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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.

SALLY JEWELL, in her official capacity as Secretary of the Interior; KEVIN WASHBURN, 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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

ADMINISTRATIVE DECISIONS

STATUTES & TREATISES

INTRODUCTION

The undisputed material facts giving rise to the Plaintiff's ("Plaintiff" or "Tribe") 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) Plaintiff is 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.[1]

The Federal Defendants have responded to the Tribe's Motion for Summary Judgment in such a manner as to obscure the central issues mentioned above. For example, although there is no law or regulation in existence that would make residency a requirement for membership,[2] the Federal Defendants argue that the residency on the Rancheria was the criteria for membership. Their theoretical legal concoction ("TLC") is a combination of the Indian Reorganization Act ("IRA")(25 U.S.C.§479) and the California Rancheria Act ("CRA")(72 Stat. 619) provisions in which residency was ONE of the examples, though not conclusive, of having an interest in the Rancheria sufficient to allow voting on reorganization under the IRA or termination under the CRA and the acknowledgment in both statutes that a larger group most likely comprised the actual Tribal entity. The TLC would hold that the Rancherias were the source of recognition by the federal government, sovereignty and membership. So that if a resident were called to active duty military or endeavored to a university to seek education or was hospitalized for an extended period of time, those individuals simply would stop being members.

[1] For the Court's convenience, rather than file duplicative attachments, the Plaintiff refers to its Motion for Summary Judgment.

[2] It is true that some Tribes such as the Colusa Band of Wintun Indians aka Cachil Dehe Band of Wintun Indians aka the Colusa Indian Community have made residency a requirement for membership in their own Tribal Constitution, not under federal law.

Also, the TLC is in direct conflict with the fact that most of the restored Tribes under *Tillie Hardwick v. United States*, No. C-79-1710-SW (N.D.Cal. 1979) are not named rancherias but rather named as being Indians from rancherias: (1) Big Valley Band of Pomo Indians of the Big Valley Rancheria, (2) Blue Lake Rancheria Tribe, (3) Buena Vista Rancheria of Me-Wuk Indians of California, (4) Chicken Ranch Rancheria of Me-Wuk Indians of California (5) Cloverdale Rancheria of Pomo Indians, (6) Elk Valley Rancheria (7) Greenville Rancheria, (8) Mooretown Rancheria of Maidu Indians of California, (9) North Fork Rancheria of Mono Indians, (10) Picayune Rancheria of the Chukchansi Indians, (11) Pinoleville Pomo Nation, (12) Potter Valley Tribe, (13) Quartz Valley Indian Reservation, (14) Redding Rancheria, (15) Redwood Valley Band of Pomo Indians, (16) Bear River Band of the Rohnerville Rancheria and (17) The Smith River Rancheria of the Tolowa Indian Tribe.

The Federal Defendants assert that the Plaintiff, even if descendants of the 1935 IRA voters, cannot maintain standing unless they are descendants of the CRA voters in an effort to redefine the Tribe as comprising only those of the CRA voter list, i.e. Distributees. This is not found anywhere in law. The IRA recognized Tribal existence as already conceded by the Federal Defendants.[3] The CRA did not just terminate the federal government's oversight of the land, it also called for "[t]he constitution and corporate charter adopted pursuant to [IRA] . . . shall be revoked by the Secretary of the Interior . . ." The IRA is extremely relevant since it operated to extend federal recognition to those Indian entities asked to vote for or against its application and is cited in Section 11 of the CRA.

The Federal Defendants casually dismiss materials facts by simply trying to reinterpret their meaning. For example, Assistant Secretary on Indian Affairs ("Secretary" or "ASIA") Kevin Gover did not merely reference the Advisory Council on California Indian Policy ("ACCIP") that recommended "immediate" restoration of three Tribes;[4] "[t]he Wilton Miwok Indian Community, Federated Indians of Graton Rancheria, and the Mishewal Wappo Tribe of

[3] DKT. No. 146.

