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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY, Plaintiff, v. SALLY JEWELL, *et al.*, Defendants.	No. 5:09-cv-02502-EJD FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ECF No. 186 Date: July 25, 2013 Time: 1:30 p.m. Courtroom No. 4, Fifth Floor Hon. Edward J. Davila

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Federal Defendants submit this opposition to Plaintiff's motion for summary judgment, ECF No. 186.

I. OVERVIEW

Much of the dispute between the parties stems from their disagreement on these two points: Plaintiff is not the entity that was terminated in 1961 pursuant to the California Rancheria Act ("CRA"), and an order of this Court undoing that termination would not benefit the Plaintiff.[1] Throughout its supporting memorandum, Plaintiff conflates the Alexander Valley Rancheria — an area in Sonoma County purchased for landless Indians and occupied, under a system of temporary assignments, by various individuals over the course of its existence — with the "Mishewal Wappo Tribe." For purposes of these motions for summary judgment, the Federal Defendants do not dispute that the Wappo Indians as a people predated the European discovery of North America and may to this day maintain their tribal affiliation. *See* Pl. Mem. at 1.[2] But that is beside the point. Under the CRA, upon the unanimous approval of the last remaining residents of the Alexander Valley Rancheria, the Secretary of the Interior ("Secretary") terminated an entity that Congress had earlier created: the Alexander Valley Rancheria. *See* Fed. Defs' Mem., ECF No. 185, at 1–4. For that reason, Plaintiff is not the proper party to bring suit. A decision undoing a rancheria termination can only be premised upon a legal duty owed to those individuals whose Indian status was terminated, but those individuals are not before the Court. On the other hand, to the extent that the "Mishewal Wappo Tribe" seeks federal recognition through this suit, Plaintiff has not complied with the administrative procedures that are the sole means of seeking such recognition.

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[1] Plaintiff seems to acknowledge that "the Wappo people, as a Tribe, was *[sic]* not terminated . . . ." Pl. Mem. at 2. But Plaintiff nevertheless insists that an order of this Court unwinding the termination of the Alexander Valley Rancheria is necessary and would benefit Plaintiff.

[2] Plaintiffs' opening memorandum of law is cited as "Pl. Mem."; the Federal Defendants' opening memorandum is cited as "Fed. Defs' Mem."

Beyond these threshold problems, each of Plaintiff's claims suffers from one or more fatal defects.[3] Accordingly, judgment should be entered for the Federal Defendants.

II. ARGUMENT

A. Plaintiff Lacks Standing to Bring this Action

1. Voting on the Indian Reorganization Act does not establish standing in this case

Plaintiff insists that it is comprised of descendants of individual residents of the Alexander Valley Rancheria who, in 1935, voted in favor of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 478.[4] Pl. Mem. at 1, 2–4, 6–8. But unless Plaintiff is comprised solely of the descendants of those individuals who were distributees of the Alexander Valley Rancheria property in 1961 — and Plaintiff does not allege that it is so composed — no order undoing the termination of the Rancheria could benefit the Plaintiff.[5] *See* Fed. Defs' Mem. at 18–19; *Williams v. Gover*, 490 F.3d 785, 789–91 (9th Cir. 2007) (discussing use of distributee lists in restoration of *Hardwick* Rancherias, consistent with *Hardwick* plaintiff class membership definitions). Because an order of the Court could not redress any claimed injury, Plaintiff in fact lacks standing to bring this action. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) ("To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling."); *accord Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010). It is thus irrelevant that Plaintiff may consist of

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[3] The Federal Defendants incorporate by reference, but will not repeat, their arguments that all of Plaintiff's claims are time-barred and that the specific remedies sought by Plaintiff cannot be granted. *See* Fed. Defs' Mem., ECF No. 185, Sections II.A & B, II.D.2.

[4] Plaintiff concedes that it never adopted a tribal constitution or other organizing document, under 25 U.S.C. § 476, following that vote. 1st Amd. Compl., ECF No. 49, ¶ 11.

[5] As explained in Section II.A.4, below, Plaintiff cannot pursue a claim for recognition of the "Mishewal Wappo Tribe," because Plaintiff has not followed the administrative procedures required before bringing such a claim.

descendants of Wappo Indians who voted for the IRA in 1935.[6]

The administrative decision upon which Plaintiff principally relies, *United Auburn Indian Cmty. v. Sacramento Area Dir., BIA*, 24 IBIA 33, 1993 I.D. LEXIS 9 (May 28, 1993), cited in Pl. Mem. at 3, undercuts Plaintiff's position here. In that decision, the Interior Department's Board of Indian Appeals found that the entity the federal government had recognized prior to termination under the CRA was the Auburn *Rancheria* in which the Plaintiff claimed membership, not some other, larger tribal group.[7] *Id*. 1993 I.D. LEXIS 9, at *21.

