No. 18-16764

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA JACKSON, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES of AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California, Oakland
Case No. 4:75-cv-00181-PJH
The Honorable Phyllis J. Hamilton

APPELLANTS' REPLY BRIEF

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INTRODUCTION

It is clear from a review of the Defendants-Appellees' ("Federal Officials") Answering Brief ("Answering Brief") that the Federal Officials do not understand what law applies to the facts of this case and are confused about what really occurred in this case.

First, while initially it was Amerdine Snow McCloud ("Ms. McCloud") who requested that Parcel 5 on the Upper Lake Rancheria ("Rancheria") be restored to federal trust ownership, it is Jessica Jackson, as a beneficial owner of Parcel 5, that is seeking to hold the Federal Officials in contempt of the May 15, 1979 Order and August 31, 1983 Judgment ("Judgment") for failing to comply with the terms and conditions of the Judgment as that Judgment applies to her.

Separate and apart from Ms. McCloud, Ms. Jackson has the right under the Federal Officials' "continuing obligation" under the Judgment to have her interest in Parcel 5 restored to trust status.[1] The "continuing obligation" under the Judgment imposed upon the Federal Officials is a fiduciary obligation that the Federal Officials owe to Ms. Jackson under the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958) ("Rancheria Act").

[1] As used throughout this Reply Brief of Plaintiff-Appellant, Jessica Jackson ("Ms. Jackson," the terms "restored to trust" and "trust restoration" shall mean that the United States accepts title to Parcel 5 in the name of the United States of America in trust for Ms. Jackson and her sister Gwen Loss.

Despite the Federal Officials assertions in their Answering Brief to the contrary, the "continuing obligation" is a "mandatory" obligation, not a discretionary one, once the conditions of the Judgment are met as occurred in this case.

The authority for restoring Parcel 5 to trust status, moreover, is derived from the inherent equitable authority of the District Court, not the discretionary authority of the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 5108 ("IRA"). Therefore, the procedures the Federal Officials must follow to effectuate a "trust restoration" are those set forth in the Judgement, not the IRA.

The District Court's exercise of jurisdiction to enforce the provisions of the Judgment is neither time barred nor in conflict with the Lake County Superior Court's ("Superior Court") exercise of jurisdiction in probating the McCloud estate. Ms. Jackson's cause of action to enforce the Judgment did not arise until the Federal Officials notified her that they were not going to comply with the Judgment. Her contempt motion was filed well within the six year statute of limitations period from the date her cause of action accrued.

Finally, the District Court's exercise of jurisdiction in this case does not conflict with Ms. McCloud's probate proceeding, because the Superior Court never exercised jurisdiction over Parcel 5.

For all of these reasons, as more fully set forth below, this Court should reverse the District Court's Judgment and find that the Federal Officials have violated the Judgment.

ARGUMENT

I.

THE FEDERAL OFFICIALS HAVE A CONTINUING TRUST OBLIGATION TO RESTORE PARCEL 5 TO TRUST STATUS.

The Federal Officials argue that they owe Ms. Jackson no trust obligation to restore her beneficial interests in Parcel 5 to trust status because Ms. Jackson has not cited any "statute requiring the Government to acquire Parcel 5 in trust." Answering Brief, p. 16. The Rancheria Act and the Judgment voiding the termination process and enforcing the Rancheria Act impose such a trust duty.

The Rancheria Act created a trust relationship between the Federal Officials and the Indians of the Rancheria, including Ms. Jackson.

> It is clear, and undisputed, that the United States did not herein fulfill its **fiduciary duties** to the Indian people of the Rancheria, duties that must be exercised with "great care," [citation omitted], in accordance with "moral obligations of the highest responsibility and trust," that must be measured "by the most exacting fiduciary standards." [citation omitted].

Smith v. United States, 515 F. Supp 56, 60 (N.D. Call 1978) ("*Smith*"). (emphasis added).

One of the fiduciary obligations imposed upon the Federal Officials under the Rancheria Act was to hold the Rancheria lands in trust for the Upper Lake Rancheria ("Tribe") until a lawful termination of the Rancheria was accomplished.

> The Rancheria Act clearly states the understanding of the 1958 Congress that Rancheria lands had been and would continue to be held in trust until final termination.

Duncan v. United States, 667 F.2d 36, 42 (Ct. Cl. 1981) ("*Duncan*").

The Judgment voided the illegal termination of the Rancheria and expressly authorized the Indians of the Rancheria, including Ms. Jackson, to restore their Rancheria lands to trust status.

