No. 18-16764

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSICA JACKSON,

Movant-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees United States of America, et al.

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of California
District Court Case No. 4:75-cv-00181-PJH

DAVID L. ANDERSON
United States Attorney
SARA WINSLOW
Chief, Civil Division
MICHAEL T. PYLE
Assistant United States Attorney

150 Almaden Boulevard
San Jose, CA 95113
Telephone: (408) 535-5087
Facsimile: (408) 535-5081

Attorneys for Defendants-Appellees United States of America, et al.

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I. INTRODUCTION

Jessica Jackson appeals from a district court order denying her motion to hold federal officials in contempt for failing to acquire a parcel of real property in trust for her benefit. Acquiring land in trust is a process whereby the Secretary of the Interior takes title to an interest in real property in the name of the United States for the benefit of an Indian tribe or individual Indian. *See* Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108 *et seq*.

Jackson relies on a prior court order, but the district court's 1983 judgment established a process by which an eligible Indian could seek to have the Secretary of the Interior acquire property in trust, a process that preserved the requirement that the Secretary approve the acquisition.

Parcel 5 was owned in fee by Jackson's mother, Amerdine Snow McCloud. She administratively litigated a claim that Parcel 5 was in trust, but that litigation was resolved adversely to McCloud in 1994. McCloud never made another effort to obtain the Secretary of the Interior's approval to acquire Parcel 5 before she died in 2001 without a will. Intervenor April Diwald is Jackson's sister, who was appointed by a California probate court as the administrator of McCloud's estate. Because Parcel 5 was held in fee by McCloud at the time of her death, a state probate court must first determine what heirs hold an interest in Parcel 5 before the Secretary of the Interior can be required to acquire Parcel 5 in trust for the true

owner(s)' benefit. Jackson opposed efforts to obtain a state probate court ruling, and has appealed to this Court instead of completing the necessary probate court proceedings.

Because probate court proceedings are ongoing, the district court correctly denied Jackson's contempt motion.

This Court should affirm the district court's order.

II. STATEMENT OF JURISDICTION

A. Jurisdiction in the District Court

The United States District Court for the Northern District of California had subject matter jurisdiction under 28 U.S.C. § 1331 over the underlying litigation. The district court properly held, however, that it lacked subject matter jurisdiction to grant Jackson's post-judgment motion to hold federal officials in contempt of the court's 1983 final judgment.

B. Jurisdiction in the United States Court of Appeals

The Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's August 17, 2018 order (ER 1-6)[1] denying Jackson's motion to hold defendants in contempt of the judgment because it finally resolves the sole

[1]For purposes of this Brief, "ER" refers to Appellant's Excerpts of Record. Citation to the ER have been by citing the relevant page number(s). "Docket No." refers to the District Court's Docket Record. "SER" refers to Appellees' Supplemental Excerpts of Record, which are cited by page number.

proceeding before the court. *See Balla v. Idaho State Bd. Of Corr.*, 869 F.2d 461, 465-66 (9th Cir. 1989) (stating court has jurisdiction to review order denying motion to hold party in contempt). Jackson filed a Notice of Appeal on September 14, 2018. ER 43. Jackson's appeal is therefore timely pursuant to Fed. R. App. P. 4(a) and (b).

III. STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred when it held that the need for the state probate court to complete its pending proceedings deprived the district court of jurisdiction to grant Jackson's motion?

2. Whether the Government owes Jackson a fiduciary duty to acquire Parcel 5 in trust for her, to the exclusion of Diwald and other potential claimants to Parcel 5?

3. Whether Jackson can rely on McCloud's actions and inactions prior to her passing, where McCloud did not exhaust administrative remedies about Parcel 5 after beginning them, and whether claims about actions by the mother prior to her passing in 2001 are timely to litigate in 2019?

4. Whether the district court abused its discretion in holding that Federal Defendants were not in contempt of the judgment?

