

No. 04-16676

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE,
formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA,

Plaintiff/Appellant

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR,
GAIL NORTON, Secretary of Interior, NEAL MCCALED, NEAL MCCALED,
Assistant Secretary of Interior For Indian Affairs,

Defendants/Appellees.

On Appeal from the United States District Court for the
Eastern District of California, No. CV-02-00912 FCD

APPELLANT'S OPENING BRIEF

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CVMT-2011-000562

Corporate Disclosure Statement

There are no parent corporations or publicly held corporations that own ten percent or more of the stock of any of the Appellants.

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INTRODUCTION

The case before this Court involves a federally recognized Indian tribe's efforts to be "made whole" after the harsh implementation of the California Rancheria Act. The Tribe seeks to acquire land to replace that which was unlawfully distributed pursuant to the Rancheria Act, and to have their status clarified to account for the damage inflicted on them by termination. Simply put, the Tribe is fighting for all of the property rights that it would have had absent termination, including gaming rights. This case deals with the important policy

issue of whether the government should escape liability for their wrongful acts because their wrongful acts were so effective.

The Tribe respectfully requests that this Court reverse the dismissal of the lower court, and remand this case to the District Court for determination on the merits.

JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337 and 1361, and 5 U.S.C. § 701, et seq. Final judgment was entered by the District Court on July 1, 2004, and a timely Notice of Appeal was filed August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. In view of *Cedars-Sinai Med. Ctr. v. Shalala*, whether the District Court erred in characterizing a dismissal pursuant to 28 U.S.C. § 2401(a) as jurisdictional, rather than procedural.
2. Whether the District Court erred in finding that the statute of limitations set forth in 28 U.S.C. § 2401(a) accrued when an administrative law judge issued an Order denying the government's Petition to Modify the Estate of Mabel Hodge Dixie.
3. Whether equitable tolling should be applied to toll the accrual date of 28 U.S.C. § 2401(a).
4. Whether the government should be estopped from asserting a statute of limitations defense.

STATEMENT OF THE CASE

Factual Background

Plaintiff/Appellant California Valley Miwok Tribe ("Tribe," "Plaintiff," or "Appellant") brought suit against the United States of America, the United States Department of Interior, the Secretary of Interior, and the Assistant Secretary of

Indian Affairs (Bureau of Indian Affairs, “BIA”) (collectively “Defendants.”) The Tribe claimed that BIA breached its trust responsibility by unlawfully conveying the Tribe’s rancheria to an individual, and thereby unlawfully terminating the Tribe.

The dispute that led to this lawsuit began in April, 1967, when the BIA conveyed the Tribe’s reservation, the Sheep Ranch Rancheria, to Mabel Hodge Dixie. The purpose of this conveyance was to effect the termination of the Tribe pursuant to Pub. L. 85-671, 72 Stat. 619, as amended by Pub. L. 88-419, 78-390 (“Rancheria Act”). The Rancheria Act allowed for the transfer of Indian lands to individual Indians in fee simple, pursuant to a distribution plan. A distribution plan would become final upon governmental and distributee approval. After the land’s distribution, those Indians receiving any part of the formerly Indian homesteads, as well as their dependent, immediate family members, would no longer be entitled to any services or statutory protection based on their status as Indians. Moreover, the federal trust relationship to these individuals and the Tribe would be terminated along with the federal recognition of the Tribe.

At the time that the Rancheria Act was being implemented on Sheep Ranch Rancheria, Ms. Dixie required the assistance of a conservator. Section 8 of the Rancheria Act specifically required the BIA to provide a conservator to Ms. Dixie. Despite this, the BIA conveyed the property to Ms. Dixie without a conservator. The BIA then sought to undo the conveyance administratively. However, their efforts failed, and served only to further confuse matters. In 1994, the Tribe’s federal recognition was restored by the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat 4791 (1994) (“List Act”). In 1998, the Tribe began reorganizing, and adopted a constitution and numerous other governing documents. The Tribe now has a government-to-government relationship with the government through its tribal council, currently chaired by Silvia Burley.

However, as a result of BIA's actions, the Tribe remains landless, and their recognition status with respect to land rights are unclear. Thus, the primary purposes of this litigation are to 1) obtain declaratory relief stating that the Tribe is a restored tribe within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii); and 2) obtain injunctive relief directing Defendants to accept land in trust to replace the tribal land that was unlawfully distributed.

Procedural History

This lawsuit was filed April 20, 2002, in the United States District Court for the Eastern District of California, and it was entitled *California Valley Miwok Tribe v. United States of America*, Case No. CIV S-02-0912. The case was assigned to the Honorable Frank C. Damrell, Jr.

On March 2, 2004, Defendants filed a Counter Motion to Dismiss in response to a discovery motion by the Tribe. On June 10, 2004, the court granted the Defendants' Counter Motion to Dismiss on the basis of the applicable statute of limitations, 28 U.S.C. § 2401(a). The court relied upon *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988), which provided that a claim "first accrues" for purposes of Section 2401(a) when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action and the plaintiff was or should have been aware of their existence." [ER 48, p. 16, lines 9-13]¹.

The court found that the accrual date was in 1993, when the administrative law judge rendered his decision on the legal effect of the 1967 quitclaim deed. The court noted, "the presence of this deed in the chain of title does not lessen the impact of the 1993 decision, which put the tribe on notice of the injury to its trust land." (*Id.* at p. 21, citing *Hopland*, 855 F.2d at 1577 ["It is not necessary that the

¹ "ER" refers to the Appellant's Excerpts of Record. "CR" refers to the Clerk's Record.

plaintiff obtain a complete understanding of all the facts before the tolling ceases and the statute begins to run”].) In addition, the court rejected the argument of the Tribe that it “had no living members until it began reorganization in 1998” who could have been aware of the events which fixed the government’s liability, and the Tribe’s argument under the “continuing claim” doctrine. (*Id.* at pp. 22-23.)

The court essentially reasoned that after the administrative law decision in question, one or more members of the Tribe should have filed this lawsuit. Or, as it was argued by the Assistant United States Attorney who represented the Defendants,

Clearly, there were tribal members as the beneficial interest in the Sheep Ranch Rancheria was transferred to one tribal member, Mabel Hodge Dixie, Pltf’s Exhibit 13, who had four sons and an Indian spouse who inherited this interest upon her death in 1971, Pltf’s Exhibits 19. Each of these individuals were/are putative members of the Tribe. Any of these people, and others who are tribal members could have brought suit. **Silvia Burley herself, who submits a declaration claiming to be chairperson of this unorganized tribe, could have discovered the facts necessary to determine whether her tribe’s federal recognition status had been terminated and whether the Sheep Ranch Rancheria remained tribal trust property.** None of these individuals did so within the statutory time period.

[CR Tab 64, pp. 9-10] (emphasis added).