> Thus, the lands should be restored in trust, **at the option of the individual owners**, for the benefit of the Indian(s) or tribe that possessed it prior to the distribution **or the Indian heir(s)**, legatee(s) or **Indian successor(s) in interest** of such Indian(s) or tribe.

Table Bluff Band of Indians v. United States, 532 F. Supp. 255, 260 (N.D. Cal. 1981) ("*Table Bluff*") (emphasis added).

Ms. Jackson is an Indian of the Rancheria and the heir of Ms. McCloud. **ER 162**. As such, under the Rancheria Act and the Judgment[2] the Federal Officials have a continuing fiduciary trust obligation to restore Ms. Jackson's beneficial

[2] Paragraph 2 of the May 15, 1979 Order states that the fiduciary obligation of the Federal Officials under the Rancheria Act "continues" after entry of the Judgment. **ER 138-139**.

ownership interests in Parcel 5 whenever possible.[3] *Duncan*, 667 F.2d at 42; *Smith*, 515 F. Supp. At 60; *Table Bluff*, 532 F. Supp. At 260.

II.

ANY AMBIGUITIES IN THE STIPULATION FOR ENTRY OF THE UPPER LAKE JUDGMENT AND THE JUDGMENT ENTERED PURSUANT THERETO MUST BE CONSTRUED BY THIS COURT IN FAVOR OF MS. JACKSON.

In order to carry out the United States federal trust responsibility to Indians, the Supreme Court has fashioned rules or canons of construction that the federal courts are to apply in construing agreements entered into between the United States and Indians. Agreements entered into between Indians and the United States are to be liberally interpreted to accomplish their protective purposes, with all ambiguities in the agreements being resolved in favor of the Indians.

[3] The Federal Officials also argue that they are relieved of their trust obligation to Ms. Jackson because Ms. Diwald, Ms. Jackson's sister, also claims an interest in Parcel 5 as part of the probate of the estate of Ms. McCloud. Answering Brief, p. 25. This argument fails for a number of reasons. First, Parcel 5 is not an asset of the McCloud estate. The Superior Court for Lake County specifically excluded it from the assets of the estate. Second, Ms. Diwald has no ownership interest in Parcel 5, which is evidenced by the deed Ms. McCloud executed ("McCloud Deed") conveying all of Ms. McCloud's right, title and interest in Parcel 5 to the United States to be held in trust for Ms. McCloud's two daughters Ms. Jackson and Gwen Loss. Finally, this is not a quiet title action to determine who owns Parcel 5, it's a contempt motion to determine whether the Federal Officials violated the Judgment. Thus, the Federal Officials have no competing trust obligation that it owes to Ms. Diwald that would relieve it of its trust duty to Ms. Jackson under the Judgement.

One of the most important applications of these rules of construction is found in *Winters v. United States*, 207 U.S. 564 (1908), which dealt with an Indian agreement made in 1888 and ratified by an Act of Congress. The tribes involved in that agreement had ceded to the United States a large tract of land to be opened up for settlement, while reserving to the tribes other lands, bordering by a flowing stream, which became the Fort Belknap Reservation in Montana. Non-Indian settlers diverted the stream away from the reservation, and the United States brought suit on behalf of the Indians to prevent the diversion. The settlers argued that the lands would not have been ceded for settlement without also ceding the water that would permit them to become fruitful. The United States argued that the lands would not have been reserved for the tribes unless water also had been reserved to make the reservation productive. Faced with these two plausible interpretations, the Court chose to construe the agreement from the standpoint of the Indians and to resolve the conflict in their favor. *Id*. *See also*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942)) ("treaties are construed more liberally than private agreements . . . Especially is this true in interpreting treaties and **agreements** with the Indians [which are to be construed] in a spirit which generously recognizes the full obligation of this nation to protect the interests of [the Indians].").

In addition, agreements between the Indians and the United States are to be construed as the Indians would have understood them. *Winter v. United States*, 207 U.S. 564 (1908); *see also Choate v. Trapp*, 224 U.S. 665 (1912) (dealing with an agreement and statute) and *Antoine v. Washington*, 420 U.S. 194 (1975) (dealing with an agreement ratified by Congress).

Here, the Judgment was entered pursuant to a stipulated agreement ("Stipulation for Entry of Judgment") between the Federal Officials and the Indians of the Rancheria. As such, under the applicable canons of construction, this Court must construe all ambiguities in the Stipulation for Entry of Judgment and Judgment in favor of Ms. Jackson and as Ms. Jackson understands the wording of the Judgment. *Winters v. United States*, 207 U.S. 564 (1908).

III.

