No. 15-15993

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY RANCHERIA
Plaintiff-Appellant,
v.
SALLY JEWELL, *et al*.,
Federal Defendant-Appellee,

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiff-Appellant, the Mishewal Wappo Tribe of Alexander Valley ("Appellant" or "Tribe") brings forth claims wherein subject matter jurisdiction exists under 28 U.S.C. § 1331 and 28 U.S.C. § 1361. The District Court's Order Granting Federal Defendant's Motion for Summary Judgment (MSJ) is final as to the Tribe and appealable to this Court pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erred in determining that all of the Tribe's claims rely upon the unlawful termination of the Alexander Valley Rancheria (AVR)?

2. Whether the District Court Made a Legal Error In Granting Federal Defendants Motion for Summary Judgment by Inappropriately Applying the 28 USC 2401(a) 6-year Statute of Limitations to Tribe's Claims.

3. Whether the Court Erred by Disregarding the Preclusive Effect of the Existing Fiduciary Duty on the aforementioned Statute of Limitation.

4. Whether the Court Made a Legal Mistake by Rejecting the Statute of Limitations exception "Equitable tolling" to the Tribe's Claims.

STATEMENT OF THE CASE

The Appellant, the Mishewal Wappo Tribe of Alexander Valley, is a Native American Tribe, brought this action on June 5, 2009 complaining that the Appellees had breached their fiduciary duties by failing to include the Tribe on federal lists without having officially terminated the Tribe, i.e. Congressional termination. The Tribe argues generally that the Appellees: 1) unlawfully terminated their rights to use the Alexander Valley Rancheria via the implementation of the California Rancheria Act (CRA), Public Law 85-671, 2) failed to include the Tribe on the list of "federally recognized" tribes as required by Federally Recognized Indian Tribe List Act of 1994 ("List Act") 25 U.S.C. §479a, and 3) failed to reinstate the Tribe's status when formally requested to do so and in accordance with their duty under the List Act.

On March 5, 2010, the County of Napa, and on March 24, 2010 the County of Sonoma, respectively filed Motions to Intervene requesting this Court permit each to intervene as a matter of right, or in the alternative, as permissive intervenors. At that time, Plaintiff and Federal Defendants were engaged in mediation and negotiation of resolution of the issues in this case. Plaintiff did not originally oppose the Motions:(1) in the interest of inclusion of all potential stakeholders as Plaintiff was aware that it may have dealings with some or all of the Counties in the future, and (2) based on the representations made by the

Counties' representatives that the Counties were only interested in resolving potential land acquisition issues that may impact their county should the Plaintiff be restored through this action.

On May 10, 2010, Plaintiff filed its First Amended Complaint (FAC), Dkt. No. 49. On May 21 and May 24, 2010, the Tribe and Appellees filed Statements of Non-Opposition to the Counties Motion to Intervene and on May 26, 2010 the Court granted the Counties' Motions to Intervene. The Intervenors filed a Motion to Dismiss on May 16, 2011, which was denied on October 12, 2011, Dkt. No. 150.

On February 21, 2012 Appellants filed a Motion to Dismiss Intervenors from the lawsuit claiming that the Intervenor Counties had overstepped their initial pleadings for intervention and lacked standing to be fully involved in the case. Motion to Revoke Intervenor Defendants' Status and Dismiss, February 12, 2012, Dkt. No. 162. The District Court granted the Motion on September 28, 2012, Dkt. No. 172 and this Court affirmed on July 29, 2013, Case No. 17-360, Dkt. Entry 26-1.

Appellant and Appellees then filed cross Motions for Summary Judgment on May 31, 2013, Dkt. No. 185, and, Dkt. No. 186 respectively. The District Court held a hearing on said motions on July 25, 2013 and over two years later issued its decision. Order Granting Defendants' Motion for Summary Judgment; Denying

Plaintiff's Motion for Summary Judgement, March 23, 2015, Dkt. No. 197. The District Court Order denied The Tribe's Motion and Granted Appellees'. The Tribe has filed this appeal.