IV. STATEMENT OF THE CASE

A. The Property and Parties.

At issue in this appeal is a parcel of real property in Lake County, California designated as "Parcel 5." Movant-Appellant Jackson and Intervenor Diwald both claim an interest in Parcel 5. Jackson and Diwald are daughters of Amerdine Snow McCloud. ER 162. McCloud died on February 4, 2001 (ER 58), without a will. ER 162. At the time of her death, McCloud had four children: Jackson, Diwald, Gwendlyn Loss (deceased), and Anthony Jackson. ER 162. Jackson contends that McCloud's children are the only lawful heirs. *Id*. According to Jackson's attorney's statement to the district court, Loss has two children who may be heirs. ER 36. Neither Loss's children nor Anthony Jackson have appeared in this action.

Defendants-Appellees are the United States of America, Ryan K. Zinke, Cecil Andrus, Amy Dutschke, and Troy Burdick ("Federal Defendants").

B. The District Court Litigation from 1975 to 2003.

This case was filed on January 28, 1975. ER 182. While the available docket entries do not begin until 1991 (*see* ER 191), the district court explains that this underlying litigation was brought by the Upper Lake Pomo Association and several individual members of the Association against the United States, seeking reinstatement of land over which the government had incorrectly attempted to terminate its trust relationship for the benefit of the Upper Lake Band of Pomo

Indians as a sovereign nation. ER 2. The district court granted summary judgment for plaintiffs on their claims for declaratory and injunctive relief on May 15, 1979, finding that the failure of the United States to perform its duties and obligations with regard to the Upper Lake Rancheria land constituted a material breach of the California Rancheria Act, Act of Aug. 18, 1958, 72 Stat. 619 ("the Rancheria Act"). *See* ER 147-55.

The Court entered a final judgment on August 31, 1983 regarding the claims for declaratory and injunctive relief. *See* ER 79-86. The judgment provides that it:

> b. . . . 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 . . . ;

ER 80. The judgment further provides:

> 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 said Rancheria, *whenever possible*.

ER 82-83 (emphasis added).

Restoration of trust status required the consent of the Secretary of the Interior:

> (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 said 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 said lands are located;

ER 84-85 (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." ER 86.[2]

In April 1993, the parties settled the remainder of the underlying litigation in its entirety by entering into a stipulation for the 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 stipulated agreement constituted a final resolution "of all claims of plaintiffs arising from the

[2] There are no material differences in the cited language between the 1979 order and 1983 judgment. However, it is only the 1983 judgment that establishes 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." Accordingly, the 1983 judgment is the appropriate order for this Court to consider. *See also Balla*, 869 F.2d at 464-466 (holding that contempt is properly measured by final judgment because, among other reasons, interlocutory orders can be modified before final judgment).

termination of the Upper Lake Rancheria pursuant to the Rancheria Act." ER 92. The agreement 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, ER 96-97 (Judgment incorporating Stipulation for Entry of Judgment "which is incorporated herein by reference as though set forth in full").

As the district court explained in a 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* ER 107 at 9:20-22.

C. McCloud's Unsuccessful Efforts to Place Parcel 5 into Trust

In 1994, McCloud instituted an administrative proceeding before the Department of the Interior's Bureau of Indian Affairs ("BIA" or "Bureau") to recognize Parcel 5 as being held in trust by the United States. SER 003. The Superintendent of the BIA's Central California Agency denied McCloud's request, observing that 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. SER 002-03. As such, the Superintendent concluded that McCloud must have made the decision not to have Parcel 5 placed into trust. *Id.*

McCloud administratively appealed the Superintendent's decision to the Area Director. In the course of those proceedings, however, McCloud acknowledges that she "owns Parcel 5 of the Upper Lake Rancheria *in fee*." SER 008 (emphasis added). McCloud also asserted in her administrative appeal that she did not recall receiving a grant deed in 1982. SER 009. She argued that the Bureau had a duty to act when she failed to return the 1982 grant deed. SER 012. She also argued that the Bureau, by never requesting the information to complete the conveyances, failed to act on her previous asserted attempts to transfer Parcel 5 into trust. SER 015.

On December 1, 1994, the Area Director issued a decision affirming that McCloud had failed to complete the trust restoration of Parcel 5. ER 115 at ¶ 7 & ER 118-122. The Area Director concluded that McCloud filed an application for trust restoration, but later changed her mind and never completed the required process. *Id.* The Area Director subsequently acknowledged that his decision did not preclude any future consideration of a fee-to-trust acquisition application by McCloud. SER 020.

McCloud did not appeal the Area Director's decision (*id.*), nor did she ever make any renewed attempt to obtain the Secretary's approval for acquiring Parcel

5 in trust. Instead, McCloud unilaterally recorded a Grant Deed with the County Recorder's Office on April 22, 1998, by which she stated, incorrectly, that Parcel 5 was transferred to "The United States of America in Trust" for the benefit of Jackson and Loss. ER 130.

On February 9, 2016, BIA notified the Lake County Assessor-Recorder that McCloud's April 22, 1998 deed had "purported to unilaterally convey her property into trust without consent of the United States." ER 116 at ¶ 10 & ER 130. BIA explained in its letter that "[w]hile the deed states that it was transferred to 'The United States of America in Trust,' there is no record [that] the property was accepted into trust by the United States, which would be reflected by an 'Acceptance of Conveyance' attached to the deed[.]" ER 130. Such a document, BIA explained, would confirm that the deed was executed by the Bureau of Indian Affairs pursuant to the statute authorizing such an acquisition by the United States. *Id*. BIA further stated: "Without the acceptance of conveyance the deed would be considered invalid . . . and [Parcel 5] should be considered fee land, taxable by the County." *Id*.

Furthermore, on August 9, 2013, a Department of the Interior official acting with authority disclaimed any interest that the United States might have in Parcel 5. ER 66.

Jackson does not cite any document executed by the government showing that Parcel 5 was in trust as of McCloud's death in 2001. Indeed, there is no document showing that the Secretary ever approved the deed that McCloud unilaterally recorded in 1998.

D. BIA Has Repeatedly Explained that Parcel 5 Was Not Acquired in Trust by McCloud and Following Her Death, the Parcel Must go through Probate.

Following McCloud's death in 2001, BIA sent a letter to Diwald on September 16, 2002, that stated:

> 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 . . . for the state probating procedures.

ER 115 at ¶ 8 & ER 125 (emphasis added).

On August 13, 2010, BIA sent Jackson a letter, 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?" ER 124.

On December 26, 2012, BIA sent a letter to Jackson's attorney. BIA explained that "[b]efore [the agency] can proceed" with processing Jackson's application to acquire the parcel in trust, the agency would "need current

ownership information for the property . . . in order to prepare the Deed and Acceptance of Conveyance attached to the deed." ER 115 at ¶ 9 & ER 127. BIA explained that its realty staff had taken steps 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 had advised BIA that McCloud's estate was the subject of ongoing probate proceedings.

Finally, BIA's December 2012 letter advised Jackson's lawyer: "[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." ER 127-28.

Although it has been almost seven years since Jackson was notified of the need for a final probate court order, BIA has not received such an order and remains unable to proceed with a trust acquisition of Parcel 5. ER 115 at ¶ 9; *see also* ER 46-47 at ¶4-5. Consequently, the BIA has not acquired Parcel 5 in trust. ER 114-116 at ¶¶ 4-6; s*ee also* ER 66, 124-25, 127-28, & 130.

E. Diwald Initiates California Probate Proceedings.

On August 9, 2004, the state probate court appointed Diwald as the administrator of her mother's estate. *See* ER 58-59 at ¶ 2 & ER 62. On September 24, 2013, the probate court held that it "does not have jurisdiction to determine whether [Parcel 5] is Indian trust land or not," and noted that the probate court lawyer for Diwald "intends to petition the federal court for determination of the real property in question." *See* ER 71.

F. Diwald Files Suit Against Jackson Regarding Parcel 5.

On March 15, 2016, Diwald filed suit against Jackson in federal district court, seeking declaratory relief to resolve the dispute between the sisters regarding whether or not Parcel 5 is held in trust by the United States. *Diwald v. Jackson*, No. 1:16-cv-01281-RMI (N.D. Cal.). *See* ER 52-56. Jackson contends that the state probate court lacks jurisdiction over Parcel 5 because the property is held in trust by the United States. *Id*. Diwald disagrees and instead contends that the land remains held in fee simple by McCloud's estate and therefore must be probated. The United States is not a party to that dispute. *Id*.

On February 29, 2018, Jackson and Diwald notified the district court that Jackson was "in the process of preparing and filing" a motion to hold BIA in contempt of the longstanding district court judgment at issue in this appeal and that Diwald would oppose that motion. *See* ER 73-75. The parties in *Diwald* stated:

> 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 of America in trust for any of the parties to this proceeding.

ER 74. The *Diwald* litigation is currently stayed. *See* ER 77.

G. District Court Proceedings on Jackson's Contempt Motion.

On April 19, 2018, Jackson filed a motion to hold Federal Defendants in contempt of a court order. Docket No. 320. Diwald then filed a motion to intervene to oppose Jackson's contempt request. Docket No. 324. The United States opposed Jackson's motion. Docket No. 325. Finally, Jackson filed a reply brief. Docket No. 332.

The district court held a hearing on August 15, 2018. ER 8-42. The district court stated that Jackson's motion raised an "issue [that] seems to be pretty straightforward. The issue is, in [the Court's] view, whether . . . Parcel 5 was actually transferred to the government and accepted by the government. And if not, should the court now order the transfer and the acceptance rather than allow the parcel to be deemed a part of McCloud's estate that is going through probate." ER 17. Jackson argued that Parcel 5 "was in trust before Ms. McCloud died." ER 19. The Court asked: "Where is the proof of that?" ER 19. Jackson admitted that no formal document was ever executed by the government accepting the conveyance of Parcel 5 for the government to hold in trust. ER 23-24.

The Court stated:

> The order make[s] it pretty clear that the Secretary has the final word on it. It wasn't done. There's no evidence to suggest and no argument that Parcel 5 was actually restored. Therefore, it wasn't in trust. Period. The Court cannot find otherwise given that it wasn't in trust. I cannot grant a motion for contempt or order the government to act.

ER 38-39. The district court then explained that the first step going forward would be for the probate court to determine McCloud's heirs, who have a right to decide whether or not to convey Parcel 5 to the government to hold in trust. ER 39.

H. The District Court Denies Jackson's Contempt Motion.

The district court denied Jackson's contempt motion in a written order, issued on August 17, 2018. ER 1-6. In its Order, the court observed that McCloud had "attempted to convey the Parcel to be held in trust by the government, the government had reason to refuse each attempted conveyance." ER 5. The district court interpreted the court orders that Jackson sought to enforce as ones that "clearly afford the Secretary of the Interior the discretion to approve or reject such conveyances." *Id*. Since the court orders at issue "provide that restoration of land to the trust would only be accomplished after the Secretary of the Interior accepted a conveyance, and the Secretary never accepted any of McCloud's attempted conveyances," the district court "finds that [Parcel 5] was never restored to trust status with the government." *Id*. The Court explained that McCloud owned Parcel

5 "in fee simple when she died in 2001. As such, the Parcel became part of her estate." *Id*.

The district court further held that "the probate exception to this court's jurisdiction precludes precisely what Jackson requests – seizing and controlling property that is in the possession of a state court." *Id*. (citing *Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1251 (9th Cir. 2017) (citing *Marshall v. Marshall*, 547 U.S. 293, 311 (2006)).

V. SUMMARY OF ARGUMENT

The district court correctly denied Jackson's motion to hold Federal Defendants in contempt. The district court recognized this as a straightforward matter, because all of the evidence before it showed that Parcel 5 was not held in trust by the Government. The district court correctly determined that McCloud held title to Parcel 5 in fee simple when she died in 2001. The evidence before the district court established that Diwald had been appointed as the administrator of McCloud's estate by the probate court and attempted to complete that process. Jackson opposed that effort. As the BIA and district court determined, Parcel 5 was held in fee simple at the time of McCloud's death; the next determination – who inherited Parcel 5 from McCloud – must be determined by the probate court.

The district court properly held that "the probate exception to the court's jurisdiction precludes the relief sought by Jackson – seizing and controlling

property that is in the possession of a state court." *See Goncalves*, 865 F.3d at 1251 (citing *Marshall*, 547 U.S. at 311).

