United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

WALTER ROSALES, ET AL., Appellants	:	Order Denying Petition for Reconsideration of Docket No. IBIA 99-4-A; Dismissing Docket No. IBIA 00-28-A as Moot; and Affirming Decision in Docket No. IBIA 02-47-A
v.	:	
	:	Docket Nos. IBIA 99-4-A IBIA 00-28-A IBIA 02-47-A
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	March 4, 2003

Appellants Walter Rosales, et al., seek review of decisions issued by the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), in regard to three tribal elections for the Jamul Indian Village (Village). 1/ For the reasons discussed below, the Board of Indian Appeals (Board) denies a petition for reconsideration in one appeal, dismisses a second appeal as moot, and affirms the Regional Director's decision in the third appeal.

The Village was organized in 1981 as a community of half-bloods under the Indian Reorganization Act, 25 U.S.C. §§ 461, et seq. (IRA). The nature of its organization and the resulting membership questions have led to on-going disputes over tribal elections and tribal

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1/ Appellants in Docket No. IBIA 99-4-A are Walter Rosales, Jane Dumas, Joe Comacho, Karen Toggery, Marie Toggery, Leslie A. Mesa, Gerald Mesa, Robert M. Mesa, William Mesa, and Vivian Flores. This appeal seeks review of the Village's 1997 tribal election. According to information in Rosales v. Pacific Regional Director, 37 IBIA 233 (2002), Marie Toggery has died since the filing of this appeal.

Appellants in Docket No. IBIA 00-28-A are Walter Rosales, Jane Dumas, Joe Comacho, Karen Toggery, Marie Toggery, Gerald Mesa, and Robert M. Mesa. This appeal seeks review of the Village's 1999 tribal election.

Appellants in Docket No. IBIA 02-47-A are Walter Rosales and Karen Toggery. This appeal seeks review of the Village's 2001 tribal election.

leadership. The background of these disputes was discussed in detail in Rosales v. Sacramento Area Director, 32 IBIA 158 (1998) (Rosales I), and will not be repeated here. 2/

In Rosales I, the Board addressed disputes arising from a 1994 recall election and the 1995 tribal election. The Board found that the tribal election disputes were rooted in a larger and more fundamental dispute over tribal membership. Although the Board and BIA are not normally part of the process for determining tribal membership, the Board found that, because the Village was organized as a community of half-bloods, BIA was responsible for making the initial determination of who was eligible to vote in the IRA election based on who possessed the requisite 1/2 degree blood quantum. It further found that there were problems with this initial determination because there was no evidence that BIA had actually successfully verified the blood quantums reported. Despite this, BIA determined that there were 23 individuals with the requisite blood quantum and allowed them to vote in the IRA election which organized the Village.

The Board stated in Rosales I:

> A determination of who is a tribal member must * * * precede any determination of who is a tribal leader. Without knowing who is a tribal member, neither the Village nor the Department [of the Interior] is in a position to know whether a tribal election was conducted in accordance with the constitution; i.e., whether only tribal members voted in that election (Art. V, sec. 3) and whether only tribal members were elected to office (Art. V, sec. 4).

32 IBIA at 166.

The Board concluded that the only way for there to be a lasting resolution of the issues raised in this series of appeals was to resolve the underlying membership questions. To that end, it requested that the Regional Director assist the Village's known members in addressing their membership and leadership problems in light of the decision in Rosales I.

In Rosales v. Sacramento Area Director, 34 IBIA 50 (1999) (Rosales II), the Board dismissed a challenge to a 1996 Secretarial election held to amend the Village's constitution. Although the same membership and leadership questions were raised in that appeal, the Board dismissed the appeal after finding "that there was no valid challenge to the Secretarial election under 25 C.F.R. § 81.22." 34 IBIA at 54.

2/ The Sacramento Area Director is now called the Pacific Regional Director. The Board uses the title Regional Director in this decision.

In Rosales v. Sacramento Area Director, 34 IBIA 125 (1999) (Rosales III), the Board noted that it had consistently held that a subsequent valid tribal election moots issues relating to earlier elections. See, e.g., Hamilton v. Acting Sacramento Area Director, 29 IBIA 122, 123 (1996). Finding that the Village's 1999 tribal election had not been contested, the Board dismissed as moot a challenge to the 1997 tribal election.

Rosales III was Docket No. IBIA 99-4-A. After the Board's dismissal of their appeal, Appellants petitioned for reconsideration. They alleged that they had, in fact, challenged the 1999 election, and provided evidence of that challenge. The Board took the petition for reconsideration under advisement.

Appellants subsequently appealed from the Regional Director's decisions recognizing the results of the Village's 1999 and 2001 tribal elections. As noted above, these appeals are Docket Nos. IBIA 00-28-A (1999 election) and IBIA 02-47-A (2001 election).

In accordance with its precedent that a subsequent valid tribal election moots disputes concerning earlier elections, the Board first addresses Docket No. IBIA 02-47-A. If the 2001 tribal election is found to be valid, the challenges to the earlier elections will be rendered moot.

Appellants' major argument is that the Regional Director failed to take any action in regard to the Board's discussion of the Village's membership issues in Rosales I. So that it could determine if this allegation was correct, the Board requested a report from the Regional Director on the status of his actions in regard to assisting the Village to resolve the membership dispute. The Board received the Regional Director's response on September 16, 2002. 3/

In his status report, the Regional Director states that he believes the Village's membership issues were resolved in the Jamul Indian Village Genealogical Study prepared by Dr. Michael G. Baksh, Ph.D. This report, which was funded by BIA, had been underway when Rosales I was before the Board. The report was submitted to the Regional Director in May 1998, approximately one month after the Board's decision in Rosales I. The study completed an exhaustive review of the blood quantums of the Village's original 23 members, finding that 1 of those individuals had a 1/2 degree blood quantum, 4 had a 3/4 degree blood quantum, and the remaining 18 had a 4/4 degree blood quantum. The study also provided genealogical tables showing the blood quantums of the descendants of the original 23 members. The Regional Director formally accepted this report on September 30, 1998.

3/ After beginning consideration of these appeals, the Board discovered that it appeared that the Regional Director had not served a copy of his status report on Appellants. Therefore, it sent a copy to Appellants and gave them an opportunity to respond. The Board has received and considered a response from Appellants.

The Regional Director continued his status report by indicating that only persons who were among the original 23 members of the Village voted in the 1996 Secretarial election that lowered the blood quantum requirement for membership in the Village to 1/4 degree. This is the Secretarial election that was at issue in Rosales II.

Appellants contend that the Regional Director has disregarded the Board's decision in Rosales I, by failing to meet with "the true majority of the actual members of the JAMUL tribe to address their membership and leadership problems." Appellants' Dec. 31, 2001, Statement of Reasons in Docket No. IBIA 02-47-A. This contention is based on Appellants' continued argument that the blood quantum for membership in the Village cannot be lowered to less than 1/2 degree, and therefore only persons with 1/2 or more blood quantum can be "actual members" of the Village.

The Board rejected this contention in Rosales I. The contention is based on a policy, previously espoused by at least some Departmental officials, that there was a distinction between "historic" and "created" tribes. As discussed in Rosales I, 32 IBIA at 163-66, this policy was soundly rejected by Congress in 1994 when it amended the IRA by adding sections (f) and (g) to 25 U.S.C. § 476. The Village has the right to determine its own membership criteria, including, if it wishes, lowering the blood quantum for tribal membership.

The Board addresses that part of Appellants' argument in which they contend that the Regional Director has not taken action to address the membership issue. The initial problem with the Village's membership resulted from BIA's apparent failure to verify fully the blood quantums of the 23 individuals who were allowed to organize the Village. That failure was addressed in the Baksh genealogical study. The Board rejects Appellants' contention that the Regional Director has not taken action in response to its decision in Rosales I.

Appellants base most of their remaining arguments on their contention that the 1996 Secretarial election was invalid. This contention was made in Rosales II. The fact that Rosales II was decided on procedural, rather than substantive, grounds does not enable Appellants to continue to assert their substantive arguments against the election. The results of the Secretarial election became final for the Department of the Interior with the issuance of the Board's July 29, 1999, decision in Rosales II. Under these circumstances, Appellants' objections to the Secretarial election will not be entertained.

The bottom line in these appeals is that Appellants failed successfully to challenge the 1996 Secretarial election, and the Village's Constitution was amended to allow membership with a 1/4-degree blood quantum. The 2001 tribal election was held after the Constitutional amendment. Appellants have failed to show that the 2001 election was not conducted in accordance with the Constitution's lowered blood quantum requirement. Because of this failure, Appellants have not carried their burden of proving that the Regional Director committed any reversible error in his decision concerning the 2001 tribal election.

Based on the finding that the 2001 tribal election has not been successfully challenged, and is therefore considered valid, the Board finds that the challenges to the 1997 and 1999 tribal elections are moot. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Appellants' petition for reconsideration of Docket No. IBIA 99-4-A is denied; their appeal in Docket No. IBIA 00-28-A is dismissed as moot; and the Regional Director's decision in Docket No. IBIA 02-47-A is affirmed. 5/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

4/ Other arguments not specifically addressed were considered and found to be repetitious of arguments addressed in earlier Board decisions regarding the Village's election and leadership disputes.

5/ Appellants continue to assert that a majority of the Village's original members did not participate in tribal elections, including the 1996 Secretarial election. Even assuming that this asssertion is correct, it does not make the elections illegal. The Village's original members have the right to choose either to participate or not to participate in tribal elections.

Appellants' continued refusal to participate in the Village's tribal government by, for example, declining to register to vote and holding separate elections, only allows those individuals Appellants oppose the opportunity to run the tribal government as they choose. Appellants might wish to consider bringing their voices to the tribal council by registering to vote and by participating in the tribal government. BIA has done its part here by providing the information necessary for a determination of the blood quantums of the Village's original 23 members and, consequently, of their descendants. It would appear to now be time for all of the Village's members to help the Village move forward.

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OFFICE OF HEARINGS AND APPEALS
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4015 WILSON BOULEVARD
ARLINGTON, VA 22203

WALTER ROSALES ET AL.
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-7-A, 97-45-A Decided April 22, 1998

Appeal from a decision concerning recognition of tribal leaders for the Jamul Indian Village.

IBIA 97-7-A dismissed; IBIA 97-45-A affirmed in part, reversed in part, and remanded.

1. Indians: Tribal Organization: Generally--Indians: Tribal Powers: Generally

   Under the Act of May 31, 1994, Pub. L. No. 103-263, sec. 5(b), 108 Stat. 709, codified at 25 U.S.C. § 476(f) and (g) (1994), Congress has eliminated all distinctions between "historic" and "created" Indian tribes.

2. Indians: Enrollment/Tribal Membership--Indians: Tribal Government: Elections--Indians: Tribal Government: Officers

   In the absence of a tribal determination of its membership, neither the tribe nor the Department of the Interior is in a position to know whether only tribal members voted and/or were elected to tribal office in a tribal election.

APPEARANCES: Patrick D. Webb, Esq., San Diego, California, for Appellants Walter Rosales et al.; Eugene R. Madrigal, Esq., Temecula, California, for Raymond Hunter et al.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Walter Rosales, Jane Dumas, Sarah Aldamas, Val Mesa, Joe Comacho, and Karen Toggery seek review of various actions and inactions of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), relating to leadership disputes within the Jamul Indian Village (Village). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses Docket No. IBIA 97-7-A as moot; affirms in part and reverses in part the decision in Docket No. IBIA 97-45-A; and remands this matter for further action in accordance with this decision.

Docket No. IBIA 97-7-A

Appellants filed Docket No. IBIA 97-7-A under 25 C.F.R. § 2.8, which provides procedures for making the failure of a BIA official to issue a decision the subject of an appeal. Appellants sought review of the Area Director's failure to act on their appeal from three decisions issued by the Superintendent, Southern California Agency, BIA (Superintendent), on December 5, 1994; August 3, 1995; and August 4, 1995.

On October 10, 1996, after Docket No. IBIA 97-7-A was filed, the Area Director issued a decision affirming the Superintendent's decisions. Appellants objected to the Area Director's issuance of that decision, arguing that he lacked authority to issue a decision after the matter had been appealed to the Board. At page 1 of an October 24, 1996, order, the Board stated:

> While the Board does not condone the Area Director's action in issuing a decision while an appeal was pending before the Board, it also does not believe any real purpose will be served by ignoring the existence of the October 10, 1996, decision. Accordingly, because that decision affirms the Superintendent's decisions which appellants initially appealed, the Board will treat appellants' original notice of appeal as also being an appeal from the October 10, 1996, decision. This ruling does not in any way limit the issues which appellants may raise during this appeal.