STATEMENT OF THE FACTS

The Tribe has shown that it is the same historic Wappo Tribe recognized by the Federal Defendants.[1] The interaction between the Wappo Tribe and the United States government is well documented. In 1908 and 1913 the United States purchased property for the use and benefit of the Wappo tribe. 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). After years of Wappo Tribe-United States relations, Congress passed the Indian Reorganization Act of 1934 (IRA). 25 U.S.C. §476. The Wappo Tribe submitted a list of those wishing to vote. Approved List of Voters for the Indian Reorganization of

[1]Appellant's Motion for Summary Judgment page 6, lines 14-24, ("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.);(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.)."

Alexander Rancheria, MWT-AVR-2012-000054. The federally approved list became the base roll of the Tribe's membership list.[2] For the next 20 (twenty) years the Wappo Tribe struggled to survive on the desolate and virtually barren Rancheria lands, often taking seasonal work off the Rancheria to subsist. Letter from John Terrell, Inspector DOI, Office of Indian Affairs to the Commissioner of Indian Affairs (July 29, 1917), Dkt. No. 186. In 1958, Congress passed the California Rancheria Act. The relevant result was that the Wappo Tribe lost the right to use the Alexander Valley Rancheria. Separate and aside from this consequence, the United States seemed to no longer acknowledge the Wappo Tribe. Although the United States has stated that neither the CRA nor any other act of Congress or the Bureau of Indian Affairs terminated the Wappo Tribe's status that designation has gone missing.[3]

I. Even now the Appellees Engage in Disingenuous Representations to Continue the Deception of the Ultra Vires termination of the Tribe.

The Appellees, in their Answer to the Tribe's FAC, allege that there existed

[2] Solicitor's Opinion M27810 DOI SOL Opinion Howard-Wheeler Act Interpretation, 484, 486-488 (Dec. 13, 1934) defined eligible voters as those members who had a "legal interest in the affairs of the reservation" as well as an interest in the Tribe and its assets. Dkt. 187-2, page 3, Fn. 2. As the District Court pointed out, James Adams, who would become a 2/3 AVR Distributee, was excluded from voting by the BIA.

[3] The District Court also found that the Wappo Tribe's federal status was not terminated by the CRA, Dkt. No. 197, page 15, line 3-4 ([T]ermination of the Alexander Valley Rancheria did not equate to the termination of the Plaintiff's status as a federally-recognized tribe.").

a tribal entity named the "Alexander Valley Rancheria" which was comprised only of Indians who lived on the Rancheria in 1961. Federal Defendants' Answer to FAC, March 21, 2012, Dkt. No. 167, page 12, paragraph 69, and that The Tribe, who is completely comprised of the descendants of those tribal members recognized in 1935 by the Secretary in the IRA vote, is a separate group of Indian people that has never been recognized. This is an untruth that not only defies the facts, but seems to be an attempt to confuse and confound the Court's review.

In 1994 Congress passed the H.R. 4180, codified at 25 U.S.C. §479a, entitled, the Federally Recognized Indian Tribe List Act of 1994 ("List Act"). Section 103, subsection 3 states, "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." Moreover, Congress was clear as to its intentions, "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." Id. Finally, in Section 202, Congress reported that it had finds that, "the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress; and the Secretary may not administratively diminish the privileges and immunities of federally recognized

Indian tribes without the consent of Congress."

In this same Act, Congress specifically restored the federal recognition status of the Paskenta Band of Nomlaki Indians of the Paskenta Rancheria of California, a tribe like the Appellant who had their Rancheria lands terminated by the CRA. However, unlike the torrid tale spun by the Appellees of Rancheria tribes and other nonexistent tribes, the Act identified who Congress acknowledges as the Tribe. In restoring Paskenta, Congress stated that the initial membership should include: "(A) such individual's name was listed on the Paskenta Indian Rancheria distribution roll compiled on February 26, 1959, by the Bureau of Indian Affairs and approved by the Secretary of the Interior on July 7, 1959, pursuant to Public Law 85-671; (B) such individual was not listed on the Paskenta Indian Rancheria distribution list, but met the requirements that had to be met to be listed on the Paskenta Indian Rancheria list;
(C) such individual is identified as an Indian from Paskenta in any of the **official or unofficial rolls of Indians prepared by the Bureau of Indian Affairs (IRA Voting List)**; or (D) such individual is a lineal descendant of an individual, living or dead, identified in subparagraph (A), (B), or (C)." Section 306(b)(A-D). Emphasis added.

All Rancherias are nothing but lands held in trust for the benefit of Indians. Those Indians who were asked to and did vote on the IRA were identified as

Tribes by the BIA.[4] The reference to Alexander Valley Rancheria apart from the Mishewal Wappo Tribe or the Wappo Tribe does not make these two separate entities any more than separately calling the Paskenta Tribe of Nomlaki Indians or the Paskenta Rancheria creates two entities. Appellees' Answer to Appellants' FAC page 2, footnote 1. If Congress understood that there was one tribe and one rancheria in the 1994 List Act, it is absurd for the Appellee to concoct their "second tribe theory" in order to avoid responsibility for their error, i.e. they simply left the Tribe off the list as they had done many times before with other tribes due to clerical error or the ultra vires flawed thought that the Secretary could terminate tribes unilaterally contrary to the 1994 Act.[5] Whatever the basis, the error should be corrected, not compounded by the fabrication of fantastical entities that never existed.

II. Appellant's Claim and Relief are Simple and Appropriate.

Appellant, the Wappo Tribe seeks the restoration of its status that the

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[4] The Supreme Court has stated clearly that ". . . the term 'now under federal jurisdiction' in §479 unambiguously refers to those Tribes under federal jurisdiction when the IRA was enacted in 1934 . . ." Carcieri v. Salazar, 555 U.S. 379, 395 (2009). As an IRA Tribe, Appellant was unarguable federally recognized.

[5] 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."

District Court and readily acknowledges, but yet cannot explain its loss. As simple as that is, Appellees have intentionally recast the Tribe's request for relief as one asking for the CRA termination of the Rancheria lands to be undone. Appellees' Answer to Appellants' FAC, The Tribe's simple request that the Secretary to put it on the List of federally recognized Tribes has been lost in the quagmire of misunderstanding and misconstructions of the CRA and restoration.

In the present case, the Tribe's requested relief, the restoration of its federally recognized tribal status, has been incorrectly reviewed as a request to reassert the old Tillie Hardwick claims rather than simply identify and correct the error of omitting the Tribe from the List. Simply put, since the evidence shows that the Mishewal Wappo Tribe was recognized by the federal government in 1935 as a voting entity for the IRA, and since the Appellee admits that there was never a termination of that tribal recognition status, there can be no intervening act for which the Statute of Limitations (SOL) to begin to run.

Nonetheless, Appellees argue that the Secretary's publishing of a list of recognized tribes in 1979 and 1985 should have been notice to the Tribe of the present cause of action and that the SOL has run. Dkt. No. 185, page 9, lines 13-15. Even if these publications were a de facto termination, it fails to trigger the SOL for three reasons: 1) the un-repudiated fiduciary duty owed to the Wappo Tribe by the United States precludes the Statute of Limitations from applying, 2)

assuming arguendo that these publication were termination, they lack authority and are therefore void via ultra vires, and 3) the specific fiduciary duty to create an accurate list did not exist until 1994, which is when the breach would become actionable.[6] Acri v. Int'l Assn. of Machinists & Aerospace Workers, 781 F.2d 1393, 1396 (9th Cir. 1986)(Under federal law a cause of action accrues when the plaintiff is aware of the wrong **and can successfully bring a cause of action**."). Emphasis added. Finally, the equities of allowing simple correction and granting the Wappo Tribe's relief far outweighs the value of allowing the Appellees' error, which is in contravention of the will of Congress, i.e. administratively terminating Tribes[7], to stand.

SUMMARY OF THE ARGUMENT

The District Court's Order granting the Federal Defendants' Motion for Summary Judgment was in error because: a) the Wappo Tribe's claims were held to all stem from a single act: the unlawful termination of the Alexander Valley Rancheria, b) dismissing the existence and application of the government's fiduciary duty owed which would have made causes of action preclude the

[6] Appellant's membership is made up entirely of descendants of the 1935 IRA voter/membership list some of which had not reach the age of consent in 1994, but did after this lawsuit was filed in 2009. Buntea v. State Farm Mut. Auto Ins. Co., 467 F.Supp.2d 740, 749 (E.D.Mich.2006). (Identifying "traditional judicial tolling doctrines" as including the minority age of the party).

