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THE MISHEWAL WAPPO TRIBE OF ALEXANDERVALLEY

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

MISHEWAL WAPPO TRIBE OF ALEXANDERVALLEY,

Plaintiff,

v.

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

Defendants.

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

Hon. Edward J. Davila

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: July 25, 2013
Time: 1:30 pm
Courtroom No.: 4, 5th Fl.
Hon. Edward J. Davila

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INTRODUCTION

Since before recorded history, there were Wappos. It has been estimated that Wappos occupied Northern California for as much as 5,000 to 8,000 years. Although the name Wappo is an Americanization of the Spanish word *guapo* meaning "handsome" or "brave, it has been part of these indigenous people's title since first contact. The Wappos were here long before Columbus made his "discovery" and certainly longer than the State of California, which was created in 1850. By this historical standard of time, the modern day Napa and Sonoma Counties and the State are the new comers to California.

The undisputed material facts giving rise to the Tribe's claims for relief and the basis for this Motion for Summary Judgment are essentially three: 1) the Mishewal Wappo Tribe of Alexander Valley was recognized by the Federal government and therefore existed as a tribal entity no later than 1935; 2) on August 1, 1961 the Mishewal Wappo Tribe of Alexander Valley was terminated in violation of law because the decision vote to terminate did not include the members of the Tribe and because improvements required by the California Rancheria Act were not made; and 3) Plaintiffs are descendants of the Tribe since every present day member descends from the list of voters recognized by the Federal Government in 1935. These facts are the core elements for each cause of action as set forth herein.

The Mishewal Wappo Tribe of Alexander Valley, Plaintiff, filed this case on June 5, 2009 after many years of trying to have the BIA correct its error of termination. Now, after almost four years of delays and the intervention and revoking of that intervention of Sonoma and Napa Counties, it is timely and wholly appropriate for this Court to hear Plaintiff's Motion for Summary Judgment. While it may be unusual for a plaintiff to file such a motion, in this case, where no factual disputes have been alleged and there are no real triable issues, it is proper. Thus, the Plaintiff submits this Motion for Summary Judgment seeking restoration of its federal recognition status that was unlawfully taken and should have been restored long ago.

This Court must grant Summary Judgment as the termination of the Tribe was wrongful as a matter of law and the Plaintiff is entitled to the relief contained in the Complaint as "there is

no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule. Civ. Proc. 56(a). The wrongfulness of the termination of the Tribe in 1961 is not open to a genuine factual dispute. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (Whether there is a genuine factual dispute is determined by whether there is enough supportive evidence so that a jury could decide in favor of the movant).

While the movant bears the initial burden of providing supportive evidence, once satisfied, the burden shifts to the nonmoving party to refute the evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Although the Court must review the evidence most favorable to the non-moving party, mere pleadings are insufficient to refute a properly supported Motion for Summary Judgment. *Id*. at 324; *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 720 (9th Cir. 2012). **Material facts** are those as identified by the applicable law which would affect the result of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012).

In 1958, Congress adopted the California Rancheria Act ("CRA") which tasked the Bureau of Indian Affairs ("BIA") with the duty of terminating the federal governments' oversight over tribal lands and the fiduciary duty owed to the tribes on those lands in accordance with the statutes provisions. California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619, August 18, 1958. The CRA provided that termination was a voluntary choice to be made by the people "of the Rancheria" and further provided mandatory steps before the aforementioned fiduciary duty could be repudiated. *Id.* at §§2(b) and 3. This is the heart of the instant dispute and as set forth below, the existence of the Wappo people, as a Tribe, was not terminated simply by the BIA stating it so terminated. Plaintiff is also entitled to relief as a matter of law for the wrongful termination, and to have its status restored as a recognized tribe as required by 25 U.S.C. §479a, the Federally Recognized Indian Tribe List Act of 1994 ("List Act").

ARGUMENT

I. THE PLAINTIFF HAS STANDING TO BRING THIS ACTION AS LINEAL DESCENDENTS OF HISTORIC TRIBAL MEMBERS.

A. The Request to Vote for the Indian Reorganization Act Evinces Formal Federal Recognition of the Historic Tribe Prior to 1935.

In 1934 Congress passed the Indian Reorganization Act ("IRA"). 25 U.S.C. §476. The Act required the Secretary to call for an election by the Indians of the rancherias to accept or reject the IRA's application to them within one year of its passage. *Id.* at §18. The Bureau of Indian Affairs ("BIA") has noted that the act of being given the opportunity to vote to accept or decline the IRA established federal recognition.[1] In fact, the Interior Board of Indian Appeal's ("IBIA") has also acknowledged that federal recognition had been extended to tribes by virtue of being asked to vote on the IRA. *United Auburn Indian Community v. Sacramento Area Director, BIA*, 24 IBIA 33, 41 (May 28, 1993).