Apparently, Appellants did not receive the Board's October 24, 1996, order before filing a separate appeal from the Area Director's October 10, 1996, decision. Appellants' second appeal was assigned Docket No. IBIA 97-45-A, and was consolidated with Docket No. IBIA 97-7-A.

After further consideration, the Board finds that Appellants have received the relief they sought in Docket No. IBIA 97-7-A; i.e., a decision from the Area Director on their appeals from the Superintendent's decisions. It therefore severs Docket Nos. IBIA 97-7-A and IBIA 97-45-A, and dismisses Docket No. IBIA 97-7-A as moot.

Docket No. IBIA 97-45-A
Background

The Village was organized in 1981 under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1994), 1/ as a community of half-bloods. See 25 U.S.C. § 479:

> The term "Indian" as used in [the IRA] shall include all persons of Indian descent who are members of any recognized

1/ All further citations to the United States Code are to the 1994 edition.

> Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. [Emphasis added.]

The materials submitted to the Board by Appellants 2/ show that 20 individuals signed a petition seeking to organize the Village under the IRA, and that BIA found 23 individuals eligible to vote on the proposed constitution. 3/ Of those 23 individuals, 16 voted in an election held on May 9, 1981, concerning the adoption of a constitution under the IRA (constitutional election). The vote was 16 to 0 in favor of the constitution. The constitution was subsequently approved by the Acting Deputy Assistant Secretary - Indian Affairs (Operations) on July 7, 1981.

In summary, the Village's constitution provides that the governing body is "the general council composed of all qualified voters of the village who are eighteen (18) years of age or older" (Art. IV, sec. 1); the general council elects an executive committee from its members (Art. IV, sec. 2); "[a]ll enrolled members of Jamul Village who are eighteen (18) years of age or older shall be entitled to vote in tribal elections" (Art. V, sec. 3); "[a] candidate for a position on the executive committee must be a qualified voter of Jamul Village eighteen (18) years of age or older" (Art. V, sec. 4); and "[t]hirty percent (30%) of the qualified voters shall constitute a quorum at all meetings of the general council" (Art. XI, sec. 3). Article III of the constitution restricts membership in the Village to persons who have at least 1/2 degree California Indian blood quantum.

2/ Although the Area Director provided the Board with the administrative record, consisting of those materials which were reviewed in issuing the decision under review, most of the background information relevant to an understanding of the Village's situation is taken from documents submitted by Appellants. It is clear that even those materials are not complete.

3/ The 23 individuals found eligible to vote were: Henry Aldamos, Sarah C. Aldamos, Tony Camacho, Isabel Cuero, Lupe J. Cuero, Mary A. Cuero, Ramona E. Cuero, Seraphile Helen Helm Cuero, Vivian C. Flores, Gerald Mesa, Leslie A. Mesa, Robert Mesa, Valentine Mesa, William C. Mesa, Eugene Meza, Kenneth A. Meza, Edward Rosales, Joe Luther Rosales, Manuel Rosales, Reginold S. Thing, Carlene A. Toggery, Marie A. Toggery, and Gennie M. Walker.

The petition was signed by some persons who were apparently determined not to be eligible to vote on the constitution. Those persons include "W.J. Rosales," who may or may not be Appellant Walter Rosales, and "Raymond Hunter" (Hunter).

The constitution also shows that a "Walter J. Rosales" was a member of the Election Board.

The events leading up to this appeal began on August 16, 1994, when a faction of the Village lead by Appellant Jane Dumas (Dumas) presented a petition seeking the recall of four tribal officials elected in 1992: Hunter, Chairman; Marcia Goring-Gomez, Committee Member; Mary Alveraz, Committee Member; and Lee Shaw-Conway, Secretary-Treasurer. 4/ In a September 3, 1994, election held by the Dumas faction, the four officials were recalled, and new officials were elected. The new officials elected were Dumas, Chairman (Dumas had been elected Vice-Chairman in the 1992 election); Joe Comacho, Vice-Chairman; Karen Toggery, Secretary-Treasurer; Adolph Thing, Committee Member; and Mary Sanchez, Committee Member.

On December 5, 1994, the Superintendent declined to recognize the results of the September 3, 1994, recall election on the grounds that the election violated the Village's constitution. He further held that BIA would continue to recognize the officials elected in the 1992 tribal election. The Superintendent's failure to include appeal information in this decision tolled the time for filing an appeal. 25 C.F.R. § 2.7(b).

The two factions held separate elections on June 17, 1995. 5/ On August 3, 1995, the Superintendent recognized the results of the election held by the Hunter faction. On August 4, 1995, he declined to recognize the results of the election held by the Dumas faction. Appellants appealed to the Area Director, who, on October 10, 1996, affirmed the Superintendent's decisions.

Appellants sought review of the Area Director's decision. Briefs were filed on appeal by Appellants and by the Hunter faction, which has

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4/ Article IV, sec. 2, of the Village's constitution provides that "[t]he executive committee shall select a secretary-treasurer to assist them in the administration of tribal affairs. The secretary-treasurer may or may not be a member of the Jamul Indian Village, but shall not be entitled to vote as an officer." It appears, however, that the position of secretary-treasurer has been treated as an elected position.

5/ Both factions also took other actions in the name of the Village. On May 5, 1995, the Hunter faction adopted a resolution identifying members of the Village, and on June 3, 1995, it adopted an ordinance regulating the 1995 election. The Dumas faction adopted an enrollment ordinance on Nov. 19, 1994, and established a tribal court and elected a tribal judge on July 15, 1995. On Dec. 1, 1995, that tribal court entered a default judgment against the four officials who were the subjects of the 1994 recall election and two other individuals. Among other things, the judgment found that those individuals were not tribal members.

On Jan. 31, 1995, Dumas also filed suit in Federal court against the recognized Hunter government. Jamul Indian Village v. Hunter, Civil No. 95-0131-R (BTM) (S.D. Calif.). The court dismissed the case on June 21, 1995, and denied reconsideration of the dismissal order on Dec. 20, 1995.

submitted its filings in the name of the Village. 6/ The Area Director did not file a brief.

Discussion and Conclusions

Although the immediate question raised in this appeal concerns tribal leadership, the Board finds that that question cannot be resolved without first addressing the more fundamental question of tribal membership. In addressing the Village's membership, the Board exercises the inherent authority of the Secretary to correct a manifest injustice or error. 43 C.F.R. § 4.318.

Normally, a tribe has the inherent right to determine its own membership. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897); Jamul Indian Village v. Hunter, supra, June 21, 1995, slip op. at 15 ("This Court will not usurp the Tribe's authority to determine who is an Indian and who is a member of the Tribe"); Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163, 171-72 (1995), remanded on other grounds, Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C. 1996). In this case, however, because the Village organized as a half-blood community under the IRA, BIA was responsible for making the initial determination of who was eligible to be a tribal member based on who possessed the requisite 1/2 degree blood quantum to vote on an IRA constitution. Cf. Alan-Wilson v. Sacramento Area Director, 30 IBIA 241, recon. denied, 31 IBIA 4 (1997) (BIA was responsible for making the initial determination of who was eligible to reorganize a tribal government for the Cloverdale Rancheria of Pomo Indians). As mentioned above, BIA found 23 individuals eligible to vote in the Village's constitutional election.

The materials submitted by Appellants strongly suggest that BIA never actually made and/or verified blood quantum determinations. On December 16, 1980, the Commissioner of Indian Affairs wrote to the Superintendent noting, among other things, that not all of the 23 individuals who had been found eligible to vote in the constitutional election could show the required 1/2 degree blood quantum. Despite this concern, the constitutional election was held, and BIA thereafter approved the Village's constitution, acquired land in trust for it, and recognized it as

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6/ Appellants also purported to represent the Village when they filed their Notice of Appeal. In its Oct. 24, 1996, order, the Board stated that "[t]he Village will not be shown as an appellant because the identity of those individuals who should be recognized as the governing body of the Village is the central question in this appeal."

For the same reason, the group headed by Hunter is deemed to have made its filings on behalf of the Hunter faction, rather than on behalf of the Village.

an entity eligible to receive services from BIA. See Indian Tribal Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982).

Questions about the Village's membership persisted after the constitutional election. At pages 1-2 of a December 22, 1992, letter to Carlene Tesam concerning the 1992 Village election, the Superintendent stated:

> The Jamul Executive Committee is very much aware of the need to formulate a membership roll. This process has been complicated because of our inability to determine degrees of Indian blood for most of the members. * * *
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> * * * * * *
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> The [BIA] recognizes that it is the tribe's inherent right to determine its own membership. My staff is available to provide technical assistance to the Executive Committee on this complicated process.

On July 1, 1993, the Director, Office of Tribal Services, in BIA's Central Office (OTS Director), wrote to the Area Director concerning a proposal to amend the Village's constitution to lower the blood quantum for membership from 1/2 to 1/4 degree. The proposed amendment had been submitted by Hunter, who was then recognized as the Village Chairman. The OTS Director stated:

> In 1986, Jamul Village requested assistance from the [BIA] in constructing a membership roll. However, because of the difficulties encountered this has not been possible. * * * [P]ersons on the 1972 California Judgment Roll cannot be used as a base roll since that roll was only a descendency payment roll and did not require a minimum blood degree. * * * The origin and correctness of the 1972 roll cannot be verified. The 1972 California records were retrieved by Agency personnel and there are no available records including probate records that contain blood degrees for any of the Jamul people.
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> * * * * * *
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> * * * [W]e understand that the Area Director has disavowed the validity of blood degrees for the 23 family charts submitted to the Commissioner on April 23, 1975, because no records in fact exist which would document the blood degree of any Jamul Indian. In other words, the BIA is unable to document conclusively that the 23 individuals [found eligible to vote in the constitutional election] possessed one-half degree California Indian blood * * *. The origins of the family tree charts are unknown. * * * Thus, it appears that the BIA may

> have prematurely recognized the Village as a half-blood Indian community and mistakenly extended Federal services and benefits to its members.

July 1, 1993, Memorandum at 1-2.

On November 24, 1993, the Area Director responded: "Research of our records reveals that enrollment documents regarding the base members are incomplete or unavailable and therefore cannot be used to substantiate the blood degrees." The original, or "base," members of the Village were the 23 individuals found eligible to vote in the constitutional election.

In addition to the problems in calculating the blood quantums of the original 23 members, it appears that the Village's ability to determine its future membership was hampered by the Department's distinction between "historic" and "created" tribes. On July 1, 1993, the OTS Director informed Hunter that the proposal to lower the blood quantum requirement for membership to 1/4 degree would jeopardize the Village's status as a Federally recognized tribe because the Village was a "created" tribe. The OTS Director stated:

> You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with [BIA] means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. * * * Representatives of the Village opted to seek recognition as a half-blood community even though they were aware of the limitations that result from organizing as a half-blood Indian community.

July 1, 1993, Letter at 2. The OTS Director continued:

> It has been the longstanding policy of [BIA] to require that organizational documents adopted by half-blood communities contain a membership requirement of one-half degree Indian blood or more. Consistent with the intent of [25 U.S.C. § 479], the Department of the Interior has over the more than 50 years since the passage of the IRA interpreted [25 U.S.C. § 479] to mean that those who seek recognition as a half-blood Indian community and subsequently organize under the IRA are forever restricted in their membership. In other words, once a half-blood Indian community, always a half-blood community. Therefore, the Village's proposal to lower the blood quantum from one-half degree California Indian blood to one-quarter

> or more degree is contrary to applicable Federal law and if adopted we would disapprove the constitution or any amendment that contained such language or intent. Any departure from the limitations imposed by [25 U.S.C. § 479] could jeopardize the Village's continued right to Federal recognition and the rights of its members to Federal benefits and services.

Id. at 4.