Finally, while it is true that, once recognized, a tribe may define its membership and otherwise order its internal affairs as it sees fit, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56, 72 n.32 (1978); *Williams*, 490 F.3d at 789, that is not the issue here. The Federal Defendants here argue only that the Alexander Valley Rancheria, as such, was comprised of those Indians residing thereon, rather than a larger group of Wappo Indians. Although once restored, a rancheria may expand or restrict its membership as it deems appropriate, the restoration of a terminated rancheria may be effected only by undoing the termination, such that the Indian status of those individuals who were terminated (or their descendants) may be restored. *See Williams*, 490 F.3d at 789–91 (distinguishing between membership in a rancheria once restored and the *Hardwick* class criteria defining contours of judicial relief). Indeed, once restored, a Rancheria may redefine its membership to *exclude* Indians that otherwise meet the

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[6] Plaintiff cites an opinion of the Solicitor of the Interior concerning implementation of the IRA, presumably to demonstrate that only Indians of a particular tribe were entitled to vote under that statute. *See* 1 Op. Solic. Dep't Int. Ind. Aff. 484, 488 (Dec. 13, 1934), cited in Pl. Mem. at 3, submitted for the Court's convenience as Second Glazer Decl. Exh. 1. But that opinion merely states that, if a "traditionally recognized tribe" wants to vote on a corporate charter, only those members living on the reservation who are also affiliated with that tribe are eligible to vote on the charter. *Id*. at 488–89. In contrast, where Indians residing on a reservation vote to organize as such, any Indian living on the reservation is entitled to vote, and there is no other voting qualification beyond residence on the reservation. *Id*. at 488. Plaintiff does not assert here that the "Mishewal Wappo Tribe" had been "traditionally recognized" prior to 1934. In any event, the 1935 IRA vote at the Alexander Valley Rancheria solely concerns applicability of the IRA, not termination under the CRA, and is therefore not relevant.

[7] It is noteworthy that the residents of the Auburn Rancheria originally brought suit in 1970, only three years after the Rancheria's termination in 1967, and were awarded damages by stipulated judgment entered into in 1972. *United Auburn*, 1993 I.D. LEXIS 9, at *4–5. This case, by contrast, was brought 50 years after the Alexander Valley Rancheria residents voted for termination.

criteria for tribal membership. *Williams*, 490 F.3d at 789–90 (noting that a tribe may restrict its membership as it chooses); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005) (same). Thus, membership in the Plaintiff "Mishewal Wappo Tribe" is not coterminous with membership in the Alexander Valley Rancheria.[8]

In short, even if Plaintiff consists entirely of those Indians who cast their votes in favor of the applicability of the IRA to the Alexander Valley Rancheria in 1935, that fact does not confer federal recognition on the "Mishewal Wappo Tribe" and Plaintiff does not have standing to maintain this suit as the "Mishewal Wappo Tribe of Alexander Valley."

2. Federal recognition of the Alexander Valley Rancheria prior to termination does not confer standing on the "Mishewal Wappo Tribe"

Plaintiff asserts that the creation of the Alexander Valley Rancheria conferred federal recognition on the "Mishewal Wappo Tribe" after 1935 and prior to termination of the Alexander Valley Rancheria and that, therefore, Plaintiff has standing to maintain this action. Pl. Mem. at 4–6. But while the federal government may have recognized the Alexander Valley Rancheria under the IRA as "Indians residing on one reservation," 25 U.S.C. § 479, creation of the Alexander Valley Rancheria did not confer recognition of a larger group consisting of the "Mishewal Wappo tribe."[9]

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[8] Plaintiff's citation to the report issued by the Advisory Council on California Indian Policy ("ACCIP") is therefore inapposite. *See* Pl. Mem. at 7 & n.6 (citing ACCIP Report at 23) (expressing concern that BIA not advise tribes to limit their membership). The Federal Defendants here take no position on how a restored Alexander Valley Rancheria might in the future define its membership. But if the Alexander Valley Rancheria termination were to be undone, such restoration would need to *begin* with the descendants of those individuals whose Indian status was terminated under the CRA, not any larger group.

The ACCIP was created by Congress, Pub. L. No. 102-416, 106 Stat. 2131 (1992), 25 U.S.C. § 651 note, and charged with making recommendations on Indian policy and programs. While Congress can enact legislation recognizing the "Mishewal Wappo Tribe," the Secretary cannot accord such recognition without legislative authorization, or compliance with the federal acknowledgment procedures at 25 C.F.R. Part 83.

[9] Plaintiff insists that the Alexander Valley Rancheria was purchased and maintained for the "Mishewal Wappo Tribe." Pl. Mem. at 4–5. But the documents cited merely suggest that the intention was to benefit Wappo Indians. That does not equate to federal recognition of the "Mishewal Wappo Tribe," rather than recognition of Indians actually residing on the Alexander Valley Rancheria from time to time.

(Footnote continued)

The Alexander Valley Rancheria was necessarily a considerably smaller entity than one comprising a larger tribal group. As even Plaintiff acknowledges, Pl. Mem. at 5–6, the population of individual Indians residing on the Alexander Valley Rancheria was constantly in flux. This is significant because use of Rancheria land was only by assignment and required occupancy; otherwise, use of that land would pass to another. Solicitor's Opinion, Rancheria Act of August 18, 1958, 2 Op. Solic. Dep't Int. Ind. Aff. 1882, 1883 (Aug. 1, 1960);[10] MWT-AVR-2012-000133. In 1951, only one family and one non-Indian squatter lived on the Rancheria, MWT-AVR-2012-000453, and by the time of the termination, there were only two adults who could receive the Rancheria property, MWT-AVR-2012-000461–62. That evidence certainly does not prove federal recognition of a tribal entity apart from those individual Indians who resided on the Alexander Valley Rancheria. What it does demonstrate is that, by the time of termination, the Rancheria had long since ceased being a reservation in other than a nominal sense.