Jackson argues that the Government owes a duty of trust to her, at the expense of Diwald and any other claimant to Parcel 5. The Government's duty, however, "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). Jackson cites no statute requiring the Government to acquire Parcel 5 in trust. But even assuming that the government had a trust responsibility, it would have to account for the interests of other Indians who are potential heirs to the property. "No trust relation exists which can be discharged to the plaintiff . . . at the expense of other Indians." *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). To rule in favor of Jackson, therefore, would be to ignore the claims of Diwald, as well as the other possible heirs who are not before this Court.

Furthermore, Jackson may not relitigate McCloud's unsuccessful attempts to have Parcel 5 acquired in trust here, because McCloud litigated those issues administratively and lost in 1994. McCloud never appealed the administrative decision or subsequently sought the Secretary of the Interior's approval to acquire Parcel 5 in trust before her death. Any claims about McCloud's efforts are barred by a failure to exhaust administrative remedies and the six-year statute of limitations.

Finally, Jackson ignores the law regarding contempt. Jackson cannot establish that Federal Defendants are in contempt of the 1983 judgment. The relevant officials have been transparent in explaining that Parcel 5 has never been acquired in trust, and that McCloud's death in 2001 has required that a state probate court determine the heirs of McCloud with an interest in Parcel 5. The district court's order should be affirmed.

VI. ARGUMENT

A. Standard and Scope of Review

"We review the denial of a motion for contempt for abuse of discretion." *Balla*, 869 F.2d at 464. The Ninth Circuit will reverse a district court's decision "only if the district court has misapprehended the law or rested its decision on a clearly erroneous finding of a material fact." *Hallett v. Morgan*, 296 F.3d 732, 749 (9th Cir. 2002). A district court enjoys "wide latitude in making a determination of whether there has been contemptuous defiance of its own orders." *Neebars, Inc. v. Long Bar Grinding, Inc.*, 438 F.2d 47, 48 (9th Cir. 1971).

B. The Probate Exception Precludes Granting Relief About Parcel 5.

"[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell v.*

Maurer, 293 U.S. 237, 244 (1934)). Consequently, this Court first needs to determine whether the district court correctly held it did not have jurisdiction to grant Jackson's contempt motion.

The "probate exception" is a limitation on a federal court's jurisdiction 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 explained the probate exception as reiterating "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 Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195-96 (1935) and *Waterman v. Canal–Louisiana Bank & Tr. Co.*, 215 U.S. 33, 45-46 (1909)).

The district court correctly invoked the "probate exception" in holding that it lacked jurisdiction to grant Jackson's contempt motion seeking to compel the transfer of Parcel 5 before the probate court decides who actually owns the property. The district court recognized that Jackson's contempt motion sought "an order . . . removing the Parcel from the probate court's jurisdiction and requiring

that the government now take ownership of it in trust." ER 5. The district court correctly held that the "probate exception to the court's jurisdiction" precluded the court from awarding what Jackson requests – seizure of property in the possession of a state court. *Id*.

McCloud owned Parcel 5 "in fee simple when she died in 2001. As such, the Parcel became part of her estate." ER 5. There was no contrary evidence before the district court. All of the available evidence supported the court's finding. ER 114-116 at ¶¶ 4-6; s*ee also* ER 66, 124-25, 127-28, & 130.

Jackson nevertheless argues that Parcel 5 was not an asset of McCloud's estate. Jackson first argues that McCloud conveyed title to the United States to be held in trust for her two daughters, Jackson and Loss. Jackson Br. at 39 (citing ER 164-65). As an initial matter, the cited record does not support Jackson's argument. This citation to Jackson's declaration states that she and her mother "*assumed* that Parcel 5 was owned by the United States in trust for me and my sister, reserving a life estate for my mother." ER 164 (emphasis added). Jackson states that she was informed by BIA, "[a] number of years after [her] mother's death," that "there was nothing in their title records showing that the BIA ever recorded the Deed . . . or ever executed a document . . . evidencing that BIA accepted either the Deed or the BIA deed." *Id*.

BIA concluded in 2002, however, that Parcel 5 was held in fee simple by McCloud at the time of her death and would thus be subject to state probate procedures. ER 125. In fact, if the property had been held in trust at the time of McCloud's death, BIA, and not the state probate court, would have had to probate the property. 25 C.F.R. § 15.10(a) ("We will probate only the trust or restricted land, or trust personalty owned by the decedent at the time of death."). BIA does not probate real property not held in trust for an Indian at the time of her death, such as Parcel 5. *Id*. § 15.10(b)(1).

