)
Nixon Peabody LLP
One Embarcadero Center
18th Floor
San Francisco, California 94111
(415) 984-8200

Attorneys for Appellants-Intervenors-Defendants
County of Napa and County of Sonoma

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

FEDERAL RULES AND REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Every federal court has an unwavering duty to ascertain the existence of subject matter jurisdiction, even if no party raises the issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes"); *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005) ("jurisdictional bars cannot be waived by the parties and may be addressed sua sponte"). Thus, whether or not the Counties intervened below, and whether or not their intervention status is restored on appeal, this Court is required to address two threshold subject matter jurisdiction issues.

First, this Court must determine whether Plaintiff discharged its burden, when responding to the Counties' Rule 12(b)(1) factual challenge to standing, to affirmatively demonstrate by admissible evidence a meaningful genealogical relationship between the modern tribal plaintiff and the historic group of Indians who occasionally resided on the Alexander Valley Rancheria ("AVR"), and who might have been injured by the termination of the Rancheria.

Second, this Court must decide a straight-forward question of law: is the applicable statute of limitations (28 U.S.C. § 2401) jurisdictional and thus not subject to waiver or equitable tolling?

The Counties' Opening Brief ("Opening Br.") presents these jurisdictional challenges and details the errors in the district court's consideration of them. As set forth below, Plaintiff's Opposition Brief ("Opp. Br.") only reinforces the conclusion that the district court mishandled both pivotal questions.

Moreover, Plaintiff's Opposition Brief does nothing to rebut the Counties' showings that they have a significant protectable interest in this litigation – which seeks the creation of a quasi-sovereign authority within the Counties, the transfer of lands situated within the Counties and the designation of those lands as eligible for casino gaming – and that the district court erred in granting Plaintiff's motion to revoke the Counties' status as intervenors.

ARGUMENT

I. Plaintiff Failed To Meet Its Burden To Show That It Has Standing To Sue On Behalf Of The Historic Group Of Alexander Valley Indians.

A. The District Court Misapplied Rules 12(b)(1) and 12(b)(6) and Improperly Excused Plaintiff From Having to Prove Standing as a Factual Matter.

As demonstrated in the Counties' Opening Brief, the district court committed the following errors, among others:

(i) converting a Rule 12(b)(1) factual challenge to a 12(b)(6) motion directed to the pleadings, which altogether excused Plaintiff from having to

produce any evidence to establish standing (ER-15)[1] (Opening Br. at 47-49);

(ii) making contradictory statements that the Counties' factual submissions were too insubstantial to trigger a hearing under Rule 12(b)(1) (ER-14-15), but were nevertheless too voluminous and complex to be addressed as a threshold matter (ER-15) (Opening Br. at 46-51); and

(iii) ruling that the issue of Plaintiff's Article III standing would be addressed in discovery (ER-15, 109), but then terminating the Counties' intervention after they served a discovery request demanding that Plaintiff provide information relevant to standing. (ER-1, 9, 82.) (Opening Br. at 25-28, 41-42.)

Underlying the district court's mishandling of the standing issue was the untenable conclusion that the Counties could not make out a factual challenge to standing so long as Plaintiff withheld its membership rolls. (ER-172.) In other words, the district court determined that Plaintiff's assertion of privacy respecting its membership rolls precluded a Rule 12(b)(1) challenge. (ER-15.) That is not the law. Every tribal plaintiff is required to meet Article III and prudential standing requirements. *Sault Ste. Marie Tribe of Chippewa Indians v. U.S.*, 288 F.3d 910, 914 (6th Cir. 2002); *see generally, Table Bluff Reservation (Wiyot Tribe) v. Philip*

[1] Plaintiff acknowledges that the district court assumed the truth of Plaintiff's claims under both Rule 12(b)(1) and Rule 12(b)(6). (Opp. Br. at 20 and n.12.)

Morris, Inc., 256 F.3d 879 (9th Cir. 2001); *Indian Oasis-Baboquivari Unified School Dist. No. 40 of Pima Cnty, v. Kirk*, 91 F.3d 1240, 1251 (9th Cir. 1996).