[1] The distinction which the Department had drawn between "historic" and "created" tribes was addressed by Congress in the Act of May 31, 1994, Pub. L. No. 103-263, sec. 5(b), 108 Stat. 709, which added subsections (f) and (g) to 25 U.S.C. § 476. These subsections provide:

> (f) Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> (g) Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In discussing this act in a July 13, 1994, memorandum to the Assistant Secretary - Indian Affairs, the Department's Solicitor stated that the amendment was intended to end the distinction which had been drawn since at least 1936 between the powers of "historic" and "created" tribes. In a September 9, 1994, memorandum to BIA officials, the Assistant Secretary stated: "Basically, this Act represents an 'equal footing' doctrine for Tribes in that they all have the same sovereignty and political relationship with the United States regardless of the means by which they were recognized or the method of their governmental organization." 7/

It is possible that the Village's membership problem has been allowed to continue because no one was certain what action should be taken in light

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7/ An appeal concerning Hunter's submission of a second proposal to amend the Village's constitution to lower the blood quantum for tribal membership, apparently submitted after the enactment of this Act, is currently pending before the Board. See Rosales v. Sacramento Area Director, Docket No. IBIA 98-9-A.

of the questions about the blood quantums of the original members and the resulting concern that the Village may have been improperly recognized. However, the Village's status is no longer a question for resolution by the Department. The Federally Recognized Indian Tribe List Act of 1994, Pub.L. No. 103-454, sec. 103, 25 U.S.C. § 479a note, took effect on November 2, 1994. In passing this Act, Congress made it emphatically clear that the Department lacks authority to withdraw recognition of an Indian tribe, and that only Congress has such authority. See H.R. Rep. No. 781, 103rd Cong., 2nd Sess. 2-4, reprinted in 1994 U.S.C.C.A.N. 3768-3770. Therefore, unless at some time Congress acts to "derecognize" the Village, the Village is a Federally recognized Indian tribe which, under new subsections (f) and (g) of 25 U.S.C. § 476, has all of the same rights and authorities as every other recognized Indian tribe, including the right to define its own membership. With the Village's status thus clarified, its members may have an opportunity which has not previously existed to develop membership criteria tailored to their particular situation.

No party to this appeal has submitted any evidence that the original 23 members of the Village ever admitted new members in accordance with Article III, section 1, of the Village's constitution. Thus, it is possible that the only members of the Village at this time are those of the original 23 members who are still living and who have not relinquished their membership in the Village. If the original 23 members have, in fact, admitted new members, they have the responsibility to show that such action was taken in accordance with the constitution and to provide BIA with an up-to-date list of tribal members.

[2] A determination of who is a tribal member must, however, precede any determination of who is a tribal leader. Without knowing who is a tribal member, neither the Village nor the Department is in a position to know whether a tribal election was conducted in accordance with the constitution; i.e., whether only tribal members voted in that election (Art. V, sec. 3) and whether only tribal members were elected to office (Art. V, sec. 4).

The materials before the Board show that persons who were not among the original 23 members have participated in the Village's government, perhaps from the time the Village was first recognized. Clearly, tribal leadership disputes began soon after the Village was recognized, and those disputes frequently centered on the question of who was a tribal member for purposes of voting and/or holding tribal office. See, e.g., Superintendent's Letters of Apr. 29, 1987, to Valentine Mesa; of Sept. 2, 1987, to Vivian Flores; and of Dec. 22, 1992, to Carlene Tesam. These letters show that, at least until 1987, BIA questioned whether persons voting in tribal elections and/or on tribal business were tribal members, but they do not show that BIA consistently asked the same question about persons elected to tribal office.

In regard to the leadership issue presented in this appeal, the Board finds that neither the Hunter faction nor the Dumas faction has shown that

voting in its elections was restricted to tribal members, or that only tribal members were elected to tribal office in its elections. Thus, neither faction has shown that its elections conformed to the Village's constitution. The Board concludes that, in the absence of proof that only tribal members voted and/or were elected to office in any of the three elections at issue in this appeal, Departmental recognition of the results of any of the elections would violate the Village's constitution. It therefore affirms that part of the Area Director's October 10, 1996, decision which declined to recognize the results of the 1994 recall election and of the 1995 tribal election held by the Dumas faction, and reverses that part of the decision which recognized the results of the 1995 tribal election held by the Hunter faction. 8/

The Board is aware that this decision will continue the Village's leadership controversy. In effect, the decision reinstates the officers elected in the 1992 tribal election, which is the last election that is not before the Board in this appeal. The Board notes, however, that Appellants dispute BIA's statement that the 1992 election was uncontested, and that the 1992 election may suffer from the same problems as do the 1994 recall election and 1995 tribal elections.

Another tribal election was held on June 21, 1997, with a run-off election for Chairman being held on July 19, 1997. The Superintendent recognized the results of that election on October 6, 1997. The Board requested position statements from the parties on whether the 1997 tribal election mooted these appeals under Board precedents that a valid tribal election held during the pendency of an appeal from a prior leadership dispute moots the earlier appeal. See, e.g., Villegas v. Sacramento Area Director, 24 IBIA 150 (1993). The Hunter faction argued that the 1997 election was valid and mooted these appeals. Appellants contended that the election was not valid for the same reasons as they raised in this appeal, and further asserted that they had not been informed that BIA had recognized the results of that election and that they were not given appeal rights. Appellants stated that they appealed the Superintendent's recognition of the results of the 1997 election to the Area Director when they

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8/ Appellants contend that the Department must defer to the default judgment entered by the tribal court established by the Dumas faction. The Board agrees that it has held that the Department should defer to tribal resolution of election disputes. See, e.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996); John v. Acting Eastern Area Director, 29 IBIA 275 (1996); Bucktooth v. Acting Eastern Area Director, 29 IBIA 144, 149 (1996), and cases cited therein. It concludes here, however, that the Department cannot defer to a decision issued by the Dumas court because there is no evidence that that court was established by tribal members in accordance with Art. VIII, sec. 1(e), of the Village's constitution.

Once the Village has resolved its membership issue, it might wish to consider designating or creating a tribal forum for the resolution of future election disputes.

learned of the Superintendent's decision. To the best of the Board's knowledge, the appeal from the 1997 election is still pending before the Area Director, probably awaiting the issuance of this decision.

The possible problems with these two additional elections highlight the seriousness of the failure to resolve the Village's underlying membership controversy. Without such resolution, the Village has not had, and will not have, a solid foundation upon which to build a stable government.

In the meantime, however, BIA and other Federal agencies need to know the identity of the persons with whom they can deal on a government-to-government basis. The materials before the Board show that the Village is participating in several Federal grant and/or contract programs. That participation could be placed in jeopardy if the Village's leadership remains disputed. Expeditious attention by the Village's members to its membership and leadership issues would therefore appear to be of paramount importance.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Docket No. IBIA 97-7-A is dismissed as moot. The Sacramento Area Director's October 10, 1996, decision at issue in Docket No. IBIA 97-45-A is affirmed in part and reversed in part. This matter is remanded to the Area Director with a request to assist the Village's actual members in addressing their membership and leadership problems in light of this decision. 9/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

9/ All motions not previously addressed are hereby denied.

Westlaw Attached Printing Summary Report for KAUFMAN,PETER H 1718892

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For Opinion See 73 Fed.Appx. 913Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
Walter ROSALES, et al., Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al., Defendants-Appellees.
No. 02-55800.
January 8, 2003.

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

Answering Brief of the Federal Appellees

Thomas L. Sansonetti, Assistant Attorney General, Mark Haag, Katherine J. Barton, Attorneys, Department of Justice, Environment & Natural Resources, Division, Washington, D.C. 20530, (202) 353-7712, Robert H. Plaxico, Assistant U.S. Attorney San Diego, California.

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***1** ORDER BELOW

The order of the district court (Honorable I defendants' motion for summary judgment and denying the defendants' motion to dismiss or for judgment on the pleadings is unreported and is reproduced in the Appellants' Excerpts of Record (" ER") at pages 336-350. The order of the district court denying plaintiffs' motion for reconsideration is unpublished and is reproduced at ER449-457.

***2** STATEMENT OF JURISDICTION

The district court's jurisdiction is in dispute. Plaintiffs-Appellants Walter Rosales, Marie Toggery, and Karen Toggery (collectively, "Rosales") alleged jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1346 (United States as defendant); and 28 U.S.C. § 1353 and 25 U.S.C. § 345 (Indian claims to allotments).[FN1] As set forth in Part I, the United States contends that jurisdiction in district court was precluded by the Indian trust lands exception of the Quiet Title Act, 28 U.S.C. § 2409a(a) or, in the alternative, was barred by the Quiet Title Act's statute of limitations. In addition, as set forth in Part II, the district court lacked jurisdiction because, under this Court's precedent, the Jamul Indian Village, a federally recognized tribe, is an indispensable party to this suit.

FN1. The complaint (ER 12) also cites as sources of the district court's jurisdiction 25 U.S.C. §§ 81, 335, 348, and 465, as well as 18 U.S.C. § 1151 , none of which are jurisdictional provisions.

The district court entered final judgment on February 14, 2002 (CR 36). Rosales filed a timely Rule 59(e) motion on February 22, 2002 (CR 37, 38). See Fed. R.Civ.P. 59(e). The district court denied the motion for reconsideration on April 22, 2002 (CR 47). Rosales filed a timely notice of appeal on May 10, 2002 (CR 49). See Fed. R. App. P. 4(a)(1)(B) and 28 U.S.C. § 2107. This Court's jurisdiction rests on 28 U.S.C. § 1291.[FN2]

FN2. Rosales erroneously asserts (Br. 2) that this Court has jurisdiction under 28 U.S.C. §§ 158(a) and (d). These provisions pertain only to appeals from bankruptcy courts.

***3** STATEMENT OF THE ISSUES

This case involves a claim by certain alleged members of the Jamul Indian Village, a federally recognized tribe, to ownership of certain land - Parcel 597080-01 (" the Parcel") - that the United States claims to hold in trust as a reservation for the Jamul Indian Village as a whole. The issues on appeal are:

I. Whether the district court lacked jurisdiction in this case because, pursuant to the Quiet Title Act, the United States is immune to a suit claiming title to Indian trust lands or, in the alternative, Rosales' claim is barred by the Quiet Title Act's statute of limitations.

II. Whether the Jamul Indian Village is an indispensable party to this suit, which challenges the Village's beneficial ownership of the Parcel.

III. If jurisdiction existed in district court, whether the district court correctly held that the United States holds the Parcel in trust for the Jamul Indian Village as a whole, not as allotments for individual Jamul Indians.

STATEMENT OF THE CASE

In this case, Rosales and certain other Jamul Indians claim that they, not the tribe, hold beneficial title to a parcel of land that forms the major part of the Jamul Indian Village reservation. This case is one of numerous cases filed in

recent years in various courts by these plaintiffs, or other dissident members of the tribe represented by the same counsel, seeking to challenge the tribal leadership and/or its control over reservation lands.

The dispute is over 4.66 acres of land acquired by the United States in trust for " such Jamul Indians ... as the Secretary may designate." The Parcel was acquired in 1978 in order to allow the Jamul Indians to become a federally recognized tribe pursuant to a provision of the Indian Reorganization Act that allowed Indians residing "on the same reservation" to form a tribe. In 1981, the Village organized as a tribe under the IRA by adopting a constitution approved by the Secretary of the Interior, and the Secretary listed the Village as a federally recognized tribe in 1982.

Rosales contends that the Secretary acquired the Parcel for individual Jamul Indians, not the tribe, and that he and other Indians hold individual Indian " allotments" in the Parcel. Rosales claims, therefore, that the United States holds the land in trust not for the tribe but for him and certain other Jamul Indians, who hold beneficial title to undivided interests in the Parcel. Rosales claims to have learned of the United States' allegedly wrongful claim to hold the Parcel in trust for the tribe in 2001, when the Bureau of Indian Affairs published notice of a proposal to take additional land in trust for the tribe. The additional trust land will, among other things, allow the tribe to relocate tribal members from the Parcel, on which the tribe proposes to build a casino.

On February 14, 2002, the district court dismissed Rosales' claims for lack of ripeness and, in the alternative, granted summary judgment for the United States on the merits, holding that the language of the deed and extrinsic evidence demonstrated that the Village is the beneficial owner of the Parcel. The district court denied two subsequent motions for reconsideration by Rosales, and this appeal ensued.

STATEMENT OF FACTS

A. Statutory Background

1. *The General Allotment Act*

Rosales claims that beneficial title in the disputed Parcel is held by him and various individual Jamul Indians as "allotments." The practice of allotting land to individual Indians arose in the late 1800s. For most of the 19th century, the national policy toward Indians was to segregate reservation lands for the exclusive use and control of Indian tribes. See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 253-54 (1992). Late in the 19th century, however, this policy gave way to a policy of "allotting" reservation lands to tribe members individually, in order to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254; see generally, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) ("F. Cohen"), at 612-14. In 1887, to accomplish this

policy, Congress enacted the General Allotment Act (also known as the Dawes Act), 24 Stat. 388, as amended, 25 U.S.C. §§ 331 et seq., which empowered the President to allot most tribal lands without the consent of the Indians. Under the Allotment Act, a ***6** parcel was allotted and held in trust for 25 years, after which time a fee patent would issue to the Indian allottee, who could then sell it to non-Indians. 25 U.S.C. § 348; see generally *United States v. Mitchell,* 445 U.S. 535, 543-44 (1980).

