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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| UPPER LAKE POMO ASSOCIATION, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants. | CASE NO. C-75-0181-PJH<br><br>OPPOSITION TO JESSICA JACKSON'S MOTION TO HOLD CERTAIN FEDERAL OFFICIALS IN CONTEMPT<br><br>Date: July 18, 2018<br>Time: 2:00 p.m.<br>Courtroom: 3<br><br>Hon. Phyllis J. Hamilton |

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## I. INTRODUCTION

Jessica Jackson moves to hold certain officials ("Federal Officials") within the Department of Interior ("DOI") in contempt for allegedly violating a Court order in this case from May 15, 1979.[1] She seeks an order compelling the Bureau of Indian Affairs ("BIA"), which is part of DOI, to accept a 1988 deed regarding the property at issue – Parcel 5 – and take action to place that property in trust for her benefit. She also seeks an award of attorney's fees.

The motion fails to disclose critical points about this matter. It does not adequately address the fact that the death of Jessica Jackson's mother ("Ms. McCloud") in 2001 makes it unclear which person or persons owns Parcel 5 and has authority to request putting the property into trust because probate of her estate is still pending. BIA explained this issue to Jessica Jackson and her attorney in detail in 2012 and to a lesser extent in 2010 (and to her sister, April Diwald, beginning in 2002). Jessica Jackson and her attorney were put on notice of this issue six years before she filed her motion for contempt. BIA remains willing to consider placing Parcel 5 in trust upon receipt of a valid deed that reflects the current ownership status of the property and pursuant to a request for trust acquisition from the Indian landowner(s) whose ownership interest is reflected by a valid deed. Based on BIA's inability to obtain this information from other sources, it appears that Ms. McCloud's estate will need to proceed through probate before the California Superior Court for the County of Lake in order for BIA to know who currently owns the property. BIA would then have to await an application from those owner or owners if they seek to place Parcel 5 in trust. The motion fails to advise the Court of litigation currently pending between Jessica Jackson and her sister April Diwald over whether Parcel 5 is held in trust by the United States following a probate court decision.

Before this Court can reach the merits of the motion, however, it must satisfy itself that it has jurisdiction over the dispute. Parcel 5 is part of Ms. McCloud's estate and thus an asset before a Probate Court in Lake County. The "probate exception" to federal court jurisdiction precludes the Court from ordering the transfer of the property. Furthermore, Ninth Circuit precedent provides that a district court

[1] She seeks to hold both Secretary of the Interior Ryan Zinke and former Secretary Cecil Andrus in contempt, but pursuant to Federal Rule of Civil Procedure 25(d), the current Secretary is substituted as a matter of law for a former Secretary. She also seeks to hold two other officials in contempt: Amy Dutschke and Troy Burdick.

does not have power to issue an award of money as a contempt sanction against the federal government. On the merits of the contempt motion, Plaintiff cannot meet her burden to show that Federal Officials should be held in contempt. Among other issues, the motion fails to disclose that Ms. McCloud litigated administratively within BIA and claimed that the agency should have or had accepted Parcel 5 in trust based on the 1988 deed. The agency's final decision rejected Ms. McCloud's arguments on December 1, 1994. Jessica Jackson cannot re-litigate that question here and seek an order compelling the agency to place Parcel 5 into trust based on a 1988 deed.

The Court should deny the motion to hold Federal Officials in contempt of a Court order.

## II. BACKGROUND

### A. There is No Evidence that Parcel 5 is Held in Trust.

At issue in Jessica Jackson's motion is a parcel of property in Lake County, California designated as Assessor's Parcel Number ("APN") 003-059-004-00, and also known as Parcel 5. BIA's records do not include any documents that demonstrate that this property was ever accepted into trust for Ms. McCloud. *See* Declaration of Troy Burdick ("Burdick Decl.) ¶ 4. Ms. McCloud and attorneys for her and her estate have sought in the past to have the United States acquire Parcel 5 in trust, including by a grant deed executed by Ms. McCloud purporting to convey her fee simple property to the United States in trust, and which was not signed or approved by the BIA, but was recorded with Lake County as #98-006477. *Id*. at ¶ 5. Despite the recordation of this deed, BIA has no record indicating that BIA currently holds Parcel 5 in trust. *Id*. at ¶ 6. On February 9, 2016, BIA notified the Assessor-Recorder, Lake County Courthouse that "[w]hile the deed states that it was transferred to "The United States of America in Trust," there is no record the property was accepted into trust by the United States, which would be reflected by an 'Acceptance of Conveyance' attached to the deed that was executed by the Bureau of Indian Affairs pursuant to the statutory authority that authorizes the acquisition by the United States." *Id*. at ¶ 10 & Exh. 4. The letter states: "Without the acceptance of conveyance the deed would be considered invalid . . . and should be considered fee land, taxable by the County." *Id*. Furthermore, on or about August 9, 2013, the United States of America, through Cynthia Staszak, Associate Deputy State Director, California, Bureau of Land Management, disclaimed any interest in Parcel 5. *See* Declaration of Michael T. Pyle and Request for

Judicial Notice ("RJN"), Exh. 2 at Exhibit C.[2]

**B. Jessica Jackson's Mother Sought to Compel BIA to Take Parcel 5 Into Trust As This Litigation Concluded.**

On February 24, 2003, this Court denied a motion by the plaintiffs to modify or grant supplemental relief in an effort to force the United States to place 67 acres of land in Yolo County into trust. *See* Docket No. 309; *see also* RJN, Exh. 9. The Court summarizes the history of the litigation from 1975 in considering the motion. *Id*. at 2:25-6:13.

While the Court granted summary judgment for plaintiffs on their claims for declaratory and injunctive relief on May 15, 1979, the Court entered a final judgment on these claims on August 31, 1983. *See* RJN, Exh. 6. The judgment provided, in part:

> b. . . . This judgment shall constitute a final declaratory judgment as to the respective rights and obligations of plaintiffs and defendants with respect to the attempted termination of the Upper Lake Rancheria and distribution of its lands and assets under the Act of August 18, 1958 . . . ;

*Id* at 2. The judgment provided further that

> i. The Secretary of the Interior is under a continuing obligation to restore to trust status lands of the Upper Lake Rancheria and fee interests in trust or former trust allotments issued to persons listed in the plan for distribution of assets of the Upper Lake Rancheria by reason of the purported termination of such Rancheria, ***whenever possible***.

*Id*. at 4-5 (emphasis added).

Restoration of trust status was to be accomplished as follows:

> (1) A copy of this judgment shall be published in a newspaper of general circulation within Lake County, California . . . ;

[2] Federal courts are permitted to "judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). This includes "undisputed matters of public record." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (admitting document of a state entity into evidence); *see also Hotel Employees and Rest. Employees Local 2 v. Vista Inn Mgmt. Co.*, 393 F. Supp. 2d 972, 977-78 (N.D. Cal. 2005) (taking judicial notice of quitclaim deed, grant deeds, and "cancellation of lease and memorandum of lease," all of which were "publicly recorded with the San Francisco Assessor-Recorder's office"). Courts may also "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2006) (citing *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)).

> (2) **Within one year of receipt of actual notice of the terms of the judgment**, each Indian or Indian or organization of the Upper Lake Rancheria who has or retains any interest in or to the lands or assets of the Rancheria (however acquired) shall be entitled to convey his or her interest to the United States, to be held in trust for the benefit of such Indian member(s) of the Upper Lake Rancheria (as defined under the constitution or bylaws thereof . . . ;
>
> (3) ***Before accepting any instrument*** ... which has the effect of restoring trust status to lands within the Rancheria, the ***Secretary of the Interior shall be entitled to approve or reject such instrument as to form*** . . . ;
>
> (4) ***Upon acceptance of any instrument or instruments conveying title to lands within or without the Rancheria to the United States pursuant to this judgment***, the Secretary of the Interior . . . shall promptly record said instruments with the County Recorder of the County in which such lands are located;
>
> (5) The time limit for restoring trust status to lands of the Rancheria may be modified by the Court by application of any party to this action showing good cause for such action;
>
> (6) It is the intent of this judgment that maximum flexibility be allowed in working out the administrative details of trust restoration . . . ;
>
> (7) In the event that at any future time lands are acquired within the boundaries of the Rancheria by one or more Indian members thereof (as defined by the constitution or bylaws of said Rancheria), they may similarly be restored to trust status in accordance with the procedures outlined above**.**

*Id*. at 5-7 (emphasis added). The judgment also provided that "[t]his court will retain jurisdiction over this action for the purpose of granting such supplemental relief as is or may become necessary or proper for the purpose of implementing the provisions of this judgment. *Id*. at 8 (emphasis added).

As this Court explained in its February 24, 2003 Order, the plaintiffs "concede, however, that the 1983 final judgment led to restoration of services to members of the Tribe and do not argue that the United States failed to comply with any provision of the injunction." *See* Docket No. 309; *see also* RJN, Exh. 9 at 9:20-22.

In April 1993, the parties entered into a stipulation for entry of judgment, which provided for the completion of certain improvements to the water system on the Rancheria, and the payment of attorneys' fees and damages. The stipulation provided that the parties' agreement constituted a final resolution of

all claims of plaintiffs arising from the termination of the Upper Lake Rancheria pursuant to the Rancheria Act. *See* Docket No. 198; *see also* RJN, Exh. 7 at 5. The agreement further provides:

> Plaintiffs and defendant agree that the entry of judgment pursuant to this agreement shall constitute a full, complete and final resolution of all claims, legal or equitable, related in any way, directly or indirectly; and that this agreement shall finally dispose of all rights, claims, or demands which plaintiffs have asserted, or could have asserted, in this action.

