No. 12-17360

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY

Plaintiff-Appellee,

v.

KEN SALAZAR, *et al.*,
Federal Defendant,

and

COUNTY OF NAPA and COUNTY OF SONOMA,
Intervenor Defendants-Appellants

PLAINTIFF-APPELLEE'S ANSWER TO INTERVENOR DEFENDANTS-APPELLANTS' OPENING BRIEF

Kelly F. Ryan (CA SBN 195921)
THE RYAN LAW FIRM
80 South Lake Avenue, Suite 500
Pasadena, California 91101

Joseph L. Kitto (DC Bar No. 469760)
P.O. Box 819
Lower Lake, CA 95457

Attorneys for the Plaintiff
MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

FEDERAL RULES AND REGULATIONS

OTHER

STATEMENT OF JURISDICTION

Appellee, the Mishewal Wappo Tribe of Alexander Valley ("Plaintiff" or "Tribe") generally agrees with the Appellants', Napa and Sonoma Counties ("Intervenor Defendants" or "Counties"), statement of jurisdiction.

ISSUES PRESENTED[1]

1. Whether the District Court erred in revoking the Intervenor Defendants' status on grounds that they ". . . did not have present a 'significant protectable interest' at the time of intervention" and therefore ". . . did not intervene as of right under Federal Rule of Civil Procedure 24(a)(2)"? (ER-008)

2. Whether the District Court abused its discretion in revoking the Intervenor Defendants' status on the grounds that they ". . . do not have a common claim or defense" with the main action, and would cause ". . . further undue delay and prejudice to the named parties" and therefore did not intervene pursuant to Fed. R. Civ. Proc. Rule 24(b)(1)(B)[2]? (ER-009)

---

[1] The Plaintiff interprets the requirements of Federal Rule of Appellate Procedure 28(a) to specify that the heading "Issues Presented" must precede "Statement of the Case."

[2] Intervenor Defendants mistakenly cite Fed. R. Civ. Proc. Rule 24(b)(2) in their second presented issue. Appellants' Opening Brief, page 4. Fed. R. Civ. Proc. Rule 24(b)(1)(B) is the correct citation as evident from the Intervenor Defendants' individual motions to intervene, ER-487, 506, as well as Judge Davila's statement of the Rule at ER-008.

3. Whether the District Court erred in denying the Intervenor Defendants' Motion to Dismiss made pursuant to Fed. R. Civ. Proc. 12(b)(1) asserting that Plaintiff failed to plead facts and injury sufficient to maintain Article III standing?

4. Whether the District Court erred in denying Intervenor Defendants' Motion to Dismiss made pursuant to Fed. R. Civ. Proc. Rule 12(b)(1) and (6) asserting that 28 U.S.C. §2401(a) is a jurisdictional bar to Plaintiff's claims?

STATEMENT OF THE CASE

On June 5, 2009 Plaintiff filed its Complaint against the Secretary of the Department of the Interior, Ken Salazar, seeking, in part, the restoration of the Mishewal Wappo Tribe of Alexander Valley. [3] Alternative Dispute Resolution between the Plaintiff and the Federal Defendants began on Nov 24, 2009. The County of Sonoma, filed a Motion to Intervene on March 5, 2010 and on March 24, 2010, the County of Napa, filed its Motion to Intervene. On March 26, 2010, the County of Lake, who has since withdrawn from the action, also filed a Motion to Intervene. All three Counties' Motions for Intervention sought such as of right in accordance with Fed. R. Civ. Proc. Rule 24 (a)(2) and permissively pursuant to Fed. R. Civ. Proc. Rule 24 (b)(1)(B).

[3] Plaintiff's Amended Complaint does not seek the transfer of **any** county land, but rather seeks only to have the Federal Defendants identify federal lands for which the Plaintiff would be eligible to acquire if restored. The Intervenor Defendants' statement to the contrary is a merely an attempt to concoct a "significant protectable interest" where none exists.

Motions to Intervene were filed by local Cities and other entities between December 22, 2010 and January 23, 2011. On January 28, 2011, Judge Ware issued an order denying all the Motions to Intervene based upon their failure to identify a "significant protectable interest." On October 24, 2011 Intervenor Defendants' Motion to Dismiss was denied. Plaintiff filed its Motion to Revoke the Intervenor Defendants' Status and Dismiss on February 21, 2012 arguing that the Intervenor Defendants had no "significant protectable interest" and that their continued involvement had already digressed greatly from their original stated purpose for intervention. The Motion to Revoke the Intervenor Defendants' Status and Dismiss was granted on September 28, 2012. On October 22, 2012 the Intervenor Defendants filed the current appeal.

