C.A. No. 04-16676

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE,
formerly Sheep Ranch Rancheria of Me-Wuk Indians of California,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

McGREGOR W. SCOTT
United States Attorney
DEBORA G. LUTHER
Assistant U.S. Attorney
501 "I" Street, Suite 10-100
Sacramento, CA 95814
Tel: (916) 554-2720

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

U.S CONSTITUTION

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER

FEDERAL RULES

BRIEF FOR FEDERAL APPELLEE

UNITED STATES OF AMERICA

OPINION BELOW

The decision of the district court (Honorable Frank C. Damrell, Jr.) is reproduced in the appellant's Excerpts of Records ("ER") at tab 48. This decision issued after a hearing held on June 10, 2004. Appellee's Supplemental Excerpts of Record (hereafter, "SER") at 208-257.

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court - Because there was no waiver of sovereign immunity, the district court held that it lacked subject matter jurisdiction over this suit. ER at tab 48, pp. 7-15. *The plaintiff/appellant has not raised this issue on appeal.* Alternatively, the Court held that the suit is untimely. Only this latter ruling of the court has been briefed by appellant to this Court.

In her first amended complaint, plaintiff predicated jurisdiction on 28 U.S.C. §§ 1331, 1337, and 1361, and on the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. SER at 2.

B. Jurisdiction of the Court of Appeals - The district court's order granting the government's motion to dismiss was entered on July 1, 2004. ER at tab 48. Final judgment also was entered on July 1, 2004. SER 207. The Notice of Appeal was filed timely on August 25, 2004. ER at tab 49. However, this Court lacks subject matter jurisdiction over plaintiff's claims for the same reason the district court dismissed the claims, *i.e.*, the United States has not waived its sovereign immunity.

ISSUES PRESENTED FOR REVIEW

The United States agrees with the issues framed by Silvia Burley in her opening brief (hereafter "AB") at 2.[1]/ In addition, the following two issues are germane and are briefed herein:

1. Whether this Court should summarily affirm the district court's decision on the grounds that Silvia Burley does not challenge in her brief the district

---

[1]/ At one time, Silvia Burley was recognized as the interim tribal chairperson for the California Valley Miwok Tribe, and the Secretary of the Interior duly recognized an interim governing body for the Tribe. *See* 28 U.S.C. § 1362 (federal courts have jurisdiction over suits brought by tribes "with a governing body duly recognized by the Secretary of the Interior"). However, on March 26, 2004, the Secretary withdrew her recognition of the Burley governing body, *see* SER 121-124, for which reason Burley may no longer prosecute this appeal in the name of the Tribe. She may, however, prosecute this appeal in her own name for which reason the United States will herein refer to the appellant as "plaintiff" or "Silvia Burley."

court's alternate determination that it lacks subject matter jurisdiction on the grounds that sovereign immunity has not been waived.

2. Whether Silvia Burley raised tolling or estoppel in the district court, thus preserving these issues for appellate review.

STATEMENT OF THE CASE[2/]

A. Nature of the Case

This appeal, brought in the name of the California Valley Miwok Tribe, is not prosecuted by an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C. § 1362, but by Silvia Burley who presently is recognized only as a spokesperson on behalf of a recognized, but unorganized, tribe.[3/] Significantly, no appeal has been taken of the BIA's decision to recognize Ms Burley as a tribal spokesperson, rather than interim tribal chair. Therefore, the decision is final and Ms. Burley's standing to prosecute this appeal

---

[2/] Appellant's Statement of the Case and Statement of Facts, AB at 2-14, contain numerous unproven allegations and misstatements, most of which are irrelevant to this appeal. Those allegations and misstatements that are relevant are addressed in the government's Statement of Facts *infra*.

[3/] Up until this past year, BIA believed that the Tribe was organizing and duly recognized an interim tribal governing body led by Silvia Burley. After the briefing was completed on dispositive motions in the district court in Spring 2004, the time lapsed for administratively appealing the decision to recognize Ms. Burley only as a tribal spokesperson, no administrative appeal was taken from that decision, and the decision, therefore, became final. SER 275-276.

in the name of the tribe is questionable. *See* 28 U.S.C. § 1362.[4]/ Ms. Burley does not address this issue in her brief or in any way demonstrate standing to prosecute this appeal.

In this suit, Ms. Burley, and, presumably, her two daughters and her granddaughter, all of whom were first deemed to be members of this tribe in 1998, AB at 28, seek land for their tribe for gaming purposes. They do so on the theory that the tribe's status as a federally-recognized tribe was terminated in violation of the California Rancheria Act and that its less-than-one-acre tribal property was deeded improperly to a tribal member in 1967. SER at 1-15. The United States admits that the land was transferred to the tribal member but denies that the tribe was ever terminated. The question of whether the tribe was terminated is significant for reasons *other* than this appeal, *i.e.*, for the prospect of gaming. As relief, Ms. Burley seeks (1) a declaration that her tribe's status as a federally-recognized tribe was terminated and subsequently restored within the meaning of

---

[4]/ In its entirety, § 1362 provides,

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band *with a governing body duly recognized by the Secretary of the Interior* wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Emphasis added.

the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii), and (2) an order directing the United States to take up to 240 acres into trust on behalf of her tribe, either in Calaveras or in San Joaquin County, California. SER at 14-15.

By order issued July 1, 2004, the district court correctly dismissed plaintiff's complaint in its entirety on the grounds that there was no waiver of sovereign immunity to permit plaintiff's claims. ER at tab 48, p.7-15. Alternatively, the district court held that suit was untimely as plaintiff's claim accrued *at the latest* in 1993 and suit was not filed until April 2002 well after the six year statute of limitations, 28 U.S.C. 2401(a), had passed. *Id.* at p. 15-24.

B. Statutory Scheme

Germane to this appeal is the statute of limitations found at 28 U.S.C. § 2401. It is reprinted in the addendum to this brief.

C. Statement of Facts

Several misstatements of fact appear in the opening brief. The disagreement over these facts is immaterial as plaintiff's discussion of thereof is irrelevant to the issues on appeal. Below, the United States addresses those facts that are relevant to the issue before the Court on appeal.

1. The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California, *see* SER 1, is a federally-recognized

tribe, *id.*at 5, ¶ 4. The land known as the Sheep Ranch Rancheria consists of 0.92 acre (less than one acre) and is located in Sheep Ranch, Calaveras County, California. ER at tab 12, p.1; SER 205, ¶ 3. Today, the 0.92-acre rancheria is held in trust by the United States for the heirs of Mabel Hodge Dixie. *Id.*

2. The Bureau of Indian Affairs has never identified the Tribe as a "terminated tribe," *i.e.*, one ineligible to receive services from the federal government because of its status as a terminated tribe nor have any of its members been refused services because of the Tribe's status as a terminated tribe. SER 91.

3. In 1972, the federal government published its first listing of tribal entities in the United States. The publication was a booklet entitled "American Indians and Their Federal Relationship" and was available to the general public. SER 164-201. The Sheep Ranch Rancheria is identified in this booklet as an "Indian organization[] without [a] written governing document[] that [is] served by the Bureau of Indian Affairs." *Id.* at 170, 178.

4. In 1979, the Bureau of Indian Affairs began publishing in the Federal Register, on a periodic basis, the list of tribes deemed to be federally-recognized. *See* 25 C.F.R. § 83.6(b)(1984). The Sheep Ranch Rancheria of Me-Wuk Indians of California, as the tribe formerly was known, SER 1, has been listed on each such

published list since the list first was published in 1979. 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, 52831 (Dec. 29, 1988)[5]/; 58 F.R. 54364, 54368 (Oct. 21, 1993)[6]/; 60 F.R. 9250, 9253 (Feb. 16, 1995)[7]/.