[4] Federal Defendants describe this recommendation as involving the Plaintiff and others, when the impact of this recommendation was limited to only three specific tribes.

Alexander Valley."[5] The evidence overwhelmingly shows: 1) that the Wappo Indians of California were recognized as such prior to purchase of the two parcels in 1909 and 1913,[6] 2) the Wappos had rights to use and occupy the land,[7] 3) the Wappo Indians were recognized as a Tribe under the IRA,[8] and 4) BIA officials knew the Tribe should be restored and made efforts to do so, but the ASIA did nothing.

The evidentiary factual documents rendered by the various branches and offices of the BIA over the years supporting these findings and proving the facts material to Plaintiff's Motion for Summary Judgment cannot be summarily dismissed by declaring factual records irrelevant. Perhaps the most absurd aspect of the Federal Defendants method of defense is that while there is very little by way of argument for proper termination, there is a plethora of argument that this Plaintiff is the wrong entity and if not, it is too late, and if it is not too late, then the relief sought is not allowed. This "in the alternative" method of argument may be legally permissible, but in this case it fails to defend the wrongful termination itself. This alone should be enough to cast serious doubt on the validity of the Federal Defendants' arguments.

ARGUMENT

I. THE FEDERAL DEFENDANTS' ARGUMENTS THAT THE PLAINTIFF HAS NO STANDING TO BRING THIS ACTION ARE WITHOUT MERIT.

A. The Evidentiary Support That The Members Of The Plaintiff Tribe Are Descendants From The Historic Tribe And Thus, The Same Tribe Is Indisputable.

1. The Federal Defendants Cannot Refute The Fact That The BIA Has Repeatedly Held That A Request To Vote For The Indian Reorganization Act Evinces Federal Recognition.

The BIA has on numerous occasions found that when a "Tribe, band or community of

[5] It bears importance to note that in naming the Plaintiff, the Secretary made no reference to the Alexander Valley Rancheria, but rather the Wappos from the Alexander Valley.

[6] Plaintiff's Motion for Summary Judgment, Attachment 5.

[7] MWT-AVR-2012-000140 ("Our files are filled with requests of various Indians . . . to live on the Rancheria for several years past.")

[8] DKT. No.187, page 6, lines 5-8.

Indians" has been asked to vote for the IRA, that fact evinces federal recognition."[9] In fact, the BIA has also found that where a request for land was made by local BIA representatives, this, too, evinced federal recognition.[10] It wasn't until 1978 that a formal recognition process was created for petitioners to achieve federal recognition as **newly** recognized Tribes.[11]

2. The Wappo Tribe Existed Long Before The BIA, IRA, CRA And The Alexander Valley Rancheria Was Purchased For Them.

The Wappo people have been recognized by the federal government since prior to 1909. The Administrative Record is flush with documents that establish the fact that the parcels of land comprising the Alexander Valley Rancheria were purchased for the Wappos, not some unknown, unnamed conglomeration of landless and homeless Indians. MWT-AVR-2012-000053 (IRA voter list entitled, "Alexander, (Wappo) Rancheria").

3. No Federal Law Or Act Of Congress Makes Tribal Affiliation Conditional On Residency And Subject To Loss For Change Of Residential Status.

It would be unlawful for the BIA to adopt regulations that would make only the Distributees members of the Tribe. *Williams v. Gover*, 490 F.3d 785, 791(9th Cir. 2007)(citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). The idea that residing on Rancherias somehow defined both the Tribe and its membership is a new invention found nowhere else in public record. The Courts have consistently held that the criteria for membership, unless otherwise dictated by Congress, is an internal matter under the sole purview of Tribal law. *Id*.

Moreover, the IRA recognized that the pool of voters was a subset of the overall membership and thus limited to those tribal members who had an interest in the Rancheria and considered the Rancheria their home, although they might not actual live on the Rancheria at the time. 25 CFR §81.1 ("*Member* means . . . or who is recognized as belonging to a tribe by the

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[9] *United Auburn Indian Community v. Sacramento Area Director, BIA*, 24 IBIA 33, 41 (May 28, 1993); Plaintiff's Motion for Summary Judgment, Attachment 1.

