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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

NO. CIV. S-02-0912 FCD GGH

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
THE INTERIOR, GAIL NORTON,
SECRETARY OF THE INTERIOR,
NEAL MCCALED, ASSISTANT
SECRETARY OF THE INTERIOR FOR
INDIAN AFFAIRS,

MEMORANDUM AND ORDER

Defendants.

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This matter is before the court on motion to dismiss filed
by defendants, the United States of America, United States
Department of the Interior, Gail Norton, Secretary of the

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1 Interior, and Neal McCaleb¹, Assistant Secretary of the Interior
2 for Indian Affairs (collectively the "government"). Plaintiff,
3 California Valley Miwok Tribe, (the "Tribe" or "plaintiff")
4 opposes the government's motion. The court heard oral argument
5 from parties' counsel on June 10, 2004.

6 BACKGROUND

7 In 1916, pursuant to a federal statute which authorized the
8 purchase of land for landless California Indians, the Bureau of
9 Indian Affairs ("BIA") acquired in trust for the Tribe
10 approximately two acres of land, subsequently referred to as the
11 "Sheep Ranch Rancheria" (the "Rancheria"). In 1935, the
12 Department of Interior ("DOI") conferred on the Tribe the status
13 of a federally recognized tribe.

14 Beginning in the 1940's the federal government's policy
15 toward small tribes changed in favor of terminating tribal status
16 and transferring lands in fee to tribal members. This policy was
17 codified in the California Rancheria Act, Pub. L. 85-671, 72
18 Stat. 619 (1958), as amended by Pub.L. 88-419, 78 Stat. 390
19 (1964) ("Rancheria Act"). The Rancheria Act sets forth the
20 procedure for distribution of trust lands to tribal members and
21 for the termination of federally-recognized tribal status.
22 Rancheria Act § 1(a). Pursuant to the Rancheria Act, the
23 government, upon request by tribal members, shall prepare a plan
24 for distributing tribal lands ("Plan of Distribution"). Prior to
25 distribution, the Rancheria Act requires the government to make

26
27 ¹ Since the filing of this lawsuit, Neal McCaleb has
28 retired from federal service. David Anderson, the current
Assistant Secretary for Indian Affairs, has substituted as
defendant in place of McCaleb. Fed. R. Civ. P. 25 (d).

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1 certain improvements to distributed land. Generally, upon
2 approval of the Plan of Distribution and conveyance of title from
3 the government to the designated tribal members, federally-
4 recognized tribal status is terminated.² After termination of
5 federally-recognized tribal status, tribal members are no longer
6 entitled to services based on their status as Indians.³

7 In accordance with the Rancheria Act, in 1966 officers of
8 the BIA contacted the Tribe to discuss termination of its tribal
9 status and distribution of tribal lands. At that time, BIA
10 listed Mabel Hodge Dixie as the only Indian living on the
11 Rancheria. On February 9, 1966, the Tribe held an election at
12 which Mabel Hodge Dixie voted in favor of distribution.
13 Subsequently, a deed to the Rancheria was executed to Mabel Hodge
14 Dixie and recorded in Calaveras County on April 26, 1967.
15 According to the Tribe, the issuance of the deed and approval of
16 the distribution plan terminated the Tribe's status as a
17 Federally recognized Tribe as well as the trust status of the
18 Rancheria property, which was then held in fee simple by Mabel
19 Hodge Dixie.⁴

20
21 ² It is arguable that tribal status may not be terminated
22 where the government does not satisfy the conditions of the
23 Rancheria Act, which include, *inter alia*, making improvements to
24 roads and installation of irrigation or domestic water systems.
(See Letter dated February 16, 1966 from BIA Commissioner James
E. Officer to Leonard Hill, BIA Area Director, Sacramento,
California, attached as Exh. 14 to Opp'n.)

25 ³ Of modern significance, only federally recognized
26 tribes are eligible to operate gaming facilities under the Indian
Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.

27 ⁴ The government contends that the Tribe's federally-
28 recognized status was never terminated. (Reply in Support of
Motion to Dismiss at 7.)

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1 Allegedly, BIA soon realized that conveyance of the property
2 was a mistake as a result of the failure to appoint a conservator
3 for Mabel Hodge Dixie prior to conveyance of the property. To
4 rectify its error, BIA allegedly attempted to reestablish the
5 trust by having Mabel Hodge Dixie execute a quitclaim deed in
6 favor of the United States. Plaintiff asserts that these and
7 subsequent events left uncertain plaintiff's status as a
8 federally recognized tribe.

