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E-Filed 3/7/2014

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

TILLIE HARDWICK, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

Case No. 5:79-cv-01710-JF

NISENAN TRIBE OF THE NEVADA CITY
RANCHERIA; RICHARD JOHNSON, in his
official capacity as Tribal Chairman and in his
individual capacity as the heir/legatee/successor
to the distributees Peter Johnson and Margaret
Johnson,

Plaintiffs,

v.

S.M.R. JEWELL, Secretary of the Interior;
KEVIN K. WASHBURN, Assistant Secretary –
Indian Affairs for the United States Department
of the Interior,¹

Defendants.

Case No. 5:10-cv-00270-JF

**ORDER GRANTING PLAINTIFFS’ MOTION
TO CORRECT A CLERICAL MISTAKE IN
HARDWICK; GRANTING PLAINTIFFS’
MOTION TO AUGMENT THE
ADMINISTRATIVE RECORD IN NISENAN;
GRANTING DEFENDANTS’ MOTION FOR
JUDGMENT ON THE PLEADINGS IN
NISENAN; AND DISMISSING THE NISENAN
ACTION WITH PREJUDICE**

¹ S.M.R. Jewell and Kevin W. Washburn are substituted as the defendants in this action in place of their predecessors, Ken Salazar and Larry Echo Hawk. See Fed. R. Civ. P. 25(d).

1 Plaintiffs move to correct a clerical mistake in the *Hardwick*² action and to augment the
2 administrative record in the *Nisenan*³ action; Defendants move to dismiss the operative first
3 amended complaint (“FAC”) in the *Nisenan* action or, in the alternative, for judgment on the
4 pleadings. *Hardwick* ECF No. 356; *Nisenan* ECF Nos. 87, 93. The Court concludes that these
5 motions are appropriate for disposition without oral argument pursuant to Civil Local Rule 7-1(b).
6 For the reasons discussed below, all three motions will be granted, and the *Nisenan* action will be
7 dismissed with prejudice.

8 I. BACKGROUND

9 Early in the twentieth century, the United States sought to improve “the landless, homeless
10 or penurious state of many California Indians” by purchasing numerous small tracts of land known
11 as “rancherias.” *Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) (internal quotation marks and
12 citation omitted). The United States held these lands in trust for Indians who resided thereon. *Table*
13 *Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 258 (N.D. Cal. 1981). Trust lands could not be
14 taxed or conveyed to others. *Id.* “The United States controlled the rancheria lands under the special
15 fiduciary duty owed by the United States to the Indian people.” *Id.* Among the rancherias
16 established during this time frame was the Nevada City Rancheria, which was established by
17 executive order of President Woodrow Wilson on May 6, 1913. *Nisenan* Admin. R. (“AR”) 001.⁴

18 A. Rancheria Act

19 In 1958, Congress passed the California Rancheria Termination Act (“Rancheria Act” or
20 “Act”), which provided that the lands of forty-one enumerated California rancherias were to be
21 removed from trust status and distributed to the individual Indians of those rancherias. Cal.
22 Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), *amended by* Pub. L. 88-419,
23

24 _____
25 ² *Tillie Hardwick, et al. v. United States, et al.*, No. 5:79-cv-01710-JF.

26 ³ *Nisenan Tribe of the Nevada City Rancheria, et al. v. S.M.R. Jewell, Secretary of the Interior, et al.*, No. 5:10-cv-00270-JF.

27 ⁴ The United States manually filed the administrative record in *Nisenan* on October 30, 2012.
28 *Nisenan* ECF No. 79.

1 78 Stat. 390 (1964).⁵ The Act directed the Indians of each enumerated rancheria, or the Secretary of
2 the Interior after consulting them, to prepare a plan for distributing the rancheria’s lands or for
3 selling the lands and distributing the proceeds. *Id.* § 2(a). Upon approval of such plan by the
4 Secretary of the Interior, general notice of the plan was to be given and individual Indians were to
5 be afforded an opportunity to object. *Id.* § 2(b). Upon subsequent approval of the plan by a
6 majority of adult Indians who were to participate in the distribution, the plan was to be executed. *Id.*
7 Prior to distribution, the Secretary of the Interior was to complete certain tasks, including making
8 improvements to rancheria lands and appointing guardians to protect the rights of Indians who were
9 minors or otherwise in need of assistance in conducting their affairs. *Id.* §§ 2, 3, 8.