[10] The Ione Band was determined to have been recognized by virtue of a field representatives request to purchase land for them although no land was ever purchased.

[11] 25 CFR §83.

local Indians comprising the tribe.'). The CRA also contemplated that the actual tribal members was comprised of those who lived on and off the rancheria. CRA at §2 (". . . **any** Indian who 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. The CRA indisputably intended to terminate the Tribal relationship with the federal government. CRA at §11. ASIA Kevin Gover stated that, "[e]ssentially, termination [via the CRA] changed land ownership, ended the special federal-trust relationship, transferred almost all responsibility for Indians to the States, imposed State legislative jurisdiction and judicial authority, ended all exemptions from State taxing authority, and discontinued all special federal programs to Indian tribes and Indian individuals; in effect it **ended these Tribes' sovereignty**."). Emphasis added. DKT. 187-3, page 1.

4. The Assistant Secretary Of The BIA Acknowledged That The Plaintiff's Options Were Congress Or The Courts, Not 25 CFR §83.7.

Larry Echo Hawk's decision to reject the Plaintiff's request for administrative restoration was based, not on the TLC but rather on the mistaken belief that the CRA is still in full effect. [12] Further, neither former Secretary Echo Hawk nor any other BIA official has cited the OFA petitioning process at 25 CFR §83 as another viable method for the Plaintiff to be restored until now and only in this final filing. This retreaded Intervenors' argument should not be afforded any more consideration when presented by the Federal Defendants than it was the first time it was proffered. DKT. No. 135, page 23. ("At a minimum, Plaintiff should be obliged to exhaust its administrative remedy by petitioning for acknowledgment, pursuant to 25 C.F.R. Part 83, and then appealing from a final agency determination in the event that the petition is denied."); DKT. No. 187, page 8 ("If Plaintiff wishes to pursue federal recognition of the 'Mishewal Wappo Tribe,' it must first pursue its administrative remedies.

B. The Federal Defendants Claim Authority To Restore Distributees But Not The Larger Group Of Culturally Related Tribal Members.

The Federal Defendants' claim that they can only restore that which existed prior to

[12] The CRA has been gelded as effective law.

termination is flawed in several ways. First, there is no authority for that type of restoration absent the ASIA authority to correct administrative errors. Solicitor Opinion, Assoc. Sol. Div. of Indian Aff., Carl Artman, Associate Solicitor to James Cason, Assoc. Deputy Secretary, Dept. of Interior (Sept. 19, 2006). Secondly, there is no authority or regulation that dictates when the error to be corrected must have occurred. The ASIA should go back to the last instance of governmental accounting of the Tribal membership, i.e. the 1935 IRA Voter List, not the last accounting of residents when the numbers were the lowest to achieve some larger administrative goal that died away long ago, i.e. reducing the federal obligation to Indians in California. DKT. No. 59-16, page 34.

II. PLAINTIFF'S CLAIMS ARE VALID.

A. The Assistant Secretary Breached The Fiduciary Duties Owed To Plaintiff.

The first fiduciary duty breached involved the lie reported to Congress that the Plaintiff had passed a Resolution seeking inclusion in the CRA. July 2, 1958 Cong. Rep., 85th Congress, 2d Session, Senate report accompanying H.R. 2824, page 4 ("Resolutions requesting this legislation from each of the rancheria and reservation listed above are on file with the Committee on Interior and Insular Affairs."). The BIA knew or should have known that this supposed action had not taken place. *Id.* at 4 (the Report includes a letter from the Commissioner of Indian Affairs, O. Hatfield Chilson). By remaining silent and by continuing the lie by limiting notice and participation to James Adams and William McCloud to the exclusion of other known Tribal members, the Federal Defendants further breached their duties to the Tribe.[13]

Insofar as the Distribution Plan and those who voted for it are concerned, the Federal Defendants' understanding and interpretation of the CRA is flawed. The Distribution Plan was not to be prepared by only resident as evinced by the CRA terms which include the second category of potential Plan preparers as ". . . the Indians of such reservation or rancheria." CRA at

[13] *Smith v. U.S.*, 515 F. Supp 56 (N.D. Cal 1978) (It is clear, and undisputed, that the United States did not herein fulfill its fiduciary duties to the Indian people of the Rancheria, duties that must be exercised with "great care," in accordance with "moral obligations of the highest responsibility and trust", that must be measured "by the most exacting fiduciary standards".)(citations omitted).

