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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GALE NORTON, SECRETARY OF INTERIOR, AURENE MARTIN, ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, Defendants.	CASE NO. CIV.S-02-0912 FCD/GGH DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF THEIR COUNTER MOTION FOR SUMMARY JUDGMENT DATE: May 14, 2004 TIME: 10:00 a.m. COURTROOM: 2

INTRODUCTION

The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians, *has never been terminated*. Therefore, it is not a *restored* tribe within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii), which is the force propelling this litigation.

Plaintiff's argument appears to focus on two erroneous bases for assuming that the Tribe was once terminated: (1) unrestricted title to the 0.92 acre Sheep Ranch Rancheria passed briefly to a member of the small tribe, Mabel Hodge Dixie and (2) there appear to have been no tribal members

in the 1980's and early 1990's. Plaintiff errs. First, although Sheep Ranch Rancheria was scheduled for termination, termination was never fully effected and the relationship between the United States and the rancheria (and its residents) was never severed. Plaintiff offers nothing other than conjecture to support its argument to the contrary.[1]

Secondly, plaintiff contends that a trust relationship is somehow imposed by 25 C.F.R. Part 151, which governs the process by which the United States accepts land into trust on behalf of federally-recognized tribes. No special trust responsibility is imposed by the regulations themselves. Indeed, whether the Secretary of the Interior will accept land into trust is discretionary. But, more importantly, as plaintiff has never submitted a land acquisition application, Part 151 is irrelevant to this case.

DISCUSSION

A. THE UNITED STATES HAS NOT BREACHED ANY TRUST DUTY TO THE TRIBE; RATHER, ANY BREACH WAS A BREACH OF ITS DUTY TOWARDS MABEL HODGE DIXIE IN FAILING TO OBTAIN A CONSERVATOR.

With the exception of providing a conservator for Mabel Hodge Dixie and publishing a

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[1] Plaintiff argues that there were no tribal members until 1992 or thereabouts. If that were true, which BIA disputes, this Court would be justified in determining that administrative error caused the Tribe's name to be added to the list of federally-recognized tribes, order the Tribe's name stricken from the list, and instruct Ms. Burley to seek re-recognition through the tribal acknowledgment process found at 25 C.F.R. Part 83. However, the Bureau of Indian Affairs ("BIA") consistently has had communication with members of this tribe who have continued to live in the area. BIA recognizes this Tribe as a duly constituted, loose-knit Tribe that has not formally organized. Silvia Burley, who became a tribal member in 1998 at age 38, maintains otherwise, in light of the tribal constitution that she drafted and adopted on the strength of her vote and the votes of her two daughters. Declaration of Brian Golding, Sr, filed simultaneously herewith, at Exhibit "b". The tribal constitution permits only the lineal descendants and lineal ancestors of Yakima Dixie and Silvia Burley to be voting members of the tribe. As Mr. Dixie, who was born in 1940, is not believed to have any living lineal descendants or ancestors, Silvia Burley and her descendants will control the tribe. Based on nearly 100 years of interaction with the Tribe, BIA believes that the tribal community constituting this Tribe is substantially larger than is portrayed in the Burley constitution. *Id.* at Exhibit "c". Indeed, under the terms of the Burley constitution, Silvia Burley's three living siblings are ineligible to be voting members, Yakima Dixie's living brother is likewise ineligible, and other Indians known to live in or near Sheep Ranch and to whom Mr. Dixie and Ms. Burley are related likewise are ignored.

Notice of Termination, the BIA complied with the requirements of the California Rancheria Act, *as amended*, and the distribution plan for the Sheep Ranch Rancheria. However, recognizing that it had not obtained a conservator and given the United States' abandonment of the Termination policy, BIA never completed the termination of the Sheep Ranch Rancheria and, therefore, none of its tribal members experienced the difficulties attendant to the termination of other rancherias. To the extent that the government breached any duty, that duty was owed not to the Tribe but to *Mabel Hodge Dixie*, now deceased for over 30 years, for the appointment of a conservator for her. The government has not breached any duty towards the *Tribe*.[2]

The California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 (Aug. 18, 1968), *as amended*, Pub.L. 88-419, 78 Stat. 390 (Aug. 11, 1964)("Rancheria Act"), enacted by Congress, provided for the severance of special services and relations between the United States and certain peoples based upon their status as Indians. As explained in *Duncan v. United States*, 667 F.2d 36, 38 (Ct.Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983)("*Duncan II*"),

> Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use. . .in the early years of [the 20th] century. * * * [The Rancheria Act] provided for termination of the special status (as Indian lands) of various California rancherias upon approval by a majority of the affected Indians of a final distribution plan. * * * Under the [Rancheria] Act, termination of the Rancheria ended the rights of the Indians to receive special federal services qua Indians, and exposed Rancheria lands to state tax liability and regulations.