STATEMENT OF THE FACTS

The Mishewal Wappo tribe has existed in Northern California since before recorded history of the area. The most recent and profound recognition of the Tribe of Wappos living on the Alexander Valley Rancheria ("Historic Tribe") was in 1935 when the Secretary of the Department of the Interior, in accordance with a mandate of the Indian Reorganization Act of 1934 ("IRA"), polled the Tribal members and asked them to vote to implement the organizational methodology of the IRA. The intent of the IRA was to make Tribes look and operate more like mainstream America by having them adopt governments similar to that of the

United States. As such, even though the Alexander Valley Rancheria was established in 1909 and added to in 1913, the Tribe of Wappos, who called themselves "Mishewal Wappos," was definitively recognized by the federal government in 1935. Contrary to Stephen Beckham's report, Congress acknowledge the continued existence of the Tribe in 1952, when the Bureau of Indian Affairs ("BIA") provided a report of known **active** Tribes in Northern California and reported the Alexander Valley Rancheria as the home of the Wappo Tribe. *See* 1952 Cong. Rep., 82nd Congress, 2d Session, pages 671, 687, 1086, 1140, 1142, 1145. [4]

The California Rancheria Act of August 18, 1958 ("CRA") terminated the federal government's responsibility for the land used by Tribes and the relationship it had with the Tribes living on the lands. Subsequently, in *Tillie Hardwick v. U.S.*, C-79-1710-SW (N.D. Cal. 1983) 34 Tribes sought to restore the trust status of the lands distributed in that termination and peripherally the status of those who had land distributed to them. The BIA took this opportunity to restore only those to which land had been distributed, not the members of the Tribes themselves. After

[4] Although Beckham's report identifies the funds used to purchase the properties of Alexander Valley Rancheria as for "homeless Indians," the cited Congressional Report notes that the first funds provided for "homeless Indians" were appropriated on August 1, 1914, which is **after** the second property for the Rancheria was already purchased in 1913. *Id*. at 742.

years of being acknowledged by various parts of the federal government[5] as deserving restoration, but nonetheless receiving nothing, the Mishewal Wappo Tribe, going by its traditional name, filed the instant action.

On June 5, 2009, Plaintiff brought the present case against Federal Defendants seeking restoration of its Tribal status, assistance to regain its ability to help its members receive the long lost federal medical and educational benefits, and a commitment to establishing a new land base comprised of surplus federal lands and land that might be some day acquired in its former Wappo territory.

The Plaintiff met with the Counties several times and was informed that their objection to the litigation was that the language in the Complaint seemed to them to indicate a prayer for relief such that the District Court would order the federal government to take land into trust "immediately" and without the Counties' participation. In an effort to clarify its intent for the Counties, Plaintiff amended its Complaint so that it is clear that no request for land to be taken into trust would occur outside the federal rules and regulations. When the Counties moved to intervene, Federal Defendants advised Plaintiff that including the Counties would likely help to settle the case since all possible future litigants would be involved. Based on this, Plaintiff did not oppose the Motion to Intervene, but did state language that sought to limit the Counties participation to claimed issues; land.

[5] *See* Dkt. No. 147, pages 19-21.

After the Plaintiff, Federal Defendants and the Counties attended multiple sessions of mediation, it became clear that the Intervenor Defendants were not sincere in their desire to preserve County interests in any land issues that might arise. In fact, the Counties made it known that they were only there to gather facts (ER-105), which became apparent in the filed Motion to Dismiss. Plaintiff filed its Motion to Revoke the Intervenor Defendants' Status and Dismiss, not in response to their irrelevant discovery request, but rather to stop the untimely delays, to eliminate the infusion of irrelevant issues and to allow for a fair adjudication of the issues brought by the Plaintiff in its action. Plaintiff's case does not involve land usage. It does not involve county or city jurisdictions. It does not involve vineyards or political agendas. Plaintiff's case is about the correcting injustice of unlawful termination by the Federal Defendants under the California Rancheria Act and restoring the trust responsibility owed to their people.

SUMMARY OF THE ARGUMENT

1. The District Court's Order granting the Motion to Revoke the Intervenor Defendants' Status and Dismiss, either as of right or permissive was not in error because: a) at the time of intervention, Intervenor Defendants' Motion to Intervene was not opposed and, therefore, no review of the sufficiency of the evidence that they had a "significant protectable interest" was required under Rule 24(a)(2), b) the interests asserted by the Intervenor Defendants were similar to those interests

alleged by the various Cities and other entities and were also determined to be insufficient for a Motion to Intervene, c) the Counties' alleged interests do not constitute a claim or defense that shares a common question of law or fact with the main action as required by Rule 24 (b)(1)(B), and 4) the Counties' intervention has caused undue delays and has prejudiced the named parties including the Federal Defendants, as demonstrated by the Federal Defendants Response to Amended Motion to Dismiss. *See* Dkt. No. 146.