THE FEDERAL OFFICIALS DUTY TO RESTORE PARCEL 5 TO TRUST STATUS ARISES UNDER THE JUDGMENT, NOT THE IRA.

Throughout their Answering Brief, the Federal Officials argue that they have a discretionary, not a mandatory, duty to restore Parcel 5 to trust status since the IRA grants the Federal Officials broad discretionary authority to accept trust deeds.

> In 1934, Congress enacted the IRA, Section 5108 . . . of which 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 BIA acquires land in trust pursuant to 25 C.F.R. Part 151, the implementing regulations for the IRA. . . . Section 151.14 provides

> that: "Formal acceptance of land in trust status shall be accomplished by 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.

Answering Brief, p. 21-22.

The problem with the Federal Officials' argument is that the Court did not void the termination process and direct the Federal Officials to restore Ms. Jackson's Parcel 5 to trust status pursuant to the provisions of the IRA. Rather, the Court ordered the Federal Officials to restore Ms. Jackson's Parcel 5 to trust status pursuant to its inherent equitable power and in accordance with the procedures set forth in the Judgment. As such, the IRA has no role to play in this case.

> Defendants posit several statutory arguments suggesting that the Secretary of the Interior is limited in this case to holding land in trust for the Table Bluff Indians as a whole. The Court, however, is cognizant of **its own equitable powers** to fashion appropriate relief. Regardless of what power the Secretary of the Interior may have to award land to Indians in severalty, the Court has broad powers to do equity to the parties. 5 U.S.C. § 706; [citation omitted]. Invoking that power, the court believes that fairness dictates that the land be restored to the status quo exactly as it existed prior to the approval of the now void distribution plan. Thus, the lands should be returned in trust, **at the option of the individual owners, for the benefit of the Indian(s) or . . . the Indian heir(s)**, legatee(s) or Indian successor(s) in interest of such Indian(s) . . .

Table Bluff, at 260 (emphasis added).

In fact, Paragraph 7(e) of the Judgment states that the Court ordered the Federal Officials to restore the lands of the Indians of the Rancheria to trust status pursuant to its "equitable" authority and not the provisions of the IRA.

In determining whether the Federal Officials violated the Judgement and have a mandatory duty to accept the McCloud Deed conveying title to Parcel 5 to the United States in trust for Ms. Jackson and her sister Gwen Loss, therefore, this Court must look solely to the language of the Judgment and not the provisions of the IRA.

IV.

THE FEDERAL OFFICIALS VIOLATED THE JUDGMENT AND SHOULD BE HELD IN CONTEMPT.

In examining the Federal Officials' conduct in this case in light of the plain wording of the Judgment and construing all ambiguities in Judgment in Ms. Jackson's favor, it is clear that the Federal Officials violated the Judgement by refusing to accept the McCloud Deed restoring Parcel 5 to trust status.

Paragraph (f) of the Judgment places a "continuing obligation" on the Federal Officials to restore Parcel 5 to trust status "whenever possible." Paragraph (f) set forth the conditions that have to be met in order to make it "possible" for a parcel to be restored to trust status: (1) an Indian named in the Distribution Plan must make an election to restore his/her interest in Rancheria lands to trust status; (2) the Indian making the election must "specify the person for whom the land is to

be held in trust by the United States"; (3) the Secretary of the Interior has to approve the deed of conveyance "as to form," only; and (4) the Indian named in the deed must be an Indian named in the Distribution Plan for the Rancheria. If all of these conditions are met, the Secretary's duty to accept the deed is mandatory.[4]

In this case, Ms. Jackson met all of the conditions precedent for a mandatory acquisition of Parcel 5 into trust by the Federal Officials. Both Ms. McCloud and Ms. Jackson were named in the Distribution Plan for the Rancheria. **ER 135-136**. Parcel 5 is located on the Rancheria and both Ms. McCloud and, later, Ms. Jackson notified the Federal Officials of their intent to elect to restore Parcel 5 to trust status. **ER 162-163**; **ER 164-165**. Ms. McCloud executed the McCloud Deed specifying that Parcel 5 should be held in trust for two of her daughters, reserving a life estate for herself. **ER 162-163**. The McCloud Deed was delivered to the Federal Officials and they made numerous representations to Ms. Jackson that they would accept the Deed and restore Parcel 5 to trust status. **ER 165-167**. Thus, Ms. Jackson met all of the conditions precedent, under Paragraph (f) of the Judgment for placing a mandatory, nondiscretionary, obligation on the Federal Officials to

[4] Paragraph (f) of the Judgment states: "Restoration of trust status **shall** be accomplished as follows: . . .". This provision is mandatory and makes it clear that once the conditions for trust restoration under the Judgment are met, the Federal Officials have a mandatory duty to accept the deed in trust.

accept the McCloud Deed and record the McCloud Deed with the County Recorder.[5]

Paragraph (f)(6) of the Judgment also provides "that maximum flexibility be allowed in working out the administrative details of trust restoration" and authorizes the parties "to enter into one or more agreements for the purpose of specifying the terms and conditions on which trust restoration is to be effected."