Moreover, no other plaintiff in any other context is permitted to avoid a 12(b)(1) factual challenge to standing by shielding from disclosure relevant information about its mission, interests, or the damages *it* claims to have suffered. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (threshold question in every federal case is whether plaintiff has made out a case or controversy "between *himself* and the defendant") (emphasis added). Just as a plaintiff suing for personal injury waives his or her right to privacy (relating to medical records), so too should a tribal plaintiff be deemed to have waived its right to privacy (relating to its membership) if those records are relevant to the litigation, as in the case of a standing determination. To the extent legitimate privacy rights exist in this context, the district court could have reviewed Plaintiff's membership rolls *in camera* and determined whether further disclosure was needed to resolve the standing question. The relevancy of the rolls is not disputed; indeed, Plaintiff argues that the rolls support its standing by establishing a genealogical relationship to the AVR residents who voted in 1935 to accept the Indian Reorganization Act ("IRA"). (Opp. Br. at 23-24; *see also* ER-296.) But that just begs the question: what information is contained on those rolls? Non-tribal litigants are not afforded

the luxury of making selective, self-serving, partial disclosures as to standing, and the same must hold true for tribal litigants as well. Here, the Counties (and the district court) received no membership rolls, despite the Counties' requests through FOIA and the discovery process. (ER-82, 172.) Accordingly, Plaintiff's refusal to produce its membership rolls was not an appropriate basis for denial of the Counties' Rule 12(b)(1) standing challenge. To the contrary, it was a reason to grant the challenge, because the tribal Plaintiff's refusal to disclose its membership rolls left a gaping evidentiary hole in Plaintiff's proof as to standing, as to which it bore the burden of proof.

B. Plaintiff Presented No Evidence Below as to the AVR's Population And Occupancy, and Now Mistakenly Relies on Historical Documents That are Inconsequential to the Standing Analysis.

In lieu of evidence regarding Plaintiff's current membership, and any genealogic connection between those members and the mixed Pomo/Wappo Indians who occasionally resided on the AVR more than a half-century ago, Plaintiff identifies two historical records that are inconsequential to the standing analysis: (1) a document showing that fourteen residents identified with the AVR in 1935 voted to adopt the IRA, affirming their status as a federally recognized tribe eligible for federal benefits *as of that date* [2] (Opp. Br. at 24; *see also* ER-296);

[2] Plaintiff wrongly suggests that its tribal status persisted until at least 1959 (Opp. Br. at 18-19), without regard to the actual historical record regarding the

(Footnote continued on next page)

and (2) a 1952 Congressional Report that provides no AVR census data beyond 1940. (Opp. Br. at 4.)[3]

These documents do nothing to undermine the historical records obtained from the National Archives relating to the actual use and occupancy of the AVR, or any of the opinions contained in the report of Stephen Dow Beckham, Ph.D., that are based on those archival records. The official records establish, without contradiction, that as of 1951 the only people residing on the AVR were James Adams (a non-Wappo, non-Pomo half-Indian and half-Hawaiian), his non-Indian wife, their children, and one African American male squatter (ER-304-305); there was no organized tribal government known to the BIA (ER-329); and the BIA had no idea where the AVR Indians had dispersed to, and struggled even to find a single Wappo, William McCloud, who resided elsewhere. (ER-305-306, 329.) None of those historic facts is subject to genuine dispute.

---

dissipation and dispersal of the Indians of the AVR in prior decades. Plaintiff is incorrect as a matter of law. As confirmed recently in *Muwekma Ohlone Tribe v. Salazar*, 2013 U.S. App. LEXIS 4193 at *26 (D.C. Cir. Mar. 1, 2013), "a once-recognized tribe can fade away." *See also Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001).

[3] Although the 1952 Congressional Report identifies 1945 as the last year for which a population figure was reported for the AVR, Prof. Beckham's review of relevant BIA documents confirms that the population figure used in the Congressional Report was extracted from a *1940* census. In fact, Prof. Beckham notes that "[f]or the period 1942-51the BIA apparently had little or no dealings with the Alexander Valley Rancheria." (ER-303.)

On this record, no rational factfinder could conclude that the AVR Indians maintained a tribal organization and existence after the Rancheria was terminated. Any such belief would rest on counter-factual speculation. The district court agreed that the historic tribe had dispersed and had no formal existence, but stated that this "does not mean that no tribal identity was maintained, or that the member [sic] of the Tribe have no connection to such identity." (ER-15.) This assumption substitutes guesswork for record evidence, because nothing in the record shows that the AVR Indians maintained a tribal identity or organization after dispersing and assimilating into non-Indian communities. (ER-304-306, 329.) If any evidence existed on that score it was incumbent upon Plaintiff to present it.[4]

---

[4] Plaintiff contends that it submitted a "plethora of evidence" to the district court (Opp. Br. at 7, 18) consisting of "numerous governmental documents" (*id.* at 18) that provide "overwhelming proof" as to its standing to bring this suit. As indicated above, the only contemporaneous historical records identified by Plaintiff, however, are the 1935 Indian Reorganization Act voter list and the 1952 Congressional Report. The other scant bits of evidence cited by Plaintiff are of relatively recent vintage and say nothing about any genealogical relationship between the modern tribal plaintiff and the AVR Indians. The 1997 ACCIP report (Opp. Br. at 22-23) was prepared by an Indian rights advocacy group and refers only to AVR Indians, not to the modern tribal plaintiff. Likewise, the *Tillie Hardwick* litigation (Opp. Br. at 22) says nothing about the modern tribal plaintiff – that action identifies (and dismisses) only the Indians of the AVR. The 2009 report prepared by the BIA Regional Office supports restoration of Plaintiff (Opp. Br. at 22) but says nothing about any genealogical relationship between Plaintiff and the historic group of AVR Indians. Finally Plaintiff's reliance on the so-called "compelling admissions by the Federal Defendants" (Opp. Br. at 19) is misplaced for two reasons. First, nothing the Federal Defendants could say could bind the Counties as

(Footnote continued on next page)

Likewise, the district court erred in dismissing out of hand Prof. Beckham's genealogical analysis. His analysis was based on archival records and other publicly available information that raised serious questions as to whether Plaintiff could show a meaningful genealogical connection to the historic Indians of the AVR. Nothing in the record shows such connection. And it was error for the court to reject Prof. Beckham's analysis because he had not reviewed Plaintiff's membership rolls, which were withheld by Plaintiff despite the Counties' requests. (ER-82, 172.)

C. Plaintiff Fails to Make Any Cognizable Objection to the Evidentiary Materials Submitted by the Counties in Support of Their Rule 12(b)(1) Challenge to Plaintiff's Standing.

Plaintiff argues that the district court was free to ignore the Counties' evidentiary materials because they were not "properly" before the court (Opp. Br. at 18), contending they were either "unauthenticated" (*id.* at 17) or "self-authenticating." (*Id.* at 20, n.12). These objections are without merit.

As an initial matter, the district court did not note any lack of authentication or other threshold problem with the evidentiary materials submitted by the Counties in support of their motion, nor could it. Rather, the district court chose

---

"admissions" since they are distinct parties. Second, the Federal Defendants have remained conspicuously silent as to Plaintiff's standing, apparently not persuaded by Plaintiff's membership rolls that Plaintiff has a meaningful genealogical connection to the AVR Indians or the distributees of the AVR's assets upon its termination. (*See* Opening Br. at 17.)

not to consider the materials under Rule 12(b)(1) on the basis that the materials could not answer the question of standing in the absence of disclosure of Plaintiff's membership rolls. (ER-15).

The materials were fully admissible, however, for purposes of the Counties' Rule 12(b)(1) factual challenge to standing. They consisted of official government records (Department of the Interior/Bureau of Indian Affairs and census records) obtained from the National Archives, which were incorporated into the Administrative Record, and were analyzed in the sworn affidavit of Prof. Beckham. (ER-236-239.) By his affidavit Prof. Beckham adopted his expert report and the opinions expressed therein. *Id.* Those opinions included conclusions about the historic occupancy and use of the AVR. *Id.* Such expert affidavits are routinely utilized in summary judgment motion practice under Rule 56 (*see Walton v. U.S. Marshals Service*, 492 F.3d 998, 1008 (9th Cir. 2007)) and have been endorsed for use in Rule 12(b)(1) factual challenges. *See Safe Air for Everyone v. Meyer*, 337 F.3d 1035, 1039-1040 (9th Cir. 2004). While Plaintiff would like this Court to disregard the evidentiary materials just as the district court did, those materials were properly before the district court and are properly before this Court. Moreover, it was incumbent upon the district court to consider these materials and require Plaintiff to come forward with evidentiary material in support of its

allegation of standing. *Safe Air for Everyone*, *supra*, at 1039. The district court did neither. That was error.

D. The Fact that Plaintiff Provided its Membership Rolls to The Federal Government is Not Proof of Anything.

Plaintiff curiously argues that proof of its standing can be found in the fact that it provided its membership records to the Federal Government and "the Federal Defendant [sic] did not join in the Counties in their challenge of Plaintiff's Standing." (Opp. Br. at 7.) Given the Federal Defendants' cooperation with Plaintiff thus far, seeking to facilitate tribal restoration through this invited lawsuit, it is reasonable to conclude that the Federal Defendants would have worked out a restoration settlement by now if they believed the membership rolls satisfied their concerns regarding a relationship between Plaintiff and the Indians who once resided on the AVR, and/or the distributees of the Rancheria's assets. The only logical inference that can be drawn from the Federal Defendants' silence on the motion, and the continuing absence of a settlement, is that the Federal Defendants are not persuaded by the content of Plaintiff's membership records.