The General Allotment Act and subsequent amendments provide for several types of allotments. Section 1 authorized the President to make allotments to individual Indians from Indian reservation lands. See 25 U.S.C. § 331. Section 4 permitted Indians not residing on a reservation to settle on "any surveyed or unsurveyed lands of the United States not otherwise appropriated" - in other words, public domain land - and to have the land allotted to them in the same manner as allotted reservation land. *Id.* § 334. Subsequent amendments authorized the Secretary of the Interior to make allotments within national forests to certain Indians occupying such land. *Id.* § 337.

The process of patenting an allotment to an Indian occurred in two steps. Upon approving an allotment, the Secretary issued a trust patent, declaring the United States to hold the allotment land in trust for 25 years for the sole use and benefit of the Indian (and his successors) to whom the allotment was made. 25 U.S.C. § 348. At the expiration of the trust period, the Secretary conveyed a fee patent for the allotment to the Indian owner. *Id.*

2. *Indian Reorganization Act of 1934*

By the 1920s, it was generally recognized that the allotment policy had failed to serve any beneficial purpose for Indians. F. Cohen at 614. Almost 90 ***7** million acres of tribal land were lost under the allotment policy, about two-thirds of the total acreage held by tribes in 1887. *Id.* In 1934, Congress generally repudiated the practice of allotment with the enactment of the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461 et seq. ("IRA"). See *County of Yakima,* 502 U.S. at 255; *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 650 n. 1 (2001). The IRA halted further allotments from Indian reservations and extended indefinitely the period in which the allotments would be held in trust by the United States. See 25 U.S.C. §§ 461, 462; *County of Yakima,* 502 U.S. at 255. The IRA also allowed unallotted Indian lands to be restored to tribal ownership. 25 U.S.C. § 463.

Most relevant to this litigation, the IRA authorized the Secretary of the Interior, at his or her discretion, to acquire interests in land, including by gift, "for the purpose of providing land for Indians." 25 U.S.C. § 465. This provision specifies that title to such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." The Secretary of the Interior is authorized to proclaim new Indian reservations on lands acquired under this provision. 25 U.S.C. § 467.

In addition, section 16 of the IRA allowed certain Indians living on the same reservation to organize and form tribes. Specifically, the Act provided:
Any Indian tribe, or tribes, residing on the same reservation, shall have the

right to organize for its common welfare, and may adopt an appropriate ***8** constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

IRA, § 16, 48 Stat. 987. This provision was subsequently amended to, among other things, eliminate the requirement that a tribe reside on the same reservation in order to have the right to organize. See Act of Nov. 1, 1988, Pub. L. 100-581, Title I, § 101, 102, Stat. 2938, codified at 25 U.S.C. § 476. At the time the Parcel was acquired, however, only a tribe of Indians that lived on a reservation could organize under this provision.

The IRA granted the right to organize as a recognized tribe to a broad range of Indians.[FN3] Section 19 of the Act defines the term "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. "Indian" is defined to include

> FN3. See discussion of Interior Solicitor Opinions interpreting the IRA, *infra* pp. 45-46.

persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, within the present boundaries of any Indian reservation, *and shall further include all other persons of one-half or more Indian blood.*

Id. (emphasis added).

***9** B. Factual Background

The Jamul Indian Village is a small Indian tribe located in Jamul, California, east of San Diego. Prior to the events at issue in this case, the Jamul Indians resided on private property owned by Lawrence and Donald Daley. ER12. The property was adjacent to an Indian graveyard encompassing 2.21 acres, which was owned by the Roman Catholic Bishop of Monterey and Los Angeles. *Id.*

During the 1970s, representatives of the Jamul Indian Village contacted the Bureau of Indian Affairs ("BIA"), an agency of the Department of the Interior, about obtaining federal recognition. ER284. BIA explained that the Village could seek recognition through one of two methods. It could apply for recognition pursuant to federal acknowledgment regulations, today codified at 25 C.F.R. Part 83, but this would entail a lengthy process of consideration. ER284. Or, the Village could seek recognition as a half-blood Indian community under sections 16 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 476 & 479). ER 284. As discussed *infra,* pp. 45-47, these sections provided that persons of one-half or more Indian blood, living on the same reservation, could organize and form an Indian tribe recognized under federal law.

The Village opted to seek recognition as a half-blood Indian community. ER284. In 1975, the Commissioner of Indian Affairs determined that certain members of the Jamul Indian Village qualified for individual benefits as half-blood Indians and held that "should these Jamul half-bloods secure, in trust status, ***10** the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA." *Id.*

On March 15, 1978, BIA notified the Jamul Indians that it had received a sufficient number of signatures of half-blood Indians "to proceed with the proposed acquisition through a donation to establish the Jamul Indian Reservation." ER128. On December 12, 1978, the Secretary of the Interior acquired, by gift from the Daleys, the 4.66 acres on which the Jamul Indians resided. The grant deed conveyed the Parcel to

[t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.

ER21. The United States accepted the conveyance on December 21, 1978, and the conveyance was recorded on December 27, 1978. ER21-23.

In December 1980, the Jamul Indians submitted a petition to the Commissioner of Indian Affairs requesting an election under the IRA to adopt a constitution, which the commissioner approved. ER285. On May 9, 1981, the half-blood members of the Jamul Indian Village ratified the constitution, which formally established the Jamul Indian Village, governed by a tribal council. ER410-19. Among other things, the constitution exercised tribal jurisdiction over all lands within the Village, and granted the tribal council power to prevent the sale, disposition, lease or encumbrance of tribal lands and to administer tribal ***11** assets. *Id.* The constitution was approved by Interior on July 7, 1981. ER419-420. On November 24, 1982, the Secretary of the Interior included the Jamul Indian Village on the list of federally recognized tribes published in the *Federal Register.*[FN4] See 47 Fed. Reg. 53,130, 53,132 (1982).

> FN4. At the time the Jamul Indian Village became a federally recognized tribe, the Department of the Interior made a distinction between "created" tribes, like the Jamul, and "historic" tribes. These distinctions were eliminated by Congress in 1994. See Act of May 31, 1994, Pub. L. No. 103-263, sec 5(b), 108 Stat. 709 (adding subsections (f) and (g) to 25 U.S.C. § 476). See generally ER300.

In 1982, the United States accepted a second parcel of land, consisting of 1.372 acres, into trust status for the tribe. This land is part of the adjacent land on which the Indian graveyard is located. ER85. Today, the land base of the Jamul Indian Village consists of the 6.03 acres encompassed in these two acquisitions. ER85.

During the 1990s, disputes about tribal membership and leadership arose. See, e.g., ER290-97. Rosales or other tribal members represented by Rosales' counsel in

this case filed numerous other suits challenging tribal leadership decisions and gaming plans. See *Rosales v. Pacific Regional Director. Bureau of Indian Affairs,* No. IBIA 00-28-A (Interior Board of Indian Appeals ("IBIA")); *Jamul Indian Village v. Hunter,* Civ. No. 95-01310-R (S.D. Calif.); *Rosales v. Townsend,* No. 96cv6879 (S. D. Calif.); *Rosales v. United States,* No. 98-869-L (Fed. Cl.); *Rosales v. Kean Argovitz Resorts, Inc.,* No. 00cv1910-W(POR) (S.D. ***12** Calif.), aff'd, 35 Fed. Appx. 562 (9th Cir. 2002) (unpublished), cert. denied, 123 S. Ct. 437 (2002). All cases except the case before the IBIA, which is still pending, have been dismissed. Rosales filed this case two weeks after *Kean Argovitz* was dismissed. [FN5]

FN5. Information on the disputes underlying these cases is provided in Martin Lasden, *Playing the Race Card,* California Lawyer, January 2003, at 18-25.

On February 5, 2001, BIA provided notice that the Jamul Indian Village Reservation had applied to have the United States acquire approximately 101 acres of property in trust for the Village. ER83. The accompanying application detailed the need for the land for the purposes of housing, economic development, and other community needs. ER86. Among other things, the application explained that the Village planned to construct a casino/resort development on its existing property, and that the 15 existing home sites on the Reservation would need to be moved to the newly acquired land. ER88.

C. Course of Proceedings and Disposition Below

On May 30, 2001, Rosales filed a complaint for declaratory and injunctive relief against "the United States of America, and its divisions, including, but not limited to, the Department of the Interior, the Bureau of Indian Affairs, and the National Indian Gaming Commission" (collectively, "United States"), as well as Does 1 through 20. The complaint alleged that upon the United States' acquisition of the Parcel, Rosales became entitled to it as an allotment under the IRA and the ***13** General Allotment Act of 1887. ER13, 15. The complaint alleged that the United States' February 5, 2001 publication of the notice proposing to take additional land into trust for the Village, in order to allow a casino to be built on the Parcel, illegally denied and excluded him from his allotment. ER14, 15. Rosales sought an order: (I) declaring that he became entitled to the allotment on December 27, 1978, when the conveyance of the Parcel was recorded; (2) compelling the United States to issue him a trust patent for the Parcel; (3) enjoining the United States from denying or excluding him from the Parcel; (4) declaring the United States liable for money damages for the deprivation of use and benefit by Rosales of the Parcel; and (5) awarding attorneys fees and costs. ER16.

On February 14, 2002, the district court issued an order denying the United States' motion to dismiss or for judgment on the pleadings but granting its motion for summary judgment. The district court first determined that Rosales' claim to entitlement to allotment was not ripe because, under the General Allotment Act of 1887, the United States could convey land to individual Indians only after holding the land in trust for 25 years. ER346. Because the Parcel was not taken into trust

until 1978, Rosales would not be able to obtain a fee patent until at least 2003. ER347. In any event, the district court concluded that the General Allotment Act provisions were limited by the IRA, which extended indefinitely the 25-year trust period, thus precluding Rosales' from having any right to compel issuance of a fee ***14** patent for the Parcel.[FN6] *Id.*

> FN6. As Rosales states that he does not claim a right to a fee patent, only a trust patent, the United States does not pursue this ripeness argument on appeal.

In the alternative, the district court held that, even if the General Allotment Act was not modified by the IRA, its provisions did not apply to the Parcel, because it was accepted into trust pursuant to 25 U.S.C. § 465, not the General Allotment Act. The district court concluded that section 465 made no provision for the issuance of a fee patent for trust land to Indians. ER348.

Finally, the district court held that the language of the 1978 deed clearly conveyed the Parcel in trust to the United States for the benefit of the Jamul Indian Village as a whole, not for individual Indians. ER349. The court found support for this reading of the deed in the 1978 letter from the Department of the Interior, which noted that Interior had received 11 of 13 signatures of Jamul Indians to proceed with the acquisition of the Parcel to "establish the Jamul Indian Reservation." *Id.*

Rosales moved for a new trial and relief from judgment, which the district court construed as a Federal Rule of Civil Procedure 59(e) motion for reconsideration. ER453. Rosales contended that the court misconstrued his claim to be a request for fee patent rather than trust patent. The district court noted that either claim failed under the court's reading of the 1978 deed as designating the tribe as the beneficiary of the Parcel's acquisition. *Id.* The court also rejected ***15** Rosales' claim that the United States could not have accepted the Parcel into trust for the benefit of the tribe in 1978, because the tribe was not federally recognized at that time. ER454. The district court cited prior case law of this Circuit, *Pit River Home and Agric. Coop. Ass'n v. United States,* 30 F.3d 1088 (9th Cir. 1994), which interpreted language similar to that of the 1978 deed as referring to an entire tribe when it was organized and recognized as such. ER455. On this basis, the district court also rejected Rosales' contention that the court must make specific findings of fact as to whether a tribe existed in 1978. ER456.

On May 2, 2002, Rosales filed a "Request to Set a Motion for Relief from Judgment." The Court rejected the filing on May 3, 2002 (CR48).

SUMMARY OF THE ARGUMENT

1. This case should be dismissed for lack of jurisdiction, because the United States is immune to this suit under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"). The QTA provides the exclusive waiver of federal sovereign immunity in suits that claim title to land in which the United States holds an interest. The QTA expressly bars suits against the United States claiming title to lands held in trust for Indians. Accordingly this suit, in which Rosales seeks beneficial title to land that the United States claims to hold in trust for the Jamul Indian

Village, is barred by the QTA.