§2(a). The Federal Defendants' interpretation would make these words meaningless which is not a proper interpretation of federal law. *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."). Unlike the Federal Defendants' analysis, i.e. TLC, which ignores the Tribal entity, the IRA and CRA recognized that there existed a tribal entity and therefore a membership. CRA at §§2 and 6 (". . . the Indians of such rancheria or reservation . . ."). IRA at §16 (". . . when ratified by a majority vote of the adult members of the tribe **OR** of the adult Indians residing on such reservation . . .") Emphasis added; MWT-AVR-2012-000368 (". . . duly enrolled Indians of the hereinafter listed rancherias or reservations . . . Alexander Valley"). However, the primary goal of the IRA was, among other related goals, ". . . to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations . . ." Therefore the vote to accept or reject the IRA was necessarily limited to those tribal members who considered the land their home. M27810 DOI SOL Opinion Howard-Wheeler Act Interpretation 484, 486 (Dec. 13, 1934) (". . . [I]n order to carry out the intent of Congress, should be such as to grant the right to vote . . . only to those Indians who may be seriously affected by the application of [the IRA] to a given reservation. . . .This means that physical presence is not a proper criterion of voting rights, and that those who are entitled to vote are those who in some sense 'belong' on the reservation . . .") DKT. No. 187-2 page 3.

The CRA was intended "[t]o provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes." CRA at 619. Like the IRA, the CRA contemplates a tribal entity with members having certain rights to the lands. *Id.* at §11 (revoking the Tribe's governing documents adopted pursuant to the IRA thereby recognizing that a tribal entity exists); *Id.* at 8 (ordering that before land or assets are distributed the ". . . Secretary of the Interior shall protect the rights of individual Indians . . ." who are minors or incompetent.); *Duncan v. Andrus*, 517 F.Supp. 1 (N.D. Cal. 1977) ("Here, Congress is

attempting to end its traditional trust relationship with a group of Indians and to place them on the road to economic self-sufficiency.").

The first breach of the Federal Defendants' fiduciary duties occurred when, unlike the IRA, which accounted for non-residents who had protectable interests in the land and resources, the Secretary of the Interior failed to consider the involvement of all Tribal members in the voluntary inclusion in the CRA and the additional failure to adequately include the same members in the Notice process.

The Plaintiff reasserts the factual assertions supporting the remaining breaches of fiduciary duties found in the Plaintiff's initial filing of its Motion for Summary Judgment. DKT. No. 186, pages 9-12. This claim and the evidence provided supporting it are sufficient for this Court to find in favor of the Plaintiff and grant its Motion for Summary Judgment.

B. The Assistant Secretary Failed To Take Appropriate Actions.

The Federal Defendants confuse the Plaintiff's claim that the Secretary failed to act by not restoring the Tribe to federally recognized status with a petition for first time recognition under the regulations at 25 CFR §83.7.[14] Federal Defendants' Response to Plaintiff's Motion for Summary Judgment, pages 11-12. The Federally Recognized Indian Tribe List Act of 1994 ("List Act") was proposed and adopted because, "[t]he grand council was improperly removed from the BIA's list of recognized tribes - - which in part prompted me (Congressman Richards from New Mexico) to introduce H. R. 4180 and this could return them to the status quo ante."[15] Cong. Record, 103rd Congress H.R. 4180 (0ctober 3, 1994). The List Act creates a duty for the Secretary to list Tribes recognized by the federal government. 25 U.S.C. § 479a.

