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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Acting Secretary of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1-100, Defendants.[1]	Case No. 2:17-cv-01156 TLN CKD **FEDERAL DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** **[Fed. R. Civ. P. 12(b)(6)]** Date: April 4, 2019 Time: 2:00 p.m. Ctrm: 2, 15th Floor Judge: Hon. Troy L. Nunley

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on Thursday, April 4, 2019, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 2, 15th Floor, before the Honorable Troy L. Nunley, the United States Department of the Interior, David Bernhardt, in his official capacity as Acting Secretary of the Interior, and Tara Katuk Mac Lean Sweeney, in her official capacity as Assistant Secretary-Indian

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Acting Secretary of the Interior David Bernhardt and Assistant Secretary-Indian Affairs Tara Katuk Mac Lean Sweeney are automatically substituted for former Secretary Ryan Zinke and former Acting Assistant Secretary-Indian Affairs Michael S. Black, respectively, as the defendants in this action.

Affairs of the United States Department of the Interior ("Federal Defendants"),[1] will and do hereby move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff's first amended complaint because plaintiff's claims are barred by the Administrative Procedure Act's ("APA") six-year statute of limitations. 28 U.S.C. § 2401(a) (a civil action against the United States "shall be barred unless the complaint is filed within six years after the right of action first accrues").

This motion is based on this notice, the accompanying memorandum of points and authorities, the Court's files and records in this matter, other matters of which the Court takes judicial notice, and any oral argument that may be presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

In its original complaint, plaintiff sued the U.S. Department of the Interior, the Secretary, and the Assistant Secretary-Indian Affairs under the APA and sought from the Court a declaration that plaintiff "is a federally [recognized] tribe" and that its members "are Indians whose status have not been vanquished." ECF 1 at 7. Federal Defendants moved to dismiss the original complaint, among other reasons, because it was time-barred by the APA's six-year statute of limitations. Since the gist of plaintiff's claim is that Federal Defendants wrongly excluded it from the list of federally recognized tribes, Federal Defendants argued that plaintiff was on notice of its loss of federal recognition since at least 1979, when it was not included on the first published list of federally recognized tribes, and noted that plaintiff also has not been included on list ever since. *See* ECF 12 at 15-17. Alternatively, Federal Defendants argued that plaintiff was aware of its non-federally recognized status in 1998 when it filed its letter of intent to petition for acknowledgment as an Indian tribe. *Id.* at 16 n.4.

In its order granting the motion on statute of limitations grounds,[2] the Court found that:

> The thrust of Plaintiff's allegations is that it was injured by its loss of federal recognition, which can be traced back to the sale of the Taylorsville Rancheria in 1966. Yet Plaintiff did not file its complaint until 2016. Plaintiff has not sufficiently alleged that it lacked notice of its loss of federal recognition until the six years prior to filing the complaint."

ECF 33 at 9. The Court held that plaintiff "had actual notice of its lost tribal status when it petitioned for federal recognition in 1998." *Id.* (citing ECF 1, ¶ 4). Thus, the Court ruled that "it appears from

[2] Finding the statute of limitations to be dispositive, the Court granted the motion on that basis without addressing the parties' other arguments. ECF 33 at 9-10.

the face of the complaint that the limitations period has run" and that "Plaintiff's claims as currently alleged are time-barred and should be dismissed." *Id.* at 9. However, the Court granted leave to amend for a limited purpose – "so that Plaintiff may allege further factual details regarding its lack of notice of adverse agency action, if applicable." *Id.* Because plaintiff has failed to allege additional facts showing that it was not on notice of its loss of federal recognition within six years of the filing of its complaint, the Court should dismiss the amended complaint without leave to amend.

Indeed, the amended complaint is nearly identical to the original, and includes the very same allegation that the Court cited in finding that, in 1998, plaintiff had actual notice of its lost tribal status. *See* ECF 34, ¶ 4 ("In 1998, Plaintiff submitted its letter of intent to petition for acknowledgment as an Indian tribe"). While plaintiff also now alleges that: it did not have notice of the Taylorsville Rancheria sale in 1966 (ECF 34, ¶ 25); its members still have access to the ranch and perform ceremonial and ritual gatherings there (*Id.*, ¶ 26); and it had "no choice" but to submit its letter of intent and exhaust administrative remedies before seeking judicial relief (*Id.*, ¶¶ 3-5, 27), none of these new allegations address, much less show, that plaintiff was not notice of its loss of federal tribal status until six years before filing its complaint, which is the limited purpose for which the Court allowed amendment.

These new allegations do not change the fact that, as of 1979, when the first list of federally recognized tribes was first published (and every time it has been published thereafter), plaintiff was not included on the list of federally recognized tribes. As the Ninth Circuit explained in *Mishewal Wappo Tribe of Alexander Valley v. Zinke*, 688 Fed. Appx. 480 (9th Cir. 2017):

> It is undisputed that the Federal Defendants published notice of the termination of the Rancheria in the Federal Register in 1961, along with a list of those who would receive land. See 26 Fed. Reg. 6875 (Aug. 1, 1961). This publication was "legally sufficient notice . . . [,] regardless of actual knowledge or hardship resulting from ignorance," to put the Tribe on notice of the Federal Defendants' alleged breach of their fiduciary duty and to trigger the statute of limitations. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (quoting *Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663, 667-68 (9th Cir. 1989)). Absent tolling, the statute of limitations expired in 1967, decades before the Tribe filed the instant suit. See 28 U.S.C. § 2401(a).

