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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. S.M.R. JEWELL, *et al*., Defendants.	No. 5:09-cv-02502-EJD FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, ECF No. 185 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 reply memorandum in support of their motion for summary judgment, ECF No. 185, and in response to Plaintiff's opposition memorandum ("Pl. Opp."), ECF No. 188.

Plaintiff "Mishewal Wappo Tribe" seeks relief from this Court that it simply cannot get, because that relief — federal recognition — may be obtained only from Congress or from the Executive Branch. This Court would have jurisdiction over a timely filed suit to restore the former Alexander Valley Rancheria, but that relief would run to individuals who are not before the Court. But even if the right plaintiff were seeking relief within this Court's power to grant, all of the claims pled in Plaintiff's First Amended Complaint, ECF No. 49, are time-barred. And even if they were not time-barred, they all suffer from one or more fatal defects. The Court should therefore award summary judgment to the Federal Defendants.[1]

I. Plaintiff Cannot Obtain the Relief it Seeks

A. The "Mishewal Wappo Tribe" Cannot Seek Federal Recognition Through Court Order

The "Mishewal Wappo Tribe" was never federally recognized prior to — or independently of — the creation of the Alexander Valley Rancheria.[2] And while the California Rancheria Act ("CRA")

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[1] As discussed below, certain of Plaintiff's claims may be dismissed without prejudice.

[2] Plaintiff asserts that the "Wappo Indian Tribe" had been federally recognized in 1935. Pl. Opp. at 1 (citing MWT-AVR-2012-000368 and MWT-AVR-2012-000103). But the first document Plaintiff relies on, a BIA notice of election under the Indian Reorganization Act ("IRA"), refers to "duly enrolled Indians of the hereinafter listed *rancherias*." The second document is simply a report that refers to those residents of the Alexander Valley Rancheria — not the Mishewal Wappo Indians — as a "tribe" (or "band" or "community") consistent with the IRA definition in 25 U.S.C. § 479, which includes as a "tribe" those Indians living on a reservation (or a rancheria). The Federal Defendants do not deny that the Alexander Valley Rancheria was federally recognized *as a rancheria* no later than 1935.

Plaintiff also repeats the assertion that the Alexander Valley Rancheria was created prior to any appropriations for landless Indians and that it therefore must have been created for the "Wappo Indians of Alexander Valley." Pl. Opp. at 10 & n.15. But the 1909 and 1913 purchases comprising the Alexander Valley Rancheria were made following the initial 1906 appropriations for land for Indians who otherwise did not have a land base. *See* Fed. Defs' Opp. at 5 n.9. In any event, the Alexander Valley Rancheria may have been acquired for the "Wappo Indians," but that does result in federal recognition of the "Mishewal Wappo Tribe," as opposed to the Alexander Valley Rancheria, as such.

terminated the Indian status of the named distributees,[3] it did not terminate the "Mishewal Wappo Tribe," to the extent that such an entity might have otherwise existed independently of the Alexander Valley Rancheria. ECF No. 59-8, AR 12; *see* Fed. Defs' Opp., ECF No. 187, at 6–7. But federal recognition of the "Mishewal Wappo Tribe" cannot be had other than by legislation according such recognition or acknowledgment through the process established in 25 C.F.R. Part 83 (acknowledgment regulations).[4] *See* Fed Defs' Opp., at 7–9; *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273–76 (9th Cir. 2004); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1373 (Fed. Cir. 2005); *Miami Nation v. U.S. Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993).

Contrary to Plaintiff's claims, Pl. Opp. at 10–12, the Federal Defendants' position is not inconsistent with well established case law holding that only a tribe may determine its own membership criteria. *See Williams v. Gover*, 490 F.3d 785, 789–90 (9th Cir. 2007); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). At the same time, however, the Alexander Valley Rancheria existed as a "tribe" within the meaning of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 479, only to the extent that it consisted of Indians living on the Rancheria.[5] Plaintiff concedes that it never adopted any organizational document that would have defined its membership apart from residency on the Rancheria. *See* ECF No. 49 ¶ 11. If Plaintiff seeks recognition of the "Mishewal Wappo Tribe," it must pursue acknowledgment under the Part 83 regulations or recognition by act of Congress, not restoration of the Alexander Valley Rancheria.

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[3] The subsequent order in *Knight v. Kleppe* provided that the status of minor dependents of distributees could not be terminated absent notice and an opportunity to be heard. *See* ECF No. 185-6.