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[14] ". . . Congress enacted Public Law 103-454, the Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792), which formally established three ways in which an Indian group may become federally recognized: [b]y Act of Congress, [b]y the administrative procedures under 25 C.F.R. Part 83, *or* [b]y decision of a United States court. **However, a tribe whose relationship with the United States has been expressly terminated by Congress may not use the Federal Acknowledgment Process.**" http://www.bia.gov/FAQs/. Emphasis added.

[15] The Grand Council of Tlingit-Haida Indians had been inadvertently left off the federally recognized list and was deemed terminated.

The Federal Defendants completely ignore 25 CFR 83.7(g) which prohibits Tribes terminated pursuant to an Act of Congress from using the acknowledgment process. *See* fn. 16 infra. Further, the Federal Defendants have forgotten their own assertions before this Court in which they stated, ". . . the federal government purchased lands comprising the former Alexander Valley Rancheria in order to provide a home for Indians choosing to live there. That is enough, under the IRA, to support federal recognition of the Rancheria."[16] Federal Defendants' response to Amended Motion to Dismiss, page 9, Section C, entitled, "Restoration of Federal Recognition is a Proper Remedy in this Case.

In fact, since the time of this statement, the Federal Defendant, who then acknowledged federal recognition based on the IRA vote, has now disavowed that assertion completely. DKT. No. 187, page 8, "Voting on the Indian Reorganization Act does not establish standing in this case." The TLC and its ill-fated counterpart "conflation theory"[17] are illogical and unsupported by the undisputed facts.

As noted above, there are no Indian Tribes where the membership is federally defined by a piece of land, i.e. rancherias or reservations. The federal government owes no fiduciary duties to a piece of land.[18] The Indian Health Care Improvement Act ("IHICA"), 25 U.S.C. §§1601-1603, and the Indian Self Determination and Education Assistance Act ("ISDEAA") 25 U.S.C. §450, are cornerstone statutes of valuable services provided by the federal government to Indian Tribes, independent of land holdings.[19]

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[16] This was stated in response to the Intervenors' argument that the Plaintiff could not be restored because there was nothing to restore.

[17] This is Defendants' argument that Plaintiff conflates the IRA vote and federal recognition with restoration.

[18] *See Smith* at 62 ("Since the Rancheria has not been lawfully terminated, and should not be treated as terminated, the United States still owes a fiduciary obligation to the Indian people of the Rancheria . . .")

[19] *Table Bluff Band of Indians V. Andrus*, 532 F.Supp.255, 260-61 (N.D. Cal. 1981)(" Some question has also been raised about the status of the Table Bluff Band as the Rancheria's federally recognized governing body. . . . The revocation of the Band's federally recognized status was not accomplished pursuant to the Rancheria Act since the planned termination of the

The effort to minimize the testimony of former Assistant Secretary Kevin Gover and the ACCIP Report that sought restoration for the Tribe fails to include the fact that both developed rigid criteria and only made restoration recommendations after evaluating the Plaintiff by the factors.

Further, the Court is safe to conclude that if Dale Risling and Larry Echo Hawk of the BIA had meant to call the Plaintiff the Mishewal Wappo Tribe of the Alexander Valley Rancheria instead of omitting the word "Rancheria," they would have done so. The Federal Defendants' assertion to the contrary need not be mentioned further. *Infra*. at fn. 23. [20]

C. The Assistant Secretary Failed to Conclude the Matter of the Plaintiff's Restoration in a Timely Manner.

The Federal Defendants' argument that Plaintiff has no valid claim that the Secretary failed to conclude a matter presented within a reasonable time is plagued with its continued effort to persuade the Court that the TLC is a matter of fact not merely assertion. The TLC is not fact.

