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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PEARL ALVARADO, *et al.*,

Plaintiffs,

vs.

TABLE MOUNTAIN RANCHERIA, *et al.*,

Defendants.

No. C 05 00093 MHP

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION BY DEFENDANTS TABLE MOUNTAIN RANCHERIA, LEWIS BARNES, WILLIAM WALKER, CAROLYN WALKER, TWILA BURROUGH, LEANNE WALKER GRANT, CRAIG MARTINEZ, ROBBIE CASTRO, RAY BARNES AND VERN CASTRO

Date: May 2, 2005
Time: 2:00 p.m.
Courtroom: 15

Judge: Hon. Marilyn Hall Patel

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I. INTRODUCTION

In this action, plaintiffs ask this Court to decide what a federal court in another district has already concluded it lacks the power to decide—namely, that Table Mountain Rancheria ("the Tribe") is obligated to recognize plaintiffs as among its members. That question is an intra-tribal matter, and can only be answered by the Tribe, a sovereign government, with reference to its own laws. Accordingly, the first lawsuit that sought such a determination—a lawsuit filed by the same attorney who brings this action, on behalf of several of the same plaintiffs—was dismissed from the Eastern District of California (in November 2003) because it constitutes a tribal membership matter over which federal courts lack jurisdiction, notwithstanding the invocation of various federal statutes assertedly violated.

Plaintiffs' counsel has now recast that complaint, adding more plaintiffs and defendants, and masquerading old claims as new ones. Adding parties and theories cannot create jurisdiction where none exists, however. Even assuming the efficacy of plaintiffs' various legal claims, this Court simply cannot grant the requested relief. It cannot because it would require the Court to impose its will on a sovereign tribal government by deciding whether the Tribe should—indeed must—recognize plaintiffs as members under its own internal laws.

Fully aware that federal courts lack power to resolve such intra-tribal matters, plaintiffs now seek to use a 25-year-old class action as their jurisdictional hook. They allege their claimed right to be recognized members of the Tribe is compelled by that class action because this Court then approved a settlement agreement confirming the Tribe's status as a federally-recognized *sovereign* tribe. Plaintiffs contend they were unnamed members of the class, represented in that case by the class representatives (some named as defendants here), and that this Court "has the authority to order the Table Mountain Rancheria to comply with its stipulated settlement agreement/consent decree and judgment issued in the 1980 Action, and to order the admittance of the Plaintiffs" to the Tribe. (Complaint, 11:6-8.)

However, the court-approved settlement agreement does not even address, let alone dictate, whom Table Mountain must recognize as its members under its tribal laws—nor would it since "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to

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its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). It would be illogical indeed, if, in exchange for securing judicial confirmation that its sovereign status remained intact in the eyes of the United States, Table Mountain was required to relinquish "one of an Indian tribe's most basic powers"—"the authority to determine questions of its own membership." *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

While plaintiffs assert they seek nothing more than to enforce the "court orders" and "judgment" from the 1980 Action, their claims for sweeping relief show otherwise. (Complaint, 21:12-25.) They seek, in part, an order directing the Tribe to "admit all Plaintiffs as members" and an order directing the Tribe to "continue" to do so for all time. (Complaint, 21:18, 21:25.) They ask the Court to oversee a "full accounting" of all tribal financial records, and to assume "continuing jurisdiction" to ensure payment of past and future benefits that plaintiffs would have received—and would receive—as members. (Complaint, 24:2, 13:9.) In effect, plaintiffs invite this Court to do indirectly that which it cannot do directly—to not only resolve, but indeed, to become enmeshed in, on an ongoing basis, an internal tribal matter that federal courts have long recognized raise no federal question, and that not only fall beyond their limited jurisdiction, but within the exclusive authority of a sovereign tribe.

Of course, if plaintiffs are correct, and if a 25-year-old class action confirming a tribe's federally-recognized sovereign status gives a federal court the power to compel the Tribe to include certain persons within its membership, then the jurisdictional floodgates will have opened. This Court would be the arbiter of any and all claims of persons contending they are members of the Tribe (and the alleged intended beneficiaries of a class action long since closed), and the same goes for any other federal court that once adjudicated an Indian tribe's sovereign status (and there are others). Such would flout an entire body of law holding that federal courts simply may not, under the guise of federal law, "interfere with [a] sovereign tribe's membership determinations," as such matters "lie[] at the very core of tribal self-determination" and Indian sovereignty. *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *see* pp. 11-17 *infra*.