Id. at 482. Likewise, it is undisputed that the Federal Defendants published in the Federal Register in 1979 a list of all federally recognized Indian Tribes. Plaintiffs were not included on that list, nor on any subsequently published list. Federal statute directs that filing a document with the Office of the

Federal Register and its publication in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. § 1507; *see United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990) ("Congress has provided that proper publication in the Federal Register shall act as constructive notice to all of those affected by the regulation in question."); *Shiny Rock*, 906 F.2d at 1364 ("Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"); *Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663, 667-68 (9th Cir. 1989) ("Publication in the Federal Register is legally sufficient notice to all interested or affected *1142 persons regardless of actual knowledge or hardship resulting from ignorance"). Plaintiff's claim in the amended complaint that it "never lost its status as a federally recognized tribe" (ECF 34 at 2) establishes conclusively that its members are persons "affected by" the publication of lists of federally recognized tribes that did not include Plaintiff. Even assuming for the sake of argument that plaintiff exhausted administrative remedies, the fact that it did not file its complaint (or its letter of intent to petition for federal recognition)[3] until decades after 1979, establishes that the amended complaint is time-barred because the APA's six-year statute of limitations expired decades ago.

Finally, to the extent that plaintiff is attempting to avoid the running of the statute of limitations based on the Assistant Secretary-Indian Affairs' June 9, 2015 letter, the Court rejected plaintiff's reliance on the June 2015 letter as the applicable trigger for the statute of limitations by finding that "as a practical matter, allowing plaintiffs such as this one to effectively restart a statute of limitations

[3] Federal Defendants object to plaintiff's recharacterization in the amended complaint of its 1998 letter of intent as an actual petition for federal recognition. *See* ECF 34, ¶¶ 5, 27, 38. In its original and amended complaints, plaintiff alleges that "[i]n 1998 Plaintiff submitted its *letter of intent to petition* for acknowledgment as an Indian tribe." ECF 1, ¶ 4; ECF 34, ¶ 4 (emphasis added). The 1998 letter was not a petition for acknowledgment as plaintiff now suggests elsewhere in the amended complaint. *See* ECF 34, ¶¶ 5, 27, 38. A true and correct copy of the 1998 letter of intent is attached as Exhibit A to this motion. The Court may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Regardless, plaintiff's recharacterization of its 1998 letter is immaterial to the statute of limitations issue because plaintiff was on notice of its loss of federal recognition if not in 1966, then in 1979, and, most certainly in 1998, as the Court already has found. *See* ECF 33 at 8. And, as the Court noted, plaintiff's inquiry about federal status did not restart the statute of limitations. *See id.*

simply by inquiring about a past agency decision would essentially eliminate section 2401's six-year statute of limitations requirement." ECF 33 at 8.

In sum, the Court dismissed plaintiff's original complaint on statute of limitations grounds, but permitted plaintiff to allege further factual details to show that it did not have notice of its loss of federal recognition within six years of filing its complaint in 2016. *Id.* at 9. Plaintiff has failed to provide any additional facts to cure the statute of limitations defect that required dismissal of the original complaint. Accordingly, the Court should dismiss the amended complaint because plaintiff's claims are time-barred by 28 U.S.C. § 2401(a), and it should deny leave to amend because further amendment would be futile. *See Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009); *see also Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013); *see also Curry v. Yelp, Inc.*, 875 F.3d 1219, 1228 (9th Cir. 2017) ("Where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to [his] claims, the district court's discretion to deny leave to amend is particularly broad") (internal citations omitted)..

Respectfully submitted,

DATED: February 25, 2019

McGREGOR W. SCOTT
United States Attorney

/s/ Lynn Trinka Ernce
LYNN TRINKA ERNCE
Assistant United States Attorney

EXHIBIT A

September 29, 1998

T'si-akim Maidu
P.O. Box 3951
Quincy, Ca 95972

Bureau of Indian Affairs
Branch of Acknowledgment and Research
Mail Stop 4627-MIB
18th and C Streets, N.W.
Washington, D.C. 20240

Dear Administrator,

The T'si-akim Maidu tribe is writing to express its intentions to petition for status clarification.

At the meeting of the tribal council on September 29, 1998, the undersigned voted to pursue recognition by the United States of America.

Sincerely,

Donald E. Ryberg, Tribal Chairman
Donald E. Ryberg

Ezzie Evelyn Davis
Ezzie Evelyn Davis
Tribal Treasurer

Eileen R. Moon,
Tribal Vice-Chairman
Eileen R. Moon

Louella H. Giordano
Tribal Secretary
Louella H. Giordano

BettieRose Davis
Member at Large
BettieRose Davis