

1 MICHAEL V. BRADY (SBN 146370)
MICHAEL E. VINDING (SBN 178359)
2 BRADY & VINDING
400 Capitol Mall, Suite 2640
3 Sacramento, CA 95814
Telephone: (916) 446-3400
4 Facsimile: (916) 446-7159

5 Attorneys for Plaintiff
NISENAN MAIDU TRIBE OF THE
6 NEVADA CITY RANCHERIA and the
Individual members of NISENAN
7 MAIDU TRIBE OF THE
NEVADA CITY RANCHERIA
8

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 NISENAN MAIDU TRIBE OF THE
NEVADA CITY RANCHERIA,

13 Plaintiff,

14 v.

15 KEN SALAZAR in his official capacity as
16 Secretary of the Interior; LARRY ECHO
HAWK in his official capacity as Assistant
17 Secretary for Indian Affairs of the United
States Department of Interior; Does 1
18 through 100,

19 Defendants.

CASE NO. 5:10-cv-00270-JF

**NOTICE OF MOTION AND MOTION TO
PROCEED IN THE MATTER OF *TILLIE
HARDWICK v. UNITED STATES*; POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

Date: September 9, 2011
Time: 10:30 a.m.
Dept: Ctrm 3

20
21 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

22 PURSUANT TO THE COURT’S DIRECTIVE AND ORDER ON JULY 29, 2011, please
23 take notice that at the above noted date and time, at the above noted court, Plaintiff NISENAN
24 MAIDU TRIBE OF THE NEVADA CITY RANCHERIA (“Plaintiff”), will seek an order allowing
25 its individual members including “any heirs or legatees of such persons and any Indian successors
26 in interest to real property so distributed” from the Nevada City Rancheria (hereinafter “class
27 members”) to proceed in *Tillie Hardwick, et al. v. United States of America, et al.*, No. C 79-1710
28 JF (PVT) (Complaint filed July 10, 1979) (“*Tillie Hardwick*”).

1 **POINTS AND AUTHORITIES**

2 This motion is organized in three parts. First, the motion will briefly review the historical
3 facts of the Nevada City Rancheria, its members, and its relationship with the United States.
4 Second, the motion will discuss the BIA's actions in terminating the Nevada City Rancheria under
5 the California Rancheria Act, Public Law 85-671 ("Rancheria Act") of 1953. Third, the motion
6 will review the procedural history of *Tillie Hardwick* in order to demonstrate that the class members
7 fell through the "legal cracks" and are entitled to the relief requested.

8 I. Brief History of the Nevada City Rancheria.

9 The history of the Nevada City Rancheria is set forth in greater detail in the Declaration of
10 Shelly Covert ("Covert Declaration") filed concurrently herewith. However, a brief history will
11 put this motion in historical context.

12 The families comprising the Nevada City Rancheria at the time of termination in 1964 were
13 known to be living in the Nevada City area prior to the Gold Rush and prior to the admission of
14 California into the Union.

15 In 1887, Chief Charlie obtained a 75-acre allotment under the Dawes Act for the property
16 originally selected in 1853. Although fee title was held in his name, Chief Charlie's intention was
17 that the property known then as "Campoodie," should be used by all of the Indians within the area.

18 When Charlie Cully died in 1911, the United States Indian Service sent an investigator who
19 determined that, in fact, there were several Indians still living at the Campoodie. The Indian
20 Service determined that the property should be used as a home for the common use of these Indians.

21 The Secretary of Interior recommended that the President of the United States, at that time
22 Woodrow Wilson, cancel the allotment and create an Executive Order Reservation.

23 On May 6, 1913 President Wilson issued an order stating: "It is hereby ordered the
24 following described land in Nevada County, California, be and the same hereby is, withdrawn from
25 entry sale or other disposition and set aside for the Nevada or Colony tribe of Indians residing near
26 Nevada City," and then he listed the 75-acre parcel that had been the subject of the allotment.