Nor did the *Tillie Hardwick* litigation, No. C-79-1710 SW (N.D. Cal.), establish the "Mishewal Wappo Tribe" as an entity apart from the Alexander Valley Rancheria. *See* Pl. Mem. at 6. The "Mishewal Wappo Tribe," as an entity distinct from the Alexander Valley Rancheria, was not part of that litigation. *See* Glazer Decl. Exh. 7, ECF No. 185-8 (order dismissing claims of class members from the "Alexander Valley Rancheria.").

Finally, contrary to Plaintiff's claims, the federal government has not "acknowledged" the "Mishewal Wappo Tribe" as a tribal entity apart from the Alexander Valley Rancheria, and none of the documents cited by Plaintiff, Pl. Mem. at 6, supports such a claim. *See* ECF No. 59-16, at 5, AR 33

Plaintiff also insists, wrongly, that the first appropriations for the purchase of rancheria land for landless Indians was enacted in 1914, after the parcels comprising the Alexander Valley Rancheria were acquired. Pl. Mem. at 5 n.4. That is incorrect. While the 1914 Act first used the phrase "for landless Indians," prior appropriations were made to benefit Indians that lacked a land base. *See* Act of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325, 333, previously submitted as Glazer Decl. Exh. 1, ECF No. 185-2 (1906 appropriations for purchase of land for Indians not residing on reservations); Fed. Defs' Mem. at 1–2.

[10] Previously submitted as Glazer Decl. Exh. 2, ECF No. 185-3.

(referring to Alexander Valley "rancheria"); 1st Amd. Compl., Exhs. A & B, ECF Nos. 49-1, 49-2 (both referring to "Alexander Valley Rancheria").[11] And although the report prepared by the Advisory Council on California Indian Policy ("ACCIP Report") refers to potential restoration of the "Mishewal Wappo Tribe of Alexander Valley," ECF No. 59-16, at 34, AR 62, the Report elsewhere refers to restoration of *rancherias*, *id*. at AR 59, 81.[12] If the ACCIP Report uses the terms "tribe" and "rancheria" interchangeably, it is because those Indians living on a rancheria may be deemed a "tribe" under the IRA, 25 U.S.C. § 479, not because the "Mishewal Wappo Tribe" had been recognized by the federal government as an entity independent of the Alexander Valley Rancheria.[13]

3. Termination under the CRA did not terminate the "Mishewal Wappo Tribe"

While there is no dispute that, after the vote of approval in 1959, the federal government terminated the federal recognition of the Alexander Valley Rancheria, that does not mean that it terminated a larger ethnographic entity that may have existed prior to, and independent of, the creation of the Rancheria. *See United Auburn*, 1993 I.D. LEXIS 9, at *25–26 ("The Board finds no valid basis for concluding that the Rancheria Act abolished whatever tribal organization existed at the Auburn

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[11] The correspondence submitted as ECF No. 49-1 alternately refers to the Alexander Valley Rancheria and the Mishewal Wappo Tribe of Alexander Valley. But the latter must be taken as a stand-in for the former. The letter notes that the "[t]he Mishewal Wappo Tribe of Alexander Valley is located in Sonoma County, California, contained 54 acres, and was purchased by Government *[sic]* for the benefit of James R. Adams, William McCloud, and James R. Adams *[sic]*, Indians."). Obviously a tribe cannot be a plot of ground, while a Rancheria *can*. Thus, the two formulations must be taken as synonymous, and the letter is not referring separately to a "Mishewal Wappo Tribe" independent of the Rancheria.

[12] ACCIP Report refers specifically to potential restoration of *rancherias*, including Alexander Valley. *Id*., 59-16, at 31, 53 (Recommend. No. 2 & n.4), AR 59, 81.

[13] The testimony of then-Assistant Secretary of the Interior–Indian Affairs Kevin Gover cited in Plaintiff's First Amended Complaint, ECF No. 49 ¶ 69, was provided to support restoration of the Graton Rancheria under H.R. 946, the Graton Rancheria Restoration Act. *See* H.R. Rep. No. 106-677 (2000), 2000 WL 793932 (Leg. Hist.) at *5 ("I am pleased to report that after careful review of the information submitted by the Federated Indians of the Graton Rancheria (the successor name), the documentation shows that the group is significantly tied with the terminated tribe known as the Graton Rancheria. Therefore, [Interior] support[s] their *[sic]* restoration of tribal status."). Although Mr. Gover quotes the ACCIP Report's recommendation that the Alexander Valley Rancheria (among others) be restored, Mr. Gover's testimony does not address that subject. The full text of Mr. Gover's testimony is submitted for the Court's convenience as Second Glazer Decl. Exh. 2.