Pursuant to Paragraph (f)(6) of the Judgment, Ms. Jackson entered into a series of agreements with the Federal Officials to effectuate the trust restoration of Parcel 5. She entered into: (1) an agreement for the payment of property taxes that had been levied by the County on the Parcel; (2) an agreement for the appraisal of Parcel 5; (3) an agreement for the purchase of a preliminary title report and title insurance for the Parcel; (4) an agreement for the probate of the Gwen Loss' estate by the Office of Hearings and Appeals; and (5) an agreement for the Solicitor's office to render an opinion on whether the acceptance of the McCloud Deed in trust was exempt from compliance with the National Environmental Policy Act. **ER 164-168**.

Based on the forgoing, it is clear that Ms. Jackson did everything necessary for the Federal Officials to accept the McCloud Deed restoring Parcel 5 to trust

[5] Paragraph (f)(4) of the Judgment provides: "Upon acceptance of any instrument . . . conveying title to lands within . . . the Rancheria . . . pursuant to this judgment, the Secretary of the Interior . . . shall promptly record said instruments with the County Recorder. . .".

status under the Judgment. Instead of accepting the Deed and recording it with the Lake County Recorder, however, the Federal Officials violated the Judgment by telling Ms. Jackson that they would not accept the Deed. **ER 181**.

V.

THE DISTRICT COURT'S JURISDICTION WAS NOT BARRED BY THE STATE COURT PROBATE OF MS. MCCLOUD'S ESTATE.

The Federal Officials also argued in their Answering Brief that Ms. Jackson could not maintain her contempt action in the District Court because the Lake County Superior Court had already exercised jurisdiction over Parcel 5.

In *Marshall v. Marshall,* 547 U.S. 293 (2006) the Supreme Court held that a district court lacked jurisdiction over a parcel of property that was already under the custody of a state court.

> . . . 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 v. Marshall, 547 U.S. at 311.

Based upon the *Marshall* holding, the Federal Officials argue that the District Court lacked jurisdiction over Parcel 5, since the Lake County Superior Court had already exercised jurisdiction over the Parcel as part of the probate of the McCloud estate.

The Court can give short shift to this argument. In her Opening Brief, Ms. Jackson sets forth all of the reasons why this argument fails. Appellant's Opening Brief, pp. 38-41. Ms. Jackson will not repeat those arguments here except to say that Parcel 5 was never under the *in rem* jurisdiction of the Lake County Superior Court. The Superior Court expressly found that it did not have jurisdiction to determine whether Parcel 5 was in trust and therefore, excluded it from the inventory of the assets of the estate. **ER 164-165**. The Superior Court, therefore, never exercised jurisdiction over the Parcel. Thus, the District Court had jurisdiction to determine whether the Federal Official violated the Judgment.

VI.

MS. JACKSON'S MOTION TO HOLD THE FEDERAL OFFICIALS IN CONTEMPT OF THE JUDGMENT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Federal Officials continue to conflate the Federal Officials' failure to restore Parcel 5, pursuant to Ms. McCloud's request, with Ms. Jackson's request to restore Parcel 5 to trust status.

Paragraph (f)(7) of the Judgment states:

> In the event that at any future time lands are acquired within the boundaries of the Rancheria by one or more Indian members thereof . . ., they may be similarly restored to trust status in accordance with the procedures outlined above.

Judgment, p. 18, ¶ (f)(7).

Ms. Jackson acquired an interest in Parcel 5 upon the execution of the McCloud Deed by her mother. **ER 163**.

Ms. Jackson was not aware of the fact that the Federal Officials had not accepted the McCloud Deed until after her mother's death, when she received a property tax bill from Lake County for Parcel 5. **ER 164**. Ms. Jackson then contacted Troy Burdick, Superintendent of the Central California Agency of the Bureau of Indian Affairs ("BIA") and requested that the Federal Officials accept the McCloud Deed and restore Parcel 5 to trust status. **ER 164-165**.