27 It is important to note, unlike the circumstances of other California rancherias, the Nevada
28 City Rancheria was not created by the federal government in 1913. No land was purchased by the

1 Indian Service and no tribal organization efforts were undertaken for the simple reason that there
2 was an organized tribe already living on land owned by its Chief. This distinction becomes critical
3 forty years later when the federal government terminated all of the rancherias. The Nevada City
4 Rancheria was the only one that was not created by the federal government in the first place.

5 As further noted in the Covert Declaration, the Tribe continued to govern through an ancient
6 system whereby the Tribe was ruled by a “Chief” up until modern times when the system changed
7 to a Tribal Council and a Tribal Chairperson.

8 II. The Rancheria Act.

9 The California Rancheria Act of 1958, which terminated Federal supervision and Indian
10 status for 41 rancherias, was enacted with the goal of eliminating the many small reservation units
11 and to promoting assimilation. Section 1 of the Rancheria Act identified the Nevada City
12 Rancheria as subject to the Act. Section 2 provided for preparation of a plan for future use of the
13 Rancheria and required that the Indians holding formal or even informal assignments, or the Indians
14 of such reservations or the Secretary of Interior, after consulting with such Indians, prepare the
15 plan. Though some provisions of the Rancheria Act provided for the granting of allotments to
16 individual Indians, another provision authorized title held collectively by a group, i.e., the status
17 quo at the Nevada City Rancheria in 1953 and the status desired by Charlie Cully when he
18 purchased the property that ultimately became the Rancheria.

19 As shown in the Exhibits to the Covert Declaration, in 1958 representatives of the BIA
20 visited the Rancheria for the purposes of disposing of the property pursuant to the Rancheria Act.
21 Historical documentation demonstrates that, rather than consult with the several Indians living in
22 the vicinity who were actually implicated by the Rancheria Act, the BIA spoke only to the two
23 Rancheria occupants at that point in time, Peter and Margaret Johnson. (See each of the
24 declarations filed concurrently herewith.)

25 The BIA did not consult with any of the other members noted on “membership rolls” in
26 possession of the BIA. (See Covert Declaration.) Nor did the BIA consult with the Chief Kelly,
27 known to the BIA, who was living in line of sight and was within walking distance of the Johnsons’
28 home. (See Covert Declaration.)

1 Both Mr. and Mrs. Johnson were in their later years and both agreed that they would like to
2 receive any benefits of sale of the Rancheria.

3 Despite having this knowledge and owing a fiduciary obligation to the Tribe, and despite the
4 requirement within the Rancheria Act that the BIA consult with all adult members, the BIA failed to
5 consult with Chief Kelly or any others. Consultation would have been crucial because later
6 interviews with Louis Kelly suggests that he was confused as to the legal title of the Rancheria and
7 who was responsible to be an assignee (as noted in the newspaper article attached to the Covert
8 Declaration).

9 Neither did BIA contact the Yemie family who were just some of the many documented
10 Tribal members living in the area. (See Covert Declaration regarding the objection provided to the
11 BIA four months after the alleged "vote" to terminate the Rancheria five years before the Rancheria
12 was actually sold.)

13 Tragically, the BIA did not even consult the Johnsons' own living descendants who could
14 have, at the very least, benefitted from the educational training required by the Termination Act.
15 (See Declarations of Richard and Robert Johnson.)

16 The BIA's failure to contact any tribal members other than the Johnsons before disposing of
17 the Rancheria property violated the fiduciary duty owed to the Tribe. In the case of other rancherias
18 the BIA engaged in substantial outreach both on and off the Rancheria to ensure that any
19 termination took place with due process protections in place.¹ Particular attention was paid to
20 ensuring participation by all those having an interest in the Rancheria:

21 At each of the meetings Public Law 85-671 was discussed entirely,
22 section by section. Generally speaking, the Indians concerned
23 were very anxious to receive title to the lands they are occupying.
24 It was explained that we wanted them to make their own plans and
25 to include in the plan those people whom they thought had rights
26 on their Rancheria. We found that there were different situations
27 that called for different conclusions and it would be hard to issue a
28 regulation governing membership. It is our hope, and we tried to

¹ Compare the efforts reported in connection with the Mooretown Rancheria in the September 5, 1958 Progress Report No. 3 - Public Law 85-671 with those at the Nevada City Rancheria in November 3, 1958 Progress Report No. 6 - Public Law 85-671.