Rancheria. It thus agrees with appellant that the tribal organization of the Auburn Rancheria survived the termination of Federal supervision over and responsibility for the tribe's property and members. This agreement, however, does not equate with a conclusion that the Auburn Rancheria was not terminated. It merely concedes that the tribe did not cease to exist when Federal recognition was withdrawn."). Thus, to the extent that Plaintiff claims injury because of termination, that claim fails because it was the Alexander Valley Rancheria that was terminated, not the "Mishewal Wappo Tribe," and the termination of the Alexander Valley Rancheria does not give the "Mishewal Wappo Tribe" standing to sue. *See Davis*, 554 U.S. at 733; *Catholic League.*, 624 F.3d at 1049.

4. Federal recognition of an entity independent of the Alexander Valley Rancheria is governed by a separate administrative process

The termination of the Alexander Valley Rancheria ended the relationship between the named distributees (and their descendants) and the federal government. If Plaintiff seeks federal recognition of another entity (which it apparently does), it must follow the procedures established by the regulations in 25 C.F.R. Part 83 ("acknowledgment regulations"). *See* Fed. Defs' Mem. at 14, 16.[14] Those regulations set forth the procedures established by Congress under its constitutional authority in matters concerning Indian tribes, U.S. Const., art. I, § 8, cl. 3 (power to regulate commerce with Indian tribes), and then delegated by Congress to the Executive, 25 U.S.C. §§ 2, 9 (delegating to the Executive the power to regulate Indian affairs); 43 U.S.C. § 1457 (establishing authority of the Secretary of the Interior). *See James v. U.S. Dep't of Health and Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9."); *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1030 (E.D. Cal. 2012) ("Pursuant to its plenary power rooted in the Indian Commerce Clause, among other sources, 'Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a

[14] Plaintiff cites to March 18, 1996 correspondence from BIA, ECF No. 186-9, but that letter is careful to distinguish between descendants of the Alexander Valley Rancheria distributees terminated by the CRA and other (Wappo) Indians seeking federal acknowledgment.

tribe.'" (quoting *Miami Nation v. U.S. Dep't of Interior*, 255 F.3d 342, 345 (7th Cir.2001))); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273–74 (9th Cir. 2004) (discussing establishment and application of acknowledgment regulations); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001) ("BIA has been delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes.").[15] Only under the acknowledgment regulations does the Secretary have the authority to accord federal recognition to the Plaintiff, but Plaintiff has not followed those regulatory procedures.

Pursuant to the acknowledgment regulations, a petition for acknowledgment and completion of the federal acknowledgment process is a prerequisite for those tribes seeking federal recognition in the first instance, 25 C.F.R. §§ 83.5–83.7, as well as those tribes seeking federal recognition premised on prior acts of federal recognition such as treaties or executive orders, *id*. § 83.8. *See James*, 824 F.2d at 1136. If Plaintiff wishes to pursue federal recognition of the "Mishewal Wappo Tribe," it must first pursue its administrative remedies. *Id*. at 1137–38; *United Tribe of Shawnee Indians*, 253 F.3d at 550–51. That requirement is no mere procedural nicety, but rather reflects the proper division of institutional authority and competence between the Executive and Judicial Branches, as well as limitations on the Secretary's authority to add to the list of federally recognized tribes. *Miami Nation*, 255 F.3d at 348.

Thus, whether a given group of Indians should be accorded federal recognition "should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations." *James*, 824 F.2d at 1137. Plaintiff should not be able to "bypass the regulatory framework for establishing that an Indian group exists as an Indian tribe." *United Tribe of Shawnee Indians*, 253 F.3d at 550; *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013, 2008 U.S. Dist. LEXIS 75826, at *4 (E.D.N.Y. Sept. 30, 2008)

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[15] Deference to the Executive and Legislative Branches in matters of tribal recognition is a constitutional principle of long standing. *See U.S. v. Holliday*, 70 U.S. 407, 419 (1865) ("In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.").

("claims [for recognition] must be dismissed as a matter of law because there is no legal basis for this Court to review the 'recognition' issue under the APA until there is final agency action . . . ."); *see also Kahawaiolaa*, 386 F.3d at 1274 ("[T]hrough its broad delegation and acknowledgment regulations, the Department of Interior has assumed much of the responsibility for determining which tribes have met the requirements to be acknowledged as a tribe with a government-to-government relationship with the United States.").

Outside the Part 83 procedures, federal recognition remains a political — and thus nonjusticiable — question. *See Miami Nation*, 255 F.3d at 347 ("[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." (internal quotation marks and citation omitted)); *see also W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition."); *Shinnecock Indian Nation*, 2008 U.S. Dist. LEXIS 75826, at *4 ("The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts.").

> [B]y adopting the acknowledgment criteria the government voluntarily bound its process within the confines of its regulations, subject to APA review by the courts. But that limitation alters neither the commitment of the federal recognition determination to the political branches, nor the regard for separation of powers that precludes judicial evaluation of those criteria in the first instance.

Samish Indian Nation v. United States, 419 F.3d 1355, 1373 (Fed. Cir. 2005); *see also Kahawaiolaa*, 386 F.3d at 1276 ("as courts have recognized, 'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" (quoting *Miami Nation*, 255 F.3d at 347)).