*See id.*; *see also* Docket No. 200, RJN, Exh 8 (Judgment incorporating Stipulation for Entry of Judgment "which is incorporated herein by reference as though set forth in full").

On January 12, 1988, Ms. McCloud submitted a grant deed to the Central California Agency seeking to convey Parcel 5 to the United States in trust. ECF No. 324-7 at 6. On March 5, 1992, Ms. McCloud filed a Request for Trust Restoration form with the Central California Agency. *Id.* at 14. Ms. McCloud submitted another grant deed, dated January 24, 1994, to convey Parcel 5 to the United States in trust for Jessica Jackson and Gwendolyn Loss as tenants in common with a life estate reserved to Ms. McCloud. *Id.* at 13.

In a proceeding before the Central California Agency, the Superintendent denied Ms. McCloud's request to recognize that Parcel 5 was held in trust by the United States. ECF No. 324-7 at 12. The Superintendent noted that Ms. McCloud never returned a grant deed that the Bureau had prepared for her in 1982, and that she subsequently paid all taxes levied on Parcel 5 between 1982 and 1988. *Id.* at 11-12. As such, the Superintendent concluded that Ms. McCloud must have made the decision not to have Parcel 5 placed into trust. *Id.*

Ms. McCloud appealed this decision and filed a Statement of Reasons in support. In her Statement, Ms. McCloud asserted that she did not recall receiving a grant deed in 1982. ECF No. 324-6 at 8. Ms. McCloud argued that the Bureau had a duty to act when Ms. McCloud failed to return the 1982 grant deed. *Id.* at 12. She also argued that the Bureau, by never requesting the information to complete the conveyances, failed to act on her 1998 and 1992 attempts to transfer Parcel 5 into trust. *Id.* at 14.

On appeal, and in a decision dated December 1, 1994, the Area Director affirmed that Ms. McCloud had failed to complete trust restoration of Parcel 5. Burdick Decl. Ex. 1, at 4. The Area

Director concluded that Ms. McCloud filed an application for trust restoration, but later changed her mind and never completed the required process. *Id.*

In a letter to the Superintendent dated June 7, 1995, the Area Director acknowledged that the December 1, 1994 decision does not preclude any future consideration of a trust land acquisition application by Ms. McCloud. ECF No. 324-3 at 9.

**C. BIA Has Repeatedly Explained What it Needs and Remains Willing to Consider Placing Parcel 5 into Trust if It Obtains the Necessary Documentation and Information.**

Ms. McCloud died in 2001. On September 16, 2002, BIA sent a letter to April Diwald that stated, in part:

> This is official notice to you that the Bureau of Indian Affairs has researched the possibility of your mother Amerdine Snow Jackson McCloud owning trust assets. The Estate of Amerdine McCloud does not have any trust assets with the Bureau of Indian Affairs and will need to be probated with the state. You can contact the California Indian Legal Services in Oakland at (510) 835-0284 for the state probating procedures.

Burdick Decl., ¶ 8 & Exh. 2. On August 13, 2010, BIA sent a letter to Jessica Jackson with a cc to her attorney Lester Marston, which referenced and enclosed the September 16, 2002 letter and stated that the 2002 letter requested "Probate information from the State of California. Has this Probate been resolved?" *Id*.

On December 26, 2012, BIA sent a letter to Lester Marston, Jessica Jackson's attorney. Burdick Decl., ¶ 9 & Exh. 3. In the letter, BIA explained that "before [the agency] can proceed" with processing Jessica Jackson's application, the agency would "need current ownership information for the property (APN 003-059-040-00) in order to prepare the Deed and Acceptance of Conveyance attached to the deed." *Id*. at Exh. 3. The letter next explains the steps BIA's realty staff had taken to "obtain current ownership information for the property by various means including contacts with title companies, the Lake County Recorder's office, the Lake County Tax Assessor's office, and most recently, the Probate Department of the Lakeport Superior Court." *Id*. BIA explained that a "Probate Court Clerk advised staff that the above-referenced probate case [Probate Department Docket PR50072] is a pending matter with the next court date scheduled for February

20, 2013, in Department 3. Realty staff was further informed that the subject of the hearing was a proposed sale of land in the McCloud Estate by April Diwald, daughter, which was being contested by Anthony Jackson, her brother." *Id*.

Finally, the agency's December 2012 letter specifically advised Jessica Jackson's lawyer Lester Marston: "[B]ecause of the pending status of the McCloud probate matter, we are currently unable to proceed with ordering a title policy commitment required for Ms. Jackson's pending fee-to-trust application. As soon as we receive the final order in the matter with a determination as to the ownership/heirs to the estate, we can resume processing this application." *Id*.