In sum, the law compels dismissal on three, distinct jurisdictional grounds. First, the case presents no substantial federal question, but rather, constitutes an intra-tribal matter within an

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Indian tribe's exclusive jurisdiction. Second, the Tribe and its members are immune from suit under the doctrine of sovereign immunity, separately depriving this Court of jurisdiction. To the extent any individual tribal defendants do not themselves possess immunity, dismissal is still compelled because the Tribe is an indispensable party that cannot be joined. Finally, neither the 25-year-old class action, nor the resulting settlement agreement that plaintiffs now purport to enforce, even involved tribal membership. However, assuming it did, and assuming plaintiffs seek not to force membership on a sovereign entity but to enforce a class action judgment entered in 1983, this Court's jurisdiction in that case ceased to exist, by its express terms, one year after the judgment's entry—21 years ago.

II. BACKGROUND AND SUMMARY OF ALLEGATIONS

A. Twenty-Two Years Ago, This Court Approved A Settlement Agreement Confirming The Sovereign Status of Table Mountain As A Federally-Recognized "Tribal Entity," The "Indian Country" Status Of Certain Rancheria Lands Returned To The United States, And The "Federal Indian Status" Of Certain Individuals Who Had Received Rancheria Lands.

In 1980, in an action styled *Table Mountain Rancheria Association, et al. v. James Watt, Secretary of the Interior*, Case No. C-80-4594-MHP ("1980 Action" or "*Watt* Action"), the Table Mountain Rancheria Association (the legal entity representing the Tribe's then governing body) and several individuals sued the federal government in connection with the government's effort to terminate the Table Mountain Rancheria decades before. (*See Watt* Complaint (attached as Exhibit A to the Request for Judicial Notice ("RFJN")); *see also Alvarado* Complaint, Ex. 1-3.) In resolution of that lawsuit, the parties entered a court-approved settlement agreement that confirmed the federal government had not, in fact, terminated the Tribe, and that its sovereign status, as a federally-recognized "tribal entity," remained intact. (*See* Stipulation for Entry of Judgment ("*Watt* Stipulation," attached to *Alvarado* Complaint, Ex. 1), 2:17-19; *see also Watt* Order (*Alvarado* Complaint, Ex. 2).) The stipulated agreement confirmed that certain lands returned to the United States by the "terminated" Indians remained "Indian country." (*Watt* Stipulation, 2:19-28.) And, it confirmed that the individuals whose "federal Indian status" the government had purported to terminate retained such status. (*Id.*, 2:14-16.) (As explained *infra* (p. 10), tribal membership and

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Indian status are distinct concepts.) By virtue of that settlement, the individuals were deemed entitled to whatever federal benefits they had been denied by virtue of the purported termination of their "federal Indian status" (*Alvarado* Complaint, Ex. 1, 4:13-5:5), and the Tribe was listed in the Federal Register as a recognized tribe. *See* 48 Fed. Reg. 56862, 56864 (Dec. 23, 1983) (including "Table Mountain Rancheria of California" on list of "Indian tribal entities" "recognized and eligible to receive services from the United States Bureau of Indian Affairs.").

B. The Federal Court In The Eastern District Rejects Certain Plaintiffs' Effort To Use The *Watt* Action As A Means To Secure Federal Adjudication Of An Intra-Tribal Membership Matter.

On July 11, 2003, four of the plaintiffs in this action[1] sued certain officials of the Bureau of Indian Affairs, the National Indian Gaming Commission, and Department of Interior for declaratory and injunctive relief, alleging they meet Table Mountain Rancheria's membership requirements, and that such federal officials must order the Tribe to recognize them as members. (*Lewis* Complaint (RFJN, Ex. B).) Filed in federal court in the Eastern District of California, the *Lewis* plaintiffs sought to use the 1980 *Watt* Action as the vehicle for securing federal relief in an intra-tribal membership matter. Specifically, the *Lewis* Complaint alleged that the Tribe's federally-recognized status, as confirmed in the *Watt* Action, obligated the federal agencies to force the Tribe to comply with its own Constitution and membership ordinances, as well as a "tribal revenue allocation plan" the Tribe developed pursuant to the Indian Gaming Regulatory Act ("IGRA"), all of which plaintiffs alleged required the Tribe to recognize them. (*Id.,* 5-6.) The plaintiffs sought, among other things, an order directing the federal defendants to require Table Mountain to either recognize plaintiffs as among its members (and pay them past and future benefits afforded any other tribal member), or alternatively, an order directing the Tribe to cease "engaging in gaming." (*Lewis* Complaint, 9-10.)