10 Under the Rancheria Act, approval of a distribution plan was to be considered final; the
11 distribution of assets was “not be the basis for any claim against the United States.” *Id.* § 10(a).
12 Upon final approval of a plan, the Secretary of the Interior was to revoke the tribal constitution and
13 corporate charter adopted by the Indians of the subject rancheria. *Id.* § 11. Following distribution,
14 former rancheria lands no longer would be exempt from state and federal taxes. *Id.* § 2(d).
15 Moreover, Indians who received any part of a rancheria’s assets, and the dependent members of
16 their immediate families, no longer would be entitled to federal services or immunities based on
17 Indian status. *Id.* § 10(b).

18 **B. Termination of the Nevada City Rancheria**

19 The Nevada City Rancheria was one of the forty-one rancherias enumerated by the
20 Rancheria Act. *Id.* § 1. The Bureau of Indian Affairs (“BIA”) prepared a distribution plan dated
21 June 8, 1959. AR 189-192. The plan indicated that: Peter Johnson and his wife Margaret Johnson
22 (“the Johnsons”) were the only Indians living on the Rancheria; the Johnsons were the only
23 individuals entitled to share in distribution of the Rancheria lands and assets; the Johnsons had
24 requested that the BIA sell the Rancheria lands and assets on their behalf; no minor children would

25 _____
26 ⁵ On August 11, 1964, the Rancheria Act was amended to provide for the distribution of lands and
27 assets of any California rancheria upon request by a majority vote of the adult Indians of the
28 rancheria. Cal. Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), amended by
Pub. L. 88-419, 78 Stat. 390 (1964). The Nevada City Rancheria lands at issue here were
distributed prior to the date of the amendment.

1 receive funds from the sale of the Rancheria lands and assets; and the Johnsons were capable of
2 handling their own affairs. *Id.* On July 17, 1959, the acting BIA Area Director sent the BIA
3 Commissioner a letter stating that general notice of the distribution plan had been given on June 16,
4 1959, and no objections had been received. AR 199. On July 29, 1959, the BIA Commissioner
5 responded by letter, advising that the distribution plan was approved and should be presented to the
6 Johnsons for their acceptance. AR 201.

7 On August 4, 1959, the BIA Area Director sent the Johnsons a letter informing them that the
8 distribution plan had been approved by the United States and that a general meeting of distributees
9 would be held for the purpose of voting on the plan. AR 202. The letter advised that the Johnsons
10 could vote by written ballot in lieu of attending the general meeting. *Id.* On August 14, 1959, both
11 Peter and Margaret Johnson voted to approve the distribution plan. AR 212. However, distribution
12 was delayed by other individuals claiming mining rights in Rancheria lands. AR 224. The
13 Johnsons were permitted to remain on the property during this period of delay. *Id.* Margaret died
14 on May 24, 1963. AR 256. A few days later, on May 27, 1963, the Rancheria lands were sold for
15 \$20,500. AR 258. The grant deed was delivered to the purchasers on June 10, 1963. AR 261.

16 On September 22, 1964, the Secretary of the Interior published a Notice stating as follows:
17 Notice is hereby given that the Indians named under the Rancherias listed below are
18 no longer entitled to any of the services performed by the United States for Indians
19 because of their status as Indians, and all statutes of the United States which affect
20 Indians because of their status as Indians, shall be inapplicable to them, and the laws
of the several States shall apply to them in the same manner as they apply to other
citizens or persons within their jurisdiction. Title to the lands on the Rancherias has
passed from the United States Government under the distribution plan of each
Rancheria.

