No. 16-616

IN THE SUPREME COURT OF THE UNITED STATES

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA, RICHARD JOHNSON, in his official capacity as Tribal Chairman and in his individual capacity as the heir/legatee/successor to the distributees Peter Johnson and Margaret Johnson,
Petitioners,

vs.

S.M.R. JEWELL in her official capacity as Secretary of the Interior, KEVIN K. WASHBURN in his official capacity as Assistant Secretary - Indian Affairs of the United States Department of Interior,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals' *nunc pro tunc* ruling depriving Petitioners of substantive procedural rights was in error?

2. Whether the Ninth Circuit Court of Appeals' ruling on the statute of limitations was in error?

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On May 25, 2016 the United States Court of Appeals for the Ninth Circuit issued a six page unpublished Memorandum decision affirming the District Court's order dismissing this action. See Appendix A for the Memorandum decision and Appendix B for the District Court's March 7, 2014 "Order Granting Plaintiffs' Motion to Correct a Clerical Mistake in *Hardwick*; Plaintiffs' Motion to Augment the Pleadings in *Nisenan*; Granting Defendant's Motion for Judgment on the Pleadings in *Nisenan*; and Dismissing the *Nisenan* action with Prejudice." A Petition for Rehearing En Banc was denied by the Ninth Circuit on August 10, 2016. See Appendix C.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. section 1331. The District Court entered Judgment on March 7, 2014 dismissing the *Nisenan* action with prejudice. The Tribe filed a timely notice of appeal on March 21, 2014. The Ninth Circuit Court of Appeal had jurisdiction under 28 U.S.C. section 1291, and issued its Memorandum opinion affirming the District Court's dismissal on May 25, 2016. A Petition for Rehearing En Banc was denied by the Ninth Circuit on August 10, 2016. This Court has jurisdiction to review on a writ of certiorari the judgment in question pursuant to 28 U.S.C. section 1254. The notification required by Rule 29.4(b) has been made.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), amended by Pub. L. 88-419, 78 Stat. 390 (1964) and the Administrative Procedures Act, 5 U.S.C. sections 551 to 559, are the statutes involved in this dispute.

STATEMENT OF THE CASE

Petitioners are a Native American Indian Tribe that has existed in the vicinity of what is now Nevada City, California, since well before the Gold Rush, and its Tribal Chairman, Richard Johnson. In approximately 1859, the Tribe moved to the parcel subsequently identified as, and with, the Nevada City Rancheria (hereinafter "Tribe" or "Nevada City Rancheria").

On May 6, 1913 President Woodrow Wilson issued an Executive Order setting aside and reserving the parcel stating: "It is hereby ordered the following described land in Nevada County, California, be and the same hereby is, withdrawn from entry sale or other disposition and set aside for the Nevada or Colony tribe of Indians residing near Nevada City," and the 75-acre parcel was so listed.[1] The Tribe was recognized by the federal government from 1913 to 1964 when it was terminated pursuant to the California Rancheria Termination Act (Pub. L. No. 85-671, 72 Stat. 619

[1] See Appendix D.

(1958), amended by Pub. L. 88-419, 78 Stat. 390 (1964)).[2]

In 1979 the Nevada City Rancheria and others sued the United States to regain federal recognition in *Tillie Hardwick, et al. v. United States, et al.*, Case No. 5:79-cv-01710-JF. *Tillie Hardwick* was a class action and the Tribe was a class member. Most of the claims in *Tillie Hardwick* were resolved in 1983 by way of a "Stipulation for Entry of Judgment," entered into by the United States and California Indian Legal Services ("CILS") on behalf of the various rancherias.[3] For unknown reasons the Nevada City Rancheria was left off the "Stipulation for Entry of Judgment."

In 2009 the Tribe filed a new action under the California Rancheria Termination Act entitled *Nisenan Tribe of the Nevada City Rancheria et al., v. Jewell et al.*, Case No. 5:10-cv-00270-JF ("*Nisenan*"). A short time later the Tribe discovered that it was still a party to *Tillie Hardwick,* having never been dismissed. The current appeal arises out of both *Tillie Hardwick* and *Nisenan.*

On March 7, 2014 the District Court for the Northern District of California, the Honorable Jeremy Fogle presiding, recognized that, through a clerical error committed in 1983, the Nevada City

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[2] See Appendix E.

[3] See Appendix F.

