

No. 18-16764

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESSICA JACKSON, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES of AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California, Oakland
Case No. 4:75-cv-00181-PJH
The Honorable Phyllis J. Hamilton

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Pursuant to the California Rancheria Act, Act of August 18, 1958, Pub. L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, Pub. L. 88-419, 78 Stat. 390 (“Rancheria Act” or “Act”), the Secretary of the Interior (“Secretary”) terminated the special reservation status of the Upper Lake Indian Rancheria (“Rancheria”)¹ occupied by the members of the Rancheria, including but not limited to Amerdine Snow McCloud, aka, Amerdine Jackson (“Ms. McCloud”). The federal government subdivided the Rancheria into individual parcels and conveyed those parcels to the Indians of the Rancheria prior to installing the water, sanitation, and irrigation facilities that it was required to install before terminating the trust status of the Rancheria in direct violation of Section 3(c) of the Rancheria Act.

The Indians of the Rancheria filed suit in this case, alleging that the Rancheria was prematurely and improperly terminated, depriving them of their federal status as Indians entitled to federal benefits and subjecting them and their former Rancheria lands to state and local laws, including property taxes.

The District Court, the Honorable Spencer William presiding, found in favor of the Indians and granted them equitable relief by declaring the Secretary’s termination of the Reservation void. ER 149-150. The Court found that the

¹ A “Rancheria” is a small Indian Reservation set aside for the use and occupancy of particular Indians.

Rancheria Act imposed a fiduciary obligation on the Secretary to hold title to the Rancheria in trust for the Indians, and to install adequate water, sanitation and irrigation facilities on the Rancheria before conveying the lands of the Rancheria to the individual Indians in fee. ER 145-147. The Court also found that the Secretary's improvident conveyance of Rancheria lands to the adult Indians of the Rancheria, called distributees, was not only a violation of Section 3(c) of the Rancheria Act, but also of the Secretary's solemn trust obligation that the Secretary owed to the Indians under the Act. *Id.*

To remedy these violations of the Act and the breach of the Secretary's fiduciary duty, the District Court issued its May 5, 1979 Order ("Order") in this case, granting the Indians' motion for partial summary judgment. ER 137-155. In issuing the Order, the Court sought to void, among other things, the illegal termination of the trust status of the Indians' former Rancheria lands and to put the Indians in the position that they were in, to the extent possible, prior to the illegal termination. *Id.*

For a period of one (1) year after issuance of the Order, the Order imposed upon the Secretary, a non-discretionary duty to restore to trust status, any Rancheria land still in Indian ownership upon receipt of a request from a Rancheria Indian that their Rancheria land be restored to trust status. ER 152-153.

Upon expiration of the one (1) year period, the Order imposed a “continuing obligation” on the Secretary “to restore to trust status lands of the Upper Lake Rancheria” to “persons listed in the Plan for the Distribution of the Assets of the Upper Lake Rancheria (“Plan”) by reasons of the purported termination of said Rancheria whenever possible.” ER 151-152.

Ms. McCloud and her daughter Jessica Jackson were both Indians of the Upper Lake Rancheria listed on the Plan. ER 162. Ms. McCloud owned Parcel 5 on the Rancheria (“Parcel 5”) at the time the Order was entered. *Id.* Ms. McCloud was eligible under the Order to restore her Parcel 5 on the Rancheria to trust status. *Id.* Ms. McCloud did everything necessary under the Order for the Secretary to accept title to Ms. McCloud’s Parcel 5 on the Rancheria to trust status. ER 162-164.

Instead of accepting Ms. McCloud’s deed (“Deed”) conveying title to Parcel 5 to the United States of America in trust for her two daughters, Jessica Jackson and Gwen Loss, and reserving a life estate for herself, the Secretary, acting through his designated representative, Kimberly Yearyean, Realty Officer for the United States Department of the Interior, Bureau of Indian Affairs (“BIA”), denied the request (“Decision”). ER 168.

The Decision was made twenty (20) years: (1) after the BIA initially told Ms. McCloud that they had approved her request; (2) after Ms. McCloud had died;

and (3) after Jessica Jackson provided the BIA with everything it needed to accept the Deed restoring Parcel 5 to trust status. ER 162-168.

After the BIA made its Decision, Ms. Jackson filed a motion with the District Court, the Honorable Phyllis J. Hamilton presiding, seeking an order from the Court holding the BIA in contempt of the Court's Order ("Contempt Motion" or "Motion"). ER 161. Specifically, Ms. Jackson requested that the Court find that the BIA's willful refusal to accept Ms. McCloud's Deed violated the Secretary's mandatory duty and continuing obligation to restore Ms. McCloud's Parcel 5 on the Rancheria to trust status. ER 31-33.

In denying Ms. Jackson's motion the District Court found that the Order clearly afforded the Secretary "the discretion to approve or reject such conveyance." ER 38. The Court rationalized, that since the BIA had not accepted the Deed, and the BIA had discretion to do so, the BIA had not violated the Order. ER 38-39. In so, ruling the District Court failed to see the forest for the trees. The very purpose of the Order was to take away the Secretary's discretion. The purpose of the Order was to void the termination process at the Indian's option. Not the Secretary's. Under the Order, the Indians only had to make an election to restore their Rancheria land to trust status within one (1) year from the date of the Court's Order and notify the BIA of their election. In addition, even if the Indian made his/her election after the one (1) year period, the Secretary still had a mandatory

duty to restore the Indians' Rancheria land to trust status "whenever possible." Here, it was "possible" for the Secretary to "accept" Ms. McCloud's Deed restoring Parcel 5 to trust status.²

Ms. Jackson had provided the BIA with everything the BIA had requested from her to accomplish the trust restoration. In response to Ms. Jackson's actions, the BIA told her numerous times that they were going to do just that: accept the Deed and restore Parcel 5 on the Rancheria to the ownership of the United States in trust for Ms. Jackson and her sister, Gwen Loss.

The District Court's Order denying Ms. Jackson's motion is clearly contrary to the plain wording of the Order. Furthermore, the conduct of the federal officials of the BIA ("Federal Officials") in this case, particularly when judged by the most exacting fiduciary standards, simply did not comply with its continuing obligations under the Order.

For these reasons, the District Court's order denying Ms. Jackson's motion to hold the Federal Officials in contempt of the District Court's May 15, 1979 Order must be reversed.

² As used throughout this brief, the phrase "restore to trust status" shall mean the Secretary or his/her designated representative in the BIA executing a written acceptance of a deed conveying Ms. McCloud's interests in Parcel 5 to the United State of America in trust for Jessica Jackson and Gwen Loss, reserving a life estate in Ms. McCloud and recording of that deed by the BIA with its Lands, Titles and Records Office and the Lake County Recorder's Office.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331, because the plaintiffs' claims arose under a federal statute, the California Rancheria Act, and the regulations promulgated thereunder and under the District Court's May 15, 1979 Order and final judgment on claims for declaratory and injunctive relief ("Order"). The District Court retained "jurisdiction over this action for the purpose of granting such supplemental relief as is or may become necessary or proper for the purpose of implementing the provisions of this judgment." ER 147.