First, the Federal Defendants argue that ". . . there is no request for agency action pending." *Id*. at page 14, line 10. Assuming arguendo that this is true, it would mean that the Plaintiff's request for administrative restoration has been fully responded to and as stated by the Federal Defendants, "[t]he acknowledgment regulations represent the sole avenue for the administrative relief . . ." *Id.* The clear error here is that the Federal Defendants argue that the Plaintiff had failed to exhaust administrative remedies,[21] but is now claiming that the matter has been concluded. DKT. No. 185, Page 14, lines 16-18 ("Moreover, Plaintiff does not allege that it

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Rancheria was never successfully accomplished under the Act. Thus, the Table Bluff Band retains its status as the federally recognized governing body of the Rancheria, eligible to participate in federal programs and benefits provided to federally recognized Indian tribes or bands.").

[20] DKT. No. 22, page 9 ("Defendant admits generally that the Mishewal Wappo Tribe of Alexander Valley was dismissed from that litigation [*Tillie Hardwick v. United States*, No. C-79-1710-SW (N.D.Cal. 1979)] without prejudice, under the terms set forth in the relevant order.") **compared to** DKT. No. 187, page 5, lines 15-16 ("The "Mishewal Wappo Tribe," as an entity distinct from the Alexander Valley Rancheria, was not part of that litigation.").

[21] DKT. No. 187, fn. 29.

sought reconsideration of an unfavorable finding by the Assistant Secretary before the Interior Board of Indian Appeals, as provided under 25 C.F.R. § 83.11.").

Second, the Federal Defendants seek to distinguish the 1987 memo recommending restoration for the Plaintiff as referencing only the Distributees and their Dependents to be restored. Rather, the 1987 letter also considered, ". . . whether there currently exists, or previously existed, a large Indian population on, or adjacent to, the rancheria . . ." DKT. No. 59-16, page 6. While it is true that the 1987 recommendation sought to settle the remaining cases for the unrestored Tribes along the same lines as the previous settlements, it is apparent that the BIA was considering the larger Tribal entity as well. *Id.*

D. The Assistant Secretary Acted Arbitrarily And Capriciously By Refusing To Use Its Administrative Authority To Correct Its Own Recognized Error.

In the Federal Defendants' Response to the Plaintiff's Motion for Summary Judgment on page 16, line 4, they state, ". . . termination under the CRA required only the participation and vote of those individuals who used and occupied the rancheria property. By itself, this statement is inaccurate. The CRA's terms provided that one of three group could prepare the Distribution Plan; those holding informal or formal assignments, those Indians of the rancheria, or the Secretary. CRA paragraph 1.There is no requirement of actual use or occupation. This is a misrepresentation of the Act by the inclusion of BIA policy regarding law assignments, e.g. the BIA required use and occupancy, not the CRA. However, Congress did anticipate that the participants would be those who had rights to the land regardless of use or occupation. Specifically,

> "Attention is directed to the fact that no provision is made for preparing a membership roll for each rancheria or reservation. The preparation of such rolls impracticable because the groups are not well defined. Moreover, the lands were for the most part acquired or set aside by the United States for Indians in California generally, rather than for a specific group of Indians and the consistent

> practice has been to select by administrative action the individual Indians who **may** use the land."

Emphasis added.

Although this Report refers to those rancherias where the purchase was for landless Indians, which is not the case with the Wappo Indians,[22] it does evince the fact that the BIA had a list or should have had a list of those Indians with use and occupation rights. Rather than debate the TLC, the Plaintiff simply reasserts its claim that the Secretary, aware of the Tribe's unlawful termination acted arbitrarily and capriciously by not restoring the Tribe administratively, especially when it had done so before with other terminated Tribes.

III. SUMMATION OF THE UNDISPUTED MATERIAL FACTS.

A. Plaintiff Was Recognized By The Federal Government No Later Than June 11, 1935.

The Federal Defendants have repeatedly acknowledged the Tribe as the Mishewal Wappo Tribe of Alexander Valley. This is accurate given that the Plaintiff is the band of Wappo Indians that called the Alexander Valley home. The absence of any reference to the Rancheria when acknowledging the Tribe is further evidence that the Rancheria itself was neither an Indian entity nor was it a criterion of being Wappo.

