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NISENAN MAIDU TRIBE OF THE
NEVADA CITY RANCHERIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NISENAN MAIDU TRIBE OF THE NEVADA CITY RANCHERIA,

Plaintiff,

v.

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

Defendants.

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

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

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

The sole issue raised in the motion filed by the NISENAN MAIDU TRIBE OF THE NEVADA CITY RANCHERIA ("Plaintiff") is whether its individual members, made up of "any heirs or legatees of such persons and any Indian successors in interest to real property so distributed" from the Nevada City Rancheria (hereinafter "Class Members"), may proceed in *Tillie Hardwick, et al. v. United States of America, et al.,* No. C 79-1710 JF (PVT) (Complaint filed July 10, 1979) ("*Hardwick*").

That issue was raised when it was discovered in the last year that the Class Members may still be parties to *Hardwick,* having fallen through the legal cracks due to a clerical error. It is now without reasonable dispute as the clerical error is demonstrated not only by the Court's file, the

Defendants' file, Plaintiff's prior counsel's file, but also the recollection of those attorneys involved in *Hardwick*. In opposing this motion even Defendants acknowledge that Class Members were not listed in the settlement of *Hardwick*.[1]

Rather than address how the clerical error should be corrected, Defendants advance a plethora of unconvincing excuses why the error can not be corrected, which we dispose of below.

1. *HARDWICK* WAS NEVER PROPERLY CLOSED.

Defendants' primary argument is that "Plaintiff does not allege a valid means to reopen *Hardwick*." (See generally, Opposition, 7-11.) Closure of a case can only result from either a judgment or dismissal of all parties. It is undisputed that Class Members were parties to *Hardwick* and equally undisputed that they were not the subject of a judgment or dismissal. As such *Hardwick* should be considered open to Class Members, which is all this motion seeks.

Defendants mistakenly assume Class Members are seeking relief pursuant to Federal Rule of Civil Procedure[2] 60 as a motion to alter a judgment. At the present time, that is not the relief sought.[3] The goal of this motion is simply to obtain an order directing the Clerk of the Court to designate the *Hardwick* docket as "open" and consolidate the present action with *Hardwick*.

The Court should also reject Defendants' attempt to twist Plaintiff's motion into a defense motion under Rule 41 for involuntary dismissal for failure to prosecute. Aside from the obvious infirmities arising from lack of notice, the five factors noted in *Omstead v. Dell, Inc*. (9th Cir. 2010) 594 F.3d 1081, 1084, cited by Defendants (Opposition, 9:15-20) argue strongly in favor of allowing Plaintiff to proceed. First, the public's interest in expeditious resolution of litigation sometimes must bow to a greater interest, as the *Hardwick* litigation itself demonstrates.[4] Second, the Court's

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[1] "Defendants' Opposition to Plaintiff's Motion to Proceed in the Matter of *Tillie Hardwick v. United States* and Notice of Motion and Defendants' Motion to Dismiss Plaintiff's Complaint," ("Opposition") at p. 14, n. 8.

[2] Unless otherwise noted, all references to the Federal Rules of Civil Procedure will be denoted as "Rule."

[3] Plaintiff/Class Members specifically reserve the right to seek such relief at the appropriate time.

[4] In fact, the way in which the *Hardwick* stipulated judgment was constructed foresaw such an event as this. The stipulated judgment had three categories: one group was recognized, one group was dismissed on *res judicata* grounds and the members of the last group were dismissed without prejudice to refiling. As to the last group, Defendants agreed not to assert, and the Court ordered Defendants not to assert, any laches defense. (See para. 14 of the Stipulated Judgment, Document No. 27-1.)

need to manage its docket is in no way implicated by the relief Class Members seek, the Court's docket indicates that *Hardwick* is alive, filings are being accepted by the clerk and considered by the Court and cases are still being related. Third, there is no risk of prejudice to Defendants who, after all, recently settled the Wilton Rancheria case and restored the Rancheria's federal recognition in the face of the very same statue of limitations and laches arguments that they interpose here. (See *Wilton Miwok Rancheria et al. v. Kenneth Salazar et al.*, C-07-2681 JF ("*Wilton*").) Fourth, the public policy in favor of resolution on the merits can only be honored by allowing Class Members to proceed. Lastly, there is no less drastic sanction. The only equitable solution is to give the Class Members their day in this Court under *Hardwick*.