[7] Federally Recognized Indian Tribe List Act of 1994, Section 202.

application of the Statute of Limitations at 28 U.S.C. §2401(a), and c) dismissing the equitable tolling exception which would have stayed the SOL.

ARGUMENT

I. The District Court Committed Legal Error by Holding That All of Appellant's Claim Arise from a Single Event; The Termination of the Alexander Valley Rancheria Lands.

A. Applicable Law.

The District Court considered the California Rancheria Act, California Rancheria Termination Act, Public Law 85-671 (August 18, 1958) and the Act, Indian Reorganization Act in making its finding regarding the Tribe's claims of unlawful termination of the Alexander Valley Rancheria.

B. Standard of Review.

De Novo review is appropriate in this case wherein the District Court made multiple errors of application of the relevant law and legal interpretation in granting Appellant's Motion for Summary Judgment. Wapato Heritage, v. United States, 637 F.3d 1033, 1037 (9th Cir. 2011)(quoting Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co., 546 F.3d 1142, 1145 (9th Cir.2008) "A district court's grant of summary judgment is reviewed de novo.") An Appellate Court reviewing [an agency] decision … "must set aside any agency action, findings, or conclusions found to be-(1) arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence....").

Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir.1995).

C. The Improper Termination of the Lands of the Mishewal Wappo Tribe, While a Breach of the Federal Defendants' Fiduciary Duty is Only One Claim and Not the Basis of All Appellant's Claims.

The District Court made a fundamental error by finding that all of the Tribal Plaintiff's claims stem from the same event; the unlawful termination of the Alexander Valley Rancheria (AVR) under the California Rancheria Act (CRA) in 1961. Dkt. 197, page 8, lines 10-13. While the Tribe did focus on the facts of said event, it was not asserted as the basis for all of its claims. The Tribe's claim regarding the unlawful termination of the AVR serves to assert that the Tribe was denied its right to "use" the land individually or collectively. This tribal right was violated by the misapplication of the CRA.

This claim is distinctively different from the Tribe's APA claims, which is that the Federal Defendant has breached its fiduciary duty by failing to include the Mishewal Wappo Tribe on the federal list of recognized tribes. This claim is not contingent on whether or not it is found that the AVR was unlawfully terminated. FAC at pages 26-31. As noted by the District Court's Order Granting Defendants' Motion for Summary Judgment; Denying Plaintiff's Motion for

Summary Judgment, Fn. 12, page 15 (Dkt. 197 2015)". . . [t]he IRA permitted the Indians of the Alexander Valley Rancheria to organize themselves into a tribe in 1935 due to a common interest in the previously-established rancheria, this fact did not then render the existence of the tribe dependent on that of the rancheria."). Thus, Appellant's claim that the Federal Defendants' breached the fiduciary duty owed by denying them tribal status is validly brought under the Indian Reorganization Act and the List Act.[8] Even if it were determined that the AVR had been terminated lawfully, Appellant's claimed land use rights is not a condition precedent to resolving Appellant's other claims as the legal basis for the other claims is still unresolved.

1. Appellant's Claim That the BIA Unlawfully Withheld and Unreasonably Delayed the Decision to Restore the Tribe to Federal Recognition Status is Not Dependent on Resolution of the Unlawful Termination of the Tribal Lands.

In the Appellant's Motion for Summary Judgment (MSJ), Appellant argued that, "[t]he 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

[8] It is worth noting that the only analysis of the FAC that could result in the finding that all the claims stem from the termination of the Rancheria would be if it were determined that the Appellant's tribal status, that which it is suing for, was also terminated by the CRA, however this analysis has been repeatedly rejected by both Judge Davila and the Appellees.

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." This argument is not reliant on the CRA, but rather invoked the fiduciary duty created under the Federally Recognized Indian Tribe List Act of 1994 ("List Act").

Further, Appellant identified the specific "agency action" complained of in the Motion for Summary Judgment, "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.[9] This claim, unlike the CRA claims, requires the interpretation and application of the Administrative Procedures Act and the List Act. Therefore, the claim should not have been grouped as being dependent on a determination of the unlawful termination of the Rancheria.