Id. at 38-39.

The severance (or "termination") was conditioned upon the performance of certain final services by the United States as may be negotiated with the Indians or deemed necessary by the Secretary of the Interior, relating to sanitary systems, roads, vocational assistance, etc. 1958

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[2] Whether by fluke or design, the termination of Sheep Ranch Rancheria was nearly complete but for the appointment of a conservator for its sole distributee, Mabel Hodge Dixie. Consequently, the Tribe received the "benefits" of Termination and then some – the Tribe and its members remained recognized while its sole distributee received a trust allotment of land, a new house, sanitation facilities, and fencing – without the unfulfilled promises attendant to the termination of such rancherias as Hopland Rancheria.

Rancheria Act at § 3, *as amended*. Following the satisfaction of these services, the Indians were to receive unrestricted title to the land according to a mutually agreed plan of distribution of the assets of the rancheria. *Id.* at § 2, *as amended*.

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In the original 1958 Rancheria Act, termination was mandatory for 41 California rancherias and did *not* include Sheep Ranch Rancheria. *Id.* at § 1; 25 C.F.R. § 242 at n.1[3]. In the 1964 amendment to the Rancheria Act, termination or "the distribution of assets of a rancheria" was made available to all California rancherias and reservations upon the request "by majority vote of the adult Indians of a rancheria" or those holding assignments thereon. 1964 Rancheria Act at § a.

Amended regulations promulgated in 1965[4] set out the process by which a request for termination could be made and the ensuing process of terminating relations. 25 C.F.R. Part 242 (Defts' Exhibit __). First, "[u]pon receipt of a written request from an adult Indian or Indians of an unorganized rancheria," the BIA was to prepare a list of Indians eligible to vote on whether or not the distribution of rancheria assets should take place. *Id.* at § 242.3(a) & (c). "Eligible voters" were deemed to be the adult Indians from among the following:

(1) Those who have allotments on the rancheria or reservation.

(2) Those who hold formal assignments.

(3) Those who reside on the rancheria or reservation pursuant to an informal assignment.

(4) Those not in the above categories who have resided for a period of at least three consecutive years immediately preceding receipt of the request [for termination] on the rancheria or reservation not set aside for a designated group of Indians.

(5) The dependent members of the immediate families of those Indians [identified above].

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[3] A complete copy of 25 C.F.R. Part 242 (1971) is appended hereto at Exhibit __.

[4] Regulations first were promulgated to implement the 1958 Rancheria Act. These regulations were amended and renumbered following the 1964 amendments. *Kelly v. United States Dept. of Interior*, 339 F.Supp. 1095, 1100 (E.D.Cal. 1972)(3-judge court).

Id. at § 242.3(a).[5] After the list of eligible voters was prepared, it was to be published once weekly for three consecutive weeks in a local newspaper for the purpose of providing notice and opportunity for persons "to protest. . .the omission of a name from the list or the inclusion of any name thereon." *Id.* at § 242.3(d). Following the resolution of any protests, an election was to be held among the eligible voters "on the issue of whether a distribution plan is to be developed," or, put another way, whether the rancheria and its residents should be terminated. *Id.*

If a majority of the eligible voters voted in favor of termination, a plan for the distribution of the assets of the rancheria was to be drafted and approved by the Secretary of the Interior and the persons designated in the distribution plan as "distributees." *Id.* at § 242.4. The distribution plan also was to include any services, *e.g.*, housing, water, sanitation, that the United States and the Indians agreed were needed and that the United States would perform before termination. [cite]