E. Plaintiff Creates Straw Arguments to Knock Down

Unable to marshal evidence in the record to show a genealogical relationship between the modern tribal plaintiff and the historic group of AVR Indians, Plaintiff resorts to mischaracterizing the Counties' arguments. One of the more obvious misstatements is Plaintiff's unsupported contention that the "Counties assert the

historic tribe was not federally recognized." (Opp. Br. at 22.) That has never been the Counties' contention. A related distortion is Plaintiff's claim that "even if the Plaintiffs [sic] proved that there was a [sic] Historic Tribe and that they descended from the Historic Tribe, it would not matter since Dr. Beckham had already concluded that the Historic Tribe ceased to exist by 1951." (Opp. Br. at 19, 20.) (*emphasis in original.*) Again, this misstates the Counties' argument. The Counties acknowledge that a modern tribal plaintiff *might* be able to come forward with evidence to establish standing to sue on behalf of the AVR Indians with respect to the termination of the Rancheria. But any such group would have to overcome the substantial evidence of tribal dissipation that is in the record.[5] The members of such a group would have to come forward with affirmative proof not only of their lineal descent from the AVR Indians but also of the tribe's continued existence after termination, including evidence that the tribe continuously maintained a tribal government and its members continuously maintained tribal relations. That evidentiary burden is not likely to be sustained given what is known about the assimilation of the Pomo and Wappo Indians into the dominant non-Indian society. There is no indication that any such group exists. And Plaintiff has not come forward with any evidence to the contrary.

---

[5] And of course that group would nevertheless be unable to overcome the commencement of this action beyond the jurisdictional period of limitations. *See* Point II, *infra*.

As Prof. Beckham's report recounts, the publicly available information about the modern-day Mishewal Wappo Tribe of Alexander Valley – a name nowhere mentioned in connection with the creation, occupation, or termination of the AVR, or in *the Tille Hardwick* litigation challenging that termination – indicates that the tribe is composed principally of Salcedo family members but that family was never enumerated on a census of the AVR. (ER-330.) [6]

Plaintiff was obligated to come forward with evidence to meet its burden to establish standing. *Safe Air for Everyone*, 343 F.3d at 1039. Its failure to do so requires dismissal of the complaint for lack of subject matter jurisdiction.

II. Section 2401(a) Establishes A Jurisdictional Limitations Period.

Plaintiff does not offer a sound reason for this Court to adhere to its 1997 decision in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997),

---

[6] Plaintiff disagrees that it has to prove any relationship to the distributees of the Rancheria's assets, *i.e.*, the McLouds and Adamses. That was the test for standing in the *Tillie Hardwick* case, and provides a logical place to start in measuring relatedness. Plaintiff rejects any such requirement on the basis that the AVR list of distributes was "fallacious" (Opp. Br. at 23-24), apparently because the distributees included James Adams and his family, who were non-Wappo and non-Pomo. Adams was a long-time resident of the AVR and was one of the AVR residents who voted in favor of the IRA in 1935. (ER-296.) While he lacked a blood relationship with the Wappo/Pomo, he was for a time married into the group of AVR Indians and even after divorcing his Wappo/Pomo wife, remained an integral part of the Rancheria life, improving the land. Plaintiff has no explanation for why a genealogical connection to the 1935 IRA voter list (including James Adams) is a proper test, while requiring a connection to McCloud and Adams in 1959 is not. In any event, Plaintiff has provided no evidence of any connection to any AVR Indians at any time.

rather than to apply the teachings of *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130 (2008), which confirmed that 28 U.S.C. § 2501, the companion statute to 28 U.S.C. § 2401(a), establishes a jurisdictional period of limitations that is not subject to the equitable principles of waiver and estoppel.