9 Through this litigation, plaintiff seeks to obtain a
10 judicial determination that Distribution Plan excluded members of
11 the Tribe and that the termination of the Tribe violated the
12 Rancheria Act and that the Tribe was restored to federal
13 recognition in 1994. In addition, the Tribe requests a mandatory
14 injunction directing the government "to accept into trust as a
15 restoration of Reservation Lands any fee interests in San Joaquin
16 or Calaveras County owned by the tribe on the date the judgment
17 is entered or which are thereafter acquired up to 240 acres,
18 subject to reasonable approval of title and determination that
19 the lands are not contaminated." (First Amended Complaint at 14-
20 15.)

21 STANDARD

22 Under Rule 12(b)(1) of the Federal Rules of Civil
23 Procedure, a party may by motion raise the defense that the court
24 lacks "jurisdiction over the subject matter" of a claim. Fed. R.
25 Civ. P. 12(b)(1). It is well established that the party seeking
26 to invoke the jurisdiction of the federal court bears the burden
27 of establishing the court's subject matter jurisdiction. Stock
28

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1 West, Inc. v. Confederated Tribes of the Colville Reservation,
2 873 F.2d 1221, 1225 (9th Cir. 1989).

3 On a motion to dismiss pursuant to Rule 12(b)(1), the
4 standards the court is to apply vary according to the nature of
5 the jurisdictional challenge. A motion to dismiss for lack of
6 subject matter jurisdiction may either attack the allegations of
7 jurisdiction contained in the complaint as insufficient on their
8 face to demonstrate the existence of jurisdiction ("facial
9 attack"), or may be made as a "speaking motion" attacking the
10 existence of subject matter jurisdiction in fact ("factual
11 attack"). Thornhill Publishing Co. v. General Tel. & Elec.
12 Corp., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed.
13 Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the
14 motion constitutes a facial attack, the court must consider the
15 factual allegations of the complaint to be true. Williamson v.
16 Tucker, 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at
17 891. If the motion constitutes a factual attack, however, "no
18 presumptive truthfulness attaches to plaintiff's allegations, and
19 the existence of disputed material facts will not preclude the
20 trial court from evaluating for itself the merits of
21 jurisdictional claims." Thornhill, 594 F.2d at 733 (quoting
22 Mortensen, 549 F.2d at 891).

23 In situations "[w]here a jurisdictional issue is separable
24 from the merits of a case," the court "may consider the evidence
25 presented with respect to the jurisdictional issue and rule on
26 that issue, resolving factual disputes if necessary." Thornhill,
27 594 F.2d at 733. If, however,

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1 the jurisdictional issue and substantive
2 issues are so intertwined that the question
3 of jurisdiction is dependent on the
4 resolution of factual issues going to the
5 merits, the jurisdictional determination
6 should await a determination of the relevant
7 facts on either a motion going to the merits
8 or at trial.

9 Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983).

10 In ruling on a jurisdictional motion in which factual issues also
11 go to the merits, the court should apply the standard used to
12 determine motions for summary judgment brought pursuant to Rule
13 56. Id.

14 ANALYSIS

15 It appears that the primary goal of the instant complaint is
16 to obtain an order from this court compelling the government to
17 take into trust up to 240 acres of land which will be eligible
18 for the construction and operation of Class III gaming
19 facilities, pursuant to the Indian Gaming Regulatory Act, 25
20 U.S.C. § 2701, et seq. ("IGRA")

21 Toward that end, the Tribe has asserted two causes of action
22 in the complaint: (1) violation of the Rancheria Act ("Rancheria
23 Act") for failure to appoint a guardian for Mabel Hodge Dixie
24 prior to distributing the trust property in violation of § 8 of
25 the Rancheria Act, and (2) breach of fiduciary duty for conveying
26 trust property to Mabel Hodge Dixie in 1967 without first
27 installing a domestic water system, in violation of § 3(c) of the
28 Rancheria Act. Essentially, both claims allege that the Sheep
Ranch Rancheria was illegally conveyed to Mabel Hodge Dixie, thus
terminating the tribe's federally recognized status and leaving
the tribe landless. As a remedy for this illegal conveyance, the

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1 tribe seeks an order from this court directing that land be taken
2 into trust on its behalf.

3 However, lands taken into trust after October 17, 1988, the
4 effective date of IGRA, are excluded from Class III gaming
5 activities, with certain exceptions. 25 U.S.C. § 2719(a). One
6 such exception exists for lands which are taken into trust as
7 part of "the restoration of lands for an Indian tribe that is
8 restored to Federal recognition." 25 U.S.C. §
9 2719(b) (1) (B) (iii). The Tribe's prayer for declaratory relief
10 "that the Distribution Plan excluded members of the tribe"; "that
11 the termination of the tribe violated the Rancheria Act"; and
12 "that the tribe was restored to federal recognition in 1994"
13 appear directed toward satisfying the requirements of section
14 2719(b) (1) (B) (iii).

15 The government contends that the present action is an effort
16 by the Tribe "to avoid certain restrictions in [IGRA] by bringing
17 this 'pre-emptive' litigation strike." (Motion to Dismiss at 1.)
18 According to the government, the Tribe's claims should be
19 dismissed because the government has not waived its sovereign
20 immunity from suit. The government also alleges that the statute
21 of limitations has passed on plaintiff's claims for breach of
22 trust and violation of the Rancheria Act, which are based on the
23 1967 conveyance of the Sheep Ranch Rancheria to Mabel Hodge
24 Dixie.

25 **I. Sovereign Immunity**

26 "The United States, as a sovereign entity, is immune from
27 suit unless it has consented to be sued." Cominotto v. United
28 States, 802 F.2d 1127, 1129 (9th Cir. 1986). In the absence of a

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1 waiver of sovereign immunity, the court lacks subject matter
2 jurisdiction over a claim against the sovereign. The plaintiff
3 bears the burden of proving such waiver. Id. In order for the
4 plaintiff to sustain this burden, the waiver of immunity must be
5 clear on the face of the statute creating the cause of action.
6 United States v. Idaho, 508 U.S. 1, 6-7 (1993). Waivers of
7 sovereign immunity must be strictly construed in favor of the
8 sovereign and will only be found where the waiver is unequivocal.
9 United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1990).

10 According to the government, the only basis for a waiver of
11 sovereign immunity asserted in the complaint is the
12 Administrative Procedures Act. (Motion to Dismiss at 5.) However,
13 the Tribe raises additional bases for waiver of sovereign
14 immunity in its memorandum in Opposition to the Government's
15 Motion to Dismiss.

16 A. Administrative Procedures Act

17 The Administrative Procedures Act ("APA") constitutes a
18 limited waiver of the government's sovereign immunity for actions
19 "in a court of the United States seeking relief other than money
20 damages and stating a claim that an agency or an officer or
21 employee thereof acted or failed to act in an official capacity
22 or under color of legal authority." 5 U.S.C. § 702. While only
23 final agency actions are reviewable, 5 U.S.C. § 704, agency
24 action unlawfully withheld or unreasonably delayed may be
25 compelled by a reviewing court. 5 U.S.C. § 706(1). However,
26 agency action that is committed to agency discretion by law is
27 not reviewable under the APA. 5 U.S.C. § 701(a)(2).

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1 It appears to be the government's position that plaintiff
2 cannot obtain the relief requested - an order compelling the
3 government to take land into trust - without first filing a fee-
4 to-trust application with the Secretary of the Interior and
5 allowing the administrative process to take its course.⁵
6 According to the government, no such application has been filed,
7 and consequently, the government contends review under the
8 Administrative Procedures Act is premature.

9 According to the Government, the Band never initiated the
10 administrative process by filing a fee-to-trust application, and
11 consequently, there is no "final agency action" subject to review
12 under the APA. The Tribe disputes this, asserting that it filed
13 "numerous written requests and attempted to replace the land that
14 was unlawfully distributed by the Government." (Opp'n at 18.)
15 The three documents to which the Tribe refers are three letters,
16 dated August 28, 2000, November 9, 2000, and November 28, 2000
17 from David Rapport, counsel for the Tribe, to Kevin Gover,
18 Assistant Secretary of Indian Affairs for the United States
19 Department of Interior ("letters"). The government disputes that
20 said letters satisfied the requirements of 25 C.F.R. § 151.9,
21 which provides that:

22 [An] Indian or tribe desiring to acquire land in
23 trust status shall file a written request
24 for approval of such acquisition with the
25 Secretary. The request need not be in any
special form but shall set out the identity
of the parties, a description of the land

26 ⁵ Under the usual procedure for taking land into trust, a
27 Tribe submits a fee-to-trust application to the Secretary of the
28 Interior in accordance with 25 C.F.R. § 151.9. Upon the filing
of a fee-to-trust application, the Secretary has a duty to act
upon the application. 25 C.F.R. 151.10.

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1 to be acquired, and other information which
2 would show that the acquisition comes within the
terms of this part."

3 25 C.F.R. § 151.9 (emphasis added).

