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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.	Case No. 2:17-cv-01156 TLN CKD **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** **[Fed. R. Civ. P. 12(b)(6)]** Date: April 18, 2019 Time: 2:00 p.m. Ctrm: 2, 15th Floor Judge: Hon. Troy L. Nunley

In its order dismissing the original complaint, the Court found that plaintiff's claim was for "its loss of federal recognition, which can be traced back to the sale of the Taylorsville Rancheria in 1966" and that plaintiff "had actual notice of its lost tribal status when it petitioned for federal recognition in 1998." *See* ECF 33 at 9. Noting that plaintiff did not file its complaint until 2016, and that plaintiff had not "sufficiently alleged that it lacked notice of its loss of federal recognition until the six years prior to filing the complaint," the Court ruled that plaintiff's claim was time-barred. *Id.* However, the Court granted leave to amend "so that Plaintiff may allege further factual details regarding its lack of notice of adverse agency action, if applicable." *Id.*

Plaintiff has failed to cure the pleading defects that required dismissal of its loss of federal recognition claim on statute of limitations grounds. Plaintiff argues for the first time in its opposition brief that it first learned that it was not included in the list of federally recognized tribes in 1994. ECF 36 at 8. This new fact, which is not alleged in the amended complaint, is irrelevant to the statute of limitations analysis regarding plaintiff's claim on the loss of its federally recognized status. Plaintiff has not been included on the list of federally recognized tribes since it was first published in the Federal Register in 1979, or at any time thereafter, and plaintiff has been on notice of that fact as a matter of law since 1979. 44 U.S.C. § 1507 (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"); *see United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990); *Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663, 667-68 (9th Cir. 1989).

The statute of limitations for plaintiff's claim expired no later than 1985, thirteen years before plaintiff filed its 1998 letter of intent to petition for recognition, and decades before filing its complaint. *See Mishewal Wappo Tribe of Alexander Valley v. Zinke*, 688 Fed. Appx. 480, 482 (9th Cir. 2017). And, as the Court correctly found in its dismissal order, the Assistant Secretary-Indian Affairs' June 9, 2015 letter responding to plaintiff's inquiry about its status did not restart the statute of limitations on plaintiff's loss of federal recognition claim. ECF 33 at 8.[1] Therefore, any claim by plaintiff regarding the loss of its federally recognized status is time-barred, and the Court should dismiss that claim with prejudice.

However, because the amended complaint and plaintiff's opposition brief, when read together, appear to challenge the Department of the Interior's decision in its 2015 letter that plaintiff is ineligible for Part 83 acknowledgment, Federal Defendants do not challenge that claim on statute of limitations grounds, as such a claim would not be time-barred under the Administrative Procedure Act's six-year statute of limitations. 28 U.S.C. § 2401(a).

[1] The Court should disregard plaintiff's argument entitled "The Doctrine of Ultra Vires Is Applicable In This Case," (ECF 36 at 6-8) as an improper motion for reconsideration of the order dismissing the original complaint. Plaintiff's argument that the Assistant Secretary-Indian Affairs' decision in the June 9, 2015 letter is arbitrary and capricious (*Id.* at 4-5) is irrelevant to the statute of limitations analysis on its loss of federal recognition claim, and is premature on any APA claim that plaintiff may be asserting regarding its ineligibility for Part 83 acknowledgment.

In sum, the Court should dismiss with prejudice plaintiff's challenge to the loss of its federally recognized status because that claim has long been time-barred. Plaintiff's challenge to the Assistant Secretary-Indian Affairs' determination in 2015 that it is not eligible for Part 83 acknowledgment is not barred by the APA's six-year statute of limitations, and can proceed as an APA judicial review case in the normal course.

Respectfully submitted,

DATED: April 10, 2019

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/s/ Lynn Trinka Ernce
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