[4] Although Congress may legislatively recognize or restore a tribe, Plaintiff seems to be incorrect when it cites ECF No. 59-16, at 34, AR 62, as a request from the Secretary of the Interior to "correct" the "error" of terminating the Alexander Valley Rancheria. *See* Pl. Opp. at 1. The document cited appears to be a page from a report of the Advisory Committee on California Indian Policy ("ACCIP"), which recommended restoration of the Alexander Valley Rancheria through legislation.

[5] While the Alexander Valley Rancheria was the only entity recognized under the IRA, that is not to say that Plaintiff's members are not ethnically and culturally Wappo Indians. But being a group of Indian people and being a federally recognized tribe are two different things.

B. The Alexander Valley Rancheria Cannot be Restored by the Executive Branch

The Bureau of Indian Affairs ("BIA") has striven to make clear the distinction between federal acknowledgment under Part 83 of a tribal group consisting of Wappo Indians, on the one hand, and restoration of the terminated Alexander Valley Rancheria, on the other. The "Mishewal Wappo Tribe" may only seek federal acknowledgment under the Part 83 regulations or recognition through congressional legislation; however, acknowledgment through the Part 83 regulations is not available to the former Alexander Valley Rancheria. *See* ECF No. 186-9, at 2–3[6] (explaining that under 25 C.F.R. § 83.7(g), the Alexander Valley Rancheria and terminated individuals would not be eligible for acknowledgment, but Indians whose status was not terminated[7] may pursue acknowledgment, and noting that a terminated rancheria could seek congressional relief); ECF No. 186-11, at 2 (discussing possible legislative action to restore terminated tribes).

Plaintiff cites no authority that supports its position that the Secretary of the Interior ("Secretary") has the authority to restore federal recognition to a terminated rancheria. The 2006 memorandum from Mr. Artman that Plaintiff cites[8] concerns the Ione Band, which was not terminated under the CRA. *See Ione Band of Miwok Indians v. Burris*, No. CIV. S-90-993 LKK, slip op. at 16–17 & n.7 (E.D. Cal. Apr. 22, 1992) (denying plaintiff's claim for federal recognition outside the acknowledgment regulations).[9] Similarly, the Lower Lake Rancheria[10] (also known as the Koi Nation) was never terminated under the CRA, but under the Lower Lake Act, Pub. L. No. 84-443, 70 Stat. 58 (1956), as amended by Pub. L. No. 84-751, 70 Stat. 595 (1956),[11] which did not entail loss of Indian status. *See*

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[6] Citations to exhibits included as ECF attachments are to the ECF-endorsed document numbers.

[7] That would include dependents of terminated individuals (and descendants of those dependents), whose termination was suspended by the judgment in *Knight v. Kleppe*.

[8] Pl. Opp. at 1. The Artman memorandum is submitted for the Court's convenience as Third Glazer Decl. Exh. 1.

[9] Submitted as Third Glazer Decl. Exh. 2.

[10] Discussed in Pl. Opp. at 8.

[11] Submitted as Third Glazer Decl. Exh. 3.

Assistant Secretary–Indian Affairs, Memorandum: Reaffirmation of Federal Recognition of Indian Tribes at 3 (Dec. 29, 2000).[12] It is therefore simply not the case that the Secretary has "administratively restored" rancherias terminated under the CRA.

II. Plaintiff's Claims are Time-Barred

As explained above, Plaintiff "Mishewal Wappo Tribe" was not the tribal entity terminated in 1961 and thus has no standing to bring a claim for "wrongful termination." And the only relief that is within the Court's jurisdiction to grant is an order requiring restoration of the *Alexander Valley Rancheria*, should the Court find that the Rancheria had been wrongfully terminated. However, even if the "Mishewal Wappo Tribe" were the correct entity to bring suit, its claims are nevertheless time-barred.[13]

A. Plaintiff's Claims are Barred by the Statute of Limitations in 28 U.S.C. § 2401(a)

Plaintiff apparently concedes that its action would be barred by 28 U.S.C. § 2401(a), but argues only that the statute should be equitably tolled, Pl. Opp. at 2–3, or that it has not yet begun running because, in Plaintiff's view, the fiduciary relationship between the Plaintiff and federal government has not been terminated, *id*. at 3–4.[14]

1. Equitable tolling does not apply in this case

On the undisputed facts of record, there is no basis for equitably tolling the statute of limitations in this case.[15] Plaintiff sues because, as it alleges, the Alexander Valley Rancheria was wrongfully

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[12] Submitted as Third Glazer Decl. Exh. 4.

