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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PEARL ALVARADO, *et al.*, Plaintiffs, v. TABLE MOUNTAIN RANCHERIA, *et al.*; UNITED STATES OF AMERICA; and GALE NORTON, Secretary of the Interior, Defendants.	No. C–05–00093–MHP FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A STAY Date: May 2, 2005 Time: 2:00 p.m. Courtroom 15, 18th Floor Hon. Marilyn Hall Patel

Defendants United States of America and Gale Norton, Secretary of the Interior, (collectively "the United States" or "Federal Defendants") submit this reply memorandum in support of their motion to dismiss plaintiffs' complaint or, in the alternative, for a stay of these proceedings pending the decision on appeal in *Lewis, et al. v. Norton, et al.*, No. 03–17207 (argument heard April 5, 2005).

OVERVIEW

Plaintiffs cannot seriously maintain, although they try in their opposition memorandum, that the government has waived its sovereign immunity over the kinds of claims plaintiffs have brought or that this Court may exercise subject matter jurisdiction over such claims. Instead, they expend most of their efforts in an attempt to bootstrap their complaint into a case that was concluded over twenty years ago and that did not address the very question they urge this Court to reach. For those reasons, as well as those set forth in the Tribal Defendants' memorandum in support of their separate motion to dismiss, the Court should dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6). If the Court is not inclined to dismiss plaintiffs' complaint at this time, the Federal Defendants urge that, at a minimum, the Court stay these proceedings until the Ninth Circuit issues its decision in the *Lewis* appeal.

ARGUMENT

I. Federal Defendants' Motion to Dismiss

Plaintiffs have failed to demonstrate, as they acknowledge they must when challenged (Opp. at 2:8–10), that their claims may proceed under a valid waiver of the federal government's sovereign immunity and that they fall within this Court's subject matter jurisdiction. Either failure must result in dismissal of their complaint.

> [S]tatutes that create federal jurisdiction do not, in and of themselves, waive [] sovereign immunity." [16 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 105.21 (3rd ed. 1998).] Thus, while sovereign immunity can bar jurisdiction, a statute that purports to create jurisdiction alone does not necessarily eliminate sovereign immunity.
>
> This understanding of sovereign immunity is consistent with Ninth Circuit precedent. "'[I]n an action against the United States, in

> addition to statutory authority granting subject matter jurisdiction, there must be a waiver of sovereign immunity." *Friedman Co. v. United States*, 6 F.3d 1355, 1357 (9th Cir. 1993) (quoting *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991)) (emphasis added).

Powelson v. United States by & Through Secretary of Treasury, 150 F.3d 1103, 1104 (9th Cir. 1998). Conversely, a statute that waives sovereign immunity does not necessarily provide subject matter jurisdiction. *See Norton v. Southern Utah Wilderness Alliance*, ___ U.S. ___, 124 S. Ct. 2373 (2004) ("*Norton v. SUWA*") (discussed below); *see also Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S. 449, 457–58 (1999); *Califano v. Sanders*, 430 U.S. 99, 105–07 (1977); *Gallo Cattle Co. v. United States Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (APA, while a limited waiver of sovereign immunity, is not an independent grant of subject matter jurisdiction). In this case, plaintiffs fail on both counts.

A. Sovereign Immunity Precludes Suit Against the Federal Defendants

Although the Federal Defendants read plaintiffs' complaint to seek money damages against the United States in addition to equitable relief (U.S. Br. at 2:20–3:4), plaintiffs now represent that they seek no monetary relief from the government (Opp. at 4:4–5). Yet sovereign immunity, absent a waiver, bars equitable claims as well as monetary claims against the government. *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980) ("Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States") (cited in Opp. at 5:3–4). Plaintiffs rely solely upon 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701–706 as waivers of sovereign immunity, but neither basis is sufficient.

Section 1331, the general federal question provision, is not itself a waiver of sovereign immunity.

> [S]ection 1331 "is not a general waiver of sovereign immunity. It merely establishes a subject matter that is within the competence of federal courts to entertain." *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 4 (1st Cir. 1989) (citation omitted); *Humphreys v. United States*, 62 F.3d 667 (5th Cir. 1995) (holding that 28 U.S.C. § 1331, by granting district courts jurisdiction over constitutional claims, does not thereby waive sovereign immunity).

Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996). Accordingly, some other waiver of immunity is required. Although plaintiffs invoke the APA, that statute provides only a limited waiver of sovereign immunity that does not include the kinds of claims plaintiffs bring in this case.

As set out in the Federal Defendants' opening brief (at 11–12), *Norton v. SUWA*, the Supreme Court's latest pronouncement on the reach of APA review, clarifies that before a court may redress agency action "unlawfully withheld or unreasonably delayed" by compelling the agency to act, the plaintiffs must identify, not only a "discrete" agency action, but one "demanded by law." *Southern Utah Wilderness Alliance*, ___ U.S. ___, 124 S. Ct. at 2380; *accord Center for Biological Diversity v. Veneman*, 335 F.3d 849, 854 (9th Cir. 2003). As set out in Section I.B, below, plaintiffs cannot point to agency actions, otherwise required by law, that have been withheld. What they complain of is the federal government's lawful refusal to intervene in a matter that is wholly within the defendant Tribe's sovereign authority. Because, as set out in the Federal Defendants' opening brief (at 4:4–16:16), there is no statutory or other right to the relief plaintiffs seek, the APA does not waive sovereign immunity or otherwise confer on this Court jurisdiction over plaintiffs' claims.

The cases cited by plaintiffs (Opp. at 4-5, 7) merely underscore the point that the APA, standing by itself, is not an open-ended waiver of sovereign immunity that operates in the absence of other statutory or constitutional underpinnings. *Stock West Corp. v. Lujan*, 982 F.2d 1389 (9th Cir. 1993), for instance, held that a challenge to agency administrative rules may proceed under the APA, in a case in which the plaintiff had brought an action under 25 U.S.C. § 81, a substantive statute governing approvals of contracts between Indians and non-Indians. *Guerrero v. Stone*, 970 F.2d 626 (9th Cir. 1992), involved an action for correction of military records pursuant to 10 U.S.C. § 1552. Similarly, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), involved a challenge to Navy personnel regulations and proceedings. None of these cases supports the proposition that review may be had under the APA standing alone. Indeed, one of the very cases cited by plaintiffs (Opp. at 5:4–5) makes clear that the APA does not operate in a

statutory vacuum. *See Blue v. Widnall*, 162 F.3d 541, 545 (9th Cir. 1998) ("federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the [Civil Service Reform Act] or elsewhere").

Finally, to the extent that plaintiffs cite *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), as a basis for reading the "agency action" requirement out of the APA (*see* Opp. at 4–5), such a reading is flatly inconsistent with *Norton v. SUWA*, as well as with earlier Supreme Court precedent. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled"); *accord Gallo Cattle Co. v. United States Dep't of Agric.*, 159 F.3d at 1198; *Tucson Airport Auth. v. General Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). Instead, at the very most, *Presbyterian Church* should be limited to its facts, holding as it did that certain investigatory activities conducted by the Immigration and Naturalization Service may be reviewable under the APA.

B. This Court Lacks Subject Matter Jurisdiction over Plaintiffs' Claims

Even if a valid waiver of sovereign immunity applied in this case, the Court lacks subject matter jurisdiction over plaintiffs' claims, because resolution of such claims has been left to the Tribe. Despite plaintiffs' attempts to dress them up, their claims are fundamentally that the Tribe has failed to recognize their asserted entitlement to tribal membership. That is precisely the kind of dispute over which federal courts must defer to tribal sovereignty, under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978), and progeny.