1 explain this to each group, that they will not exclude anyone who
2 has a right on the Rancheria.

3 Progress Report No. 4 - Public Law 85-671 (September 26, 1958).

4 But when it came to the Nevada City Rancheria, the BIA did not follow its own advice or
5 procedures and rejected participation by anyone not currently residing on the Rancheria proper,
6 including the tribal Chief, Louis Kelly.²

7 In short, the BIA took advantage of the Johnsons, to the detriment of the Johnsons and the
8 many other beneficiaries of Charlie Cully.³

9 There are many possible explanations for this nonfeasance. However, one result is clear:
10 Unlike other rancherias where BIA failed to honor the contractual terms of termination, the BIA
11 avoided having to provide infrastructure, training, education and the like through the simple
12 expedient of reaching a deal with Peter Johnson, who, according to press clippings at the time,
13 never wanted to leave the Rancheria in the first place.⁴ The Approved Distribution Plan included
14 only Peter and Margaret Johnson as distributees.⁵

15 Thus, contrary to the intentions of Charlie Cully when he obtained his original allotment and
16 President Wilson's Executive Order, the property was sold for the benefit of one Indian, Pete
17 Johnson (Margaret Johnson having died shortly after voting to liquidate the Rancheria).

18 This and all other evidence is consistent with an agency taking an exceedingly narrow, and
19 under the Rancheria Act, illegal view of its obligations.

20 It is important here to go back to one of the United States Solicitor's opinions about
21 property title on Executive Order Reservations like the Nevada City Rancheria. It varied. Some
22 would have mineral rights, some would not. Some would have water, some would not. Solicitor
23 E. L. Patterson said in a March 6, 1926 legal opinion:

24 ² December 15, 1955 Worksheet for Rancheria Termination, attached to the Covert Declaration.

25 ³ November 3, 1958 Progress Report No. 6 - Public Law 85-671.

26 ⁴ Nevada County Nugget, October 1, 1959 "Rancheria Sale Ends Colorful Chapter," quotes Peter Johnson as
27 saying, "I have lived here since I was eight years old and I don't know what I would do if the Indian Agency
moved me out." (Attached to the Covert Declaration.)

28 ⁵ "A Plan for the Distribution of the Assets of the Nevada City Rancheria, According to Public Law 85-671,
August 18, 1958," dated June 8, 1959. (Attached to the Covert Declaration.)

1 These but illustrate the fact that at particular reservations, or a
2 particular tribe, or band of Indians, relevant facts or circumstances
3 surrounding the creation of the reservation should not be
4 disregarded in determining the character or extent of the Indian
5 title.

6 For the Nevada City Rancheria the character of the title was that the property was held for
7 the benefit of Indians in and around Nevada City, not just the one elderly couple that was found
8 upon the Rancheria one day by BIA as it was clearing its rolls.

9 II. Tillie Hardwick And The Crack In The Legal System.

10 California Indian Legal Services (“CILS”) filed *Tillie Hardwick* on July 10, 1979. (Docket
11 No. 37, at Exhibit 1.) CILS challenged the actions of the BIA in terminating thirty-four Rancherias
12 alleging that the BIA failed to follow the Rancheria Act and failed to fulfill its mandates including
13 upgrading of houses, roads, water and sewer systems, and training and education for “terminated”
14 Indians.

15 On February 28, 1983, this Court issued an “Order Re: Class Certification” in *Tillie*
16 *Hardwick*. (Docket No. 27-1, at Exhibit 1.) Nevada City Rancheria is listed as a class member on
17 page 2, line 13.