[13] The Federal Defendants do not, as Plaintiff maintains, concede that 28 U.S.C. § 2401(a) is not a limit on the Court's jurisdiction. *See* Pl. Opp. at 2. The Federal Defendants do, of course, acknowledge the Court's prior ruling on this question, ECF No. 150, at 7–9, denying the Intervenor Counties' motion to dismiss on limitations grounds. In responding to the Counties' motion to dismiss, Federal Defendants stated that they were interested, at that time, in pursuing settlement rather than litigating the application of the statute of limitations. *See* ECF No. 146, at 9.

[14] Plaintiff apparently concedes that the "continuing violations" doctrine is not applicable. *See* Fed. Defs' Mem., ECF No. 185, at 8–9; *Wilton Miwok Rancheria v. Salazar*, Nos. C-07-02681-JF-PVT, C-07-05706-JF, 2010 WL 693420, at *5 n.5 (N.D. Cal. Feb. 23, 2010) (rejecting application of continuing violations doctrine).

[15] If 28 U.S.C. § 2401(a) is deemed jurisdictional, equitable tolling is not available. *See Rouse v. United*

(Footnote continued)

terminated, which Plaintiff then alleges has harmed it in various ways over the years. But "'a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir.1986) (quoting *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir.1981)); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir. 1990) ("a cause of action does not accrue until the claim is 'perfected,' and statutes of limitations do not commence running until plaintiffs knew or should have known the facts upon which their claims are based . . . .").[16] Plaintiff has known of the facts on which its claims are based since the termination notice was published in the Federal Register in 1961. AR 12. As a matter of law, such publication puts the public, including the Plaintiff, on notice of a potential claim. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) ("Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667–68 (9th Cir. 1989))).

The facts Plaintiff advances to support its demand for equitable tolling simply do not satisfy the test that Plaintiff itself acknowledges is the touchstone for tolling. *See* Pl. Opp. at 2 (citing *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193–94 (9th Cir. 2001) (construing period for filing motion under immigration regulations)). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). But the circumstances on which Plaintiff relies come nowhere near to being "extraordinary." Indeed, Plaintiff admits that it was a party to the 1979 *Tillie Hardwick* litigation. Pl. Opp. at 2; *see also* Fed. Defs' Mem. at 7–8.

States Dep't of State, 567 F.3d 408, 415 (9th Cir. 2009) (the traditional defenses of "waiver, estoppel, and equitable tolling" apply only to non-jurisdictional statutes of limitations); *see also Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576–77 & n.3 (Fed. Cir. 1988) (28 U.S.C. §§ 2401(a) and 2501(a) are to be strictly construed, with no implied exceptions or conditions).

[16] As argued in the Federal Defendants' opening memorandum, ECF No. 185, at 7–8, actual notice of a claim is not required; rather, constructive or inquiry notice is sufficient, unless the facts underlying a plaintiff's claims are inherently unknowable or actively concealed. *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720–21 (Fed. Cir. 1984); *see also Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (publication notice sufficient). The 1961 Federal Register notice of termination, AR 12, satisfies the notice requirement.

Plaintiff's acknowledgment that it was a party to the *Hardwick* litigation is a concession that it had actual notice of the facts underlying its claims and, in fact, joined in litigation aimed at vindicating those claims. Those circumstances, far from being "extraordinary," defeat any assertion of equitable tolling.

Nevertheless, Plaintiff insists that it was somehow misled by the federal government and therefore delayed bringing its claims for another thirty years after *Hardwick* was filed. But Plaintiff does not assert that any of the government's actions *prevented* Plaintiff from bringing its claims. Plaintiff merely contends that it "relied on" certain government representations,[17] Pl. Opp. at 2, but cites no authority for the proposition that "reliance" is an element of equitable tolling. *Cf. Socop-Gonzalez*, 272 F.3d at 1194 ("The question is whether, despite due diligence, [petitioner] was *prevented* during this period, by circumstances beyond his control and going beyond 'excusable neglect,' from discovering that his order of deportation had become effective — the vital information he needed in order to determine that a motion to reopen was required in order to preserve his status.") (emphasis added). Whether or not Plaintiff relied on government actions or representations, Plaintiff was not *prevented* from bringing suit decades before it finally did.