5. The Tribe itself maintains that it has been federally recognized since 1994. SER 3 at ¶ 4.

6. At one time, the Tribe was scheduled for termination[8]/ pursuant to the California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 (1958), *as amended*, Pub.L. 88-419, 78 Stat. 390 (1964). AB at 6; SER 4 at ¶ 13. Pursuant to the amended act,

---

[5]/ No list was published in 1984 or 1987.

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

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

[8]/ "Termination" is a term of art in Indian law used to refer to a now-rejected federal policy of severing (or "terminating") federal supervision of and services to certain Indians and tribal entities. Pursuant to such policy, the federal government no longer provided services to terminated tribes and/or individual Indians based upon their status as Indian tribes and/or Indians. *TOMAC v. Norton*, 193 F.Supp. 2d 182, 193 (D.D.C. 2002)(termination refers to those tribes whose federal trust relationship was terminated); *Table Bluff Band of Indians v. Andrus*, 532 F.Supp. 255 (N.D.Cal. 1981).

an election was held at Sheep Ranch Rancheria on the question of whether the Termination Act should apply to Sheep Ranch Rancheria. One adult resident of the rancheria, Mabel Hodge Dixie, was eligible to vote. ER at tabs 6-8, 13. Ms. Dixie voted in favor of termination. ER at tab 10.

7. The Bureau of Indian Affairs ("BIA") then prepared a "Distribution Plan" for the land known as the Sheep Ranch Rancheria, which plan was approved by Ms. Hodge. ER at tabs 12 & 14; SER 4-5 at ¶¶ 11, 14. The Distribution Plan specifically requires the United States to publish a notice in the Federal Register upon termination of the Rancheria and the eligibility of Ms. Dixie to receive federal services based upon her status as an Indian. ER at tab 12, p.3.

8. BIA apparently had information suggesting that Mabel Hodge Dixie was in need of a conservator and anticipated the appointment of a conservator prior to delivery of title to the Sheep Ranch Rancheria. ER at tabs 15-17; SER 5-6 at ¶¶ 13, 18-19, 21. Before a conservator could be appointed, the United States transferred title to the 0.92-acre Sheep Ranch Rancheria to Ms. Dixie. ER at tabs 18-20; SER 6 at ¶ 20. Recognizing its error, the United States immediately had Ms. Dixie quitclaim the property back to the United States. ER at tabs 20-21; SER 6 at ¶ 22. Thereafter, the process of terminating the Sheep Ranch Rancheria came to a halt. No notice of termination was ever published in the Federal Register, as

required by 25 C.F.R. § 242.10 (1965)[9]/ and the distribution plan for Sheep Ranch Rancheria, ER at tab 12, p.3. No record has been located within BIA showing that the Sheep Ranch Rancheria ever transferred out of trust status for any period of time.[10]/ SER 205 at ¶ 4.

9. Ms. Dixie passed away in 1971 and the beneficial interest in the Sheep Ranch Rancheria was probated at that time by the Department of Interior pursuant to 25 U.S.C. § 372 as an asset of Ms. Dixie's estate. ER at tab 22, pp. 1-7; SER 6 at ¶ 24. The land then passed to Ms. Dixie's husband by Indian Custom (Merle Butler) and to her four sons (Yakima, Melvin, Tommy, and Richard Dixie). ER at tab 22, p. 2.

10. In 1990, the Bureau of Indian Affairs sought to amend its land title records with respect to Sheep Ranch Rancheria by filing a petition with Department of Interior's Office of Hearings and Appeals to modify the 1971

---

[9]/ With the demise of the government's termination policy, Part 242 was replaced 20 years ago by wholly new and unrelated regulations. Therefore, the 1965 regulations, which were the original termination regulations that pre-dated the termination regulations invalidated in *Kelly v. United States Dept. of Interior*, 339 F.Supp. 1095, 1100-02 (E.D.Cal. 1972), are appended at SER 160-163.

[10]/ The federal government maintains its own title records independent of any title documents recorded with local governments. SER 204-205 at ¶ 2. With respect to Indian lands, the Bureau of Indian Affairs maintains the records of Indian trust lands that identify the name of the beneficiaries on whose behalf the land is held in trust. *See id.* and 25 C.F.R. Part 150.

probate decision by withdrawing the rancheria from Dixie's schedule of assets, which would permit the BIA to hold title in trust for the Tribe. ER at tab 26. The petition for modification was denied. ER at tab 29.

11. In April 2002, the Tribe filed suit against federal defendants, seeking declaratory, injunctive and monetary relief. ER at tab 50, p.14.

SUMMARY OF THE ARGUMENT

Inasmuch as the district court concluded that there was no waiver of sovereign immunity to permit plaintiff's claims to go forward, which conclusion is not challenged in this appeal, the instant appeal should be dismissed. The remaining ground for dismissal, untimeliness, does not raise any substantial issue affecting any rights between the parties, as noted *infra*, for which reason summary affirmance is appropriate. Moreover, the district court correctly decided that this action is time-barred.

Should this Court reach the merits of plaintiff's appeal, the district court correctly found that plaintiff's claims accrued, *at the latest*, in 1993 when the agency affirmed the 1971 probate decision in which the Sheep Ranch Rancheria was inherited by the heirs of Mabel Hodge Dixie. This decision imparted knowledge to tribal members that the Rancheria no longer was tribal land but

individually-held land. Plaintiff's arguments to the contrary are unavailing, especially since plaintiff acknowledges that she knew, within the six-year limitations period for bringing suit, that the property was included in the estate of Ms. Dixie and admitted that she surmised that the property no longer was tribal property.

To escape the consequences of a dismissal on untimeliness grounds, plaintiff raises tolling and estoppel arguments, two doctrines rarely applied against the United States. These issues were not first presented to the district court, for which reason this Court may disregard them. Should this Court reach the merits of plaintiff's equitable arguments, they remain unavailing. Tolling is inapplicable inasmuch as plaintiff knew within the statutory time period that the tribe was landless and then inexplicably delayed four years before filing suit. Similarly, plaintiff is unable to establish any entitlement to estoppel inasmuch as any alleged error by the government did not rise to the level of egregiousness required to estop the government from asserting a limitations defense.

Finally, the untimeliness of plaintiff's suit is jurisdictional in the absence of justification for any delay in filing. Nothing in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), commands an alternative result. Indeed, this Court in *Nesovic*

v. United States, 71 F.3d 776, 778 (9th Cir. 1995), cited with approval in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997), held that "if Mr. Nesovic failed without justification to bring his lawsuit within the prescribed period, we are without jurisdiction to hear his claims."

ARGUMENT

I. BECAUSE ONLY ONE OF TWO ALTERNATE GROUNDS FOR DISMISSING THIS SUIT HAS BEEN APPEALED, THIS COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION.

The district court held that it lacked subject matter jurisdiction over appellant's suit for two reasons: (1) Sovereign immunity is not waived and (2) suit is untimely. ER at tab 48. Only the latter determination has been challenged by appellant. Therefore, regardless of the outcome of the instant appeal, the instant suit cannot be revived.

Generally speaking, the Court will not entertain appeals that raise insubstantial or harmless issues. *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982); *Page v. United States*, 356 F.2d 337, 339 and n.1 (9th Cir. 1966). For example, in *Page*, the appellant was convicted on six drug offenses. 356 F.2d at 338. He was sentenced to serve 20 years on each count, to be served *concurrently*. *Id.* Page appealed, and his brief addressed only his conviction on two of the six

offenses. *Id.* This Court granted the government's motion for summary affirmance on the grounds that where the sentence remains unchanged (*i.e.,* 20 years), the appellate court will not examine the validity of any "companion" convictions. *Id.* (string citations omitted). Regardless of the outcome of the appeal, the appellant remained convicted and remained sentenced to serve 20 years.

The same result obtains in the instant case. Whether or not the limitations issue is decided is not going to affect the outcome of this case as the unchallenged alternate ground for dismissal of appellant's complaint necessarily will remain in place.

