Roia Shefayee (SBN: 236179)
WEISS LAW, PC
1151 Harbor Bay Parkway, Suite 134
Alameda, CA 94502
(510) 581-1857
(650) 581-9493
rshefayee@wslawgroup.com

Attorneys for Plaintiff
TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA

WEISS LAW, PC
1151 Harbor Bay Parkway, Suite. 134
Alameda, CA 94502

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 MACLEAN SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1 to 100

Defendants

Case No.: 2:17-cv-01156 TLN CKD

PLAINTIFF TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[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**

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INTRODUCTION

This motion must be denied because (i) Plaintiff is seeking timely judicial review of a final agency decision within six years; (ii) within six years from the publication of the Indian List Act in 1994, Plaintiff sought executive review about its status as a federally recognized tribe; (iii) statute of limitations is tolled while a claim is before an executive tribunal; (iv) Plaintiff is an interested third party because the sale of the Ranch in 1966 did not terminate the federal status of the Plaintiff but disrupted the relationship of Government with individual Indians who received distribution.

This case concerns the judicial review of the June 9, 2015, decision (the "2015-Decision") of the Assistant Secretary of Indian Affairs (the "AS-IA") concerning TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA ("Plaintiff") Petition under Part 83 of Title 25 of the Code of Federal Regulations (25 CFR Part 83), Federal Acknowledgment of American Indian Tribes (hereinafter, the "83-Process".) The AS-IA applied the California Rancheria Act (the "CRA") and concluded that Congress terminated Plaintiff's status as Indian Tribe when the Taylorsville Rancheria (the "Ranch") was sold. The AS-IA said that the sale of the Ranch is the equivalent of Congressional termination of Plaintiff's status as a Federally recognized tribe.

However, in its First Amended Complaint ("FAC"), Plaintiff seeks judicial review of the AS-IA 2015-Decision. Plaintiff alleges that nothing in the animus of the CRA indicates that the purchase and designation of the Ranch or its sale affects the status of the Indian tribe. Plaintiff contends that the principle of tribal self-determination and self-governance led to the passage of the 1934 Indian Reorganization Act, 25 U. S. C. § 461 et seq (the "IRA".) Pursuant to the IRA, Plaintiff voted in the IRA election in 1923. Nothing in the CRA purports to nullify or undermine the IRA, nor does the IRA extend to CRA any basis to vanquish tribal status after the Ranch sale.

In their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), Defendants argue that the FAC is 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"). However, this contention lacks merit. Plaintiff is seeking a timely judicial review of the AS-IA 2015-Decision. The six-year statute of limitations starts from June of 2015. Plaintiff filed the original complaint less than six years after the AS-IA issued its decision. Moreover, Congress passed the Indian List Act in 1994, and in 1998 Plaintiff commenced the 83-Process. The statute of limitations is tolled while the 83-Process was pending. Finally, pursuant to 5 U.S. §702, this Court is empowered to conduct a judicial review separate and apart from any alleged bar of the statute of limitations. As such, Defendants' Motion is unmeritorious in its entirety. Plaintiff respectfully ask that the Court deny the motion.

MEMORANDUM OF POINTS & AUTHORITIES

A. The Standard For Judicial Review

The APA 5 U.S.C. § 706(2)(A) authorizes a reviewing court to set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" As said in *Citizens to Preserve Overton Park, Inc. v. Volpe*, (1971) 401 U.S. 402, 416, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." See also *Appalachian Power Company v. Environmental Protection Agency*, (1973) 4 Cir., 477 F.2d 495, 506-507. The court may not substitute its judgment for that of the agency. *Overton Park*, 401 U.S. at 416. If the agency's construction of the controlling statute is "sufficiently reasonable" it should be accepted by the reviewing court. *Train v. Natural Resources Defense Council, Inc*., (1975) 421 U.S. 60, 75.