2. The District Court correctly rejected the Counties' challenge to the Plaintiff's standing in its Motion to Dismiss because: a) the Plaintiff provided the District Court with a plethora of evidence disputing Intervenor Defendants' **factual** claim that the Historic Tribe had ceased to exist, (*see* Dkt. No. 147 at 19-21), b) the Federal Defendant acknowledged that the Tribe had not ceased to exist, nor was a Tribal Constitution necessary for recognition, (*see* Dkt. No. 146 at 2-3), and c) Plaintiff met the burden of pleading and proving its standing sufficiently under the **facial** challenge standard of a Motion to Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) to the District Court in its Brief in Opposition to the Motion to Dismiss and to the Federal Defendants through provision of membership records as evinced by the fact that the Federal Defendant did not join the Counties in their challenge of Plaintiff's standing.

3. The District Court was correct in denying the Counties' challenge to subject matter jurisdiction in its Motion to Dismiss pursuant to 28 U.S.C. §2401(a) because: a) the Ninth Circuit has made it clear that §2401(a) is a type of statute of limitation subject to tolling as defined by *John R. Sand & Gravel v. U.S.*, 552 U.S. 130 (2008) and restated in *Aloe Vera of America, Inc. v. U.S.*, 580 F. 3d 867 (9th Cir. 2009), and b) the Ninth Circuit precedent of not overturning its determination that §2401(a) is subject to tolling is affirmed as recently as 2010 in *Wilton Miwok Rancheria v. Salazar*, 2010 WL 693420 (N.D. Cal. 2010).

ARGUMENT

I. The District Court Did Not Abuse its Discretion in Granting Plaintiff's Motion to Revoke the Counties' Status as Intervenor Defendants

A. Applicable Law

The District Court has the authority to dismiss intervening parties regardless of the type of intervention when doing so assists the efficient management of the case. *See Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984). Although the courts traditionally apply 28 U.S.C. §2401(a)(2) liberally to applicants for intervention as the Intervenor Defendants note, *see Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003), a related and significant interest is required. *Id*. ("A party seeking to intervene as of right must . . . have a significant protectable interest relating to the property or transaction that is the subject of the action."); *Donnelly v. Glickman*, 159 F.3d 405,410 (9th Cir. 1998)("An applicant generally

satisfies the 'relationship' requirement if the resolution of the plaintiff's claims actually will affect the applicant.").

B. Standard of Review

The District Court's finding that the Intervenor Defendants failed to meet the requirements of Fed. R. Civ. Proc. 24(a)(2) to intervene as of right is reviewed *de novo* by this Court. *See U.S. ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1393 (9th Cir. 1992). Review of the District Court's finding that the Intervenor Defendants did not meet the requirements of Fed. R. Civ. Proc. 24(b)(1)(B) for permissive intervention is reviewable for abuse of discretion. *See Donnelly* at 411, 412 ("We have jurisdiction over the district court's denial of permissive intervention only if the district court abused its discretion.").

C. Intervenor Defendants' Motion to Intervene Was Properly Reviewed for Sufficiency

The District Court gave proper consideration to Intervenor Defendants' Motion for Intervention. Since there was no opposition, Judge Ware's Order did not provide an analysis of the Counties arguments in its Motion to Intervene, Judge Davila had to review it *de novo*. *See* ER-002, fn.1, ER-003. ("[T]his court's predecessor conducted little if any analysis on the issue of intervention."). Judge Ware did not identify whether the Order granted Intervention as of right or permissively, therefore Judge Davila had to first classify the Counties'

intervention. *Id.* ("Thus, the Court must first classify the Counties' intervention before . . . [deciding whether to terminate or not].")

While the Intervenor Defendants concede that Judge Ware granted their Motion to Intervene because it was not opposed, they argue that since the Order begins with the words "[f]or good cause shown…" he also ruled on the merits of their application. *See* Appellants' Opening Brief at 11-12. However, this introductory phrase is insufficient to support the conclusion that an analysis of the "significant protectable interests" alleged in the Motion to Intervene must have been done.[6]

The Counties argue: 1) that it was "incumbent" on Plaintiff to oppose the Motion to Intervene if the Plaintiff believed there were no grounds for intervention, 2) since the Plaintiff did not do so at the time of intervention, it is prevented from raising objection now by principles of waiver and laches. *See*, Appellants' Opening Brief at 26. These arguments are not only unsupported in law as illustrated by the lack of citing authority, but lack merit as being illogical.

[6] "For good cause shown" is a legal phrase that introduces further discussion as to what the actual good causes shown are, much like the standard legal phrase "For good and valuable consideration" must generally be followed by a description of the actual consideration so that it can be deemed "sufficient consideration" by a reviewing court. *See generally,* Restatement (Second) of Contracts §71 (1981), Chapter 4. Formation of Contracts.

The Counties' characterization of the Plaintiff's land transfer request is a gross exaggeration of the process designed to bolster their arguments that they possess a "significant protectable interest." Surplus government lands cannot be automatically and immediately transferred in the event that Plaintiff prevails. At a minimum the process would involve the following steps and conditions: the Plaintiff becomes: 1) eligible for, 2) public lands, 3) not in use, 4) that are available for transfer, and 5) are within the Tribes historically aboriginal land yet to be determined. The requested land transfer is a post judgment process with many rules and regulations governing the requirements that must be met prior to transfer of a single acre.

In a further attempt to fabricate a significant protectable interest, Intervenor Defendants' Appeal miscites[7] and misapplies *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976), which it quotes as, "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory *[sic]* " to support its own proposition that "[a]s a general proposition, state and local governments retain important powers over federal lands located within their territorial jurisdiction." Appellants' Opening Brief, page 30. This is profoundly incorrect. A more careful and thorough reading of *Kleppe* shows that when

[7] The Intervenor Defendants' quote did not indicate that the quoted sentence continues on to state, ". . . but Congress equally surely retains power to enact legislation respecting those lands pursuant tthe *[sic]* Property Clause."

Congress acquires exclusive or partial jurisdiction over state land by consent or cession, the state retains some jurisdiction. Nonetheless, federal legislation overrides conflicting state laws. *Kleppe*, 426 U.S. at 542.

Intervenor Defendants torture logic and rationale to assert the argument that the Federal Land Policy Management Act, the National Forest Management Act, and National Environmental Policy Act and the corresponding agency practices of consulting with local government and consideration of their opinions and plans somehow bestows upon them the ". . . ability to exercise meaningful land use regulatory authority over the lands, and thus, their ability to ensure compliance with their agricultural preservation laws." *See* Appellants' Opening Brief at 32.

The claim that the Bureau of Land Management ("BLM") ". . . would never undertake a large scale commercial development of vacant federal lands in contravention of the Counties' highly visible, politically popular, and economically critical land use laws" is immaterial since the Plaintiff's case does not involve the BLM, imaginary large scale commercial developments, or the Counties' visible and popular laws. The Complaint merely seeks restoration of the Tribe and following such restoration, that it be granted lands owned by the Federal Government. The Counties' parade of horribles on remote future events does not transform their arguments into a current "significant protectable interest" in the instant litigation. In short, the Counties' series of "significant protectable interest"

arguments regarding the potential future impacts of Plaintiff's case is irrelevant to the analysis because: 1) a successful outcome of the litigation for the Tribe would not result in land in trust, but rather the Tribe would merely become eligible for it, 2) no specific land has been identified by the Federal Defendants and therefore no impacts can be reasonably anticipated, and 3) without plans for a specific land use by the restored Tribe approved by the BIA, no impacts on the Counties' can even be reasonably ascertained.

The District Court and the Plaintiff cite Fed. R. Civ. Proc. 24(b)(1)(B) as the rule governing permissive intervention. The Counties cite 24(b)(2) as the relevant rule. Assuming that this is simple error, Plaintiff notes that Judge Davila, in the discretion afforded him under that rule, held that the Counties' interests were "nonexistent," "contingent on future events," or "tangential" to the proceedings which involve core issues of restoration of the Tribe and transfer of federal lands. *See* ER-008. He also found that the Counties stated interests were not ". . . claims that have much of anything in common with the actual issues." *Id*. The Appellants have thus failed to show a reversible error or an abuse of discretion regarding the District Court's revoking of their status as intervenors as of right or permissively.

D. Judge Ware Dismissed Other Motions to Intervene Where Similar Interests Were Rejected

In Judge Ware's Order Denying Cities' Motions to Intervene, he states the

Cities' alleged interests supporting their Motion to Intervene as of right as being: 1) regulatory authority, and 2) taxation authority. Dkt. No. 128 at 2. He notes that the Plaintiff and Federal Defendants respond to the claims of interest by asserting that the lands sought are "…within federal jurisdiction and does not implicate any legally protectable interests of the Cities…" *Id.* at 2. Judge Ware addressed this response first after concluding that it might be dispositive.

Judge Ware's analysis begins with a restatement of this Circuit's opinion in *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003), where the significant protectable interest of Fed. R. Civ. Proc. Rule 24 (a)(2) is protectable under some law and there is a relationship between the interests and the claims in the case. The relationship element is satisfied, "…only if the resolution of the plaintiff's claims actually will affect the applicant." *See Donnelly*, 159 F.3d 410. Judge Ware held that since the Plaintiff's Complaint did not identify specific parcels of federal land to be transferred into trust, nor did it identify the boundaries of the Plaintiff's aboriginal lands, the Cities claimed interests were "too tenuous" to support intervention as of right and "mere speculation" insufficient to support the finding of a significant protectable interest. *See* Order Denying Cities Motion to Intervene at 4. Judge Ware concluded his opinion by determining that the Cities application for permissive intervention failed the requirements of Fed. R. Civ. Proc. Rule 24(b)(1)(B) by not having "an independent ground for jurisdiction" *Id.* at 5.

Similarly, Judge Davila, in reviewing the Intervenor Defendants' Motion to Intervene quoted the *Arakaki* holding to review the Counties stated significant protectable interest as satisfying the relationship element for intervention as of right under Rule 24 as being satisfied "…only if the resolution of the Plaintiff's claims actually will affect the applicant." *See* Order Granting Plaintiff's Motion to Revoke Intervenors' Status at 5 (citing *Donnelly,* 159 F.3d at 410). Judge Davila identified the Counties stated interests as "…preventing environmental impact as well as maintaining regulatory and taxing authority…" *Id.* at 5. In reviewing the Counties contentions regarding the impact of resolution of the Plaintiff's claims, Judge Davila found that there was "…no direct, immediate or harmful affect…" and that the impacts described were "too remote," "speculative" and futuristic to meet the relationship test. *Id.* at 6.

Judge Davila's application of Fed. R. Civ. Proc. 24(b)(1)(B) in consideration of the claimed interests resulted in his determination that the Counties do not have a common claim or defense. He identified the core issues of the case as being restoration of federal recognition and acquisition of federal lands and in the analysis of the Rule for permissive intervention and the identified core issues, Judge Davila correctly found that the Counties interests were "…non-existent, contingent on future events or tangential to this proceeding." *Id.* at 8.

The Counties restatement of the same alleged interests that were rejected as a basis for permissive intervention or intervention as of right by two District Court Judges in two separate orders cannot change the fact that the Intervenor Defendants were properly removed as intervenors for failure to have a "significant protectable interest" identifiable in law or fact.[8]

II. The District Court Correctly Denied Counties' Motion to Dismiss[9] Asserting That Plaintiff Lacks Standing

A. Applicable Law

The Intervenor Defendants invoked Fed. R. Civ. Proc. 12 (b)(1) as both a factual and facial challenge to Plaintiff's standing. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)("rule 12(b)(1) jurisdictional attacks can be either facial or factual.").

B. Standard of Review

A Court of Appeals reviews questions of standing *de novo*, but reviews a District Court's finding of fact by a *clear error* standard. *See Preminger v. Peake*, 552 F.3d 757, 762 fn. 3 (9th Cir. 2008); *Savage v. Glendale Union High School*,

[8] It should be noted that the Intervenor Defendants have introduced new arguments that were not before the District Court, e.g. practical sense interests, Indian child Welfare Act interests, jurisdiction over federal lands interests, and should not be considered in this appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 ("As a general rule, we will not consider arguments that are raised for the first time on appeal.")

[9] Although central to the case, the Motion to Dismiss was not included in the Appellant's submission.

343 F.3d 1039 fn. 2.[10]

C. Intervenor Defendants' Factual Challenge Failed to Allege an Actual Factual Dispute Sufficient to Require Plaintiff to Prove Standing Beyond the Complaint

In reviewing a Motion to Dismiss under Rule 12(b)(1) that challenges the factual allegations that support standing in a complaint, a Judge "…need not presume the truthfulness of the plaintiffs allegations" and "…may look beyond the complaint to matters of public record…" *Id.* A party so moving asserts a valid challenge ". . . by presenting affidavits or other evidence *properly* before the court…" *See Safe Air for Everyone v. Meyer*, 373 f3d 1035, 1039 (9th Cir. 2004)(citing *Savage*, 343 F3d 1039, fn. 2)(emphasis added).

While the Intervenor Defendants submitted affidavits and an unauthenticated historical report from a paid consultant, these do not meet even a reasonable standard of a factual offering. For example, in the Intervenor Defendants Motion to Dismiss, Dkt. No. 135 on page 4 in a section entitled "Factual Background" the Intervenor Defendants state:

> Moreover as set forth in a report prepared for the counties by ethno-historian and noted expert on Native Americans of the American west, Stephen Beckham, Ph.D., ('the Beckham Report') the small group of Indians who occasionally stayed on the Alexander Valley Rancheria did not have a tribal

[10] Intervenor Defendants miscite the *Savage* case by listing the pinpoint cite as 1040 when in fact the pinpoint cite is 1039, fn. 2. It must be noted the systemic defect of multiple miscitations in the Appellant's Opening Brief is troublesome if in error and contemptible if by design.

> government or community governing body *at any point*, and largely abandoned the Rancheria a decade before the Rancheria's termination in 1959.

In footnote 3, following the above stated quote, the Intervenor Defendants offer this conclusory statement as Dr. Beckham's summary of available historical documents. Further, the affidavit referenced as providing a factual challenge was made by David H. Tennant, an attorney of Nixon Peabody, the Intervenor Defendants' attorney.