Jackson's argument also ignores that under both the district court's final judgment and under the IRA, 25 U.S.C. § 5108, an individual Indian cannot compel a transfer of title into trust by unilaterally recording a transfer that did not in fact take place.

Jackson also argues that immediately after McCloud's death, beneficial title to Parcel 5 vested with Jackson and Loss. Jackson Br. at 33. Jackson cites no authority for this legal proposition. As the district court correctly noted, this is an argument for the state probate court. ER 5. Whether Jackson did inherit Parcel 5 from McCloud such that she may now begin the process of transferring it into trust is a question for the state probate court alone.

As to the district court's final judgment, it provides that the "continuing obligation to restore to trust status lands of the Upper Lake Rancheria" is limited

by the phrase "whenever possible." ER 82-83. 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." ER 84.

Consistent with the judgment, case law and regulations confirm that an individual Indian cannot unilaterally place property in trust. In 1934, Congress enacted the IRA, Section 5108 (formerly codified at 25 U.S.C. § 465) 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 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 acquires land in 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* ER 115 at ¶¶ 4-6; ER 66. In fact, Jackson's motion confirms that the federal government never approved placing Parcel 5 in trust. She seeks an order requiring "the Secretary or his/her designated representative in the BIA [to execute] 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 Ms. McCloud and recording of that deed by the BIA with its Lands, Titles and Records Office and the Lake Country Recorder's Office." Jackson Br. at 5 n.2. If Parcel 5 was already in trust, she would not need an order compelling the Federal Defendants to execute a document and record a deed.

Jackson's only other argument is that the probate court excluded Parcel 5 from McCloud's estate. Jackson Br. at 39. This is not true, as the state probate court merely concluded that it lacked "jurisdiction to determine *whether* certain real property in this case is Indian trust land or not." ER 71 (emphasis added). The district court here found that Parcel 5 is in fact part of McCloud's estate, as the federal court was entitled to do. As the district court explained, its order would allow the probate court proceedings to be resolved as to Parcel 5 and any other assets in McCloud's estate. ER 39:7-24 & 40:11-23.

Parcel 5 was not in trust at the time of McCloud's death in 2001, and

therefore only the state probate court can determine which person (or persons) owns the property at this time. The district court lacked jurisdiction to order the transfer of Parcel 5, and it did not err in so holding.

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

There is "'undisputed[ly] … a general trust relationship between the United States and the Indian people,'" *Jicarilla*, 564 U.S. at 176 (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (*Mitchell II*)), but that trust relationship "is defined and governed by statutes rather than the common law." *Id.* at 173-174. "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) (*Mitchell I*)). 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 by this Circuit. 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*.

Jackson does not identify any "specific, applicable, trust-creating statute or regulation that the Government violated." *See Jicarilla*, 564 U.S. at 177 (quoting *United States v. Navajo Nation*, 556 US 287, 302, 129 S.Ct. 1547, 1558 (2009) (Navajo II). Instead, she relies on cases that long predate *Jicarilla*'s clarification of the law, and her cases are not on point as to the dispute at issue here. *See* Jackson Br. at 26. For example, *Smith v. United States*, 515 F.Supp. 56 (N.D. Cal. 1978) and *Duncan v. United States*, 667 F.2d 36, 44 (Ct. Cl. 1981) are cases in which courts held the United States breached federal law by unlawfully terminating Indian Rancherias by failing to adhere to the terms of the Rancheria Act, and so any claim of breach of fiduciary duty was tied to the statute in question. *See Duncan*, 667 F.2d at 44 ("this is not a case in which the court, on its own, imposes a trust relationship without clear direction from Congress."). But Jackson is not contending that the government has violated the Rancheria Act, and the original plaintiffs fully resolved their claims under the statute through the

stipulated settlement, with which the original plaintiffs agreed the government has complied. *See* Jackson Br. at 8. Jackson's argument therefore fails under *Jicarilla* and its application to the facts of this dispute.

