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CALIFORNIA VALLEY MIWOK TRIBE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALIFORNIA VALLEY MIWOK TRIBE,)	
formerly SHEEP RANCH OF ME-WUK)	No. 04-16676
INDIANS OF CALIFORNIA,)	D.C. No. CV-02-00912 FCD
)	
Plaintiff/Appellant,)	APPELLANT'S OPPOSITION TO
)	APPELLEES' MOTION FOR
v.)	SUMMARY AFFIRMANCE OF
)	JUDGMENT AND DISMISSAL
)	OF APPEAL
UNITED STATES OF AMERICA, UNITED)	
STATES DEPARTMENT OF THE INTERIOR,)	
GAIL NORTON, Secretary of Interior,)	
NEAL MCCALED, Assistant Secretary of)	
Interior For Indian Affairs,)	
)	
Defendants/Appellees.)	
_____)	

Appellant California Valley Miwok Tribe ("Tribe") respectfully submits that the Motion for Summary Affirmance and Dismissal of Appeal filed by Appellees, United States of America, et al. ("Government" or "Appellees"), should be denied. By prevailing on the statute of limitations issue, the Tribe will overcome the current bar to further litigation, and will regain the right to litigate the merits of this

case, and any issues of subject matter jurisdiction, should this Court find that any remain.

INTRODUCTION

The Government bases their Motion on the assertion that even if the Tribe prevails on the statute of limitations issue, that the suit will remain dismissed. They argue that the court dismissed the action on two bases: sovereign immunity and the statute of limitations. As an initial matter, the Tribe disputes that the court's dicta on sovereign immunity can be construed as a holding, in view of the court's conspicuous refusal to address 5 U.S.C. § 702, and controlling law. Even if one does conclude that sovereign immunity was a basis for dismissal, then such a dismissal would not preclude further litigation in the district court, or some other forum, such as the Court of Claims. With respect to the statute of limitations issue however, a dismissal on that basis operates as a bar to further litigation. Therefore, by prevailing on the statute of limitations issue, the Tribe regains the right to seek redress for "defendants' admittedly negligent actions with respect to the Tribe." Memorandum and Order re Costs Bill and Memorandum in Support Thereof, at 2, attached as Exhibit "1." Thus, the question before this Court is substantial in that the determination of it shall dictate whether the Tribe may seek a remedy for the Government's unlawful acts against the Tribe.

STANDARD OF REVIEW

Summary affirmance is appropriate only where it is "manifest that the questions on which the appeal depends are so insubstantial as to not justify further proceedings." Circuit Rule 3-6(b); United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982).

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ARGUMENT

1. If A Court Dismisses A Case For Lack Of Subject Matter Jurisdiction, The Plaintiff Is Free To Renew The Suit Under Circumstances Supporting Jurisdiction

“A jurisdictional dismissal is not a judgment on the merits.” Wages v. Internal Revenue Service, 915 F.2d 1230, 1234 (9th Cir. 1990); FRCP 41(b).

“Consequently, upon such a dismissal the plaintiff is free to institute the suit anew in a jurisdiction or under circumstances supporting jurisdiction.” Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2nd Cir. 1994); Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1035 (9th Cir. 1985); FRCP 41(b).

To the extent that the dismissal in this case may have been based upon conventional jurisdictional issues, the dismissal was without prejudice, since by definition it could not have been on the merits. Id. Therefore, if the Tribe prevails on the statute of limitations issue, and this Court rules that an alternative holding of dismissal for lack of subject matter jurisdiction exists, the Tribe will be free to refile under circumstances supporting jurisdiction. Id. If the dismissal had actually been granted for a lack of subject matter jurisdiction, the Tribe could have addressed the jurisdictional issues at the court below, and an appeal to this Court would not have been necessary. However, in the instant case, the district court based its ruling on the statute of limitations, which while mischaracterized by the district court as jurisdictional, is actually a procedural bar to further litigation that is treated as a judgment on the merits. Plaut v. Spend Thrift Farm, Inc., 514 U.S. 211, 228 (1995). The statute of limitations is the critical issue to be addressed by this Court.

As a result, should the Tribe prevail on the statute of limitations issue, it may continue to seek a remedy for the harm done to it, since the bar to further litigation will have been overcome. A valid jurisdictional issue may require that the Tribe

refile, although the Tribe does not concede that one exists here. But in no case does a dismissal for lack of subject matter jurisdiction prevent the Tribe from continuing to seek circumstances supporting jurisdiction. Robinson at 507.

Thus, the statute of limitations issue is far from insubstantial in this case, and the Government's Motion should be denied.

2. **A Court Cannot Rule On The Merits If It Lacks Subject Matter Jurisdiction**

Appellees contend that the district court dismissed the Tribe's action on two separate bases: sovereign immunity, and the statute of limitations. This cannot be the case. Sovereign immunity relates to subject matter jurisdiction. See Beller v. Middendorf, 632 F.2d 788, 795 (9th Cir. 1980). The statute of limitations relates to the merits. Plaut, at 228. A court that concludes that subject matter jurisdiction is lacking has no power to rule alternatively on the merits of a case. Wages at 1234, citing Cook at 1035. Thus, Appellees' argument relies on an interpretation of the district court's order that is contrary to law. Id.

Appellees' position is further weakened by the fact that the district court chose not to address the Tribe's assertion of 5 U.S.C. § 702 as the applicable waiver of sovereign immunity, especially in view of the fact that it is settled law that the Government's sovereign immunity is waived by § 702. Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 793 (9th Cir. 1986); Beller, at 797. In addition, please consider the court's own statement as to its holding:

“Since the statute of limitations, 28 U.S.C. § 2401(a), is a precondition to the United States' waiver of sovereign immunity, this court lacks subject matter jurisdiction over these claims.”

The court's statement indicates that the court did not consider the sovereign immunity issue necessary for the decision of the case. Memorandum and Order Dated June 30, 2004 (“Order”), at 23, 24, attached hereto as Exhibit “2.”

Therefore, the Tribe respectfully submits that the portions of the Order addressing sovereign immunity and jurisdictional issues are dicta, and should be regarded as such by this Court. Moreover, to read the Order as an alternative holding as urged by Appellees would allow Appellees to “have it both ways,” which is both unfair and contrary to law. Plaut at 228, Wages at 1234, Cook at 1035. In fact, in view of the law, the district court’s Order impliedly concedes that it had subject matter jurisdiction over this matter, since, as discussed above, the court could not have ruled on the statute of limitations issue without it. Id.

CONCLUSION

For the reasons stated above, the Tribe respectfully requests that this Court deny Appellees’ Motion for Summary Affirmance. The Tribe submits that Appellees have failed to meet their heavy burden of proving that the statute of limitations is an “insubstantial or harmless issue” in this case. Hooton at 858.

Dated: January 3, 2005

Respectfully submitted,



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