In the alternative, jurisdiction is barred by the QTA's 12-year statute of limitations because Rosales was put on notice that the United States deemed the Parcel to be beneficially owned by the tribe in 1981, when Interior approved the Jamul Indian Village's constitution, which formally organized the Village as a tribe and exercised tribal authority over the Parcel. Additional notice was provided in 1982, when Interior listed the Jamul Indian Village as a federally recognized tribe pursuant to section 16 of the Indian Reorganization Act, which permitted Indians living on a "reservation" to form a tribe.

Jurisdiction is not provided by 25 U.S.C. § 345, which waives the United States' sovereign immunity for Indian claims of right to original allotments, because - as a threshold matter - the QTA provides the exclusive means by which Rosales may challenge the United States' trust interest in the Parcel. Even if the QTA did not bar jurisdiction under 25 U.S.C. § 345, however, jurisdiction would not lie because the Parcel is not an "allotment" within the meaning of section 345. The Parcel was not selected by Rosales as a matter of right from reservation or public domain land but rather was acquired by the Secretary of the Interior in his discretion from private owners. And even if the Parcel were an allotment, section 345 would not waive the United States' immunity to suit because Rosales does not claim that the allotment was never made, but rather that the United States allotted the Parcel to him but now refuses to recognize his beneficial title to it. 25 U.S.C. § 345 does not waive immunity to such claims brought in relation to existing allotments.

2. Rosales' claims also should be dismissed because, under the precedent of this Court, the Jamul Indian Village, a federally recognized tribe, is an indispensable party to this suit. Rosales' claim to the Parcel seeks to strip the Village of the major part of its reservation, of which the Village has beneficial ownership and sovereign control. In cases like this one, involving competing claims to trust property, this Court has held that the tribe whose trust interest is challenged, if not joined as a party, would not be bound by an order determining the property's beneficial ownership and could prevent the award of complete relief to the plaintiff. In addition, the Village's ability to protect its interests in the Parcel could be impeded by its absence, because - in the rather unusual circumstances of this case, where the primary issue is which group of Indians has beneficial ownership of trust land and the suit does not challenge any federal agency action - this Court has held that the United States may not adequately represent the Village's interests. Thus, Rosales is a necessary party who cannot be joined due to its tribal sovereign immunity. Given the severe prejudice the Village would suffer by not being able to represent its interests in the Parcel, the impossibility of ensuring that this litigation could resolve Rosales' claims, and the interests in preserving the Village's sovereign immunity, the Village is also an indispensable party, requiring dismissal of this suit.

3. If this Court determines that the district court had jurisdiction over Rosales' claims, the district court's grant of summary judgment to the United States on the merits should be affirmed. Rosales' claim to an Indian allotment and trust patent to a portion of the Parcel fails on its face because no statutory provisions

providing for allotments are applicable to the Parcel. Rosales' claim that the Secretary of the Interior acquired the Parcel in trust for individual Indians under the Indian Reorganization Act, 25 U.S.C § 465, also fails because the undisputed facts establish that the Secretary acquired the Parcel for the Jamul Indian tribe, to enable it to become a recognized Indian tribe pursuant to section 16 of the Indian Reorganization Act. Furthermore, the Secretary designated the Jamul Indian tribe as the beneficial owner of the Parcel in 1981, when he approved the constitution formally organizing the Jamul Indian tribe and exercising tribal authority over the Parcel. That designation was further confirmed in 1982 when the Secretary listed the Jamul Indian Village as a federally recognized tribe based on the Jamul Indians' residence on a "reservation."

ARGUMENT

Standard of Review

The district court's grant of summary judgment is reviewed de novo. *Western Energy Co. v. Dept. of Interior,* 932 F.2d 807, 809 (9th Cir. 1991).

I. ROSALES' CLAIMS AGAINST THE UNITED STATES ARE BARRED BY SOVEREIGN IMMUNITY.

A. Rosales' Claims are Barred by the Indian Trust Lands Exception to the Quiet Title Act.

The district court lacked jurisdiction over this case because the United ***19** States is immune to this suit under the QTA.[FN7] Waiver of the federal government's sovereign immunity must be "unequivocally expressed." *Lane v. Pena,* 518 U.S. 187, 192 (1996); *United States v. Mitchell,* 445 U.S. 535, 538 (1980); *Metropolitan Water District,* 830 F.2d at 142. A waiver of sovereign immunity may not be implied, see *Lane,* 518 U.S. at 192, and must be strictly construed. See *Library of Congress v. Shaw,* 478 U.S. 310 (1986); *United States v. Sherwood,* 312 U.S. 584, 590 (1941). If the statutory text is ambiguous, the statute must be construed in favor of immunity, so long as that construction is plausible. See *United States v. Williams,* 514 U.S. 527, 531 (1995); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 37 (1992). When Congress attaches conditions to legislation waiving sovereign immunity of the United States, "those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 287 (1983).

FN7. This Court may reach this question even though the district court did not address it. See *Metropolitan Water District v. United States,* 830 F.2d 139 (1987), aff'd sub nom. by an equally divided court, *California v. United States,* 490 U.S. 920 (1989) (dismissing suit as barred by QTA despite failure of U.S. to raise issue in district court). Furthermore, the Court may affirm the district court on any basis supported in the record. See *Vernon v. Heckler,* 811 F.2d. 1274, 1277 (9th Cir. 1987).

The QTA waives the United States' sovereign immunity for civil actions "to adjudicate a disputed title to real property in which the United States claims an ***20** interest." 28 U.S.C. § 2409a(a). The QTA provides the "exclusive means by which adverse claimants may challenge the United States' title to real property." *Block v. North Dakota,* 461 U.S. 273, 286 (1983); see also *Alaska v. Babbitt (Albert Allotment),* 38 F.3d 1068, 1072 (9th Cir. 1994) ("*Albert*"). The sovereign immunity waiver in the QTA, however, "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a); *United States v. Mottaz,* 476 U.S. 834, 842 (1986). Thus, if the United States claims an interest in real property based on its status as trust lands, the QTA does not waive the government's immunity.[FN8] See *Mottaz,* 476 U.S. at 843; *Albert,* 38 F.3d at 1073; *Wildman v. United States,* 827 F.2d 1306, 1309 (9th Cir. 1987).

> FN8. Excluding suits against the United States seeking title to trust lands is necessary to prevent abridgment of "solemn obligations" that the federal government made to Indians regarding Indian lands. "A unilateral waiver of the Federal Government's immunity would subject those lands to suit without the Indians' consent." *Mottaz,* 476 U.S. at 843 n.6; *Albert,* 38 F.3d at 1072 n.4.

Rosales' claim is barred by the QTA. The QTA governs jurisdiction over Rosales' claim because the claim seeks to adjudicate a disputed title to real property in which the United States claims an interest. Rosales disputes title to the Parcel, alleging that beneficial title in the Parcel is held by him and certain other individual Jamul Indians, not the Jamul Indian Village. The United States claims an interest in the Parcel, claiming to hold legal title to the Parcel in trust for the beneficial use of the Village. The QTA, however, does not waive sovereign ***21** immunity for claims such as Rosales' that dispute title to Indian trust land. Thus, this case must be dismissed for lack of jurisdiction.

In this regard, it makes no difference that the United States would continue to hold the property in trust even if Rosales' claim succeeded. A holding in favor of Rosales would alter the United States' legal interest in the property. Rather than holding the Parcel in trust for the beneficial interest of the Jamul Indian Village, the United States would hold the property in trust for the beneficial use of Rosales and other individual Jamul Indians. See *Albert,* 38 F.3d at 1074 (QTA's waiver of sovereign immunity and Indian lands exception apply to cases involving claims for less than fee simple title interests to disputed property). A tribe's beneficial ownership is a property interest, "as securely safeguarded as is fee simple absolute title," that is held in common by the United States and the tribe. *United States v. Shoshone Tribe,* 304 U.S. 111, 117 (1938). Thus, a transfer of the beneficial interest from one tribe to another alters the United States' interest in the property by altering its trust obligations from one tribe to another. Thus, the QTA governs a suit that seeks to quiet equitable title in others than the tribe or Indian for whom the United States claims to hold such title. See *Metropolitan Water District,* 830 F.2d at 143; accord *Florida v. United States Dept. of Interior,* 768 F.2d 1248, 1254 (11th Cir. 1985).

Rosales also cannot successfully argue that his claim may proceed because he is an

Indian. The plain language of the QTA states that the sovereign immunity ***22** waiver in section 2409a(a) "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). The statute contains no language limiting this exception to non-Indian claimants. Under the strict construction required for sovereign immunity waivers, this limitation on the waiver applies to all claims by all claimants. See *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 745 (8th Cir. 2001) , cert denied, 122 S. Ct. 1541 (2002) (QTA's waiver of sovereign immunity construed strictly); see also *Mottaz,* 476 U.S. at 843 ("when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity"). There is no exception from this rule of strict construction for Indian plaintiffs. *Mottaz,* 476 U.S. at 851; *Sisseton-Wahpeton Sioux Tribe v. United States,* 895 F.2d 588, 592 (9th Cir. 1990); see also *Naganab v. Hitchcock,* 202 U.S. 473 (1906) (no jurisdiction over Indian land claims against the United States where the U.S. has not waived immunity or consented to suit). Including claims by Indian tribes within the scope of this exception to the QTA's sovereign immunity waiver is consistent with court decisions applying other limitations to the sovereign immunity waiver in the QTA to claims brought by tribes. See *Mottaz,* 476 U.S. at 847-48 (applying statute of limitations in QTA to claim by Indian); *Groz v. Andrus,* 556 F.2d 972 (9th Cir. 1977) (same); *Spirit Lake Tribe,* 262 F.3d 732 (same).

Finally, Rosales cannot avoid the QTA by asserting that the United States' ***23** claim to hold the Parcel in trust for the Village is in question. This Court recognizes that "the QTA's limitations on actions challenging the United States' assertions of title apply without regard to the ultimate validity of those assertions." *Alaska,* 38 F.3d at 1076. "'The immunity of the government applies whether the government is right or wrong.'" *Metropolitan Water District,* 830 F.2d at 144 (quoting *Wildman,* 827 F.2d at 1309); *Alaska v. Babbitt (Foster Allotment),* 75 F.3d 449, 452 (9th Cir. 1996) ("*Foster*"). All that the United States needs to show is that it has a "colorable claim," *Wildman,* 827 F.2d at 1309, - *i.e.,* that it "had some rationale" for its claim. *Albert,* 38 F.3d at 1076. The United States has at least a colorable claim regarding the trust status of the Parcel. It is undisputed that the United States has a trust interest in the Parcel; it is only the nature of that trust interest that is in dispute. Cf. *Albert,* 38 F.3d at 1076 (U.S. has colorable claim where it holds a trust interest that would remain regardless of lawsuit's outcome). Furthermore, the record shows that the United States acquired the Parcel to enable the Jamul Indian Village to become a federally recognized tribe and has treated the Parcel as tribal land since 1981, when it approved the Village's constitution. See discussion in Part III. Thus, the United States' claim that it holds the land in trust for the Jamul Indian Village is not arbitrary or frivolous and brings this claim within the purview of the QTA. See *Foster,* 75 F.3d at 451 (US claim to trust land colorable where US treated land as held in trust for many years without challenge). Accordingly, the district court lacked jurisdiction over this suit.

***24** B. Rosales' Claims Also Are Barred by the QTA's 12-Year Statute of Limitations.

The district court additionally lacked jurisdiction over Rosales' claims because this suit was filed outside of the 12-year statute of limitations provided in the

QTA. Under the QTA, an action is barred "unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409(g). An action is deemed to have accrued "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* A plaintiff must comply with the limitations period to effectuate the sovereign immunity waiver in the QTA. Thus, "the QTA statute of limitations acts as a jurisdictional bar unlike most statutes of limitations, which are affirmative defenses."[FN9] ***25***Spirit Lake Tribe,* 262 F.3d at 738.