In any event, this Court does not need to determine the extent or scope of any trust responsibilities of the federal government. Diwald and Jackson disagree about the proper outcome for Parcel 5. Jackson wants it put in trust for her benefit, while Diwald wants the state probate court to determine the property's current owners. In reasoning fully applicable to the dispute between Diwald and Jackson, this Court has held that "[n]o trust relation exists which can be discharged to the plaintiff . . . at the expense of other Indians." *Hoopa Valley Tribe*, 812 F.2d at 1102; *see also Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (Federal Government has "conflicting fiduciary responsibilities" to the Northern Cheyenne and Crow Tribes, and finding no breach of trust duty). The Supreme Court in *Jicarilla* cited both *Hoopa Valley Tribe* and *Nance* with approval. *See Jicarilla*, 546 U.S. at 182-83.

As indicated by this precedent, it would be improper for the Court to rule in favor of Jackson and order the transfer of Parcel 5 to her exclusive benefit on the basis of an alleged trust duty to her alone, ignoring Diwald and other potential heirs who have an interest in Parcel 5. After all, either both Diwald and Jackson are owed trust duties by the Federal Defendants, or neither is.

D. Any claim that the BIA Acquired Parcel 5 in Trust Prior to McCloud's Death Was Not Administratively Exhausted and is Untimely.

This Court can affirm a judgment on "any ground supported by the record." *Thompson v. Paul*, 547 F.3d 1055 (9th Cir. 2008). McCloud died more than eighteen years ago, in 2001. McCloud made efforts to place Parcel 5 in trust, but none of those efforts was successful.

"[E]very 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 McCloud's application requesting that the BIA recognize that Parcel 5 had been restored to trust status under the various prior deeds. *See* ER 115 at ¶ 7 & ER 118-122. The Director's decision expressly states that it is final absent a timely administrative appeal. ER 122. As there was no timely administrative appeal of the 1994 decision, the Director's decision became final. However, the Director noted that the 1994

decision did not preclude any future conveyance applications by Ms. McCloud if they were accompanied by a proper former conveyance deed acceptable to the Secretary. SER 020.

Most decisions of the Bureau of Indian Affairs require an administrative appeal before judicial review of such decisions can be obtained. *See, e.g.*, 25 C.F.R. § 2.6(a). BIA regulations provide for direct appeal of an Area Director's decision to the Interior Board of Indian Appeals ("IBIA"). *See* 25 C.F.R. § 2.4(e). Interior Department regulations require such appeal to the IBIA before the decision of a BIA Area Director can be judicially reviewed. *See* 43 C.F.R. § 4.314(a).

Any claim that the Federal Defendants failed to accept Parcel 5 by one of McCloud's several discrete efforts is both time-barred and unexhausted. Additionally, this Court routinely upholds the dismissal of lawsuits challenging BIA decisions on the ground that plaintiffs failed to take the required administrative appeal. *Joint Bd. of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 862 F.2d 195, 199–201 (9th Cir. 1988); *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677–78 (9th Cir. 1988). The requirement permits the development of a factual record, application of agency expertise, and possible resolution of the dispute without resort to federal court. *Joint Bd. of Control*, 862 F.2d at 199; *White Mountain*, 840 F.2d at 677. Under 28 U.S.C. § 2401(a),

McCloud's opportunity to challenge the Area Director's decision in district court expired on December 1, 2000, six years after the decision was made. Jackson's lengthy argument about her purported ability to bring her motion is therefore unavailing. *See* Jackson Br. at 34-38.

Upon McCloud's death intestate in 2001, and with Parcel 5 remaining in fee status, only a state probate court can determine which person (or persons) has an interest in Parcel 5. Jackson is time-barred by the applicable statute of limitations from seeking to litigate whether the government should have acquired Parcel 5 in trust before 2001. Jackson knew that McCloud was unsuccessful in placing Parcel 5 into trust prior to her death, as evidenced by her attempts, in the years since McCloud's death, to place Parcel 5 into trust herself. Jackson's brief does not say a word about the BIA's 2002 determination (which was repeated in writing thereafter) that only a probate court can determine the heirs of Parcel 5.

E. The Federal Defendants Should Not Be Held in Contempt.

Jackson's brief makes only a passing reference to contempt. Jackson Br. at 41 ("the power to punish acts of contempt has been recognized as inherent in the federal courts."). Jackson ignores the relevant law on contempt, as discussed below. Applying the correct legal principles, the district court did not abuse its discretion in denying Jackson's motion.

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).

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), but substantial compliance can serve as a defense. *Balla*, 869 F.2d at 466. The burden falls upon 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 Defendants Are Not in Contempt of Court.

Jackson cannot meet her burden to establish that the Federal Defendants 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.

First, Jackson's motion is premised on the idea that the Court's final judgment awarding declaratory and injunctive relief requires BIA to take property into trust if a request is submitted. The text of the district court's 1983 judgment, however, belies this argument. 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." ER 82-83. 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." ER 84. The judgment is not sufficiently specific and definite to hold Federal Defendants in contempt because it does not make transferring property a unilateral decision by an Indian landowner; rather, it gives Federal Defendants discretion to determine that a request to restore land to trust status is not possible or to refuse to accept a deed that is not prepared in a form acceptable to the Secretary. The judgment places no specific or

definite limitation on the Federal Defendants' discretion in that regard.

In other words, the judgment provides no basis for a court to order Federal Defendants to take Parcel 5 into trust, as it gives Federal Defendants discretion to reject a transfer instrument as to form. These facts alone preclude holding the Federal Defendants in contempt. *Balla*, 869 F.2d at 466 (affirming denial of motion to hold party in contempt because, among other things, the order was not sufficiently "specific and definite"). *See also Inst. of Cetacean Research*, 774 F.3d at 945 (holding that civil contempt is only appropriate where there is clear and convincing evidence of violation of a "specific and definite court order").

(b) The Ongoing Probate Proceedings Make It Impossible 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). The BIA has explained since 2002 why it has been unable to place Parcel 5 into trust following the death of Jackson's mother. *See* ER 115 at ¶ 9 & ER 124-125. In a 2012 letter, BIA explained that "before [it] can proceed" with processing Jackson's application to acquire Parcel 5 in trust, the agency would "need current ownership information for the property . . . in order to prepare the Deed and Acceptance of Conveyance attached to the deed." ER 115 at ¶ 10 & ER 127. The letter

advised: "[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." ER 127-28.

Although it has been more than seven years since BIA notified Jackson that the agency could not consider a trust application until the probate court has determined McCloud's heirs, Jackson opposed Diwald's efforts to complete the probate of McCloud's estate. Accordingly, BIA remains unable to proceed in acquiring Parcel 5. ER 115 at ¶ 9 & ER 47 at ¶¶ 4-5 (probate proceedings concerning Parcel 5 "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 contends that it 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." ER 47 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 has asked for information concerning probate results and other information since 2002 (the year after McCloud's death) 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 acquiring Parcel 5 in trust.

It has been seventeen years since BIA first explained that Parcel 5 would have to go through state probate court proceedings because McCloud held the property in fee at the time of her death. Once Parcel 5's status is resolved by the state probate court, BIA will entertain any application to acquire the land in trust by the rightful owner(s) of the property.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order denying Jackson's motion to hold Federal Defendants in contempt.

Dated: June 7, 2019

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

SARA WINSLOW
Chief, Civil Division

/s/ Michael T. Pyle
MICHAEL T. PYLE
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(a), Appellees are unaware of any other cases related to this appeal now pending before this Court.

Dated: June 7, 2019

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

SARA WINSLOW
Chief, Civil Division

/s/ Michael T. Pyle
MICHAEL T. PYLE
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the preceding Brief of Appellees is proportionately spaced, has a typeface of 14 points or more, and contains 7,990 words as calculated by the word count function of Microsoft Word.

Dated: June 7, 2019

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

SARA WINSLOW
Chief, Civil Division

/s/ Michael T. Pyle
MICHAEL T. PYLE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 7, 2019.

Counsel for all parties are registered CM/ECF users and were served by the appellate CM/ECF system.

Dated: June 7, 2019

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

SARA WINSLOW
Chief, Civil Division

/s/ Michael T. Pyle
MICHAEL T. PYLE
Assistant United States Attorney