The Wappo Indians of the Alexander Valley Rancheria submitted a list of potentially eligible voters who were residents of the Rancheria. MWT-AVR-2012-000054. The United States Department of the Interior Solicitors Office ("SOL") stated in a December 13, 1934 opinion that,

> The phrase "one-third of the adult Indians" must refer to the membership of the Tribe seeking incorporation. Does the phrase "a majority vote of the adult Indians living on the reservation," likewise refer to the members of such tribe, or does it include other Indians living on the reservation and exclude members of the tribe who do not live on the reservation?
>
> On its face, the requirement of "a majority vote of the adult Indians living on the reservation" would seem to be independent of any requirement of tribal affiliation. Upon analysis, however, it will be seen that this construction leads to an absurd result which Congress could not have intended.[2]

The absurdity described is where a minority of the residents, members or not, would be able to foist their will upon and over the objection of the member majority, therefore the SOL interpreted the phrase as being an ". . . additional qualification for voting in the ratification of the tribal charter." *Id.* The Wappo Indians submitted 15 names, which the BIA approved as

[1] Letter from Troy Burdick, DOI, BIA, Superintendent to "To Whom it May Concern" (June 14, 2006) (Attachment 1) ("Federal recognition was extended to the Me-Wuk Indian Community of the Wilton Rancheria when the adult Indians were provided the opportunity to vote as a Tribe at a special election to accept or reject the terms of [IRA] of June 18, 1934 as amended").

[2] M27810 DOI SOL Opinion Howard-Wheeler Act Interpretation 484, 488 (Dec. 13, 1934).

"belonging to the Rancheria" except for one; James Richard Adams, Sr.[3] *Compare* Administrative Records MWT-AVR-2012-000054 and MWT-AVR-2012-000053 (showing that the government approved list had removed James Richard Adams, Sr. as an eligible voter). These events establish two facts;

1. On June 11, 1935 the federal government recognized the Wappo Indians as a tribe, now known as the Mishewal Wappo Tribe of Alexander Valley.
2. James Richard Adams was excluded because although he was a resident he was not a member and thus, did not "belong" to the tribe. 1930 United States Federal Census (showing James Adams was not Wappo or Wapu as the Census mistakenly spells it) (Attachment 3); 1930 Population Schedule for the Department of Commerce for the Fifteenth Census (further evidence that James Adams was not Wappo.) (Attachment 4).

These events also established the base roll of membership in the Tribe. DKT. 146, pg. 9 (The Federal Defendant acknowledges that, ". . . the federal government purchased lands comprising the former Alexander Valley Rancheria . . . [t]hat is enough under the IRA to support federal recognition . . ."); MWT-AVR-2012-000368 (BIA letter identifying the IRA voters of Alexander Valley as "duly enrolled Indians."). In fact, the federal government created and provided a form letter by which non-resident tribal members could affirm that the Rancheria was their home, thus "belonging" to the Rancheria. *See* Attachment 2 supra, Absentee Ballot Statement (further evincing the fact that the IRA vote considered the voting entities, "Tribes."); MWT-AVR-2012-000103 (U.S. report acknowledging the Alexander Valley Rancheria IRA voters as a Tribe).

B. The Historic Tribe Has Been Continually Recognized Since 1935.

The federal government purchased land in 1909 and 1913 for the Wappo Indians as

[3] *see* Letter from William Zimmermann, Jr., Assistant Commissioner, DOI, Commission of Indian Affairs, (October 26, 1934) (Nat'l Archives, Attachment 2) ("Unaffiliated Indians who have no claim to tribal property or interest in tribal affairs cannot vote at the election even though they reside on the reservation.").

members of the historic tribe. [4] Letter collection of Office of Indian Affairs acknowledging that the land was purchased, ". . . for the use of the Wappo or Alexander Band of Indians." (1909-1910) (Attachment 5); Letter from John Terrell, Inspector DOI, Office of Indian Affairs to the Commissioner of Indian Affairs (July 29, 1917) (Attachment 6), (The Inspector related his visit to the ". . . Alexander Valley Indians, sometimes called Wappo Indians, situated on two separate tracts . . ." and noted that the land ". . . for this band of Indians has only served as a temporary squatting place, occupied chiefly during the winter season when employment was not to be found.") The Wappo Indians were therefore, "of the Rancheria" in that their right to occupy and use the land was created and granted from the time of the initial purpose.[5]

After the purchase of the land, the members of the Tribe lived on and off the Rancheria periodically. MWT-AVR-2012-000136 (Noting that a tribal member was intending to move back onto the rancheria and that, "[h]e, too, apparently has certain rights on the Reservation [*sic*]"); MWT-AVR-2012-000076 ("Indians in this region are permitted to go and come at will . . ."). The federal government was well aware of the fact that the Rancheria was desolate and that many members had to leave the Rancheria seasonally in order to subsist. MWT-AVR-2012-000031 (BIA noting that the cost of providing water to the Rancheria was prohibited by the poor land conditions and the money should be spent elsewhere); MWT-AVR-2012-000311 (BIA letter taking note of the fact that the Wappo Indians of Alexander Valley Rancheria were seasonally absent from early spring until the fall). The Social Services and Health Departments of Sonoma County interacted frequently with the federal government regarding programs and benefits for members of the Wappo Tribe. MWT-AVR-2012-000129 (Sonoma County Indian Health acknowledging the Ledger family of the rancheria and their long term interaction); MWT-AVR-2012-000349. There are a plethora of communications between Tribal members and

[4] The 1952 Congressional Report, 1952 Cong. Rep., 82nd Congress, 2d Session, page 742 shows that the first appropriation made for "homeless" Indians was in 1914; which was after both parcels of Wappo land had been purchased.