Plaintiff argues that these two statutes, containing virtually identical language in all relevant respects, and largely sharing a common history of enactment and amendment, should be treated differently for jurisdictional purposes. Plaintiff cites *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990) for the basic proposition that Congressional intent should drive the determination of whether a statutory limitations period is jurisdictional. (Opp. Br. at 25.) Plaintiff fails to appreciate, however, what this Court noted in *Cedars-Sinai, i.e.*, that "the language of a statute of limitations . . . *'is likely to be a realistic assessment of legislative intent* as well as a practically useful principle of interpretation.'" 125 F.3d at 770, *citing Irwin*, 498 U.S. at 95 (emphasis added). Indeed, eighteen years after *Irwin,* the Supreme Court confirmed in *John R. Sand & Gravel* that the operative language of 28 U.S.C. § 2501 (*i.e.*, "[e]very claim . . . shall be barred unless filed within six years of the time it first accrues") reflected Congressional intent to create a jurisdictional limitations period.[7] 552 U.S. at 136. There is no

[7] Congressional intent can be divined from the interpretation of the language of a statute (*see U.S. v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841

(Footnote continued on next page)

reason why the virtually identical language of 28 U.S.C. § 2401(a) should be treated differently.[8]

Equivalent treatment of these companion statutes was accorded in *W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 142 (D.D.C. 2008), where the district court granted a motion to dismiss an action as untimely under 28 U.S.C. § 2401(a), noting that "John R. Sand is relevant to this case for two reasons. To begin with, § 2501 and § 2401(a) contain highly similar language . . . . [m]oreover, both statutes are Congressional waivers of sovereign immunity that effectively serve the same purpose; the only difference between them is that § 2501 deals with cases in the Court of Federal Claims, a narrow subset of claims against the United States addressed more generally in § 2401(a). The Supreme Court's

---

(2012) (observing it would be "difficult, perhaps impossible" to give the same language in an original and a reenacted Internal Revenue Code provision a different interpretation)) or similar language in similar provisions. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) ("This is not to say that Congress must incant magic words in order to speak clearly. *We consider "context, including this Court's interpretations of similar provisions* in many years past," as probative of whether Congress intended a particular provision to rank as jurisdictional.) (Emphasis added).

[8] The limitation periods of Sections 2501 and 2401(a) were each deemed jurisdictional before *Irwin* (*see* cases cited in *John R. Sand & Gravel* (regarding Section 2501), and *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (regarding Section 2401(a))). Thus, to the extent the Supreme Court in *John R. Sand & Gravel* relied on circuit authority pre-dating *Irwin* to find Congressional intent to establish a jurisdictional limitations period under Section 2501, that same reasoning applies equally to Section 2401(a).

determination that § 2501 is jurisdictional strongly suggests the same conclusion with respect to § 2401." *See also P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1027 (D.C. Cir. 2008).

These decisions equating Sections 2401(a) and 2501 add to the substantial weight of authority that independently recognizes Section 2401(a) as a jurisdictional statute of limitations. *See, e.g., Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) ("Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed.")[9]; *Muwekma Ohlone Tribe v. Salazar*, 2013 U.S. App. LEXIS 4193, at * 55 (D.C. Cir. Mar. 1, 2013) ("The court lacks subject matter jurisdiction to hear a claim barred by section 2401(a)"; *Lewis v. Sec'y of the Navy*, 2012 U.S. Dist. LEXIS 126035, at *12-13 (D.D.C. Sept. 5, 2012) (holding that Section 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity); *Ricciardi Family LCC v. U.S. Postal Serv.*, 2011 U.S. Dist. LEXIS 80133, at *5 (D.N.J. July 19, 2011) (citing *Spannaus* and holding that Section 2401(a) is "more than an ordinary statute of limitations; it is a condition on the waiver of sovereign immunity, and we

[9] Interior Secretary Ken Salazar recently relied on the *Spannaus* decision in an effort to have the D.C. Circuit declare that a claim alleging the wrongful "withdrawal" of federal recognition of the Muwekma Ohlone Tribe was barred by 28 U.S.C. § 2401(a). *See* Answering Brief of The Defendants-Appellees in *Muwekma Ohlone Tribe v. Salazar* (D.C. Circuit Case No. 11-5328), at 45.

are obliged to construe such waivers strictly."); *Conservation Force v. Salazar*, 811 F. Supp. 2d 18, 27 (D.D.C. 2011) ("The D.C. Circuit has long held that "section 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity"); *see also* cases cited at pp. 54-55 of the Counties' Opening Brief, including authorities directly on point from the Eleventh Circuit and Federal Circuit.