Accordingly, Plaintiff's failure to pursue recognition from the Executive Branch under the procedures established by Congress should preclude it from attempting to do so in this case now.

B. Plaintiff Cannot Support a Claim for Breach of Fiduciary Duty

The Federal Defendants are entitled to summary judgment on Plaintiff's First Cause of Action, for alleged breach of fiduciary duty. Plaintiff is correct that the contours of any fiduciary relationship between the federal government and an Indian tribe is governed by the relevant statutory provisions.

See Pl. Mem. at 8 (citing *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810–11 (9th Cir. 2006)). However, as apparently acknowledged by Plaintiff, see Pl. Mem. at 9–10, the governing statute in this case is the CRA, and the government complied with the procedural requirements of that statute.[16]

Plaintiff argues that the alleged failure by the Bureau of Indian Affairs ("BIA") to properly obtain approval for termination from the "Mishewal Wappo Tribe" rendered the termination invalid and a "breach of fiduciary duties." Pl. Mem. at 10–12. But as explained in the Federal Defendants' opening memorandum, Fed. Defs' Mem. at 3–4, termination under the CRA did not depend upon establishing a tribal membership roll. Moreover, even the *United Auburn* decision, upon which Plaintiff relies extensively, recognized that termination did not require the consent of tribal members, as opposed to the approval of a majority of the proposed *distributees*. 1993 I.D. LEXIS 9, at *26 n.16.[17] The proposed Alexander Valley Rancheria distributees, on the other hand, both received notice of the proposed distribution and voted in favor of it. *See* Fed. Defs' Mem. at 12–13 & n.22.

Finally, although it was not pled in support of Plaintiff's claim for breach of fiduciary duty in Plaintiff's First Amended Complaint, *see* ECF No. 49 ¶¶ 81–89, Plaintiff now asserts that the alleged breach included the failure to improve roads, provide sanitation services, and provide assistance to "members of the Tribe that needed assistance in negotiating the terms of the CRA . . . ."[18] Pl. Mem. at

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[16] Of course it bears repeating that any relationship with the federal government was not with the Plaintiff "Mishewal Wappo Tribe," but with the residents of the Alexander Valley Rancheria.

[17] Plaintiff complains that "William McCloud's ballot was suspiciously undated and signed . . . ." Pl. Mem. at 12 n.11. While it is true that McCloud's ballot was not dated, MWT-AVR-2012-000464, that circumstance hardly creates a *genuine* issue of *material* fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). And the only evidence Plaintiff cites to support its claim that McCloud's signature itself was suspect concludes, on the contrary, that the signature "agrees with other of his signatures on file in this office." MWT-AVR-2012-000511. Plaintiff's allegations thus fail for lack of support. *See* Fed. R. Civ. P. 56(c)(1)(A); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986). Similarly, Plaintiff asserts without authority that BIA failed to verify the "tribal membership" or Rancheria assignment of James. R. Adams (one of the two adult distributees). Pl. Mem. at 11–12 (citing ECF No. 59-17, at 30, AR 119). But the document cited (a deposition excerpt from a 1971 case unrelated to this one) does not refer anywhere to James Adams.

[18] Plaintiff relies on CRA § 8 for the claim that the required "assistance" was lacking, although that section actually states that "the Secretary of the Interior shall protect the rights of individual Indians who (Footnote continued)

12 & nn.12, 13. But "assistance" under CRA § 8 would not have gone to members of the broader "Mishewal Wappo Tribe," but rather to the members of the Alexander Valley Rancheria. However, Plaintiff does not allege that any of the Alexander Valley Rancheria members requested and were denied such assistance.[19] Moreover, allegations that the Secretary failed to comply with CRA's provisions concerning land improvements do not support the conclusion that the Alexander Valley Rancheria termination was void *ab initio*. *See Taylor v. Hearne*, 637 F.2d 689, 690–91 (9th Cir. 1981).[20] Nor can Plaintiff pursue a claim for damages in this Court for improper termination where such damages are not limited to less than $10,000. Fed. Defs' Mem. at 16–17.

C. Plaintiff Cannot Support a Claim for the Government's "Failure to Act"

As explained in the Federal Defendants' opening memorandum, Fed. Defs' Mem. at 13–14, Plaintiff's Second Cause of Action for "Agency Action Unlawfully Withheld or Unreasonably Delayed," brought under section 706(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), fails to come within the APA's limited waiver of sovereign immunity because it does not allege that the Federal Defendants failed to perform a discrete agency action that is demanded by law, *see Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62–65 (2004); *Ctr. for Biological Diversity v.*

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are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs . . . ." Plaintiff cites the ACCIP Report, ECF No. 59-16, at 43, AR 71, *see* Pl. Mem. at 12 n.13, but the Report does not specifically conclude that CRA § 8 was not complied with in connection with the termination of the Alexander Valley Rancheria.

[19] Issues surrounding the Indian status of dependents of rancheria distributees have already been litigated in the *Eddie Knight* and *Duncan* class actions, resulting in judgments in favor of the class members. *See* Glazer Decl. Exh. 5, ECF No. 185-6, ¶¶ B, C.