The District Court's August 17, 2018 order was final because it resolved all of plaintiffs' claims in favor of all of the defendants' claims pertaining to plaintiffs' contempt motion. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

The District Court entered its order denying the motion to hold defendants in contempt and the motion to intervene, on August 17, 2018. ER 01. Plaintiffs filed a notice of appeal on September 14, 2018, or twenty-eight (28) days later. ER 43. This appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(i)(iii).

STATEMENT OF ISSUES

1. Did the Federal Officials of the Bureau of Indian Affairs violate the District Court's May 5, 1979 Order by refusing to accept Amerdine Snow McCloud's Deed conveying Parcel 5 on the Upper Lake Rancheria to the United

States of America in trust for Jessica Jackson and Gwen Loss and reserving to herself a life estate?

2. Did the District Court abuse its discretion by interpreting the Order in a manner that is clearly contrary to the plain wording and intent of the Order?

STATEMENT OF THE CASE

A. The California Rancheria Act.

In 1953 Congress formally adopted a policy of “termination,” its intended purpose being “as rapidly as possible, to make the Indians within the territorial limits of the United State subject to the same laws and entitled to the same privilege and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States” H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). Pursuant to this policy, Congress enacted the California Rancheria Act for the purpose of terminating forty-eight small Indian tribes and Indian Reservations in California, including the Upper Lake Rancheria.

In accordance with the provisions set forth by Congress in the California Rancheria Act, the trust relationships between the government and the resident Indians on various rancherias, including Upper Lake, was to be terminated and the trust property or proceeds from the sale of such property distributed to eligible

adult Indians of the Rancheria. *See generally, Duncan v. United States*, 667 F.2d 36, 38-40 (Ct. Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983).

Under Sections 1 and 2 of the Rancheria Act, termination of an individual Rancheria and individual Indians and distribution of the lands of the Rancheria were to be carried out in accordance with a termination plan, called a “distribution plan,” prepared by the Secretary of the Interior and approved by a majority of the adult Indians affected by the plan. *Id.* In accordance with the distribution plan, individual Rancherias were subdivided into parcels and conveyed in fee by the United States to the Indians residing on the Rancheria. *Smith v. United States*, 515 F. Supp. 56, 57-58 (N.D. Cal. 1978).

In accordance with Section 10(b) of the Rancheria Act, when the distribution of the Rancherias lands and assets was completed, the Indians’ tribal government, as a federally recognized Indian tribe, was to be terminated, thereby ending the eligibility of its members for services and benefits provided by the government to federally recognized Indian tribes. In other words, termination resulted in the ending of the tribe, tribal government, the Indians as members of the tribe with the right to govern themselves on their Reservation and an ending of the Reservation status of the land itself.

However, in accordance with Section 3 of the Rancheria Act, no actual distribution of the land and assets of the Rancheria to the individual Indian

distributees was to take place until the government reached agreement with the Indians of the Rancheria on the construction of certain water, sanitation, and irrigation facilities for the Rancheria. *Table Bluff Band of Indians, et al. v. Cecil Andrus, et al.*, 532 F. Supp. 255, 258 (N.D. Cal, 1981).

Thus, under the Rancheria Act, actual termination of a rancheria was not mandatory. Instead, termination was dependent upon approval, by a majority of the Rancheria Indians of a plan to distribute Rancheria lands to the Indians and upon the Secretary constructing the water, sanitation and irrigation facilities agreed to with the Indians under the Plan **prior** to the Secretary conveying any parcels of Rancheria lands in fee to the Indians. *Smith v. United States*, 515 F. Supp. 56, 58-59 (N.D. Cal. 1978).

B. The May 15, 1979 Upper Lake Order.

In order to remedy the Federal Officials' violations of the Rancheria Act, the District Court exercised broad equitable powers to void the illegal termination process.

Regardless of what powers the Secretary of the Interior may have to award land to Indians in severalty, this Court has broad power to do equity to the parties. 5 U.S.C. § 706; *Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964). Invoking that power, the Court believes that fairness dictates that the land be returned to the status quo exactly as it existed prior to the approval of the now void distribution plan. Thus, the lands should be returned in trust, **at the option of the individual owner**, for the benefit of the Indian(s) or tribe that possessed it prior to the distribution or the Indian heir(s), legatee(s) or Indian successor(s) in interest of such Indian(s) or tribe.

Table Bluff Band of Indian, et al. v. Cecil Andrus, et al., 532 F. Supp. 255, 260 (N.D. Cal. 1981) (emphasis added).

On March 15, 1979, the District Court issued a final order in this case voiding the termination of the Upper Lake Rancheria. Pursuant to Paragraph 7(f) of the Order, the Court concluded that the Federal Officials violated the Rancheria Act and that, based upon those breaches, the plaintiffs, including Amerdine Snow McCloud, were “entitled to equitable relief” and at the Indians’ “option,” were entitled to void some or all of the “plan for distribution of the assets of the Upper Lake Rancheria, . . .” ER 147-155.

Under the Order, all that was necessary for an Indian of the Rancheria to restore his or her lands on the Rancheria to trust, was for the Indian to notify the BIA of the Indian’s desire to restore its land on the Rancheria to trust status. Paragraph 8(f)(2) of the Order provides that a “Restoration of trust status **shall** be accomplished as follows:”

Within one year of receipt of actual notice of the terms of this judgment, each Indian . . . of the Upper Lake Rancheria who has or retains any interest in or to the lands or assets of said Rancheria (however acquired), **shall be entitled to elect** to convey his or her interest to the United States, to be held in trust for the benefit of such Indian . . . or for the benefit of the Indians of the Upper Lake Rancheria. . . .

ER 151-155. (emphasis added).

Thus, if an Indian of the Rancheria made an election to restore his/her land on the Rancheria to trust status, the Federal Officials had a mandatory, non-

discretionary duty, to effectuate a trust restoration of the land and could only refuse to accept a deed of conveyance from the Indians restoring the Indian's land to trust status based upon the form of the deed.

Before accepting any instruments of conveyance which has the effect of restoration trust status to lands within the Rancheria, the Secretary of the Interior shall be entitled to approve or reject said **instrument** as to form, however, the existence of non-consensual liens and/or encumbrances shall not constitute a basis for declining to accept any such conveyance. Conveyance of title to the United States made pursuant to this judgment may, at the election of the grantor, provide that the election of the grantor, provide that the United States will hold title in trust for an Indian or Indians of the Upper Lake Rancheria, and be subject to such conditions or restrictions as are set forth in the instrument of conveyance.

Order, Paragraph 8(f)(3). ER 153.

Under Paragraph 8(f)(6) of the Order, the parties to the Order were given “maximum flexibility” to effectuate a “trust restoration.” ER 154.

Finally, Paragraph 8(f) imposed a “continuing obligation” on the Federal Officials “to restore to trust status lands of the Upper Lake Rancheria . . . issued to persons listed in the plan for distribution of the assets of the Upper Lake Rancheria . . . whenever possible.” ER 151-152.

In summary, the Order voided the termination of the Upper Lake Rancheria and granted to the Indian owners of land on the Rancheria, the unconditional right to restore their land on the Rancheria to trust status, provide the Indian made an election to do so within one year from the date of the Order. Once the Indian

notified the Federal Officials of the Indian's election to restore the Indian's land on the Rancheria to trust status, the Federal Officials had a mandatory duty to accept any deed from the Indian conveying the Indian's land on the Rancheria to the United States to be held in trust for said Indian grantor or any other Indians of the Rancheria specified in the deed.

C. Amerdine Snow McCloud's Election to Restore Her Parcel 5 on the Rancheria to Trust Status.

It is undisputed that Amerdine Snow McCloud was an original distributee of the Upper Lake Rancheria, named in the Distribution Plan for the Rancheria and the owner of Parcel 5 on the Rancheria ("Parcel 5"). ER 135-136.

It is also undisputed, that Ms. McCloud elected on November 30, 1982, to restore Parcel 5 to the ownership of the United States of America to be held in trust for her. ER 162-163. In response to her request, the Federal Officials agreed to restore Parcel 5 to trust status as part of the United States continuing obligation to restore property on the Rancheria to trust under Paragraph 8(f) of the Order ER 163.

In order to effectuate the trust restoration, the BIA prepared a deed for Ms. McCloud to sign granting all of her interest in Parcel 5 to the United States to be held in trust for Amerdine Snow McCloud. *Id.* But, by the time the BIA completed preparation of the deed and caused it to be delivered to Ms. McCloud, Ms. McCloud changed her mind and wanted to convey Parcel 5 to the United States to

be held in trust for her daughters, Jessica Jackson and Gwen Loss, reserving a life estate for herself. *Id.* To accomplish this goal Ms. McCloud executed a deed (“Deed”) conveying all of her right, title and interest in Parcel 5 to the United States of America to be held in trust for Jessica Jackson and Gwen Loss and reserving to herself a life estate. *Id.* The Deed was prepared by David Rapport, an attorney at the time with California Indian Legal Services. Mr. Rapport transmitted the Deed, along with a letter, requesting that the BIA accept the Deed under Paragraph 8(f) of the Order. *Id.* After the BIA received the Deed, the BIA, through Virginia Carpenter, then Realty Officer for the BIA’s Central California Agency, advised Ms. McCloud that the BIA would prepare a new deed (“BIA Deed”), in accordance with the BIA’s rules, for Ms. McCloud’s execution, taking Parcel 5 into trust for Jessica Jackson and Gwen Loss and reserving a life estate for Ms. McCloud. *Id.*

The BIA subsequently prepared the BIA Deed and sent it to Ms. McCloud for her execution. Ms. McCloud subsequently executed the BIA Deed and mailed it to the BIA for acceptance and for recording at the BIA’s Lands Title Office. ER 163. Subsequently, Ms. Carpenter advised Ms. McCloud that the BIA received the BIA Deed and would process the BIA Deed restoring Parcel 5 to trust status. *Id.*

Despite the execution of the Deed and the BIA Deed by Ms. McCloud, Ms. McCloud’s delivery of the Deed and BIA Deed to the BIA, the BIA’s

acknowledgement of receipt of the Deed and the BIA Deed and the representations made to Ms. McCloud by the BIA Realty personnel that the BIA Deed would be approved and processed by the BIA restoring Parcel 5 to trust status, the BIA never executed a written acceptance of the BIA Deed or recorded the BIA Deed with the BIA Lands and Title Office.

After the execution of the Deed and later the BIA Deed, Ms. McCloud assumed that Parcel 5 was owned by the United States in trust for Jessica Jackson and Gwen Loss, reserving a life estate for Ms. McCloud. ER 164.

Ms. McCloud's died intestate on February 4, 2001. ER 164.

D. Jessica Jackson's Attempts to Have the Federal Officials Restore Parcel 5 to Trust Status.

A number of years after Ms. McCloud's death, Jessica Jackson received a bill from the Lake County ("County") Tax Collector assessing a property tax on Parcel 5. At that time she contacted the BIA, Central California Agency, Real Property Officer, to advise the BIA that the County was attempting to tax Parcel 5. ER 164. It was at that time that the BIA informed her that there was nothing in their title records showing that the BIA ever recorded the Deed or the BIA Deed with the Lands Title Office of the BIA or ever executed a document called an "Acceptance of Conveyance" evidencing that the BIA accepted either the Deed or the BIA Deed restoring Parcel 5 to trust status. *Id.*

After talking to the BIA, Ms. Jackson met with her attorney, Lester Marston, to discuss what she should do to get Parcel 5 into trust. *Id.* Based upon his advice, Ms. Jackson made a request to the BIA to accept the BIA Deed in trust. *Id.* The request was made to Troy Burdick, Superintendent of the Central California Agency of the BIA. ER 164-165. Mr. Marston advised Mr. Burdick of the history of what had happened regarding Ms. McCloud's election and the execution of the Deed and the BIA Deed and the BIA's agreement to take Parcel 5 into trust. ER 165. In response to Ms. Jackson's request, on January 16, 2008, Mr. Burdick referred the matter by letter to the Agency's Realty Specialist, Katherine D. Souther, to investigate the history of Ms. McCloud's request. *Id.*

On June 25, 2008, Lester Marston sent a letter to Mr. Burdick, confirming a phone call with Mr. Burdick, in which Mr. Burdick advised Mr. Marston that the "Bureau of Indian Affairs, Central California Agency, would complete the work on Amerdine Jackson's fee-to-trust request and accept title to Ms. Jackson's Parcel 5 on the Upper Lake Rancheria by no later than July 30, 2008." ER 165.

After the BIA agreed to process Ms. McCloud's fee to trust application and formally accept her BIA Deed into trust in writing, an issue arose regarding who was going to pay the property taxes on the property, the preliminary title report for the property showing that there were no encumbrances on the property, and pay for

title insurance for the property, all of which the BIA required to be done in order for the BIA to accept the BIA Deed into trust. ER 165.

At that time, Ms. Jackson agreed to pay for all the costs necessary to have the BIA formally accept the BIA Deed in trust. *Id.* This process took years. *Id.* For example, every time Ms. Jackson would pay off the property taxes on Parcel 5 and provide the BIA with evidence that they were paid, the BIA would take too long to complete the fee to trust process and new property taxes would be assessed on the property, requiring Ms. Jackson to pay the newly assessed taxes. *Id.* The process was complicated further by the understaffing of the BIA Realty Office which had more work than it could handle and by the high turnover rate in the Office. ER 165-166. Every time a new Realty Officer would come into the Office, Ms. Jackson would have to start the process over with the BIA. ER 165.

Finally, in 2010, Ms. Jackson's attorney, Lester Marston, convinced Lake County, that with the execution and recording of the Deed and the BIA Deed with the Lake County Recorder Office, Parcel 5 was owned by the United States in trust for Jessica Jackson and Gwen Loss by operation of law under the Order. ER 166. The County subsequently stopped assessing property taxes on the property. *Id.*

However, after Ms. McCloud's death another issue arose. The BIA then took the position that since Ms. McCloud died, that Ms. Jackson and her sister, Gwen

Loss, had to execute new deeds conveying their interest in Parcel 5 to the United States in trust for the two of them, in order to restore the Parcel to trust status. *Id.*

On August 13, 2010, Mr. Burdick wrote Ms. Jackson a letter advising her that the BIA was working on the “Fee to Trust application for [Ms. Jackson’s] deceased mother” and that they would be preparing the “deeds within the next week or two” for Ms. Jackson and her sister to sign. *Id.*

Again years went by with the BIA delaying the acceptance of the Deed or the BIA Deed and the preparation of the new trust deeds for Ms. Jackson and her sister to sign. *Id.* Then a new issue arose regarding who was going to pay for the title insurance for the property. *Id.* On August 12, 2010, Mr. Burdick requested that Fidelity National Title Insurance Company give the BIA an estimate of what it was going to cost to have the title company issue a preliminary title report and a ALTA Policy of Insurance for the property. ER 166. After a lengthy debate over who was going to pay for the insurance, the BIA agreed to pay for the cost. ER 177. Then another issue arose. First, Fidelity National would not issue the policy of title insurance unless it had an appraisal of Parcel 5 so that it knew the amount of the title insurance policy that it would have to issue for the Parcel. ER 166. That problem was solved when Ms. Jackson’s attorney, Lester Marston, convinced Fidelity National to accept a comparable pricing study performed by a local real estate broker. *Id.*

Yet another problem subsequently arose when Gwen Loss passed away. *Id.* Initially the BIA took the position that her estate would have to be probated before the BIA could formally accept the Deed or BIA Deed restoring the Parcel to trust status. *Id.* Then Ms. Jackson's attorney, Lester Marston, convinced the BIA to process Ms. McCloud's original BIA Deed and issue a formal acceptance of the BIA Deed and record the BIA Deed and the Acceptance with the Land Title Office of the BIA. ER 166-167. Mr. Marston convinced the BIA that with the recording of the Deed the BIA Office of Hearings and Appeals would then have jurisdiction to probate Ms. McCloud's and Ms. Loss' estates and determine their interests in Parcel 5 at no cost. ER 167 This would then allow Ms. Jackson and her sister's heirs to execute the new BIA deeds conveying their interests in Parcel 5 to the United States to be held in trust for them. *Id.*

Then another issue arose regarding whether the acceptance of Ms. McCloud's BIA Deed and the new BIA deeds would be subject to the National Environmental Quality Act ("NEPA") requiring the BIA to undertake an environmental review of the formal acceptance of the BIA Deed. *Id.* Ms. Jackson's attorney, Lester Marston, advised the BIA that the BIA's formal acceptance of Ms. McCloud's BIA Deed was not a discretionary action subject to NEPA review but was a mandated acquisition by the BIA under the Order. ER 167. In response, the BIA referred the matter to its solicitor, who agreed with Mr. Marston's position.

The BIA then agreed to complete the trust process for Ms. McCloud's BIA Deed under the Order.

By November of 2016, the taxes on Parcel 5 had been paid, the preliminary title report and title policy of insurance had been ordered, and the local Solicitor had determined that the BIA acceptance of the BIA Deed was a mandatory acquisition not subject to NEPA. ER 181.

On November 4, 2016, Ms. Jackson's attorney, Lester Marston, called the BIA to find out what the status was of Ms. McCloud's and Ms. Jackson's request that the BIA formally accept the BIA Deed and record the acceptance of the Deed with the BIA's Lands and Title Office. ER 167. On that same day, Kimberly Yearyean, Realty Office for the Central California Agency of the BIA sent an email to Mr. Marston confirming their phone call and that Ms. Jackson's and Ms. McCloud's former requests were being processed by the BIA as a "mandatory fee to trust acquisition", apologizing for the delay in completing the fee to trust process and agreeing within the next thirty (30) days to give Mr. Marston an estimate of how long it would take to complete the process. *Id.*

At the conclusion of the thirty (30) days, Ms. Yearyean advised Mr. Marston that given the BIA's limited staff it would be at least ninety days before the BIA would complete the process. ER 168. Again months went by with the BIA doing nothing. *Id.* Then in early November of 2017, Ms. Yearyean advise Mr. Marston in

a telephone call that the BIA was not going to accept the BIA Deed or process either Ms. McCloud's or Ms. Jackson's request to have Parcel 5 restored to trust status. *Id.*

E. Proceedings in the District Court.

On April 19, 2018, Jessica Jackson filed with the District Court her motion to hold the Federal Officials in contempt of the District Court's Order, dated May 15, 1979. ER 202. In the motion, Jessica Jackson alleged that the Federal Officials violated the Court's May 15, 1979 Order, by refusing to restore to trust status Amerdine Snow McCloud's Parcel 5 on the Upper Lake Rancheria. ER 36-37.

The District Court held oral argument on Ms. Jackson's contempt motion on August 15, 2018. ER 01. On August 15, 2018, the District Court issued a minute order denying Ms. Jackson's motion to hold the Federal Officials in contempt of the Court's May 15, 1979 Order. ER 07. On August 17, 2018, the District Court entered its order denying the motion to hold the defendants in contempt. ER 01-06.

On September 14, 2018, Ms. Jackson filed a timely appeal with this Court, appealing that portion of the District Court's August 17, 2018 Order, denying her motion to hold the Federal Officials in contempt. ER 205.

SUMMARY OF ARGUMENT

On May 15, 1979, the District Court entered an order finding that the Federal Officials had: (1) breached their fiduciary trust obligation owed to the

Indians of the Upper Lake Rancheria and (2) violated the provisions of the California Rancheria Act by prematurely conveying to the Indians of the Rancheria parcels of Rancheria land prior to installing water, sewer and irrigation facilities on the Rancheria, as required by the Act.

To remedy the Federal Officials' breach and violations of the Act, the District Court exercised its broad equitable powers to fashion a remedy for the Indians. The District Court declared the termination process void and held that the Indians, who still owned land on the Rancheria, had the right to restore their individual, Rancheria parcels to the ownership of the United States to be held in trust for them or any Indians the Indian grantor conveyed beneficial title to, provided the Indian grantee was eligible to have land taken into trust by the United States.