Rancheria remained a party to *Tillie Hardwick*. In response to a motion brought under FRCP 60(a) and 60(b) the District Court dismissed the Tribe from *Tillie Hardwick* but made the dismissal effective, *nunc pro tunc*, as of 1983. The District Court then granted the United States' motion for judgment on the pleadings in *Nisenan* and dismissed the action with prejudice on the basis that the action was time barred. On March 25, 2016, a three judge panel of Ninth Circuit ruled that the Nevada City Rancheria's action in pursuit of federal recognition was time barred under the Administrative Procedure Act's ("APA's") six year statute of limitations. (*See* 28 U.S.C. § 2401.) On August 10, 2016 Petitioners' Petition for Rehearing En Banc was denied.

The Ninth Circuit erred when it dismissed Plaintiffs from *Tillie Hardwick* on a *nunc pro tunc*. Under applicable law Plaintiffs' dismissal from *Tillie Hardwick* can not be retroactive. Case law in the Ninth Circuit and elsewhere is very clear that while a district court enjoys great latitude when it comes to correcting mistakes or omissions in the record, a retroactive order, like the one here, may not be used to record an event that never occurred or have the record reflect a fact that never existed. The Ninth Circuit erred when it affirmed the District Court. The dismissal should have been effective as of March 7, 2014, by which time the *Nisenan* case was already on file. "*Nunc pro tunc* signifies now for then, or in other words, a thing is done now, which shall have [the] same legal force

and effect as if done at [the] time when it ought to have been done." (*United States v. Allen*, 153 F.3d 1037, 1044 (9th Cir. 1988).) The power to amend *nunc pro tunc* is a limited one and may only be used where necessary to correct a clear mistake and prevent injustice. (*Martin v. Henley*, 452 F.2d 295, 299 (9th Cir. 1971).) The power to correct its orders does not allow the court to alter the substance of what actually transpired or to backdate events to serve some other purpose.

The Ninth Circuit relied upon two criminal cases, *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000) and *United States v. Inocencio*, 328 F.3d 1207 (9th Cir. 2003) in affirming the District Court's *nunc pro tunc* order. Neither case is on point. In *Sumner* there was no error and this Court, accordingly, affirmed denial of a request for an order *nunc pro tunc* expunging a previous conviction. (*Sumner* at 1009.) Here, in contrast, all of the parties and the District Court agreed that an error was made when the Nevada City Rancheria was not included in the 1983 Stipulation for Entry of Judgment.

In *Inocencio* there was an error which the government subsequently corrected through an order *nunc pro tunc* revoking a person's naturalization. Such an order was legally mandated upon conviction of knowingly procuring naturalization in violation of the law but the United States neglected to seek such an order until six years after the original conviction. (*Inocencio* at

1208-09.) As noted by the panel Opinion ". . . such revocation should have (but for a clerical error) followed automatically from the defendant's conviction for naturalization fraud." (Citation omitted.) (*Inocencio* at 1208-11. Panel Opinion, p. 3.)

In *Tillie Hardwick* there was no "automatic" action that followed entry of the 1983 Stipulation for Entry of Judgment. Instead, the District Court retained jurisdiction and continued to decide matters subject to the Stipulation for Entry of Judgment for the next thirty years.

Put simply, an order *nunc pro tunc* may not be used to alter substantive rights, which is the practical effect of the Ninth Circuit's ruling.

The District Court also erred when it held that the *Nisenan* action was brought outside the statute of limitations. The *Nisenan* action was filed three years before Plaintiffs were dismissed from *Tillie Hardwick*. The statute of limitations was tolled beginning in 1979 when *Tillie Hardwick* was originally filed. At that time the United States waived both the statute of limitations and laches by choosing not to raise them in its answer to *Tillie Hardwick*. The Tribe was one of the intended beneficiaries of that waiver until it was dismissed from *Tillie Hardwick*, which again, did not occur until March 7, 2014, by which time the *Nisenan* action was on file. The United States may not revoke its waiver of the defenses now.

There is no prejudice to the United States in providing Plaintiffs with their day in court. Plaintiffs' case is, according to the United States, an Administrative Procedures Act challenge where the record has already been certified by the United States and then augmented by way of a motion by Plaintiffs that was granted by the District Court. While the passage of time is regrettable, it in no way prevents justice being done now.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Certiorari should be granted because the District Court and Ninth Circuit's rulings in this matter are such a departure from the other proceedings in *Tillie Hardwick* as to require exercise of this Court's supervisory power.