FN9. The Supreme Court has repeatedly described the QTA's statute of limitations in jurisdictional terms. See *Mottaz,* 476 U.S. at 844 (noting that "the terms of [a] waiver of sovereign immunity define the extent of the court's jurisdiction" and that the QTA's "limitations period is a central condition of the consent given by the Act"); *Block,* 461 U.S. at 292 ("If North Dakota's suit is barred by §2409a(f) [now (g)], the courts below had no jurisdiction to inquire into the merits."). In addition, to the extent this Court has deemed statutes of limitations not to be jurisdictional, see *Washington v. Garrett,* 10 F.3d 1421, 1437 (9th Cir. 1993), but see *Cedars-Sinai Medical Center v. Shalala,* 125 F.3d 765, 770 (9th Cir. 1997), it has generally relied on the Supreme Court's ruling in *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89 (1990). *Irwin* held that the rebuttable presumption of equitable tolling of statutes of limitations applicable to suits against private defendants applies to suits against the United States unless Congress provides otherwise. In *United States v. Beggerly,* 524 U.S. 38 (1998), however, the Supreme Court held that equitable tolling is not available in a suit brought pursuant to the QTA, supporting the United States' contention that Congress intended the statute of limitations in the QTA to be jurisdictional.

Rosales "knew or should have known" that the United States claimed to hold the Parcel in trust as of July 7, 1981, when Interior approved the constitution of the Jamul Indian Village (ER420). The constitution formally organized the Village as a tribe and declared that the jurisdiction of the "Jamul Indian Village shall extend to all lands now within the confines of the Jamul Indian Village." ER410. The Parcel was within the confines of the Jamul Indian Village; thus Interior's approval of the constitution put Rosales on notice that the United States deemed the tribe, not the individual Jamul Indians, to hold beneficial title to the Parcel.[FN10] Rosales himself was a member of the election board that certified the results of the vote on the constitution to Interior (ER419), and had actual notice of the language of the constitution and the Secretary's approval of it.

FN10. Rosales asserts (Br. 43 n. 11) that the Parcel was not "within the confines of the Jamul Indian Village" at the time the constitution was enacted on the grounds that the Parcel was not held in trust for the tribe as a whole at that time. Under Rosales' interpretation, there would have been *no* lands within the Village at the time of the constitution, because no lands would be considered to be held in trust for the tribe at that time. That reading is unsupportable in light of the specific language of the

> constitution which states that the tribe's jurisdiction extends "to all lands *now* within the confines" of the village. ER410. Rather, the constitution necessarily referred to lands physically located within the Village, which included the Parcel and the 2.21 acres owned by the Catholic diocese on which the Indian burial ground was located.

Interior provided further notice that the Parcel was held in trust for the Jamul Indian Village as a whole on November 24, 1982, when Interior published ***26** notice in the *Federal Register* (47 Fed. Reg. at 53,132) that the Jamul Indian Village was a federally recognized Indian tribe. See *Shiny Rock Mining Corp. v. United States,* 906 F.2d 1362, 1362, (9th Cir. 1990) (publication in the *Federal Register* is legally sufficient notice of government action regardless of a plaintiff's actual knowledge). As discussed *infra,* Part III.A, federal recognition of the Jamul Indian Village depended, as a matter of law, on the fact that the Parcel constituted a "reservation" upon which half-blood Indians resided, which was a necessary condition for the formation of a tribe. Accordingly, Interior's recognition of the Jamul Indian Village as a tribe in 1982 provided notice that Interior deemed the Parcel to constitute the Jamul Indian Village's reservation, not property owned by individual Jamul Indians.

C. The General Allotment Act, 25 U.S.C. § 345, Does Not Waive the United States' Sovereign Immunity to Rosales' Claims.

Rosales cannot avoid the express limitations of the QTA by characterizing his suit as a claim for an allotment under 25 U.S.C. § 345, a provision of the General Allotment Act. As a threshold matter, the QTA provides the exclusive means for challenging the United States' title in real property. In any event, Rosales' claim does not come within the sovereign immunity waiver provided by 25 U.S.C § 345 . That provision waives the United States' sovereign immunity to suits "involving the right ... to any allotment ... under any law or treaty. Rosales does not seek an "allotment" to which he had any "right" under "any law or treaty" ***27** within the meaning of 25 U.S.C. § 345. In addition, section 345 limits the sovereign immunity waiver to actions seeking an original allotment. *Mottaz,* 476 U.S. at 845-46. Rosales does not seek an "original" allotment but asserts that his existing allotment was alienated by the United States.[FN11]

> FN11. 25 U.S.C. § 345 not only fails to provide a waiver of sovereign immunity for Rosales' claim to beneficial ownership of the Parcel, but also fails to confer jurisdiction over Rosales claim for damages. See *Vicenti v. United States,* 470 F.2d 845 (10th Cir. 1972).

The term "allotment" as used in 25 U.S.C. § 345 means "a selection of specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 142 (1972); see also *Kicking Woman v. Hodel,* 878 F.2d 1203, 1204 n.1 (9th Cir. 1989) (quoting *Affiliated Ute* definition of allotment); *Price v. United States,* 7 F.3d 968, 969 n.5 (10th Cir. 1993) (same). The General Allotment Act provides for allotments to be made from three types of land: Indian reservations (25 U.S.C. § 331, repealed by 25 U.S.C. § 461); public domain land (25 U.S.C. § 334); and national forests (25 U.S.C. § 337)

. 25 U.S.C. § 345 "provides governmental consent for only actions for allotment" as so defined. *Id.;* see also Wright & Miller *Federal Practice and Procedure* § 3579 ("'Allotment' is a term of art and most claims by Indians to land do not involve an allotment in the sense in which the statute uses the term.")

The Parcel is not an "allotment" within the meaning of 25 U.S.C. § 345 because it was not awarded from a "common holding" as required by *Affiliated* ***28** *Utes*. The Parcel was not reservation land, public domain, or national forest - the types of land from which an allotment could be made under the General Allotment Act - but rather was acquired by the United States from a private party.[FN12] Thus, jurisdiction fails on this ground alone.

FN12. Rosales is wrong (Br. 20-21) that the Parcel was allotted pursuant to 25

U.S.C. § 334. That provision, by its terms, provides entitlement only to "surveyed or unsurveyed lands of the United States," while the Parcel that Rosales claims was allotted in part to him was land in private ownership. The cases cited by Rosales (Br. 22-23) to support his claim to an allotment provide no such support. *Chase v. McMasters,* 573 F.2d 1011, 1016 (8th Cir. 1978) held that the United States may take land into trust for individual Indians but did not address whether such land may be deemed an "allotment" pursuant to the General Allotment Act. *City of Tacoma v. Andrus,* 457 F. Supp. 342 (D.D.C. 1978) merely held that the Secretary may take non-trust land owned by an Indian or a tribe into trust and did not pertain to allotments.

Jurisdiction also fails because the Parcel was not land that any law or treaty gave Rosales any "right" to, as required by 25 U.S.C. § 345. Rather, the Parcel's acquisition was authorized by 25 U.S.C. § 465, which authorizes the Secretary, "in his discretion," to acquire land into trust for Indians, but imposes no mandatory duty to do so. See *Florida Dep't of Business Regulation v. U.S. Dep't of the Interior,* 768 F.2d 1248, 1250 (11th Cir. 1985) (decision to acquire land in trust for Indians is exercise of Secretary's discretion); *Cermak v. Babbitt,* 234 F.3d 1356, 1361-1363 (Fed. Cir. 2000), cert. denied 522 U.S. 1021 (2001) (25 U.S.C. § 345 does not confer jurisdiction over claim to land acquired at Secretary's discretion and for which no trust or fee patent was promised). Rosales contends that the ***29** terms of the deed conveying the Parcel to the United States grant him a right to beneficial ownership of the Parcel, but such a claim is not covered by § 345.

Furthermore, section 345 does not provide Rosales the necessary waiver of sovereign immunity because Rosales makes a claim "in relation to" a purported existing allotment rather than a claim seeking the issuance of an "original" allotment. The Supreme Court has squarely held that section 345 does not waive the United States' sovereign immunity for Indian claims made "in relation to" allotments, but only to obtain an allotment in the first instance. See *Mottaz,* 476 U.S. at 846; see also *Pinkham v. Lewiston Orchards Irrigation Dist.,* 862 F.2d 184, 187, 188 n.2 (9th Cir. 1988) (section 345 does not waive the government's immunity with regard to cases involving the interests and rights in an allotment after it

has been acquired); *Albert,* 38 F.3d at 1073 n.5 (same).

Rosales does not claim that the United States refused to acquire the Parcel for him in the first instance but rather claims that the United States has wrongfully deprived him of land that *was* allotted to him when it was conveyed to the United States in 1978. ER13. Rosales claims that the United States wrongfully excluded him from his allotment in February 2001 when it published notice of a proposal to take additional land into trust for the Jamul Indian Village. ER14. This is analogous to the claim rejected by the Supreme Court in *Mottaz,* in which an Indian plaintiff claimed that land allotted to her had been illegally sold to a third party by the United States. Rosales does not seek original title, but seeks to ***30** recover title previously granted. Hence, Rosales' claim is barred by the QTA.

Finally, even if 25 U.S.C. § 345 did provide a sovereign immunity waiver, the claim would be barred by the statute of limitations. 28 U.S.C. § 2401 (a) provides a general six-year statute of limitations governing civil suits against the United States, including suits brought pursuant to 25 U.S.C. § 345. *Christensen v. United States,* 755 F.2d 705, 707 (9th Cir. 1985); *Nichols v. Rysavy,* 809 F.2d 1317, 1327 (8th Cir. 1987). A complaint must be filed within six years after "the right of action first accrues." 28 U.S.C. § 2401 (a). A right of action accrues when " plaintiffs knew or should have known the facts on which their claims are based." *Sisseton-Wahpeton Sioux Tribe,* 895 F.2d at 594; *Loudner v. United States,* 108 F.3d 896, 902 (8th Cir. 1997); *Lord v. Babbitt,* 992 F.2d 1150, 1160 (D. Alaska 1998). Rosales' claims under 25 U.S.C. § 345 were untimely filed for the same reasons that Rosales' claims are barred by the QTA's statute of limitations.[FN13] See *supra,* Part I.B.

FN13. The statute of limitations at 28 U.S.C. § 2401(a) is not jurisdictional and may be waived. *Cedars-Sinai Medical Center v. Oui Tam Relator,* 125 F.3d 765, 770 (9th Cir. 1997). The United States did not raise the statute of limitations defense in district court, but this Court may affirm the district court's decision on any basis the record supports, including one the district court did not reach. See *Herring v. Fed. Deposit Ins. Corp.,* 82 F.3d 282, 284 (9th Cir. 1996).

***31** II. ROSALES' CLAIM TO THE PARCEL IS BARRED BECAUSE THE JAMUL INDIAN VILLAGE IS AN INDISPENSABLE PARTY.

Under the precedent of this Court, Rosales' claim to the Jamul Indian Village's land is barred because the Jamul Indian Village is an indispensable party under Federal Rule of Civil Procedure 19.[FN14] Several significant factors in this case compel this conclusion. First, the suit's primary goal is to divest the Jamul Indian Village of the Parcel, of which it has beneficial ownership and sovereign control. Because this Court holds that a non-party tribe is not bound by a ruling pertaining to its beneficial ownership of trust land, the Village would not be bound by a ruling issued in its absence in this case. Thus, the Village could still assert its beneficial ownership of the lands, preventing the relief sought in this case from being granted. Second, the Village has an exceptional interest at stake in this case, which seeks to strip it of the major part of its reservation and, under this Court's precedent, the potentially conflicting trust

duties posed by the competing claims to the Parcel could prevent the United States from adequately representing the Village in its absence. Third, the Village, as a federally recognized tribe, is immune to suit, and Rosales' claim against the United States essentially seeks to circumvent this immunity, to the substantial prejudice of the Village. Under such ***32** circumstances, this Court has held that dismissal is required.

FN14. Although the district court did not address the question of whether the Jamul Indian Village was an indispensable party, this Court may address the question in the first instance. See *UOP v. United States,* 99 F.3d 344, 347 (9th Cir. 1996); *Pit River,* 30 F.3d at 1099.

A. The Jamul Indian Village is a Necessary Party to the Suit.

Under Rule 19, a court undertakes a three-step analysis to determine if a party is indispensable. First, the court determines if a party is needed for the litigation under Rule 19(a). See Fed. R.Civ.P. 19(a); *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.,* 276 F.3d 1150, 1155 (9th Cir. 2002), cert. denied, 123 S. Ct. 98 (2002). Such a party is generally termed a "necessary party." See *Shields v. Barrow,* 58 U.S. 130, 139 (1854) (defining difference between " necessary" and "indispensable"). If a party is necessary to the litigation, the court then determines if joinder of the party is feasible. If joinder is not feasible, the court applies the factors in Rule 19(b) to determine whether "in equity and good conscience" the litigation can proceed without the necessary party. See Fed. R.Civ.P. 19(b); *American Greyhound Racing Inc. v. Hull,* 305 F.3d 1015, 1012 (9th Cir. 2002). If the court determines the litigation cannot proceed, the party is "indispensable" and the case must be dismissed. *Dawavendewa,* 276 F.3d at 1155.