Those persons whose names appeared on the distribution plan (the "distributees") would be entitled to participate in the distribution of the assets of the rancheria. *Id.* at § 242.4(b). The distributees were to consist of those persons identified under § 242.3 and any additional persons added with the joint approval of the majority of the adult Indians, the person(s) to be added, and the United States. *Id.*

Once a distribution plan was approved, the regulations required a copy to be mailed or delivered to each distributee and each person claiming an interest in the rancheria's assets, posted in a public place on the rancheria, and published once weekly for three consecutive weeks in a local paper. *Id.* at § 242.5. After a period of time for receiving and resolving any objections to the distribution, a final distribution plan again would be sent to each distributee and a referendum held on whether to accept or reject the distribution plan. *Id.* at § 242.7. When the Secretary of the Interior was satisfied that the government had carried out the provisions of the distribution plan, a notice was required to be published in the Federal Register to declare that the rancheria and its distributees and their dependents no longer eligible for government services based upon their status as Indians. *Id.* at

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[5] Persons who met the criteria of § 242.3(a) but were members of another rancheria were ineligible to vote. 25 C.F.R. § 242.3(c).

§ 242.12. At that time, the cessation of all relations, including responsibility for former trust lands, between the federal government and the designated Indians, based on their status as Indians, would be effective.

In the instant case, each of the above steps were followed:

1. A written request was received from Ms. Dixie, who resided on the Sheep Ranch Rancheria, to commence the termination process. *See* Pltf's Exhibit 6 (Mabel Dixie gave the BIA agent a letter requesting distribution of the assets).
2. BIA determined that Mabel Hodge Dixie likely was the only person eligible to vote on whether the assets of Sheep Ranch Rancheria should be distributed and BIA published appropriate notice thereof and solicited any objections to the proposed voters list. Pltf's Exhibits 7-8.
3. No objections were received to the proposed list of voters for the election on whether Sheep Ranch Rancheria should be terminated. Golding Declaration.
4. Ms. Hodge voted in favor of termination. Pltf's Exhibit 9.
5. A distribution plan was prepared, which named Mabel Hodge Dixie as the sole distributee. Pltf's Exhibit 10. The plan was approved by the United States and by Ms. Dixie. *Id.*
6. Notice of the approval of the distribution plan was published and posted. Defts' Exhibit C.
6. No objections were received to the plan of distribution. Defts' Exhibit D.
7. A referendum was then held and Ms. Dixie, the sole eligible voter, accepted the distribution plan. Pltf's Exhibit 12.
8. A survey of the land was prepared. Defts' Exhibit A.
9. A new home was built for Ms. Dixie. Pltf's Exhibit 21.
10. Sanitary facilities, including domestic water, were installed for Ms. Dixie. *Id.*
11. Notice of the appraised value of the home was given to Ms. Dixie as well as a deed

conveying title.[6] Pltf's Exhibits 17 & 18.

12. A fence was placed around the property. *See* Pltf's Exhibit 21 ("All actions required under the Plan for Distribution of the Assets of the Sheep Ranch Rancheria were completed....").

The federal-tribal relationship with Sheep Ranch Rancheria likely would have been terminated but for two undisputed facts: (1) No conservator was ever appointed for Ms. Hodge, as required by the Rancheria Act, and (2) no Notice of Termination was published, as required by the Sheep Ranch Rancheria Distribution Plan. Thus, in essence, the Sheep Ranch Rancheria – as it existed in the mid-1960s – received the benefits of termination in the form of a formal land allotment held in trust free from taxation, a new home, sanitary and water facilities, and fencing without losing its tribal sovereign rights and without loss of eligibility for services.

1. The Approval of the Distribution Plan and Issuance of Title to the Rancheria Lands Did not Legally or Factually Effect the Termination of the Rancheria

Plaintiff argues that the Rancheria Act made termination effective upon the issuance of the property deed and the approval of the distribution plan. Pltf's Brf. at 4. This argument flies in the face of the unambiguous language of the Rancheria Act, its implementing regulations and the contractual distribution plan for the Sheep Ranch Rancheria.