In the 1983 Stipulation for Entry of Judgment the trial court in *Tillie Hardwick* divided the Indian rancherias that were parties to the action, including the Nevada City Rancheria, into three groups. The first group consisted of those rancherias whose distributees had received real property as the result of the implementation of the Rancheria Act.[4] Federal recognition was restored to those seventeen rancherias.[5] The second group consisted of those persons who received non-real property assets of other rancherias.[6] These

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4 See Appendix F, Stipulation for Entry of Judgment, ¶ 2.

5 *Id.* at ¶ 3.

6 *Id.* at ¶ 14.

claimants were dismissed without prejudice to their claims being re-filed in new actions.[7] The third group consisted of rancherias and individuals who had filed separate legal actions.[8]

The Nevada City Rancheria properly belonged in the second grouping, i.e., the rancherias who were dismissed without prejudice to re-filing, but it was inadvertently left out of the Stipulated Judgment, and thus remained a party to *Tillie Hardwick*. Because the District Court considered the *Tillie Hardwick* case closed, the Tribe filed a Motion for Correction of Clerical Mistake pursuant to FRCP 60(a) and 60(b) asking that it be dismissed from *Tillie Hardwick* without prejudice effective as the date the District Court issued its opinion, i.e., some time in 2013 or 2014.[9] The District Court ultimately agreed with the Tribe that the Tribe had been inadvertently omitted from

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[7] Ultimately nearly all of these tribes would regain federal recognition in the subsequently filed actions through settlement with the United States. See, for example, *Wilton Miwok Rancheria v. Salazar*, No. C-07-02681-JF (N.D. Cal. 2009) (Stipulation and Order for Entry of Judgment). Others would be restored through the legislative process, i.e., the United Auburn Community by way of Public Law No. 103-434, codified at 25 U.S.C. § 1300(l); the Paskenta Band of Nomlaki Indians by way of Public Law No. 103-454, codified at 25 U.S.C. § 1300(m); and the Federated Indians of the Graton Rancheria by way of Public Law No. 106-568, codified at 25 U.S.C. § 1300(n).

[8] *Id.* at ¶¶ 15-19.

[9] The motion was filed on April 3, 2013.

the 1983 Stipulation but then granted the motion, under Rule 60(a), *nunc pro tunc* as of the date of the 1983 Stipulation.

The District Court erred when it, *sua sponte,* made the dismissal retroactive to 1983 – a drastic result that no party had requested. This action deprived the Nevada City Rancheria of the key benefit of the Stipulated Judgment for other similarly situated rancherias – the opportunity to regain federal recognition. To place the Nevada City Rancheria into the same position as the other similarly situated rancherias in 1983, the District Court should have made the dismissal effective as of March 7, 2014, which is what the Nevada City Rancheria requested, so that it could pursue, as did the other rancherias dismissed from *Tillie Hardwick*, federal recognition, without inter-position by the United States of claims of laches or the statute of limitations.

The District Court's error in dismissing the Nevada City Rancheria *nunc pro tunc* was fundamental and went far beyond correcting a clerical mistake. Unlike all of the other rancherias that were parties to *Tillie Hardwick*, the Nevada City Rancheria alone was denied the opportunity to pursue federal recognition.

The question is what was intended at the time of the 1983 Stipulated Judgment. There can be little dispute that all signatories to the Stipulated Judgment, and the Court, intended that

the rancherias in the classification that should have included the Nevada City Rancheria would receive the opportunity to pursue federal recognition in a subsequent lawsuit. That is why the dismissal was without prejudice to re-filing and why the United States waived the defenses of the statute of limitations and laches. By making the dismissal retroactive to 1983 the District Court, and the Ninth Circuit deprived the Nevada City Rancheria of the substantive procedural rights it was entitled to, and that all other similarly situated rancherias received, under the Stipulated Judgment.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant the petition for certiorari.

Dated: October 28, 2016 Respectfully submitted,

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APPENDIX A

FILED
MAY 25, 2016
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA; et al., Plaintiffs – Appellants, v. SALLY JEWELL, in her official capacity as Secretary of the Interior, et al.; Defendants – Appellees.	No. 14-15541 D.C. No. 5:10-cv-00270-JF MEMORANDUM*

Appeal from the United States District Court for the Northern District of California Jeremy D. Fogel, District Judge, Presiding

Submitted May 13, 2016**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.