4 If the letters identified by the Tribe constitute "written
5 requests for approval," the government had a mandatory duty to
6 act on such requests. 25 C.F.R. § 151.11 ("secretary shall
7 review all requests and shall promptly notify the applicant in
8 writing of his decision."). See also Confederated Tribes of the
9 Cools, Lower Umpqua and Suislaw Indians v. United States, 1988 WL
10 135757 at *4 (D.Or. Nov. 29, 1988) (failure to act on request to
11 take land into trust violates agency's own regulations and
12 constitutes abuse of discretion.) An agency that unlawfully
13 withholds or unreasonably delays action it has a duty to take can
14 be compelled to act under the Administrative Procedures Act. 5
15 U.S.C. § 706(1).

16 The letters fail to comply with the requirements of 25
17 C.F.R. § 151.9 in that they do not provide a description of the
18 land to be acquired, or other information necessary for the
19 Secretary to determine whether the acquisition is appropriate
20 under section 151. Section 151.10 requires the Secretary to
21 evaluate the appropriateness of the acquisition in the context of
22 specific enumerated factors including, *inter alia*:

- 23 (a) The existence of statutory authority for the
24 acquisition and any limitations contained in such
25 authority;
26 (b) The need of the individual Indian or the tribe for
27 additional land;
28 (c) The purposes for which the land will be used;
(d) If the land is to be acquired for an individual
Indian, the amount of trust or restricted land already
owned by or for that individual and the degree to
which he needs assistance in handling his affairs;
(e) If the land to be acquired is in unrestricted fee

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1 status, the impact on the State and its political
2 subdivisions resulting from the removal of the land
3 from the tax rolls;
4 (f) Jurisdictional problems and potential conflicts of
5 land use which may arise; and
6 (g) If the land to be acquired is in fee status,
7 whether the Bureau of Indian Affairs is equipped to
8 discharge the additional responsibilities resulting
9 from the acquisition of the land in trust status.
10 (h) The extent to which the applicant has provided
11 information that allows the Secretary to comply with
12 516 DM 6, appendix 4, National Environmental Policy
13 Act Revised Implementing Procedures, and 602 DM 2,
14 Land Acquisitions: Hazardous Substances
15 Determinations.

16 25 C.F.R. § 151.10

17 As an initial matter, none of the letters specifically
18 identify the property the Tribe seeks to have taken into trust.
19 (See August 28, 2000 letter, Exh. 28 attached to Opp'n) ("If the
20 tribe can acquire suitable land in Calaveras or San Joaquin
21 Counties. . ."; Nov. 28 2000 Letter, Exh. 30 to Opp'n) ("The
22 Sheep Ranch Rancheria requests that the United States do belated
23 justice by stipulating to a judgment requiring the United States
24 to take some property into trust for the tribe in San Joaquin
25 County . . .") At the point when these letters were filed, the
26 Tribe had not yet narrowed down its request to a single county,
27 let alone an identifiable parcel. Without such information, the
28 Secretary would be unable to evaluate the appropriateness of the
29 acquisition pursuant to 25 C.F.R. 151.

30 Moreover, the letters clearly indicate they were sent in an
31 effort to obtain agreement from the Secretary to acquire land in
32 trust in settlement of prospective litigation, in lieu of
33 compliance with the administrative process outlined in 25 C.F.R.
34 151. (See August 28, 2000 Letter, Exh. 28 attached to
35 Opp'n) ("If the Tribe can acquire suitable land . . ., a federal

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1 court can compel the Secretary to accept that land in trust for
2 the Tribe without full compliance with the substantive or
3 procedural provisions of 25 C.F.R. Part 151.") Decisions with
4 respect to settlement of prospective litigation are within the
5 Secretary's discretion.

6 The court finds that the letters fail in both substance and
7 spirit to comply with 25 C.F.R. § 151.9 and were not "written
8 requests" on which the Secretary had a duty to act.⁶ The Tribe
9 has identified no statute obligating the Secretary to take
10 action on letters seeking out-of-court settlement of anticipated
11 litigation. In the absence of a mandatory duty to act, the
12 Secretary's alleged inaction is not reviewable under the 5
13 U.S.C. § 706(1).

14 B. Alternative Bases for Waiver of Sovereign Immunity.

15 In opposition to the Government's motion to dismiss, the
16 Tribe asserts three alternative bases on which to find the
17 government waived sovereign immunity.

18 1. Inherent Subject Matter Jurisdiction

19 The Tribe asserts that this court has inherent subject
20 matter jurisdiction over this case by virtue of the trust
21 relationship between the tribe and the Government. Tribes, like
22 all litigants asserting claims against the United States, must
23 show "that Congress has waived sovereign immunity for

24
25 ⁶ On January 5, 2004, the Tribe filed a formal written
26 request "that the Federal Government take land into trust for the
27 California Valley Miwok Tribe" which requests information with
28 regard to "the requirements for a fee-to-trust application and
provides detailed information as to the approximately 84.5 acres
of land in San Joaquin County the Tribe seeks to have taken into
trust. (January 5, 2004 Letter from Silvia Burley to Clay
Gregory, Acting Director - PRO/BIA, Exh. 2 to Motion to Dismiss.)