[20] Plaintiff asserts that the 1964 amendments to the CRA, requiring provision of sanitation services, apply "retroactively." Pl. Mem. at 12 n.12 (citing ECF No. 59-16, at 57 n.56, AR 85). But the document cited (an excerpt from the ACCIP Report) merely observes that "[t]he effect of the 1964 amendment was to retroactively mandate the installation of sanitation facilities on the affected rancherias." Plaintiff does not explain how such facilities could be installed on rancheria land that had already been sold off by the rancheria residents, who unanimously voted in favor of distribution. *Cf.* MWT-AVR-2012-000582 (acknowledging (though disagreeing) that the Sacramento Area Termination Review Committee found that the Alexander Valley Rancheria domestic water supply system was adequate under CRA § 3, being satisfactory to both BIA and Mr. Adams (who held 2/3 of the assigned land, 1st Amd. Compl., ECF No. 49, ¶ 39), and noting that the Rancheria land had since been sold).

Veneman, 394 F.3d 1108, 1113 (9th Cir. 2005), and because Plaintiff has not exhausted available administrative remedies as required by 5 U.S.C. § 704, *Darby v. Cisneros*, 509 U.S. 137, 146–47 (1993); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677–78 (9th Cir. 1988). Plaintiff's opening memorandum does not address those jurisdictional infirmities, but merely asserts that the Federally Recognized Indian Tribe List Act of 1994 ("FRITLA"), *codified at* 25 U.S.C. § 479a *et seq.*, creates a "mandatory" duty. *See* Pl. Mem. at 13–14.

While it may be true that FRITLA directs the Secretary of the Interior to publish a list of federally recognized tribes, 25 U.S.C. § 479a-1(a), nothing in that statute directs the Secretary to *recognize* any particular tribe in the first instance. *See* Fed. Defs' Mem. at 13–14. Nor does the statute confer power on the Judiciary to recognize any particular tribe, independent of the Executive Branch. *See Robinson*, 885 F. Supp. 2d at 1031–32 (court has no power to recognize modern-day tribe and place it on the FRITLA list);[21] *Shinnecock Indian Nation*, 2008 U.S. Dist. LEXIS 75826, at *56–57 ("In short, the 'Congressional findings' in the List Act do not confer upon federal courts the authority to review a tribe's federal status for federal recognition purposes prior to the BIA's final determination."). Plaintiff nevertheless insists that statements made by various Department of the Interior officials demonstrate an "awareness"[22] that the "Mishewal Wappo Tribe" should be restored. *See* Pl. Mem. at 13–14. But as noted above, the statements relied upon by Plaintiff all refer to the potential restoration of the Alexander Valley *Rancheria*, not the "Mishewal Wappo Tribe" as an independent tribal entity.

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[21] The *Robinson* court distinguished this Court's earlier decision in this case holding that Plaintiff's claim that the termination of the Alexander Valley Rancheria was unlawful was reviewable under the APA. *Robinson*, 885 F. Supp. 2d at 1031 (citing *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 2011 WL 5038356, at *7 (N.D. Cal. 2011)). In that earlier decision, this Court distinguished a claim for federal recognition under the Part 83 regulations, which the Court at that time did not understand Plaintiff to be pursuing, from a claim for restoration of the Alexander Valley Rancheria. But, in fact, Plaintiff has conflated a claim for recognition under Part 83 with a claim for restoration of the Rancheria. Plaintiff's demand that the "Mishewal Wappo Tribe" be placed on the FRITLA list is indeed nonjusticiable.

[22] Plaintiff asserts without any support that the term "recognize" as used in FRITLA merely means "to be aware of." Pl. Mem. at 14 & n.16. Even if that were true, it hardly helps the Plaintiff to argue that the Secretary may simply have been "aware" of Plaintiff, when Plaintiff paradoxically states that the Secretary "does not have the authority to recognize" a tribe. *Id.* at n.16.

Not only do the statements relied upon by Plaintiff not support recognition of the "Mishewal Wappo Tribe," they do not establish any mandatory duty on the part of the Secretary to recognize even the former Alexander Valley Rancheria. For instance, the Acting BIA Regional Director stated in 2009 that the BIA "supports the Tribe's efforts for restoration, either through legislation or administration action." ECF No. 59-17, at 47, AR 136 (cited in Pl. Mem. at 14 n.17). But that statement does not support the claim that the Secretary was under a mandatory duty to accord federal recognition and, in fact, is consistent with well established law that federal recognition is a political determination reserved to the Executive and Legislative Branches. *See Samish Indian Nation*, 419 F.3d at 1370 (tribal recognition is a political determination for Congress and the Executive Branch).[23] Similarly, both the ACCIP Report and congressional testimony of then-Assistant Secretary Gover at most reflect an acknowledgement that restoration "should be" provided. *See* Pl. Mem. at 14 n.15. But mere recommendations that the Alexander Valley Rancheria be restored cannot convert a discretionary political determination into a justiciable mandatory duty.[24] *See Kahawaiolaa*, 386 F.3d at 1276 ("as courts have recognized, 'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" (quoting *Miami Nation*, 255 F.3d at 347)); *W. Shoshone Bus. Council*, 1 F.3d at 1057 ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition."); *Shinnecock Indian Nation*, 2008 U.S. Dist. LEXIS 75826, at *4 ("The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not the courts.").[25]

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[23] Despite calling the Rancheria the "Mishewal Wappo Tribe of the Alexander Valley," it is clear that BIA's 2009 letter was referring to the Alexander Valley Rancheria, not an independent tribal entity, since it specifically equates the "Mishewal Wappo Tribe of Alexander Valley" with the 54 acres originally comprising the Rancheria property. ECF No. 59-17, at 47, AR 136.