The Jamul Indian Village is a necessary party to this litigation. Under Rule 19(a) , a party is a necessary party if:
(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or ***33** impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R.Civ.P. 19(a). Thus, a party is a necessary party if one of the three criteria of Rule 19(a) is met: (1) complete relief cannot be afforded in the party's absence; (2) the party has an interest in the action and its ability to protect that action would be impeded in its absence; or (3) the party's absence would risk inconsistent obligations being imposed on present parties, generally defendants. For the reasons set forth below, the Jamul Indian Village is a necessary party.

1. *Complete relief cannot be afforded in the Jamul Indian Village's absence.*

Under this Court's precedent, complete relief could not be accorded in the Jamul Indian Village's absence. Courts have frequently held that complete relief may not be accorded in actions where present and absent parties make claims to overlapping or mutually exclusive property interests. In *Pit River Home and Agric. Coop. Ass'n v. United States,* 30 F.3d 1088 (9th Cir. 1994), a group of Indian families claiming to be a federally recognized tribe claimed beneficial ownership of lands held in trust by the United States for the Pit River Indian Tribe. This Court held the tribal council was a necessary party because "judgment against the government would not bind the Council, which could assert its right to possess the Ranch." *Id.* at 1099. Similarly, courts have held that complete relief cannot be ***34** awarded in a dispute over contract or lease rights unless all parties to the contract or lease are joined. See *Clinton v. Babbitt,* 180 F.3d 1081, 1088 (9th Cir. 1999) (lease agreement); *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1326 (9th Cir. 1975) (same); *Soberay Machine & Equipment Co. v. MRF Ltd., Inc.,* 181 F.3d 759, 764 (6th Cir. 1999) (contract).

Here, both the Jamul Indian Village and Rosales claim beneficial ownership of the Parcel. The Court could provide relief to Rosales only by adjudicating the Village's property interest in those lands. Under the reasoning of *Pit River,* however, if the Village is not a party to this litigation, it would not be legally bound by the district court's determination of its property interest. 30 F.3d at 1099. Thus, if the Court concluded that Rosales and other individual Jamul Indians were the beneficial owners of the Parcel, the Jamul Indian Village could still assert its beneficial ownership in the lands, and complete relief could not be accorded.

2. *The Jamul Indian Village's ability to protect its interest in this action would be impeded by its absence.*

The Jamul Indian Village is also a necessary party under Rule 19(a)(2)(i). Because Rosales seeks the conveyance to him and other individual Indians of the beneficial ownership of the Parcel, the Jamul Indian Village unquestionably has an interest in the litigation. See *Wichita and Affiliated Tribes of Okla. v. Hodel,* 788 F.2d 765, 774 (D.C. Cir. 1986) (tribe's beneficiary interest in trust makes it ***35** necessary party to action by minority tribe seeking to obtain redistributions of future income); *Dawavendewa,* 276 F.3d at 1156 ("a party to a challenged contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract"); *Makah Indian Tribe v. Verity,* 910 F.2d 555, 559 (9th Cir. 1990) (absent tribes have interest in suit seeking to allocate fishing rights held by them to another tribe); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1502 (9th Cir. 1991) (O'Scannlain, J., dissenting) (noting that "[i]t is appropriate to dispose of cases [] through Rule 19" where "the court quite literally cannot give the plaintiff the interest that it seeks without simultaneously taking that interest away from the absent non-party "). See also *McClendon v. United States,* 885 F.2d 627, 633 (9th Cir. 1989) (tribe is necessary party to action seeking to enforce a lease agreement signed by the tribe); *Enterprise Mgmt. Consultants, Inc. v. United States,* 883 F.2d 890, 893 (10th Cir. 1989) (tribe's interest in contract to which it is a party makes it necessary party to action seeking to validate contract with tribe).

Furthermore, under this Court's precedent, the Jamul Indian Village's absence may impede its ability to protect that interest. An absent party's interest in litigation may be impeded if none of the present defendants can adequately represent its interests. See *Shermoen v. United States,* 982 F.2d 1312 (9th Cir. 1992); *Makah,* 910 F.2d at 558; *Wichita and Affiliated Tribes,* 788 F.3d at 774. Under many circumstances the United States is capable of adequately representing ***36** an absent tribe's interests in litigation against the United States. See, e.g., *Washington v. Daley,* 173 F.3d 1158 (9th Cir. 1999); *Southwest Ctr. for Biological Diversity v. Babbitt,* 150 F.3d 1152 (9th Cir. 1998). This may be true even where the plaintiff is another Indian tribe, see, e.g., *Ramah Navajo Sch. Bd., Inc. v. Babbitt,* 87 F.3d 1338 (D.C. Cir. 1996), and even where the suit implicates the absent tribe's interest in land, see *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001), cert. denied, 122 S. Ct. 807 (2002). That is because in many suits involving opposing interests of tribes, the United States' interest in defending federal agency action is aligned with the interests of the absent tribe, and the United States does not have a conflicting duty to the plaintiff tribe.[FN15]

> FN15. In *Sac and Fox Nation,* for example, the Tenth Circuit agreed held that the United States could adequately represent the interests of the Wyandotte Tribe in a challenge by the Sac and Fox Nation to the Secretary's decision to take certain land into trust for the Wyandotte, where the Secretary's and Wyandotte's interests were aligned and the Sac and Fox Nation did not claim beneficial ownership of the land for itself. 240 F.3d at 1258-1259.

Under the rather unusual circumstances presented here, however, the ability of the United States to represent the Jamul Indian Village's interests may not be assured. In this case, Rosales and the Jamul Indian Village claim beneficial ownership of the Parcel; thus both claim that the United States has a trust responsibility to them with respect to the Parcel. While the United States normally does not have a trust responsibility to individual Indians, here the competing ***37** claims to trust land raise the possibility of conflicting trust interests on the part of the United States. Here, where the United States is not defending an agency action, or affirmatively seeking to represent the Jamul Indian Village, the United States' interests might not necessarily be consistently aligned with the Village throughout the litigation. Accordingly, this Court has held that the United States cannot adequately represent absent tribes where there are competing Indian interests in the beneficial ownership of reservation land. See *Pit River,* 30 F.3d at 1101; see also *Makah,* 910 F.2d at 559, 560 (United States cannot adequately represent competing tribal interests in fishing rights); *Shermoen,* 982 F.2d at 1317 ("United States may adequately represent an Indian tribe unless there is a conflict of interest between the United States and the tribe"); *cf. Manybeads v. United States,* 209 F.3d 1164 (9th Cir. 2000) (United States cannot adequate represent absent tribe against plaintiffs for whom it is also trustee). Thus, the Jamul Indian Village is a necessary party under Rule 19(a)(2)(i).

B. The Jamul Indian Village is an Indispensable Party Under Rule 19(b).

The Jamul Indian Village is not only a necessary party, but also an indispensable party, requiring dismissal of the case. Joinder is not feasible here because suit against the Jamul Indian Village is barred by sovereign immunity. It is well-established that Indian tribes are immune from suit unless Congress authorized the suit or the tribe has waived its immunity. See, e.g., ***38***Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Dawavendewa*, 276 F.3d at 1158. A waiver of an Indian tribe's sovereign immunity must be unequivocally expressed by the tribe or Congress; it cannot be implied. See *Santa Clara Pueblo*, 436 U.S. at 58; *Dawavendewa*, 276 F.3d at 1158. There is no waiver, either by Congress or by the Jamul Indian Village, of the Village's sovereign immunity. See *Big Spring v. United States*, 767 F.2d 614 (9th Cir. 1985) (25 U.S.C. § 345 does not waive tribal immunity).

Where joinder is not feasible, the court determines whether "in equity and good conscience" the case should proceed in the party's absence or be dismissed. Fed. R.Civ.P. 19(b). Rule 19(b) lists four factors for the court to consider in making this determination: (i) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *Id.; American Greyhound*, 305 F.3d at 1024. These factors overlap with each other and with the Rule 19(a) analysis. See 3A Moore's Federal Practice ¶ 19.05[1][a], 19-80. In cases similar to this one, this Court has held that a balancing factors demonstrates that the absent tribe is an indispensable party. See ***39***Pit River*, 30 F.3d at 1101-03.

First, the prejudice to the Jamul Indian Village from proceeding with the case could be substantial. Prejudice is "virtually inescapable" where the claims of a party and an absentee are mutually exclusive. 3A Moore's Federal Practice ¶ 19.05[2][d], 19-93; see also *Wichita and Affiliated Tribes*, 788 F.2d at 774 (" Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence."). Here, the claims of Rosales and the Jamul Indian Village are not only conflicting, but threaten to strip the Jamul Indian Village of almost its entire reservation. As discussed above, in Part II.A.2, this prejudice is not necessarily addressed by the United States' presence in the case because the precedent of this Court holds that the United States may not be able to adequately represent a tribe where there are competing Indian claims to beneficial ownership of trust property. Second, relief cannot be shaped to lessen the prejudice, because the relief sought is the declaration that Rosales and other individual Indians, not the Village, are beneficial owners of the Parcel. Third, judgment in the absence of the Jamul Indian Village will not be adequate because, under this Court's precedent (see *supra*, Part II.A. 1), the Village would not be bound by a judgment issued in its absence, which could result in future litigation with inconsistent decisions.

Fourth and finally, even though there is no alternative forum where Rosales may seek declaratory relief regarding the beneficial ownership of the Parcel, the ***40**

Jamul Indian Village is an indispensable party, because the overriding prejudice to the Village from having the ownership of its reservation adjudicated without assurance that its interests are represented, combined with the fact that the Village would not be bound by any ruling determining those ownership interests, require in equity and good conscience - that the case be dismissed. See 3A Moore's Federal Practice ¶ 19.08 at 19-165 (1984) ("Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable."), quoted in *Wichita and Affiliated Tribes,* 788 F.2d at 777. Although a court should be "extra cautious" before dismissing an action when the plaintiff lacks an alternative forum, see *Makah,* 910 F.2d at 560, this concern may be outweighed by the other factors, as well as by the importance of protecting an absent party whose joinder is barred by sovereign immunity. See *American Greyhound,* 305 F.3d at 1025. Thus, numerous cases have ruled absent tribes to be indispensable parties under circumstances similar to those here. See, e.g., *Pit River,* 30 F.3d at 1103; *Kescoli v. Babbitt,* 101 F.3d 1304, 1311 (9th Cir. 1996); *Shermoen,* 982 F.2d at 1319; *Wichita and Affiliated Tribes,* 788 F.2d at 777. Accordingly, in equity and good conscience, this claim against the Jamul Indian Village's reservation must be dismissed.

***41** III. ASSUMING JURISDICTION EXISTS, ROSALES' CLAIMS FAIL ON THE MERITS BECAUSE THE PARCEL IS HELD IN TRUST FOR THE JAMUL INDIAN VILLAGE AS A WHOLE.

Rosales' claim to an Indian "allotment" fails on the merits because, as the district court correctly held, the record establishes that the United States acquired the Parcel for the Jamul Indian Village as a whole, in order to enable it to become a federally recognized tribe pursuant to section 16 of the IRA. In addition, the record establishes that, after acquiring the Parcel, the Secretary " designated" the tribe, not individual Jamul Indians, as the beneficial owner of the Parcel.[FN16]

FN16. If the Court does not dismiss this case for lack of jurisdiction, it should nevertheless dismiss the National Indian Gaming Commission ("NIGC") as a defendant in the case. The NIGC is an independent regulatory agency within the Department of the Interior, whose powers are defined by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. The NIGC's primary function is to monitor and regulate the conduct of gaming activities on Indian lands. 25 U.S.C. §§ 2701, 2702. The NIGC has no authority to determine the ownership of lands acquired by the Secretary pursuant to 25 U.S.C. § 465, which is the issue in this case, and should accordingly be dismissed from this action.

A. The United States Acquired the Parcel for the Jamul Tribe as a Whole, to Enable it to Become a Federally Recognized Tribe.