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1 plaintiffs' cause of action, that Congress has created
2 substantive rights on which to base plaintiffs' claims, and that
3 a proper remedy is available. See Hill v. United States, 571
4 F.2d 1098, 1102-03 (9th Cir. 1978); Cobell v. Babbitt, 52 F.
5 Supp. 2d 11, 20 (D. D.C. 1999).

6 To support its position, the Tribe relies on United States
7 v. Mitchell, 463 U.S. 206 (1983). However, Mitchell address the
8 separate issue of whether a claim against the government for
9 breach of trust creates a substantive right to money damages.

10 In Mitchell, the Quinault Tribe and individual owners of
11 allotted lands within the Quinault Indian Reservation filed an
12 action in the Court of Claims against the United States to
13 recover damages for breach of fiduciary duty in the management
14 of tribal lands. The Court of Claims found that the government
15 was subject to suit, and the government filed a petition for
16 certiorari, which was granted. The Supreme Court held that the
17 Tucker Act, 28 U.S.C. § 1491, provided a waiver of sovereign
18 immunity for suits over which the Court of Claims has
19 jurisdiction, but did not create a substantive right to damages,
20 which must be found in other statutes and regulations. The
21 Court found that the various statutes and regulations which
22 afforded the United States full responsibility for managing
23 Indian lands created a fiduciary relationship between the
24 government and the Tribe, giving rise to substantive claims for
25 damages. Consequently, the Court held that the Court of Claims
26 possessed subject matter jurisdiction over the claim and the
27 Tucker Act provided the necessary waiver of sovereign immunity.

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1 Mitchell holds that the Tribe has a substantive right to
2 file a suit for breach of trust. However, the Tribe still must
3 demonstrate that government has waived sovereign immunity.
4 Nowhere does Mitchell hold otherwise.

5 2. Ultra Vires Exception

6 The Tribe next argues that the conduct of officials at the
7 Department of Interior falls within the ultra vires exception to
8 the bar of sovereign immunity because said officials "acted
9 outside the scope of their delegated authority by conditioning
10 review of the Tribe's request for land acquisition on the
11 appointment of Yakima Dixie as Tribal leader." (Opp'n at 21.)
12 Plaintiff has not pled ultra vires acts in the complaint nor
13 does the complaint contain any reference to the facts -
14 defendant's alleged insistence on Yakima Dixie's appointment as
15 Tribal leader - which would form the basis of a cause of action
16 alleging ultra vires acts. Accordingly, the Tribe cannot invoke
17 the ultra vires exception to avoid the bar of sovereign
18 immunity.

19 3. 28 U.S.C. § 1361

20 Finally, the Tribe asserts that Congress waived sovereign
21 immunity by virtue of the Mandamus Act, 28 U.S.C. § 1361, which
22 provides that "[t]he district courts shall have original
23 jurisdiction of any action in the nature of mandamus to compel
24 an officer or employee of the United States or any agency
25 thereof to perform a duty owed to the plaintiff. However, the
26 Ninth Circuit has held that the Mandamus Act does not operate as
27 a waiver of sovereign immunity. Smith v. Grimm, 534 F. 2d 1346
28 n.9 ("The mandamus statute, 28 U.S.C. § 1361, is not a consent

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1 to suit by the sovereign.") (citing White v. Administrator of
2 General Services Administration, 343 F.2d 444 (9th Cir. 1965);
3 United States v. Transocean Air Lines, Inc., 386 F.2d 79, 81
4 (5th Cir. 1967), cert. denied, 389 U.S. 1047, 88 S.Ct. 784, 19
5 L.Ed.2d 839 (1968) (judgment against the United States due to an
6 attorney's lien held barred by sovereign immunity). See also,
7 16 James Wm. Moore, et al., Moore's Federal Practice ¶ 105.42[3]
8 (majority position seems to be that the Mandamus Act is not a
9 waiver of sovereign immunity.)

10 II. Statute of Limitations

11 Alternatively, the government argues that the six-year
12 statute of limitations applicable to the APA has long since
13 expired on plaintiff's claims that government breached its
14 fiduciary duty and violated the Rancheria Act as a result of the
15 1967 conveyance to Mabel Hodge Dixie.