[24] Again, Plaintiff asserts that the Secretary "does not have the authority to recognize or withdraw the recognition of an Indian tribe." Pl. Mem. at 14 n.16. It is therefore difficult to understand where Plaintiff locates a mandatory duty on the Secretary's part to accord Plaintiff federal recognition.

[25] Plaintiff cites *Skinner v. United States*, 594 F.2d 824 (Ct. Cl. 1979), Pl. Mem. at 14, but that decision arose in an employment action and is inapplicable to this case.

Accordingly, the Federal Defendants are entitled to judgment on Plaintiff's Second Cause of Action.

D. Plaintiff Cannot Support a Claim for the Failure to Conclude a Matter Within a Reasonable Time

As explained in the Federal Defendants' opening memorandum, Fed. Defs' Mem. at 15, Plaintiff's Third Cause of Action for "Failure to Conclude a Matter Within a Reasonable Time" should have cited 5 U.S.C. § 555(b), not 5 U.S.C. § 552(b), which Plaintiff now confirms. Pl. Mem. at 15. Still, that statutory provision does not provide a basis for relief in this case.[26]

Plaintiff cannot complain that the Federal Defendants have failed to conclude a matter "within a reasonable time" because there is no request for agency action pending.[27] As explained in Section II.C, above, Plaintiff has brought no request for administrative action that remains pending before the agency. The acknowledgment regulations represent the sole avenue for administrative relief, but Plaintiff does not allege that it has submitted a Part 83 petition that has not been acted upon. Instead, Plaintiff cites a 1987 memorandum from a government official concerning a request made by legal counsel for a number of terminated rancherias. Pl. Mem. at 15 (citing ECF No. 59-16, at 5, AR 33). The memorandum states that counsel for the rancherias was "requesting that the Bureau [of Indian affairs] adopt a policy that would allow both (1) former dependent members and (2) distributees of these rancherias to acquire lands in trust when such lands are within the former rancheria boundaries and that the Secretary shall extend Federal recognition to each group." *Id.* But even if that letter could be considered to have brought a

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[26] The Ninth Circuit recognizes that, in appropriate cases, a court may compel "agency action unlawfully withheld or unreasonably delayed" under APA § 706(1), in light of the time that the matter has been pending. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 & n.7 (9th Cir. 1997) (citing *Telecomm. Research & Action v. F.C.C.*, 750 F.2d 70, 80 (D.C.Cir.1984)). But as argued in Section II.C, above, Plaintiff has no such claim.

[27] As elsewhere in its opening memorandum, Plaintiff cites statements referring to the Alexander Valley *Rancheria* as if they referred instead to an independent Wappo "tribe." *See* Pl. Mem. at 15 (citing ECF No. 59-16, at 5–6, AR 33–34). Plaintiff's factual assertions underlying its legal claim are therefore inaccurate, as well.

"matter" before the agency within the meaning of APA § 555(b),[28] the consideration requested in that letter is *not* the relief Plaintiff seeks here. As explained above, Plaintiff does not seek an order undoing the termination of the Alexander Valley Rancheria and restoring the rights of the Rancheria distributees a their descendants, because those distributees and descendants include the descendants of James R. Adams, who Plaintiff asserts should *not* have been included as a member. *See* Pl. Mem. at 3–4, 10–11. Rather, Plaintiff seeks federal recognition of the "Mishewal Wappo Tribe." Thus, the "matter" that Plaintiff seeks to pursue in this case (recognition of the "Mishewal Wappo Tribe") is not the subject of the 1987 memorandum (termination of the Alexander Valley Rancheria) and thus has not been pending without conclusion "within a reasonable time."

Plaintiff's Third Cause of Action therefore fails to state a claim upon which relief may be granted, because the facts pled do not support the claim asserted. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

E. Plaintiff Cannot Support a Claim for Arbitrary and Capricious Agency Action

As noted in the Federal Defendants' opening memorandum, Fed. Defs' Mem. at 16, Plaintiff cannot simply repackage a claim for "agency action unlawfully withheld" as a claim for "arbitrary and capricious" agency action, if what is being challenged is the failure to undertake a non-mandatory duty. *SUWA*, 542 U.S. at 64–65. Thus, like its Second Cause of Action, Plaintiff's Fourth Cause of Action fails to state a claim within the APA's limited waiver of sovereign immunity.[29]

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[28] Plaintiff does not cite any case that suggests that result. *See* Pl. Mem. at 16. Instead, Plaintiff cites the unpublished decision in *Razaq v. Poulos*, No. C 06-2461 WDB, 2007 WL 61884 (N.D. Cal. Jan. 8 2007). However, that case concerned action on the plaintiff's immigration application, which the court held was a petition for agency action that required processing within a reasonable time. *Id.* at *1–2. Both the court in *Poulos* and Plaintiff here cite *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1998), also an immigration case, which does not discuss APA § 555(b) at all.