Although it has been almost six years since Mr. Marston was notified of this information, BIA has not received a final order in the matter and remains unable to proceed with trust acquisition for the property known as APN 003-059-040-00. *Id*. ¶ 9; *see also* Declaration of Kimberly Yearyean ("Yearyean Decl."), ¶4-5 ("probate proceedings concerning Ms. McCloud Jackson's former property must conclude in order for the Agency to identify the current owner or owners with authority to request trust acquisition and in order for the Agency to transfer a valid deed reflecting current property ownership into trust.").

BIA can proceed with reviewing the request for trust acquisition upon receipt of a valid deed that reflects the current ownership status of the property and pursuant to a request for trust acquisition from the Indian landowner(s) whose ownership interest is reflected by a valid deed. Yearyean Decl. at ¶ 6.

**D. Jessica Jackson's Mother's Estate is Subject to California Probate Court Proceedings.**

On August 9, 2004, the Superior Court of California, County of Lake appointed April Diwald as the administrator of her mother's estate. *See* RJN Exh. 2 at Exhbit A. Thus, April Diwald was appointed as the administrator by the probate court less than two years after BIA advised of the need to probate the estate of her mother in state court since there were no trust assets held by BIA. *See* Burdick Decl., ¶ 8 & Exh. 2. On September 24, 2013, minutes from the probate court shows that the probate court found that "it does not have jurisdiction to determine whether certain real property in this case is Indian trust land or not" and that the lawyer for April Diwald stated that she "intends to petition

the federal court for determination of the real property in question. *See* RJN, Exh. 3.

**E. April Diwald Filed Suit Against Jessica Jackson Regarding Parcel 5.**

On March 15, 2016, April Diwald filed suit against Jessica Jackson in the pending case of *April Jackson Diwald v. Jessica Jackson*, 1:16-cv-01281-RMI. *See* RJN, ¶ 2 & Exh. 1. April Diwald brings a claim for declaratory relief under 28 U.S.C. §2201, asking the district court to resolve the dispute between the sisters regarding whether or not Parcel 5 is held in trust. *Id*. Defendant Jackson contends that the Lake County Superior Court lacks jurisdiction over Parcel 5 because the property is held in trust with the United States, and Plaintiff Diwald contends that the property is not in trust and that the Superior Court has jurisdiction over Parcel 5 because the land remains fee simple. *Id*.

On February 29, 2018, the parties submitted a Joint Status Report in which Jessica Jackson advised that she was "in the process of preparing and filing" a motion to hold BIA in contempt. *See* RJN, Exh. 4 at ¶¶ 2-3. Significantly, the Joint Status Report represents that:

> If the Court grants the plaintiff's Contempt motion, then the underlying action is moot and can be dismissed. If the Court denies the motion, then this case will be resolved and a final judgment can be entered holding that Parcel 5 is not owned by the United States in trust for any of the parties to this proceeding.

*Id*. *See also* Exh. 5 (order staying case).

## III. ARGUMENT

**A. The Probate Exception Precludes Granting Relief About Parcel 5.**

This Court should determine whether it has jurisdiction to consider Jessica Jackson's motion before reaching the merits. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]" (citations omitted)); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004) ("[B]y whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements") (citations omitted).

The probate exception is a jurisdictional limitation on federal courts that "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise

within federal jurisdiction." *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006). The Supreme Court interpreted language from an earlier case (*Markham v. Allen*, 326 U.S. 490, 494 (1946)) as "essentially a reiteration of the general principle that, when one court is exercising in *rem* jurisdiction over a *res*, a second court will not assume in *rem* jurisdiction over the same *res*." *Marshall*, 547 U.S. at 311 (citing *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195-96 (1935); *Waterman v. Canal–Louisiana Bank & Trust Co.*, 215 U.S. 33, 45-46 (1909)).

Here, Jessica Jackson seeks an order directing Federal Officials to take Parcel 5 into trust for the benefit of her and one of her other siblings, yet does not include her apparent sister April Diwald. Jessica Jackson's motion seeks to deprive the probate court of jurisdiction over Parcel 5 in the guise of a motion to hold Federal Officials in contempt. The probate court indicated that it did not have jurisdiction to decide whether or not Parcel 5 is held in trust, and April Diwald subsequently filed suit to obtain a federal court ruling on that question so that the probate court could proceed if the federal court determined that the property was not in trust at the time of Jessica Jackson's mother's death. RJN, Exhs. 2-3.

Indeed, if the property had been held in trust at the time of her mother's death, BIA would have had to probate property held in trust. 25 C.F.R § 15.10 (a) ("We will probate only the trust or restricted land, or trust personally owned by the decedent at the time of death."). BIA does not probate real property not held in trust at the time of death, such as Parcel 5. *Id.* § 15.10(b)(1).