21
22 29 Fed. Reg. 13,146 (Sept. 22, 1964), copy provided at AR 340-42. The Notice listed the Nevada
23 City Rancheria and identified Peter Johnson as the sole distributee. *Id.*

24 **C. *Hardwick* Action**

25 In 1979, individuals from a number of terminated rancherias, including the Nevada City
26 Rancheria, filed the *Hardwick* action in this district. *Hardwick* Compl., attached as Ex. A to Pls.’
27 Opp. to Mot. to Dismiss, *Nisenan* ECF No. 96-1. The *Hardwick* plaintiffs sought restoration of their
28 status as Indians, entitlement to federal Indian benefits, and the right to reestablish their tribes as

1 formal government entities. *Id.* In 1980, Judge Williams certified a class consisting of all persons
2 who received assets of thirty-four enumerated rancherias pursuant to distribution plans prepared
3 under the Rancheria Act; any heirs or legatees of such persons; and any Indian successors in interest
4 to real property so distributed. Order Re: Class Cert., attached as Ex. B. to Pls.’ Opp. to Mot. to
5 Dismiss, *Nisenan* ECF No. 96-2.

6 In 1983, the *Hardwick* court entered a “Stipulation For Entry Of Judgment” (“1983
7 Stipulation”). *Hardwick* 1983 Stipulation, attached as Ex. D to Pls.’ Opp. to Mot. to Dismiss,
8 *Nisenan* ECF No. 96-2. The 1983 Stipulation divided the class members into three subclasses. The
9 first subclass consisted of individuals who received assets of seventeen enumerated rancherias⁶; the
10 United States agreed to restore those individuals to Indian status, restore recognition of their tribes
11 as Indian entities, and provide a mechanism by which individuals holding former rancheria lands
12 could reconvey those lands to the United States to be held in trust. *Id.* at ¶¶ 1-8. The second
13 subclass consisted of individuals who received assets of twelve different enumerated rancherias⁷; as
14 to those individuals, the action was dismissed without prejudice. *Id.* at ¶ 14. The third subclass
15 consisted of individuals whose claims were barred under the doctrine of *res judicata*; as to those
16 individuals, the action was dismissed with prejudice. *Id.* at ¶¶ 15-19.

17 For unknown reasons, the 1983 Stipulation failed to mention the Nevada City Rancheria.
18 *See id.* ¶¶ 1-19. On May 20, 1992, Judge Williams dismissed the *Hardwick* action and closed the
19 case. *Hardwick* ECF No. 258.

20 **C. *Nisenan* Action**

21 On January 20, 2010 – more than forty years after the Nevada City Rancheria’s lands were
22

23 ⁶ The seventeen rancherias were: (1) Big Valley; (2) Blue Lake; (3) Buena Vista; (4) Chicken
24 Ranch; (5) Cloverdale; (6) Elk Valley; (7) Greenville; (8) Mooretown; (9) North Fork; (10)
25 Picayune; (11) Pinoleville; (12) Potter Valley; (13) Quartz Valley; (14) Redding; (15) Redwood
26 Valley; (16) Rohnerville; and (17) Smith River. *Hardwick* 1983 Stipulation at ¶ 1, attached as Ex.
27 D to Pls.’ Opp. to Mot. to Dismiss, *Nisenan* ECF No. 96-2.

28 ⁷ The twelve rancherias were: (1) Graton; (2) Scotts Valley; (3) Guideville; (4) Strawberry Valley;
(5) Cache Creek; (6) Paskenta; (7) Ruffeys; (8) Mark West; (9) Wilton; (10) El Dorado; (11) Chico;
and (12) Mission Creek. *Hardwick* 1983 Stipulation at ¶ 14, attached as Ex. D to Pls.’ Opp. to Mot.
to Dismiss, *Nisenan* ECF No. 96-2.

1 sold and more than seventeen years after *Hardwick* was closed – the Nisenan Maidu Tribe of the
2 Nevada City Rancheria filed an action challenging the sale of the Rancheria’s lands and the
3 termination of the Tribe. *Nisenan* ECF No. 1. The *Nisenan* action was related to the *Hardwick*
4 action under this Court’s Civil Local Rules. Order Relating Cases, *Nisenan* ECF No. 21.