2. The Wappo Tribe's Claim That the BIA "Failed to Conclude a Matter Presented to it" is Not Dependent on Resolution of the Unlawful Termination of the Tribal Lands.

In the Appellant's Motion for Summary Judgment (MSJ), Appellant argued

[9] 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.

that the Assistant Secretary of Indian Affairs "failed to conclude a matter presented to it" by failing to restore the tribe on the list of federally recognized tribes. This claim is reliant upon the APA not the CRA or IRA. This claim involves facts determined when the tribe initially filed its formal request that the Secretary correct his error as was within his authority and historical prerogative. At the risk of being redundant, the Wappo Tribe points out that the determination of whether or not the termination of the Alexander Valley Rancheria is lawful or not is irrelevant to the aforementioned claim.

3. Appellant's Claim That the Secretary Acted "Arbitrarily and Capriciously" is Not Dependent on Resolution of the Unlawful Termination of the Tribal Lands.

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.

In the Tribe's MSJ, Appellants argues that the Assistant Secretary acted "arbitrarily and capriciously" by the "de facto" termination of the Tribe by not including an acknowledged tribal entity, i.e. the Mishewal Wappo Tribe of

Alexander Valley on the list of federally recognized Tribes pursuant to and in accordance with the fiduciary duty owed via the List Act of 1994. As noted above, the 1994 List Act clearly creates the duty to report as well as makes it clear that the Secretary may not administratively terminate a Tribe. In the present case, the Secretary has breached its fiduciary duty owed to the Tribe by waving its bureaucratic hand and arbitrarily deciding to eliminate the Tribe's rightful place on the list of recognized Tribes.

D. The District Court Erred by failing to Address Factual issues Before Summarily Applying the federal Statute of Limitations.

1. The Appellant's Status as A Federally Recognized Tribe is Factual and Undeniable.

The words "Federal Recognition" simply means that the United States acknowledges the existence of a tribe of Native Americans and that by doing so the government owes a fiduciary duty to that tribe. Seminole Nation V. United States, 316 U.S. 286, 297 (1942). Prior to 1978 the extension of federal recognition status was an informal process based on the interaction of the government and the Tribe. Carcieri at 397-398 (Justice Breyer, concurring)(". . . that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list."). In 1978 Congress directed the Bureau of Indian Affairs to develop regulations governing the extension of federal recognition to tribal entities. 25 CFR

§ 83. These regulations provide for a tribe that has never been recognized by the federal government to become recognized through a protracted petitioning process. Id. at §83.7(f). Also, the regulations provide for the extension of federal recognition for tribes that may have had interaction with the government, but were not officially recognized. Id. at §83.8. The Appellant Tribe was extended the status of federal recognition no later than 1935 via the IRA. See Fn. 4, page 6. The Appellees have even argued that the restoration of the Appellant's status is an appropriate remedy in this case. Federal Defendants' Response to Amended Motion to Dismiss Filed by Intervenors County of Sonoma and County of Napa, Dkt. No. 146, May 20, 2011.[10] As stated above, federal recognition status creates a fiduciary duty that is not judged by common law trust or fiduciary relationships, thus repudiation of the government's duty to the Tribe is not accomplished by its breach. U.S. v. Jicarilla Apache Nation, 131 S.Ct. 2313, 2323-2324, (2011). The Appellant's federal recognition status and the un-repudiated fiduciary duty owed are threshold factual issues necessary to an initial determination that the SOL applies.

2. The Appellees' Federal Recognition of an Native American Tribal Entity Creates Fiduciary Duties Owed by the United States to that Tribal Entity.

[10] Were the Appellant not a federally recognized Tribe, but rather an unrecognized tribe, restoration would be unlawful since only Congress and the BIA under specific regulations can extend this status to "newly recognized" tribal entities.