This Court should deny Jessica Jackson's motion because the probate exception to federal court jurisdiction precludes federal courts from taking action on Parcel 5 other than resolving the legal question of whether or not the property was in trust at the time of the mother's death. As to that legal question, the governing statute and implementing regulations provide an answer.

In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. § 5108 et seq., (the "IRA"). Section 5108 (formerly codified at 25 U.S.C. § 465), authorizes the Secretary to take lands in trust for the benefit of "the Indian tribe or individual Indian for which the land is acquired." The IRA defines "Indians" as "all persons of Indian descent who are members of any recognized Indian tribe" that was "under Federal jurisdiction" at the time of the IRA's enactment. 25 U.S.C. § 5129; *see also Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). The BIA takes land into trust pursuant to 25 C.F.R Part 151, the

implementing regulations for the IRA. 25 C.F.R § 151.3 provides that: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary." Section 151.14 provides that: "Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances." The evidence before the Court shows that the federal government has never approved placing Parcel 5 into trust, and there is no conveyance instrument reflecting such approval. *See* Burdick Decl., ¶¶ 4-6; RJN, Exh. 2 at Exhibit C. In fact, Jessica Jackson's motion confirms that the federal government never approved placing Parcel 5 in trust. She seeks an order requiring "the Secretary of the Interior or his designated representative in the [BIA] executing a written acceptance of a deed conveying Ms. McCloud's interests in Parcel 5 to the United States of America in trust for Jessica Jackson and Gwen Loss, reserving a life estate in McCloud and the recording of that deed by the BIA with its Lands, Titles and Records Office and Lake County Recorders Office." Motion at 2 & n.1.

Parcel 5 was not in trust at the time of the mother's death, and therefore only the state probate court can determine which person or persons owns the property at this time. This Court lacks jurisdiction to order the transfer of Parcel 5.

**B. Sovereign Immunity Precludes Imposition of Monetary Sanctions.**

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted). Sovereign immunity also protects federal employees acting within their official capacities. *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997) (citing S*outh Delta Water Agency v. U.S. Dep't of Interior*, 767 F.2d 531, 536 (9th Cir. 1985)). Indeed, "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hodge*, 107 F.3d at 707 (citing *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981)).

The Supreme Court has explained that any waiver of federal sovereign immunity must be contained in an express and particularized statement by Congress and cannot be inferred by the courts. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Even where a statute has waived the government's immunity, any ambiguities in its scope must be construed in favor of the sovereign. *FAA v. Cooper*, 566 U.S. 284, 291 (2012).

The Supreme Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions," *United States v. Idaho*, 508 U.S. 1, 8-9 (1993), because such claims present heightened separation-of-powers concerns. In part because the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, neither the Executive Branch nor the Judicial Branch can effect a waiver of sovereign immunity. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424-434 (1990); *United States v. Shaw*, 309 U.S. 495, 501-502 (1940). Narrow construction of statutory waivers of immunity ensures that courts do not mistakenly impose burdens on the public fisc that Congress did not authorize and that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 428, 432.

Federal courts possess "inherent powers . . . which 'are necessary to the exercise of all others.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). A lower court's inherent powers "are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation and internal quotation marks omitted). Those powers generally include the authority to impose a "sanction for conduct which abuses the judicial process." *Id.* at 44-45.

But the federal courts' inherent powers are not absolute. The Supreme Court has repeatedly recognized that district courts may not invoke their inherent supervisory power in ways that would circumvent or conflict with constitutional principles. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (holding that supervisory power cannot be used circumvent the harmless-error inquiry prescribed by Fed. R. Crim. P. 52(a)); *United States v. Hasting*, 461 U.S. 499, 506 (1983) (holding that supervisory power cannot be used to reverse a conviction in order to deter prosecutorial misconduct); *United States v. Payner*, 447 U.S. 727, 736-737 (1980) (holding that supervisory power cannot be used to suppress evidence otherwise admissible under the Fourth Amendment); *see generally Bank of Nova Scotia*, 487 U.S. at 254 ("[I]t is well established that 'even a sensible and efficient use of

the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'") (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985)) (brackets omitted).

The Supreme Court has accordingly required express statutory authorization before the government can be compelled to pay the kinds of litigation expenses that could be imposed on other parties. In *United States v. Chemical Found., Inc.*, 272 U.S. 1, 20 (1926), the Court modified a judgment ordering the United States to pay the costs of transcripts and copying. The Court reasoned that, in the absence of any such specific authority (as of 1926) in which Congress consented to having such costs taxed against the government, the government could not be required to pay them. *Id.* at 20-21. Similarly, the Supreme Court has recognized that sovereign immunity bars an award of attorney's fees against the government in the absence of a statutory waiver. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (narrowly construing statute authorizing fee awards including attorney's fees because it applied to "awards against the United States, as well as against private individuals"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267-268 (1975) (stating that fee awards against the government, "if allowable at all, must be expressly provided for by statute").