The APA, 5 U.S.C. § 706(2)(C) authorizes a reviewing court to set aside agency action which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." This standard requires the application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, (1984) 467 U.S. 837. Under Chevron, courts must first assess whether Congress has spoken to the "precise question at issue." Id. 842. To do this, courts must look to the language and design of the statute, as well as look to the traditional canons of construction. If the court finds that Congress has

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not directly addressed the precise issue, the court must then determine if the agency's action is based on a "permissible construction of the statute." Id. 843. Under Chevron, legislative regulations are given deference unless they are arbitrary, capricious, or manifestly contrary to the statute. Id. 844

B. Application To The AS-IA 2015-Decision

1. The Chevron Standard

In the 2015-Decision, the AS-IA says that the Ranch was properly sold pursuant to the 1964 amendment to the CRA, and the sale of the Ranch, qualifies as Congressional termination of the Federal relationship with the Plaintiff. However, a close analysis of the CRA does not lead to the conclusion the AS-IA made in the 2015-Decision that sale of the Ranch terminates Indian tribe status. First, Plaintiff was not specifically designated as a terminated tribe under the CRA. Second, the Indian Appropriations Act of 1906 (Pub.L. No. 59-258, 34 Stat. 325, 333) and the CRA have no reference to the IRA, which permitted tribal organization. Third, under the CRA only the statuses of the individual Indians who received a distribution of the assets had their relationships with the Government disrupted, not the tribal status. Fourth, the Federal Register Notice nowhere indicates that tribal termination would result from the distribution of the Ranch. As such, the termination of the Ranch cannot equate with Plaintiff's status as a federally recognized tribe.

Under *Chevron* (supra) the Court must first examine if Congress has spoken to the precise question at issue. The precise question at issue in this case is whether the termination of the Ranch equates with the Government's termination of its relationship with the Plaintiff as an Indian tribe. A plain reading of the CRA makes it abundantly clear that Congress did not say that the sale of the Ranch corresponds with termination of Indian Tribe status. The next step under *Chevron* (supra), is to examine if the AS-IA 2015-Decision is a permissible construction of the statute. The CRA does not allow for any permissible termination of the tribal status solely from the sale of the Ranch. As such, pursuant to *Chevron*, the AS-IA 2015-Decision must be set aside because it is a clear error in Judgment.

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2. Arbitrary And Capricious

In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance* (1983) 463 U.S. 29, 43, the High Court said "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." In *Citizens to Preserve Overton Park v. Volpe* (401 U.S. 402), the Supreme Court said that courts can inquire as to why agencies relied upon a particular set of data to make their decisions and examine if there is a clear error in judgment. Id. 416.

In this case, the AS-IA 2015-Decision says that because Congress terminated the Plaintiff's status as a federally recognized tribe, the Agency cannot recognize Plaintiff as a federally recognized tribe pursuant to 83-Process. In the same letter, the AS-IA then says that the sale of the Ranch is equivalent to Congress terminating the federal status of the tribe. The AS-IA's 2015-Decision is a clear error in judgment because it is inserting intent for Congress from factors that Congress did not allow. The CRA does not say that federal status is terminated when the Ranch is sold nor does it authorize the BIA to terminate the tribe status. Instead, the CRA says that individual Indians who received a distribution of the assets had their relationships with the Government disrupted, not the tribal status. As such, the AS-IA 2015-Decision is arbitrary and capricious and must be set aside.

C. Exhaustion Of Administrative Remedies

The doctrine of exhaustion of administrative remedies states that judicial relief cannot be rendered until the prescribed administrative remedy is exhausted. This doctrine protects

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administrative agency authority and promotes efficiency. As such, administrative law mandates that the agency be given a fair and full opportunity to adjudicate a claim before judicial relief is sought. *Woodford v. Nego* (2006) 548 U.S. 81, 89-90. In this case, in 1998, Plaintiff filed the 83-Process seeking acknowledgment as a Federally recognized tribe. In response, the AS-IA issued the 2015-Decision. As such, Plaintiff has adequately exhausted all administrative remedies because it sought and exhausted all administrative venues and obtained a final agency decision before seeking judicial relief. In *Wind River Min. Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) the Court said when a claimant must first present his claim to an executive tribunal, the right of action does not accrue until the executive tribunal has decided on the claim. Id. 716