[5] Given the fact that the Rancheria was purchased for a specific group of Indians, it therefore stands to reason that federal recognition of the Wappo tribe, while certainly acknowledged by the 1935 IRA vote, existed even prior to 1909 when the land was purchased.

the federal government regarding land use, community services, and disputes over occupancy and lease rights, all of which attest to the fact that the federal government recognized the Wappo Tribe. MWT-AVR-2012-000038 (referring to the Wappo Rancheria); MWT-AVR-2012-000088 (Letter from BIA to Grover McCloud regarding land use);

The California Rancheria Act of 1958 ("CRA"), uses the language "of the Rancheria," to acknowledge that an Indian tribal entity is being impacted by the acts and the members of the Tribe are one category of possible decision makers. *Id.* at §2(a) and §6. In 1979, the federal government acknowledged the Wappo Tribe as a plaintiff in the class action lawsuit, *Tillie Hardwick v. United States.*, No. C-79-1710-SW (N.D.Cal 1979). In 1987, the Regional Office of the BIA recommended that the Agency settle with the Wappo Tribe of Alexander Valley Rancheria after determining that Wappos continued to reside in the area. DKT. 59, Exhibit 16, pg. 5 (One of the six factors used to evaluate the terminated tribes was, "whether there currently exists, or previously existed, a large Indian population on, or adjacent to, the rancheria").

The BIA Assistant Secretary's Office acknowledges that the historic Tribe and the Mishewal Wappo Tribe of Alexander Valley are the same people. DKT. 49, Exhibit 2 (Letter from the Assistant Secretary, Larry Echo Hawk wherein he states, "[The CRA] . . . listed Alexander Valley, now known as the Mishewal Wappo Tribe of Alexander Valley, as one of the rancherias to be terminated ."); DKT 49, Exhibit 1(The BIA Acting Regional Director Dale Risling stated that the "[BIA Regional Office]. . . supports the Tribe's efforts for restoration, either through legislation or administrative action" and referred to the Tribe as the Mishewal Wappo Tribe.); DKT. 49 (FAC ¶69)(Assistant Secretary Kevin Gover testified before Congress that the "Mishewal Wappo Tribe" should be immediately restored.); DKT. 59, Exhibit 16, pg. 34 (the 1997 Advisory Council on California Indian Policy recommends the "Mishewal Wappo Tribe of Alexander Valley" to be immediately restored.) This monolithic mass of evidence can leave no doubt that the Wappo Indians are and have always been recognized as a Tribe by the federal government.

C. The Plaintiff is Comprised of Lineal Descendants of Those Who Voted for the Indian Reorganization Act in 1935.

Since the IRA Voter List serves as a federal government approved membership list, the Mishewal Wappo Tribe has used this list as its base roll. IRA §19 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all person [*sic*] who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation . . .").

The federal defendant now seeks to have the Mishewal Wappo Tribe consist only of the Distributees, William McCloud, Sr. and James Adams, Sr., and their descendants. This is contrary to the historical information held by the BIA in its Office of Federal Acknowledgement. Letter from DOI, BIA Tribal Government Services to John Trippo, Mishewal Wappo Tribal Representative (Mar. 18, 1996) (Attachment 7), ("Our Records indicate that in the decades before its termination the enrolled membership of the Alexander Valley Rancheria was considerably larger than the few individuals on the termination list. For example, in 1935, 14 adults on the rancheria voted to accept the Indian Reorganization Act. . . . Thus it appears that the **previously acknowledged** Alexander Valley group may have been significantly larger than the few individuals that were terminated.") Emphasis added. Such a limitation of membership is also contrary to policy[6] and governing law. *Williams v. Gover*, 490 F.3d 785, 791(9th Cir. 2007)(citing *Santa Clara Pueblo*, 436 U.S. 49 (1978), the Court held that, "*Santa Clara Pueblo* and its predecessors establish that '[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.' For this reason, the BIA could not have defined the membership of Mooretown Rancheria, even if had tried."