In *Barry v. Bowen*, 884 F.2d 442, 443-44 (9th Cir. 1989), the Ninth Circuit vacated a district court order imposing monetary sanctions against the government for contempt in a civil case in part because it could not find "anything which suggests that the United States expressly has waived its sovereign immunity with respect to contempt sanctions" and therefore had "doubts about the power of the district court to impose monetary sanctions." Other circuits faced with similar arguments have suggested that the government's sovereign immunity wins when it comes head-to-head with a lower court's inherent authority. *See, e.g., United States v. Droganes*, 728 F.3d 580, 588-90 (6th Cir. 2013) (rejecting the argument that a district court's inherent authority to sanction "simply trumps the government's sovereign immunity."); *United States v. Horn*, 29 F.3d 754, 761–67 (1st Cir.1994) (holding that absent an explicit statute or waiver, "sovereign immunity saves the federal government harmless from all court-imposed monetary assessments, regardless of their timing and purpose"); *Coleman v. Espy*, 986 F.2d 1184, 1192 (8th Cir. 1993) (holding that a court cannot imply a waiver of federal sovereign immunity for civil compensatory contempt actions).

Jessica Jackson ignores this law, and instead relies on cases holding nonfederal parties in

contempt of court. In *Chambers*, 501 U.S. at 50-51 the Supreme Court held that a district court did not abuse its discretion in using its inherent authority to assess attorney's fees as a sanction for bad-faith conduct in litigation by a private party. In *Harris v. City of Philadelphia*, 47 F.3d 1311, 1332 (3d Cir. 1995), the court affirmed a contempt order against the City of Philadelphia, a municipal actor. Additionally, *Robin Woods, Inc. v. Woods*, 28 F.3d 396 (3d Cir.1994) concerns a contempt order against individuals in a suit against a private company. All of these cases, cited by Jessica Jackson, are inapplicable here because each involves contempt against non-federal parties, and therefore no sovereign immunity concerns are present.

The Supreme Court has established that "when it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." *Lane v. Pena*, 518 U.S. 187, 196 (1996); *Sossamon v. Texas*, 563 U.S. 277, 291 n.8 (2011) (noting, in the context of state sovereign immunity, that the essence of sovereign immunity "is that remedies against the government differ from 'general remedies principles' applicable to private litigants") (citation omitted). Accordingly, the Court should not award any monetary sanctions, including attorney's fees.

**C. The Federal Government's Trust Duty Provides No Basis to Hold Federal Officials in Contempt.**

There is "'undisputed[ly] … a general trust relationship between the United States and the Indian people,"' but that trust relationship "is defined and governed by statutes rather than the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74, 176 (2011). "Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes." *Id*. at 176. Congress may "style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to the trust relationship between private parties at common law." *Id*. at 174 (quoting *United States v. Mitchell*, 445 U.S. 535, 542 (1980)). When a tribe "cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated … neither the Government's control over [Indian assets] nor common law trust principles matter." *Id*. at 177 (internal quotation marks and citations omitted, alterations in the original). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id*.

The principle laid out in *Jicarilla* has been reaffirmed within this Circuit. In *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, 559 Fed. Appx. 698, 699 (9th Cir. 2015), the court rejected the argument that the federal-tribal trust relationship creates a duty by the Indian Health Service to meet a specific standard of medical care. The court emphasized that "the federal-tribal trust relationship does not, in itself, create a judicially enforceable duty." *Id.* It pointed to both the Snyder Act and the Indian Health Care Improve Act, and found that neither statute required the United States to provide a specific standard of care. *Id.* In *Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016), the court held that the trust duty between United States and Indian tribes did not require the BIA to protect its members from unjust disenrollment. The court recognized that plaintiffs cited no authority suggesting an "uncabined" trust duty that would create such a requirement. *Id*.

In any event, this Court does not need to determine the extent or scope of any trust responsibilities of the federal government. Jessica Jackson cites no authority for the proposition that alleged trust responsibility to a tribe or Indian would authorize a court to hold federal officials in contempt of court. Jessica Jackson certainly does not identify any "specific, applicable, trust-creating statute or regulation that the Government violated." *See Jicarilla Apache Nation*, 564 U.S. at 177.

**D. The Federal Officials Should Not Be Held in Contempt.**

**1. The Standard for Civil Contempt.**

'Civil contempt ... consists of a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply.'" *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 945 (9th Cir. 2014) (quoting *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)). The moving party bears the burden of showing the contemnor's noncompliance by clear and convincing evidence. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). The court may exercise its civil contempt power for one or both of two purposes: "to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–304 (1947). "The measure of the court's power in civil contempt is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949).