The district court concluded "the law affords no basis for allowing plaintiffs to proceed with their claims in federal court," and dismissed them in November 2003 for lack of jurisdiction on several distinct grounds. (*Lewis* Order (RFJN, Ex. C), 17:10-11.) Specifically, the court concluded

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it lacked the power to adjudicate "intratribal matters" (*id.*, 9:7-9), that the complaint presented no federal claim (*Id.*, 14-16), and that the federal defendants possessed sovereign immunity in any event. (*Id.*, 16:11-20.)

C. The Plaintiffs Whose Complaint Was Dismissed From The Eastern District, Along With Others, Now Ask This Court To Adjudicate An Intra-Tribal Matter On The Basis Of The *Watt* Action.

On January 6, 2005, the attorney who brought the *Lewis* Action filed the instant complaint on behalf of the *Lewis* plaintiffs and others. The new complaint sues the Secretary of the Interior (as had the *Lewis* Complaint), but this time, the pleading names the Tribe, various tribal officials (current and former) and several tribal members. In addition, plaintiffs now make the 1980 *Watt* Action the centerpiece of their lawsuit. Specifically, plaintiffs allege they "bring this new complaint" "to enforce" the stipulated settlement agreement and judgment emanating from that lawsuit almost a quarter of a century ago. (*Alvarado* Complaint, 3:3-8.)

Plaintiffs allege that they are members of the class represented in that lawsuit (*Alvarado* Complaint, 15:20-21, 18:14-17), and theorize that because they were members of that class, they necessarily constitute members of the Tribe and should be so recognized. (*Id.*, 18:14-25.) They further allege that "following" the 1980 *Watt* Action, the Tribe established its Constitution, and that such governing document contained membership requirements that plaintiffs purportedly satisfy. (*Alvarado* Complaint, 18:2-25.) They claim they have applied for enrollment, and that even though they allegedly satisfy the Tribe's law governing membership, the Tribe has not acted on their applications and such remain pending. (*Id.*, 19:19-20, 20:2-4.) By this lawsuit, plaintiffs purportedly seek to "enforce" the Tribe's own law governing membership, by "enforcing" the settlement agreement and resulting judgment from the *Watt* Action, on the asserted ground "that [plaintiffs] were, in 1980, and are now entitled to be: (1) members of the Table Mountain Rancheria; (2) share all of the benefits of both government and tribal benefits including casino gaming distributions and other tribal benefits of being recognized members of the Table Mountain Rancheria; and (3) seek those government and tribal benefits retroactively to the 1980 judgment in the '1980 [*Watt*] Action.' " (*Alvarado* Complaint, 4:12-16.) Toward that end, the plaintiffs seek a

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host of declaratory, injunctive and monetary relief.[2]

III. ARGUMENT

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). "The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Id.*, (internal citations and quotations omitted).

Federal courts are courts of limited jurisdiction, meaning there must exist a specific grant of power, authorized by the Constitution or by statute, for this Court to assume jurisdiction over the subject matter of a particular lawsuit. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Federal subject matter jurisdiction cannot "be expanded by judicial decree," and it is "presumed that a cause lies outside this limited jurisdiction." *Id.* Moreover, the party seeking to invoke the Court's jurisdiction must allege—and bears the burden of proving—all facts necessary to establish it. *Id.* Plaintiffs cannot meet the burden of establishing jurisdiction here and, indeed, the law compels dismissal on three distinct grounds.