Despite the fact that the Intervenor Defendants factual challenge would fail to satisfy the requirement that information supporting a factual challenge be affidavits or public documents in order to be *properly* before the court, Judge Davila waded through the voluminous self-serving text. He insightfully summarized the counties factual challenges as: 1) the Historic Tribe of Alexander Valley had dispersed, 2) the Historic Tribe did not have a formal structure, and 3) the members of the Plaintiff Tribe have no connection to the Historic Tribe. The Plaintiff cited numerous governmental documents spanning from 1958 to the present that the Historic Tribe did not cease to exist. *See* Plaintiff's Brief in Opposition to the Motion to Dismiss, Dkt. No. 139 at 19, 20. Surprisingly, even the Federal Defendants in their Response to the Motion to Dismiss, Dkt. No. 146 at 10, argue that the federal government continued to recognize the Tribe from 1935 until at least

1959 and that a formal government structure is not required for Indian self-government. *Id*. at 3, fn. 4. Thus, even in consideration of the Intervenor Defendants improper factual submission, the District Court properly rejected the first two factual challenges in recognition of contradictory public records and the compelling admissions by the Federal Defendants. Intervenor Defendants' final argument that the members of the Plaintiff Tribe are not related to the Historic Tribe was properly dismissed since, by its own admission, the Intervenor Defendant had not reviewed the membership of the Plaintiff Tribe.[11]

The Intervenor Defendants' argue that since the Plaintiff refused to turn over membership records containing confidential individual information, the District Court should have held an evidentiary hearing or dismissed the Plaintiff's case. However, the Intervenor Defendants had already concluded that even if the Plaintiffs proved that there was a Historic Tribe and that they descended from the Historic Tribe, it would not matter since Dr. Beckham had already concluded that

[11] In the Appellant's Opening Brief on page 47, footnote 18 the Counties respond to the District Court's rejection of their third factual challenge by stating that, "[t]his analysis is as illogical as it is unfair since it reverses the burdens placed on the parties under Rule 12(b)(1)." The Counties then cite the *Savage* case as supporting their statement. However, this criticism fails to take into account that the burden of the party opposing the motion becomes effective once the moving party has made a factual challenge "…by presenting affidavits or other evidence *properly* before the court…" *See Savage* at 1039, fn. 2. (emphasis added). This, they did not do.

the Historic Tribe had ceased to exist by 1951. *See* Dkt. No. 135 at 20 ("The historical record[12] thus supports the conclusion that the Indians of Alexander Valley Rancheria not only had abandoned the Rancheria by 1951 *[sic]* but also did not exist as a tribe, lacking any tribal organization or structure."). [13] The District Court properly denied the Intervenor Defendants' Motion to Dismiss.

D. The District Court Properly Denied the Counties' Motion to Dismiss Under the Rule 12(b)(1) Facial Challenge Standard

Although the Intervenor Defendants' Motion to Dismiss does not articulate that both a factual and facial challenge is being made in the mere three and a half pages of text, the District Court found it appropriate to review the standing challenge under the aforementioned factual standard and the more liberal facial standard. *See* Dkt. No.135 at 19-22.

Under the Intervenor Defendants' **facial** challenge pursuant to either 12(b)(1) and (6)[14] the District Court assumed the Plaintiffs' claims were true and

[12] The "Historical Record" noted here is the self-authenticating report created by Stephen Beckham hired by Intervenor Defendants.

[13] The Counties have tried to create a Lorenzo Dow "damned if you do and damned if you don't" scenario in which Plaintiff's refusal to turn over sensitive private records is equivalent to a failure to prove standing while at the same time arguing that even if the Plaintiff did turn over said records and prove lineage it would not matter since the historic tribe no longer exists. This set of arguments unpalatable.

[14] The Intervenor Defendants seem to want to make a cause of error out of the fact that the District Court used the word "converted" when he turned his analysis from the Factual challenge standard to the Facial challenge standard. Whether the Facial challenge analysis was done pursuant to Fed. R. Civ. Proc. 12(b)(1) or (6) is not a

injury was alleged. The Motion to Dismiss was doomed for failure by the second paragraph of its challenge of the Plaintiff's standing, *Id.* at 19, wherein it stated "[i]n the specific context of a modern tribe seeking remedies for wrongs allegedly done to Indians of an earlier era, the tribal-plaintiff has the burden to show a substantial and meaningful connection to the Indians who were allegedly harmed." The Counties cited *United Tribe of Shawnee Indians v. United States*, 253 F.3 543, 548 n.2. A closer reading of the case cited would have enlightened the Counties to the fact that the Tenth Circuit review of the District Court's granting of a Motion to Dismiss was based on a factual challenge to standing rather than facial. *Id.* at 547. Thus, in the only part of the Counties' Motion to Dismiss where their challenge to Plaintiff's standing could have been interpreted as being facial, the standard stated and supportive citation refer only to a factual challenge.

The Counties failure to adequately present a facial or factual challenge led the Court to note that it would be unfair to require Plaintiff to prove it's standing through the rather abbreviated dismissal process. That requirement becomes a burden only on a proper challenge, thus the District Court did not err.

E. The District Court Found The The Counties Assertions Failed to Raise a Factual Dispute

---

clear error since either rule requires a presumption of the truthfulness of the pleaded facts in favor of the non-moving party.