It is established law that the United States and its Agencies, e.g. the Bureau of Indian Affairs owe Tribes a fiduciary duty. Seminole Nation at 297.The duty must be defined by a federal statute or regulation. Id. at 296. Appellees extended Tribes federal recognition, as it was defined in 1934, to Tribal entities by requiring the Secretary of the Interior to hold an election for or against application of the Indian Reorganization Act. See Fn. 5, page 6. The Federal Defendant has confirmed that this list of participating Tribal entities evinces the acknowledgment of them as Tribal entities, i.e. federally recognized tribal entities and thus entitled to the fiduciary duty owed tribes. See Letter from Troy Burdick, DOI, BIA, Superintendent to "To Whom it May Concern" (June 14, 2006) ("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").

3. Absent Formal Repudiation, the Fiduciary Duty Continues.

The United States has never withdrawn or repudiated the fiduciary duty it owes to the Appellant as recognized by the District Court. While the Federal Defendants have certainly breached its duty, this does not relieve them of the duty. Infra page 16. As proof of the governments continuing duty and ability to restore the Appellant's status, the Federal Defendants have admitted that

"restoration" is an appropriate resolution to Appellants claims. Since the Secretary can only recognize "new" Tribes through the Part 83 regulatory process, restoration is only a viable remedy if the Tribe had been previously recognized.

4. The United States has Breached its Duties and Failed to Correct the Breach.

It is an irrefutable fact that the Bureau of Indian Affairs, Department of the Interior has breached its duty owed to Native American Tribes concerning administrative termination of recognized tribes. Carcieri at 397. On several occasions the Federal Defendants have corrected their error under the administrative authority they claim to not possess. The Lower Lake Rancheria (AKA the Koi Nation) and Ione Band of Miwok Indians were administratively restored by the ASIA in 2000 and 1994 respectively. The BIA Solicitor has opined officially that the ASIA has the authority to correct administrative errors as it does not extend new federal recognition to Tribes, but rather properly restores the federal recognition that previously existed and would exist , but for the error. The United States has failed to correct the Breach in Appellant's case and refuses to do so.

II. The District Court Committed Legal Error by Applying the Statute of Limitations at 28 U.S.C. §2401(a) Inappropriately.

A. Applicable Law.

The federal statute of limitations at 28 U.S.C. §2401(a) is the basis for

the District Court's decision to grant the Appellees' Motion for Summary Judgment.

B. Standard of Review.

It is entirely appropriate for this Court to review Appellant's case de novo since the District Court's decision involved statutory interpretation. See Miranda v. Anchondo, 684 F.3d 844, 849 (9th Cir. 2011)("The construction or interpretation of a statute is a question of law also reviewed de novo."). The statute should be interpreted to be plain and direct in its meaning. Id. ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there."). Citation omitted.

C. Without Formal Action, Termination of Appellant's Federally Recognized Tribal Status Could Not Have Occurred.

The District Court held that the CRA did not purport to terminate tribal statuses but rather only the rancheria lands. If correct, then there is no Congressional authority, even if unlawfully applied, on which to base the Appellant's loss of tribal status. Since only Congress can create[11] or terminate a Tribe, which it did not do and since both the District Court and the Appellee agree that no such termination occurred, any assertion that the Appellant's status was

[11] Except for the OFA process at 25 CFR 83.7 and federal court decision.

properly terminated would be false. Explanations of what action terminated the Tribe's status remain unresolved and critical to any decision as to whether the federal Statute of limitations applies or is precluded. In other words, if there is no identified intervening action terminating the Tribe, it is equally unidentified as to when the SOL began to run, if at all. Judge Davila made no such determination. His application of the SOL was solely to Appellant's claims of the loss of land use rights of the Rancheria not its loss of tribal status. On page 17, line 23-25 the District Court's Order emphasized that the Appellant, ". . . sat idly for nearly two decades when all the facts needed to raise its claims were available to it long beforehand." Although the District Court is referring specifically to the unlawful termination of the AVR, it does not address the unlawful termination of the Tribe's status which is the heart of the entire case and was unknown in 1961 since, as asserted by the Appellee, said termination never occurred. The Tribe does not ask for restoration of the AVR, but rather its rightful place on the List.

D. District Court Committed Legal Error by Applying 28 U.S.C. §2401(a) Despite the Preclusive Effect of the Existing Fiduciary Duty Owed Appellant by Federal Defendants.