..., the tribe’s lack of formal government structure fails to toll the statute of limitations. **A tribe possesses the knowledge of its tribal members.** Therefore, the tribal members reasonably would have been aware of the tribe’s federal recognition status (or lack thereof) and would have been aware of the status of the Rancheria, especially since the Tribe’s members would have been ineligible for services based on their status as Indians had the Rancheria been terminated. Indeed, Plaintiff proffers no evidence showing that anyone was denied federal services to Indians as a result of the termination of Sheep Ranch Rancheria.

(*Id.* at p. 10) (emphasis added).

On August 25, 2004, the Tribe timely appealed to this Court.

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STATEMENT OF FACTS

A. The Establishment Of Sheep Ranch Rancheria Of Miwok Indians

In 1915, a Federal Government Indian Agent located a cluster of Miwok Indians living on a 160-acre site in or near the City of Sheep Ranch, California. [ER 1]. After confirming the Native American status of the individuals, the Federal Government decided to purchase only 2-acres of the 160-acre parcel in trust for the Miwok Indians on or about April 11, 1916. The Miwok homestead was coined the “Sheep Ranch Rancheria.” [ER 2]. Consequently, the Miwok inhabitants became known as the “Sheep Ranch Rancheria of Miwok Indians”—a name to reflect the geographical location of the governmentally acquired Miwok homestead, not the geographic location from which the Miwok Indians descended. Over time, the number of individuals living on the Rancheria dwindled, although no accurate count was ever made as to the number of individuals for which the parcel of land was purchased. Nevertheless, in 1935, the Department of the Interior conferred federally recognized tribal status upon the Miwok Indians after locating one individual and allowing him to vote on the organization of the Tribe.

B. The Termination Of Sheep Ranch Rancheria

In 1965, the United States began investigating the feasibility of terminating the Sheep Ranch Rancheria of Miwok Indians under the Rancheria Act. [ER 3-4]. The Rancheria Act allowed for the transfer of Indian lands to individual Indians in fee simple, pursuant to a distribution plan. A distribution plan would only become final upon governmental and distributee approval as outlined in the Rancheria Act. After the land’s distribution, those Indians receiving any part of the formerly Indian homesteads, as well as their dependent, immediate family members, would no longer be entitled to any services or statutory protection based on their status as Indians. Moreover, the federal trust relationship to these individuals and the Tribe

would be terminated along with the federal recognition of the Tribe. *See* Pub. L. 85-671, 72 Stat. 619, as amended by Pub. L. 88-419, 78-390.

On February 4, 1965, William Gianelli, a realty specialist for the United States Government, inspected the Sheep Ranch Rancheria. [ER 5]. Shortly thereafter, Mr. Gianelli recommended in a memorandum that the United States enter into a termination plan with the Miwok Tribe pursuant to the Rancheria Act, with distribution of the assets to members Merle Butler, Mabel Dixie and Lenny Jeff. A copy of this memorandum was sent to the BIA Tribal Operations staff in Sacramento, California. *Id.* Following a December 29, 1965 meeting between Tribal Operations Officer Jess Towns, Mr. Butler and Ms. Dixie at the Rancheria, Mr. Butler and Ms. Dixie submitted written requests for distribution of the assets of the Sheep Ranch Rancheria. [ER 7].

Pursuant to the Rancheria Act, a list of the Indians living on Sheep Ranch Rancheria was prepared on December 30, 1965. The list indicated that Mabel Hodge Dixie was the only Indian living on Sheep Ranch Rancheria. [ER 6]. A public notice of election on distribution of the assets of the Sheep Ranch Rancheria was published from January 6-20, 1966. [ER 8]. In a letter dated February 3, 1966, the Area Director responded to a protest from Lena Shelton on behalf of herself, her brother Tom Hodge, her daughter Dora Shelton Mata and her two granddaughters. Ms. Shelton was protesting the omission of the parties from the list of persons eligible to vote on whether a plan would be made for the distribution of the assets of the Sheep Ranch Rancheria. The response included the following:

After having given careful consideration to the reasons for your protests, it has been determined that neither your name nor the names of members of your family can be included in the list of eligible voters because none of you meets the requirements in any of the five categories quoted above. Although you presently live next to the rancheria, we find no record that you have ever resided on it. Records do substantiate the fact that your brother, at one time, lived on the rancheria, but such former residence does not make him eligible to vote because no vested

interest was acquired by anyone for merely occupying the rancheria. [ER 9].

An election was held on February 9, 1966, in which only Mabel Dixie voted. The result of the election was that the BIA would prepare a plan for the distribution of the tribal assets of the Sheep Ranch Rancheria. [ER 10]. The Commissioner of Indian Affairs approved of the distribution plan on August 18, 1966. [ER 12]. On October 12, 1966, James E. Officer, BIA Associate Commissioner, transmitted a teletype message to the Area Director in Sacramento that stated: “You are authorized to have Mabel Hodge Dixie vote on whether she accepts the contents of the plan, as conditionally approved by the Commissioner on August 18, and if she does you may carry out its provisions.” [ER 13]. Consequently, a referendum was held by which the distribution plan was officially accepted by Ms. Dixie on October 14, 1966. [ER 14].

The deed to Sheep Ranch was executed to Mabel Dixie on April 11, 1967, recorded in Calaveras County on April 26, 1967 [ER 18], and delivered on May 2, 1967 [ER 19]. As highlighted by the memo from James E. Officer to the Sacramento Area Director of the BIA, dated February 16, 1966, the issuance of the deed and approval of the distribution plan ratified the termination of the trust status of Sheep Ranch Rancheria. It also extinguished federal recognition of the Tribe. [ER 11 and 29].

C. The Government’s Failure To Appoint A Conservator For Mabel Dixie Before Executing The Deed

Prior to the deed’s execution, on January 30, 1967, the Sacramento Area Office of the BIA received a letter from Mabel Dixie dated January 27, 1967 that stated: “I hereby request that your office take whatever action is necessary to have Mr. Hayden Stevens appointed conservator under state law for me.” [ER 15].

In response, Leonard M. Hill informed the Regional Solicitor and the Area Director in a letter dated February 17, 1967, about Ms. Dixie’s request for the

appointment of a conservator. The letter provided the following statement in support of the recommended appointment:

Section 8 of the Amended Rancheria Act, provides that the Secretary of the Interior shall protect the rights of individual Indians who are minors, non compos mentis or persons who, in the opinion of the Secretary of the Interior, are in need of assistance in conducting their affairs. In such circumstances, we have assisted in effecting the appointment of conservators or guardians as may be deemed adequate.

We have concluded that Mrs. Dixie is in need of assistance in conducting her affairs. She, herself, feels this need and has voluntarily made a written request. Mr. Hayden Stephens, Postmaster at Sheepranch, who has known Mrs. Dixie for several years, has consented to serve as her conservator. Mrs. Dixie has discussed this matter with him and they have both indicated agreement in writing. [ER 17].

The Tribal Operations Officer, Victor T. Courtwright, even represented to Ms. Dixie that they were in the process of completing arrangements to have a conservator appointed. [ER 20].

Despite the letters of Mabel Dixie, Hayden Stephens, Leonard M. Hill and Victor T. Courtwright, the BIA failed to appoint a conservator prior to conveying Sheep Ranch Rancheria on April 11, 1967. [ER 15-17 and 20].

D. The Government's Unsuccessful Attempts To Reverse The Termination Of The Tribe

In September 1967, the BIA took the first of several unsuccessful steps to try to reverse the unlawful termination of the Tribe. The first was to have Mabel Dixie execute a quitclaim deed transferring the Sheep Ranch Rancheria back to the United States, again without appointing the requested conservator. [ER 21]. The BIA then took the position that the quitclaim deed had reversed the action taken under the Rancheria Act, thereby preserving the status quo as it had existed prior to the transfer of the land to Ms. Dixie. *Id.* However, following Mabel Dixie's death on July 11, 1971, the Department of the Interior's Probate Hearing Examiner Alexander H. Wilson found that the September 6, 1967 quitclaim deed purporting

to transfer the land known as the Sheep Ranch Rancheria back to the United States was invalid. Further, the Hearing Examiner found that the land that encompassed the Sheep Ranch Rancheria had passed to Mabel Dixie and was therefore part of her estate, and then ordered the division of that land among her heirs. [ER 22].

Despite this pronouncement from the Department of the Interior's Administrative Officer, the BIA did not change its records to reflect that the Sheep Ranch Rancheria had been transferred in fee, and was part of the estate of Mabel Dixie. [ER 23]. Instead, the land's status lay dormant for over a decade until the BIA undertook its second attempt to reverse the transfer of Sheep Ranch Rancheria to Mabel Dixie, and termination of the Tribe under the Rancheria Act. This action began on January 9, 1989. The BIA Sacramento Area Director wrote a Memorandum to the BIA Superintendent of the Central California Agency questioning the status of the Sheep Ranch Rancheria. In that Memorandum, the Area Director acknowledged the fact that the Probate Judge in 1972 had found that the quitclaim deed executed by Mabel Dixie was invalid, and that the Government had continued to ignore that valid Administrative Order by listing the Sheep Ranch Rancheria land as property held in trust by the Federal Government for the Tribe. *Id.*

This memorandum was followed by an opinion memorandum forwarded to the Area Director from the Acting Regional Solicitor, Pacific Southwest Region Sacramento, dated September 13, 1990. In that Memorandum, the Regional Solicitor concluded that the quitclaiming of the Sheep Ranch Rancheria back to the United States by Mabel Dixie "...cancels or terminates the contract (Distribution Plan). With the Distributee's repudiation, she gave up any interest she may have acquired in the Rancheria pursuant to the Rancheria Act." [ER 25, p. 2].

Armed with this Memorandum, the United States petitioned to modify Mabel Dixie's Estate by deleting Sheep Ranch Rancheria from the list of assets.

[ER 26]. Nevertheless, on April 14, 1993, Administrative Law Judge William R. Hammet denied the Petition and affirmed the Probate Court's finding that the quitclaim deed filed by Mabel Hodge Dixie was invalid. [ER 29]. In so holding, the administrative law judge noted: "If, in fact, the deed to Mabel Hodge Dixie was a valid conveyance, the recitations made in the deed were a material misrepresentation of the facts, no matter how innocently made, leading Mabel Hodge Dixie to execute the quitclaim deed." [ER 29, p. 5]. The administrative order was never appealed by the Federal Government, therefore, the order is final. *Id.*

E. The Restoration Of The Tribe's Federally Recognized Status And Effort To Obtain New Tribal Lands

As of May 12, 1992, the Tribe had no members recognized by the Federal Government. [ER 28, p. 3, lines 17-19; ER 45, p. 2, lines 5-6]. A tribal roll and census report published on February 8, 1989 further reflects that the Tribe had "0" population. [ER 24].

Soon after the Administrative Hearing in 1993 that confirmed that the Sheep Ranch Rancheria had been transferred to Mabel Dixie in 1967, which resulted in the termination of the Tribe pursuant to the Rancheria Act, Congress passed the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791 (1994). The List Act requires that "The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 4791(a). On May 17, 1995, the Acting Area Director of the BIA Sacramento Area Office sent a memorandum to the Superintendent of the BIA Central California Agency Office. The Acting Area Director provided the following clarification of the status of the Tribe after providing a detailed review of the record: "the Sheep ranch Rancheria of Me-Wuk

Indians of California shall remain on the BIA's List of Indian entities Recognized and Eligible to Receive Services, and (2) the .92-acre will be moved from our acreage reports as 'tribal' land and will be added to our listing of 'individually owned' land."

As a result, the Tribe's name was placed on the following list of federally recognized tribes as required under the List Act. This confirmed the Tribe's restoration to federally recognized status following the 1993 Administrative Hearing which, pursuant to the Rancheria Act, resulted in the termination of the Tribe. [ER 30].

As of November 26, 1997, the Government acknowledged that the Tribe had been terminated, and stated that it did not have a "government to government" relationship with the Tribe. It was at about this time that they recognized Yakima Dixie as "spokesperson" for the Tribe. [ER 31].

In 1998, the Tribe began to reorganize under its inherent authority. [See ER 32-33, 41]. Beginning in late 1998, the Tribal Government began making inquiries to the BIA about the status of the Sheep Ranch Rancheria property. At that time, the land was still described in departmental records as "Tribally owned land," which not only confused the Tribe's landholding status, but also continued to confuse the Tribe's position with regard to its termination under the Rancheria Act. [ER 38]. The BIA, however, either ignored the inquiries or told the Tribe that the Sheep Ranch Rancheria was still tribal land held in trust by the United States Government for the Tribe. [ER 45, p. 2, lines 12-14]. Unsatisfied, on or about August 5, 2000, Tribal Chairperson Silvia Burley met with then Assistant Secretary of Indian Affairs Kevin Gover in an attempt to address the status of the Tribe's land. *Id.* ¶ 9. In follow-up, the Tribe submitted additional information to him on August 28, 2000, November 9, 2000, and November 28, 2000. [ER 34-36].