2. THE CLASS MEMBERS ARE WHO THEY CLAIM TO BE.

In *Hardwick*, the plaintiff class is "all those persons who receive[d] any of the assets of the following California Indian Rancherias pursuant to distribution plans purportedly prepared under the California Rancheria Act, Act of August 18, 1958 (72 Stat. 619), or as amended by the Act of August 11, 1964 (78 Stat. 390), any heirs or legatees of such persons and any Indian successors in interest to real property so distributed." (Document No. 27-1 and also attached to Declaration of Devon McCune at 2-13.)

Defendants argue that "Plaintiff has not shown that any of its members are within the *Hardwick* class." (Opposition, 11:12.) Later, Defendants tacitly acknowledge that they are wrong: "It is possible that some of the members (specifically Richard and Robert Johnson) are heirs or legatees of the distributees, Peter and Margaret Johnson, but Plaintiff has not so asserted much less proven that fact." To the contrary, Class Members assert precisely that. The evidence that heirs and legatees are Class Members can be found in the Declaration of Richard Johnson, wherein he states he is the grandson of Mr. Peter Johnson, the sole distributee (his grandmother having died prior to distribution). (Document No. 48-8: Richard Johnson Declaration, para. 4; see also: Document No. 48-7: Declaration of Robert Johnson, paras. 2-3 (also a grandson of Peter and Margaret Johnson.)

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To the extent there is a factual dispute, it can be resolved by allowing Class Members to proceed and Defendants to conduct discovery as was allowed in *Hardwick*.[5] It is without reasonable dispute that limited discovery of birth certificates would demonstrate that the Class Members are, in fact, not only heirs or legatees, but also listed on the BIA's own documents. (See Defendants' Opposition, 11:14-15 ["It is possible that some of the members (specifically Richard and Robert Johnson) are heirs or legatees of the distributes Peter and Margaret Johnson, but Plaintiff has not asserted, much less proved that fact"], as well as Complaint, para. 46 and footnote 2 wherein Defendants represent that the facts in the Complaint are assumed to be true.)

3. SPECULATION AS TO WHAT WOULD HAVE HAPPENED TO CLASS MEMBERS' CLAIMS UNDER *HARDWICK* MISSES THE POINT.

Defendants' argument that Class Members' claims would have been dismissed in *Hardwick* misses the point: the failure to resolve Class Members' claims – by dismissal or judgment – means that those claims are still alive. Defendants' assertion based upon a hearsay-riddled document – an alleged draft stipulated judgment that mentioned the Nevada City Rancheria but was never finalized – is proof that, "their claims were disposed of in the settlement . . ." is laughable. The Stipulated Judgment that was actually signed by the parties and this Court did not include the Nevada City Rancheria. The Stipulated Judgment is a contract and the parol evidence rule prohibits use of the draft stipulated judgment to contradict its terms. Even if the Court is inclined to overrule Plaintiff's objections, the draft stipulated judgment demonstrates that Nevada City Rancheria was not, in fact, intended to be dismissed from *Hardwick* given that the Nevada City Rancheria was subsequently omitted from the dismissed group in the Stipulated Judgment that was later actually filed with the Court.