Congress, in unambiguous terms, laid out in its 1964 amendment to the Rancheria Act a process by which Indians of various California rancherias could request an end to federal supervision and relations. Pursuant to that Act, the Department of the Interior and BIA had a duty to make its provisions known to the rancherias and, upon request, begin the process of ending relations and distributing the assets of the rancherias. Bearing in mind the general trust responsibility owed to the

[6] There is some discrepancy over whether the deed actually was delivered to Ms. Dixie based on internal BIA memoranda stating that the deed was not delivered, Exhibit __, and the absence of a signed receipt for the deed from Ms. Dixie, Pltf's Exhibit 17. However, as there is a copy of a letter to Ms. Dixie signed by a BIA official stating that the deed was hereby delivered, Pltf's Exhibit 18, and as the probate judge found that the deed had been delivered, Pltf's Exhibit 28, defendants do not contest delivery of the deed to Ms. Dixie.

Indians, *United States v. Mitchell*, 463 U.S. 206, 225 (1983), the government had a duty to follow the various mandates in the Rancheria Act and act in the best interests of the Indians in doing so *before* effecting the cessation of any relations with or services to the rancheria Indians.

One of the mandates of the Rancheria Act provides:

> *Before* conveying or distributing property pursuant to this Act, the Secretary of the Interior *shall* protect the rights of individual Indians who are. . .in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction. . . .

Rancheria Act at § 8 (Pltf's Exhibit 3) (emphasis added). Plaintiff skips this provision in § 8 entirely and focuses only on § 10, which provides:

> After the assets of a rancheria. . .have been distributed pursuant to this Act, the Indians who receive any part of such assets. . .shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians [and], all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them. . . .

Therefore, pursuant to § 8, if a rancheria decides to terminate relations with the United States and one of its members is in need of a guardian or conservator, distribution and "termination" cannot apply unless or until a conservator is appointed. Put another way, appointment of a conservator or guardian, where one is required, is a predicate to termination. *But see Taylor v. Hearne*, 637 F.2d 689 (9th Cir.), *cert.denied*, 454 U.S. 851 (1981).[7]

Next, both the Sheep Ranch Rancheria distribution plan and the regulations applicable to the

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[7] In *Taylor*, plaintiff was a distributee who received title to a parcel on the Auburn Rancheria. He failed to pay his property taxes and Placer County took the land to cover the tax deficiency. Taylor sued to recover the land, arguing that § 3 of the Rancheria Act set a "condition precedent" to the effective transfer of title and, in the face of noncompliance with § 3, the United States could not convey good title. Both the district court (E.D.Cal., Judge Wilkins) and the Ninth Circuit rejected this argument. However, while *Taylor* may appear on first blush to apply to the instant case, the facts and issue in *Taylor* and in the instant case are very distinct: In *Taylor*, the issue was whether the transfer of title was effective; in the instant case, the issue is whether the federal trust responsibility for the Indians of Sheep Ranch Rancheria was extinguished when title transferred to Mabel Dixie. In *Taylor*, the United States expressly repudiated its trust responsibilities for the Auburn Rancheria by publishing a "Notice of Termination" in the Federal Register in 1967. *Taylor*, 637 F.2d at 690 (citing 32 Fed.Reg. 11,964 (1967)). In the instant case, the United States has never repudiated its trust responsibilities for the Sheep Ranch Rancheria. Golding Declaration; Facio Dep. at __:__. *See* discussion *infra* re terminating trust relationships.

termination of Sheep Ranch Rancheria required the publication of a "notice" or "proclamation" of termination before termination could be effective. 25 C.F.R. § 242.12 (Defts' Exhibit __); Pltf's Exhibit 10 at 3. The distribution plan, which was a contract between the United States and Mabel Hodge Dixie, expressly required publication in the Federal Register of a notice of termination following the distribution of the assets and "Mrs. Dixie *shall thereafter* not be entitled to any of the services performed by the United States for Indians because of their status as Indians." *Id.* (emphasis added).

Therefore, because a conservator was not appointed for Mabel Hodge Dixie and because no Notice of Termination was published in the Federal Register, as required by the Rancheria Act, its implementing regulations and the Distribution Plan for the Sheep Ranch Rancheria, the federal-tribal relationship cannot be deemed terminated by any "operation of law," assuming *arguendo* that a fiduciary relationship could be so terminated. We turn now to a discussion of whether, as a factual matter, the United States repudiated its trust relationship with the Sheep Ranch Rancheria.

2. In the absence of any Notice to the Rancheria and its Distributee of the Termination of the Federal Trust Relationship, the Relationship Endures Uninterrupted.

As plaintiff is quick to point out, there exists a general trust relationship between the United States and the Indians, a relationship that first was articulated nearly 200 years ago, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and remains still today, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003). *See* pltf's brf. at 15-16. Therefore, in carrying out the provisions of the Rancheria Act, the United States was called upon to act with "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). As the Court explained in *Seminole Nation*,

> [m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Id. at n.12 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)(Cardozo, C.J.)). However, in order to repudiate a trust relationship, there must be some affirmative *act* of repudiation that informs the ward that the fiduciary relationship no longer exists. That is, "breach of trust traditionally [occurs] when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, ___ F.3d ___, 2004 WL 746687 at *6 (Fed.Cir. Apr. 7, 2004)(copy attached hereto at Exhibit __). "Repudiation" occurs "by express words or by taking actions inconsistent with [the trustee's] responsibilities as trustee." *Id.*; *Philippi v. Philippe*, 115 U.S. 151, 157 (1885). In the context of terminating federal Indian relations, this repudiation occurred when (1) the government refused services to the Indians because federal-tribal relations were terminated and/or (2) the government gave notice to the Indians, via letter or notice in the Federal Register, that they were no longer eligible to receive government services available to Indians *qua* Indians. Especially where, as here, the cessation of the trust relationship depended upon the occurrence of several separate events, *e.g.*, delivery of title, installation of water and sanitation facilities, housing construction, appointment of a conservator, etc., some further act signifying the trustee's repudiation of the trust relationship is required.

In the several California Rancheria cases that have been litigated, the United States had effected a clear repudiation of the trust relationship. In the case of Robinson Rancheria, the termination of which was litigated in *Duncan v. Andrus*, 517 F.Supp. 1 (N.D.Cal. 1977)("*Duncan I*") and *Duncan II*, the United States published a termination notice in 1965. *See Duncan II*, 667 F.2d at 41 n.7 (parties stipulated that the trust relationship existed between the United States and the Robinson Rancheria "until publication of a termination notice for the Rancheria in 1965"). With respect to the Hopland Rancheria, which led to *Smith v. United States*, 515 F.Supp. 56 (N.D.Cal. 1978) and *Hopland Band of Pomo Indians*, 855 F.2d 1573 (Fed.Cir. 1988), BIA wrote to the Tribe in 1973 and advised that "the distributees must be considered 'terminated' even though no 'Notice of Termination' has been issued." Pltf's Exhibit 23. In this same letter, the Indians of Hopland Rancheria were denied housing assistance by BIA. *Id.* In *Table Bluff v. Andrus*, 532 F.Supp. 255, 261 (N.D.Cal. 1981), the United States "concede[d] that plaintiffs were improperly divested of their

status as Indians, along with the rights and privileges which accompany that status." *See also* Defts' Exhibit __ at 12 (Department of Interior publication stating that the Table Bluff Rancheria was terminated, effective Apr. 11, 1961). Therefore and consistent with the law of trusts, the United States in the foregoing matters informed the rancherias in clear, unambiguous terms that the trust relationship was ended.

Finally, plaintiff erroneously claims that an internal BIA letter directive issued in 1966 by the head of the BIA conclusively establishes that the Sheep Ranch Rancheria was terminated. Pltf's Brf at 4, citing Pltf's Exhibit 19. However, the cited evidence fails to support plaintiff's position. It is simply a statement of policy that does not address the requirements of the Rancheria Act itself with

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respect to the appointment of a conservator. Moreover, a statement of policy cannot contradict or override the absence of facts demonstrating that the Tribe was denied services or recognition.