2. Plaintiff cannot rely upon a "continuing fiduciary duty"

Plaintiff insists that the federal government's fiduciary relationship was never terminated and that, therefore, the statute of limitations has not yet run. Pl. Opp. at 3–4. Plaintiff cites *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), for the proposition that a limitations period does not run against a fiduciary until the underlying trust relationship has been terminated. *Manchester* relied on *Kasey v. Molybdenum Corp. of America*, 336 F.2d 560 (9th Cir. 1964), but that case found, applying California law, that there was no express trust or other fiduciary relationship that would have tolled the statute. *Id*. at 569–71. So too, here, regardless of whether the Alexander Valley Rancheria was *wrongfully* terminated, terminated it was. The federal government has

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[17] As a factual matter, former Assistant Secretary–Indian Affairs Kevin Gover did not recommend that the Alexander Valley Rancheria be restored, as Plaintiff claims. *See* Pl. Opp. at 3 (citing ECF No. 59-16, at 34, AR 62). Mr. Gover's testimony, rather, merely quotes a portion of the ACCIP Report concerning three former rancherias, including Alexander Valley; Mr. Gover's testimony itself addresses the restoration of the Graton Rancheria, not Alexander Valley. *See* Fed. Defs' Opp. at 6 n.13.

not had a fiduciary relationship with the members of the Rancheria for 50 years. Therefore, even under Plaintiff's theory, the statute of limitations has run.[18] *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1579–81 (Fed. Cir. 1988) (holding that claim for breach of fiduciary duty for unlawful termination could and should have been brought within the limitations period, despite termination of federal relationship).

B. Plaintiff's Claims are Barred by Laches

Plaintiff asserts that laches applies when there is "(1) lack of due diligence by the party [against] whom the defense is asserted, and (2) prejudice to the party asserting the defense." Pl. Opp. at 5 (citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–22 (2002)). Contrary to Plaintiff's assurances, the prejudice to the Federal Defendants from Plaintiff's delay in bringing suit is manifest.

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

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (citation and internal quotation marks omitted). In this case, the passage of time has rendered most or all of the potential witnesses unavailable, which unfairly hampers the Federal Defendants' ability to mount a defense, assuming that (as Plaintiff appears to argue), witness testimony is necessary.[19]

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[18] The other cases Plaintiff cites offer little support for Plaintiff's position. In both *Smith v. United States*, 515 F. Supp. 56 (N.D. Cal. 1978), and *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255 (N.D. Cal. 1981), some or all of the rancheria property was still owned by the plaintiff distributees. In this case, such a potential basis for an ongoing relationship between the federal government and the Alexander Valley Rancheria would have ended no later than 1977, by which time the Rancheria property was reported to have been sold. *See* MWT-AVR-2012-000582. In *Hopland*, the court held that all claims were time-barred and must be dismissed for lack of jurisdiction. 855 F.2d at 1582. Finally, *Cobell v. Norton*, 283 F. Supp. 2d 66, 261 (D.D.C. 2003), although citing *Manchester Band of Pomo Indians*, does not discuss the statute of limitations and in fact cites page 1245 of the *Manchester* decision, not page 1249, as Plaintiff states.

[19] Given that *Hardwick* was filed almost twenty years after the Alexander Valley Rancheria was terminated, Federal Defendants could have raised the laches argument at the time *Hardwick* was brought and therefore can raise it now under the terms of the 1983 *Hardwick* Stipulation and Order for Entry of Judgment, Glazer Decl. Exh. 6 (made applicable to the Alexander Valley Rancheria by the 1985 *Hardwick* (Footnote continued)

However, the Court need not reach the question of prejudice, because Plaintiff has not demonstrated diligence. Indeed, the evidence Plaintiff offers in support of its claim of diligence indicates that Plaintiff did nothing to advance its claims prior to the time the *Hardwick* litigation was filed, almost twenty years after termination of the Alexander Valley Rancheria. *See* Pl. Opp. at 5 (citing ECF No. 49 ¶¶ 67–70).[20]

C. Summary judgment is appropriate on Plaintiff's lack of timeliness

Finally, Plaintiff insists that triable issues of fact exist concerning the application of equitable tolling and laches. Pl. Opp. at 3, 4, 5. But Plaintiff does not identify any fact in dispute that would have any bearing on the applicability of the statute of limitations or laches. The dispute between the parties on these matters is entirely a question of law. In addition, Plaintiff earlier in this litigation agreed that no witness testimony or discovery was appropriate in this case. *See* Supplemental Joint Case Management Statement, ECF No. 177 ("The Parties do not anticipate the need for discovery given that the case appears to be appropriate for review on the administrative record, *see* Fed. R. Civ. P. 26(f)(1).").