Frustrated with the lack of response, Tribal Chairperson Silvia Burley demanded that the BIA confirm that the Tribe was landless as a result of the 1967 distribution pursuant to the Rancheria Act. [ER 37]. This request resulted in a Memorandum from the Realty Officer, Pacific Region to the Supervisor, Land Titles & Records Office (“LTR Office”) requesting the change in the status of the former Sheep Ranch Rancheria from “T” Tribal Tract. [ER 38]. In a letter dated February 22, 2001, from Dale Risling, Superintendent of the Central California Agency, the Tribe received the first confirmation from the Government that the Tribe was landless, and that the Sheep Ranch Rancheria had been transferred pursuant to the Rancheria Act. [ER 39]. This pronouncement, of course, contradicted the BIA’s previous representations. [ER 45, p. 2, lines 12-14]. In the course of this litigation, it was further discovered that rather than converting the status of the land to fee land as required by the Rancheria Act and the accompanying distribution plan, the government converted the status of the land to an “allotment held in trust for the heirs of Mabel Dixie.” [ER 46, p. 2, lines 4-10]. Thus, the land remains in “trust” status, but for individuals, not for the Tribe. *Id.*

F. The Re-Designation Of Tribal Land

Earlier in this litigation, the Government indicated that its refusal to acknowledge the Tribe’s multiple requests for land stemmed from a disagreement with respect to the restored status of the Tribe and an ignorance as to the location of a desired parcel of land the Tribe wished to have placed into trust. In an attempt to avoid conflict, in November of 2003, the Tribe submitted a formal settlement offer that did not include any reference to the Tribe’s “restored” status, and specifically identified a precise parcel of land. [ER 40]. In a document dated January 20, 2004, Defendant responded with a “counter-proposal” that conditioned the review of the Tribe’s land request upon Yakima Dixie and Defendant being given control of the Tribe’s membership and government equal to that of the

current leadership. [ER 42, pp. 5-6; ER 45, p. 3, lines 17-20]. Shortly thereafter, the Tribe became aware of Defendants' treatment of a similarly situated tribe after Defendants obtained control over tribal membership. [ER 44]. As a result of the Defendants' actions, all settlement discussions were terminated.²

SUMMARY OF ARGUMENT

1. The District Court erred in characterizing the statute of limitations issue as a jurisdictional issue. This characterization was contrary to Ninth Circuit law, and improperly shifted the burden of establishing timeliness to the Tribe.

2. The statute of limitations did not accrue upon issuance of the administrative law judge's order because the Tribe could not have known the contents of the Order or the impact to the Tribe until a much later date.

3. Even if the statute of limitations did accrue upon issuance of the Order, the statute of limitations would be subject to equitable tolling. The Tribe's ignorance of the facts was excusable in view of the erroneous recording of the status of the land, despite the administrative law judge's Order.

4. The government should be estopped from asserting a statute of limitations defense because of their decades-long pattern of misconduct, and misrepresentations to the Tribe regarding the status of the land.

ARGUMENT

A. Standard Of Review

This Court considers de novo whether a claim is barred by the applicable statute of limitations. *Orr v. Bank of Am.*, 285 F.3d 764, 779 (9th Cir. 2002);

² While settlement documents are often inadmissible, Defendants "opened the door" to such evidence by disclosing details of the settlement discussions in their Counter Motion to Dismiss. [CR Tab 42, p. 4, line 5; p. 11, line 8; p. 12, line 15]. In such a situation, the opposing party may respond by disclosing further details of the discussions. *See Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510 at 516, Fn2 (S.D.N.Y. 2002). Likewise, FED. R. EVID. 408 does not require exclusion of such evidence when it is offered to prove bias or prejudice, or to rebut a party's contention. FED. R. EVID. 408.

Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1050 (9th Cir. 2004). “When the statute of limitations begins to run is a question of law also reviewed de novo.” *Orr* at 780. “On a motion to dismiss, allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.” *Ventura* at 1050. Although the court below framed the dismissal as a dismissal for lack of subject matter jurisdiction, we assert that the court was in error in view of *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). Thus, the “clear error” standard for any findings of fact by the lower court is inapplicable here. *Ventura* at 1050.

B. The Court Erred In Framing The Statute Of Limitations Issue As Jurisdictional

Cedars-Sinai sets forth the law in the Ninth Circuit regarding 28 U.S.C. § 2401. The statute is procedural, not jurisdictional. *Id.* at 770, *see also Irwin v. Department of Veterans Affs.*, 498 U.S. 89, 111 S. Ct. 453 (1990). By characterizing the issue as jurisdictional, the court below applied the wrong standard of proof – incorrectly placing the burden on the Tribe. The proper standard was to view the Tribe’s allegations as true, and construe them in the light most favorable to the Tribe. *Ventura* at 1050.

The court conceded the following: “There is no question but that a cloud hung over title to the Rancheria property as a result of the government’s conveyance to Mabel Hodge Dixie and subsequent efforts to rescind that conveyance by inducing Mabel Hodge Dixie to execute a quitclaim deed in favor of the United States.” [ER 48, p. 19, lines 15-19]. The court then stated: “Certainly after issuance of this decision the Tribe was aware that the 1967 conveyance to Mabel Hodge Dixie had caused injury to its interest in the property.” [ER 48, p. 21, lines 8-11].

The record does not support the court's conclusion. The record does support the Tribe's assertion that there were no living tribal members in 1993. [ER 24; ER 28, p. 3, lines 17-19; ER 45, p. 2, lines 5-9]. In order to rebut this assertion, the court below first had to create a new class of "putative" tribal members, or deem that tribal members existed, without factual support. Then the court had to assume that one of the "tribal members" actually received the order, again without support in the record. Under the proper standard, if the record revealed conflicts on those issues, the court would be required to resolve those conflicts in favor of the Tribe, the non-moving party. *Ventura* at 1050. Here, the record reveals only facts that support the Tribe's position. Thus, the court clearly should have resolved the factual issues in favor of the Tribe. *Id.* At the very least, the court should have resolved any ambiguities through an evidentiary hearing. More appropriately, these issues should have been addressed at summary judgment, where statute of limitations issues are more commonly addressed, if not raised prior to a responsive pleading. *See generally Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983). (It was improper for the District Court to sustain the government's factual challenge to subject matter jurisdiction without conducting an evidentiary hearing on the merits). This Court should correct the error of the court below by reversing the District Court's order, and remanding this case for a determination on the merits, consistent with Ninth Circuit law.

C. The Applicable Statute of Limitations Did Not Accrue Until The Tribe Knew Of Its Injury In 2001

The applicable statute of limitations states the following:

Except as provided by the Contracts Disputes Act of 1978, every civil action against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases. 28 U.S.C. § 2401(a).

A cause of action first accrues when plaintiff learns or should reasonably have learned of both the injury and the cause. *See In Re Swine Flu Products Liab. Lit.*, 764 F.2d 637, 639-640 (9th Cir. 1985).

In the present case, analysis of the accrual of the statute of limitations requires an examination of two questions: 1) when did the injury to the Tribe occur; and 2) when could the Tribe have reasonably learned about the harm?