Plaintiff also advances the misguided and unsupported proposition that even if this Court were to agree that *Cedars-Sinai* was effectively overruled by *John R. Sand & Gravel*, dismissal of this action could not result because *Cedars-Sinai* had not been overturned at the time Judge Davila denied the Counties' motion to dismiss. *See* Opp. Br. at 27. Plaintiff cites no authority for this argument, which stands appellate practice and procedure on its head. The district court's error was failing to recognize that *John R. Sand & Gravel* dictates a determination that Section 2401(a) establishes a jurisdictional limitations period as a matter of law. That is the issue on appeal now. The decision below is not immunized from appellate review because the district court incorrectly concluded Supreme Court precedent did not effectively overrule circuit precedent. The district court's error as to a pure question of law is fully reviewable now. Indeed, because the interpretation of Section 2401(a) impacts subject matter jurisdiction, the proper reading of that statute was and remains the first question that must be answered by

this Court. This would be true even if the Counties had not raised the issue and the district court had not ruled on it.

In addition, Plaintiff suggests that this Court's denial of a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), in the matter of *County of Sacramento v. Wilton Miwok Rancheria* (Ninth Circuit Case No. 10-80062, Order filed May 20, 2010), somehow has precedential value as to the merits of the instant appeal. (Opp. Br. at p. 28, n. 18.) There is absolutely no authority for such a contention. In fact, acceptance of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) rests in the "total discretion" of the Court of Appeals, akin to that exercised by the Supreme Court on petitions for certiorari (*see* Federal Procedure (Lawyers Ed.) § 3:214, at 738 (2003)), and an appellate court may deny leave to appeal for any reason, including docket congestion. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In response to the County of Sacramento's 2010 petition, this Court wrote only that "[t]he petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied." The determination lacks any precedential value whatsoever.[10]

[10] Plaintiff oddly asserts that the Counties' instant appeal amounts to "gamesmanship" and an "insult to the Court," in light of this Court's denial of the County of Sacramento's 28 U.S.C. § 1292(b) petition. (*See* Opp. Br. at p. 28, fn. 18.) This unfortunate rhetoric reveals a misunderstanding of appellate procedure.

In the final analysis, Plaintiff is unable to offer a sound basis upon which to distinguish the Congressional intent underlying the limitation periods established by Sections 2501 and 2401(a). This Court should follow the D.C. Circuit, Federal Circuit and Eleventh Circuit in holding Section 2401(a) establishes a jurisdictional limitations period that is not subject to waiver or equitable tolling.

III. The District Court Erred In Terminating The Counties' Status As Intervening Defendants.

A. The Record Evidence Belies Any Finding of "Undue Delay."

As explained in the Counties' Opening Brief (at 42-43) the district court's "finding" of "undue delay" is wrong as a matter of law. The timely assertion of meritorious jurisdictional defenses, which the Federal Defendants included in their answer but did not pursue (ER-524), cannot amount to undue delay within the meaning of Rule 24 as a matter of law. Plaintiff nonetheless argues, without any basis in law or logic, that the Counties' effort to have the district court ascertain the existence of subject matter jurisdiction amounted to an "infusion of irrelevant issues." (*See* Opp. Br. at 6.) The "first and fundamental question" of jurisdiction is anything *but* irrelevant.

Plaintiff also argues, without support in the record, that the Counties intervened under false pretenses, not disclosing their intent to pursue those affirmative defenses. This fiction is loosely woven into Plaintiff's brief (Opp Br. at 3, 6) and is not supported by the vague and inaccurate claims in the affidavit

from Plaintiff's counsel (ER-103-105) which are refuted directly by affidavits submitted by the Counties. (ER-69-74.) The record evidence clearly disproves any "bait and switch" between the stated grounds for intervention and the actions of the Counties in pursuing jurisdictional defenses. Indeed, when the Counties sought intervention Napa County included a proposed answer that identified the jurisdictional defenses it intended to pursue, and did pursue. (ER-449-465). The Counties at all times acted promptly in engaging in motion practice (ER-106-109), seeking (unsuccessfully) to pursue an interlocutory appeal (ER-110-125), and in moving to expedite this appeal.