A party may be held in contempt even if its conduct was not willful, *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006), and "there is no good faith exception to the requirement of obedience to a court order," *Dual-Deck Video*, 10 F.3d at 695, but substantial compliance can serve as a defense. *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 466 (9th Cir. 1989). The Ninth Circuit thus places the burden on Jessica Jackson to "establish '(1) that [the respondent] violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence.'" *See Labor/Cmty. Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1123 (9th Cir. 2009) (quoting *Dual-Deck Video*, 10 F.3d at 695); *see also Labor/Cmty. Strategy Ctr*. 564 F.3d. at 1121 ("BRU must demonstrate that MTA failed to substantially comply with the decree in order to justify its extension.").

**2. The Federal Officials Are Not in Contempt of Court.**

Jessica Jackson cannot meet her burden to establish that the Federal Officials should be held in contempt of court for several reasons.

**a. The Court Order is Not Sufficiently Specific and Definite to Support a Finding of Contempt.**

Civil contempt is only appropriate where there is clear and convincing evidence of violation of a "specific and definite court order." *Inst. of Cetacean Research*, 774 F.3d at 945. Jessica Jackson's motion is premised on the idea that the Court's final judgment awarding declaratory and injunctive relief (which is the 1983 order and not the 1979 order) requires BIA to take property into trust if a request is submitted. The text of the judgment belies this argument. *See* RJN, Exh. 6. The judgment provides that the "continuing obligation to restore to trust status lands of the Upper Lake Rancheria" is limited by the phrase "whenever possible." It further provides that: "Before accepting any instrument . . . which has the effect of restoring trust status to lands within the Rancheria, the Secretary of the Interior shall be entitled to approve or reject such instrument as to form." The judgment is not sufficiently specific and definite to hold Federal Officials in contempt because it does not make transferring property a unilateral decision by an Indian landowner; rather, it gives Federal Officials discretion to determine that a request to restore land to trust status was not possible or to refuse to accept an instrument as to form. The

judgement places no limitation on the Federal Officials' discretion in this regard.

The judgment does not give the Court the power to order Federal Officials to take Parcel 5 into trust because the judgment gives Federal Officials discretion to determine whether or not that action is possible and further to reject an instrument as to form. Accordingly, that alone is ground to deny the motion. *See Office Depot, Inc. v. Zuccarini*, No. C 06-80356 SI, 2010 WL 3700271, at *2-3 (N.D. Cal. Sept. 13, 2010) (denying motion to hold party in contempt because the order was not sufficiently "specific and definite").

**b. As BIA Has Previously Explained, It is Not Possible to Place Parcel 5 into Trust at this Time.**

"Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *United States v. Rylander*, 460 U.S. 752, 757 (1983). BIA most clearly explained in 2012 why the agency has been unable to place Parcel 5 into trust following the death of Jessica Jackson's mother. *See* Burdick Decl., ¶ 9 & Exh. 3. In the letter, BIA explained that "before we can proceed" with processing Jessica Jackson's application, the agency would "need current ownership information for the property (APN 003-059-040-00) in order to prepare the Deed and Acceptance of Conveyance attached to the deed." *Id*. at Exh. 3. The letter specifically advised Jessica Jackson's lawyer, Lester Marston: "[B]ecause of the pending status of the McCloud probate matter, we are currently unable to proceed with ordering a title policy commitment required for Ms. Jackson's pending fee-to-trust application. As soon as we receive the final order in the matter with a determination as to the ownership/heirs to the estate, we can resume processing this application." *Id*. Although it has been almost six years since Mr. Marston was notified of this information, BIA has not received a final order in the matter and remains unable to proceed with trust acquisition for the property known as APN 003-059-040-00. *Id*. ¶ 9; *see also* Yearyean Dec., ¶¶ 4-5 ("probate proceedings concerning Ms. McCloud Jackson's former property must conclude in order for the Agency to identify the current owner or owners with authority to request trust acquisition and in order for the Agency to transfer a valid deed reflecting current property ownership into trust.").

BIA is not contending that it would never be able to place Parcel 5 into trust. Rather, BIA

can proceed with reviewing a request for trust acquisition upon receipt of a valid deed that reflects the current ownership status of the property and pursuant to a request for trust acquisition from the Indian landowner(s) whose ownership interest is reflected by a valid deed. Yearyean Decl. at ¶ 6.

The BIA is entitled to seek this information. For example, 25 C.F.R. § 151.9 provides that an Indian or tribe desiring to acquire land in trust status "shall file a written request for approval of such acquisition" and the request must provide "the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." Pursuant to Section 151.12(a): "The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision."

Consistent with its regulatory authority, BIA asked for information concerning probate results and other information in 2012 (and earlier) in order to determine the appropriate trust beneficiaries for Parcel 5. BIA still has not received that information, so it cannot move forward with a decision as to whether or not to approve placing Parcel 5 into trust.[3]

**c. Any claim that the BIA Must Accept the 1998, 1992 or 1994 Deed Is Untimely**

Jessica Jackson's claims pertaining to the 1988, 1992, or 1994 attempts to convey Parcel 5 in trust are barred by a six-year statute of limitations, which expired twenty-four years ago. "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This limitations period "applies to all civil actions whether legal, equitable or mixed." *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995) (internal quotation omitted). Additionally, "Indian Tribes are not exempt from statutes of limitations governing actions against the United States." *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, N.D. & S.D. v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) (citation omitted).