1. The Harm To The Tribe Occurred On April 13, 1993

With respect to when the harm occurred, the applicable date would be the April 13, 1993 decision by Administrative Law Judge Hammit. [ER 29]. It was on that date that the distribution of the Tribe's former rancheria became final, and the Tribe was terminated by operation of the Rancheria Act, which has not been repealed. Prior to that date, as outlined in the Statement of Facts above, the BIA attempted to undo the distribution of April 11, 1967 by execution of an invalid quitclaim deed on September 7, 1967, and referring the estate to their hearing examiner for probate. On November 1, 1971, Hearing Examiner Alexander Wilson determined that the rancheria remained in the estate of Mabel Hodge Dixie. While the April 11, 1967 date or the November 1, 1971 date may have been sufficient to effect the Tribe's termination, the fact that the BIA attempted again to modify the rancheria's status demonstrates that the disposition of the land was not final with respect to the Tribe's interests until the 1993 order.

2. The Tribe Could Not Have Reasonably Known About The Harm Until February 22, 2001, At Which Time They Did Discover The Harm As A Result Of Their Diligence

The decision below was based upon a finding that the 1993 decision by the administrative law judge gave the Tribe notice of injury. However, the Tribe asserts that this finding was made in error, and that a review of the record bears out this assertion. Indeed, it appears that the BIA itself was confused about the status of the Rancheria after the administrative law judge's ruling.

The only certainty disclosed on the record is that Yakima Dixie attended the hearing held by the administrative law judge prior to his ruling dated April 13, 1993. [ER 28]. There is no indication that Yakima Dixie ever received this order. In fact, it is not clear exactly who received it in view of what is disclosed in the record.

The LTR Office includes those offices within the BIA charged with the federal responsibility to record and maintain records that affect titles to Indian lands. 25 C.F.R. § 150.2(j). The purpose of their recording responsibility is to provide evidence of a transaction, event or happening that affects land titles, and to preserve a record of the title document, and to give constructive notice of the ownership and change of ownership and the existence of encumbrances to the land. 25 C.F.R. § 150.2(m).

Despite being charged with this responsibility, the LTR Office did not make any adjustments to their records concerning the Rancheria until the Tribe suggested that such a change was appropriate to the BIA in 2000. [ER 37-38]. Given that the BIA agency charged with maintaining land records for the purpose of notice did not know, or failed to perform their responsibility, one cannot assume, under the facts on the record, that Yakima Dixie was informed of the ruling, or the proper status of the land. Therefore, it would be improper to charge him with knowledge of harm to the Tribe.

The record reveals that the BIA's Realty Officer for the Pacific Region of California, Carmen Facio, attended the hearing. [ER 27, p. 2]. Ms. Facio had the following exchange with the administrative law judge:

“Q. [Judge Hammet]: Would you consider yourself somewhat of an authority as far as the terminated Rancherias of California are concerned?”

A. [Carmen Facio]: Yes.”

And yet, on February 11, 2004, Ms. Facio testified as follows at her deposition regarding the judge's subsequent order:

MR. THOMPSON: Okay. I'm finished with that. Now I'll present you a copy of Judge Hammit's – of a document – it's an order that was issued by on October 14, 1993, in the matter of the estate of Mabel Hodge Dixie, deceased, California Indian.

(Exhibit 3 marked.)

Q. BY MR. THOMPSON: Are you familiar with this order?

A. I haven't read it for a while, but, yes, I am familiar with it.

Q. And based on what you know from this order, what was Judge Hammit's decision?

MS. LUTHER: Calls for a legal conclusion. Overbroad. The document speaks for itself.

Q. BY MR. THOMPSON: Again, based on your personal – based on what you know from reviewing this order, could you tell me what this order states?

MS. LUTHER: Same objection. If you want her to tell you what the letter states, she can read it into the record for you, but I don't think that's what you're really after here.

MR. THOMPSON: Can I proceed now?

Q. Can you answer the question?

A. Could you repeat the question.

(Record read.)

MS. LUTHER: Same objections. You may want to read it again. You can do so. Basically what he's looking for is your understanding of the Judge's order.

THE WITNESS: My understanding is that the land is in trust for the heirs of Mabel Hodge Dixie.

Q. BY MR. THOMPSON: Can you find in this document where it states that?

A. No, I cannot.

Q. So what makes you reach the conclusion that the land is in trust for the heirs of Mabel Dixie?

A. Our land titles officer, who at that time was Bernadette Thomas, indicated to me that she had called Judge Hammit for clarification on this order, and he told her that it was in trust. So we have it in our land titles records as being in trust.

Q. Did Judge Hammit issue a follow-up order to this document?

A. No.

[ER 43, pp. 2-4].

As Ms. Facio's testimony indicates, despite the fact she held herself out to be an expert on the terminated Rancherias of California, neither she, nor her organization's Land Titles Officer could comprehend the administrative law judge's order without clarification from the author. *Id.* As a result, even if Yakima Dixie had received the order, he cannot be held to possess knowledge of injury based upon that order, since BIA professionals in the field lacked that knowledge by their own admission.

Moreover, it is clear that Yakima Dixie lacks knowledge of the land disposition to this day, as demonstrated by his assertion in his Motion to Intervene, filed on October 7, 2003, where he states: "This litigation **affects the Tribal property** at Sheep Ranch, California which has been the home of Yakima K. Dixie as well as Tribal headquarters for some 50 years." [CR Tab 20, p. 3, lines 51-53] (emphasis is original). Mr. Dixie's current understanding is consistent with the fact that he has never received a deed to the property, because it is still owned by the government. [ER 46, p. 2, lines 4-10].

3. **Yakima Dixie Was Not A Member Of The Tribe, Therefore Whatever Knowledge He Did Possess Cannot Be Imputed To The Tribe**

Yakima Dixie was unequivocal in stating that he was not a member of any tribe at the time of the administrative hearing. [ER 28, p. 3, lines 17-19]. The court below ignored his statement, and sought to impute knowledge from Yakima Dixie to the Tribe, despite there being no tribal members to receive the knowledge. In doing so, the court apparently sought to apply principles of common law agency

to the Tribe, relying on *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573.

In *Hopland*, a tribe was unlawfully terminated under the Rancheria Act in 1967. In 1974, an individual distributee brought suit against the United States seeking injunctive and declaratory relief. In 1978, the court concluded that the termination of the tribe was unlawful, that the rancheria had not been terminated, and that the trust relationship between the United States and the Indian people of the rancheria remained in existence. The court further ordered that the distributees be allowed to reconvey their land to the United States. In 1980, the United States acknowledged its government-to-government relationship with the Band in the Federal Register. In 1981, the Band adopted a constitution authorizing tribal officials to act on behalf of the Band. In 1986, the Band's motion to intervene in the litigation was denied, and the Band did not participate in the stipulated final judgment in 1986.

Following the judgment in 1986, the Band filed a complaint seeking damages against the government for the unlawful conveyance of the rancheria property and for denial of statutory benefits due to the unlawful termination of the tribe's status. *Id.* at 1574-1576.

In dismissing the Band's action, the court reasoned that:

The Band's theory of its own disablement through revocation of its charter ignores the reality that it is through the knowledge of individual persons that comprise legal entities such as corporations or tribes that such entities gain the actual knowledge of the events which give rise to their potential causes of action. The termination of the Band's charter or the withdrawal of federal recognition did not affect the ability of the individual members to obtain knowledge and those individual members knew or should have known at least by 1967 all the facts which indicated that the sale of Parcel 1 was improper under the Act.

The instant case is significantly different from *Hopland*. In *Hopland*, the initial litigant was a distributee. *Id.* at 1574. This means that the litigant herself

entered into the distribution plan with the government, was aware of, and agreed to its terms. Rancheria Act.

In contrast, the sole distributee in this case, Mabel Dixie, needed a conservator and was not provided with one, despite the requirement for the government to do so. In addition, Ms. Dixie was induced into executing a quitclaim deed, again without a conservator. Indeed, when Ms. Dixie died in 1971, she died believing that she had returned the Rancheria to Tribal status, if she understood at all the events that had occurred. As the sole distributee, whatever knowledge she did have regarding the distribution died with her.

In *Hopland*, the termination issue was continuously litigated by more than one distributee from 1974 until 1988. *Id.* Here, the issue lay dormant for many years. Under the facts of *Hopland*, the court concluded that knowledge of harm could be imputed to a tribe, given that a group of distributees was engaged in continuous litigation to restore the tribe to federal recognition. However, such a conclusion is not warranted in the instant case, where there have been no distributees since 1971, and that lone distributee died under the impression that she had revoked the distribution plan.

Assuming, *arguendo*, that Yakima Dixie possessed some knowledge of harm based on what is in the record, it would be grossly unfair to apply common law agency principles to an Indian Tribe, in a manner that would not apply to a similarly situated non-Indian litigant. At common law, the knowledge imputable to an organization must be that of the managing officers or supervising agents of the organization, or at least someone entitled to represent it. *See California Yacht Club of Los Angeles v. Johnson*, 65 F.2d 245 (9th Cir. 1933).

Here, there was no tribal government. There were no tribal members. [ER 45, p. 2, lines 5-9; ER 24]. The very point of the government's actions were to end the Tribe's existence, which they very nearly accomplished. This Court will recall

that when the BIA approved the distribution plan, they recognized only one tribal member. That member died in 1971. Given that the BIA did not recognize any other individuals as tribal members for the purpose of participating in the distribution plan and terminating the Tribe, it is unreasonable and unfair to arbitrarily designate tribal members for a detrimental purpose. This is especially true when no one knows with certainty who those other tribal members would be, or whether they were even alive during the relevant period.

When contacted by Lena Shelton on behalf of herself, Tom Hodge, Dora Shelton Mata and her two granddaughters, the government rejected their requests to vote on the distribution plan. This is consistent with the BIA's February 8, 1989 Report of Population by Tribe, which states that the Tribe's population was zero as of 1987-1988. [ER 24]. The court below dismissed this document, stating the following:

Plaintiff's reference to a February 8, 1989 Report of Population by Tribe which indicates that the government was unaware of any Sheep Ranch Tribal members as of 1987-1998 does not establish that no members or putative members existed who could have filed suit on the Tribe's behalf. (Exh. 20 to Opp'n; Record p.134.) It merely demonstrates that the government had no knowledge of any tribal members.

We disagree. When the BIA implemented the distribution plan that terminated the Tribe, they selected one person, and excluded at least five others. [ER 9]. Given that the BIA considered only one person eligible to vote on the termination of the Tribe, they cannot now argue that those that they excluded were tribal members after termination. To allow the government to take a narrow view of tribal membership to simplify termination, and then to adopt an impossibly broad view in order to assert the statute of limitations is extremely unfair, and should not be accepted by this Court.

Finally, Yakima Dixie unequivocally stated that he was not a member of any tribe. [ER 28, p. 3, lines 17-19]. Thus, Yakima Dixie could not possibly qualify as

an officer, agent, employee or representative within the meaning of the common law agency requirement. *See California Yacht Club*. To arbitrarily designate Yakima Dixie a tribal member in 1993, when support for such a finding is absent from the record is simply improper. It should not be the rule that a person can be proclaimed a tribal member by a court for the purpose of dismissing a case when that same person declares that he is not a tribal member, and is not considered a tribal member under any legal theory. While the court implies that he was at least a “putative” tribal member, the term “putative” by its very definition means “alleged.” Barrons Law Dictionary 1991. To allow such a construction is to place an emphasis on perceived racial status instead of socio-political status, which is contrary to federal law and custom. *See Lapier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993). At the time of the hearing, Yakima Dixie was merely an heir to a distribute, which is a status that could just as easily apply to someone of European descent. Tribal membership cannot be dictated by inheritance rights to land.

Throughout this litigation, the government has repeatedly sought to have it “both ways” with respect to recognition of tribal members. The government decided on a path in 1966, and this Court should not allow them to evade the consequences of their decision today.

D. Equitable Tolling Applies Because § 2401(a) Is Procedural, Not Jurisdictional

The statute of limitations codified at 28 U.S.C. § 2401(a) is a procedural bar, not a jurisdictional bar, and therefore, it is subject to traditional exceptions such as equitable tolling and estoppel. *Cedars-Sinai* at 770; *see Irwin*.

Should this Court find that the statute of limitations did accrue on April 13, 1993, this Court should apply equitable tolling to this case. Equitable tolling focuses on the plaintiff’s excusable ignorance of the limitations period. It allows a plaintiff to avoid a statute of limitations, if, despite all due diligence, a plaintiff is

unable to obtain vital information bearing on the existence of the claim. *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

In *Supermail*, the Internal Revenue Service (“IRS”) levied upon funds due a company without notifying the company that it had done so. *Supermail* at 1205. The subject funds were owed by the company’s former lawyers, and not the company. The IRS knew this. *Id.* When the company discovered what had happened to their funds, they tried to file a request with the IRS. *Id.* The IRS first ignored the company, then erroneously told the company that it had filed with the wrong office. *Id.* When the company filed with the office that the IRS told them to file with, the IRS told them that it was too late. *Id.* The company then sued. The IRS argued that the time to sue ran from the time the company filed with the office that the IRS had said was the wrong office, and not from the time that the company filed with what the IRS had said was the right office. *Id.* The District Court granted the IRS’ Motion to Dismiss. *Id.* at 1206.