[29] In addition, just as with Plaintiff's Second Cause of Action, Plaintiff failed to exhaust its administrative remedies with respect to its Fourth Cause of Action. *See White Mountain Apache Tribe*, 840 F.2d at 677–78 (failure to exhaust mandated administrative procedures requires dismissal).

In its opening memorandum, Plaintiff argues that by allegedly failing to comply with the CRA, the BIA "abused its discretion." Pl. Mem. at 17–18. But that assertion does not support a claim for "abuse of discretion."

First, contrary to Plaintiff's insistence, BIA was not required by the CRA to develop a membership roll or to poll all Indians affiliated with the "Mishewal Wappo Tribe" before terminating the Alexander Valley Rancheria. Instead, termination under the CRA required only the participation and vote of those individuals who used and occupied the rancheria property. *See* CRA § 2(a) (permitting preparation of a distribution plan in consultation with Indians holding rancheria assignments), § 2(b) (permitting approval of proposed plan by majority vote of proposed distributees); *see also United Auburn*, 1993 I.D. LEXIS 9, at *26 n.16 (rejecting argument that termination required consent of tribal members, as opposed to approval of a majority of the proposed distributees); H.R. Rep. No. 85-1129, at 4–5 (1957) (CRA did not require preparation of membership rolls).[30]

Second, the agency action challenged in Plaintiff's Fourth Cause of Action is the failure to recognize the "Mishewal Wappo Tribe," *see* ECF No. 49 ¶¶ 104–108, not the manner in which BIA carried out the termination and whether that agency provided the improvements called for in CRA § 3.[31] As explained above, Plaintiff has failed to follow the procedures required under the acknowledgment regulations. The Secretary's determination whether to accord recognition under the acknowledgment regulations is justiciable under APA § 706(2) only if Plaintiff has followed the required procedures; otherwise, the determination is a non-justiciable political question. *See Kahawaiolaa*, 386 F.3d at 1276 (federal recognition a political question); *accord Samish Indian Nation*, 419 F.3d at 1370; *Miami Nation*, 255 F.3d at 347; *W. Shoshone Bus. Council*, 1 F.3d at 1057. The documents Plaintiff relies upon underscore this very point: all are statements opining on what *should* be done either by the Executive Branch or by Congress to address problems raised by rancheria termination, not what *must* be done. *See*

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[30] Previously submitted as Glazer Decl. Exh. 4, ECF No. 185-5.

[31] The relief Plaintiff seeks is federal recognition, not improvements to the former Alexander Valley Rancheria land.

Pl. Mem. at 18–19.[32] Thus, there is no support in the law or any of the documents Plaintiff cites for the assertion that the "Mishewal Wappo Tribe" must be recognized or that it is somehow an abuse of agency discretion to withhold that recognition.

F. Plaintiff Cannot Pursue a Claim for Violation of Possessory Rights

As explained in the Federal Defendants' opening memorandum, Fed. Defs' Mem. at 16–17, Plaintiff's Fifth Cause of Action for "Violation of Possessory Rights" fails because (1) it is founded on the erroneous premise that the Plaintiff, rather than the Alexander Valley Rancheria, was unlawfully terminated, and (2) it is brought in federal district court rather than the Court of Federal Claims.

Plaintiff asserts, wrongly, that the Alexander Valley Rancheria was created for the benefit of people who did not necessarily live there and that its termination was therefore improperly carried out. *See* Pl. Mem. at 19–20. But as one of the very documents Plaintiff relies on makes clear, the rights to use rancheria property were "usually abandoned when the assignees [left] the rancheria for an unlimited period of time." ECF No. 186-12, MWT-AVR-2012-000136, at 1. As detailed in Section II.A.2, above, the Alexander Valley Rancheria experienced a pronounced decline in its later years. Under the CRA § 2, those individuals who held assignments or resided on the Rancheria at the time of termination benefitted from the eventual distribution of the Rancheria property. There is therefore no support for the claim that property allegedly belonging to some group other than the Alexander Valley Rancheria residents was unlawfully given away to those very residents.

Finally, Plaintiff's opening memorandum does not address the jurisdictional infirmity in its Fifth Cause of Action, that a claim for damages not limited to less than $10,000 is outside this Court's jurisdiction. *See* Fed. Defs' Mem. at 17.

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[32] Plaintiff cites *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), and *Sierra Club v. United States EPA*, 346 F.3d 955 (9th Cir. 2003), Pl. Mem. at 17, 18, neither of which concerns agency consideration of what would otherwise be a nonjusticiable political question.

III. CONCLUSION

For the reasons set forth above, the Federal Defendants are entitled to summary judgment on all of Plaintiff's claims.

Respectfully submitted,

DATED: June 21, 2013

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CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that, on June 21, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 21, 2013

/s/*David B. Glazer*
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