B. The Counties Have a Significant Protectable Interest That Supports Intervention as a Matter of Right.

Plaintiff repeats the district court's conclusion that the Counties lack a significant protectable interest in the outcome of the litigation, but neither Plaintiff nor the district court can reconcile that conclusion with (i) the liberal rules favoring intervention (*see, e.g., City of Emeryville v. Robinson,* 621 F.3d 1251, 1259 (9th Cir. 2010) or (ii) the cited case law from this Circuit and the Eighth Circuit holding that state and local governments have significant protectable interests when they may suffer off-site impacts from activities on federal lands. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1491-92 (9th Cir. 1995); *Sierra Club v. Robertson,* 960 F.2d 83, 84, 86 (8th Cir. 1992); *see also, generally*, cases cited in Opening Br. at 34-40. That precedent supports liberally recognizing

a right of intervention here on behalf of the Counties given the landmark agricultural preservation laws in each county and the inevitable off site impacts the Counties will experience from Plaintiff's development of the currently vacant public lands. Plaintiff seeks in its lawsuit not only restoration as a tribe but also the establishment of a land base within the Counties, and specifically includes in its pleading a demand to have those lands declared eligible for gaming. The reality is that the tribe will pursue gaming if authorized, as many other tribes in California have done. But even if that outcome is not assured by the current litigation, there is no doubt that the tribe will economically develop whatever lands are taken into trust for its benefit – that is the point of requesting the land, and that is the goal of the "land into trust" authority created by the IRA. *See* 25 U.S.C. § 465; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life . . ."). Likewise, there is no dispute that the Counties, as the immediately adjacent, abutting sovereigns with regulatory authority over the surrounding lands, will experience any and all off-site impacts from that development.[11] This is true

[11] In this respect the Counties are unlike the Cities that sought to intervene in this action, because according to Judge Ware (who granted the Counties' motion for intervention), the "prayed for lands . . . are not identified as within, or even nearby, the Cities." (*See* Dkt. No. 128, at 4). Thus, the Cities do not share a contiguous border with the lands sought to be transferred to Plaintiff, and might not experience off-site impacts.

(Footnote continued on next page)

whether or not the tribe succeeds in its plans to build and operate a commercial gaming facility or chooses to develop the property in another way.

The Counties' Opening Brief further explained how their regulatory interests extend into the federal public lands, identifying three federal statutes that direct the Bureau of Land Management to align federal land use planning with local land use planning whenever possible. (Opening Br. at 30.) This natural alignment of land use planning substantially limits development of federal public lands in Sonoma and Napa Counties inconsistent with their agricultural preservation laws. While Congress could pass federal laws that would trump the agricultural preservation laws, that has not happened, and in the absence of such directly conflicting federal legislation, the state and counties provide primary regulatory authority concerning land use. This is a significant sovereign power that will be substantially impaired if lands are taken into trust for the benefit of Plaintiff. The loss of that authority (however described or quantified) would have great meaning to the Counties and further confirms the Counties' significant protectable interest in the outcome of the litigation.[12]

---

[12] Contrary to Plaintiff's assertion (*see* Opp. Br. at 16, fn. 8), the argument here is not "new," but rather an extension of the protectable interest analysis offered below, and helps to flesh out the full range of County regulatory authority that is foreseeably impacted by the current litigation. If necessary, this Court can take judicial notice of the federal laws and learned treatises cited by the

(Footnote continued on next page)

C. Plaintiff's First Amended Complaint Seeks Land Transfers.

Plaintiff contends that its lawsuit concerns only tribal restoration (Opp. Br. at 5), but ignores the language in the First Amended Complaint requesting the transfer of federal public lands *and* other "Designated Lands" into trust for its benefit of Plaintiff (ER-416) *and* seeking a declaration that such lands are "restored lands" under IGRA, so as to permit gaming. (ER-416, 446.) Plaintiff cannot have it both ways. By retaining language in the complaint that demands a transfer of lands within the Counties, and with a specific stated purpose to engage in gaming operations, Plaintiff's lawsuit necessarily and directly implicates the Counties' significant protectable interests.

D. The Counties' Interests Also Support Permissive Intervention.[13]

The district court misapplied Rule 24's provisions regarding permissive intervention by making the untenable finding of "undue delay" based on the Counties' pursuit of meritorious jurisdictional defenses, as noted above.

Counties in their Opening Brief with respect to the existence of local land use planning authority within federal public lands. *Scott v. Ross*, 104 F.3d 1275, 1283 (9th Cir. 1998).

[13] Plaintiff claims the correct provision for permissive intervention is Rule 24(b)(1)(B), not 24(b)(2). Arguably, the Counties' reliance on their agricultural preservation laws and land use regulatory authority supports application of Rule 24(b)(2), but for purposes of the present analysis, it does not matter which of those provisions is cited or construed.