The Ninth Circuit reversed, concluding that the company could prove a set of facts that would establish that equitable tolling applies and that the action was timely. *Id.*

This Tribe was terminated. [ER 31]. However, the government did not notify the Tribe that it had been terminated. They could have done so by simply publishing the notice as they are directed to under 25 C.F.R. § 242.12 when the distribution became final. Instead, the government chose to conceal this fact. The Tribe’s land was being held in trust for individuals, not the Tribe. The government knew this, but either ignored the Tribe’s inquiries about the land, or told them that it was still tribal land. [ER 45, p. 2, lines 12-18]. Beginning in late 1998, the Tribe made multiple inquiries about its land status. Unsatisfied with the BIA’s responses, the Tribe continued to investigate the issue, culminating in the letter from Silvia Burley to the BIA of November 28, 2000. *Id.* ¶ 12. In that letter, Ms.

Burley demanded that the BIA correct their land records to reflect that the Sheep Ranch Rancheria was not tribal land, and that the BIA confirm that the Tribe was landless. [ER 37].

Carmen Facio, the Realty Officer for the Pacific Region, requested that the LTR Office change the designation of the Sheep Ranch Rancheria from that of a tribal tract, in a letter dated December 14, 2000. [ER 38]. She did this only after Ms. Burley requested that she do so. This fact indicates the state of confusion that existed regarding Sheep Ranch Rancheria, since Carmen Facio attended the 1992 hearing regarding the property, yet had taken no action consistent with the administrative law judge's decision. *Id.*

Finally, on February 22, 2001, the BIA notified the Tribe that they were in fact landless. [ER 39]. The Tribe's inability to discover the status of the land earlier than they did was not due to its lack of diligence, but to the BIA's failure to provide accurate information. Without the confirmation of landlessness from the BIA, the Tribe could only speculate about the land's status.

Under these circumstances, which are similar to those in *Supermail*, the Tribe's Complaint cannot be dismissed unless it appears beyond doubt that the Tribe can prove no set of facts that would establish the timeliness of the claim. *Id.* at 1207.

As demonstrated above, in addition to the complaint, the Tribe has developed a record through discovery establishing that tolling applies and the action was timely. Accordingly, this Court should follow the holding in *Supermail* and find that dismissal was improper in this case.

With respect to prejudice against the Defendant, reversal of the lower court's ruling will not prejudice the government in any way. Discovery has been concluded, and all that remains is for the court to rule on the merits.

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1. **The Government Should Be Estopped From Asserting The Statute Of Limitations Due To Their Misconduct**

This Court set forth the elements for allowing equitable estoppel against the government in *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989).

Watkins teaches that before traditional estoppel principles are applied, two additional elements must be satisfied. First, the party seeking to raise estoppel must establish affirmative misconduct going beyond mere negligence, and second, the estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public will not suffer undue damage by imposition of liability. *Id.* at 707. Both elements are satisfied here.

The government's misconduct began in 1966, when the government decided to mislead Indians about the requirements for termination under the Rancheria Act. On February 16, 1966, the Commissioner for Indian Affairs sent a letter to the Area Director that included the following:

Under the provisions of sections 2 and 10 of the Act, we do not believe the assets of a rancheria are finally distributed until the provisions of the approved distribution plan are all carried out. The issuance of the deeds ends the trust status of the land concerned; and since this is the last action that is usually taken in carrying out the provisions of the plan, "termination" can usually be considered as taking place at that time. As you know, however, each completion statement on which a proclamation is based carries in it the statement that "each recipient of property under this plan understands that a 'termination' notice in which his name will appear will be published and that he will thereafter not be entitled to any services from the Federal Government because of his status as an Indian." If the Indians understand that termination takes place when the proclamation is published, we do not think this understanding should be disturbed, even though technically termination takes place earlier if all the provisions of the distribution plan are fully expected.

The intent of the letter was to mislead Indians into believing that publication of a termination notice pursuant to 25 C.F.R. § 242.12 was a requirement to complete termination, although the Rancheria Act has no such provision. The result of this misrepresentation is that tribes, such as this Tribe, would be led to believe that by simply declining to publish a termination notice, the BIA could halt

termination, despite the fact that the tribe's land may have been irretrievably distributed, as is the case here.

In 1967, the BIA excluded tribal members from participating in the distribution plan, electing instead to allow only one person to participate. [ER 6 and 9]. They did so while knowing full well that the person that they selected needed a conservator, and failed to provide one. [ER 15-17, 20-21]. The BIA's solution to this problem was to induce the person to execute a quitclaim deed, again without a conservator. [ER 21]. The impropriety of this act is emphasized by the administrative law judge's finding that the recitations made in the deed were a material misrepresentation of the facts. [ER 29, p. 5]. Finally, to this day, the government has failed to distribute the land as they are required to based on the order of their own agency, choosing instead to label it as an "allotment held in trust for the heirs of Mabel Hodge Dixie." [ER 46, p. 2, lines 4-10]. Neither the Rancheria Act nor the administrative law judge's order grant the BIA the authority to make such a designation. Doing so constitutes an additional act of misconduct that serves to further confuse the status of the land and mislead the Tribe. In sum, these acts constitute a pervasive pattern of affirmative misconduct spanning over forty years, and well into the statute of limitations period.

2. **The Injustice To The Tribe Far Outweighs Any Possibility Of Damage To The Public Interest**

The Tribe is landless. It was not and is not the purpose of the lawsuit to have the property known as Sheep Ranch Rancheria declared to be in trust for the Tribe. As matters now stand, that property is being held in trust for certain individuals, not all of whom are lineal descendants of the distribute, and only one, Yakima Dixie, is known to exist. The problem is that the other members of the Tribe who were admitted in 1998 do not have a reservation.

Discussions between the Tribe and the government continue, to this day. [ER 40, 42]. And, the government continues to characterize the Tribe as “unorganized” despite the Tribe’s inherent authority to organize, codified in Pub. L. 118 Stat. 542 (Native American Technical Corrections Act). The government’s position is also at odds with their recognition of the Tribe’s government and ongoing government-to-government relationship. [ER 32, 41]. Nonetheless, the BIA seeks to involve itself in the Tribe’s internal membership issues. Indeed, in the most recent letter from Assistant U.S. Attorney to Plaintiff’s counsel, a draft settlement proposal was sent with the warning:

As you know, **the Bureau of Indian Affairs takes the position that the California Valley Miwok Tribe (‘the Tribe’) has not yet reorganized** despite the funds provided by the federal government for that purpose. **The lack of reorganization is underscored by Yakima Dixie’s recent motion to intervene and the courts continued silence in response to said motion.** Until the Tribe reorganizes, it is premature to obtain a home land for the Tribe, especially where that land is obtained at the behest of one family. Thus, as a first step, it would be appropriate to reorganize and, once reorganize, have the Tribe determine where its homeland shall be.

[ER 42, p. 1] (emphasis added).

In other words, the Tribe is caught in a classic Catch-22. The litigation was filed, as litigation has been filed by other tribes, but it cannot be settled because the BIA does not regard the Tribe as organized. The Tribe will not be organized in the eyes of the BIA because they refuse to tolerate the BIA’s involvement in their internal affairs.