Since it is unlikely that any of the restored Tribes that relied on their Distributee List

[6] The ACCIP report of 1997 on page 23 states, "In its role as federal trustee, the BIA often urges terminated tribes to confine their membership to lineal descendants of the distributees and dependent members listed in the distribution plan prepared under the Rancheria Act. This advice, while serving the BIA's interests in confining its trust responsibilities to a smaller Indian service population, . . . this artificial limitation ignores the fact that the distribution plans prepared in the process of termination frequently and arbitrarily excluded tribal members who objected to the distribution plans or who resided off the rancheria."

were able to in fact restore their full membership,[7] said reliance is misplaced. This is especially true for the Wappo Tribe where the Distributee List is dominated by a non-Wappo. In consideration of the aforementioned facts, the Plaintiff has standing to represent the Tribe as lineal descendants of those recognized as members by the federal government in 1935. This coupled with the facts admitted by the Federal Defendant regarding injury and causation[8], the Plaintiff's standing is established. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (the Court noted that proper standing had a minimum of three elements. First, the "injury in fact" must be "concrete and particularized," second, there must be a causal connection between the injury and the conduct of the defendant, and third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."); DKT. 167, ¶¶ 88 and 107.

II. THE FEDERAL GOVERNMENT CONTINUES TO OWE THE TRIBE A FIDUCIARY DUTY.

The federal government owes Native American Tribes a fiduciary duty generally. *Gros Ventre Tribe v. U.S.*, 469 F.3d 801, 810-811 (9th Cir. 2006). However, in order to determine the terms of a specific duty, a statute or regulation must be cited. *Id.* In the case of the California Rancheria Act, Congress provided a methodology of repudiating the fiduciary duty owed to the Tribes generally. Since the repudiation was improperly carried out, as further evinced in Section III of this Motion, the duty continues. *See United Auburn Indian Community at* 47. Since the duty continues generally, the BIA has breached the specific statutory duties each time it failed to carry out the terms of that duty. *See* the Tribal List Act.

III. THE BIA ASSISTANT SECRETARY BREACHED THE FIDUCIARY DUTY OWED TO THE TRIBE.

[7] The Distributee Lists were comprised solely of residents of the Rancherias or those with formal assignments. This failed to include members "of the Rancheria" who were temporarily away or did not receive notice. Therefore, the Distributee Lists are based on error and do not reflect the true membership of the Tribe.

[8] DKT. 167

A. Fiduciary Duties Were Created.

1. The Indian Reorganization Act of 1934 formalized the government to government relationship between the Wappo Indian Tribe of the Alexander Valley Rancheria thereby establishing a fiduciary duty owed to the Tribe. 25 U.S.C. §476 (c) and (d). Specifically, the IRA set forth a methodology for reorganizing Tribal governments that would include oversight by the Secretary of the Department of the Interior of Tribal lands, resources and government affairs. IRA 25 U.S.C. §§461-494(a) generally; *see U.S. v. Mitchell*, 463 US 206, 211, 225, 226 (1983) (quoting *Navajo Tribe of Indians v. U.S.,* 624 F2d 981, 987 (1980), "[W]here the Federal Government takes on or has control or supervision over Tribal monies or properties the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.") In fact, the IRA introductory paragraph states, "[a]n Act to conserve and develop Indian lands and resources. . . ." *See* IRA; *see also Smith v. U.S.*, 515 F.Supp. 56, 57 (N.D.Cal. 1978) ("The United States controlled the rancheria lands under the special fiduciary duty owed by the United States to the Indian people.").

2. The California Rancheria Act of 1958 and as amended in 1964, imposed fiduciary duties on the Secretary of the Department of the Interior to, at a minimum:

a. To ensure that a distribution plan of the assets of the Rancheria was properly prepared in compliance with Section 2(a) of the CRA,[9] which necessarily included the duty to ensure that the participants were eligible parties.

b. To ensure that proper notice of the Distribution Plan was made in compliance with Section 2(b) of the CRA so that, ". . . **any** Indian who

[9] "Sec. 2. (a) The Indians who hold formal or informal assignments on each reservation or Rancheria, or the Indians of such reservation or Rancheria, or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assess of the reservation or Rancherias, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common. The Secretary shall provide such assistance to the Indians as is necessary to organize a corporation or other legal entity for the purposes of this Act."

> feels that he is unfairly treated in the proposed distribution of the property shall be given an opportunity to present his views and arguments for the consideration of the Secretary." [Emphasis added]
>
> c. To ensure that a referendum vote to approve the Distribution Plan was carried out in compliance with Section 2(b) of the CRA.
>
> d. To ensure that the necessary improvements to the Rancheria lands were made in compliance with Sections 3(a), (b), and (c), i.e. surveys, roads, and water systems. [*Smith* at 57-59].