The District Court's Order established a process for how the trust restoration would be effectuated. It provided that within one year from the date of issuance of the Order that the Indian could "elect" to restore the Indian's Rancheria property to trust status. Once the Indian notified the BIA officials of his/her desire to restore their Rancheria property to trust status, the Federal Officials had to do everything necessary to effectuate the trust restoration including preparing the deed for the Indian to sign, paying any outstanding property taxes on the property, purchasing a

preliminary title report and title insurance for the property and do all other things necessary to accomplish the trust restoration.

The Order also provided that if the Indian made his/her election after the one (1) year period, the Federal Officials had a “continuing duty” to restore the Indian’s Rancheria property to trust status “whenever possible.” This provision of the Order gave the Secretary discretion to reject a trust restoration only if the conditions for restoration could not be met by the Indian, such as paying the property taxes on the parcel or obtaining title insurance for the property. But once the Indian met the conditions for trust restoration as set for the in the Order, the Secretary had no discretion to reject the request but was under a continuing mandatory duty to effectuate the trust restoration.

Here, Amerdine (Jackson) McCloud and Jessica Jackson met all of the conditions necessary to qualify under the Order for a trust restoration. Jessica Jackson, paid the property taxes on Parcel 5, paid for the preliminary title report for Parcel 5, initially paid for the title insurance on Parcel 5 and provided evidence to the BIA that the property was not part of the assets of the estate of her late mother’s probate proceeding.

In addition, the Solicitor for the BIA rendered an opinion that the acquisition of Parcel 5 by the Government in trust for Ms. Jackson and Ms. Loss was a “mandatory” acquisition under the Order and therefore, not subject to the

Secretary's discretion requiring the Secretary to undertake an environmental review of the effects of taking the property into trust under the National Environmental Policy Act.

Under the facts of this case, the Federal Officials had a mandatory duty to accept Ms. McCloud's Deed conveying her interests in Parcel 5 on the Upper Lake Rancheria to the United States to be held in trust for her two daughters, Jessica Jackson and Gwen Loss. This is the only reasonable interpretation of the Federal Officials "continuing duty" under the Order requiring the Federal Officials to take land into trust under the Order "whenever possible."

This Interpretation of the Order is further supported by the fact that the Federal Officials "continuing duty" is a fiduciary obligation that the Federal Officials owe to the Indians to remedy the Federal Officials violations of the Act that forced Ms. McCloud in the first place to accept title to Parcel 5 in fee.

The District Court's interpretation of the Order would render Paragraph 8(f) of the Order meaningless because under the District Court's interpretation of Paragraph 8(f) the Federal Officials would never have a "duty" or an "obligation" to take any eligible Indian owned property into trust on the Rancheria after the expiration of the one (1) year election period. The taking of future property on the Rancheria into trust under the District Court's interpretation would always be at the whim and discretion of the Secretary.

As Ms. Jackson will show below, the District Court's interpretation of the Order is not a reasonable interpretation, given the fact that the Federal Officials breached their fiduciary obligation imposed upon them by the California Rancheria Act.

Thus, given the fact that: (1) the Federal Officials violated the Act by prematurely terminating the Rancheria and forcing the Indians of the Rancheria to accept title to individual parcels of land on the Rancheria in fee; (2) that the District Court exercised its equitable powers to fashion a remedy for the Indians, the intent of which was to the greatest extent possible put the Indians back in the position that they were prior to termination; (3) that the District Court's Order voided the termination process and placed a mandatory duty on the Secretary, at the Indians' election, to accept title to the Indian parcels in trust; (4) that the plain wording of Paragraph 8(f) imposes a "continuing duty" on the Federal Officials, after the one (1) year election period has expired to restore to trust status Indian owned land on the Rancheria; and (5) that Jessica Jackson did everything that the Federal Officials requested that she do to effectuate a trust restoration of Parcel 5, making it "possible" for the Federal Officials to accept into trust Ms. McCloud's Deed, the Federal Officials had a mandatory, non-discretionary duty, to accept Ms. McCloud's Deed, restoring her Parcel 5 to the ownership of the United States in trust for Jessica Jackson and Gwen Loss.

STANDARD OF REVIEW

“A district court’s decision to deny a motion for contempt is reviewed for abuse of discretion.” *Hook v. Ariz. Dep’t of Con.*, 107 F.3d 1397, 1403 (9th Cir. 1997). We may reverse only if the district court has misapprehended the law or rested its decision on a clearly erroneous finding of a material fact. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).” *Hallett v. Morgan*, 296 F.3d 732, 749 (9th Cir. 2002).

ARGUMENT

I.

THE FEDERAL OFFICIALS’ FAILURE TO ACCEPT MS. McCLOUD’S DEED IN TRUST AFTER REPEATED REPRESENTATIONS TO MS. JACKSON THAT THEY WOULD ACCEPT THE DEED AND RESTORE PARCEL 5 TO TRUST STATUS, DOES NOT MEET THE HIGH FIDUCIARY TRUST STANDARD OF CONDUCT THEY WERE REQUIRED TO MEET IN CARRYING OUT THE COURT’S MAY 15, 1979 ORDER.

The Court entered the Order based upon the fact that the Federal Officials violated the California Rancheria Act by conveying subdivided parcels of the Rancheria to individual Indians of the Rancheria prior to installing the water, sanitation and irrigation facilities mandated by the Act. In doing so, the Federal Officials not only violated the Act, but also breached their fiduciary obligation owed to the Indians of the Rancheria created by the Act:

It is clear, and undisputed, that the United States did not herein fulfill its fiduciary duties to the Indian people of the Rancheria, duties that must be exercised with “great care,” *United States v. Mason*, 412 U.S. 391, 398, . . ., in accordance with “moral obligations of the highest responsibility and trust,” that must be measured “by the most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 287, 297 . . .

Smith v. United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978).

Contrary to defendant’s argument, this is not a case in which the court, on its own, imposes a trust relationship without clear direction from Congress. Instead, Congress created and maintained a trust involving Indian property – and then provided for its termination . . . without ever indicating, by word or by intimation, that the trustee’s normal duty of monetary liability for breach of trust was to be abrogated.

Duncan v. United States, 667 F.2d 36, 44 (Ct. Cl. 1981).

The Order in this case was entered to void the termination, restore the Indian owned property on the Rancheria to trust status, and restore the fiduciary relationship between the United States and the Indians of the Rancheria. In implementing the Order, the Federal Officials were carrying out these “trust duties” to hold the Indians’ property in trust until the Rancheria was lawfully terminated, duties owed to the Indians, including Ms. McCloud and Ms. Jackson, under both the Act and the Order. As such, the Federal Officials’ conduct in implementing the Order must be judged by the highest fiduciary standards. *Smith v. United States*, 515 F. Supp. at 60.