Plaintiff argues that the district court's decision goes to the merits of the case, thus potentially denying plaintiff the opportunity of refiling suit and establishing jurisdiction on different grounds. Opp. Brf. to Motion to Dismiss or for Sum.Affirm. (hereafter, "Opp. Brf."), filed on or about January 6, 2005, at 2. Plaintiff suggests that suit might be filed in the Court of [Federal] Claims or a tort claim pursued. *Id.* However, there is no averment that any new suit has been filed or a tort claim submitted to the agency, let alone evidence of the same. Moreover, suits in the Claims Court as well as suits under the Federal Tort Claims Act,

28 U.S.C. § 2671 *et seq.* and related statutes, are governed by different limitations statutes than the one addressed below.[11]/ If any such suit is ever filed in the Court of Federal Claims, that court is well qualified to address and decide any timeliness issues raised therein.

Indeed, should plaintiff file new claims arising out of the same factual allegations as the instant suit, plaintiff's suit would remain time-barred, assuming *arguendo* that plaintiff's claims accrued as late as 1998, as she argued in the district court, SER 88.[12]/ The six-year statute of limitations found in § 2501 ran in 2004; the two-year statute of limitations found in § 2401(b) for submitting an administrative tort claim ran in 2000. A review of the docket for the Court of Federal Claims does not reveal any suit filed in the name of the tribe or Silvia Burley or her two daughters, Anjelica Paulk and Rashel Reznor. Moreover, plaintiff fails to aver that an administrative claim has been submitted, which is a predicate to filing a negligence action against the United States. *Brady v. United*

---

[11]/ The parties do not dispute that the district court correctly applied the limitations period set out in 28 U.S.C. § 2401. In contrast, suits in the Court of Federal Claims generally are governed by 28 U.S.C. § 2501 while tort actions are governed by 28 U.S.C. § 2401(b).

[12]/ In her appellate brief, plaintiff now argues that her claim accrued in 2001. AB at 16, 17.

States, 211 F.3d 499, 502 (9th Cir. 2000). Finally, inasmuch as plaintiff's arguments for tolling and estoppel are not well taken in the instant appeal, *see infra* at 32-34, they would not save plaintiff from her own negligence in failing to file a timely suit setting forth these additional claims.

For the above reasons, the instant appeal should be dismissed. It fails to raise any substantial issues requiring this Court's attention. Moreover and regardless of the outcome of the appeal, plaintiff's suit cannot be revived nor would any new suits arising out of the same factual allegations be timely assuming *arguendo* appellant were to prevail in this appeal.

II. PLAINTIFF'S CLAIMS ACCRUED *AT THE LATEST* IN 1993 IN THE WAKE OF THE ADMINISTRATIVE DECISION AFFIRMING THE 1971 DECISION THAT DETERMINED THAT SHEEP RANCH RANCHERIA DESCENDED TO THE HEIRS OF MABEL HODGE DIXIE.

A. Standard of Review

Regardless of whether the decision to dismiss on untimeliness grounds is viewed as a dismissal under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction or under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, review by this Court is *de novo*. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir.)(subject matter jurisdiction), *cert.denied*, ___ U.S. ___,

125 S.Ct. 105 (2004); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004)(failure to state a claim).

To the extent that any material factual determinations are disputed on appeal, this Court reviews such factual determinations *de novo* and construes allegations favorably for plaintiff, whether the dismissal is ordered pursuant to Rule 12(b)(1) or 12(b)(6). *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000) (subject matter jurisdiction); *Edwards*, *supra* (failure to state a claim). However, in determining to dismiss, it must be clear that, given the parameters of plaintiff's complaint, plaintiff can prove no set of facts that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Where plaintiff has attached documents to her complaint, the Court may consider those documents in determining whether to dismiss plaintiff's suit. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 (9th Cir. 1998).

To the extent that a dismissal of suit against the United States on limitations grounds properly is brought under Rule 12(b)(6) and not Rule 12(b)(1), *see* discussion at 45-51, and where matters outside the pleadings are relied upon in determining the timeliness of the complaint, the motion should be considered as one under the summary judgment standards of Fed.R.Civ.P. 56. Appellate review

of decisions on summary judgment also are *de novo*. *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

B. Giving Plaintiff Every Generous Benefit of the Doubt, Plaintiff's Suit was Filed at Least Three Years Too Late.

The last time any action occurred with respect to title to the 0.92 acre parcel known as Sheep Ranch Rancheria was the 1993 administrative probate decision that *affirmed* the original probate decision issued in 1971. Both of those decisions held that the small parcel passed to the heirs of Mabel Hodge Dixie. Regardless of whether any action challenging the transfer of title accrued in 1971 or in 1993, the six year statute of limitations found in 28 U.S.C. § 2401(a) had passed by the time suit was filed in 2002. Therefore, the district court properly held that plaintiff's suit is time-barred.

As the district court correctly held, a cause of action typically accrues 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 at tab 48, p.16 (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)); *see also Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir.)("statutes of limitations do not commence running until plaintiffs knew or should have known

the facts upon which their claims are based"), *cert. denied*, 498 U.S. 824 (1990). Accrual does not await actual knowledge by the plaintiff of government action. *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). Rather, "a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action." *Id.* (quoting *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir.), *cert.denied*, 479 U.S. 816 (1986)); *see also Hopland Band of Pomo Indians*, 855 F.2d at 1577 ("a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." Emphasis in the original. Citation omitted).

The district court gave plaintiff the benefit of the doubt and assumed without deciding that simple conveyance of title to the Sheep Ranch Rancheria to Mabel Hodge Dixie effected the termination of the Rancheria.[13]/ *See* ER at tab 48, p. 19-

---

[13]/ Defendant maintains that termination did not occur *ipso facto* upon the transfer of title, but would have occurred upon publication of formal notice in the Federal Register, as required by 25 C.F.R. § 242.10 (1965), SER 163; *cf.* California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 at § 10(b)(after the assets of a rancheria are distributed, the Indians receiving such assets shall no longer be entitled to federal services to Indians based on their status as Indians).

In addition, the Distribution Plan for the termination of Sheep Ranch Rancheria also required publication of notice in the Federal Register. ER at tab 12, p.3 ("After the assets of the Sheep Ranch Rancheria have been distributed pursuant

(continued...)

20. The court then held that plaintiff's claims for the conveyance of the Rancheria as well as for the alleged termination of the tribe accrued *at the very latest* in 1993 when any cloud upon the title of the land was removed by the final probate decision issued in Mabel Dixie's estate. ER at tab 48, pp. 15 n.7 & 21. The district court explained:

> 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. * * * The Tribe has a strong argument that, as a result of the government's position [that the quitclaim deed restored the land to tribal trust land status], it was not aware that the government's allegedly illegal conveyance of the property to Mabel Hodge Dixie caused the tribe or its members any injury. If title never in fact passed to Mabel Hodge Dixie, title to the property remained with the United States in trust for the tribe and the Tribe's status was never terminated.

ER at tab 48, pp. 19-20. But, the Court ultimately found that "after issuance of [the 1993 probate] decision the Tribe was aware that the 1967 conveyance to Mabel

---

[13]/(...continued)
to this plan and Public Law 85-671 [California Rancheria Act], as amended, *and after a notice to this effect has been published in the Federal Register*, Ms. Dixie shall thereafter not be entitled to any of the services performed by the United States for Indians because of their status as Indians") (emphasis added).

No final notice of distribution was ever published in the Federal Register. Moreover, plaintiff has never adduced any evidence showing that the tribe or its people were ever denied services by the United States based upon the termination of any federal recognition.

Hodge Dixie had caused injury to its interest in the property." *Id.* at p.21. The court also properly applied the six-year period found in 28 U.S.C. § 2401(a), *id.* at 15, and held that plaintiff's claims, thereforewere time-barred, *id.* at 23-24, as the six-year period for filing suit expired in 1999 and plaintiff's suit was not filed until 2002.