5 On August 5, 2011, the Nisenan Maidu Tribe filed a motion for leave to proceed with its
6 claims in the *Hardwick* action. Pl.’s Mot to Reopen *Hardwick*, *Nisenan* ECF No. 48. The Tribe
7 argued that those claims were still viable because they had not been disposed of by the *Hardwick*
8 judgment. *Id.* On September 22, 2011, this Court issued an order deferring consideration of the
9 Tribe’s motion, noting that despite the Tribe’s references to *Hardwick* as “pending,” the case had
10 been closed since 1992. Order Deferring Consideration of Pl.’s Mot. at 5 n.4, *Nisenan* ECF No. 67.
11 The Court opined that the proper procedural vehicle for seeking to reopen *Hardwick* was a motion
12 pursuant to Federal Rule of Civil Procedure 60(b). *Id.* at 6. However, the Court indicated that it
13 would not be inclined to grant relief under Rule 60(b) unless the Nisenan Maidu Tribe could
14 demonstrate that its members would have been in the subclass entitled to relief under the *Hardwick*
15 settlement and not in one of the subclasses whose claims were dismissed. *Id.* at 6-7.

16 On October 30, 2012, the United States filed the administrative record in the *Nisenan* action.
17 *Nisenan* ECF No. 79. The Nisenan Maidu Tribe thereafter abandoned its attempt to reopen
18 *Hardwick*, conceding that its members would have been in the second *Hardwick* subclass of
19 individuals whose claims were dismissed without prejudice. Pl.’s Mot. for Correction of Clerical
20 Mistake at 5, *Hardwick* ECF No. 356. The Tribe now asserts that the Nevada City Rancheria’s
21 omission from the list of rancherias enumerated in connection with the second *Hardwick* subclass
22 was the result of a clerical error, and it requests that the error be corrected pursuant to Federal Rule
23 of Civil Procedure 60(a). *Id.* The Tribe also requests that the Court dismiss claims relating to the
24 Nevada City Rancheria from *Hardwick* without prejudice and that such dismissal be effective as of
25 the date of the dismissal order rather than *nunc pro tunc*. *Id.* at 7.

26 On March 13, 2013, the Nisenan Maidu Tribe filed the operative first amended complaint
27 (“FAC”), adding an individual, Richard Johnson, as a named plaintiff both in his official capacity as
28 Tribal Chairman and in his individual capacity as the heir/legatee/successor to Peter and Margaret

1 Johnson. *Nisenan* ECF no. 84. Claims 1-4 of the FAC assert that during the process of distributing
2 the lands of the Nevada City Rancheria and terminating the Tribe’s status, Defendants breached
3 obligations imposed by the Rancheria Act and by their fiduciary duty to Plaintiffs. Claim 5 of the
4 FAC seeks review of those alleged wrongs pursuant to the Administrative Procedure Act (“APA”),
5 5 U.S.C. § 701 *et seq.* Plaintiffs have filed a motion for leave to augment the administrative record
6 with documents that they contend are relevant and support their claims. Defendants oppose the
7 motion to augment and seek dismissal of the *Nisenan* action with prejudice.

8 **II. MOTION TO CORRECT CLERICAL MISTAKE IN *HARDWICK***

9 The Nisenan Maidu Tribe asserts that the Nevada City Rancheria was one of the rancherias
10 that was the subject of the *Hardwick* litigation; claims arising from distribution of the Nevada City
11 Rancheria’s lands were subject to dismissal without prejudice pursuant to the terms of the 1983
12 Stipulation; and the Nevada City Rancheria was omitted from the 1983 Stipulation as result of a
13 clerical mistake. The Tribe requests that the Court correct that mistake.

14 “The court may correct a clerical mistake or a mistake arising from oversight or omission
15 whenever one is found in a judgment, order, or other part of the record.” Fed. R. Civ. P. 60(a). The
16 record strongly suggests that the Nevada City Rancheria in fact was omitted from the 1983
17 Stipulation as a result of a clerical mistake. The Nevada City Rancheria was listed on the
18 “Summary Sheet” of “Terminated Rancherias” that was attached to the *Hardwick* complaint as
19 Exhibit A. *Hardwick* Compl., attached as Ex. 1 to Mot. to Correct Clerical Error, *Hardwick* ECF
20 No. 356-1. The Nevada City Rancheria also was one of the thirty-four rancherias enumerated in the
21 *Hardwick* court’s order granting class certification. Order Re: Class Cert., attached as Ex. 4. to Mot.
22 to Correct Clerical Error, *Hardwick* ECF No. 356-5. The attorney who acted as lead plaintiffs’
23 counsel has submitted a declaration saying that Nevada City Rancheria was a party to the *Hardwick*
24 action. Decl. of David Rapport ¶¶ 14-15, *Nisenan* ECF No. 37. The attorney who acted as lead
25 counsel for the federal defendants has submitted a declaration stating that he does not know why the
26 Nevada City Rancheria was omitted from the 1983 Stipulation but he believes that the Nevada City
27 Rancheria was omitted from the 1983 Stipulation as a result of a clerical error. Decl. of Paul Locke
28 ¶¶ 5-7, *Nisenan* ECF No. 38.