1. Past Case Law Has Recognized The Fiduciary Duty Owed.

The United States, acting through the Secretary of Interior, "has charged itself with moral obligations of the highest responsibility and trust." It "should therefore be judged by the most exacting fiduciary standards". The

Secretary's fiduciary duty as trustee for the Tribe and its members never ended because there was never a purported termination of the Tribe. The Secretary's fiduciary duty to the Tribe imposes upon the Secretary "moral obligations of the highest responsibility and trust," Seminole Nation at 297, and his conduct must be judged ". . . by the most exacting fiduciary standard." Id. Were the District Court to have decided that the Federal Defendants unlawfully terminated the Alexander Valley Rancheria lands, case law demonstrates that the Appellees' fiduciary duty continues even after the unlawful act. Duncan v. Andrus, 517 F. Supp. 1, 6 (N.D. Ca. 1977)(illustrating that a 1964 Rancheria termination fiduciary duties continued despite being brought well after the SOL), Smith v. U.S., 515 F. Supp. 56, 62 (N.D. Ca. 1978)("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 people of the Rancheria . . ."). Thus, it is reasonable to conclude that the unlawful termination of the Tribe's status, whether related to the AVR or not, would also have continuing duties attached.

2. Un-repudiated Fiduciary Duty Precludes SOL.

In the case of U.S. v. Taylor, 104 U.S. 216, 222 (Oct. 1, 1881), the United States Supreme Court held that, "The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in

such manner that he is called upon to assert his rights, the Statute of Limitations will begin to run against him from the time such knowledge is brought home to him, and not before." Although the fiduciary duties owed to an Indian Tribe are much greater than those owed between private parties and the government, this Supreme Court example of repudiation necessary to start the SOL clock is of great guidance here.

Discounting the Appellees' fabled, undocumented Tribe of the AVR, the Appellees' claim that the Secretary's publication of Tribes in 1979 and 1985 would have been sufficient notice of tribal status termination[12] is inadequate not only because it would have been an unlawful administrative termination, but also because it does not even approach the requirements stated above for repudiation. The fiduciary relationship could only be terminated or repudiated under specific conditions, so unlike typical fiduciary terminations or repudiations, the termination of an Indian tribe had to have been performed in a certain way. The facts that the fiduciary duty owed to the Plaintiff was not properly terminated[13] and that the BIA, as the fiduciary, led the Tribe to believe it would be restored[14], provide the

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[12] Federal Defendants' Motion for Summary Judgment, Dkt. No. 185, page, 7.

[13] Duncan v. Andrus, 517 F. Supp. 1, 6 (N.D. Cal. 1977)(After the Robinson Rancheria was terminated 1964, Plaintiffs in that case brought the action in, stating the Secretary has duties under the California Rancheria Act and noting that he had "fallen far short" of them).

[14] Dodge v. United States, 362 F.2d 810, 813 (Ct. Cl. 1966)(describing the

extraordinary circumstances necessary to rebut the statute of limitations as an affirmative defense.

Not until the 1994 List Act, did the Secretary have a fiduciary duty to publish an accurate listing of federally recognized tribes. Omission of Tribes from the Secretary's lists being the rule rather than the exception, the Appellees cannot be said to state that this was an overt act intending to notify the Appellant that it was being administratively terminated. In fact, continuing with the example set forth in Taylor, the repudiation of the fiduciary duty would be first claimed in 2009, when the Appellant first asked the Secretary to correct his error. "The 'standard of duty for the United States . . . is not mere 'reasonableness' but the highest fiduciary standards." Minn. Chippewa Tribe v. U.S., 14 Cl. Ct. 116, 130 (1987).

E. District Court Erred By Failing to Apply Equitable Tolling Correctly to Stay the Statute of Limitations at 28 U.S.C. §2401(a).

The Doctrine of Equitable Tolling requires that the party asserting the doctrine allege: 1) their diligence in pursuit of their rights, and 2) that some extraordinary circumstance prevented that pursuit. Socop-Gonzalez v. Immigration & Naturalization Serv., 272 F.3d 1176, 1193-1194 (9th Cir. 2001). The Appellant provided a plethora of documents from the government documents proving that the Appellees' committed actions wherein they either believed the Tribe was

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existence of a duty albeit not technical in nature).

terminated by the CRA or in an effort to stave off the risk of further lawsuit by fallaciously persuading the Tribe to try various other routes to correct the error. See Fn. 1, supra. Even as late as June 22, 2009, the Assistant Secretary of Indian Affairs (AISA), the highest ranking official at the Bureau of Indian Affairs; 1) recognized the Tribe as being the same as the Alexander Valley Rancheria Wappo Tribe that was subjected to the California Rancheria Act in 1961,[15] 2) illuminated the BIA's continued misunderstanding of the California Rancheria Act and how it was to be applied by calling it the "Rancheria Termination Act," and 3) incorrectly stated that the Appellee has no authority to restore the Tribe.[16] Other factually support actions cited in the Appellants FAC and MSJ were: 1) the BIA formed a committee in 1987 and ultimately recommended a negotiated restoration. *See* FAC ¶ 70, 2) in 1997, Advisory Council on California Indian Policy (ACCIP), a Congressional entity, completed a report in which the Tribe again believed would lead to its restoration. *Id.* at ¶ 68, 3) in 1999, the BIA launched an initiative to draft Congressional legislation to restore the Tribe. *Id.* at ¶ 73, and 4) in 2000, the Assistant Secretary of the BIA, Kevin Gover, made a statement to Congress that the Tribe should be immediately restored which provided more evidence for belief that the Tribe would be restored.

[15] "[The CRA {sic}] . . . listed Alexander Valley, now known as the Mishewal Wappo Tribe of Alexander Valley [Rancheria] . . ."

[16] Supra at page 14.

In 2009, the Tribe completed a historical documentary that met the criteria for restoration as set out by Assistant Secretary Kevin Gover and submitted it to the BIA Regional Office. Despite the BIA Regional Offices recommendation to restore the Tribe, the new Assistant Secretary, Larry Echo Hawk, denied the request. Id. at ¶ 75. Certainly the AISA's statements, the above stated actions, and the superabundance of evidence provided in the Appellant's Complaint and MSJ showing the Appellees complicity in the delay of filing the present lawsuit warrants equitable tolling of the Statute of Limitations. The Supreme Court of the United States has stated in Holland v. Florida, 560 U.S. 631, 645-646 (2010)("We have previously made clear that a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling.'") (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95–96)("It is hornbook law that limitations periods are 'customarily subject to "equitable tolling.") (also quoting Irwin, *supra*, at 95, 111 S.Ct. 453)). It is more than reasonable that the aforementioned Appellees' acts, whether in malice or ignorance, would dissuade Appellant from suing by lulling them into a belief that their fiduciary, the United States government, would not let such an error stand uncorrected.

In Wong v. Beebe, 732 F.3d 1030, 1050 (9th Cir. 2013) the Court reviewed 28 U.S.C. §2401(b), which had been previously determined to be a jurisdictional

bar in the Ninth Circuit and held that ". . . it is subject to the common law discovery rule, so the presumption favoring equitable tolling applies." So, too, did the Court review §2401(a) and found it to be the example of equitable tolling. Id. at 1045. In consideration of all the aforementioned factors, it would be heartbreakingly unfair to permit the Federal Defendant, a fiduciary and complicit partner in the delay of bringing this case, to escape judicial determination on the facts simply because their duplicity or incompetence persuaded their trustee, the Mishewal Wappo Tribe of Alexander Valley Rancheria to trust them to fix a simple error.

III. CONCLUSION.

The Appellant asks this Court to reverse the decision of the District Court in granting Appellees Motion for Summary Judgment and remand with instructions to grant the Appellant's Motion for Summary Judgment instead.

IV. STATEMENT OF RELATED CASES

Plaintiff states that some of its members were parties in an earlier filed class action, Tillie Hardwick, et al v. United States of America, et al., No. C-79-1710-SW, but was dismissed from that action without prejudice on December 23, 1983. Otherwise, Plaintiff is not aware of any other related cases.

Dated: September 23, 2015 Respectfully submitted,

By: s/ Joseph L. Kitto

s/ Kelly F. Ryan

Attorneys for the Plaintiff,

THE MISHEWAL WAPPO TRIBE
OF ALEXANDER VALLEY RANCHERIA