D. Statute Of Limitations

1. The Tribal List Act

In 1994, Congress enacted the Tribe List Act, requiring the Bureau of Indian Affairs ("BIA") to publish annually a list of tribal entities eligible for federal services and benefits. See Pub.L. 103-454, § 104, 108 Stat. 4792 (1994) (codified at 25 U.S.C. § 479(a)-(b)). The Tribe List Act prohibits the Secretary from removing or omitting tribes once placed on the list and underscores that Congress has the sole authority to terminate the relationship between a tribe and the United States. See 25 U.S.C. § 479(a). Within four years after the passage of the List Act, Plaintiff filed an 83-Process seeking acknowledgment of tribal status. As such, after learning that it is not listed as a federally recognized tribe, Plaintiff took actions four years after the passage of the List Act. Plaintiff was within the statute of limitations period.

2. The Doctrine Of Ultra Vires Is Applicable In This Case

In its operative FAC, Plaintiff alleges that the sale of the Ranch cannot be equated with the termination of federal status because the CRA makes no reference to tribe status termination and the sale of the Ranch only disrupts individual Indian's relationship with the Government who receive

assets. As such, Plaintiff contends that the AS-IA 2015-Decision is *Ultra Vires*. However, in its Order granting the Defendant's Motion to Dismiss the original complaint, this Court said

> "In contrast, Plaintiff in the instant case was never an uninterested third party. As the tribe itself, Plaintiff had a stake in its tribal status at the time the Taylorsville Rancheria was sold in 1966. Insofar as the loss of federal recognition is the "adverse application" of agency action, Plaintiff would have felt the effect of that loss long before it received the 2015 letter"

The Court's reasoning stem from the Court's conclusion that the sale of the Ranch terminated federal tribal status. This Court seems to infer that but-for the sale, the tribe status would not have been vanquished. But, as discussed, the sale of the Ranch does not equate with the termination of the tribal status. At the time when the Defendants sold the Ranch, Plaintiff had no reason to suspect that its status as an Indian Tribe is terminated. Plaintiff was unlikely to discover that the sale of the Ranch also terminated its tribal status because the purchase of the Ranch did not create Plaintiff's status. In 1966, Congress did not abrogate the IRA. Only when Congress passed the Tribe List Act in 1994, did Plaintiff learn that its name is not included in the list as a Federally recognized Tribe. Plaintiff Petitioned the executive tribunal in 1998 through the 83-Process, and the AS-IA responded in June 2015. As such, the Statute of Limitations does not bar this action.

In *Wind River*, the 9th Circuit relied on the reasoning of *Oppenheim v. Coleman*[1] (D.C. Cir. 1978) 571 F.2d 660, for the proposition that a substantive challenge to an earlier agency decision can be brought more than six years in the context of an adverse application. In *Oppenheim* Plaintiff's injury accrued in 1947. Thirty years later, in 1974, Plaintiff sought a review of the Agency decision. The Court said Plaintiff is not barred from bringing a challenge to the Agency's current decision because Plaintiff is seeking to set aside recent arbitrary agency action instead of recovering damages from the Government for its 1947 decision. Id. 663.

Similar to Plaintiff in *Oppenheim*, Plaintiff in this case is before the Court for a review of the

[1] The actual case's name is Oppenheim v. Campbell.

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AS-IA 2015-Decision. This request for review is within the statute of limitations period and as such timely. Pursuant to 5 U.S. §702 this Court is empowered to set aside the AS-IA 2015-Decision if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Unlike the Plaintiff in Oppenheim, the Plaintiff in this case is still within the statute of limitations as to its claim for the loss of federally recognized tribal status. When in 1966 Defendants sold the Ranch, Plaintiff had no reason to suspect that its status as a federal tribe is terminated. The CRA makes it abundantly clear that only the status of individual Indians who receive any distribution shall be disrupted with the Government. Only in 1994 when the Congress passed the List Act did Plaintiff learn that its name is not included in the list of Federally recognized tribe. As such, Plaintiff's judicial review of the AS-IA 2015-Decision is timely procedurally and substantively.

CONCLUSION

For reasons discussed, the Court must deny the Defendants' Motion to Dismiss.

Respectfully Submitted

Dated: March 21, 2019

WEISS LAW, PC

By: _____
Roia Shefayee Attorneys for Plaintiff TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA

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