Moreover, the United States maintains that plaintiff's claim accrued in 1971 when the property first was probated as part of the estate of Mabel Hodge Dixie. The 1971 probate decision was *affirmed* in all respects by the 1993 probate decision. *Cf.* ER, tab 22 with ER, tab 29. Because there is no evidence suggesting that tribal members had been informed by BIA in the years between the two probate decisions that the land was tribal land rather than individual trust land, the tribe knew in 1971 that it no longer had an interest in the Rancheria and any claim for such injury accrued at that time. Notwithstanding, even an accrual date in 1993 does not save plaintiff from the bar of untimeliness.

In the district court as well as in this appeal, plaintiff argues the following theories to support her claim for a later accrual date: (1) there were no "living [tribal] members" until the tribe's alleged 1998 reorganization who would have been aware of the 1993 probate decision and who would have recognized that the

Rancheria was no longer tribal land, AB at 16, 22-24, SER at 88, and (2) BIA did not "conclusively inform the Tribe" that it was landless until 2001, AB at 26, SER at 88. Neither of these arguments defeats the accrual date of plaintiff's claims as discussed in further detail below.

1. The Tribe is not Extinct, for Which Reason there were Tribal Members Who Could have Pursued a Timely Action

If, as plaintiff argues, there were no living tribal members until 1998, AB at 22-23, this tribe is extinct and should be removed from the list of federally-recognized tribes. But, while BIA is not privy to the precise membership of this tribe, *see Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978)("unless limited by treaty or statute, a Tribe has the power to determine tribal membership"), BIA does have some general knowledge of the Indians in the area and is aware of a substantial and viable Indian community in Calaveras County, *see generally* SER 121-123 (describing BIA's knowledge of the Indians of Calaveras County based on nearly 100 years of records). Additionally, if the tribe had no tribal members, it follows that any claim or entitlement to the Rancheria property expired with the tribe. In any event, the so-called lack of tribal members is not grounds for delaying the accrual of a claim for the land. If anything, it would be grounds for extinguishing the claim. To examine this particular argument, we turn first to a

discussion of the person(s) behind the instant lawsuit and their so-called government.

Silvia Burley, who was born in 1960, SER 100, admits that she and her daughters became tribal members in 1998 when Yakima Dixie admitted them as members[14]/, *see* AB at 28, SER 130, 105-106. Under Burley's direction, the Tribe took steps towards formal organization, utilizing federal funds. However, and despite acknowledging in this litigation that there are approximately 250 living potential tribal members, SER 1 (the tribe has "a potential membership today of nearly 250 people"), full tribal membership today is restricted to the direct ancestors and descendants of the five individuals listed on the tribe's base roll, *i.e.*, herself, her two daughters, her granddaughter and Yakima Dixie.[15]/ SER 265.

When asked at her deposition what steps were taken to publicize organization of the tribe, Silvia Burley responded, "I don't recall." SER 150-152.

---

[14]/ Thus, Burley begs the question of how one can become a member if there are "no living tribal members."

[15]/ The only other person admitted to the tribe is Yakima Dixie. SER 100. Mr. Dixie, who is 65 years old, *id.*, is not believed to have any offspring.

When asked if "the tribe" had a policy to admit non-Indians as members, Burley responded, "I don't know."[16]/ SER 157-158.

Burley has excluded her three siblings as well as the living brother of Yakima Dixie from participation in tribal matters along with any and all collateral relatives, many of whom are believed to live in Calaveras County. SER 122, 131-132. For these and other reasons, BIA now has taken the position that Silvia Burley can no longer be accorded formal recognition as an interim tribal chairperson, but only as an informal point-of-contact for the tribe. For purposes of this litigation, it is evident that Burley lacks knowledge concerning the history of her tribe.

Moreover, to the extent that plaintiff argues that no claim accrued until the tribe organized, plaintiff errs on two grounds: First, the California Valley Miwok Tribe remains an unorganized tribe in the eyes of the United States.[17]/ SER 93,

---

[16]/ The tribal enrollment ordinance drafted by Burley permits *full* membership rights, *i.e.,* voting rights, to be bestowed on the direct ancestors and descendants of Burley, her two daughters and her granddaughter. SER 265. If the paternal ancestors of Burley's daughters and granddaughter are non-Indian, the enrollment ordinance nevertheless would permit their enrollment. *Id.*

[17]/ This is not to say that Silvia Burley cannot organize her own association based on her Miwok heritage. It is, however, to say that the United States has plenary authority to determine whether a tribe is organized and has established a tribal

(continued...)

121-124. Second, any claim respecting the loss of tribal land does not await formal reorganization of the tribe. *Hopland Band of Pomo Indians*, 855 F.2d at 1580. As the Federal Circuit explained in *Hopland*,

> 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 [California Rancheria] Act.

Id.; *see also* cases cited therein. Therefore, as the district court held, it is irrelevant that Silvia Burley was not a tribal member in 1971 or 1993; what is relevant is that those individuals who were members should have been aware that the Rancheria was no longer tribal land and could have brought suit therefor. ER at tab 48, p.22.

Plaintiff's "evidence" of the lack of tribal members stems from a 1989 BIA document entitled "Report of Population by Tribe." AB at 23; ER at tab 24. On this document, the Sheep Ranch Rancheria is shown to have "0" population both on

---

[17]/(...continued)
government that is entitled to recognition by the United States for purposes of federal funding, services, etc. *See* U.S. Const. Art. 1, § 8, cl. 3; 25 U.S.C. § 2.

and off the Sheep Ranch Rancheria. *Id.* However, as former BIA official Brian Golding, Sr., explained:

> I am familiar with the "Report of Population by Tribe" dated February 8, 1989. . . . As indicated on this report, the data thereon was derived from 1987/88 Labor Force Report, a document I have not located at this time. Each one of the tribes listed on this "Report of Population by Tribe" is a federally-recognized tribe. That "zero" is reported for Sheep Ranch Rancheria does not mean the Tribe is or was terminated. Instead, this report, which continues to be prepared today, is based on the service population area that was defined at that time in accordance with 25 C.F.R. § 20.1(r)(1989). Population "on" the reservation refers to persons living on trust land; population "off" reservation refers to persons living in "areas or communities adjacent or contiguous to reservations." 25 C.F.R. § 20.1(r)(1989). Consequently, the information contained in this "Report of Population by Tribe" means that ***BIA*** was unaware of tribal members living on the Sheep Ranch Rancheria or adjacent or contiguous thereto as of February 1989. It does not mean that there were no tribal members and is not used for that purpose.

SER 92 at ¶ 6 (emphasis added). The district court agreed that the report failed to establish that there were no tribal or putative tribal members and, instead, merely established that *the government* was unaware of any tribal members actually living on or adjacent to the rancheria. AB at 23; ER at tab 48, p. 22. Plaintiff has never offered any evidence contradicting the government's explanation of this document.

Plaintiff also argues that Yakima Dixie testified in 1993 that he was not a member of a tribe at the hearing on the government's motion to modify the 1971

probate decision in his mother's estate. AB at 20. The precise testimony before the administrative judge, at which Mr. Dixie was not represented by counsel, was as follows:

> Judge: Neither you nor your brother have a *formal* membership in a tribal *unit* do you?
>
> Dixie: No.

ER, tab 28 at 3:17-19 (emphasis added). Inasmuch as the tribe, then as now, is not formally organized, *see supra*, Mr. Dixie likely did not consider himself to have a "formal membership" in a "tribal unit." Moreover, the district court properly found it preposterous of plaintiff to suggest that Mr. Dixie -- the son of the Indian to whom the Rancheria land was given, the person who had been living on the Rancheria, and the person responsible for bringing Silvia Burley and her family into the tribe -- was not a member of the California Valley Miwok Tribe:

> The Court: Yakima Dixie is a member of the Tribe, is he not?
>
> Mr. Steele: Correct. At that time [in 1993] he was not.
>
> The Court: Why do you say that?
>
> Mr. Steele: Because he said so on the record.
>
> The Court: As I understand it, he was a lineal decedent [sic, descendant] of Ms. Dixie; she was a member of the Tribe?

Mr. Steele: Yes.

The Court: You have a hard time saying he's not a member of the Tribe.

Mr. Steele: He said he wasn't a member of the Tribe.

The Court: He said he wasn't, but it seems he's a lineal decedent [sic, descendant] of Ms. Dixie's. That's her son.

Mr. Steele: Not necessarily. I don't think there's any authority that so states.[18/] These people have been running around unrecognized --

The Court: What about the Hopland case? You're not suggesting there were no[] members of the Tribe in existence in '93, are you?

Mr. Steele: Yes, we are. There were no members of the Tribe in '73.

The Court: '93.

Mr. Steele: '93, the same situation existed.

SER 227-228.19/

18/ The two probate decisions held that Yakima Dixie was the son of Mabel Hodge Dixie. ER at tabs 22, 29.

19/ Plaintiff argues erroneously that, by this colloquy, the district court somehow engaged in a form of bias based on Mr. Dixie's racial status. AB at 24. In the wake of the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), it cannot reasonably be disputed that an individual's tribal membership is a political preference, is not a racial classification, and is constitutionally sound. *Id.* at 554 n.24 ("The preference [for hiring Indians in the Bureau of Indian Affairs] is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many

(continued...)

The district court did not err in determining that there were, in fact, tribal members in 1993 who could have brought suit for the loss of the tribe's 0.92 acre property. To hold otherwise would establish that there was no tribe, because there would be no members to appreciate the loss of tribal land.

2. Conclusive Proof of Land Status is Not Required for the Claim to Accrue

A claim's accrual is not dependent on conclusive, concrete knowledge of the factual underpinnings of a claim. Therefore, plaintiff errs in arguing that there was no knowledge of the Rancheria's status until Silvia Burley received a letter from BIA in 2001 confirming that the California Valley Miwok Tribe was landless. AB at 17 (heading); ER at tab 39. What is significant is when the injury was or should have been appreciated and when the plaintiff has enough information to successfully bring a claim. *Shiny Rock*, 906 F.2d at 1364. As the district court held, tribal members were aware, with the issuance of the 1993 probate decision, that the 0.92-acre Sheep Ranch Rancheria no longer was tribal land. ER at tab 48, p. 21.

---

[19]/(...continued)
individuals who are racially to be classified as 'Indians.' In this sense the preference is political rather than racial in nature").

Moreover, Silvia Burley herself admits she knew in September 1998 that the Rancheria was not tribal property, SER 145-146, and she retained counsel to pursue the land status issue, SER 149. At that time, she became aware that Mabel Dixie's probate had been reopened and that the Rancheria was property included in the probate. This is precisely the knowledge that the district court held was significant: knowledge that the property was included in the estate of a private individual and probated. Burley, who is a college graduate, SER 128, 143, reasonably and logically determined at that time that the property must not be tribal property if it was being probated and retained counsel to pursue the issue. Therefore, the plaintiff had actual knowledge of the relevant facts *within* the statutory time period and could have instituted a timely action.

3. Other Issues Raised by Plaintiff were not Presented to the District Court and May be Disregarded on Appeal

Plaintiff also argues that her claims have not accrued because (1) BIA itself was unclear on the status of the Rancheria property following the 1993 decision, (2) there is no evidence in the record as to who received or had knowledge of the 1993 probate decision, and (3) Yakima Dixie was confused about the land's status. Not only are these arguments irrelevant, they were not raised below for which reason this Court can disregard them.

It is well established that issues not presented to the district court may be disregarded by this Court. *O'Rourke v. Seaboard Surety Company*, 887 F.2d 955, 957 (9th Cir. 1989). As the Court stated in *O'Rourke*,

> The rule in this circuit is that appellate courts will not consider arguments that are not 'properly raise[d] in the trial courts. [Citation omitted.] There is no bright-line rule to determine whether a matter has been properly raised. [Citations omitted.] A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it.

Id. Notwithstanding the Court's discretion to disregard these newly raised issues, they are addressed below.

Plaintiff argues, without support[20]/, that BIA was unclear after the 1993 probate judge's decision whether the land would be held in trust for the heirs of Mabel Dixie or in fee by the heirs of Mabel Dixie. AB at 20. This argument is irrelevant to the question of whether the tribe was landless and when tribal members reasonably should have known of the tribe's landlessness.

---

[20]/ Plaintiff cites testimony from the BIA Realty Officer, Carmen Facio, that BIA's land titles officer told her that she had obtained "clarification" of the 1993 probate decision from the probate judge. AB at 20. This testimony is hearsay and is inadequate to establish whether Ms. Facio or BIA's land titles officer or anyone else at BIA had any difficulty "comprehend[ing] the administrative law judge's order." *Id.*

Plaintiff also argues that there is no evidence that Yakimia Dixie received the 1993 probate decision. AB at 18. Had this argument been raised below, the certificate of service accompanying the order would have been produced. Plaintiff cannot now raise a factual dispute on appeal that was not raised below. *O'Rourke, supra*. Plaintiff also argues that tribal members could not be on notice that the tribe was landless when the Land Title Records Office ("LTR") had not entered a clerical correction of its records in the wake of the 1993 probate decision. AB at 18. Plaintiff, however, failed to establish that any tribal members were aware of any misinformation at the LTR Office.

Finally, plaintiff argues that another tribal member, Mabel Dixie's son, Yakima Dixie, was confused about the land's status and therefore the land claim could not accrue. AB at 20. Plaintiff claims that because Mr. Dixie referred to the rancheria as "tribal property," he somehow was confused about the land's true status. Again, plaintiff errs. Mr. Dixie is not a party to this suit and any statement attributable to him about the "tribal property" is ambiguous at best.[21]/

---

[21]/ He may have referred to the property as "tribal property" to reflect his contention that he is the rightful chairperson of the tribe and that he maintains the rightful tribal headquarters on his land, which he considers to be tribal land. He could have meant "tribal property" as the historic site of the tribe. It is entirely unclear what Mr. Dixie may have intended when he referred to the rancheria as

(continued...)

For all of the foregoing reasons, the district court properly determined that plaintiff's claims accrued *at the latest* by 1993. We turn now to a discussion of the inapplicability of the doctrines of equitable tolling or estoppel.

III. BECAUSE TOLLING AND ESTOPPEL WERE NOT RAISED IN THE DISTRICT COURT, THIS COURT NEED NOT ADDRESS EITHER OF THESE ISSUES ON APPEAL.

For the first time in the opening brief, plaintiff belatedly argues that the statute of limitations should be tolled or the United States estopped from asserting a limitations defense.

This Court ordinarily declines to consider issues that were not first raised in the district court. *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001), *cert.denied*, 538 U.S. 949 (2003); *Great Southwest Life Insurance Co. v. Frazier*, 860 F.2d 896, 904 (9th Cir. 1988). Issues raising estoppel and tolling are not exempt from this general rule. *Jiminez, supra* (equitable estoppel); *United States v. Monreal*, 301 F.3d 1127, 1131 (9th Cir. 2002)(equitable tolling, raised for the first time on appeal, is waived), *cert.denied*, 537 U.S. 1178 (2003).

Under narrow circumstances, the Court may exercise its discretion to review such issues when the issue is purely one of law that will result in no prejudice to the

---

[21]/(...continued)
"tribal property."

opposing party, *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003), *cert.denied*, ___ U.S. ___, 124 S.Ct. 1602 (2004), or where manifest injustice may result, *Monreal, supra.* Additionally, the Court may consider a new issue on appeal where there are "exceptional circumstances" for the failure to raise the issue in the district court or where a change in the law gives rise to the issue during the pendency of the appeal. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). However, none of these exceptions to the Court's general rule are present in this appeal, for which reason tolling and estoppel are waived.