Here, Virginia Carpenter, Realty Specialist for the BIA, initially prepared the deed for Ms. McCloud to execute and advised her that the BIA was going to accept the Deed restoring Ms. McCloud's Parcel 5 on the Upper Lake Rancheria to trust status. ER 163.

Then later when Ms. McCloud decided to convey her Parcel 5 to Jessica Jackson and Gwen Loss, reserving a life estate in the parcel for herself, Virginia Carpenter agreed to prepare a new deed for Ms. McCloud to execute and upon receipt of that BIA Deed, agreed to have the BIA accept the BIA Deed restoring Parcel 5 to trust status. ER 163. Ms. McCloud reviewed and executed the BIA Deed and sent it to Ms. Carpenter for acceptance. *Id.* Why the BIA Deed was never accepted at that time is anyone's speculation. Maybe Ms. Carpenter retired shortly thereafter and the BIA's acceptance of the new BIA Deed was never brought to the attention of the new BIA Realty Specialist. Maybe the BIA Deed was misfiled in BIA files and forgotten about after Ms. Carpenter retired. For whatever the reason, the BIA and Federal Officials never took action to accept Ms. McCloud's Deed or the BIA Deed after agreeing to do so. ER 164.

Then, once Ms. Jackson became aware of the fact that the BIA had never processed Ms. McCloud's request or restored Parcel 5 to trust status; she request that the BIA accept Ms. McCloud's Deed restoring Parcel 5 to trust status. ER 164-165.

Initially, Troy Burdick, Superintendent of the Central California Agency of the BIA, advised Ms. Jackson that the BIA would process Ms. Jackson's request to accept the McCloud Deed, if Ms. Jackson paid the property taxes on the Parcel. ER 166. Then after Ms. Jackson paid the property taxes on the Parcel, Superintendent Burdick advised her that the BIA would process her request and accept the Deed if Ms. Jackson paid for a preliminary title report and title insurance on the Parcel. *Id.* Then after Ms. Jackson paid for the report and insurance, she was told again by Superintendent Burdick, that the BIA would process her request and accept the Deed after Ms. McCloud and Ms. Loss's estates were probated. *Id.*

Then the BIA raised the issue of whether the approval of the Deed by the BIA constituted federal action under the National Environmental Policy Act requiring the BIA to complete an environmental review of the impacts the restoring of the Parcel to trust status might have on the environment. ER 167.

The BIA then referred the matter to its solicitor for an opinion. After the solicitor opined that the BIA's acceptance of the Deed was not subject to NEPA, because the restoring of the Parcel under the Order was mandatory, Kimberly Yearyean, Realty Officer for the Central California Agency of the BIA advised Ms. Jackson by email the Ms. McCloud's former request was being processed by the BIA as a "mandatory" fee to trust acquisition, and agreed within the next thirty (30) days to give Ms. Jackson's attorney, Lester J. Marston, an estimate of how

long it would take to complete the trust restoration and accept the Deed. ER 167-168. At the conclusion of the thirty (30) days, Ms. Yearyean advised Mr. Marston that given the BIA's limited staff, it would be at least ninety (90) days before the BIA would complete the trust restoration process. ER 168.

Then in a telephone call with Mr. Marston in early November of 2017, Ms. Yearyean told Mr. Marston, giving no reason, that the BIA had decided **not** to process Ms. Jackson's request to restore Parcel 5 to trust status. ER 168.

Clearly, when the Court examines the Federal Officials' conduct of delay and repeated representations made to Ms. McCloud and Ms. Jackson advising them that the BIA would process their requests, accept the Deed, and restore Parcel 5 to trust status in this case, the Federal Officials' conduct clearly falls far short of conduct "exercised with great care" in accordance with "moral obligations of the highest responsibility and trust." *Id.*

The Court's Order was entered to remedy the effects of the Federal Officials' illegal conduct in implementing the Rancheria Act. Under the Act and the Order the Federal Officials had a fiduciary obligation to carry out their duties under the Order in a manner that provided the Indian with the "maximum flexibility" to accomplish a trust restoration. Given the fact that the BIA agreed to accept Ms. McCloud's Deed and determined that the acceptance of the Deed under the Order was a mandatory acquisition exempting the restoration from the

requirements of NEPA, the Federal Officials fiduciary duty required them to process Ms. McCloud's and Ms. Jackson's requests and accept Ms. McCloud's Deed restoring Parcel 5 on the Rancheria to trust status.

II.

GIVEN THE CONDUCT OF THE FEDERAL OFFICIALS IN THIS CASE, THE FEDERAL OFFICIALS HAD A MANDATORY DUTY UNDER THE ORDER TO ACCEPT THE DEED AND RESTORE PARCEL 5 TO TRUST STATUS.

Paragraph 8 of the Order is clear and unambiguous. It provides:

The Secretary of the Interior is **under a continuing obligation to restore to trust status** lands of the Upper Lake Rancheria and fee interests in trust or former trust allotments issued to **persons listed in the plan for distribution of [the] assets of the Upper Lake Rancheria** by reason of the purported termination of such Rancheria, **whenever possible**.

ER 151-152. (emphasis added).

Paragraph 8(f)(6) of the Order further states:

It is intent of this Judgment that **maximum flexibility** be allowed in working out the administrative details of trust restoration, and the parties are specifically allowed to **enter into one or more agreements** for the purpose of specifying the terms and conditions on which trust restoration is to be effected . . .

ER 154. (emphasis added).

The Order is clear—it imposes a continuing, mandatory duty on the Federal Officials to restore Indian owned property on the Rancheria if the following conditions are met: (1) if the request is made by an Indian listed in the Distribution

Plan for the Rancheria; (2) the land to be restored to trust status is located on the Rancheria; and (3) the trust restoration is “possible.” *Id.*

Here, Ms. McCloud and Ms. Jackson’s request to restore Parcel 5 met all of the conditions of Paragraph 8(f) of the Order, thereby giving rise to the Federal Officials’ mandatory “continuing obligation” to restore Parcel 5 to trust status.

First, Ms. McCloud was an Indian “listed” in the Plan for Distribution of the assets of the Upper Lake Rancheria. ER 138. Second, Parcel 5 was a parcel of property located within the Rancheria that was conveyed to her as part of the termination of the Reservation. ER 162. Finally, given the facts of this case, i.e. Ms. Jackson paid the property taxes on Parcel 5, paid for the preliminary title report for Parcel 5, initially paid for the title insurance on Parcel 5 and demonstrated to the BIA that the property was not part of the assets of her late mother’s estate, it was clearly “possible” for the Federal Officials to accept the Deed and restore Parcel 5 to trust status. There can be no better evidence of this fact than the Federal Officials’ own statements that they would do just that: accept the Deed and restore Parcel 5 to trust status.

On January 25, 1988, Virginia Carpenter, Realty Officer for the Central California Agency of the Bureau of Indian Affairs told Ms. McCloud’s attorney, David J. Rapport, that the BIA would process Ms. McCloud’s request and take Parcel 5 into trust for Ms. McCloud as set forth in the Deed. ER 163.