16 Defendant asserts that, under the six-year statute of
17 limitations applicable to claims brought under the
18 Administrative Procedures Act, the Tribe's claims for breach of
19 fiduciary duty and violation of the Rancheria Act are time
20 barred.⁷

21 Section 2401(a) provides that "every civil action commenced
22 against the United States shall be barred unless the complaint
23 is filed within six years after the right of action first
24

25 ⁷ While the Tribe asserts separate claims for breach of
26 trust and violation of the Rancheria Act, both arise out of the
27 same event, the alleged improper conveyance of the Sheep Ranch
28 Rancheria and alleged termination of the Tribe's federally-
recognized status. For purposes of determining if the statute of
limitations has expired, the analysis is identical. As a result,
the court analyzes the two claims concurrently.

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1 accrues."⁸ This statute of limitations is a jurisdictional
2 requirement attached by Congress as a condition of the
3 government's waiver of sovereign immunity. Spannaus v.
4 Department of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987). As
5 such, it must be strictly construed. Section 2401(a) applies
6 with equal force to suits brought by Indian Tribes against the
7 government for breach of trust or breach of fiduciary duty.
8 United States v. Mottaz, 476 U.S. 834, 842 (1986).

9 A claim "first accrues" for purposes of section 2401(a)
10 when "all the events have occurred which fix the alleged
11 liability of the defendant and entitle the plaintiff to
12 institute an action and the plaintiff was or should have been
13 aware of their existence." Hopland Band of Pomo Indians v.
14 United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988). Once a
15 cause of action accrues and the statute of limitations begins to
16 run, a plaintiff has six years in which to file an action and no
17 more. Id. at 1578 (noting that tolling may be used to delay
18 accrual of the cause of action, but only in rare cases can it be
19 used to extend statutory period once the cause of action has
20 accrued.)

21
22 ⁸ Plaintiff erroneously asserts that the applicable
23 statute of limitations is 28 U.S.C. § 2501. That statute applies
24 only to monetary claims against the United States filed in the
25 United States Court of Federal Claims. 28 U.S.C. § 2501 ("Every
26 claim of which the United States Court of Federal Claims has
27 jurisdiction shall be barred unless the petition thereon is filed
28 within six years after such claim first accrues.") Section
2401(a) is the parallel statute of limitations applicable to
civil claims, other than those in contract, filed in district
court. However, both statutes of limitations are six years and
have been interpreted identically. See Hopland, 855 F.2d 1573,
1577 n.3 (finding "no distinction between the companion statutes
of limitations found at section 2401(a) and 2501.").

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1 A. Date of Accrual

2 The court first must ascertain when the Tribe's cause of
3 action first accrued. Plaintiff asserts that the government
4 breached its trust duties by approving the Distribution Plan and
5 conveying title to the property (and arguably therefore
6 terminating the Tribe) without first satisfying the provisions
7 of the Distribution Plan which required the installation of
8 sanitary systems on the property and by failing to appoint a
9 conservator for Mabel Hodge Dixie prior to engaging in
10 negotiations to convey title to the Sheep Ranch Rancheria to
11 her. . .

12 Defendant asserts that any cause of action for breach of
13 trust accrued in 1967 upon approval of the Distribution Plan and
14 conveyance of title to Mabel Hodge Dixie. At that time, all
15 actions by defendant breaching the trust had occurred. The
16 Distribution Plan was adopted and the title conveyed without a
17 conservator being appointed and without fulfillment of the
18 Distribution Plan's provision for installation of sanitary
19 system. Members of the tribe, including Mabel Hodge Dixie,
20 were or should have been aware of the occurrence of these
21 events.

22 Alternatively, defendant argues that the cause of action
23 accrued no later than:

- 24 • 1972 when the BIA listed the SRR as a federally
25 recognized tribe.
- 26 • 1979 when the government published the name of the
27 tribe in the federal register. See Shiny Rock Mining
28 Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990)
(publication of withdraw of lands from mining in
federal register gave plaintiff constructive notice of

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1 the withdrawal and commenced statute of limitations on
2 their claim.)

3 • April 14, 1993 when the government attempted
4 unsuccessfully to reopen the probate estate of Mabel
Hodge Dixie to remove the SRR from her estate.

5 Under any of these alternative accrual dates, the statute
6 of limitations on of plaintiff's claim for breach of trust would
7 have expired.

8 Plaintiff argues that cause of action did not accrue in
9 1967 because, the government took the position that the
10 quitclaim deed executed by Mabel Hodge Dixie overturned the
11 original conveyance. The court need not decide the effect of
12 the Mabel Hodge Dixie's quitclaim deed on the accrual date of
13 the instant cause of action. Assuming *arguendo* that the
14 execution of the quitclaim deed somehow did forestall accrual of
15 this cause of action, it would have been postponed until no
16 later than April 14, 1993, when the Administrative Law Judge
17 denied the government's effort to reopen Dixie's estate. Even
18 under this most generous interpretation of the date of accrual,
19 plaintiff's claim falls outside the six-year statute of
20 limitations period.