1 The Tribe asserts, and Defendants do not dispute, that had the Nevada City Rancheria been
2 included in the 1983 Stipulation the Tribe's members would have been in the second subclass whose
3 claims were dismissed without prejudice. Defs.' Opp. at 2, *Hardwick* ECF No. 359. Defendants
4 nonetheless oppose the motion to correct, arguing that there is insufficient evidence to show that the
5 Nevada City Rancheria was omitted from the 1983 Stipulation because of a clerical mistake. *Id.* at
6 2-3. However, Defendants offer no alternative explanation for the omission of the Nevada City
7 Rancheria. Based upon the record as a whole, the Court concludes that the Nevada City Rancheria
8 was omitted from the 1983 Stipulation as a result of a clerical mistake.

9 Defendants point out that if the motion to correct is granted, the Nisenan Maidu Tribe and
10 the Nevada City Rancheria may be able to take advantage of a provision of the 1983 Stipulation
11 limiting Defendants' ability to assert a laches defense. Defendants argue that they would be
12 prejudiced if that limitation were extended to the Nisenan Maidu Tribe at this late date. However,
13 the fact that the Court's correction of its clerical error may afford the Tribe and the Nevada City
14 Rancheria an additional defense does not constitute a basis for the Court to decline to correct the
15 error.

16 Without citation to authority, the Tribe requests that the Court grant its motion effective as
17 of the date of the present order rather than *nunc pro tunc* to the date of the 1983 Stipulation. Rule
18 60(a) motions generally are treated as motions for relief *nunc pro tunc*, and the Tribe does not offer
19 a compelling reason why the Court should depart from that practice. *See, e.g., Miller v.*
20 *Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) (equating request for entry *nunc pro*
21 *tunc* with Rule 60(a) motion); *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525,
22 528 (9th Cir. 1965) (discussing Rule 60(a) modification of an injunction *nunc pro tunc*); *Ford v.*
23 *City of Cape Girardeau*, 151 F.R.D. 116, 117 (E.D. Mo. 1993) (amending judgment *nunc pro tunc*
24 pursuant to Rule 60(a)). The Rule 60(a) motion will be granted *nunc pro tunc* to the date of the
25 1983 Stipulation.

26 III. MOTION TO AUGMENT ADMINISTRATIVE RECORD IN NISENAN

27 On October 29, 2012, Defendants filed an administrative record containing fifty-two
28 documents in the *Nisenan* action. *Nisenan* ECF No. 78. Plaintiffs attached nineteen additional

1 documents to their FAC filed March 13, 2013. *Nisenan* ECF No. 84. The parties subsequently
2 agreed that eleven of the additional nineteen documents should be included in the administrative
3 record, and Defendants filed a supplement to the administrative record on May 22, 2013. *Nisenan*
4 ECF No. 91. Plaintiffs now move to add the remaining eight documents.

5 Plaintiffs' motion is governed by the APA, which provides the waiver of sovereign
6 immunity in this case.⁸ *See* 5 U.S.C. § 702. The APA provides for judicial review of "final
7 agency action" and "[a]gency action made reviewable by statute." 5 U.S.C. § 704. The agency
8 action will be set aside if it is "unsupported by substantial evidence or arbitrary, capricious, an abuse
9 of discretion, or otherwise not in accordance with the law." *Thompson v. United States Dep't of*
10 *Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks and citations omitted).
11 "[J]udicial review is to be based on the full administrative record before the agency *when it made its*
12 *decision.*" *Id.* at 555-56. "The whole administrative record, however, is not necessarily those
13 documents that the agency has compiled and submitted as 'the' administrative record." *Id.* at 555
14 (internal quotation marks and citation omitted). The record to be reviewed "consists of all
15 documents and materials directly or indirectly considered by agency decision-makers and includes
16 evidence contrary to the agency's position." *Id.* (internal quotation marks and citation omitted).
17 "The reviewing court can go outside the administrative record but should consider such evidence
18 relevant to the substantive merits of the agency decision only for the limited purpose of background
19 information or to determine whether the agency considered all the relevant factors." *Id.*