First, the determination of whether estoppel or tolling should apply are necessarily dependent on a development of a factual basis showing *why* estoppel or tolling would be appropriate. Therefore, these issues are not issues of pure law to be decided at the first instance on appeal. Indeed, plaintiff argues in support of its tolling argument that the United States actively concealed that the Tribe had been terminated and its land held in trust for individuals rather than for the tribe. Not only was there no concealment, the United States' position is that the Tribe has never been terminated.

Second, manifest injustice will not result. This case remains at an end regardless of the outcome of this appeal because the district court also held that

there was no waiver of sovereign immunity to permit this case to go forward, an issue that plaintiff declined to pursue in this appeal. Moreover, plaintiff has argued that at some future time suit may be filed in the Court of Federal Claims or to pursue a negligence claim against the United States. Opp.Brf. at 2. Plaintiff presumably will then raise equitable tolling and estoppel, if necessary to avoid a limitations bar applicable to such suits. For these reasons, there would be no miscarriage of justice if this Court declines to consider plaintiff's tolling and estoppel arguments.

Finally, it cannot be disputed, nor does plaintiff argue, that "exceptional" circumstances or a change in the law demand this Court's attention to these new issues.

For each of the foregoing reasons, the Court should decline to consider the issues of equitable tolling and equitable estoppel.

IV. EVEN WERE THE COURT TO CONSIDER WHETHER THE STATUTE OF LIMITATIONS SHOULD BE TOLLED OR WHETHER THE UNITED STATES SHOULD BE ESTOPPED FROM ASSERTING A TIMELINESS DEFENSE, NEITHER DOCTRINE APPLIES.

Plaintiff cannot meet its burden of showing that the limitations statute should be equitably tolled or that the United States should be estopped from asserting it.

These doctrines are sparingly applied, *Irwin*, 498 U.S. at 96, and the facts herein do not justify their application.

The burden rests at all times with the plaintiff to establish that tolling or estoppel is appropriate. *United States v. Marolf*, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999)(tolling); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997) (estoppel). It is a burden that plaintiff cannot meet.

A. Equitable Tolling is Inappropriate Because Notice of the Manner in Which Title to the Rancheria land was Held was Available

While equitable tolling primarily examines plaintiff's reasons for filing an untimely suit, it is not a tool for excusing plaintiff's own negligence and it is sparingly applied. *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998). In the instant case, plaintiff knew, within the limitations period, that the Sheep Ranch Rancheria was no longer tribal land because it was going through probate. SER 145-146. Armed with this knowledge, plaintiff inexplicably delayed four years before filing suit. This negligence is inexcusable, garden variety negligence to which the equitable doctrine of tolling does not apply.

Equitable tolling provides that a statute of limitations will not commence to run "where a plaintiff has been injured by *fraud* and remains in ignorance of it without any fault or want of diligence or care on his part. . .until the fraud is

discovered." *Federal Election Commission v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996)(quoting *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)), *cert.denied*, 522 U.S. 1015 (1997)(emphasis added). Therefore, to establish tolling, the plaintiff must prove "fraudulent concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts." *Id.* at 240-41; *see also Marolf, supra* (tolling can also apply where "defendant misleads the plaintiff into allowing the statutory period to expire. . .or extraordinary circumstances beyond the plaintiff's control make it impossible for him to file suit on time. Citations omitted).

Plaintiff cannot meet her burden. First of all, there is *no* evidence offered of fraud either with respect to the alleged termination or the distribution of the land. As to termination, plaintiff merely argues conclusorily that "[t]his Tribe was terminated" and "the government did not notify the Tribe that it had been terminated." AB at 25. Nothing in either of these statements satisfies the elements of tolling.[22]/

---

[22]/ The Tribe has never been terminated and has consistently been identified as a federally recognized tribe in every publication of recognized tribes. *See, e.g.,* SER 170, 178; 44 F. R. 7235, 7236 (Feb. 6, 1979); 45 F.R. 27828, 27830 (Apr. 24, (continued...)

As to the land issue, plaintiff claims that, through some administrative oversight, BIA land records apparently were not amended in the wake of the 1993 decision of the probate judge to reflect that the lands comprising Sheep Ranch Rancheria were held in trust for the heirs of Mabel Hodge Dixie. *See* ER at tabs 37, 38. However, there is no evidence that this clerical oversight caused plaintiff to delay filing suit. In fact, it was plaintiff who requested that the error be corrected, which BIA did. *Id.* In this request, plaintiff states,

> I am requesting that the Bureau of Indian Affairs Informational Title Report/Title Status Report. . .be up dated to show the correct Status of the .92 acre[] in Sheep Ranch is Individually owned land based on the William E. Hammett (Administrative Law Judge) decision of April 14, 1993.

ER at tab 37. By this request to BIA to correct the title records, plaintiff demonstrates that she had a clear and correct understanding of the status of title to Sheep Ranch Rancheria.

More importantly, Silvia Burley confirms this knowledge. At her deposition, she testified as follows:

---

[22]/(...continued)
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, 52831 (Dec. 29, 1988); 58 F.R. 54364, 54368 (Oct. 21, 1993); 60 F.R. 9250, 9253 (Feb. 16, 1995).

Q Was there a point in time when you thought the California Valley Miwok Tribe actually had trust land?

Counsel Objection, calls for a legal conclusion

A That would have to be referred to the attorneys.

Q No, you still have to answer the question.

A I don't understand, because when I came into the tribe, when Yakima was elected chairperson they opened up for probate, *I didn't figure that the tribe had land at that time.* Why would they have a probate if the tribe had land?

Q Okay. When was that?

A I think the probate got opened up again in 1998, maybe September, I'm not sure. I wasn't chairperson.

Q Could it have been earlier than that, like around 1990, '91?

Counsel Objection.

A I don't know.

SER 145-146 (emphasis added). Pursuant to this testimony, plaintiff knew when she became a member in September 1998 and within the limitations period that the rancheria land was not held in trust for the Tribe. Therefore, plaintiff is unable to show that she failed to discover the operative facts underlying this cause of action within the limitations period as required to establish a basis for tolling the statute.

Additionally, there is no evidence of diligence by plaintiff to determine the status of the land. Although Ms. Burley avers that "multiple inquiries" were made to BIA about "its land status," ER at tab 45, ¶ 7, there is no detail concerning these inquiries, *e.g.*, to whom they were directed, when they were made, what questions specifically were asked, etc. Importantly, this evidence, which is objectionable hearsay, is contradicted by plaintiff's own deposition testimony that she knew in 1998 that the property was in probate and knew that it could not be tribal property.[23]/ Indeed, she retained counsel in 1998 to look into land issues. SER 149.

Finally, plaintiff claims that "confirmation of landlessness," *i.e.*, lack of tribal trust lands, was required from BIA and BIA did not provide such confirmation until 2001. Such confirmation is not a basis for tolling and plaintiff cites no authority for such a proposition. In 1998, plaintiff knew of the 1993

---

[23]/ Plaintiff claims that unnamed persons from the Tribe spoke with unnamed BIA staff who informed the unnamed persons from the Tribe that the Sheep Ranch Rancheria was held in trust for the tribe. ER at tab 45, ¶¶ 7-8. Inasmuch as the declarant does not represent that she was a party to these communications, the United States objects on hearsay grounds. In contrast, the declarant, Silvia Burley, claims in ¶ 9 of her declaration that "I met with Assistant Secretary of Indian Affairs Kevin Gover in an attempt to address the land issue." ER at tab 45. Therefore, the witness is capable of stating when she has been personally involved in a particular meeting or conversation.

Moreover, it cannot be determined whether plaintiff sought information about the status of the land from appropriate persons within BIA.

probate decision and knew therefrom that the land was held in trust for individuals and not for the tribe.

For the foregoing reasons, plaintiff cannot meet the showing required for the application of equitable tolling.

B. Plaintiff Cannot Establish Grounds to Estop the Government from Asserting the Statute of Limitations

In contrast to equitable tolling, equitable estoppel focuses on the defendant's *intent* in determining whether to permit the defense of limitations to be raised. In the instant case, plaintiff seeks to estop the United States from asserting that her claim for land and her claim that her tribe was terminated are both time-barred. She fails at this effort primarily because she knew the facts within the limitations period and offers no evidence that she was dissuaded from pursuing her claims because of agency action or inaction.

Plaintiff is required to meet the traditional elements of estoppel:

> (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct.

Lehman, 154 F.3d at 1016. Additionally, where equitable estoppel is sought against the United States, the plaintiff must also establish "that the agency engaged

in 'affirmative conduct going beyond mere negligence' and that 'the public's interest will not suffer undue damage' as a result of the application of this doctrine." *Id.* at 1016-17 (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)).

First of all, plaintiff makes no effort to establish any traditional elements of estoppel for her claim respecting the alleged termination of her tribe, for which reason the United States does not here address them. Indeed, plaintiff cannot establish any of the elements of estoppel except the first: Following the administrative law judge's ruling in 1993, there was no further ambiguity regarding the status of the Sheep Ranch Rancheria. That is, the BIA was then unequivocally aware that the land was held in trust for the heirs of Mabel Hodge Dixie. The agency knew the relevant facts pertaining to the land.

Plaintiff has not proven and cannot prove the remaining traditional elements of estoppel: Plaintiff offers only hearsay evidence alleging that unidentified persons at two BIA offices allegedly told "the Tribe" that the rancheria was tribal trust land. ER at tab 45, ¶¶ 7-8. Paragraphs 7 and 8 state in their entirety:

> 7. Beginning in late 1998, the Tribe made multiple inquiries to the BIA about its land status. The BIA repeatedly ignored these inquiries, or told the tribe that the Sheep Ranch Rancheria was tribal land.
>
> 8. That the Tribe and its representatives and on at least one occasion a potential Tribal Developer met with staff from the BIA's Sacramento Area

and Central California Offices and in 1999, and 2000 and were told that the Sheep Ranch Rancheria was land held in trust for the Tribe.

The United States objects to the proffer of the above hearsay evidence. The declarant does not state that she was a party to any of these conversations with BIA officials. Moreover, even assuming *arguendo* that the evidence is competent, it is very vague and conclusory and provides no indication that the agency intended that this information be acted on in any way. That is, unless BIA was informed of the purpose for which the information was to be put to use, BIA cannot have intended any particular reliance on it.

Next, Silvia Burley was not ignorant of the true facts: She admits that she knew that the land could not be tribal land when it went to Indian probate in, she believes, September 1998. SER 145 -146. This information would have been gleaned from contact with the agency as trust property is probated by the Department of the Interior . *See* 25 U.S.C. § 372. Therefore, the third element of estoppel is not met.

Finally, there is no evidence to show that plaintiff specifically relied on BIA information in refraining from filing a timely suit. Rather, it is just as conceivable that plaintiff deliberately delayed pursuing any action, recognizing that 0.92 acre of land might be insufficient acreage on which to establish a tribal home and/or the

land was held in trust for at least one tribal member, Yakima Dixie, who maintained his home there.

With respect to the two elements of estoppel that must be addressed in claims against the United States, plaintiff again falls short. First, it is undisputed that the United States transferred title to the .92 acre Sheep Ranch Rancheria to Mabel Hodge Dixie (a Miwok Indian) before a conservator could be appointed for her. It was an error that BIA attempted to undo by having Ms. Dixie, a few months thereafter, execute a quitclaim deed to deed the land back to the United States. This error was *not* further compounded by formal termination. Plaintiff offers no evidence showing that termination ever took place, *e.g.*, any denial of services to tribal members on the grounds that the tribe was terminated, but argues that termination occurred by operation of law when title to the land transferred to Ms. Dixie. The evidence of any termination is, however, to the contrary: The Tribe has always been included on every list of federally-recognized tribes. *See* n.22 *supra.*

Plaintiff also claims that the land has not been "distributed," *i.e.*, fee title given to the heirs of Mabel Hodge Dixie. AB at 28. Plaintiff has no standing to raise this claim. Even if she did, the land has been distributed in the sense that the

records of the BIA reflect that the land is held in trust for the heirs of Mabel Hodge Dixie.

The government has not engaged in any affirmative misconduct. The 0.92 acre parcel mistakenly was transferred to Mabel Hodge Dixie in April 1967 before a conservator was appointed for her. That the BIA attempted to undo the error in September 1967 without the appointment of a conservator, again, was well-intentioned. In any event, these garden variety errors do not rise to the level of egregiousness required for estoppel to lie against the United States nearly 35 years later. The land *did* remain and has remained in trust since then, first for Ms. Dixie and now for her heirs. It is only newly admitted members, who now purport to govern the tribe, AB at 29, who seek to prosecute a claim for the 0.92 acre parcel.

Finally, plaintiff does not appear to address the effect, if any, on the public's interest. The public's interest *is* unduly damaged by permitting a stale claim to be brought alive 35 years later by persons who did not become members of the tribe until 1998.

The plaintiff fails to establish any grounds for estopping the United States from asserting an untimeliness defense.

V. BECAUSE PLAINTIFF FAILED TO ESTABLISH ANY JUSTIFICATION FOR FILING AN UNTIMELY SUIT, THE DISTRICT COURT CORRECTLY HELD THAT DISMISSAL ON LIMITATIONS GROUNDS WAS JURISDICTIONAL.

Plaintiff failed to establish any justification for her failure to pursue this litigation during the limitations period. For this reason and pursuant to this court's decision in *Nesovic*, 71 F.3d at 778, the district court properly held that dismissal on limitations grounds was jurisdictional.

We begin our analysis with the well-known maxim that the United States of America, its agencies and its employees, may not be sued in the absence of a waiver of sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, (1994); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *United States v. Testan*, 424 U.S. 392, 399 (1976). The terms of the sovereign's consent define a court's jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941). Therefore, the United States, as sovereign, is immune from suit except to the extent that it consents to be sued. *Id.*

The terms of the consent to suit against the United States frequently include such conditions as a mandatory administrative claim preceding suit, *Brady*, 211 F.3d at 502 (Federal Tort Claims Act), the plaintiff's agreement to relinquish the right to a jury trial, *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981)(Age

Discrimination in Employment Act), and the plaintiff's relinquishment of the right to claim damages, *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998)(Administrative Procedures Act). Importantly, for our discussion here, the statute of limitations also is an undisputed term of the United States' consent to suit. *Irwin*, 498 U.S. at 94 (the limitations period found in "2000e-16 is a condition to the waiver of sovereign immunity and thus must be strictly construed"); *United States v. Dalm*, 494 U.S. 596, 608 (1990) ("A statute of limitations requiring that a suit against the United States be brought within a certain time period is one of those terms [of the United States' consent to suit]").

Where suit is brought against the United States, as here, the United States' waiver of sovereign immunity is one of the cornerstones informing the court's jurisdiction.[24]/ *F.D.I.C.*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature"); *United States v. Mottaz*, 476 U.S. 834, 841(1986)("When the United States consents to be sued, *the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction*")(emphasis added); *Block v. North Dakota*,

---

[24]/ Other cornerstones include the jurisdictional statute that grants jurisdiction over the subject matter of the suit, *e.g.*, whether the subject matter may be heard in the district courts, court of federal claims, etc., *see, e.g.*, 28 U.S.C. §§ 1346, 1491, and venue statutes.

461 U.S. 273, 278 (1983)(same); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)("Jurisdiction over any suit against the [United States] Government requires a clear statement from the United States waiving sovereign immunity. . .together with a claim falling within the terms of the waiver").