In the instant case and in spite of its failure to have a conservator appointed for Mabel Dixie, the government ultimately did not fail in its fiduciary duty either to Ms. Hodge or to the tribe. The property was distributed in accordance with the terms of the Rancheria Act, *as amended*, and its implementing regulations.[8] It is undisputed that Mabel Hodge Dixie was the "distributee" who was to receive unrestricted title to the rancheria.[9] Pltf's Undisputed Fact Nos. 13, 16, & 20; Pltf's Exhibit 10. It is also undisputed that both Ms. Dixie and the BIA determined that she was in need of a conservator yet none was ever appointed for Ms. Dixie. Pltf's Undisputed Fact Nos. 17-19. Although it is further undisputed that title passed to Ms. Dixie briefly, *id.* at nos. 20-22, the *cessation* of relations between the United States and the Rancheria would have violated the Rancheria Act in

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[8] As part of the United States' plenary authority over Indian matters, *United States v. Wheeler*, 435 U.S. 313, 319 (1978), Congress is empowered to determine if, when and how relations may cease with the Tribes, *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[9] Despite two opportunities to object to the distribution of the assets of the Sheep Ranch Rancheria, including the designation of Ms. Dixie as the person eligible to receive the assets, no objections were received nor were any additional names proposed as eligible to share in the distribution. Defts' Exhibit __; declaration of Brian Golding, Sr.

the absence of the appointment of a conservator for Ms. Dixie. Instead, BIA *continued* in its role as fiduciary for Ms. Dixie by maintaining the property as a trust parcel and, given the shift in Administration policy *against* termination of tribes[10], apparently discontinued any efforts to carry out

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the terms of the Act.[11] No proclamation of termination, as required by 25 C.F.R. § 242.12, was published in the Federal Register nor was any other notice given that would put a reasonable person on notice that the trust relationship had been repudiated. Golding Declaration. Indeed, on every published list of federally-recognized tribes, the Tribe appears as a recognized tribe. Defts' Exhibit __ at 10 ("American Indians and Their Federal Relations," published in 1972 by the Department of the Interior); 44 F.R. 7235, 7236 (Feb. 6, 1979); 45 F.R. 27828, 27830 (Apr. 24, 1980); 46 F.R. 35360, 35362 (July 8, 1981); 47 F.R. 53130, 53133 (Nov. 24, 1982); 48 F.R. 56862, 56864 (Dec. 23, 1983); 50 F.R. 6055, 6057 (Feb. 13, 1985); 51 F.R. 25115, 25117 (July 10, 1986); 53 F.R. 52829,

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[10] In March 1968, President Johnson announced "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination." Pub.Papers, pt. I, at 343 (Lyndon B. Johnson)(text appended hereto as Exhibit __). At the same time, President Johnson established the National Council on Indian Opportunity to *inter alia* promote Indian involvement in federal program planning for Indians. E.O. No. 11,399, 3 C.F.R. 717, *reprinted* in 25 U.S.C. prec. § 1 (1976) and 82 Stat. 220 (1968). By 1970, when President Nixon was in office, termination was no longer the Administration's policy. In a strong message to Congress on July 8, 1970, President Nixon proclaimed that "this policy of forced Termination [of Indian tribes] is wrong." 6 Pres.Doc. 94 (1970), *reprinted in* 116 Cong. Rec. S23258-262 (July 8, 1970). By 1973, Congress began a process that continues today of legislatively restoring recognition to those tribes whose status as federally-recognized tribes was terminated in the 1950's and 1960's. *See, e.g.,* 25 U.S.C. §§ 903 *et seq.* (1973 restoration of the Menominee Tribe).

[11] The only realistic breach-of-trust claim that the Tribe has is the government's failure to cease relations with the Tribe as Ms. Dixie had requested on behalf of the rancheria, which could arguably be effected now that Ms. Dixie is deceased! However, unilateral termination has long been repudiated by the United States. *See e.g.*, 25 U.S.C. § 2501(f)("Congress repudiates and rejects. . .any policy of unilateral termination of Federal relations with any Indian nation"). Moreover, it is evident that the Tribe no longer is interested in termination.

52831 (Dec. 29, 1988)[12]; 58 F.R. 54364, 54368 (Oct. 21, 1993)[13]; 60 F.R. 9250, 9253 (Feb. 16, 1995)[14]. In contrast, rancherias that were effectively, if wrongfully, terminated were listed in "American Indians and Their Federal Relations" either as "termination pending[15]" or as "terminated since 1958." Defts' Exhibit __ at 10-12. Those rancherias listed in the latter category included an effective date of termination. *Id*. at 11-12.