1. *Santa Clara Pueblo v. Martinez* Requires Dismissal of Plaintiffs' Complaint

As set out in the Federal Defendants' opening brief (at 6–9), the Supreme Court in *Martinez* ruled broadly that matters of tribal membership must be left to the tribes. In an effort to avoid the sweep of that decision, plaintiffs attempt to distinguish their situation from that in *Martinez* and in the circuit court cases of *Ordinance 59 Ass'n v. U.S. Dep't of Interior*, 163 F.3d 1150 (10th Cir. 1998), and *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996). (Opp. at 19–23.)

Those attempts are unconvincing, as Judge Karlton found in *Lewis v. Norton*, slip op. at 12.[1]/

a. The nature of the membership challenge at issue is irrelevant to the jurisdictional question

Plaintiffs observe that, in *Martinez*, the Tribe changed its membership ordinance and that it was to that change that the plaintiff's challenge was directed. Similarly, plaintiffs point out that, in *Ordinance 59*, the Tribe repealed its membership ordinance and then took no action on the plaintiffs' pending membership applications. Finally, plaintiffs note that, in *Smith*, the issue was whether the tribe was impermissibly granting membership privileges to persons who were not entitled to them. None of these distinctions make a difference. In all cases, the courts grounded their decisions on the principle that control over tribal membership is a sovereign function whose exercise is vested in the tribes. *See Martinez*, 436 U.S. at 72 n.32, 98 S. Ct. at 1684 n.32 ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community"); *Ordinance 59 Ass'n*, 163 F.3d at 1160 ("tribes, not the federal government, retain authority to determine tribal membership"); *Smith*, 100 F.3d at 559 ("A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-government") (quoting *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 (D. Minn. 1995)). Nor does it matter that, in some cases, the federal government may have approved the offending membership ordinance. *See, e.g.*, *Smith*, 100 F.3d at 558–59. As discussed in Section I.B.2, below, it is not the validity of the underlying membership ordinance that is at issue; it is the Tribe's implementation of it that plaintiffs challenge. *Martinez* leaves those implementation decisions to the Tribe.[2]/

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[1]/ A copy of Judge Karlton's opinion and order has been submitted by the Tribal Defendants as RFJN Exh. B.

[2]/ Plaintiffs cite footnote 22 of *Martinez* (Opp. at 21:3–7), suggesting perhaps that recourse may be available against the federal government under 25 U.S.C. § 476 (governing federal approval of proposed tribal constitutions in certain cases). *See* 436 U.S. at 66 n.22, 98 S. Ct. at 1681 n.22. Plaintiffs have not alleged, however, that the Table Mountain constitution has been (continued...)

b. The absence of a formal tribal court does not compel federal assertion of jurisdiction

Plaintiffs place great weight on the absence of a formal tribal court within the Rancheria, claiming that, under *Martinez*, they are therefore entitled to a federal remedy. (Opp. at 20:17–21:2.) But as the Court in *Martinez* noted, tribal fora may include informal councils as well as more formal courts. 436 U.S. at 66, 98 S. Ct. at 1681. It is just such a council whose actions plaintiffs challenge in this case. (Compl. ¶ 48.) As a result, *Martinez* applies with full effect to bar plaintiffs' claims.

2. The *Watt* Settlement Provides No Basis for Jurisdiction in This Case

Plaintiffs seek to get around the legal rules cited above by insisting that this case is a merely continuation of the *Watt* action. (Opp. at 9–19.) That is simply not true.