20 The agency actions about which Plaintiffs complain are Defendants' termination of the
21 Nevada City Rancheria without first taking certain actions required by the Rancheria Act, and
22 Defendants' failure to reinstate the Nevada City Rancheria and the Nisenan Maidu Tribe to
23 protected Indian status. FAC ¶¶ 112-16, *Nisenan* ECF No. 84. As noted above, the Nevada City
24 Rancheria lands were sold in 1963 and members of the Nevada City Rancheria were stripped of

25 _____
26 ⁸ The FAC asserts waiver of sovereign immunity pursuant to "the APA, and the United States'
27 fiduciary and trustee obligations owed to the Nevada City Rancheria and its members." FAC ¶ 7,
28 *Nisenan* ECF No. 84. However, "[t]ribes cannot allege a common law cause of action for breach of
trust that is wholly separate from any statutorily granted right." *Gros Ventre Tribe v. United States*,
469 F.3d 801, 810 (9th Cir. 2006). The APA is the only statute identified in the FAC that provides
for waiver of sovereign immunity.

1 their Indian status by means of a notice placed in the Federal Register in 1964. The Nevada City
2 Rancheria and the Tribe have not been reinstated to Indian status since then.

3 It does not appear that the eight documents at issue would have been materials directly
4 considered in taking these agency actions. One document is a letter dated 1936 – well before the
5 enactment of the Rancheria Act in 1958 – discussing the Nevada City Rancheria; five documents are
6 BIA letters, memoranda, or reports dated between 1956 and 1958, discussing other rancherias or the
7 Rancheria Act generally; one document is a 1975 memorandum from the Commissioner on Indian
8 Affairs interpreting the Rancheria Act; and one document is a 1978 notice in the Federal Register
9 describing the terms of judgments entered in other lawsuits. Arguably, the documents may have
10 been considered indirectly by agency decision-makers, as they all relate to the Nevada City
11 Rancheria, to the Rancheria Act as applied to other rancherias, or to the Rancheria Act generally.
12 Even if the documents were not actually considered by Defendants when taking the agency actions
13 challenged here, they provide useful background information. Defendants have not articulated any
14 prejudice that would result from the Court’s consideration of the documents. Accordingly, the
15 motion to augment the administrative record also will be granted.

16 **IV. MOTION FOR JUDGMENT ON THE PLEADINGS IN *NISENAN***

17 Defendants seek dismissal of the FAC or, in the alternative, judgment on the pleadings.
18 Because Defendants filed an answer to the FAC before filing the present motion, the motion
19 properly is construed as a motion for judgment on the pleadings rather than as a motion to dismiss.
20 *See* Fed. R. Civ. P. 12(b) (motion to dismiss under Rule 12(b) must be made before responsive
21 pleading); Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings may be brought after
22 pleadings are closed); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (a Rule 12 motion
23 filed after an answer may be construed as a motion for judgment on the pleadings under Rule 12(c)).

24 Because a motion for judgment on the pleadings under Rule 12(c) is “functionally identical”
25 to a motion to dismiss under Rule 12(b)(6), the same legal standard applies to both motions.
26 *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). A motion to dismiss tests
27 the legal sufficiency of the plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
28 When determining whether a claim has been stated, the Court accepts as true all well-pled factual

1 allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration*
2 (*Alaska Inc.*, 643 F.3d 681, 690 (9th Cir. 2011)). However, the Court need not “accept as true
3 allegations that contradict matters properly subject to judicial notice or by exhibit” or “allegations
4 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
5 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations
6 omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient
7 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
8 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
9 claim is facially plausible when it “allows the court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged.” *Id.*

11 As noted above, the APA provides the only waiver of sovereign immunity for the claims
12 asserted in the FAC. The APA does not contain a specific statute of limitations; however, in
13 general “every civil action commenced against the United States shall be barred unless the
14 complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a).
15 “Indian Tribes are not exempt from statutes of limitations governing actions against the United
16 States.” *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990).

17 On their face, the claims relating to termination of the Nevada City Rancheria accrued in
18 1964 when the notice of termination was published in the Federal Register. Plaintiffs filed the
19 *Nisenan* action in January 2010, well outside the limitations period. With respect to the claims
20 relating to Defendants’ failure to reinstate the Nevada City Rancheria and the Nisenan Maidu Tribe,
21 Plaintiffs contend that those claims were tolled during the pendency of the *Hardwick* action.
22 However, even assuming that the claims had not expired before the filing of *Hardwick* and that they
23 were tolled during its pendency, *Hardwick* was closed in 1992. Plaintiffs filed the *Nisenan* action
24 more than six years later, in January 2010. Accordingly, all of the claims asserted in the *Nisenan*
25 action appear to be time-barred.

26 Plaintiffs assert that Defendants waived the defense of statute of limitations by failing to
27 raise it in their answer in *Hardwick*. However, Defendants raised the defense in their answers to
28 both the complaint and FAC in the *Nisenan* action. *See Nisenan* ECF Nos. 13, 88. Plaintiffs argue

1 that Defendants are judicially estopped from “taking contrary positions” in the *Hardwick* and
2 *Nisenan* actions. “Judicial estoppel is an equitable doctrine invoked by a court at its discretion.”
3 *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). When deciding whether to apply the
4 doctrine, a court considers: “(1) whether a party’s later position is clearly inconsistent with its
5 original position; (2) whether the party has successfully persuaded the court of the earlier position;
6 and (3) whether allowing the inconsistent position would allow the party to derive an unfair
7 advantage or impose an unfair detriment on the opposing party.” *Id.* (internal quotation marks and
8 citation omitted). “[J]udicial estoppel seeks to prevent the deliberate manipulation of the courts, and
9 therefore should not apply when a party’s prior position was based on inadvertence or mistake.” *Id.*
10 (internal quotation marks and citation omitted).

11 The Court concludes that judicial estoppel is not warranted in *Nisenan*. The fact that
12 Defendants did not assert the statute of limitations in *Hardwick* is not “inconsistent” with their
13 assertion of the defense in a different case filed thirty years later. *Hardwick* was a class action
14 involving numerous rancherias and tribes. The record does not disclose why the statute of
15 limitations was not raised as a defense. *Hardwick* ultimately settled, and the statute of limitations
16 never was addressed by the Court. In contrast, Defendants asserted the statute of limitations at the
17 first available opportunity in *Nisenan*. The Court is at a loss to understand how Defendants’
18 assertion of a limitations defense in *Nisenan* allows Defendants to “derive an unfair advantage” over
19 Plaintiffs.

20 It is clear from this record that Plaintiffs have a deep and sincere desire to regain federal
21 recognition of Indian status. However, the *Nisenan* action – filed more than forty years after
22 termination of the Nevada City Rancheria and more than seventeen years after *Hardwick* was closed
23 – simply was filed too late. “Statutes of limitation are primarily designed to assure fairness to
24 defendants and to promote the theory that ‘even if one has a just claim it is unjust not to put the
25 adversary on notice to defend within the period of limitation and that the right to be free of stale
26 claims in time comes to prevail over the right to prosecute them.’” *Albillo-De Leon v. Gonzales*,
27 410 F.3d 1090, 1095 (9th Cir. 2005) (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428
28 (1965)).

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V. ORDER

Accordingly, and good cause therefor appearing,

(1) the motion to correct a clerical mistake in *Hardwick* is GRANTED;

(2) the motion to augment the record in *Nisenan* is GRANTED;

(3) the motion for judgment on the pleadings in *Nisenan* is GRANTED without leave to amend; and

(4) the *Nisenan* action is DISMISSED WITH PREJUDICE.

DATED: March 7, 2014



JEREMY FOGEL
United States District Judge