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Grindstone Indian Rancheria
And One Hundred Plus Men,
Women And Children Living
On The Grindstone Indian
Reservation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GRINDSTONE INDIAN RANCHERIA and ONE HUNDRED PLUS MEN, WOMEN AND CHILDREN LIVING ON THE GRINDSTONE INDIAN RESERVATION,

Plaintiffs,

vs.

TERRENCE OLLIFF, individual, and as beneficiary/trustee of the Olliff Family Trust, DIANE L. OLLIFF, individually and as a beneficiary/trustee of the Olliff Family Trust and DOES 1-10,

Defendants

Case No. 2:17-CV-02292-JAM-EFB

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF DECLARATORY RELIEF CLAIM

MSJ Date: August 13, 2019
Time: 1:30 p.m.
Dept. Courtroom 6, 14th Floor

Trial Date: October 21, 2019
First Amended Complaint: March 3, 2018

INTRODUCTION

In their Motion for Summary Adjudication ("Motion"), Plaintiffs established, as a matter of law, that Plaintiffs are entitled to summary adjudication as to their declaratory relief claim. Because Plaintiffs are an Indian Tribe that has established its right to the disputed strip of land, Defendants as "non-Indians" had the burden of proving their right to the disputed area by operation of Federal law. But Defendants have not -- and in fact never can -- meet their burden because, while Defendants had the opportunity to appeal the BLM survey, they failed to do so. Since the BLM's survey is final and the appeal deadline has passed, Defendants are now barred from challenging the BLM survey's findings. As the Code of Federal Regulations makes explicitly clear, Defendants have lost their chance and now must accept the findings of the BLM survey. Because Defendants can no longer challenge the survey, Defendants therefore will never satisfy their burden of proof as a matter of law. Accordingly, this Court should grant Plaintiffs' Motion.

ARGUMENT

I. Defendants Failed to Timely Appeal or Request Reconsideration of the BLM's Decision.

Section 4.410(a) of the Code of Federal Regulations states, in part, that "[a]ny party to a case who is adversely affected by a decision of the [BLM] has the right to appeal". Defendants unequivocally fall under Section 4.410(a) as a "party to a case," as demonstrated in the letter from the Bureau of Land Management to Defendant Terrence Olliff ("BLM Letter"). [*See* Dkt. No. 29-4 at pp. 50,51.] The BLM Letter clearly identified the disputed land at issue, acknowledged Defendants' disagreement with the BLM survey's findings, and stated, on no uncertain terms, "[i]f you disagree with this resurvey, you have the right to protest any decision of this office which is adverse to your interests." [Dkt. No. 29-4 at pp. 50,51.]

After receiving the BLM's resurvey decision via the BLM Letter, Defendants had a limited window during which they could appeal the BLM decision. Section 4.411(2) of the Code of Federal Regulations specifies the mandatory time period during which an appeal must be made and clarifies that the appeal deadline will not be extended. Section 4.403 further provides that if a party "wishes

to request reconsideration of a Board decision" then they "must file a motion for reconsideration with the Board within 60 days after the date of the decision." Further, the BLM Letter advised Defendants that if they decided to protest the BLM survey, that "the protest must be filed with this office no later than 60 days after the receipt of this letter." [Dkt. No. 29-4 at p. 51]; *see also* Kirk Declaration ¶¶ 13, 16. The BLM Letter is dated August 16, 2012. Therefore, the time window to appeal or file for reconsideration closed years ago. [Dkt. No. 29-4 at pp. 50,51.] Defendants have proffered no evidence demonstrating or even suggesting that they tried to appeal or request reconsideration of the BLM's decision within the designated timeframe after August 16, 2012. In fact, Defendants' Answer even concedes that Defendants failed to appeal the decision. [Dkt. No. 22.] Thus, Defendants had the opportunity to appeal and/or request reconsideration of the decision yet purposefully declined to do so.

II. The Defendants Cannot Challenge or Even Ask the Court to "Interpret" The BLM Survey, Because Defendants Failed to Exhaust Their Administrative Remedies.

The only way that the Defendants could seek to have the BLM survey be interpreted by this Court is if the BLM decision became final agency action, which only then makes the decision judicially reviewable under 5 U.S.C. Section 704. Per 43 C.F.R. Section 4.21(c), a decision does not become final agency action unless a petition for a stay of decision has been timely filed or a decision has been made effective pending appeal. *See M.L. Johnson Family Props., LLC v. Bernhardt*, 924 F.3d 842, 849, 2019 U.S. App. LEXIS 14366, *11, 2019 FED App. 0091P (6th Cir.), 8 (explaining that 43 C.F.R. 3.21(c)-(d) provide a "general finality definition that makes **only decisions of the Appeals Board final agency action subject to judicial review**") (emphasis added). As stated by the Ninth Circuit:

> **When the regulations governing an administrative decision-making body require that a party exhaust its administrative remedies prior to seeking judicial review, the party must do so before the administrative decision may be considered final and the district court may properly assume jurisdiction**. Department of Interior regulations do require that administrative remedies must be exhausted before any administrative decision from the Department is subject to judicial review. 43 C.F.R. § 4.21(b). Administrative

> remedies are deemed exhausted upon disposition of a claim which is not appealable to either the Director of the Interior Office of Hearings and Appeals or an Appeals Board such as the IBLA. *Id.* § 4.21(b). A decision of the IBLA is not subject to further appeal before either the Director or any Appeals Board. *Id.* § 4.21(c). When [plaintiff] lost before the IBLA, therefore, it had exhausted its administrative remedies, and the IBLA determination constituted the Secretary of the Interior's final decision to deny the validity of [plaintiff's] purported placer mining claims. The district court thus had jurisdiction to review the IBLA judgment.

Doria Mining & Engineering Corp. v. Morton, 608 F.2d 1255, 1257 (9th Cir. 1979) (Emphasis added); *see also Wind River Mining Corp. v. United States*, 946 F.2d 710, 712 n.1 (9th Cir. 1991) (explaining that parties exhaust their administrative remedies under these regulations "by petitioning the BLM and appealing its decision to the IBLA"); *Shasta Res. Council v. United States DOI*, 629 F. Supp. 2d 1045, 1051-1052, (9th Cir. 2009) (same). Here, in contrast, it is undisputed that Defendants did not appeal the BLM survey to the IBLA. As such, the BLM's decision cannot be considered a final administrative decision that subject to judicial review by this Court.

As a result, the BLM survey can no longer be challenged because there is no procedural mechanism for Defendants to appeal or otherwise dispute the BLM survey. In sum, Defendants sat on their rights and lost their chance to challenge or otherwise contradict the findings of the BLM survey.

III. Because Defendants Cannot Challenge the BLM Survey and the Court Cannot Review the BLM Survey, Defendants Can Never Meet Their Burden of Proof as A Matter of Law.

Because Defendants can no longer challenge the BLM survey, Defendants will never be able to meet their burden of proving their right to the disputed area. As explained in Plaintiffs' Motion, Section 194 of Title 25 of the United States Code establishes that Defendants, rather than Plaintiffs, have the burden of proof since Defendants are "non-Indians" and Plaintiffs as an Indian Tribe, established their right to the disputed area through competent evidence, including the BLM survey. *See* 25 U.S.C. 194 ("In all trials about the right of property in which an Indian may be a party on one

side, and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."). Similarly, the BLM Letter explained that "the burden of proving a government survey to be in error is upon the person who challenges the survey" and "an appellant challenging a Government resurvey has the burden of establishing by a preponderance of evidence that the resurvey is not an accurate retracement or reestablishment of the original survey." [Dkt. No. 29-4 at p. 51.] Because Plaintiffs made the requisite showing in their moving papers, the burden shifted to Defendants to prove that the survey findings of T.S. Knock from 1893 to 1975, as recognized by the BLM survey in 2011, are incorrect.

By operation of Section 194, Defendants have the burden of showing that there *is* a genuine issue of material fact and therefore summary adjudication is not appropriate here. Defendants failed to make such a showing in the Opposition, and in fact **cannot** make such a showing. The only way that Defendants could have changed the outcome of this case as pertaining to the disputed land is by challenging the findings of the BLM survey. As established above, however, Defendants cannot challenge the BLM survey. Defendants cannot and should not gain from their failure to comply with procedures set forth in the Code of Federal Regulations, which required Defendants to bring any challenges to the BLM survey years ago. The BLM survey is clear on what it states, and the law is clear that the legal ramifications arising from the BLM survey are that the disputed strip of land belongs to Plaintiffs. Because Defendants can never meet their burden of proof as a matter of law, the Court should grant Plaintiffs' Motion.

In their Opposition, Defendants attempt to avoid this fatal legal roadblock by claiming that they are not challenging the BLM survey and instead suggest that they are merely *interpreting* it. Defendants' characterization is misleading and wrong. Defendants are disguising as an "interpretation" their attempt to completely contradict and challenge the BLM survey as a backdoor approach of getting around their insurmountable legal burden of challenging a governmental survey after the fact. In any event, as demonstrated above, however, the law forbids Defendants' attempt. Defendants cannot get around the fact that they were a party to a decision by the BLM, that the decision is final, and Defendants can no longer challenge the BLM survey. As such, any evidence

proffered to contradict the BLM survey cannot be considered by the Court, because the Ninth Circuit cases have established that Defendants arguments must fail as a matter of law, because they did not exhaust their administrative remedies, and therefore cannot meet their burden of proof.

CONCLUSION

For the foregoing reasons and for all the reasons stated in their moving papers, Plaintiffs respectfully request that this Court grant their Motion for Summary Adjudication of Declaratory Relief Claim.

DATED: August 6, 2019

DURAN LAW OFFICE

/s/ Jack Duran
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