First, no federal subject matter jurisdiction exists because plaintiffs' complaint contains no federal claim for relief, but instead, requires the interpretation of tribal law and the resolution of an intra-tribal matter—namely, whether Table Mountain should recognize plaintiffs as its members under its own laws. Such matters—however creatively crafted or pled—fail to "arise under" federal law and are beyond the scope of federal courts' limited jurisdiction. 28 U.S.C. § 1331; Fed. R. Civ. P. 12(b)(1).

[2] While plaintiffs' *factual* allegations must be assumed true for purposes of this motion to dismiss (*Cruz v. Beto*, 405 U.S. 319, 322 (1972)), their *legal* characterizations (*e.g.*, with respect to the effect of the *Watt* Action) are owed no deference. *Olpin v. Ideal National Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969) (court need not accept as true legal conclusions or factual allegations at variance with instrument attached to complaint), *cert. denied*, 397 U.S. 1074 (1970); *In re Fortune Systems Securities Litigation*, 604 F. Supp. 150, 159 (N.D. Cal. 1984) ("Court is not required to accept legal conclusions, particularly if the legal effect of the events plaintiff has set out in these allegations do not reasonably flow from his description of what happened...").

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Second, this Court lacks jurisdiction over the Tribe and the individually-named tribal members because they possess sovereign immunity under the federal common law. That immunity was neither waived by the Tribe nor abrogated by Congress, requiring dismissal of all claims against the Tribe, its officers and its members. Fed. R. Civ. P. 12(b)(3).

Finally, and putting aside the above jurisdictional bars, the stipulated settlement agreement upon which plaintiffs' theory rests provides no basis for this Court's assertion of jurisdiction. Even assuming the Court was empowered to decide whether the *Watt* plaintiffs were (and are) members of the Tribe under its own laws, the Court never purported to do so. Moreover, to the extent the Court possessed jurisdiction to enforce the settlement agreement it approved in 1983, such jurisdiction expired more than two decades ago by its express terms. Fed. R. Civ. P. 12(b)(1), (3).

A. Plaintiffs Rewrite History To Suggest The *Watt* Action Adjudicated The Tribe's Membership And Whom The Tribe Must Recognize As Its Members.

As an initial matter, it bears noting that plaintiffs mischaracterize the purpose and effect of the *Watt* Action—the 25-year-old class action from which they seek to bootstrap federal jurisdiction. The purpose and effect of that action was to essentially unwind the United States' purported termination of Table Mountain Rancheria under the Rancheria Act decades before. To that end, the lawsuit sought to secure judicial confirmation that (1) Table Mountain's sovereign status as a federally-recognized "tribal entity" remained intact; (2) that the "federal Indian status" of the individuals who lived at the Rancheria and who were subject to "termination" was restored; and finally, (3) that property received by the "terminated" Indians and thereafter returned to the United States remained "Indian country" beyond the state and local jurisdiction. (*Watt* Complaint (RFJN, Ex. A), 1-7, 93 & 33-39; *see also Alvarado* Complaint, Ex. 1.)

The *Watt* Action was one of several class action lawsuits filed by California tribes and/or Indians contending the Secretary of Interior violated the law when purporting to terminate their status in the 1950s and 1960s. In these cases, the plaintiffs variously sought to unwind the purported terminations or to be compensated for damages caused by the unlawful termination.

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While the federal courts adjudicated several such cases to final resolution,[3] the *Watt* Action ended with a judicially-approved settlement agreement between the Tribe's governing body and the individual plaintiffs on the one hand, and the United States defendants on the other.

To understand the *Watt* Action, and what it did (and did not) effect, one must consider the purpose and language of the Rancheria Act itself and the context in which the termination statute was implemented. Congress had specifically enacted the Rancheria Act in 1958 to terminate the trust relationship between the United States and 41 rancherias and reservations in California and the Indians who lived there. The Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619-21 (1958) (specifically listing Table Mountain Rancheria as one of the 41 rancherias targeted for termination) (RFJN, Ex. D). Congress later amended the Act to include all rancherias and reservations lying wholly within the state. Pub. L. No. 88-419, 78 Stat. 390-91 (1964) (RFJN, Ex. D). Termination could only occur, however, with the Indians' consent, and by the government's adherence to certain procedural and substantive requirements. *Id.*