Not only did the federal trust relationship between the Rancheria and the United States continued unabated and *uninterrupted*, plaintiff did not suffer the harms that befell the terminated rancherias: Upgrades were made to the property at Sheep Ranch Rancheria with the construction of a new home for Mabel Dixie and the installation of fencing, domestic water and sanitation facilities; the property remained in trust status and was never lost through sale to non-Indians or taken for the nonpayment of taxes; those affiliated with Sheep Ranch Rancheria have not been denied federal services or benefits available only to Indians; etc. These were very real injuries sustained by the peoples of other rancherias. *See Duncan I* & *II*, *supra*; *Hopland Band*, *supra*; *Table Bluff*, *supra*.

It would be a miscarriage and misapplication of the federal trust responsibility for this Court to hold that termination occurred here solely as a matter of *law*; termination must be established as a matter of both law and fact. Because plaintiff has adduced no *facts* to support their theory of termination, summary judgment must be denied. Indeed, had the United States moved forward with the termination of the Rancheria in the absence of the appointment of a conservator for Ms. Dixie, plaintiff may well have a claim for breach of trust and/or violation of the Rancheria Act. But under the uncontroverted and materially relevant facts presented by the parties, termination of this

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[12] No list was published in 1984 or 1987.

[13] No list was published between December 29, 1988, and October 21, 1993. *See* 58 F.R. at 54364.

[14] No list was published between October 21, 1993, and February 16, 1995. *See* 60 F.R. at 9250.

[15] One rancheria, Middletown Rancheria, is listed as "termination pending" but includes the additional annotation that it was "named in [the 1958 Rancheria Act] but has made no progress toward termination)." Defts' Exhibit __ at 10.

particular tribe did not occur. Because the government has adduced facts supporting the continued recognition of the Tribe, judgment must be entered in favor of the United States.

B. FEDERAL LAND ACQUISITION REGULATIONS, IN AND OF THEMSELVES, DO NOT IMPOSE A FIDUCIARY DUTY, FOR WHICH REASON DEFENDANTS HAVE NOT BREACHED ANY DUTY TO THE PLAINTIFF.

BIA's land acquisition regulations do not impose or create any fiduciary duty. In fact, whether the United States will accept land into trust is discretionary in the absence of a Congressional mandate to the contrary. *Confederated Salish and Kootenai Tribes v. United States*, 343 F.3d 1193, 1194-95 (9th Cir. 2003); *City of Roseville v. Norton*, 348 F.3d 1020, 1031 (D.C.Cir. 2003), *cert. denied sub.nom, Citizens for Safer Communities v. Norton*, ___ U.S. ___, ___ S.Ct. ___, 72 U.S.L.W. 3539 (Apr. 5, 2004). Moreover, even assuming *arguendo* that a fiduciary duty did exist, the Tribe in the instant case has not submitted a land acquisition application!

In order to establish a specific fiduciary duty, there must be a corpus over which that duty is exercised. *United States v. Mitchell*, 463 U.S. at 225. As the Supreme Court explained in *Mitchell*,

> a fiduciary relationship necessarily arises when the Government assumes. . .elaborate control over forests and property belonging to Indians. *All of the necessary elements of a common-law trust are present:* a trustee (the United States), a beneficiary (the Indian allottees), and *a trust corpus* (Indian timber, lands, and funds).

Id. (emphasis added). While there is also a "general trust relationship between the United States and the Indian people," *id.*, there must still be a "substantive source of law that establishes specific fiduciary or other duties," *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). *See also Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). ("[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Pit River Tribe v. Bureau of Land Management*, ___ F.Supp.2d ___, 2004 WL 415224 at *15-16 (E.D.Cal. Feb. 13, 2004)(Levi, J.)(copy appended at Defts' Exhibit N)(same).

Pursuant to 25 C.F.R. § 151.9 and as plaintiff concedes, a written request must be submitted to the Secretary of the Interior for the taking of land into trust on behalf of a tribe. The request must

identify a parcel of land to be taken into trust and must identify the party on whose behalf the land is taken into trust. *Id.* The request must also provide information sufficient to determine that additional requirements of Part 151 are met, *e.g.*, § 151.11 sets out information required for off-reservation acquisitions whereas § 151.10 sets out information required for acquisitions within or contiguous to a reservation. § 151.9. But there is no provision in these regulations or their authorizing statutes "that establishes specific fiduciary or other duties" for the processing of an application, assuming one were submitted. *Navajo Nation*, 537 U.S. at 506. When and if a land acquisition application is approved and the United States accepts title to land on behalf of the Tribe, *then* a fiduciary relationship arises with respect to the land. But no fiduciary duty is created by a tribe's submission of an application and no fiduciary duty towards the California Valley Miwok Tribe is created under the statutes authorizing the regulations at Part 151 .