As a threshold matter, Rosales' claim to an Indian "allotment" fails because, as established *supra,* Part I.C, there is no provision of law under which Rosales could have a right to an "allotment" of the Parcel. Despite the language Rosales uses in his complaint, his claim is not that the United States failed to allot him land to which he had a right. Rather, Rosales' claim is that the United States acquired ***42** land for him and other individual Jamul Indians but now refuses to

recognize their rightful ownership of that land. Rosales bases his claim to ownership of the Parcel on the language of the deed conveying the Parcel to the United States. Whether

Rosales' claim is deemed a claim to an allotment or a more general claim to beneficial ownership of trust land, application of the standard rules for construing a deed of conveyance establishes that the Village, not Rosales, holds beneficial title to the Parcel.[FN17]

> FN17. Rosales argues (Br. 26-31) that, in the event the Court determines he does not have a trust allotment, the Court should recognize that the Parcel is held in trust for him and other individual Jamul Indians as part of a " dependent Indian community." This argument is a non-sequitur. "Dependent Indian community" is a concept used to in determining land ownership but in determining whether a state or tribe has jurisdiction over certain criminal activities. See 18 U.S.C. § 1151. In any event, the United States does not contend that there is no legal mechanism by which a group of individual Indians may hold undivided beneficial interests in trust land, but rather that Rosales simply does *not* hold such an interest in the Parcel. This argument also demonstrates the fundamental nature of Rosales' challenge, which implicates the very existence and authority of the Jamul Indian Village as a tribe.

It is unnecessary in this case to decide whether federal or state law applies. The Supreme Court has held that federal common law applies to property disputes where the federal government acquires property pursuant to a federal law that does not specify the appropriate rule of decision. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-94 (1973). Because the United States acquired the Parcel pursuant to 25 U.S.C. § 465, which does not specify the appropriate rule of decision, federal common law may be applied to the deed's construction. ***43** However, where state law does not significantly conflict with federal interests or policy, or does not frustrate specific policy objectives of federal legislation, state law applies. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 (1988). Because it appears that the application of California law on construction of deeds does not conflict with or frustrate federal interests in this case, we apply state law to construe the deed conveying the Parcel. See *Richmond, Fredricksburg & Potomac Railroad Co. v. United States,* 75 F.3d 648, 655 (Fed. Cir. 1996) (applying Virginia law of property transactions where rules are neutral, not hostile to federal interests, and no overriding federal regulatory scheme is at issue).

The paramount object in the construction of a deed is to give effect to the intention of the parties. *Wise v. Watts,* 239 F. 207, 218 (9th Cir. 1917); accord *People ex rel. Dep't of Public Works v. Scheinman,* 56 Cal. Rptr. 168, 170 (Ct. App. 1967). Where the deed is susceptible of two constructions, the circumstances surrounding the execution of the deed may be properly considered. *Scheinman,* 56 Cal. Rptr. at 170. "A deed indefinite in its terms may be made certain by the conduct of the parties." *City of Manhattan Beach v. Superior Court,* 914 P.2d 160 (Cal. 1996). Extrinsic evidence may be considered to prove a meaning to which the language of the deed is reasonably susceptible. *Id.*

The district court concluded that the language of the deed clearly indicated that the Parcel was conveyed to the Jamul Indian Village as a whole. The court concluded that the deed's language conveying the property to the United States in ***44** trust for "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate" indicated that the Parcel was held in trust for the tribe, not for the individual Indians. ER348-49. Even if this language is deemed ambiguous, however, extrinsic evidence clearly indicates that the United States intended to acquire the Parcel to enable the Village to become a federally recognized tribe pursuant to section 16 of the IRA, and thus acquired the Parcel for the Village as a whole, not for the individual Indians.

The IRA was intended in part to help rectify the loss of Indian lands and tribal identity caused by the allotment policies of the late 19th and early 20th centuries, see *County of Yakima,* 502 U.S. at 255, and Interior construed and implemented the Act to allow displaced Indians to form tribes. In 1934, shortly after enactment of the IRA, the Interior Solicitor issued an opinion interpreting the IRA to allow certain Indians who were otherwise unaffiliated with a tribe to form a tribe if they lived on the same reservation. Specifically, the Solicitor determined that section 16 of the IRA contemplated "two distinct and alternative types of tribal organization." It authorized members of a tribe to organize " without regard to any requirements or residence." It also authorized "the residents of a single reservation (who may be considered a tribe for the purposes of this act, under section 19) to organize without regard to past tribal affiliations." Memo. Sol. Int., Dec. 13, 1934, reprinted in 1 *Opinions of the Solicitor of the Department of the* ***45** *Interior Relating to Indian Affairs 1917-1974,* at 487.[FN18]

FN18. This publication is available on-line at http://thorpe.ou.edu/solicitor.html.

In 1936, the Solicitor recommended a procedure by which the United States could facilitate Indians unaffiliated with a tribe to become an organized tribe. The Solicitor reviewed a proposed acquisition of trust land for Choctaw Indians in Mississippi who had become separated from and thus had severed their relations with the Choctaw Tribe in Oklahoma. The Solicitor determined that land could be taken into trust for "such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." [FN19] Memo. Sol. Int., Aug. 31, 1936, reprinted in 1 *Interior Opinions* at 668.

FN19. The Solicitor additionally recommended that the deed include language indicating that, once the Choctaw Indians organized as an Indian tribe pursuant to the IRA, the property would be deemed to be held in trust for such organized tribe. Memo. Sol. Int., Aug. 31, 1936, reprinted in 1 *Interior Opinions* at 688. While it may have been clearer for Interior to have required such language in the deed conveying the Parcel, such language is not necessary. Where there is ambiguity as to the intended grantee, extrinsic evidence may be used to determine the grantee's identity. See, e.g., *Byrd v. Patterson,* 48 S.E.2d 45 (1948) (cited in *Am.Jur.,* Deeds, § 31

n.3 (2002).

Similarly, in 1937, the Solicitor endorsed the acquisition of trust land for "the St. Croix Chippewa Indians of the [sic] half blood or more who may be designated by the Secretary of the Interior until such time as they organize under section 16 of the Reorganization Act and then for the benefit of such organization," noting that the Indians who subsequently came to reside upon the ***46** acquired land would be entitled to organize as Indians residing on a reservation. Memo. Sol. Int., Feb. 8, 1937, reprinted in 1 *Interior Opinions,* at 724. Likewise, the Solicitor recognized the only method by which the Nahma and Beaver Island Indians in Michigan could organize a tribe "is through the selection of those Indians among them who are of one half or more Indian blood and the purchase of land for them and their subsequent organization." Memo. Sol. Int., May 1, 1937 reprinted in 1 *Interior Opinions,* at 747-48. Interior's use of this mechanism for enabling the organization of tribes is widely recognized. See F. Cohen, at 15 (noting that " once individuals [of one-half or more Indian blood] become the beneficiaries of land held in trust they can organize themselves as a government and, as a ' reservation' tribe or band, become eligible for organization under the IRA").

Thus, when the Jamul Indian Village approached Interior about becoming a federally recognized tribe, Interior recommended this time-tested method for organizing as a tribe and obtaining recognition. In 1975, Interior identified Jamul Indians of one-half or more Indian blood and noted that if the land on which they resided could be secured for them in trust, they could organize as a tribe under section 16 of the IRA. ER284. In March 1978, Interior notified the Jamul Indians that it had received a sufficient number of signatures of half-blood Indians to "proceed with the proposed acquisition" of the Parcel in order "to establish the Jamul Indian Reservation." ER128. In December 1978, the United States ***47** acquired the Parcel in trust "for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." ER21. Thus, the record establishes that the Secretary acquired the Parcel in order to provide a reservation that would enable the Jamul Indians to form a federally recognized tribe pursuant to section 16 of the IRA. Hence, the Secretary clearly intended the Parcel to be held in trust for the Jamul Indian Village as a whole and not for individual Jamul Indians.

B. The Secretary of the Interior Designated the Jamul Indian Tribe as the Beneficial Owner of the Parcel.

The Secretary not only intended to acquire the Parcel for the Jamul Indian tribe as a whole, but the Secretary also designated the tribe as the beneficial owner of the Parcel. While the deed in this case specifically conveyed legal title to the Secretary of the Interior, it granted beneficial title to "such Jamul Indians ... *as the Secretary may designate.*" The record establishes that the Secretary's actions and course of conduct after the acquisition of the property designated the Jamul Indian Village as a whole, not the individual Indians, as the beneficial owner of the Parcel. See *Coast Indian Community v. United States,* 550 F.2d 639 (Ct. Cl. 1977) (Secretary may designate beneficial owner of trust land by implication).

The record first shows the Secretary's intent to designate the Jamul tribe as the owner of the Parcel in December 1980, when the Commissioner of Indian Affairs approved the Village's request to hold an election under the IRA to adopt a ***48** constitution. ER285. Then, in 1981, the half-blood members of the Jamul Indian Village ratified the constitution, organizing the Jamul Indians as a tribe and extending tribal jurisdiction over "all lands now within the confines of the Jamul Indian Village and to such other lands as may hereafter be added thereto," which necessarily included the Parcel. ER410. The Secretary's approval of this constitution in 1981 further indicated that the Secretary viewed the tribe as the beneficial owner of the Parcel. The Secretary's listing of the Jamul Indian Village as a federally recognized tribe in 1982 further demonstrates the Secretary's designation of the tribe, not individual Jamul Indians, as holding beneficial title to the Parcel.

Rosales recognizes (Br. 40) that the language of the deed provides for the Secretary to designate the beneficial owners of the Parcel. Rosales contends, however, that the tribe cannot be the owner because the Secretary has not acted to confer such designation. To the contrary, it is Rosales' claim that fails for lack of secretarial designation. Rosales neither alleges nor points to any evidence in the record to show that the Secretary acted to designate Rosales and other individual Jamul Indians as the owner of the Parcel. Rosales cannot prevail by showing that the tribe is not the rightful owner of the property; rather he must establish his own right to beneficial title. See *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1336 (9th Cir. 1990) (plaintiff must have interest in land to have standing to quiet title); cf. *Preston v. Bush,* 408 S.W. 2d 675 (Tenn. Ct. App. 1966) (plaintiff ***49** in ejectment action can prevail only on strength of their title, not deficiencies in other title). Thus, Rosales' claim to beneficial ownership in the Parcel must fail on his own reasoning.

C. It is Immaterial Whether the Jamul Indians Were a Tribe at the Time the Parcel Was Acquired.

Rosales contends (Br. 32-37) that the Parcel could not have been taken into trust in 1978 for the Jamul tribe because there was no tribe recognized in 1978. Interior agrees that the Jamul Indians were not a recognized tribe at the time the Parcel was acquired. Indeed, as discussed above, it was for the very purpose of enabling the Jamul Indians to organize and be recognized as a tribe that the United States acquired the Parcel in trust. The IRA does not limit the acquisition of trust land to federally recognized tribes. See 25 U.S.C. § 465; *Pit River,* 30 F.3d at 1096.

Rosales further contends (Br. 37-43) that the United States could not take the Parcel into trust for a tribe that had yet to be formed. Rosales' reliance on *Coast Indian Community* to support this proposition is unavailing, however, because there was no dispute in that case that the beneficial title to the property in question was held by the individual Indians. 550 F.2d 639. Furthermore, Rosales' contention is contrary to the longstanding practice of Interior and this Court's opinion in *Pit River.* In *Pit River,* the Secretary acquired property in 1938 "in trust for such Bands of the Pit River Indians ... as shall be designated by the ***50** Secretary," but did not designate a beneficial owner until 1987, when a Pit River

Tribe Council was formed. 30 F.3d at 1096-96, 1103. *Pit River* upheld the tribe's beneficial ownership of that property, regardless of the fact that the tribe did not exist at the time the Secretary acquired the property. *Id.* Similarly, here, the Secretary's acquisition of the Parcel for "such Jamul Indians ... as the Secretary *may designate,*" provided the Secretary discretion to determine, at any point after acquisition, exactly what entity would hold beneficial title. The Secretary properly designated the subsequently formed Jamul Indian tribe.

***51** CONCLUSION

For the foregoing reasons, the district court's order and judgment should be affirmed.

***52** STATEMENT OF RELATED CASES

The United States is unaware of any related cases.

Walter ROSALES, et al., Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, et al., Defendants-Appellees.
2003 WL 22025320 (C.A.9)

Briefs and Other Related Documents (Back to top)

- 2003 WL 22025321 (Appellate Brief) Appellants' Reply Brief (Feb. 10, 2003) Original Image of this Document (PDF)
- 2002 WL 32155672 (Appellate Brief) Appellants' Opening Brief (Sep. 30, 2002) Original Image of this Document with Appendix (PDF)
- 02-55800 (Docket) (May. 16, 2002)

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