B. The Fiduciary Duties Were Breached.

1. The Secretary of the Interior's fiduciary duty to properly maintain a government to government relationship with the Wappo Indian Tribe as created and detailed by the IRA was breached when the Wappo Indian Tribe was improperly reported to have voluntarily requested the application of the California Rancheria Act to the Tribe. Form Letter from James and Dretta Adams to Congressman Scudder (January 11, 1957) (Attachment 8) ("I want you to have Alexander Valley Rancheria included in the bill [CRA] so we can get title to our land."). The fact that the BIA knew of tribal members who were "of the Rancheria" but did not contact them or have a meeting of the Tribe prior to the unlawful adoption of the distribution plan under the CRA is a further factual evincing of the breach. Further, even prior to the CRA, the BIA had violated administrative policy regarding land use and assignment thereby breaching the fiduciary duty regarding land and resource protections as established by the IRA. MWT-AVR-2012-000178 and 000179 (requiring "applicants for permits or assignments to procure the consent of the other residents or assignees on the rancheria" where no such requirement exists); MWT-AVR-2012-000138 (requiring consent of existing residents before giving assignments of vacant land without rule or policy so stating); MWT-AVR-2012-000246 (correspondence from tribal member Angelo Trippo (raising the issue that James Adams is not Wappo and does not "belong" on the rancheria); MWT-AVR-2012-000314 ("From all appearances this land purchased by Mr. Kelsey for this band of Indians [Wappo] . . ."); MWT-AVR-2012-000055 (A petition was signed in 1935 by the tribal members to remove James Adams); MWT-AVR-2012-00133 (Minnie Adams was denied the right to live on the Rancheria but her non-Wappo ex-husband was given the right to occupy). The BIA, being aware that the Wappo Tribe was the Indian entity of the

Alexander Valley Rancheria as formally recognized by the IRA,[10] owed a duty to the Wappos to accept or reject the California Rancheria Act as was falsely reported to have occurred to Congress. 1958 Cong. Rep., 85th Congress, 2d Session, Report No. 1874, page 2-3 ("It is not the intention to force the legislation upon any group, any rancheria desiring to withdraw may do so. . . . Resolutions requesting this legislation from each of the rancherias and reservations listed are on file with the Committee on Interior Insular Affairs.") There was at no time an opportunity provided to withdraw from the legislation and there is no resolution from the Wappo tribe supporting inclusion in the CRA. It is a fact that the Tribe was not given the opportunity to voluntarily participate in contravention of the BIA's fiduciary duty.

2. The BIA breached the following fiduciary duties imposed by the California Rancheria Act:

a. The Secretary breached his duties regarding the Distribution plan by not including all the necessary participants and by allowing a non-tribal member to receive land assets held in trust by the United States for the benefit of the Wappo Tribe.

b. The Secretary breached his duties regarding the proper notice requirement for the approval of the Distribution Plan by having a defective Notice that stated any Indian could protest the Distribution Plan and that, "[a]fter the protest has been submitted for the **approval of the adult Indians who will participate in the distribution of the property** . . ." Emphasis added. DKT. 59, Exhibit 11. The Notice should have read "[a]fter the plan . . ." The Notice, as written, indicates that the protest will only be considered if those already a part of the Distribution Plan approve of it. This would be futile and no doubt caused a chilling effect on protesting. Even if the error was realized by a reader, the Notice fails to inform a potential protestor of what their rights would be regarding the submitted protest after it has been forwarded to the Secretary. Finally, since the Secretary was well aware that the majority of adult members of the Tribe left the area for seasonal work elsewhere, he knew that it would be unlikely that the adult tribal members would be in the area to receive the Notice; MWT-AVR-2012-000307 (Letter to the Commissioner of Indian Affairs detailing a recent visit to the rancheria finding it deserted because the members were away working fields in Ukiah, California until the fall. The visit occurred in March, 1917).

c. The BIA Secretary breached his fiduciary duties regarding the CRA's required referendum vote. Specifically, the Secretary failed to verify tribal membership of James Adams or his self-asserted assignment.

[10] *See* MWT-AVR-2012-000353 ("We the Indians (Wappo tribe) living on the Alexander Valley Rancheria . . .); MWT-AVR-2012-000162 (a fund has been established for the ". . . Alexander Valley Rancheria, California. This group is also identified as the Wappo Indians.")

DKT. 59, Exhibit 17, page 30. Further, the Secretary failed to verify the mailed in ballots.[11]

d. The Secretary failed to make the improvements required under the CRA before distributing the property.

(1) Section 3(b) of the California Rancheria Act required the BIA to bring the road on the 3 parcels up to comparable State standards, which it did not.

(2) Section 3(c) of the CRA required the BIA to make certain improvements so that the County could assume responsibility for domestic (sanitary) water system on the 3 parcels, which it did not do.[12]

(3) Section 8 of the CRA provided that the BIA should provide assistance to those members of the Tribe that needed assistance in negotiating the terms of the CRA, which was not provided.[13]

C. Damages Resulted From the Breach of the Fiduciary Duty.

The Federal Defendant has made the factual admission that the Tribe does not receive services or benefits available to other tribes, ". . . because it is not on the list of federally recognized tribes . . ." *See* Docket 22 pg 12 para. 92. Thus, the Secretary has breached the duty under the List Act by unlawfully withholding the inclusion of the Plaintiff where the Secretary recognizes the Plaintiff's eligibility but for the unlawful termination and failure to administratively correct.

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[11] William McCloud's ballot was suspiciously undated and signed with a signature foreign to any other documents signed by him in the past. MWT-AVR-2012-000464; MWT-AVR-2012-000511. While this does not rise to level of any election fraud allegations, it does point out the uncertainty caused by the Secretary's failure to perform his CRA duty regarding election procedures.