21 In opposition, plaintiff argues that the cause of action
22 could not have accrued as of April 14, 1993 because the Tribe
23 was not aware that the land in fact had been conveyed to Mabel
24 Hodge Dixie and had lost trust status until it received formal
25 notification to that effect from government on February 22,
26 2001. (February 22, 2001 Letter from Dale Risking, Sr., to
27 Sylvia Burley, Exh. 33 to Opp'n.) As noted, *supra*, a cause of
28 action does not accrue under 28 U.S.C. § 2401(a) until the

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1 plaintiff knew or should have known of the events which fix the
2 alleged liability of the defendant. Hopland, 855 F.2d at 1577.
3 Ignorance of rights which should be known is not enough.
4 Japanese War Notes Claimants Ass'n of Philippines, Inc. v.
5 United States, 373 F.2d 356, 359 (Ct.Cl. Feb 17, 1967), cert.
6 denied by, 389 U.S. 971 (1967), reh'g denied by, 390 U.S. 975
7 (1968), Art Center School v. United States, 142 F.Supp. 916,
8 921, 136 Ct.Cl. 218, 227 (1956); Thomas v. United States, 125
9 Ct.Cl. 76, 80 (1953); Dion v. United States, 137 Ct.Cl. 166
10 (1956). Plaintiff must either show that defendant has concealed
11 its acts with the result that plaintiff was unaware of their
12 existence or it must show that its injury was 'inherently
13 unknowable' at the accrual date Id. (quoting Urie v. Thompson,
14 337 U.S. 163, 169 (1949)).

15 There is no question but that a cloud hung over title to
16 the Rancheria property as a result of the government's
17 conveyance to Mabel Hodge Dixie and subsequent efforts to
18 rescind that conveyance by inducing Mabel Hodge Dixie to execute
19 a quitclaim deed in favor of the United States. At that time,
20 the government took the position, as expressed in the quitclaim
21 deed, that the April 26, 1967 conveyance to Mabel Hodge Dixie
22 "was not intended to pass title nor did said deed actually pass
23 title" to the property. (September 6, 1967 Quitclaim Deed, Exh.
24 18 to Opp'n.) The Tribe has a strong argument that, as a result
25 of the government's position, it was not aware that the
26 government's allegedly illegal conveyance of the property to
27 Mabel Hodge Dixie caused the tribe or its members any injury.
28 If title never in fact passed to Mabel Hodge Dixie, title to the

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1 property remained with the United States in trust for the tribe
2 and the Tribe's status was never terminated.

3 The subsequent inclusion of the property in Mabel Hodge
4 Dixie's probate estate created further uncertainty. Obviously,
5 if the property was reconveyed to the United States in 1967, it
6 did not belong in Mabel Hodge Dixie's estate and should not
7 descend to her heirs through intestacy. On the other hand, as
8 the probate proceedings of Mabel Hodge Dixie's estate apparently
9 has not been finalized and deeds have never been issued to her
10 heirs, this event alone may not have been sufficient to apprise
11 the Tribe of the injury caused by the April 26, 1967 conveyance.
12 As a result of these errors, and in order to harmonize its own
13 records with respect to ownership of the property, the
14 government sought a decision from an administrative law judge to
15 reopen Mabel Hodge Dixie's estate and remove the property, thus
16 affirming the government's position that the original conveyance
17 was void.

18 On April 14, 1993, the administrative law judge denied the
19 government's request. The judge found that (1) the April 26,
20 1967 conveyance did pass title to the property from the United
21 States to Mabel Hodge Dixie, (2) "the government's role in
22 preparation, execution, and acquisition of the quitclaim deed .
23 . . raises serious questions as to the quality of the title
24 received," (3) that there appears to have been no consideration
25 for the deed, and (3) even if the deed was a valid conveyance,
26 "the recitations made in the deed were a material
27 misrepresentation of the facts, no matter how innocently made,
28 leading Mabel Hodge Dixie to execute the quitclaim deed." (April

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1 14, 1993 Order Denying Relief Requested in Petition to Modify
2 Order Dated November 1, 1971, Exh. 23 to Opp'n.) As a result of
3 his findings, the judge denied the government's request to
4 remove the property from Mabel Hodge Dixie's probate estate.
5 That decision, which was not appealed by the government,
6 precludes the government from seeking to remove the property
7 from Mabel Hodge Dixie's estate, and consequently, from
8 asserting ownership for the benefit of the Tribe. Certainly
9 after issuance of this decision the Tribe was aware that the
10 1967 conveyance to Mabel Hodge Dixie had caused injury to its
11 interest in the property.