On June 25, 2008, Troy Burdick told Ms. Jackson's attorney, Lester J. Marston, that the BIA would complete the work on Amerdine Jackson's fee-to-trust request and accept title to Ms. Jackson's Parcel 5 on the Upper Lake Rancheria by no later than July 30, 2008. ER 165.

On August 13, 2010, Superintendent Burdick again wrote Ms. Jackson a letter stating that the BIA was working on the "Fee-to-Trust application" for her deceased mother and that the BIA would be preparing the "deeds within the next week or two" for Ms. Jackson and her sister, Gwen Loss, to sign taking Parcel 5 into trust for them. ER 166.

Finally, on November 4, 2010, Kimberly Yearyean, Realty Officer for the BIA, sent Ms. Jackson's attorney, Lester J. Marston, an email stating that Ms. McCloud's request was being processed by the BIA as a "mandatory fee-to-trust acquisition." *Id.*

Clearly, if the trust restoration wasn't "possible," the Federal Officials and BIA employees, acting under the authority of the Act and the Order, would not have stated that it was not only "possible," to restore Parcel 5 to trust status, but that it was being done. ER 165-167. Moreover, pursuant to Paragraph 8(f)(6) of the Order, Ms. Jackson and the Federal Officials "entered into one or more agreements for the purpose of specifying the terms and condition on which [the] trust restoration [of Parcel 5 was] to be effected" ER 154.

Ms. Jackson agreed to pay, and did pay, the property taxes on Parcel 5. ER 165. Then Ms. Jackson agreed to pay, and did pay, for a preliminary title report for Parcel 5 showing there were no encumbrances on the Parcel that would prevent the Federal Officials from accepting title to the Parcel in the name of the United States in trust for Ms. Jackson and her sister, Ms. Loss. ER 132. Then the Federal Officials and Ms. Jackson agreed that, because the Federal Officials were accepting title to Parcel 5 under the “continuing obligation” imposed upon them by the Order, the trust acquisition was a mandatory acquisition by the United States not subject to the National Environmental Quality Act. ER 167. Finally, the parties agreed that neither Ms. McCloud’s nor Gwen Loss’ estates needed to be probated in order for the Federal Officials to accept the Deed and restore Parcel 5 to trust status since, with the death of Ms. McCloud, acceptance of the Deed would immediately vest beneficial title to the Parcel in Ms. Jackson and her sister Gwen Loss. ER 166-167. Upon the acceptance of the Deed, Ms. Loss’ estate could be probated by the Office of Hearings and Appeals for the Department of the Interior, which could determine Ms. Loss’ heirs entitled to inherit her trust interests in Parcel 5. ER 167.

Thus, all of the conditions necessary to accept the Deed and restore Parcel 5 to trust status under the Order had been met and the Federal Officials’ willful

failure to accept the Deed and restore Parcel 5 to trust status at that point constituted a direct violation of the Order.

III.

MS. JACKSON'S CONTEMPT MOTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS OR LACHES.

Before the District Court, the Federal Officials argued that Ms. Jackson's contempt motion was time-barred by 28 U.S.C. § 2401(a) or the doctrine of laches. In making this argument, the Federal Officials ignored the fact that they made repeated representations to Ms. Jackson advising her that they would restore Parcel 5 to trust status. In addition, the Federal Officials, during the same period of time that they were making these representations to Ms. Jackson, were negotiating and entering into agreements with her to effectuate the trust restoration of Parcel 5.

In reliance on the Federal Officials' representations, Ms. Jackson materially changed her position to her detriment: she paid the delinquent County property taxes assessed on Parcel 5, she paid to have a title company issue a preliminary title report for Parcel 5, she paid to have a realtor conduct an appraisal of Parcel 5, and she paid her attorney to write letters and prepare legal memoranda—all for the purpose of assisting the Federal Officials with the trust restoration. ER 164-167. As a result, Ms. Jackson's cause of action against the Federal Officials did not accrue until November of 2017, when she was advised for the first time that the Federal Officials were not going to restore Parcel 5 to trust status. ER 168. Thus,

the filing of her contempt motion was well within the six-year limitation period provided in 28 U.S.C. § 2401(a).

Additionally, as the Second Circuit has explained, “[t]he crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damage may be recovered in a civil action.” *Singleton v. City of New York*, 632 F.2d 185, 192 (2d. Cir. 1980). Similarly, the Supreme Court has noted “the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.” *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Here, Ms. Jackson did not become aware of the fact that Parcel 5 was not in trust until she received a property tax bill from the County after her mother’s death. ER 164. She immediately contacted the BIA and was advised that the property was not in trust. *Id.* She then made a request that the Federal Officials restore the property to trust status. *Id.* The Federal Officials then advised her that they would grant her request and restore Parcel 5 to trust status. ER 165-168. It wasn’t until November of 2017 that the BIA advised Ms. Jackson’s attorney that the Federal Officials were not going to accept the McCloud Deed restoring Parcel 5 to trust status. *Id.* Thus, Ms. Jackson’s cause of action against the Federal Officials accrued in November of 2017. She filed her contempt motion on April 17, 2018, well within the six year limitation period of 28 U.S.C. § 2401(a).

Furthermore, the “continuing violation” doctrine provides an exception to the normal “knew-or-should-have-known” rule for when a cause of action accrues. It tolls the statute of limitations period, bars the laches defense, and estops the Federal Officials in this case from asserting timeliness defenses. *See Gonzales v. Hasty*, 802 F.3d 212, 220 (2nd Cir. 2015). “Courts have long distinguished continuing violations, which toll the applicable statutes of limitations, from repetitive discrete violations, which constitute independently actionable individual causes of action.” *Nat’l Parks Conservation Ass’n v. TVA*, 480 F.3d 410, 417 (6th Cir. 2007). The doctrine applies to claims composed of a series of separate acts that collectively constitute one unlawful practice and to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment. *Gonzales v. Hasty*, 802 F.3d at 220. Accordingly, “where the continuing violation doctrine applies, the limitations period begins to run when the defendant has engaged in enough activity to make out an actionable . . . claim . . .” *Id.* (internal citations omitted).

Here, there is no doubt that the Federal Officials engaged in “a series of separate acts that collectively constitute one unlawful practice.” They repeatedly told Ms. Jackson that they would restore Parcel 5 to trust status and repeatedly entered into agreements with her to accomplish that goal. It wasn’t until November of 2017, when the BIA advised Ms. Jackson’s attorney that the Federal Officials

would not restore Parcel 5 to trust status, that Ms. Jackson's "actionable claim" accrued against the Federal Officials for a violation of the Order.