[12] DKT. 59, Exhibit 16, page 59, fn. 75 (". . . BIA had conducted their surveys, without confirming lot sizes to local health code requirements. . . . Thus, the IHS policies could not remedy the BIA's failure to consider local requirements."); DKT. 59 Exhibit 59, page 57, fn. 56 (Noting that the water standards were retroactively applied in the 1964 amendments to the CRA); MWT-AVR-2012-000582 (Letter from BIA Area Director William E. Finale to Commissioner of Indian Affairs stating that he did not agree that the CRA Section 3 [water] requirements had been "adequately completed.")(February 15, 1977).

[13] DKT. 59, Exhibit 16, page 43 (. . . the BIA failed to adequately consider the Indians' needs and to prepare them and their property for the full imposition of state and local taxing and regulatory jurisdiction."); CRA §8.

IV. THE BIA UNLAWFULLY WITHHELD AND UNREASONABLY DELAYED THE DECISION TO RESTORE THE TRIBE TO FEDERAL RECOGNITION STATUS.

A. Action Was Required By Law.

The Administrative Procedure Act ("APA") authorizes judicial review for those suffering legal wrong because of agency action. 5 U.S.C §702. An agency's "failure to act" constitutes "agency action." *Id.* § 551(13). The APA therefore authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The Secretary's failure to publish a list of federally recognized tribes that includes the Tribe's name constitutes "agency action". On November 4, 1994 Congress passed the Federally Recognized Indian Tribe List Act of 1994 ("List Act"). The List Act provides in Section 103(5) "Congress has expressly repudiated the policy of terminating recognized Indian tribes and has actively sought to restore recognition to tribes that previously have been terminated." Further, section 104 of the List Act creates a duty imposed upon the Secretary of the Interior ". . . **shall** publish in the Federal Register a list of all Indian tribes which the Secretary **recognizes** to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Emphasis added*.

In addition to the authority to recognize Indian tribes as identified in the List Act in Section103(3),[14] the current Assistant Secretary of Indian Affairs, Kevin Washburn, has recently testified before Congress that, "[t]he Department may also reaffirm a nation-to-nation relationship with tribes by rectifying previous administrative errors by the Bureau to omit a tribe from the original Federal Register list of entities recognized and eligible to receive services from the Bureau of Indian Affairs . . ."

The CRA delegated the authority to the Secretary of the Interior to carry out the mandatory terms of the CRA so as to convey Rancheria lands to tribal members and to revoke tribal organic documents *See* CRA at Sections 6 and 11. This delegation necessarily created a duty. This duty was breached as evinced by the testimony of Kevin Washburn referring to the

[14] "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . or by a decision of a United States court."

Plaintiff's sister tribe[15] wherein he stated, "[t]he Wilton Rancheria had been erroneously terminated by the United States under the California Rancheria Act of 1958 . . ." These facts, coupled with the 1987 BIA Regional letter to the Secretary recommending tribal restoration based on BIA administrative error in complying with the CRA establish the fact that the Secretary recognized[16] the Mishewal Wappo Tribe as being ". . . eligible for special programs and services."

B. No Action Or Insufficient Action Was Taken.

The fact that the Secretary was aware of the erroneous termination of the Mishewal Wappo Tribe of Alexander Valley as evinced by multitude of internal BIA correspondences recommending settlement and immediate restoration[17] and thereby recognized that the Plaintiff is eligible for benefits and services failed to correct the error administratively by listing the tribe in compliance with the List Act. *Skinner v. United States*, 594 F.2d 824, 831 (Cl. Ct. 1979).

C. Failure To Act Caused Harm.

The Federal Defendant has made the factual admission that the Tribe does not receive services or benefits available to other tribes, ". . . because it is not on the list of federally recognized tribes . . ." *See* Docket 22 pg 12 para. 92. Thus, the Secretary has breached the duty under the List Act by unlawfully withholding the inclusion of the Plaintiff where the Secretary recognizes the Plaintiff's eligibility but for the unlawful termination and failure to administratively correct.

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[15] The ACCIP of 1997 and Assistant Secretary Kevin Gover in his Congressional testimony of 2000 reported that the Graton tribe, Wilton Rancheria, and the Mishewal Wappo Tribe of Alexander Valley should be immediately restored due to erroneous termination.

[16] The word "recognize" as used in the List Act is used in the informal definition meaning "to be aware of" versus the formal legalistic definition as found in Section 103(3) since the Secretary does not have the authority to recognize or withdraw the recognition of an Indian tribe.

[17] The most recent proof of the Secretary's awareness that the Plaintiff should be restored to federal recognition is the BIA Region Office letter dated February 6, 2009 wherein the Regional Director, Dale Risling, stated that after reviewing the Tribe's petition for administrative restoration based on unlawful termination determined that, ". . . the Bureau of Indian Affairs Pacific Region, supports the Tribes efforts for restoration, either through legislation or **administrative** action." Emphasis added.