12 During oral argument counsel for the Tribe referred to the
13 fact that a deed on file with the Calaveras County Recorder's
14 office still lists the property as owned by the United States.
15 It appears the deed to which counsel referred is the September
16 6, 1967 quitclaim deed executed by Mabel Hodge Dixie in favor of
17 the United States. According to the Tribe, the continued
18 recordation of this quitclaim deed demonstrates that, even after
19 the 1993 administrative law judge decision, the status of the
20 land was still an open question. Thus, counsel argues, the
21 Tribe could not have understood the extent of its injury - and
22 its cause of action could not have accrued - until the
23 government formally notified the Tribe of its landlessness in
24 2001. However, the 1993 decision by the administrative law
25 judge cast serious doubt on the legal effect of the 1967
26 quitclaim deed. The presence of this deed in the chain of title
27 does not lessen the impact of the 1993 decision, which put the
28 Tribe on notice of the injury to its trust land. See Hopland,

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1 855 F.2d at 1577 ("It is not necessary that the plaintiff obtain
2 a complete understanding of all the facts before the tolling
3 ceases and the statute begins to run.") (quoting Japanese War
4 Note Claimants, 373 F.2d at 359.

5 Alternatively, the Tribe argues that the cause of action
6 could not have accrued as of April 14, 1993 because the Tribe
7 "had no living members until it began reorganization in 1998"
8 who could have been aware of the events which fixed the
9 government's liability. This simply does not appear to be the
10 case. There were and are tribal members, or putative tribal
11 members, who had standing to sue on behalf of the tribe,
12 including Yakima Dixie, Mabel Hodge Dixie's son who was born in
13 1940 and unsuccessfully attempted to intervene in this action.
14 To the extent plaintiff is asserting that there were no members
15 because the Tribe was unorganized at the time, this argument was
16 rejected by the Federal Circuit in Hopland. The reasoning of
17 that case is persuasive and is adopted by this court.
18 Plaintiff's reference to a February 8, 1989 Report of Population
19 by Tribe which indicates that the government was unaware of any
20 Sheep Ranch Tribal members as of 1987-1998 does not establish
21 that no members or putative members existed who could have filed
22 suit on the Tribe's behalf. (Exh. 20 to Opp'n; Record p.134.)
23 It merely demonstrates that the government had no knowledge of
24 any tribal members.

25 **B. Continuing Claim Doctrine**

26 Finally, plaintiff argues that this cause of action remains
27 viable under the 'continuing claim' doctrine. As described in
28 Hopland, the continuing claim doctrine provides that, where the

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1 government has a mandatory duty to provide a benefit to tribal
2 members, periodic denial of such benefits resulting from the
3 termination of federal status could result in a suit for damages
4 which would periodically accrue for as long as the tribe's
5 status remained unlawfully terminated. Hopland, 855 F.2d at
6 1581.

7 Plaintiff asserts that the government has continued to
8 violate its fiduciary duty to the tribe by failing to cure the
9 tribe's landlessness after it unlawfully conveyed the property
10 to Mabel Hodge Dixie in 1967. However, as a prerequisite to
11 invoking the continuing claims doctrine, plaintiff must
12 demonstrate that the source of substantive law he relies upon
13 "can fairly be interpreted as mandating compensation by the
14 federal government for the damage sustained." Hopland, 855 F.2d
15 at 1581 n.5.) Plaintiff has pointed to no substantive law
16 supporting the proposition that the government has a continuing
17 duty to cure the tribe's landlessness, which is breached on an
18 ongoing basis so long as the tribe remains landless. Under this
19 interpretation, the statute of limitations in Section 2401(a)
20 would have no effect in actions by Indian tribes for unlawful
21 conveyance of trust lands. Such a result is inconsistent with
22 prior Supreme Court holdings that section 2401(a) applies with
23 equal force to actions by Indian Tribes. See United States v.
24 Mottaz, 476 U.S. 834 (1986).

25 Accordingly, the court finds that plaintiff's cause of
26 action for breach of trust and violation of the Rancheria Act
27 are untimely. Since the statute of limitations, 28 U.S.C. §
28 2401(a), is a precondition to the United States' waiver of

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1 sovereign immunity, this court lacks subject matter jurisdiction
2 over these claims.

3 **CONCLUSION**

4 For the foregoing reasons, the defendants' motion to
5 dismiss is GRANTED. The clerk of the court is instructed to
6 close the file.

7 IT IS SO ORDERED.

8 DATED: June 30, 2004.

9 
10 FRANK C. DAMRELL, JR.
11 United States District Judge
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