Surprisingly, the court expressed sympathy for Indians in just such a situation:

To think that there would be Indians or members of tribes that would be helpless or without any recourse in this court simply because the Tribal government didn’t exist and land had been taken away from the Tribe at some previous time unfairly or improperly, and as a result, these folks are landless members of a Tribe, even though there is no government of the Tribe, I’d be interested in some case law that spelled that out. [¶] My reaction is that there would be standing under those circumstances, but it seems to me instinctively that seems

wrong. [¶] You're telling me that these folks have no rights to bring any action on behalf of the Tribe simply because there was no Tribal government? That doesn't sound right to me.

[ER 47, pp. 2-3].

And yet, that is precisely what has happened. Should this case not be allowed to proceed to the merits, the Tribe will remain in that predicament.

3. The Traditional Elements Of Estoppel Are Present In This Case

Having shown that estoppel can be asserted here, we now turn to the traditional elements of estoppel. *Watkins* sets forth the elements as:

1) the party to be estopped must know the facts; 2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it was so intended; 3) the latter must be ignorant of the true facts and 4) he must rely on the former's conduct to his injury.

Watkins at 709.

It is clear from the discussion above that the BIA knew the facts. Simply put, it was they that performed each of the acts terminating the Tribe and rendering the Tribe landless. We have also addressed the fact that the Tribe was ignorant of the true facts, based upon the records of the LTR Office and the BIA's representations to the Tribe. It is clear that the Tribe relied on the BIA's conduct to their injury, which is why we are contesting the lower court's application of the statute of limitations here. What remains is the second element of traditional estoppel, which is whether the BIA acted so that the Tribe had a right to believe that the BIA intended for its conduct to be acted on. *Id.*

In *Watkins*, this court upheld the District Court as follows: "The district court found that this element of estoppel was satisfied because, regardless of what the army actually intended, *Watkins* had a right to believe that the Army intended him to rely on its acts." *Id.* at 710.

By virtue of the trust relationship between the government and Indian tribes, the government, through the BIA, is pervasively involved in Indian affairs. With

respect to their involvement, “The most substantial activities of the Bureau are probably the provision of education and the management of tribal resources, particularly lands.” WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW*, at 47 (1998).

In view of this responsibility the Tribe had every right, and was in fact required to rely on the BIA. This is especially true since the government holds legal title to Indian lands held in trust, as was the Sheep Ranch Rancheria. *See id.* at 357.

Furthermore, at the hearing below, counsel for Defendants conveyed the following to the Court:

MS. LUTHER: The land records for Calaveras County reflect that the United States of America owns the property. That is why the United States maintains a separate equivalent, I guess you could call it, to the County Recorder’s Office.

THE COURT: That’s still on record there?

MS. LUTHER: Correct. That is where – that is the official recorder’s office for Indian land that shows on whose behalf the government holds title to the land.

THE COURT: Despite the ALJ’s opinion, the land is still recorded in the name of the United States?

MS. LUTHER: In Calaveras County.

THE COURT: Why is that?

MS. LUTHER: I couldn’t tell you why. It’s just the way it’s always been done, I believe because the United States hold title. We hold title, and then in our records at the Bureau of Indian Affairs, it reflects on whose behalf the fiduciary the United States holds the land.

THE COURT: The conveyance was valid and the quitclaim fraudulent?

MS. LUTHER: That’s what the ALJ held. There’s been no request from the heirs to have that land taken out of trust. In other words, there have been no requests from Yakima –

[ER 47, pp. 4-5].

What the above exchange demonstrates is that not only did the BIA know the status of the land, but that they knew that no one else did. The BIA had to

know that anyone, including the Tribe, who checked the land records would know nothing more than the land was owned by the government as a Tribal Tract. [ER 38]. Therefore, they must have also known that for that reason alone, the Tribe would have to rely on their misrepresentations concerning the land. Moreover, the Tribe had a right to rely on the BIA's representations because it was only the BIA who knew the information they were seeking. In view of the above, the elements necessary to apply equitable estoppel have been satisfied, and this Court should estop Defendants from asserting the statute of limitations in this case.

CONCLUSION

Since their inception and recognition as a separate Band, the Tribe has seen their land base dwindle from 160 acres, to 2 acres, to 0.92 acres, to nothing. Until recently, the common thread that connected all of their dealings with the BIA was that tribal members were unrepresented, and the BIA did with them, or to them whatever suited their fancy at a given time. However, the Tribe had and still has rights. The difference now is that the Tribe, through their own perseverance has learned to assert their rights. Every wrong committed on them in the past occurred because they simply didn't know they were wronged. Now that they do know, they are told that they should have known sooner, despite the fact that the wrong they are trying to address was the reason for their ignorance. Basic fairness

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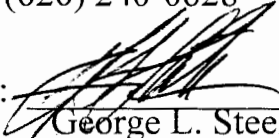
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demands that this not be the case. Accordingly, the Tribe respectfully requests that this Court reverse the judgment below, and remand the case to be addressed on the merits.

Respectfully Submitted,

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By: 
George L. Steele
Counsel for Plaintiff/Appellant

Statement of Related Cases

There are no related cases in this Court.

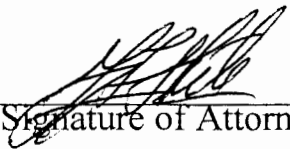

George L. Steele

Certification Pursuant to Circuit Rule 32(e)(4), Form of Brief

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the attached brief

- Uses proportionately spaced, has a typeface of 14 points or more and contains **10,411** words,
or
- Uses monospaced, has 10.5 or less characters per inch and
 - Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs), or
 - Contains _____ words.

November 19, 2004
Date



Signature of Attorney or Unrepresented Party

Certificate of Service

I, the undersigned, declare: that I am a resident or employed in Los Angeles County, California; that my business address is 790 E. Colorado Boulevard, Suite 900, Pasadena, California 91101; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by George L. Steele, who is a member of the Bar of the Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California, and at whose direction I served the following:

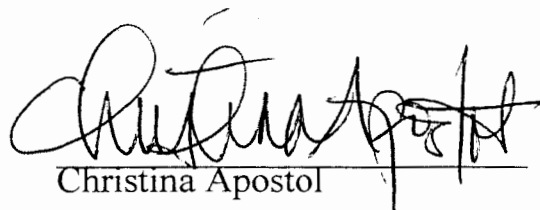
Appellant's Opening Brief

On November 19, 2004, following ordinary business practice, service was: Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

McGregor W. Scott, United States Attorney
Debra G. Luther, Assistant United States Attorney
501 "I" Street, Suite 10-100
Sacramento, CA 95814

This proof of service is executed at Pasadena, California, on November 19, 2004.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.


Christina Apostol