But all of the foregoing is irrelevant inasmuch as the Tribe has yet to submit a land acquisition application or request. The only document produced by plaintiff that remotely meets this criteria is a settlement document, Pltf's Exhibit 39, which not only is incompetent evidence under Fed.R.Evid. 408 but was provided not to the Secretary of the Interior or her designated representative but to her counsel of record in the instant litigation. Moreover, nothing in this exhibit, which consists of two cover letters from the Tribe's two sets of counsel as well as a proposed settlement stipulation, even requests that it be provided to the BIA for consideration as an application under Part 151. That the settlement proposal is not intended to do "double duty" as a land acquisition application is underscored by the Tribe's request in January 2004 for information from BIA for the purpose of submitting an application under Part 151. Deft's Exhibit I.

Last but not least and assuming *arguendo* that plaintiff had submitted a land acquisition application, the administrative appeals remedies set for th in 25 C.F.R. Part 2 and 43 C.F.R. Part 4 must be exhausted before seeking judicial review under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* Plaintiff's amended complaint contains no claim for judicial review of a land acquisition application submitted under 25 C.F.R. Part 151 or any mention of exhausting

prerequisites to suit, as required by Fed.R.Civ.P. 9(c).[16]

For the foregoing reasons, there has been no breach of trust as to any land acquisition application under 25 C.F.R. Part 151.

CONCLUSION

Ultimately, plaintiff's argument rests on a large unfounded assumption: That the BIA must have terminated the Sheep Ranch Rancheria simply because it had a distribution plan and title was temporarily transferred to Mabel Hodge Dixie. But, just because the Rancheria was *supposed* to have been terminated does not mean that it actually ever *was* terminated. There must be an affirmative act that informs the Tribe that the United States no longer intends to fulfill its fiduciary role. That act never happened.

To the extent that the Tribe maintains that it lost its land in violation of federal law, it did not. The land is held in trust for the heirs of the one person deemed eligible to receive title under the Rancheria Act and its implementing regulations. Congress, in the exercise of its plenary authority, determined that the land should be distributed at the request of a majority of the adult Rancheria Indians. Ms. Dixie, the only person authorized to vote on whether to accept the terms of the Rancheria Act, voted in favor of accepting its terms. No one submitted any challenge to her eligibility to vote and no one submitted any additional persons to be considered eligible to vote. Even assuming *arguendo* that plaintiff's argument is remotely timely, plaintiff is unable to show that the two persons it deems eligible to vote, Lenny Jeff and Merle Butler, met the eligibility criteria set out in 25 C.F.R. Part 242.

Although the United States did not intend to transfer title to Mabel Hodge Dixie until a private person could be appointed as conservator for her, the United States, in furtherance of its

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[16] Plaintiff also suggests, wholly without evidentiary support, that defendants "conditioned the performance of their statutory duties on the Tribe's installation of Yakima Dixie as Tribal Leader." Pltf's Brf. at 20. This statement not only is completely unfounded but is untrue. For the reasons set forth in BIA's response to the tribal Constitution submitted by Silvia Burley, BIA continues to maintain that the California Valley Miwok Tribe is an unorganized tribe. Golding Declaration at Exhibit "c".

responsibilities as trustee for the Indians, continued to maintain the property on the government's land records as trust property, *albeit* as an individual land allotment favoring Mabel Hodge Dixie rather than as a communal land holding.[17] Furthermore, the United States did not end or terminate the federal trust relationship with the Rancheria, which continues today.

Finally, plaintiff cannot establish any trust obligation to process a land acquisition request under 25 C.F.R. Part 151 when no request has been properly submitted.

Respectfully submitted,

DATED: April 29, 2004

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[17] In essence, the United States claimed the role of conservator for Ms. Dixie and, in that role, continued to hold the 0.92 acre parcel as restricted, trust property. Mitchell Declaration. The property remains in trust status today for the heirs of Mabel Hodge Dixie. *Id.*