V. THE BIA FAILED TO CONCLUDE A MATTER PRESENTED TO IT REGARDING RESTORATION OF THE TRIBE'S FEDERAL RECOGNITION STATUS WITHIN A REASONABLE TIME.

A. The Secretary Was Presented with the Matter of Restoring the Tribe's Federal Recognition Status.

The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." *See* 5 U.S.C. § 555(b). On June 5, 1987 a correspondence was sent by Maurice Babby, the BIA Area Director that acknowledged that on September 22, 1986 California Indian Legal Services requested on behalf of fifteen unlawfully terminated tribes that the BIA adopt a policy that would result in restoration. DKT. 59, Exhibit 16, pg. 5. In the same correspondence, Area Director Babby articulated that after a comprehensive ". . . review of existing records and our discussion of the merits of the proposal, it is our recommendation that the proposal receive favorable consideration as to the following rancherias: (1) Alexander Valley . . ." Thus, the **matter** of the restoration of the Mishewal Wappo Tribe of Alexander Valley was **presented** as early as June 5, 1987.

B. The Secretary Failed to Conclude the Matter of Restoring the Tribe's Federal Recognition Status Within a Reasonable Time.

The Regional Office made a determination that the Tribe should be restored based on their criteria and recommended such to the Secretary. *Id*. The factual record in this case shows that the Secretary failed to consider or conclude this matter entirely.[18] Although other offices of the BIA and the federal government addressed the issue of restoring the Mishewal Wappo Tribe's federal recognition status, it was not until the late 1990's that the Assistant Secretary considered the matter presented to him regarding restoration of the Mishewal Wappo Tribe's federal recognition status. Despite the fact that the Assistant Secretary was presented with the matter of restoring the Tribe's federal recognition status no later than June 5, 1987 and the fact

[18] This fact cannot be disputed since neither the Plaintiff nor Federal Defendant, in the course of diligent research was able to find a response to the 1987 letter even after Plaintiff requested such information from Federal Defendants via an invited informal FOIA.

that this matter arose again from the ACCIP in 1992 it has still failed to be concluded to date.[19]

The Ninth Circuit has established six criteria in determining whether a government agency has unreasonably delayed in concluding a matter in violation of the APA:

1. Reasonability of time to make decision;
2. Whether there is a Congressional time table;
3. Whether health and welfare are at stake;
4. Impact of court ordered action on higher or competing priorities;
5. Nature and extent of interests prejudiced by delay; and
6. A finding of impropriety unnecessary.

See Razaq v. Poulos, 2007 WL 61884 at *6, (N.D.Cal 2007).

With regards to the first criteria, section 706 of the APA requires that the agency act within a reasonable time. *Id.* The fact that the matter was presented in 1987 and has not been concluded to date makes the determination that a decision has been unreasonable held irrefutable. *See Patel v. Reno*, 134 F3d 929 (9th Cir. 1998). Congress did not establish a time table for the BIA to make a decision as considered by criteria two, however, Congress did, in 1994, repudiate the termination policy of the CRA and commit to restoring those terminated tribes. *See* List Act, Section 103(5) "Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated." Criteria three is satisfied in that federal recognition is the vehicle by which tribal members receive health and general welfare benefits in accordance with federal trust responsibility. With regards to criteria four and five, the unreasonable delay has led to the failure of the BIA to meet its trust responsibilities to the members of the Mishewal Wappo Tribe of Alexander Valley for which there is no known competing priority. Criteria six provides that there need not be shown an agency impropriety, therefore it is not necessary to allege one.

C. Failure To Act Caused Harm.

The Federal Defendants in their Answer to the Plaintiff's Amended Complaint

[19] This fact should be noted in light of the determination of the administrative authority to restore a tribe where administrative error resulted in loss of recognition.

acknowledge that the Tribe has not received and is ineligible for benefits or services afforded ". . . other tribes because it is not on the list of federally recognized tribes." Dkt. 22 para. 97.

VI. THE BIA ARBITRARILY AND CAPRICIOUSLY WITHHELD THE TRIBE'S RESTORATION OF ITS FEDERAL RECOGNITION STATUS.

A. The Applicable Legal Standard.

The Administrative Procedures Act, 5 USC §706(2)(a) provides that,

> [t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Supreme Court has held that grounds for setting aside an agency decision include, " . . . the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The BIA Abused its Discretion by Unlawfully Terminating the Tribe.

The CRA required that there be a vote of the Indians "of the Rancheria" to voluntarily terminate their relationship with the federal government and to adopt a distribution plan of the Tribe's land and assets. CRA §2(b). By failing to include all the Tribal members who had an interest in the Rancheria, the BIA abused its discretion and failed to carry out the terms of the CRA. Therefore, the voter list was incorrect.

The CRA required that the land be improved to meet certain standards which were not done. DKT. 59, Exhibit 17, Page 33 and 44 (Babby deposition in which he admits that the BIA knowingly received no funds to carry out improvements and that the promise of improvements was used to induce Tribe's to voluntarily terminate.) The BIA's survey of the Alexander Rancheria and the subsequent Completion Report failed to provide for the required

improvements, e.g. water, sanitation, and road access. DKT. 59, Exhibit 14, page 1.