Nothing in *Irwin* alters the conclusion that limitations periods are part of the condition of the waiver of sovereign immunity and therefore jurisdictional. Indeed, *Irwin* specifically states that "the time limits imposed by Congress in a suit against the Government *involve a waiver of sovereign immunity,*" 498 U.S. at 96 (emphasis added), and concludes that "making the rule of equitable tolling applicable to suits against the Government. . .amounts to little, if any, *broadening* of the congressional waiver [of sovereign immunity]," *id.* at 95 (emphasis added). Hence, the Supreme Court in *Irwin* continued to view the applicable limitations period as a term of the government's waiver of sovereign immunity that are subject to the *sparingly-used* exceptions of tolling, waiver and estoppel.

Indeed, *Irwin* stands for the proposition that there is a rebuttable presumption that equitable tolling applies to waivers of the United States' immunity. *Irwin*,

498 U.S. at 95-96 (the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States"); *see also Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 542-43 (2002); *see also id.* at 553 n.11 (Stevens, J., dissenting)(citing *Irwin* for the same proposition). Subsequent pronouncements of the Supreme Court emphasize that *Irwin* was not a departure from earlier rulings in which the Court had stated that the statute of limitations is a condition on the United States' waiver of sovereign immunity and, therefore, is jurisdictional. *See id.* at 542-43.

Bearing in mind the foregoing line of cases, this Court correctly observed that,

> "[t]he applicable statute of limitations [in § 2401(a)] is a term of consent. The failure to sue the United States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action."

Nesovic, 71 F.3d at 777-78 (quoting *Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 592). Indeed, the Court in *Nesovic* did not disregard the Supreme Court's ruling in *Irwin*. The Court observed, "because Mr. Nesovic's lawsuit is a civil action against the United States, and because it was not filed within six years after his right of action, if any, 'first accrue[d],' it is barred *unless* he can find a recognized reason to avoid this result." *Id.* at 778 (citing *Irwin*)(emphasis in the original). In *Nesovic*,

the plaintiff argued *inter alia* that the limitations period of 28 U.S.C. § 2401(a) should be equitably tolled, an argument this Court rejected on its merits. *Id.* at 779. Thus, the Court ultimately concluded that, in the absence of any justification for tolling the statute, the limitations period jurisdictionally barred plaintiff's suit. *Id.* at 778 ("if [plaintiff] failed without justification to bring his lawsuit within the prescribed period, we are *without jurisdiction* to hear his claims").[25]/

Two years after *Nesovic*, this Court in *Cedars-Sinai* confirmed that *Nesovic* was correctly decided. 125 F.3d at 770. Importantly, this Court recognized and held that "limitations periods for suing the federal government are not *strictly* jurisdictional." *Id.* (emphasis added). Although the Court did hold that "[b]ecause the statute of limitations codified at 28 U.S.C. § 2401(a) makes no mention of jurisdiction but erects only a procedural bar. . .§ 2401(a)'s six-year statute of limitations is not jurisdictional. . . ," *id.*, this holding conflicts with other statements in this decision ("limitations periods for suing the federal government are not strictly jurisdictional") as well as with its approval of *Nesovic*. More importantly, *Cedars-Sinai* is at odds with Supreme Court pronouncements in *Irwin* and *Raygor*,

---

[25]/ As seen in *Sisseton-Wahpeton Sioux Tribe*, tolling has been considered in cases against the United States prior to the Supreme Court's decision in *Irwin*, 895 F.2d at 595-97, and, in the absence of justification for tolling the statute, a dismissal for untimeliness is jurisdictional, *id.* at 592.

all of which hold that limitations statutes applicable to suits against the United States remain jurisdictional.

Thus, in *Cedars-Sinai*, 125 F.3d at 770, this Court -- relying on *Irwin* and Circuit precedent interpreting *Irwin* -- indicated that the statute of limitations defense is not jurisdictional and can be waived by the United States. However that decision is read, the Supreme Court subsequently has made clear (1) that *Irwin* stands for the proposition that there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity, *see Raygor*, 534 U.S. at 542-43; *see also id.* at 553 n.11 (Stevens, J., dissenting) (citing *Irwin* for the same proposition); and (2) that *Irwin* was not a departure from earlier rulings in which the Court had stated that the statute of limitations is a condition on the United States' waiver of sovereign immunity and, therefore, is jurisdictional, *see Raygor*, 534 U.S. at 542-43 (citing with approval *Block* and *Mottaz*); *see also Henderson v. United States*, 517 U.S. 654, 656 (1996) (majority opinion) (statute of limitations is condition on waiver of sovereign immunity and therefore jurisdictional) and *id.* at 677-78 & n.3 (Thomas, J., dissenting) (stating that the Court has "long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the

district court's jurisdiction to hear a claim against the United States," and citing cases).

The Court in *Irwin* believed that tolling would be *sparingly* applied in suits against the United States, for which reason there would be little, if any, *broadening* of the waiver of sovereign immunity. The limitations period, therefore, remains a term of the consent of the United States to suit. Where, as here and in *Nesovic*, the plaintiff fails to establish any justification (*i.e.*, tolling, waiver or estoppel) for extending the limitations period, the immunity of the United States is not waived and the court "is deprived of jurisdiction to entertain the action." *Nesovic*, *supra*. Therefore, because the court below properly held that the statute was not tolled, the court also properly dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the district court's decision is entitled to affirmance.

Dated: March 4, 2005

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

By: 
DEBORA G. LUTHER
Assistant U. S. Attorney
501 "I' Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2720

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the court is advised that this case is not believed to be related to any other case now pending before the Court.

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,992 words.

McGREGOR W. SCOTT
United States Attorney

By: _____
DEBORA G. LUTHER
Assistant U. S. Attorney

Dated: March 4, 2005

APPENDIX

CHAPTER 159—INTERPLEADER

Sec.
2361. Process and procedure.

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

(June 25, 1948, c. 646, 62 Stat. 970; May 24, 1949, c. 139, § 117, 63 Stat. 105.)

CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec.
2401. Time for commencing action against United States.
2402. Jury trial in actions against United States.
2403. Intervention by United States or a State; constitutional question.
2404. Death of defendant in damage action.
2405. Garnishment.
2406. Credits in actions by United States; prior disallowance.
2407. Delinquents for public money; judgment at return term; continuance.
2408. Security not required of United States.
2409. Partition actions involving United States.
2409a. Real property quiet title actions.
2410. Actions affecting property on which United States has lien.
2411. Interest.
2412. Costs and fees.
2413. Executions in favor of United States.
2414. Payment of judgments and compromise settlements.
2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—Exclusions.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced 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.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, c. 646, 62 Stat. 971; Apr. 25, 1949, c. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub.L. 86–238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89–506, § 7, 80 Stat. 307; Nov. 1, 1978, Pub.L. 95–563, § 14(b), 92 Stat. 2389.)

HISTORICAL AND STATUTORY NOTES

Senate Revision Amendment

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding $1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

1949 Acts. House Report No. 276, see 1949 U.S. Code Cong. Service, p. 1226.

1959 Acts. Senate Report No. 797, see 1959 U.S. Code Cong. and Adm. News, p. 2272.

1966 Acts. Senate Report No. 1327, see 1966 U.S. Code Cong. and Adm. News, p. 2515.

1978 Acts. Senate Report No. 95–1118, see 1978 U.S. Code Cong. and Adm. News, p. 5235.

References in Text

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub.L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (section 601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Effective and Applicability Provisions

1978 Acts. Amendment by Pub.L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978 and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub.L. 95–563, set out as a note under section 601 of Title 41, Public Contracts.

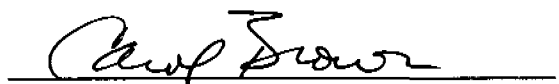
1966 Acts. Amendment by Pub.L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers; that on March 4, 2005, she served two copies of **APPELLEE'S BRIEF** by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and its contents in the United States Mail at Sacramento, California.

Addressee(s):

George L. Steele, Esq.
Law Offices of George L. Steele
790 E. Colorado Boulevard, Suite 900
Pasadena, CA 91101



CAROL BROWN