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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA; et al., Plaintiffs - Appellants, v. SALLY JEWELL, in her official capacity as Secretary of the Interior; et al., Defendants - Appellees.	No. 14-15541 D.C. No. 5:10-cv-00270-JF MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeremy D. Fogel, District Judge, Presiding

Submitted May 13, 2016**
San Francisco, California

Before: WARDLAW, PAEZ, and BEA, Circuit Judges.

Plaintiff-Appellants, The Nisenan Tribe of the Nevada City Rancheria, Richard Johnson, and other individual members of the Nevada City Rancheria

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

("Appellants"), assert that the district court erred in dismissing their claims with prejudice on the grounds that such claims were time-barred under the Administrative Procedure Act's ("APA's") six-year statute of limitations. *See* 28 U.S.C. § 2401. We find no error in the district court's analysis, and we affirm.

I.

The district court did not err in granting Appellant's Rule 60(a) motion to correct a clerical error in the 1983 Stipulation for Entry of Judgment (the "Stipulation") in the *Hardwick* action *nunc pro tunc*,[1] rather than as of the date of the court's March 7, 2014 order. To the extent Appellants are challenging the district court's jurisdiction to enter such order *nunc pro tunc*, our review is *de novo*. *See United States v. Sumner*, 226 F.3d 1005, 1009 (9th Cir. 2000). To the extent Appellants challenge the district court's exercise of its discretion to issue an order *nunc pro tunc*, we review the court's ruling for abuse of discretion. *Atkins v. Wain, Samuel & Co.*, 69 F.3d 970, 973 (9th Cir. 1995).

A court's jurisdiction to enter an order *nunc pro tunc* "is limited to making the record reflect what the district court actually intended to do at an earlier date,

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[1] "Nunc pro tunc signifies now for then, or in other words, a thing is done now, which shall have the same legal force and effect as if done at [the] time when it ought to have been done." *United States v. Allen*, 153 F.3d 1037, 1044 (9th Cir. 1998) (quoting Black's Law Dictionary 964 (5th ed. 1979)).

but which it did not sufficiently express or did not accomplish due to some error or inadvertence." *Sumner*, 226 F.3d at 1010. Appellants asserted in their motion to correct the *Hardwick* court's clerical error that, absent the error, the Nevada City Rancheria would have been among the parties whose claims were dismissed without prejudice by the 1983 Stipulation. By granting Appellants' motion *nunc pro tunc*, the district court merely corrected the record to make it "reflect what the [*Hardwick*] court actually intended to do at an earlier date, but which it did not sufficiently . . . accomplish due to some error or inadvertence." *Id.* The district court's actions here fell well within the authority recognized in *Sumner*.

We are not persuaded by Appellants' argument that a court lacks authority to correct an error *nunc pro tunc* if the correction would adversely affect a party's "substantive" right. Appellants cite no case that has so held. Indeed, in *United States v. Inocencio*, 328 F.3d 1207 (9th Cir. 2003), we affirmed a district court's authority to correct an earlier failure to revoke a defendant's naturalization *nunc pro tunc*, where such revocation should have (but for a clerical error) followed automatically from the defendant's conviction for naturalization fraud. *Id.* at 1208–11. The later revocation of naturalization clearly affected the defendant's substantive rights in *Inocencio*. Accordingly, we reject Appellants' argument that the district court erred because correcting the *Hardwick* court's error *nunc pro tunc*

restarted the statute of limitations on Appellants' current claims as of 1983—thus rendering Appellants' present action untimely.

In sum, we conclude that the district court neither exceeded its jurisdiction nor abused its discretion in granting Appellants' motion to correct a clerical error *nunc pro tunc*.

II.

Appellants next argue that the district court erred in permitting the government to raise the APA's statute of limitations as an affirmative defense. We review *de novo* whether an affirmative defense has been waived, *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001), and again find no error in the district court's analysis. The government timely asserted the APA's six-year statute of limitations in both its answer to Appellants' original complaint and in its answer to Appellants' first amended complaint. The government therefore timely raised that defense. *See* Fed. R. Civ. Proc. 8(c).

No law supports Appellants' position that waiver of a statute of limitations defense in an earlier action bars the assertion of that defense in a *different action*,

filed nearly forty years later.[2] The cases Appellants cite merely hold that "[t]he filing of a class action tolls the statute of limitations as to all asserted members of the class," until, for instance, the class action is dismissed or the class decertified, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (internal quotation marks omitted), or a plaintiff opts out of the class, *see Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 550 (1974). Because we reject Appellants' premise that the *Hardwick* action remained pending (and the Nevada City Rancheria remained a party to that action) until 2014, these cases do not compel a ruling in Appellants' favor. Here, one of two things occurred: (1) the Nevada City Rancheria claims were dismissed as of 1983 by the Stipulation, corrected *nunc pro tunc*, or (2) the Nevada City Rancheria claims were dismissed in 1992, when the court entered a "Judgment" closing the *Hardwick* case and finally disposing of "all" remaining claims. Either way, the current action, filed in 2010, was time-barred by the APA's six-year statute of limitations.

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[2]Appellants are correct that the government waived any statute of limitations defenses it may have had in the *Hardwick* action. The district court found—and Appellants do not dispute—that Appellants' claims relating to the Nevada City Rancheria accrued in 1964 when the notice of termination of the Nevada City Rancheria was published in the Federal Register. *Cf.* 28 U.S.C. § 2401(a). Thus, the APA's six-year statute of limitations had run before the 1971 *Hardwick* action had been filed.

That the 1983 Stipulation dismissed Appellants' and similarly situated Rancherias' claims *without* prejudice does not compel a different result. A dismissal without prejudice does not indefinitely preserve a party's right to bring a new action. Nor does the 1983 Stipulation contain any provision that would preclude the government from raising the statute of limitations as a defense in a later action.

In sum, there is no basis for finding that the government waived its statute of limitations defense in the present action. The district court correctly dismissed Appellants' suit as time-barred.

III.

We need not reach Appellants' argument that the government has waived its laches defense. Regardless whether the government may raise that defense, the district court's order must be upheld on statute of limitations grounds.

For the foregoing reasons, we **AFFIRM** the district court's order dismissing Appellants' action.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....*(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Form 10. Bill of Costs - *Continued*

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Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

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Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____, Deputy Clerk