Moreover, the district court's narrow reading of the grounds for permissive intervention is contrary to the Rule's liberal construction in this Circuit. This Court has held that "where a would-be intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention under FRCP 24(b)." *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1991); *Officers for Justice v. City and County of San Francisco*, 52 F.3d 334 (9th Cir. 1995). The district court did not apply (or appear to recognize) this Circuit's accommodating conception of permissive intervention as a back-up when intervention as of right is not established. While the decision to grant or deny permissive intervention is discretionary, "subject to considerations of equity and judicial economy," *id.*, the district court here abused its discretion in construing Rule 24 narrowly and terminating the Counties' intervention on the factual and legally untenable ground that the Counties' diligent pursuit of clearly non-frivolous (indeed meritorious) jurisdictional defenses had caused undue delay and prejudice to Plaintiff.

CONCLUSION

The district court lacked subject matter jurisdiction, as does this Court, based on Plaintiff's lack of standing and the commencement of this action long after the jurisdictional limitation period established by 28 U.S.C. § 2401(a) had expired. Accordingly, the Counties respectfully ask this Court to:

(1) dismiss this action as time-barred under 28 U.S.C. § 2401(a); and hold that the federal courts lack subject matter jurisdiction to entertain Plaintiff's lawsuit based on the patent untimeliness of the action; or in the alternative, if this Court does not find subject matter jurisdiction lacking under Section 2401(a)

(2) dismiss this action on the ground that subject matter jurisdiction is lacking based on Plaintiff's failure to meet its burden to plead and prove Article III standing; and

Finally, and also in the alternative, the Counties ask that their status as intervenors-defendants be restored (as having been improperly terminated whether their intervention is deemed to have been granted as a matter of right or permissively), so that they might continue to participate in the action and assert

defenses as if they had been named as original defendants.

Dated: San Francisco, California
March 15, 2013

Respectfully submitted,

/s/ Michael S. Cohen

NIXON PEABODY LLP
Attorneys for
Intervenors-Defendants-Appellants
County of Napa and
County of Sonoma
MICHAEL S. COHEN, ESQ.
DAVID H. TENNANT, ESQ.
MATTHEW FRANKEL, ESQ.
One Embarcadero Center, Suite 1800
San Francisco, California 94111
(415) 984-8200

14355473

Form 6. Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 5,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Microsoft Word 2010 *(state font size and name of type style)* 14-point Times New Roman, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____ with *(state number of characters per inch and name of type style)*

_____.

Signature /s/ Michael S. Cohen

Attorney for Intervenors-Defendants-Appellants

Date March 15, 2013

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY, *Plaintiff-Appellee*, v. KEN SALAZAR, in his capacity as Secretary of the Interior, and LARRY ECHO HAWK, in his capacity as Assistant Secretary of the Interior, and JOHN DOES 1-5, *Defendants-Appellees*, -and- COUNTY OF NAPA and COUNTY OF SONOMA, *Appellants-Intervenors-Defendants*.	No. 12-17360

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 15, 2013.

APPELLANTS' REPLY BRIEF

Participants in the case who are registered CM/ECF users were served by the appellate CM/ECF system, as follows:

Michael S. Cohen, Esq. David H. Tennant, Esq. (SBN 132568) Matthew J. Frankel, Esq. (SBN 256633) Nixon Peabody LLP One Embarcadero Center 18th Floor San Francisco, California 94111 Tel: (415) 984-8200 Fax: (415) 984-8300 mfrankel@nixonpeabody.com *Attorneys for Appellants County of Napa and County of Sonoma*	Joseph L. Kitto, Esq. 2309 Renard Place SE Suite 211 Albuquerque, NM 87106 Tel: (505) 414-2413 Fax: (505) 242-2236 Email: kitto@sovsys.net *Attorneys for Plaintiff-Appellee Mishewal Wappo Tribe of Alexander Valley*

I further certify that some of the participants in this matter are not registered CM/ECF users. I have dispatched the foregoing documents via Federal Express for delivery on the next business day to the following non-CM/ECF participants:

Kelly F. Ryan, Esq. (SBN 195921)
The Ryan Law Firm
A Professional Law Corporation
80 South Lake Avenue, Suite 500
Pasadena, California 91101
Tel: (626) 568-8808
Fax: (626) 568-8809
Email: info@ryanattorneys.com

Attorneys for Plaintiff-Appellee Mishewal Wappo Tribe of Alexander Valley

Ignacia S. Moreno, Esq.
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

David B. Glazer, Esq. (D.C. 400966)
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
Tel: (415) 744-6491
Fax: (415) 744-6476
Email: david.glazer@usdoj.gov

Attorneys for Defendants-Appellees Ken Salazar and Larry Echo Hawk

/s/ Michael S. Cohen
MICHAEL S. COHEN

14365951.1