Plaintiff cannot then insist, in opposing the Federal Defendants' motion for summary judgment, that "triable issues" of fact exist, especially when it does not "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition . . . ." Fed. R. Civ. P. 56(d).

> References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f).[21] Rule 56(f) requires affidavits setting forth the particular facts expected from the movant's discovery. Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment.

Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986). Having made a decision

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Order Dismissing Claims by Class Members from the Alexander Valley Rancheria, Glazer Decl. Exh. 7).

[20] Plaintiff contends that only in 2009 did the federal government reverse a former policy of "administrative restoration." Pl. Opp. at 5. But as explained above, there was no policy of administratively restoring terminated rancherias, and none of the rancherias terminated under the CRA has been administratively restored.

[21] Formerly Fed. R. Civ. P. 56(f). *See* Adv. Comm. Note on 2010 Amendment ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).").

to forgo discovery, Plaintiff cannot now insist that summary judgment not be entered against it. *Id*. It is not enough to assert in legal memoranda that "triable issues of fact exist"; a party opposing summary judgment must marshal the necessary facts. Fed. R. Civ. P. 56(c)(1)(A) (party must support assertions of factual disputes); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (party opposing summary judgment must establish entitlement to claim or defense); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 585–87 (1986) (claimant must marshal facts in support of claim). And, as noted above, the facts Plaintiff has alleged concerning "reliance" on government representations and earlier "recognition" of tribal membership are legally irrelevant to the application of equitable tolling and laches. For that reason, "no *genuine* issue of *material* fact" exists that would justify a trial, rather than entry of summary judgment against Plaintiff. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

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

The Federal Defendants have already addressed the facts Plaintiff advances in support of its First Cause of Action, for alleged breach of fiduciary duty. *See* Fed. Defs' Mem. at 10–13; Fed Defs' Opp. at 9–11. Although Plaintiff seems to rely heavily on its assertion that BIA's notice of the proposed Alexander Valley Distribution Plan was defective, Pl. Opp. at 6 (citing ECF No. 59-11, AR 16), the notice on its face invites anyone who needs further clarification to contact the BIA. Plaintiff also cites a BIA letter noting that a visit to the Alexander Valley Rancheria found it deserted because residents were evidently away working fields in Ukiah, California, until the fall. Plaintiff offers the document to support its claim that the Secretary should have been aware in 1959 that Rancheria residents may have missed the notice of the proposed Plan and upcoming referendum on it. Pl. Opp. at 6–7 (citing MWT-AVR-2012-000307). But the document Plaintiff relies on describes a visit that occurred in *1917*. As explained in the Federal Defendants' opening memorandum, ECF No. 185, at 2, by the time notice was given of the proposed Distribution Plan in 1959, the Alexander Valley Rancheria was home to only two adult residents, all others having abandoned it.[22] Therefore, it was consistent with CRA § 2 for BIA to

[22] Plaintiff also cites the ACCIP Report on the question of whether rancheria lot sizes were adequate in (Footnote continued)

have named those individuals as distributees, and certainly not a "breach of fiduciary duty" to have done so.

Finally, even if a breach of fiduciary duty occurred in implementation of the substantive provisions of the CRA, any duties would run to the Alexander Valley Rancheria distributees and their descendants, not to the "Mishewal Wappo Tribe." *See* Fed. Defs' Mem. at 18–19.

IV. Plaintiff Cannot Support a Claim for Agency Action Unlawfully Withheld or Unreasonably Delayed

Plaintiff insists that the Federal Defendants have withheld or unreasonably delayed a decision on Plaintiff's request to be "restored" to "federal recognition." But as Plaintiff acknowledges, former Assistant Secretary Larry Echo Hawk in 2009 denied what he understood to be the Alexander Valley Rancheria's request for "administrative restoration," *see* ECF No. 59-16, at 1, AR 29, which he correctly noted was prohibited by regulation (the acknowledgment regulations at 25 C.F.R. § 83.7(g)). *See* Pl. Opp. at 3 (citing ECF No. 49 ¶ 75 *[sic]* [should be ¶ 76]). While Mr. Echo Hawk's June 22, 2009 letter, ECF No. 49-2, mistakenly equates the "Mishewal Wappo Tribe of Alexander Valley" with the "Alexander Valley Rancheria,"[23] Mr. Echo Hawk was correct when he notes that the Rancheria was terminated in 1961 and could not be "administratively restored," which was the relief that Plaintiff expressly requested. *See* ECF No. 59-16, at 1–2. Therefore, agency action on Plaintiff's request for "administrative restoration" has not been withheld. At the same time, as explained in Section I.B,