As discussed in the Federal Defendants' opening brief (at 3:5–4:10), the *Watt* action was concerned solely with restoring the Indian status of the Rancheria and the trust status of its tribal lands. The case had nothing to do with determining who should be a member of the Tribe. Although plaintiffs insist that they are "forgotten" class members who should benefit from the 1983 settlement (Opp. at 15:24), that assertion does not compel the relief they seek. First, contrary to their assertions, the class consisted of former distributees of Rancheria assets (and their dependents) — in other words, those persons who received tribal assets in exchange for relinquishing their Indian status. (Compl. Exh. 3, at 3:15–4:9.) The class was not defined by who or who was not entitled to tribal membership in the reconstituted Rancheria. Second, the "benefit" of the class settlement was the relief promised in the stipulation of settlement: reestablishment of the Rancheria as a federally recognized tribe and return of tribal lands to trust status. (Compl. Exh. 1.) Those benefits have been realized, and the federal government's

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[2]/ (...continued)
approved pursuant to that statutory provision (part of the Indian Reorganization Act ("IRA")). Moreover, the United States is not aware of cases in which that provision has ever been invoked in the manner the Supreme Court suggested (the tribe in *Martinez* was not an IRA tribe.)

obligations under the settlement have been fulfilled. Indeed, plaintiffs appear to acknowledge that the terms of the 1983 settlement have been satisfied. (Opp. at 15:8–14.)

Thus, there is simply nothing left to litigate under the guise of the *Watt* action, and the cases cited by plaintiffs (Opp. at 15–17) are not to the contrary. *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004), provides no basis for the Court's supposed "continuing jurisdiction." That case involved the court's implementation of an institutional reform consent decree that, by its terms, remained in effect until compliance was demonstrated; in that case, the defendants did not argue that they were in compliance with the decree. *Id*. at 853 nn.8, 9. Similarly, *Hook v. Arizona Dep't of Corrections*, 972 F.2d 1012 (9th Cir. 1992), merely provided that the defendants there had to seek relief from the operative decree, if at all, under Fed. R. Civ. P. 60(b). *Id*. at 1015–17.[3]/ Neither of those cases supports the proposition that a settlement agreement that was fully implemented and satisfied over twenty years ago can now confer jurisdiction, otherwise unavailable, over claims not at issue in the earlier litigation.

Finally, contrary to plaintiffs' position (Opp. at 17:16–18:12 and RFJN Exh. 1), actions taken by the federal government with respect to approval of the Rancheria's constitution after *Watt* are irrelevant to disposition of this action. It is not the constitution that is at issue, but membership decisions made by the Tribe. Under *Martinez*, those decisions may not be challenged in federal court.[4]/

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[3]/ The remaining cases cited (Opp. at 19:8–11) merely stand for the proposition that, under certain circumstances, a tribe may be deemed to have consented to suit. *See United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (tribe may waive immunity by initiating or intervening in suit); *McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989) (noting the holding in *United States v. Oregon*); *Confederated Tribes v. White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (tribal agency, otherwise immune, waives immunity by participating in bankruptcy proceeding to collect debt).

[4]/ Plaintiffs also invoke 25 U.S.C. § 163 (Opp. at 6:15–21, 8:2–3) as a basis for federal involvement in this case. As the court noted in *Ordinance 59*, however, that provision is limited to actions not involved in cases such as this and, in any event, does not impose on the federal government any duty to act on individual tribal membership applications. 163 F.3d 1159.

II. Federal Defendants' Motion to Stay Proceedings

Although the caption of plaintiffs' opposition memorandum suggests that it includes an "Opposition to the Government Defendants' Motion to Stay the Case Pending an Appeal in Another Case," the plaintiffs do not, in fact, present any argument in response to the Federal Defendants' motion to stay these proceedings or any suggestion that the Ninth Circuit's anticipated disposition of the *Lewis* appeal would have no potential bearing on the outcome in this case. Accordingly, if the Court does not grant the defendants' motions to dismiss, the Federal Defendants respectfully urge this Court to stay this action until the Ninth Circuit decides the *Lewis* appeal.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court dismiss plaintiffs' complaint with prejudice or, in the alternative, stay these proceedings pending the decision on appeal in *Lewis v. Norton*.

Dated: April 18, 2005

Respectfully submitted,

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