18 CILS filed a “Certificate of Counsel Re: Hearing on Approval of Settlement Class Actions”
19 filed by California Indian Legal Services on November 17, 1983. (Docket No. 27-1, at Exhibit 2.)

20 On December 22, 1983, CILS filed a “Stipulation For Entry of Judgment.” (Docket No. 27-
21 1, at Exhibit 3.)

22 Notably, while Nevada City Rancheria was listed as a class member in the February 29,
23 1983 Order, it was not listed anywhere in the December 22, 1983 Stipulation. In other words, it
24 appears that Nevada City Rancheria fell through the legal cracks.

25 Both the former trial counsel for CILS that actually litigated *Tillie Hardwick*, Mr. David
26 Rapport (Docket No. 37) and the former trial counsel for the United States agree that the class
27 members fell through the cracks. (Docket No. 38.) On May 10, 2011, Mr. Rapport declared (at
28 paragraphs 13-16 in his first declaration; Docket No. 37):

a. While Nevada City Rancheria was listed as a class member in
the Complaint, the First Amended Complaint and the February 29,
1983, class Certification, it was not listed or referenced in the

1 Stipulation For Entry of Judgment.

2 b. The Stipulation For Entry of Judgment disposed of the claims
3 asserted in the action on behalf of the class members from all of
4 the rancherias, included in the Order Certifying the Class, who
5 received notice of the proposed settlement, except for the class
6 members from the Nevada City Rancheria.

7 c. As a result, the claims of the class members from the Nevada
8 City Rancheria were not dismissed with or without prejudice by
9 the 1983 Stipulation and the resulting judgment.

10 d. It is my understanding and belief that Nevada City Rancheria
11 was, is and continues to be a class member in *Tillie Hardwick* and
12 that no final determination, no dismissal and/or no judgment has
13 been entered in regards to Nevada City Rancheria.

14 (*Id.*)⁶

15 As for the United States, Mr. Paul Locke was the Assistant U. S. Attorney and lead counsel
16 of record for the federal defendants in *Tillie Hardwick*. Mr. Locke, as noted in his declaration filed
17 on May 10, 2011 (Docket No. 38), reviewed pleadings from *Tillie Hardwick* and concluded that
18 while Nevada City Rancheria was a class member therein, he believes the omission of Nevada City
19 Rancheria from the Stipulation for Entry of Judgment “was a clerical error.” (Locke Declaration,
20 2:14.)

21 As noted in the Declaration of Michael Vinding, a year long exhaustive search has revealed
22 that there is only one conclusion: the class members were a party to *Tillie Hardwick*, but have never
23 been given their day in court.

24 In light of the history of the Nevada City Rancheria, the BIA’s actions under the Rancheria
25 Act, and the procedural history of *Tillie Hardwick*, the class members must be allowed to proceed
26 under *Tillie Hardwick*.

27 CONCLUSION

28 Class members of the Nevada City Rancheria and the Nevada City Rancheria respectfully
request that the Court issue an Order allowing the class members to proceed in *Tillie Hardwick*.

⁶ In a clarifying declaration, Mr. Rapport clarified, “the class consisted of certain Indians **from the** Rancherias, including Nevada City Rancheria, which were listed in Exhibit A to the amended complaint and paragraph 3 of the Order Certifying the Class.” (Docket No. 43, filed 5/23/11; emphasis in original.)

1 For purposes of judicial finality that request includes a suggestion that the Court consolidate the
2 present action with *Tillie Hardwick* as such action would be consistent with the federal defendants
3 position taken in the Joint Motion to Relate (Document 18) (*i.e.*, it relates to the same property, the
4 same transaction and event, and avoids duplication of labor and expense).

5 Respectfully submitted,

6 Dated: August 5, 2011

BRADY & VINDING

7
8 By: /s/Michael E. Vinding
MICHAEL E. VINDING
Attorneys for Plaintiff
Nisenan Maidu Tribe of the Nevada City
9 Rancheria and the individual members of the
10 Nevada City Rancheria
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