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view of sanitation (septic system) requirements, Pl. Opp. 7 n.8 (citing ECF No. 59-16, at 59 n.75, AR 87), but that is a moot point in this case, given that the land had been sold off at least by early 1977. *See* MWT-AVR-2012-000582. Moreover, the ACCIP Report is of questionable probative value in this case, given that the 54-acre Alexander Valley Rancheria was divided between only two adult residents, suggesting that the Report's general concern about lot sizes may not have applied to Alexander Valley.

[23] Any confusion on Mr. Echo Hawk's part is understandable given the Plaintiff's tendency to blur the distinction between the "Mishewal Wappo Tribe" and the Alexander Valley Rancheria. For instance, in Plaintiff's February 2009 request for "administrative restoration," Plaintiff asserts that, in 1987, BIA recommended restoration of "the Mishewal Tribe *[sic]* of Alexander Valley." ECF No. 59-16, at 1, AR 29. The document that Plaintiff appends to its 2009 request in support of that statement, a 1987 BIA memorandum, recommends instead favorable consideration of the Alexander Valley *Rancheria*. *Id*. at 6, AR 34. It does not refer to "Mishewal" or "Wappo" at all. Similarly, the ACCIP Report excerpt that Plaintiff includes with its 2009 request discusses restoration of terminated *rancherias*, including Alexander Valley. *Id*. at 31 & n.4, AR 59, 81.

above, the Assistant Secretary's decision — which was a final agency action in response to Plaintiff's February 2009 letter — was lawful and correct: the Secretary did not have the authority to administratively restore the Alexander Valley Rancheria.[24]

V. Plaintiff Cannot Support a Claim for Agency Failure to Conclude a Matter Within a Reasonable Time

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 see Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099–1102 (D.C. Cir. 2003) (remanding to district court to consider limited BIA resources where Part 83 petition had been pending since 1990). But as argued in Section IV, above, to the extent that Plaintiff complains of action taken in 2009 denying administrative restoration, Plaintiff has no such claim. The former Assistant Secretary's June 2009 letter was a final agency action on that request. The agency did not therefore fail to conclude a matter within a reasonable time.

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

As explained in Section IV, above, if Plaintiff's claim is that the Assistant Secretary failed to "administratively restore" the Alexander Valley Rancheria, which he was prohibited from doing, *see* 25 C.F.R. § 83.7(g), that decision was lawful on its face. The Federal Defendants agree with Plaintiff, however, that Plaintiff would not need to administratively appeal that decision.

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[24] Consequently, there is no merit in Plaintiff's assertion, Pl. Opp. at 8, that a "triable issue" exists concerning the Secretary's refusal to grant "administrative restoration," particularly given that Plaintiff's Second Cause of Action is expressly brought under the APA, which presupposes judicial review on the administrative record. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (in an APA action, "there are no disputed facts that the district court must resolve. The court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.").

On the other hand, if Plaintiff is complaining that the Secretary has failed to acknowledge the "Mishewal Wappo Tribe" (as opposed to the "Alexander Valley Rancheria"), judicial relief can be accorded only after the "Mishewal Wappo Tribe" exhausts its administrative remedies by completing the acknowledgment process set out in 25 C.F.R. Part 83. Therefore, at this time there is no agency action affecting the "Mishewal Wappo Tribe" that is ripe for judicial review under 5 U.S.C. § 706(2), and Plaintiff's Fourth Cause of Action must be dismissed.[25]