The OFA letter recognizes that the group, the Plaintiff, was much larger than the Distributees and that one of the best places to begin accounting for membership is the 1935 voters list. Plaintiff's Motion for Summary Judgment, Attachment 7. Notably, the newly proposed OFA regulations for petitioning Tribes suggests that the year of first recognition of the petitioners by outsiders be changed from 1900 to 1934. Http://www.bia.gov/WhoWeAre/AS-IA/Consultation/index.htm.

B. The Plaintiff Is The Same Tribe That Was Unlawfully Terminated.

The Federal Defendants' arguments that the Plaintiff either never existed as a Tribe or was never recognized as such is the last-ditch effort towards implementation of a protocol made

[22] DKT. No. 186, Attachment 5.

famous by William Claude Dukenfield wherein the first option is to dazzle with brilliance. It is obvious that the Federal Defendants opted for the second option under that approach.[23]

In an effort to clarify the point that the Plaintiff has standing, it has been the subject of at least three evaluations and found unanimously to be the Tribe affected by the CRA and deserving "immediate restoration." DKT. No. 59-16, page 6 (Noting that staff from three BIA offices met and reviewed existing records and after evaluations by seven criteria determined that the Plaintiff should be restored); DKT. No. 59-16, Page 31 (citing six criteria by which the ACCIP used to determine if a terminated Tribe, ". . . would meet the following criteria used by the Federal Government in evaluating a terminated tribe's eligibility for restoration.'); Congressional Testimony of Assistant Secretary of Indian Affairs Kevin Gover, "To be considered ready for restoration, the BIA requested current certification of the documentation from respective e governing bodies of these terminated tribes. . . A copy of the official membership list of all known current members of the group, separately certified by the group's governing body."

The Federal Defendants cannot credibly rewrite the purpose and history of the CRA especially when they have repeatedly found that the Plaintiff is the same tribal entity that was terminated and that they are deserving of restoration.[24] The Wappo Indians of the Alexander

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[23] An example of this technique is found in the first sentence of the Federal Defendants' Response Brief wherein they claim, "Plaintiff seems to acknowledge that 'the Wappo people, as a Tribe, was *[sic]* not terminated . . . .'" This is not only poorly quoted but incorrectly corrected. The full quote is "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." Properly quoted, it shows that the Plaintiff was referring to the Tribe's "existence" as a people and not its federally recognition. On another point, the correction of the conjugated verb form "was" is erroneous since the verb shows the action of the noun "existence" not "people" as in the misquoted version.

[24] Even though the Federal Defendants have attempted to redefine "Tribe" so that it refers to the Rancheria instead of actual people, its own filing contradicts that notion. On page 6, they state, "If the ACCIP uses the terms 'tribe' and 'rancheria' interchangeably, it is because those Indians living on a rancheria may be deemed a 'tribe' under the IRA." This is exactly what the Plaintiff is arguing, i.e. on June 11, 1935 the voters for the IRA became a federally recognized Tribe. All of the Plaintiff members descend from those fourteen voters.

Valley, now the Mishewal Wappo Indians of the Alexander Valley are the same people today as they were when they were unlawfully terminated and are the same people that the BIA should have restored long ago.[25] When the Federal Defendants argue that the Tribe waited too long, it does so not only with unclean hands but without realization that the Wappo people have suffered for the many years not the federal government. It is time for restoration.

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.

[25] DKT. No. 59-16, Page 34 ("In its advisory capacity to newly restored tribes, the BIA often urges the tribes to confine their membership to persons appearing on the distribution list prepared during termination, and tribal membership, sows conflict among different groups of potential members, and ignores the fact that many tribal members were arbitrarily omitted from the distribution list in the first place.").

CERTIFICATE OF SERVICE

I, Joseph L. Kitto, hereby certify that on July 5, 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 July 5, 2013 at Santa Rosa, California.

By: /s/ Joseph L. Kitto