The Federal Officials then advised Ms. Jackson that they would "complete the work on Amerdine Jackson's fee-to-trust request and accept title to Ms. Jackson's Parcel 5 on the Upper Lake Rancheria by no later than July 30, 2008." **ER 165**. This started a long, drawn-out process that occurred over many years under which the Federal Officials continued to tell Ms. Jackson that they would restore Parcel 5 to trust status by accepting the McCloud Deed. **ER 164-181**. Ms. Jackson relied on those representations to her detriment by entering into numerous agreements with the Federal Officials to effectuate the trust restoration process as provided for in the Judgment. **ER 164-181**.

It wasn't until November of 2017, that the Federal Officials, for the first time, advised Ms. Jackson that they would not comply with her request and accept Parcel 5 into trust. **ER 168**. Upon being notified that the Federal Officials were

denying Ms. Jackson's request, Ms. Jackson filed her contempt motion on April 19, 2018. **ER 202**.

Simply put, Ms. Jackson's cause of action against the Federal Officials arose in November of 2017 and she filed her contempt motion in April of 2018, well within the applicable six year statute of limitation period, 28 U.S.C. § 2401(a).

VII.

MS. JACKSON'S CONTEMPT MOTION IS NOT BARRED BECAUSE MS. MCCLOUD FAILED TO EXHAUST AN ADMINISTRATIVE REMEDY ON A UNRELATED ISSUE PERTAINING TO PARCEL 5.

The federal Officials also argue that Ms. Jackson's motion to hold them in contempt of the Judgment is barred because Ms. McCloud failed to exhaust an administrative remedy dealing with the payment of County property taxes on Parcel 5. Answering Brief, pp. 26-28.

Again, the Federal Officials erroneously conflate Ms. McCloud's request that the Federal Officials pay the property taxes assessed on Parcel 5 by Lake County with Ms. Jackson's request that the Federal Officials accept the McCloud Deed into trust under the Judgment.

While the two requests both deal with Parcel 5, one request has nothing to do with the other. Ms. McCloud made a request to the Federal Officials to pay the property taxes that had been assessed on the Parcel after the illegal termination of

the Rancheria. That request had nothing to do with Ms. Jackson's request to restore Parcel 5 to trust status.

> This is our decision to the appeal filed by you [California Indian Legal Services] on behalf of your client, Amerdine Jackson McCloud, to the July 27th decision of the Superintendent of our Central California Agency concerning your request to have the Bureau of Indian Affairs pay the delinquent taxes by your client on Parcel 5 of the Upper Lake Rancheria.

ER 118.

Since the request to pay taxes was not made by Ms. Jackson, dealt with an issue totally unrelated to Ms. Jackson's request to restore Parcel 5 to trust status, and did not involve a motion to hold the Federal Officials in contempt of that provision of the Judgment dealing with trust restoration, the failure of Ms. McCloud to file an appeal from the Federal Officials denial of Ms. McCloud's request to pay the property tax on Parcel 5 does not bar Ms. Jackson's request that the Federal Officials restore Parcel 5 to trust status.

Furthermore, 25 C.F.R. Part 2, dealing with administrative appeals from decisions of the BIA employees, simply does not apply to BIA decisions to violate federal district court orders.

Finally, no law requires the Indians of the Rancheria to exhaust any administrative remedy prior to filing a motion to hold the Federal Officials in contempt for violating the Judgment. The appropriate procedure established by the federal courts to address the violation of a district court order is the filing of a

motion to hold the violator in contempt of the court's order. *See* Rule 70 of the Federal Rules of Civil Procedure.

For these reasons Ms. Jackson had no obligation to exhaust any administrative remedy prior to filing her contempt motion.

CONCLUSION

The Federal Officials violated the Court's Judgment by failing to restore Parcel 5 to trust status.

The District Court had the authority to find the Federal Officials in contempt of the Court's Judgment and to impose a sanction directing the Federal Officials to accept the McCloud Deed into trust as required by Paragraph 8(f) of the Judgment. The District Court failed to do so, contrary to the plain wording of the Judgment.

Ms. McCloud is now dead. Her daughter Jessica Jackson has been waiting over seven (7) years for the Federal Officials to do what they promised they would do: restore Parcel 5 to trust status. It is time that the Federal Officials be forced to comply with Paragraph 8(f) of the Judgment.

For these reasons and the reasons stated above, this Court should reverse the decision of the District Court, find that the Federal Officials violated the Judgment and direct the District Court to enter an order, directing the Federal Officials to accept the McCloud Deed restoring Parcel 5 to trust status.

DATED: July 29, 2019

Respectfully Submitted

By: /s/*Lester J. Marston*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,141 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED: July 29, 2019

Respectfully Submitted
RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: July 29, 2019 Respectfully Submitted

By: */s/ Ericka Duncan*
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