C. The BIA, Through its Arbitrary and Capricious Behavior, Failed to Correct its Unlawful Act.

The BIA has evaluated the Mishewal Wappo Tribe several times by similar criteria and has consistently found that the Tribe has continued to exist and remained unified as a body. *See* 1987 BIA Regional Letter describing the six (6) factors used to determine recommendation to restore through settlement; DKT. 59, Exhibit 16, pg. 31 (ACCIP report that states, ". . . at least three of these would meet the following criteria used by the Federal government in evaluating a terminated tribe's eligibility for restoration." Footnote 4 following this language names the Mishewal Wappo Tribe of Alexander Valley as one of the three tribes meeting the criteria.) The BIA Regional Office has recommended administrative restoration in 1987 and 2009 to the Assistant Secretary. DKT 49, Exhibit 1 and DKT. 59, Exhibit 16, pg. 34. The ACCIP recommended that the Plaintiff be restored. *Id.* In fact, the same Assistant Secretary who administratively recognized Koi Nation aka the Lower Lake Tribe recommended to Congress that the Plaintiff should be restored, i.e. Kevin Gover. *See* fn. 15 supra. This knowledge of the error, awareness of the authority to correct the error, but unwillingness to do so constitutes an arbitrary act of inaction and a capricious act of indifference.[20] *Sierra Club v. U.S. Environ. Protection Agency*, 346 F.3d 955, 961 (9th Cir. 2003)("We have interpreted this statutory provision [§706 of the APA] as requiring the agency to articulate a rational connection between the facts found and the choice made." Citations omitted.) In his letter denying administrative restoration, Assistant Secretary Larry Echo Hawk, stated that the basis for denial was "[b]ecause the Rancheria Termination Act [*sic*] is still in force and effect, the Department of the Interior

[20] *Hearing on Authorization, Standards, and Procedures for Whether, How, and When Indian Tribes Should Be Newly Recognized by the Federal Government: Perspective of the Department of the Interior*, March 19, 2013(statement of Kevin K. Washburn, Assistant Secretary-Indian Affairs)("The Department may also reaffirm a nation-to-nation relationship with tribes by rectifying previous **administrative errors** by the Bureau to omit a tribe from the original Federal Register list of entities recognized and eligible to receive services from the Bureau of Indian Affairs or by resolving litigation with tribes that were **erroneously terminated**."). Emphasis added.

does not have the authority to restore your Tribe administratively." DKT. 49, Exhibit 2. This is profoundly incorrect. The Department can and has on at least two occasions restored a tribe's status administratively. Further, the California Rancheria Act has been repudiated formally by Congress and the President. Richard M. Nixon, President of the United States, Special Message on Indian Affairs, Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76 (July 8, 1970),

> As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.
>
> This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government.

Even the BIA has repudiated the CRA and ". . . made addressing the terminated tribe's issues in California a high priority." Letter from the BIA, Pacific Region to John Trippo, Tribal Representative (March 17, 2000) (Attachment 9).

VII. THE BIA VIOLATED THE TRIBES POSSESSORY RIGHTS TO THE RANCHERIA BY UNLAWFUL DISTRIBUTION.

The two parcels that comprised the Alexander Valley Rancheria were purchased for the benefit of "Wappo Indians." *See* Attachment 7, supra. The Wappo Indians, i.e. tribal members, had the right to use and occupy land held in trust by the federal government. *Id.* The fact that they had not adopted governing documents under the IRA is irrelevant to the individual rights of use and possession.

Assignment to an individual, even if erroneous, did not extinguish this right since the assignment could be revoked. Letter from James B. Ring, BIA Acting Area Director to K. O. Williams (June 16, 1950) (Attachment 10). This land was never allotted . . . It is owned by the Government with title in the United States and was acquired for the members of the Alexander Valley Community. The various lands were merely assigned to the former occupants for their individual use . . . All of this detail is intended to help you understand our reluctance to recognize the rights of one individual over the possible rights of another . . .”). Members of the Tribe who did not live on the Rancheria had rights to use and possess the Rancheria. *Id.* Despite the fact that the BIA erroneously gave James Adams, Sr. an assignment, said assignment did not grant James Adams or William McCloud had the right to speak on behalf of the members and request termination. *Id.* Nor did the assignment give James Adams or William McCloud the right to adopt a self-serving Distribution Plan for land that still belonged to the Tribe as a whole. *Id.* In the final analysis, since the termination was unlawful, the resulting land distribution was unlawful as well.

CONCLUSION

Based on the merits of the Motion herein, the Plaintiff asks the Court to grant its Motion for Summary Judgment and award it all the relief sought in the Complaint.

CERTIFICATE OF SERVICE

I, Joseph L. Kitto, hereby certify that on May 31, 2013 I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 31, 2013 at Santa Rosa, California.

By: /s/ Joseph L. Kitto