Finally, as shown above, the Federal Officials are in a trust relationship with Ms. Jackson. In dealing with her they were required to "exercise great care" in fulfilling their "continuing" trust obligation under the Order. They made material representations to Ms. Jackson, representations that she relied upon and which caused her to materially change her position by entering into a series of agreements with the Federal Officials in order to effectuate the trust restoration of Parcel 5. ER 165-167. To allow the Federal Officials to assert the limitations period or laches to bar Ms. Jackson's contempt motion would be highly prejudicial to Ms. Jackson. It would divest her of her beneficial one-half ownership interest in Parcel 5, it would deprive her of the benefits of the Federal Officials' "continuing" trust obligations under the Order, and it would deprive her of the benefits of the various agreements that she entered into with the BIA in order to effectuate the trust restoration.

Based on: (1) the fiduciary obligations the Federal Officials owed (and continue to owe) to Ms. Jackson under the Act and the Order; (2) the representations made by the Federal Officials to Ms. Jackson that they would restore Parcel 5 to trust status; (3) Ms. Jackson's reliance on those representations; (4) Ms. Jackson materially changing her position in reliance on those representations; (5) Ms. Jackson entering into agreements with the Federal

Officials to effectuate the trust restoration; and (6) the extreme prejudice Ms. Jackson will suffer if the Federal Officials are allowed to assert the limitation period and laches as a bar to Ms. Jackson's contempt motion, the Federal Officials are estopped from asserting any time-bar defenses to defeat Ms. Jackson's motion. *U.S. v. Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970).

IV.

PARCEL 5 IS NOT AN ASSET OF MS. MCCLOUD'S ESTATE SUBJECT TO THE JURISDICTION OF THE SUPERIOR COURT OF LAKE COUNTY.

Before the District Court, the Federal Officials also argued that the District Court lacked jurisdiction to determine whether they had violated the Court's Order and, if so, direct them to fulfill their "continuing obligations" under the Order to accept the Deed and restore Parcel 5 to trust status.³ They claimed that the Court was deprived of jurisdiction because the Superior Court of California for Lake County ("Superior Court") had jurisdiction over Parcel 5 as part of the inventory of the assets of the estate of Ms. McCloud. In support of their position, the Federal Officials rely on two cases: (1) *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006) ("*Marshall*"); and (2) *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S.

³ While the District Court never specifically addressed this argument in its Order denying Ms. Jackson's contempt motion, the Court did rule on the contempt motion rejecting this argument by implication.

33, 45-46 (1909) (“*Waterman*”). The Federal Officials’ argument fails for a number of reasons.

First, by executing the Deed, Ms. McCloud conveyed title to Parcel 5 to the United States to be held in trust for her two daughters, Ms. Jackson and Ms. Loss, reserving a life estate to herself. ER 157-159. Upon Ms. McCloud’s death, beneficial title to Parcel 5 vested in Ms. McCloud’s two daughters. ER 164-165. Thus, Parcel 5 never became an asset of Ms. McCloud’s estate and it was not, therefore, subject to the Superior Court’s probate jurisdiction.

Second, 25 U.S.C. § 1360(b) (“P.L. 280”) prohibits state courts from adjudicating any right, title, or interest in trust property. Based upon its interpretation of P.L. 280, the Superior Court issued an order excluding Parcel 5 from the assets of Ms. McCloud’s estate. ER 45. Parcel 5, therefore, was not an asset of the estate under the jurisdiction, possession, or control of the Superior Court. *Id.*

Third, the *Marshall* and *Waterman* cases do not stand for the proposition for which the Federal Officials cite them. Neither, *Marshall* or *Waterman* prohibited the District Court from exercising jurisdiction over this matter or precluded the District Court from ruling on Ms. Jackson’s contempt motion. Instead, *Marshall* and *Waterman* stand for the proposition that a federal court, which would otherwise have jurisdiction over a case, may not exercise its jurisdiction if a state

probate court is already exercising “in rem” jurisdiction over the property that is the subject of the federal court action:

This Court therefore comprehends *Markham's* “interference” language as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res* Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from disposing of property that is **in the custody of a state probate court**. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Marshall, 547 U.S. at 298 (emphasis added).

The Superior Court expressly excluded Parcel 5 from the assets of Ms. McCloud’s estate. Parcel 5 was not, therefore, “in the custody of a state probate court” at the time the District Court asserted jurisdiction over Ms. Jackson’s contempt motion and therefore, neither the holding in *Waterman* or *Marshall* precluded the District Court from exercising jurisdiction over Ms. Jackson’s contempt motion.

Finally, the District Court clearly had the jurisdiction and authority to determine whether the Federal Officials had violated the Court’s Order:

The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of their power [i.e., the contempt power].

Ex parte Robinson, 86 U.S. (19 Wall) 505, 510 (1873).

Moreover, the power to punish acts of contempt has been recognized as inherent in the federal courts. *Chambers v. NASCO Inc.*, 501 U.S. 32 (1991); *accord, Roadway Express Inc. v. Pipsa*, 447 U.S. 752, 764 (1980).

The District Court in its May 15, 1979 Order, ordered the Federal Officials to continue to restore Indian owned land on the Rancheria whenever possible to trust status. The Federal Officials had, and continue to have, the means and the ability to do so in this case. The District Court, therefore, had jurisdiction to determine whether the Federal Officials' conduct in this case violated the Court's May 15, 1979 Order and to hold them in contempt for violating the Order.

CONCLUSION

This case involves the actions of Federal Officials, acting in a fiduciary capacity, to carry out specific duties imposed upon them by the Rancheria Act and the District Court's Order. The Order was entered to remedy the illegal conduct of those same Federal Officials' in terminating the trust status of the Upper Lake Rancheria. The Order was clear: restore Indian owned property on the Reservation whenever possible. The restoration of Parcel 5 to trust status was "possible" in this case. The Federal Officials said it was "possible" by making numerous representations to Ms. Jackson that they were going to do just that. In reliance on those representations, Ms. Jackson entered into a number of agreements with the Federal Officials and materially changed her position in order to effectuate the

trust restoration. Given the Federal Officials' fiduciary responsibility and the representations they made to Ms. Jackson in this case, the Court should find that they have violated their "continuing obligation" under the Order to restore Parcel 5 to trust status.

For these reasons, and the reasons stated above, the Court should reverse the District Court's Order denying Ms. Jackson's contempt motion and hold that the Federal Officials have a mandatory duty to accept the McCloud Deed restoring Parcel 5 to trust status.

DATED: January 23, 2019

Respectfully Submitted

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for Plaintiffs-Appellants, is not aware of any related cases.

Dated: January 23, 2019

Respectfully Submitted
RAPPORT AND MARSTON

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LESTER J. MARSTON,
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,376 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: January 23, 2019

Respectfully Submitted
RAPPORT AND MARSTON

By: /s/ Lester J. Marston
LESTER J. MARSTON,
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Participants in the case who are not registered CM/ECF users will be served by U.S. Mail.

Dated: January 23, 2019

Respectfully Submitted

By: /s/ *Ericka Duncan*
ERICKA DUNCAN