On December 1, 1994, the Area Director denied an appeal to recognize that Parcel 5 had been restored to trust status under the 1988 grant deed, the 1992 Request for Trust Restoration, or the 1994

[3] If the BIA were to render a decision now, it would deny the trust application due to a lack of appropriate information. A denial would be issued pursuant to 151.12(b). If BIA were to issue a decision denying the trust information due to lack of appropriate owner information, that would trigger the administrative appeal process pursuant to Part 151 and 25 C.F.R. Part 2.

grant deed. *See* Burdick Decl. Ex. 1. The Director's decision is explicit that it should be considered final unless a timely notice of appeal is filed. *Id.* at 5. Ms. McCloud's opportunity to appeal that decision and have Parcel 5 restored to trust status under any of those attempts at conveyance expired on December 1, 2000, six years after the Director's decision. As there was no timely appeal of the 1994 decision, the Director's decision is final. However, the Director noted that the 1994 decision does not preclude any future conveyance applications by Ms. McCloud. ECF No. 324-3 at 9.

In addition, the doctrine of laches should bar any claim about the 1988, 1992, or 1994 attempts to transfer because there has been an unreasonable delay since the 1994 decision that has prejudiced the defendant. "Laches is an equitable time limitation on a party's right to bring suit, resting on the maxim that one who seeks the help of a court of equity must not sleep on his rights." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (internal quotation omitted). Although courts have considered whether a laches defense is applicable against civil contempt claims, the issue is unresolved within this Circuit. *See Melendres v. Arpaio*, 154 F.Supp. 3d 845, 849-55 (D. Ariz. 2016) (considering a laches defense against a contempt claim, though ultimately rejecting the defense for failure to establish all required elements); *Pac. Shinfu Techs. Co. v Pinnacle Research Inst., Inc*, No. C-00-21034 RMW, 2008 U.S. Dist. LEXIS 8918, at *8-10 (N.D. Cal. Oct. 14, 2008) (assuming that a laches defense applies against a contempt claim, though ultimately rejecting it). Ultimately, "the decision to apply laches is primarily left to the discretion of the trial court." *Coal. For Canyon Pres. v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980).

A laches defense is available where the defendant proves "both an unreasonable delay by the plaintiff and prejudice to itself." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000). Courts may measure delay "with reference to the limitations period for the analogous action at law." *Jarrow*, 304 F.3d at 835. There is often a presumption that laches is applicable when suit is filed outside of the analogous limitations period. *Id.* (citing *Brown v. Kayler*, 273 F.2d 588, 592 (9th Cir. 1959); *Wilson v. Northwest Marine Iron Works*, 212 F.2d 510, 511 (9th Cir. 1954). "The limitations period runs from the time the plaintiff knew or should have known about his . . . cause of action." *Jarrow*, 304 F.3d at 838. To determine reasonableness, courts look to the cause of the delay. *Danjaq LLC v. Sony Corp*, 263 F.3d 942, 954 (9th Cir. 2001). Delay is justified when, among other reasons, it is necessitated

by the exhaustion of remedies through the administrative process, or it is used to evaluate and prepare a complicated claim. *Id.*

Jessica Jackson's delay in bringing this claim is unreasonable and should be barred by the laches doctrine. The relevant delay period in this case may be understood to coincide with the expiration of the statute of limitations on December 1, 2000, following the Area Director's 1994 decision. By bringing this claim in 2018, she commences her contempt motion twenty-four years after the statute of limitations on the analogous legal action has expired. She had all necessary information and documentation to take action prior to this point, and her delay is therefore unreasonable.

This delay has prejudiced the United States. Given the time that has lapsed since the 1994 Agency Director's decision, Jessica Jackson's present claim requires retrieval of evidence and documentation spanning decades, concerning the 1988 grant deed, 1992 Request for Trust Restoration, and 1994 grant deed. In that time, agency personnel has changed. Her claim therefore implicates parties that are no longer with the agency, and seeks to hold in contempt officials that were not involved in the 1994 proceeding or the events prior to it. In addition to encumbering the defendants, Jackson's delay has imposed an administrative burden on the judicial system by requiring examination and consideration of evidence dating back to 1979 and earlier.

## IV. CONCLUSION

Jessica Jackson's motion should be denied. Even if the Court had jurisdiction to grant relief to Jessica Jackson, the Federal officials are not in contempt of any Court order.

Date: May 30, 2018

Respectfully Submitted,

ALEX G. TSE
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