4. DEFENDANTS' STATUTE OF LIMITATIONS AND LACHES ARGUMENTS ARE PREMATURE.

Defendants' fourth and fifth arguments (Opposition, 15-22) are that Plaintiff cannot proceed

[5] Defendants' continued insistence that this matter can only be resolved within the narrow confines of an administrative record they prepare is not only wrong, and more than a little disingenuous, it runs contrary to what happened in *Hardwick*.

in this action or in *Hardwick* because of the statute of limitations and/or laches. Plaintiff respectfully suggests that the appropriate time for resolving these arguments is after Plaintiff has been able to pursue discovery.

Plainly Defendants' position on the statue of limitations and laches in the Opposition is contradicted by its position on these same issues in *Hardwick* and *Wilton*. The extent to which Defendants are estopped to take such a position will turn, in part, on discovery which has yet to be taken. Estoppel is an equitable doctrine invoked to avoid injustices in particular cases. (See, FRCP 8(c).) Estoppel may apply against government defendants in the appropriate case. (See, *Salmon River Concerned Citizens v. Robertson,* 32 F.3d 1346, 1357-1358 (9th Cir. 1994); *Heckler v. Community Health Services of Crawford County, Inc.* (1984) 467 U.S. 51.) Three forms of estoppel are potentially implicated in the instant case - equitable estoppel, collateral estoppel, and judicial estoppel.

The doctrine of equitable estoppel is based on the principle that a party should not be rewarded for engaging in actions which misrepresent or conceal facts from the opposing party. (See, *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000).) Thus, the doctrine is fundamentally intended to ensure fair dealing between parties. In the Ninth Circuit, the elements of equitable estoppel are (1) knowledge of the true facts by the party to be estopped; (2) intent to induce reliance, or actions giving rise to a belief in that intent; (3) ignorance of the true facts by the relying party; and (4) the relying party has detrimentally relied upon the opposing party's prior position. (*Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991).)

Collateral estoppel prevents re-litigation of matters that were fully considered and decided in a prior proceeding. Accordingly, collateral estoppel operates to prevent repetitive litigation.

The policies supporting the doctrine of judicial estoppel are different from those that support the more common doctrines of collateral estoppel and equitable estoppel. (*Yanez v. United States,* 989 F.2d 323, 326 (9th Cir. 1993).) Judicial estoppel protects the integrity of the judicial process by preventing a party from gaining advantage by taking a position inconsistent with one unequivocally asserted by the same party in a prior legal proceeding. (*Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990).) Unlike equitable estoppel, a party need not have relied on the adverse litigant's prior

position to invoke judicial estoppel, when the adverse litigant adopts an inconsistent subsequent position. It is sufficient that the court relied on or accepted the litigant's previous inconsistent position. (See, *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 783 (9th Cir. 2001).)

Defendants have taken inconsistent positions with regard to the statute of limitations and laches in the context of terminated rancherias. Whether it proceeds under *Hardwick* or not, Plaintiff will need to, and is entitled to, seek discovery into inconsistent positions taken by Defendants in other Rancheria cases, such as *Wilton*. (Fed. Rule. Civ. Proc. 26.)

CONCLUSION

The Court's file, Defendants' file, and the recollection of both the former trial counsel for CILS that actually litigated *Hardwick*, Mr. David Rapport (Docket No. 37), and the former trial counsel for the United States, Paul Locke (Docket No. 38), agree that the Class Members fell through the cracks. While Plaintiff has proffered documents, declarations and other evidence to demonstrate that Class Members were included within the class in *Hardwick,* Defendants have offered nothing to rebut that evidence.

There can only be one conclusion: the Class Members were a party to *Hardwick*, but have never been given their day in court.

In light of the history of the Nevada City Rancheria, the BIA's actions under the Rancheria Act, and the procedural history of *Hardwick*, the Class Members must be allowed to proceed under *Hardwick*. Class Members of the Nevada City Rancheria and the Nevada City Rancheria respectfully request that the Court issue an Order allowing the Class Members to proceed in *Hardwick* and consolidate the present action with *Hardwick*.

Respectfully submitted,

Dated: August 26, 2011

BRADY & VINDING

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