The District Court found that ". . . the evidence supplied by the Counties is insufficient to create a factual dispute . . . " *See* ER-014. As noted above the District Court refused to require the Plaintiff to respond to the Counties submitted evidence as being to "complex" for the abbreviated process of a motion to dismiss. *Id.* The Counties continued efforts to invent factual situations and apply fanciful standards has made the answer to a relatively simple question almost unintelligible. To clarify, the Counties assert that the Historic Tribe was not federally recognized. This has been proven false by the Advisory Council on California Indian Policy ("ACCIP") (Administrative Record, Exhibit 16, Attachment C), BIA testimony before Congress (Administrative Record, Exhibit 16, Attachment A), and the Federal Defendants in its Response to the Motion to Dismiss, *See* Dkt. No. 146 at 10-11. The Counties assert that the Historic Tribe dispersed and ceased to exist by 1951 despite the overwhelming evidence to the contrary supplied by the 1952 Congressional Report, , recognition by the *Tillie Hardwick* Court in 1979 as a Plaintiff[15], and the 2009 BIA Regional Office recommendation for restoration of the Tribe's federal recognition status. The Counties assert that the Plaintiff must

[15] The Intervenor Defendants once again miscite the case of *Tillie Hardwick v. U.S.* which was resolved by Stipulated Judgment in 1983. Instead they cite an action in 2006 involving the Picayune Rancheria of Chukchansi Indians in an unrelated matter, but bearing the same case name. Adding insult to injury the Intervenor Defendants make the argument that the Plaintiff representatives in Tillie Hardwick, "…could not count among themselves distributees of the AVR, or their heirs, legatees, or successors in interest." This statement is as irrelevant as it is unsupported.

prove a relationship between its members and the Distributees who received the assets of the Alexander Valley Rancheria pursuant to the CRA. *See* Appellant's Opening Brief at 44. However, there is nothing in the record, or any rule of law or regulation, nor even a case citation from any court that mandates that the members of the Plaintiff Tribe must descend from the fallacious Distributee List conceived through the unlawful process of termination and equally as flawed. In fact, the twice above cited statement of the Federal Defendants in their Response to the Motion to Dismiss more appropriately, although not exclusively, establishes the date of federal recognition as of 1935. *See* Dkt. No. 146 at 10. Further evidence that this date is appropriate is found in the correspondence from the BIA itself wherein it suggested to the Tribe that its membership should be determined by using the 1935 IRA voter list as a base roll. Even if the two aforementioned facts were not part of a plethora of evidence supporting the1935 voter list as being appropriate, certainly the 1997 ACCIP Report to Congress of the devastating and destructive effects of restoring Tribes based on the Distributee List as a result of the *Tillie Hardwick* case would be ample indicia of the falseness of the Counties claim.[16] In the simplest terms, using the most basic definitions the question of

[16] "This advice, [to use the Distribution List] while serving the BIA 's interest in confining its trust responsibility to a smaller Indian service population, also sows the seed of conflict among different groups of potential tribal members. Moreover, this artificial limitation ignores the fact that the distribution plans . . . frequently and arbitrarily excluded tribal members who objected to the distribution plans or

membership is easily resolved by the genealogical determination of whether members of the Plaintiff Tribe descend from those tribal members on the 1935 IRA voter list. The Counties' endeavor to create complexity and chaos from what should be an otherwise simplistic determination of lineage is another example of the proposition advanced by James Madison in Federalist[17] No. 10 regarding controversy. James Madison, November 22, 1787.

III. The District Court Correctly Denied Counties' Motion to Dismiss Asserting That 28 U.S.C. §2401(a) Bars Plaintiff's Complaint

A. Applicable Law

The Intervenor Defendants' Motion to Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) challenged the District Courts' subject matter jurisdiction alleging that the federal statute of limitations codified at 28 U.S.C. §2401(a) raised a jurisdictional bar preventing the District Court from hearing the case. Section 2401(a)states:

> Except as provided by chapter 71 of title 41, 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. The action of any person under legal disability or

---

who resided off the rancheria." *See* ACCIP Final Reports and Recommendations, September 1997.

[17] "So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."

> beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

B. Standard of Review

An Appellate Court reviews the denial of a motion to dismiss based on the statute of limitations *de novo*. *See Aloe Vera* at 870.

C. The Ninth Circuit has Consistently Held That 28 U.S.C. §2401(a) is Subject to Tolling

The Ninth Circuit has consistently held that §2401(a) did not create a jurisdictional bar to subject matter jurisdiction. In *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997) the Ninth Circuit reviewed 28 U.S.C. §2401(a) to determine whether that statute of limitations was jurisdictional and not subject to waiver or tolling. Relying, in part, on the Supreme Court's analysis in *Irwin v. Department of Veteran Affs.*, 489 U.S. 89 (1990)(the Court reasoned that whether the limitation is jurisdictional depends on the Congressional intent as stated in the statute), the *Cedars-Sinai* court held that, ". . . §2401(a)'s six-year statute of limitations is not jurisdictional, but is subject to waiver."

The Intervenor Defendant's acknowledge the holding in *Cedars-Sinai*, however they argue that "[t]his reasoning is no longer valid, however, in light of the Supreme Court's more recent decision in *John R. Sand & Gravel* 552 U.S. 130 (2008)." In *John R. Sand*, the Supreme Court reviewed 28 U.S.C. §2501 and found

that the language therein indicated that the Congressional intent was for the limitation to be jurisdictional. *Id*. at 136.

Since the language in §2501 is similar to that in §2401, Intervenor Defendants argue that both should be determined to raise a jurisdictional bar to judicial review. The Counties argue that because other Circuits hold differently this Court should overrule its holding and submit. They seem to hope that by repeating the same ill-fated dogmatic doctrine of "if it looks like §2501, it should be treated the same" they will somehow overcome the reason and analysis that demands a different, more sophisticated review. It is the in-depth analysis of *John R. Sand* that dictates a contrary result.

In that case, the Supreme Court posited that statutes of limitations generally fall into two distinct categories. The first being those limitations that ". . . seek primarily to protect defendants against stale or unduly delayed claims." *Id*. at 133. The second category of limitations seek ". . . to achieve a broader system related goal, such as facilitating the administration of claims, limiting the scope of governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id*. (citations omitted). This analysis has been relied upon by the Ninth Circuit in its consistent finding that §2401(a) is not a jurisdictional bar and thus subject to waiver and tolling. *Marley v. United States*, 567 F. 3d 1030, 1037 (9th Cir. 2009). The *Marley* Court stated specifically, "if Congress had intended to grant

exceptions to the §2401(b) limitations period, it would have done so expressly, as it did in §2401(a). *Id.* (emphasis added).

Lastly, the Intervenor Defendants argue that this Court has questioned the continuing validity of the determination in *Cedars-Sinai* that §2401(a) is not jurisdictional in *Aloe Vera of America, Inc. v. United States*, 580 F.3d 867 (9th Cir. 2009). Appellants' Opening Brief, page 56. Specifically, they interpret the language, "To the extent that *Cedars-Sinai* is still valid after *John R. Sand* . . ." to mean that the holding that §2401(a) is not a jurisdictional bar is questionable. This interpretation is unlikely since the *Aloe Vera* Court again applied the *John R. Sand* two category method of review and in doing so noted that "[i]n *Cedars-Sinai*, we held that the statute of limitations in 28 U.S.C. §2401(a) was not jurisdictional." Whatever aspect of *Cedars-Sinai* that may be in question after *John R. Sand*, there is no language in *Aloe Vera* to indicate that it is the holding regarding §2401(a).

D. The Ninth Circuit Recently Rejected an Appeal in the *Wilton Miwok* Case Foregoing a Challenge of its 28 U.S.C. §2401(a) Holding

The Counties ask the Ninth Circuit to **now** overturn the *Cedars-Sinai* holding that §2401(a) is not a jurisdictional bar and then to reverse the District Court's denial of their Motion to Dismiss. This request recognizes that the status of the law in the 9th Circuit at the time in which the District Court made its ruling was that §2401(a) was not a jurisdictional bar and by seeking such a reversal, the Counties inextricably acknowledge the correctness of Judge Davila's interpretation

and application of §2401(a) as it stands in the Ninth Circuit.[18] Where the Counties have no new arguments to support reversal of *Cedars-Sinai*, they seek to re-argue that §2401(a) is jurisdictional. Where their arguments fail to point out a judicial error, they ask the Ninth Circuit to overrule its own decision regarding §2401(a) thereby reversing the District Court's denial of their Motion to dismiss.

Fortunately, the Ninth Circuit's read of *John R. Sand* and the subsequent incorporation of the two category analysis by the Circuit Court and her lower courts, makes the law of the Circuit regarding §2401(a) as only a procedural bar to jurisdiction subject to waiver and tolling, founded on solid ground.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Ninth Circuit, Court of Appeals Affirm the District Court's Denial of the Intervenor Defendants' Motion to Dismiss and the District Court's granting of the Plaintiff's Motion to Revoke the Intervenor Defendants' Status and Dismiss.

Dated: March 1, 2013

Respectfully submitted,

By: s/ Joseph L. Kitto
s/ Kelly F. Ryan

Attorneys for the Plaintiff,

[18] The Counties ask this Court to dismiss the Plaintiff's case declaring *Cedars-Sinai* overruled by *John R. Sand*. This Court refused to do so in the *Wilton Miwok* case, which is a sister case parallel to present Plaintiff's case. The gamesmanship of such a request to change the rules to achieve victory is not only an insult to the Court but also further illustrates the Counties desperation to deny the Tribe justice.

MISHEWAL WAPPO TRIBE OF
ALEXANDER VALLEY

9th Circuit Case Number(s)

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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 (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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 (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)