NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 24 2017

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U.S. COURT OF APPEALS

MISHEWAL WAPPO TRIBE OF ALEXANDER VALLEY,

Plaintiff-Appellant,

v.

RYAN ZINKE; MICHAEL BLACK,

Defendants-Appellees.

No. 15-15993

D.C. No. 5:09-cv-02502-EJD

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

Before: WARDLAW and GOULD, Circuit Judges, and HUFF,** District Judge.

The Mishewal Wappo Tribe of Alexander Valley (the Tribe) sued the Secretary and Assistant Secretary of the Department of Interior (the Federal Defendants), asserting claims for breach of fiduciary duty and violations under the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

Administrative Procedure Act. The district court granted the Federal Defendants' motion for summary judgment, holding that (1) all of the Tribe's claims depended on the allegation that the Secretary of the Interior improperly terminated the Alexander Valley Rancheria in violation of the California Rancheria Act (CRA), (2) the claim of improper termination accrued no later than 1961, (3) the six-year statute of limitations found at 28 U.S.C. § 2401(a) barred that claim (and consequently all of the Tribe's claims), and (4) the Tribe did not provide evidence to establish the statute of limitations should be equitably tolled. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

(1) The district court correctly concluded that all of the Tribe's claims relied upon a central allegation that the Federal Defendants unlawfully terminated the Alexander Valley Rancheria. We decline to address the Tribe's new argument that termination of the Rancheria did not terminate its status as a federally recognized tribe because the Tribe did not raise this argument before the district court. *See Robinson v. Jewell*, 790 F.3d 910, 915 (9th Cir. 2015).

(2) The Tribe argues that the United States owes a continuing fiduciary duty to the Tribe, and that the existence of this duty precludes the running of the statute of limitations. We do not decide whether the Federal Defendants owe a fiduciary duty to the Tribe. If there is such a duty in this case, the existence of such a duty

does not at all prevent the statute of limitations from running under the circumstances presented here.

The general rule, to which we adhere, is that: "Indian Tribes are not exempt from statutes of limitations governing actions against the United States." *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, N.D. & S.D. v. United States*, 895 F.2d 588, 592 (9th Cir. 1990). The statute of limitations begins to run in a breach of trust claim "when the trustee repudiates the trust and the beneficiary has knowledge of the repudiation." Cohen's Handbook of Federal Indian Law § 5.06[5], at 444 (2012 ed.). A trustee may expressly or impliedly repudiate the trust "by taking action inconsistent with duties imposed by the trust." *Id.* The statute of limitations begins to run when the beneficiary has either actual or constructive notice of the repudiation, whether or not the fiduciary's repudiation results in the lawful termination of its trust relationship. *See id.* at 445 & n.51 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1575–77 (Fed. Cir. 1988) (holding claims against the United States for the termination of the Hopland Rancheria were barred by the statute of limitations, even though it was later determined that the termination violated the CRA and the United States recognized a trust relationship with the Hopland Band).

It is undisputed that the Federal Defendants published notice of the termination of the Rancheria in the Federal Register in 1961, along with a list of those who would receive land. *See* 26 Fed. Reg. 6875 (Aug. 1, 1961). This publication was "legally sufficient notice . . . [,] regardless of actual knowledge or hardship resulting from ignorance," to put the Tribe on notice of the Federal Defendants' alleged breach of their fiduciary duty and to trigger the statute of limitations. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) (quoting *Friends of Sierra R.R., Inc. v. I.C.C.*, 881 F.2d 663, 667–68 (9th Cir. 1989)). Absent tolling, the statute of limitations expired in 1967, decades before the Tribe filed the instant suit. *See* 28 U.S.C. § 2401(a).

We decline to address the Tribe's argument, raised for the first time on appeal, that the statute of limitations was never triggered because the Federal Defendants have not repudiated their fiduciary duty in any way. *See Robinson*, 790 F.3d at 915.

(3) The Tribe did not diligently pursue its rights or show that extraordinary circumstances prevented it from doing so. Equitable tolling is therefore not appropriate. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (the party seeking equitable tolling must establish: "(1) that [it] has been pursuing [its] rights diligently, and (2) that some extraordinary circumstances stood in [its]

way." (internal quotation marks omitted)), *aff'd*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015).

The Tribe argues that the Federal Defendants induced it to not file an action or proceed through the administrative recognition process by representing in various ways that the Federal Defendants would restore the Tribe's status as a federally recognized Tribe. The earliest piece of evidence the Tribe cites to support this claim is a 1987 letter from the Area Director of the Sacramento Area Office of the Bureau of Indian Affairs recommending that the BIA adopt a policy to extend federal recognition to various rancherias, including "Alexander Valley." Even assuming this letter induced the Tribe to refrain from pursuing other avenues of recognition or litigation to rectify the purportedly unlawful termination of the Rancheria, it was issued about 26 years after the Rancheria was terminated. *See* 26 Fed. Reg. 6875 (Aug. 1, 1961). The 1987 letter could not warrant tolling of the statute of limitations for the 20 years beforehand. The Tribe did not meet its burden to support equitable tolling.

AFFIRMED.

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			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *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*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

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

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk