No. 06-15351



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEARL ALVARADO, ELISHIA ARENAS, MARIO ARENAS, JR., DANNY DANIELS, KATHLEEN DAVIS, CHERYL DURAN, JEANINE GONZALES, DIANE GRIGSBY, WAYNE GRIGSBY, PAULA ANN GUTIERREZ, CHAD ELLIOTT LEWIS, CHERYL LEWIS, CLIFFORD LEWIS, DONALD LEWIS, JERRY LEE LEWIS, KATHY LYNNETTE LEWIS, KEVIN LEWIS, LARRY PAUL LEWIS, Jr., LISA LEWIS, LOUELLA LEWIS, REGINA LEWIS, TRINA LEWIS-DAVIS, CARL MEKEALIAN, CONNIE MEKEALIAN, JENNIFER MEKEALIAN, LORI MEKEALIAN, MIKE MEKEALIAN, YVONNE MEKEALIAN, ALEX MONTGOMERY, CLIFF MONTGOMERY, FRANCINE MONTGOMERY, VINCENT MORENO, VALENTINA OLIVER, and DARREN SORONDO,

Plaintiffs/Appellants,

v.

TABLE MOUNTAIN RANCHERIA, (dba or successor to the TABLE MOUNTAIN RANCHERIA ASSOCIATION), LEWIS BARNES, WILLIAM WALKER, AARON JONES, CAROLYN WALKER, TWILA BURROUGH, LeANNE WALKER GRANT, CRAIG MARTINEZ, ROBBIE CASTRO, RAY BARNES, VERN CASTRO; GALE NORTON, in her official capacity as the Secretary of the Department of Interior; and THE UNITED STATES OF AMERICA,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

# REPLY BRIEF FOR APPELLANTS

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September 11, 2006

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, each of the Appellants are individuals. Therefore they are not a publicly held corporation, nor do they have any parent company, subsidiary or affiliate, and they do not issue shares to the public.

September 11, 2006

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## I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

Appellees argue as their primary and overriding premise that the *Watt* decision did not involve "membership", and since this Court and other appellate courts refuse to exercise jurisdiction over "tribal membership" disputes, *that* should be the end of this case.

However, at the time that the class action plaintiffs, including Table Mountain, filed their complaint against the Secretary in 1980, Congress had established the law in 1975 that "status as Indians" and "Indian status" were the operative words, and *those* phrases meant tribal membership, regardless of whether or not "membership" was the succinct term that was used. In light on the express statements by Congress in 1975, and the Secretary's regulations promulgated thereunder in 1978, the Table Mountain Rancheria, the class of distributees and dependents thereof of the Table Mountain Rancheria, including their heirs, and their offspring sued the Secretary of the Interior to: (1) restore Table Mountain's status as a federally recognized tribe, with the benefits, privileges, immunities and government-to-government relations with the federal government and its "constituent members", and (2) to restore the distributees, their heirs and assigns, and the dependent members and their offspring of the distributees to their full "status as Indians" under the laws of the United States, in

order to receive the benefits, privileges and immunities of other recognized tribes. That class of "restored-to-the-status of Indians" necessarily included Appellants herein. Congress intended their act (25 U.S.C. § 450 *et seq.*), to assure "maximum Indian participation in the direction of the tribe, its culture, education and self-determination, and while "tribal membership" was defined secondarily by Congress as the same as Indian status associated with a recognized tribe, the primary definition was to restore Native Americans to their "status as Indians under the laws of the United States, with full benefits, privileges, protections and immunities."

Thus, the restoration of the "status as Indians", given the law announced by Congress five (5) years before the lawsuit was filed, was exactly the same thing as "membership." Those issues will be discussed in Sections II and III below.

Further, as explained in more detail in Appellants' opening brief, the individually named Appellees including the Table Mountain Rancheria Tribe, waived its sovereign immunity with respect to not only seeking tribal recognition for itself, but also its "constituent memberships", *and* restoring Table Mountain's people to the "status as Indians" with all rights, benefits, and privileges accompanying that restoration, which was Congress' intent and the statute it passed, absolutely meant "tribal membership."

Many – but not all of the class plaintiffs – had their status as Indians rights restored, including the named class plaintiffs and their favorite relatives, but many were left out, including the Appellants herein who were represented by the named class plaintiffs in the *Watt* case. Named and unnamed class representatives cannot receive any more benefits, or benefits different, than other members of the class. However, none of the "restored" Appellants in this case are recognized at all by the tribe nor by the federal government, as they all promised and stipulated to in the *Watt* decision.

Only short shrift – or none at all – is necessary to reply the Appellees' remaining arguments, as said arguments have already been dealt with in Appellants' opening brief.

The Court is urged by the Appellants herein to reverse the judgment below and order restored the rights, privileges and immunities and government and tribal benefits required by the law, and confirmed in the *Table Mountain v. Watt* order, which in Table Mountain parlance is membership, but in the legal context it is the restoration of Appellants' status as Indians of the Table Mountain Tribe.

## II. RELEVANT FACTS IN REPLY TO APPELLEES' ARGUMENT RE "MEMBERSHIP"

Critical to this Court's disposition of this appeal in light of the Appellees' respective arguments are some key facts in the pleadings and rulings from the *Table Mountain, et al v. Watt* decision, as well as in Appellants' complaint below. These facts are critical in light of Appellees' briefs and argument where they claimed that the *Table Mountain Watt* case did not at all involve "tribal membership", with their thought being that their continuous use of the word "membership" automatically produces a win for them because of the court's repeated disavow of jurisdiction re "tribal membership" because of the tribe's sovereign immunity. For example, the government attempts to provoke the court into an opinion affirming the court below by repetitively referring to the Appellants herein as the "Membership Applicants"; also Appellees Table Mountain and the Table Mountain individual Appellees continuously assert that Table *Mountain v. Watt* dealt with "Indian status" which is – according to them – not at all "membership", because "membership" was never mentioned in the pleadings in the *Watt* case nor in the settlement nor in the court's decision and order re settlement. How wrong they all are.

Quite candidly it is true that the "Plaintiffs" in the *Watt* case did not use the term "Table Mountain membership" or "membership", in the pleadings in that case, but the pleadings and the orders must be considered in the context of the law at the time, and in the context of the *Watt* case. It was a class action lawsuit where respective individuals representing distributees and dependants (and their offspring) of distributees of the Table Mountain Rancheria, joined forces with Table Mountain to successfully sue the Secretary of the Interior to not only regain Table Mountain's status as a recognized Indian tribe, but to garner for its class representatives and the entire class who they respectively represented to regain their "Indian status" which, under the law unequivocally and necessarily meant MEMBERSHIP in the now recognized Table Mountain Rancheria for all classes of Plaintiffs in that case – which necessarily included the Appellants herein.

First, none of the Appellees assert, nor could they, that the instant Appellants were not members of the class represented by the class representatives in the *Watt* case. Appellants below in their complaint repeatedly alleged (which was not refuted) that they were unnamed class members in that *Watt* decision (e.g., CR 1, ER p. 3, lead-in paragraph of the complaint); each of the Appellants in this action is a direct descendent of distributees and dependants of distributees of the 1958 distribution plan and are direct lineal descendants of those distributees (ER

4, ¶ 1); Appellants herein are related through blood to every "recognized" Table Mountain member, and most, if not all, of these Appellants are generationally closer to or as close to the original distributees as many now "recognized" members (ER 4, ¶ 1; ER 12, ¶ 51; ER 13-14, ¶ 56; ER 15, ¶ 60); and the membership requirements of the constitution of the Table Mountain Rancheria necessarily included all of the Appellants and who were represented class members in that 1980 action. (ER 17-18, ¶ 61-62)

### A. Pertinent stipulation for settlement and court order in the *Watt* case:

As stated in the next section, for purposes of the case brought by the Plaintiffs in the *Watt* action "Indian status" is exactly the same thing as "tribal membership" in light of the law at the time, and what the complaint in *Watt* asserted, and what was stipulated to by the parties in that case along with the court order. Again, the stipulation reached by the parties in that *Watt* action was that (ER 30, ¶ 3) "the status of the named individual Plaintiffs and class members as Indians under the laws of the United States is confirmed" and that "the Secretary of the Interior shall list the Table Mountain band of Indians as an Indian tribal entity pursuant to 25 C.F.R. Part 83.6(b)." (ER 30, ¶ 4) Also, the parties stipulated in *Watt* that the government defendant therein was to prepare and

provide to the plaintiffs a "list of federal services, benefits and programs and the eligibility criteria therefore which were available to Indians because of their *status as Indians*...." (Emphasis added) "Any individual plaintiff or plaintiff class members who applied for any federal service...available exclusively to Indians and whose application therefore was rejected solely on the ground that the applicant's status as an Indian had been terminated by the distribution of the assets of the Table Mountain Rancheria shall be entitled to re-apply for the same benefit or service...." (ER 32 ¶ 10) In the court order confirming settlement on June 16, 1983 (ER 35) the court again affirmed its previous order granting plaintiff's motion for class action certification and affirmed the settlement. (CR 35-37) On April 11, 1983 the court issued an order granting class certification (ER 39) which again, Plaintiffs in the instant case claimed, without refute by the instant Appellees, that they all were members of the class. (CR 8 ¶¶ 37 & 39; ER 15, ¶¶ 59-60; ER 18, ¶ 62; and the entire second and fourth causes of action, ER 22-26)

**B. Pertinent allegations in the class action complaint in *Watt:***

The class action complaint in *Watt* begins at page 54 of the Excerpts of Record, and the following will merely recite paragraph numbers of that complaint that are pertinent to the argument herein. One counsel represented all plaintiffs in that action.

> "Plaintiffs bring this action on behalf of themselves and all other persons similarly situated, to redress wrongs committed against and damages suffered by them as the result of the premature and unlawful purported termination of the federal trust status of the land *and Indian status of the people of the Table Mountain Rancheria....*" (¶ 1, ER 55) (Emphasis added.) (Note the chosen words: "Indian status" of the Table Mountain "People")

Plaintiff Table Mountain Rancheria Association represented itself as the "governing body of the American Indian Tribe, consisting of the Indians and their descendants and/or Indian successors in interest for whose benefit the United States of America acquired and created the Table Mountain Rancheria...." (ER 56, ¶ 2)

Some of the (*Watt*) listed plaintiffs were persons named in the final plan for the distribution of the assets and would be referred to as the "plaintiff distributees" and would include all distributees as being members of the class represented by the name plaintiff distributees. (ER 56 ¶ 3)

The plaintiff distributees represented a class who "...were, are or have been considered by the government of the United States or any other entity to have lost their status as Indians under the laws of the United States." (ER 57 ¶ 4) (Emphasis added.)

Several other named plaintiffs in *Watt* were class representatives of a class referred to as a "plaintiff dependants", and were described as dependant members

of the families of distributees "...and who, for that reason, were, are, or have been deemed by the government of the United States and/or another entity to have lost their status as Indians under the laws of the United States." (ER 57 ¶ 5) (Emphasis added.) Those "plaintiff dependants" were representing a class consisting of all Indian persons "other than distributees, who were named in the Table Mountain Rancheria distribution plan as dependants of distributees, and who, for that reason, were, are or have been deemed by the United States and/or another entity to have lost their status as Indians under the laws of the United States. This class also includes the offspring of said dependants...." "The claims or defenses of the named plaintiff dependants are typical of the claims or defenses of the class [and] the named plaintiff dependants will fairly and adequately protect the interest of the class." (ER 58, ¶ 6) (Emphasis added.)

In 1916 the United States purchased 160 acres "to be held in trust for the benefit of the Table Mountain Band of Indians." (ER 59, ¶ 9) As a result of that purchase of land held in trust the BIA provided services to the Rancheria "and its people", and therefore a trust relationship was established to not only "protect plaintiffs' status and interest in the Rancheria, but also to affirmatively act to insure that plaintiffs receive all opportunities, rights and benefits and

improvements to which they are entitled under the constitution and laws of the United States." (ER 59-60, ¶ 10) (Emphasis added.)

"Upon distributing the assets of the Rancheria, [the government] regarded the Indian country and the trust status of the Rancheria land, and the Indian status of the people thereof (including both distributees and dependant members of the families of the distributees) as having been terminated." (ER 64-65, ¶ 19) (Emphasis added.)

The *Watt* plaintiffs alleged that the government breached their trust obligations and therefore the "plaintiff distributees" and the "plaintiff dependants were entitled to a decree rescinding the Table Mountain distribution plan and "restoring their rights, status, privileges and immunities as Indians under the laws of the United States and declaring the government's obligation to provide plaintiffs with the same services, benefits and programs available to Indians because of their status as Indians. (ER 66-67, ¶¶ 24-26 re plaintiff distributees; ER 67-70, ER 27-32, re plaintiff dependants) (Emphasis added.) Plaintiff Table Mountain itself sought declaratory and injunctive relief to be recognized as an Indian tribe which has to maintain government-to-government relations but because of the government's actions had been "unable to effectively govern the Rancheria, provide for the needs and welfare of the people thereof, participate in

federal programs and benefits available to recognized Indian bands or tribes and exercise self-government to the exclusion of state and local civil regulatory jurisdiction." (ER 70-71, ¶ 35) (Emphasis added.)

Then, as to the second cause of action, Table Mountain stated: "Defendants owed plaintiff association *and its constituent members* a fiduciary obligation to convey the community assets of the Rancheria only to legal entity formed for the purpose of receiving and holding title to said assets...." (Emphasis added.) (ER 71, ¶ 36) Table Mountain sought declaratory relief to declare its status as a federally recognized Indian community "maintaining government-to-government relations with the United States." (ER 71, ¶ 37) Obviously the "constituent members' to whom Table Mountain was referring were all of the class action Plaintiffs – named and unnamed, especially in light of the fact only one counsel represented all plaintiffs in that action.

Plaintiff distributees in *Watt* alleged that "...defendants have treated plaintiff distributees and the class represented by them as if said persons no longer are entitled to be considered as Indians under the laws of the United States, and have treated or countenanced the treatment of said plaintiffs' Rancheria and other lands as if said lands no longer were in trust, Reservation or Indian country status" and that the plaintiff distributees "are entitled to the restoration of all of their

rights as Indians and so that they no longer suffer systematic deprivation of valuable Indian rights, to their severe and irreparable injury...." (ER 73, ¶¶ 42-44) (Emphasis added.) The class plaintiff dependants alleged the same thing as the class distributees and sought restoration to Indian status and the same relief as the distributees. (ER 74-75, ¶¶ 47-48)

Table Mountain itself then asserted that "by reason of defendants unlawful revocation of the Rancheria status as a Tribe or Band having government-to-government relations with the United States *and jurisdiction over the lands and people of the Rancheria...* [which has prevented Table Mountain] to participate in federal and other programs available to tribes and bands recognized by the Secretary of the Interior...." (ER 76, ¶ 51) (Emphasis added.)

The seventh and eighth causes of action plaintiff distributees and plaintiff dependants requested injunctive relief restoring them to the status of Indians with all rights granted to those by virtue of their status of being Indian, and sought money damages for the previous deprivation. (ER 77-78, ¶¶ 53-57)

As to the prayer for relief Table Mountain, the distributees and the dependants and their class sought the same thing, that is: restoring the Rancheria as a federally recognized tribe, declaring the distributees and their dependants as never having lost their status as Indians and to remain eligible to participate in all

federal programs and benefits provided Indians because of their "status as Indians". (pp. 87-90)

Table Mountain in their prayer sought, among other things, to again be considered as a federally-recognized Indian Band (p. 90) and as being a recognized Indian Tribe and to maintain a government-to-government relationship with the United States (p. 93)

The dependants and the distributees also sought from the court an injunction enjoining the government from regarding the distributees and the dependants as being ineligible for government programs, and to be allowed to participate and receive benefits under any federal program provided or available to Indians because of their status of Indian. (ER 91-92)

All of these requests (except money damages) by Table Mountain distributees, dependants and the entire class – which necessarily included the Plaintiffs/Appellants herein – were stipulated to by the parties in *Watt* (ER 29 at specifically ER 30, ¶¶ 3 & 4, and ER 32, ¶ 10) and confirmed by the District Court in *Watt* (ER 35).

## III. FOR PURPOSES OF THE WATT CASE AND THE PROCEEDINGS THROUGHOUT THIS CASE, "INDIAN STATUS" IS EXACTLY THE SAME THING AS "TRIBAL MEMBERSHIP" GIVEN THE *LAW* AT THIS TIME THE SUIT WAS COMMENCED AND STIPULATIONS ENTERED AND JUDGMENT ENTERED BY THE COURT IN THAT CASE

As set forth in detail in the previous section, the entire case in *Table Mountain v. Watt* used the words "Indian status" on numerous occasions in the complaint (ER 54, etc.), the class action certification (ER 39, etc.), the "Stipulation for Entry of Judgment" (ER 29, etc.) and the court order regarding the same (ER 35-37) and the "Judgment" (ER 38).

It must be noted, the class action complaint in *Watt* was filed on December 24, 1980. (ER 54). To know what "Indian status" legally means – the claim repeatedly used throughout the *Watt* decision by the party plaintiffs in that case, the government and the court – it can only be understood by what the law was at that time, as declared by Congress. In 1975 Congress passed legislation recognizing their obligation of the United States to Indian tribes, the Indian communities and their people through Indian self-determination, as found at 25 U.S.C. § 450, etc. Section 450a(a) recognizes Congresses obligation to the "Indian people for self-determination *by assuring maximum Indian participation*

*in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."* (Emphasis added.) Section 450(a)(b) and (c) declared the congressional goal for Indian children and Indians to receive government services, and for the Indian tribe to plan, conduct and administer those congressional programs. However, in § 450 (b)(e) Congress, in its definitional terms, stated:

> "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community,...*which is recognized as eligible for special programs and services provided by the United States to Indians* ***because of their status as Indians;....*** " (Emphasis added.)

Section 450b(l) contemplated Congresses beliefs that tribal organizations would have the "maximum participation of Indians in all phases of its activities...."

Further, and very importantly, in light of the previous sections cited above, § 450b(d) defined "Indian" as a ***"a person who is a <u>member</u> of an Indian tribe"*** (Emphasis added.)

Thus, Congress not only used the terminology of "status as Indians" to mean the same thing as a "member of an Indian tribe", it expected "maximum participation of Indians" in "all phases" of the tribes activities, and it meant "Indian tribe" to mean one which is recognized "as eligible for the special

programs and services provided by the United States to Indians because of their status as Indians". (§ 450b(e) In short, that meant "membership".

This Court, in *Greene, et al v. Babbitt*, 64 F.3d 1266 recognized that Congress, in order to qualify for "various benefit programs for Indians, that, since the 1970's "have been made available only to members of recognized tribes." *Id.* at 1268-1269.

> "The Samish Indian Tribe of Washington initially sought federal recognition in 1972, after Congress begin conditioning eligibility for most programs benefitting American Indians upon status as a tribe recognized by the federal government, see, e.g., 25 U.S.C. §§ 450-450n (extending benefits to Indian tribes 'recognized as eligible for the special programs and services provided by the United States to Indians ***because of their status as Indians***.') In 1978 the Department of the Interior published final regulations governing the procedure for official recognition of Indian tribes. 25 C.F.R. Part 83." *Id.* at 1269. (Emphasis added.)

The Secretary of Interior, acknowledging the government's intent with respect to the passage of the Indian Self-Determination Act (*supra*, 25 U.S.C. § 450 *et seq.*) passed regulations found at 25 C.F.R. Part 83, which was first instituted in 1978. Under the Secretary's definitional terms in § 83.1 "Indian tribe" is defined as any tribe that the Secretary of the Interior "presently acknowledges to exist as an Indian tribe." That's precisely what Table Mountain

individually sought in the *Table Mountain v. Watt* case, but not only for itself, but its people – that is the class plaintiffs (which included Appellants herein).

The Secretary further described "member of an Indian tribe" to mean "an individual who meets the membership requirements of the tribe as set forth in its governing document...[or by other means described by the Secretary]." (Emphasis added.) Please note; the Secretary's definition does not require the tribes blessing or authority for tribal "membership" only the fact that the Indian met the Tribe's Constitution (i.e. governing document). As stated in the instant complaint, and not refuted by the Appellees at any stage of these proceedings, the Plaintiffs/Appellants herein specifically alleged that with respect to the Table Mountain Constitution (to which 25 C.F.R. § 83.1 references) Plaintiffs herein fully "meet the membership requirements of the tribe as set forth in its governing document [in this case, its Constitution]". (ER 18, ¶ 62, and throughout the complaint herein) Thus, since the Plaintiff members herein "meet[] the membership requirements of the [Table Mountain] tribe as set forth in its [Constitution], Plaintiffs must be considered as members under § 83.1.

Further, as set forth in § 83.2 (25 C.F.R.), which was passed by the Secretary in 1978, two years before the class action complaint was filed in *Watt*:

> "Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes [and] acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationships with the United States...."

This is exactly what Table Mountain and the class action plaintiffs sought in their *Watt* complaint, which was acknowledged and stipulated to by the government.

Thus, under the Congressional enactment of 25 U.S.C. § 450 *et seq.*, only federally recognized "Indian tribes" will receive the benefits and services and be granted the government-to-government relationship with the United States, and those tribes and tribal persons who are eligible for Congressional benefits are those recognized by the United States "because of their status as Indians", and "Indians" only means for purposes of § 450b, those who are a "member of an Indian tribe". Since Appellants herein were in the class of plaintiffs in *Watt* whose status as Indians was restored, it necessarily meant "membership" – particularly in light of the Secretary's definition of "members" as being one who meets the Tribe's Constitution. 25 C.F.R. § 83.1.

The Secretary set forth the same purpose and the same requirement under Title 25 C.F.R. § 83.2, being that the Department must acknowledge the tribe in

order for the tribe and its people to receive the "protection, services, and benefits of the federal government...by virtue of their status as tribes."

As stated in the previous section, the entire class action lawsuit in *Table Mountain v. Watt* was to not only restore the status of "Table Mountain" as a federally recognized tribe, so it and its people could receive the benefit, privileges and immunities, and the government-to-government relationship with the federal government as a result of that "status", but sought for its "people" (i.e., members) not only distributees, but dependent members of distributees, and their offspring, to regain their "status as Indians" so they could receive the benefits, privileges and services of the federal government. That entire lawsuit was brought several years after Congress announced that only "recognized" tribes and their people would receive that recognition, etc., but also declared its policy and its commitment to the recognized tribe and the tribal people their "status as Indians". Further the Secretary's and Congress' determination was that "members" are those Indians who "meet the membership requirements of the tribe as set forth in its governing document". Thus; to be a "member" needs no vote of the Tribal Council nor the *imprimatur* of the same official. It, therefore is clear beyond cavil that "status of Indians", which the *Watt* case restored to all of the distributees, the dependants of the distributees and their offspring, and restored Table Mountain as a tribe

recognized by the federal government meant, in the unspoken words of all those in the *WATT* case – "membership". Therefore, the *Watt* case was about tribal recognition for Table Mountain and "membership" – i.e., Indian status – for those who were represented by the named class members in *Table Mountain v. Watt*, which included the Appellants herein. The Appellants have been totally ignored by all of the Appellees and have not received any government or tribal benefits.

It is also important to note that following the *Watt* decision, and after Table Mountain had sent its proposed Constitution to the Secretary, the latter informed the tribe that with respect to the tribe's Constitution it must conform to the *Watt* decision. (ER 144) First, (ER 144, third paragraph) BIA told Table Mountain that it had to change their proposed Constitution in order to insure who was "being considered a *basic* member", and the basic membership had to be the list of distributees and dependent members of the distributees, i.e., the same as the class plaintiffs in *Watt*.. (ER 144) (Emphasis added.) As the Secretary well noted, conforming to the law as Congress had passed in 1975, "Tribal membership is essential for access to tribal trust funds and to the benefits, privileges and distributions which accompany the possession and use of those assets. The Secretary's trust responsibilities for the proper and non-wasteful use of trust assets is thus related to tribal membership. Thus, it has been the long-standing policy of

this office that enrollment ordinances which could effect the substantive requirements of membership are subject to secretarial approval." (ER 144-145) This statement by the Secretary in 1985 confirms what the law was at that time, confirms that the Secretary of the Interior was insisting on compliance with the *Watt* decision, and directing the tribe to insure that the tribe acted consistently with the *Watt* decision. (*Id.*) Of course, the *Watt* decision and this letter from the Department of Interior belie the government's assertions here that it has no control over membership with respect to this Tribe in this context in light of *Watt* and the law. As stated elsewhere above, all of the named Plaintiffs herein were necessarily "members" of Table Mountain because of the restoration of the named class action plaintiffs and those they represented to their "status as Indians" in conjunction with, and unseparated from the government's recognition of Table Mountain as a recognized Indian tribe.]

In the strictly legal context, the restoring of Appellants status as Indians and in the context of Table Mountain being recognized in the same lawsuit necessarily meant "membership" and eligibility for government and tribal benefits.

After all, "What's in a name? That which we will call a rose by any other name would smell as sweet"[1]

As the instant complaint sets forth, the instant Plaintiffs were included in the class in that *Watt* action and were to be benefitted by that action, (discussed in detail in the previous section), but these Appellants have been denied by these Defendants, government and tribal, of the benefits Congress recognized to be provided to those who had the "status as Indians", which is obviously membership. See, for example, Complaint at ER 17, ¶ 18, the entire first cause of action (ER 21-22) and the fourth cause of action, at ER 25-26. The fact that Plaintiffs' instant Complaint used the term "membership", and the *Table Mountain v. Watt* case used "status as Indians" and restoring the benefits to those who should have the status as Indians, like the Plaintiffs herein, it is the same thing. After all, if it looks like a duck, walks like a duck...., etc. it must be a duck. Thus, Plaintiffs herein are entitled to the exact same relief that the other plaintiffs received in *Table Mountain v. Watt*, which is a restoration of their right as a result of their "status as Indians", with full federal benefits, which includes tribal

[1] Romeo and Juliet II, ii, 1-2; Shakespeare. The meaning of that has been historically described as – a thing is what it is, not what it is called!

benefits, since the Plaintiffs meet the criteria of Table Mountain Constitution. Appellants herein have the right then to enforce that *Watt* decision.

## IV. REPLY TO THE APPELLEES' OTHER VARIOUS ARGUMENTS

### A. This Court's recent ruling in *Lewis* does not jurisdictionally barr the current suit:

The government erroneously argues (brief at 12) that the current suit is barred by this Court's prior decision in *Lewis v. Norton,* 424 F.3d 959 (9th Cir. 2005).

First, Appellants discussed this issues at pages 39-40 of their opening brief, and the argument will not be repeated herein.

This instant case is decidedly different. Here, thirty-four (34) plaintiffs who allege that they were members of the class action plaintiffs in the *Watt* case went back to the same court that exercised jurisdiction in that 1980 action (not the District Court in *Lewis* which had no jurisdiction to enforce the Watt judgment) by virtue of the fact that the tribe had waived sovereign immunity to have that court enforce the stipulated judgment and the court order which, to these instant Appellants, meant a restoration of their "Indian status" which the parties in *Watt* stipulated to and the court so ordered. The District Court in the *Lewis* case had no

jurisdiction to enforce the court order of a different District Court in San Francisco.

Further, the current action seeks to stop the tribe and the individually named defendants from receiving more benefits as a result of that 1980 class action lawsuit than Appellants herein received (which was nothing) because once the class was certified, all members of the class had to be treated exactly equally by the named class plaintiffs, as well as the defendants as a result of the stipulated judgment. The *Lewis* case does not at all foreclose this case. See, *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995). Moreover, the *Lewis* case did not involve the tribe as a defendant nor the individual defendants sued herein and who were sued herein as the named class members who received "Indian status" (*vis a vie* membership), and because of that restoration of "Indian status" began receiving all of the government benefits that are provided to those who have "Indian status". Therefore, *Lewis* does not bar this suit.

B. **Appellants' claims are not barred because of the one-year period specified in the settlement agreement, especially in light of the class action nature of the case**:

Each of the Appellees' briefs allege that even if the *Watt* case dealt with "membership" issues, the Appellants herein failed to bring their claim within the

one (1) year period specified in the settlement agreement and thus any enforcement action now is out of time.

First, as pointed out in Paragraphs 60 and 64 of the complaint (ER 15-16, 19) the instant Appellants first were never notified of the class action settlement even though they were required to be notified by the now named tribal defendants herein through their counsel who represented all of the then tribal plaintiffs in that action, and once it was learned through word of mouth, the instant Appellants began requesting acknowledgment, receipt of Indian status benefits, were advised that they would be taken of, then advised applications had to be made to the tribe, then advised that their applications were still under review, etc. (See Paragraph 60 of the complaint, ER 15-16.)

The stipulation for entry of judgment entered into through one counsel for the class action plaintiffs and the tribe and the government (ER 29) confirmed: "The status of the named individual plaintiffs and class members as Indians under the laws of the United States is confirmed" and that the "Secretary of the Interior shall list the Table Mountain Band of Indians as an Indian Tribal entity pursuant to 25 C.F.R. Part 83.6(b)" (¶¶ 3-4 of said stipulation, ER 30) and it was the governments responsibility pursuant to that stipulation to "prepare and provide to Plaintiff a list of federal services, benefits, and programs and the eligibility criteria

therefore ..." because of the fact that all of the class action plaintiffs' status as Indians had been restored. (¶ 10, ER 32) Appellants were notified of nothing by the government.

The paragraph relied upon by the Appellees herein is Paragraph 14 of the stipulation (ER 33) which stated that "for the purpose of resolving any disputes which arise among the parties in the course of implementing the judgment to be entered pursuant to this stipulation, the court shall retain jurisdiction over this matter for a period of one year from the entry of judgment ... ." (ER 33) Even within that one year period of time, the plaintiff tribe was required to do certain time-consuming things (¶ 7, ER 31). However, that one year, even if applicable in other contexts does not apply in the context of the relief sough here. The court's order granting class determination, certifying the class and prescribing the notice of hearing on settlement (ER 39) the court determined that the representative parties will fairly and adequately protect the interest of the classes, "that defendants have acted or refused to act on grounds generally applicable to the classes (ER 40). That "one year" has simply no import with respect to the instant case here. That is, the named tribal defendants here cannot escape their fiduciary obligation to treat all members of the class the same as the named class representatives, and the one year expiration date cannot affect that claim. Nor can

the claim against Table Mountain since it was acting on behalf of these Appellants as the "constituent members" which included the two classes of plaintiffs in that *Watt* case. Further, there is no authority for the parties to stipulate to preclude continuing district court jurisdiction to enforce its own orders. Likewise, the government cannot ignore its stipulation and court order to restore Appellants' status as Indians, any more than it could wait a couple years after that stipulation and court order and then refuse to recognize the tribe or its people.

Appellants "status as Indians" has not been restored, and neither the tribe, the individual tribe defendants named herein, nor the government recognize these Appellants as having the status as Indians under the laws of the United States, in the context of the complaint and settlement in *Watt*, and thus these Appellants cannot be deprived of the benefits of the stipulation and court order in *Watt*, simply because more than one year has passed. The district court always has jurisdiction to enforce its own judgments. *Jeff D., etc. v. Kempthorn, et al*, 365 F.3d 844, 853 (9th Cir. 2004). Everyday that goes by where Appellants are not provided the recognition of their "status as Indians" is simply a continuing violation of the stipulated judgment. In *Kempthorn* (*id.* 853), for example, this Court held that the district court had continuing jurisdiction (and in that case for over two decades) to enforce a consent decree.

Both Appellees cite *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375 (1994) for the alleged proposition that the Court does not maintain jurisdiction over a stipulation and order of dismissal which did not reserve jurisdiction to enforce the settlement. That case is inapposite, because here, it is clear that the Court below did incorporate the terms of the settlement agreement in this Court's order of June 16, 1983, which stipulation required jurisdiction for at least one year, and the stipulation and the judgment did not just end the case then because the government defendants in that action were required to fulfill a number of obligations, including publishing Table Mountain as an Indian Tribe in the Code of Federal Regulations, and restoring the land to trust status, and restoring the tribe to a recognized tribe all for the benefits of the plaintiffs in that class action, which included the Appellants in this instant action, and **the restoration of Appellants' status as Indians, which under the law at the time meant tribal membership recognition, and recognition by the government in order to receive all of the benefits accompanying the recognition as "status as Indians."** The orders in Watt were much more like consent decrees and thus always enforceable. Appellants' rights to be restored as having the status as Indians has still not occurred.

The court below was required to have a continuing authority to protect the members of the "forgotten" class, and the named class plaintiffs in that case, and their counsel, had a continuing duty to ensure that all class members, named and unnamed, received the exact same benefits.

This Circuit in *United States v. Oregon*, 657 F.2d 10009 (9th Cir. 1981) held that where the Yakima Tribe intervened in a court action and became a party to a consent decree, and when several years later an action was brought to enforce the decree, the tribe was held to have waived their sovereign immunity by intervening in the first action. (*Id.* at 1014) As the court clearly held in *United States v. Oregon, supra.*, tribal entities that voluntarily join a lawsuit "enter the suit with the status of original parties and are fully bound by all future court orders." *Id.* at 1014. See also *Confederated Tribes etc., v. White*, 139 F.3d 1268, 1270-71 (9th Cir. 1998). See also, *Hook v. Arizona*, 972 F.2d 1012 (9th Cir. 1992).

In *Hook*, there was a suit that was never certified as a class action, prison reform orders were adopted in that case, and over nine years later, new inmates filed suit to enforce the Court's previous judgment. The Court in *Hook* stated: "A district court retains jurisdiction to enforce its judgments, including consent decrees." [Citation omitted.] *Id.* at 1014. See also 1015.

The Table Mountain Appellees' citation to *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002) and *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999) are of no avail to the Table Mountain Appellees because those cases dealt specifically with congressional prison reforms, which had their own end to the court's jurisdiction over prison reform suits.

Indeed, the Secretary of Interior on March 22, 1985 insisted at least two years after the judgment was entered in this case that Table Mountain must comply with the *Table Mountain v. Watt* decision. (ER 144) This important letter is discussed *supra*.

Therefore the "one year" argument by Appellees is meritless.

### C. Neither *Santa Clara Pueblo v. Martinez*, nor its progeny are authority for the Appellees' claim of lack of subject matter jurisdiction:

Of course, the Appellees argue herein that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and its progeny preclude this court from exercising jurisdiction into "tribal-membership" disputes. As set forth in detail, it is the "status as Indians" and the compliance with the previous court order, in light of the law that was relevant to the case, which are set forth in Sections II and III above.

Appellants fully discussed the non-applicability of *Santa Clara Pueblo* at pages 41-52, and that argument will not be repeated herein. Given the

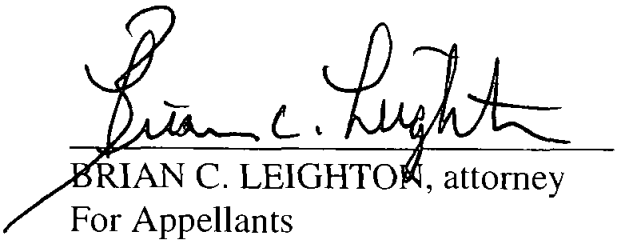
significance of Sections II and III above, no further discussion is necessary, as it is clear that Table Mountain waived its sovereign immunity with respect to the restoration of Indian status of the Appellants herein.

## V. CONCLUSION

Based on the foregoing points, authorities, and argument, Appellants' opening brief, and the record on appeal, the judgment of the District Court must be reversed.

DATED: September 11, 2006

Respectfully submitted.



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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(B) and (C) of the Local Rules of this Court, I hereby certify that the foregoing brief is produced in a proportionally spaced font (Times New Roman) of not less than 14 point typeface, utilizes double line spacing, except in footnotes, headings and extended quotations which are single spaced, and contains 6,702 words.

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**PROOF OF SERVICE BY U.S. MAIL**

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 701 Pollasky, Clovis, California 93612.

On September 11, 2006, I served a copy of the attached **REPLY BRIEF FOR APPELLANTS** on the interested parties herein by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Clovis, California, addressed as follows:

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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 11th day of September, 2006, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Wendy Fimbres