VII. Plaintiff Cannot Maintain a Claim for Damages

Plaintiff may not maintain its Fifth Cause of Action, for alleged violation of possessory rights, because damages exceeding $10,000 are not available in district court. *See* Fed. Defs' Mem. at 16–17; Fed Defs' Opp. at 17. In response, Plaintiff merely asserts that, depending on the course of the litigation, the amount of damages "*may* not exceed the $10,000 limit." Pl. Opp. at 10 (emphasis added). That is not sufficient to invoke district court jurisdiction under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). That provision grants federal district courts concurrent jurisdiction (with the Court of Federal Claims) to entertain actions for damages (not sounding in tort and with some other exceptions) where the amount claimed does not exceed $10,000. But unless Plaintiff *expressly waives* any recovery in excess of $10,000, Plaintiff cannot maintain its claim in this Court. *Clouser v. Espy*, 42 F.3d 1522, 1539 (9th Cir. 1994) ("The 'Little' Tucker Act vests the district courts with jurisdiction over suits against the federal government only where plaintiffs seek less than $10,000 in damages."); *Kotarski v. Cooper*, 799 F.2d 1342, 1345 n.3 (9th Cir. 1986) (plaintiff may proceed in district court under Little Tucker Act if he waives claims for damages in excess of $10,000); *Roedler v. DOE*, 255 F.3d 1347, 1351 (Fed. Cir. 2001) ("A district court may permit multi-plaintiff Little Tucker Act cases to proceed when each plaintiff waives recovery in excess of $10,000, even when potential liability exceeds

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[25] Federal Defendants recognize that, to the extent such a claim would be dismissed because not ripe, the dismissal would be without prejudice. Plaintiff does not appear to have followed through on its earlier efforts seeking acknowledgment of the "Mishewal Wappo Tribe," as opposed to restoration of the terminated Alexander Valley Rancheria. *See* ECF No. 186-9, a complete copy of which is submitted as Third Glazer Decl. Exh. 5; ECF No. 59-16, at 2, AR 30 (Plaintiff noting, although incorrectly describing, BIA's determination of ineligibility for Part 83 acknowledgment; electing to pursue "administrative restoration," instead).

$10,000."). Absent such waiver, Plaintiff's claim for damages must be dismissed without prejudice or transferred to the Court of Federal Claims.[26]

VIII. Plaintiff Seeks Other Remedies that Cannot be Granted

Plaintiff does not respond to the Federal Defendants' arguments, Fed. Def's Mem. at 19–22, that the Federal Defendants cannot be compelled to take land into trust under the IRA, 25 U.S.C. §§ 465, 467, or to proclaim such land "restored lands" under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii), or "Indian Country" under 18 U.S.C. § 1151. Such claims do not become ripe until (1) a decision is made whether or not to take lands into trust, and (2) such lands are determined to be "restored lands" under IGRA. *See Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1109 (N.D. Cal. 2012) (discussing IRA and IGRA requirements). BIA must be given the opportunity to weigh the requirements specified in the applicable statutes and regulations and to make its decision, prior to district court review. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (under the doctrine of "primary jurisdiction," where the agency must determine an issue committed to it by Congress, the court should allow the agency to make the necessary findings prior to judicial review). Similarly, the question whether any lands are "Indian Country" does not arise unless and until the Secretary decides to take land into trust "for the purpose of providing land for Indians" under 25 U.S.C. § 465.

Accordingly, Plaintiff's claims for relief respecting lands should be dismissed at this time, without prejudice.

IX. CONCLUSION

As explained above, Plaintiff cannot maintain a suit for federal recognition of the "Mishewal Wappo Tribe" until it pursues the procedures required under the acknowledgment regulations in 25 C.F.R. Part 83. Until then, no such claim is ripe for judicial review. To the extent that Plaintiff

[26] As noted in the Federal Defendants' earlier papers, Fed. Defs' Mem. at 17; Fed Defs' Opp. at 17, Plaintiff "Mishewal Wappo Tribe" is not entitled to claim damages for a distribution of property to individual Alexander Valley Rancheria members. If such a claim can be maintained, the claim belongs to the distributees or their descendants, not the "Mishewal Wappo Tribe."

simply seeks an order requiring the Secretary to "administratively restore" the Alexander Valley Rancheria, that relief is prohibited by the acknowledgment regulations. On the other hand, Plaintiff is the wrong party to seek a judicial decree restoring the Rancheria and, in any event, has brought its claims too late. Finally, any claims for relief respecting "Indian" or "restored" lands are premature, and claims for damages in excess of $10,000 cannot be maintained in this Court.

Accordingly, summary judgment should be granted to the Federal Defendants.

Respectfully submitted,

DATED: July 5, 2013

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CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that, on July 5, 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: July 5, 2013

/s/*David B. Glazer*
David B. Glazer