Congress' decision to terminate its trust relationship with willing California Indians constituted an abrupt turnabout in federal Indian policy, as Congress had just 50 years earlier created rancherias to settle California Indians who, having been dispersed from their homes by white settlers, were found to be landless and living in abject poverty. These homeless Indians came to occupy the rancherias, sometimes by formal and informal "assignment" by the federal government and often without regard to tribal affiliation.[4] By thereafter embracing a new policy of termination, Congress sought "rapidly to end Indian dependence on federal services, curtail the Indian services bureaucracy, and assimilate Indians into the mainstream of the United States

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[3] *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 257 (N.D. Cal. 1981) ("a group of Indian people residing at the Table Bluff Rancheria" seeking restoration of "Indian status" and tribal entity seeking restoration of federally-recognized tribal status, and court granting same); *Duncan v. Andrus*, 517 F. Supp. 1, 6 (N.D. Cal. 1977) ("Both parties agree on the fundamental issue [that] Robinson Rancheria must be 'unterminated' and its distributees and their families must be given the opportunity to retain federal benefits lost through termination"); *Smith v. United States*, 515 F. Supp. 56, 59, 61 (N.D. Cal. 1978) (individual Indians seeking declaratory, injunctive and monetary relief in connection with unlawful terminations).

[4] *See* S. Rep. No. 1874 at 3 (1958) (RFJN, Ex. F); *see also Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1176 (E.D. Cal. 2003) (noting rancheria occupied by Indians of different tribal affiliation).

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culture." *Duncan v. Andrus*, 517 F. Supp. 1, 3 (N.D. Cal. 1977). To that end, the Rancheria Act empowered the Secretary of the Interior to distribute rancheria assets to the "Indians of a rancheria or reservation"—defined in the Act as "distributees" and "dependants of distributees"—whose "Indian status" was thereby terminated, subject to certain procedural and substantive requirements. *See* Rancheria Act, §§ 6, 10(b) (RFJN, Ex. D); 25 C.F.R. § 242.2 (1959) (RFJN, Ex. E); *see also Andrus*, 517 F. Supp. at 3 (noting that termination "objectives were to be accomplished in part by granting legal title to Rancheria land to individual Indians and terminating federal benefits and services to such Indians").

The Act and its promulgating regulations make no mention of tribal membership. *See* Rancheria Act, §§ 2-10 *et seq*; *see also* 25 C.F.R. §§ 242 (1959) *et seq.* Indeed, as the Act's legislative history (and case law interpreting it) make abundantly clear, the "distributees" were simply those persons who lived on, and used, the rancheria. Such made sense given the manner in which the rancherias in California were created, settled and occupied, as the legislative history underlying the Act underscored:

> *Attention is directed to the fact that no provision is made for preparing a membership roll for each rancheria or reservation. The preparation of such rolls would be impracticable because the groups are not well defined. Moreover, the lands were for the most part acquired and set aside by the United States for Indians in California, generally, rather than for a specific group of Indians* and the consistent practice has been to select by administrative action the individual Indians who may use the land. The bill provides for the distribution of the land, or the proceeds from the balance of the land, primarily on the basis of plans prepared or approved by those administratively selected users of the land.

S. Rep. No. 1874 at 3 (1958) (emphasis added) (RFJN, Ex. F); *see also Kelly v. United States*, 339 F. Supp. 1095, 1100 (E.D. Cal. 1972) (Rancheria Act had nothing to do with distributing assets to persons with tribal or even familial affiliation, but rather, simply involved distribution of assets to persons using and living on Rancheria).[5]

[5] Indeed, in describing the specific rancherias subject to termination under the Rancheria Act, the legislative history describes several in detail, noting that, most maintained no current membership rolls or even tracked membership. (RFJN, Ex. F, at 12-50.) With respect to Table Mountain Rancheria, the legislative history states, "[t]here is no approved membership roll." (*Id* at 46.)

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In sum, when seeking to terminate Table Mountain Rancheria and distribute Rancheria assets to the Indian "distributees" under the Rancheria Act, the United States did not even purport to decide who were the Tribe's members. Likewise, when seeking to unwind that unlawful termination, the individual plaintiffs in the *Watt* Action nowhere alleged—let alone, sought an adjudication—that they were members of the Tribe. (*Watt* Complaint (RFJN, Ex. A).) They sought instead a ruling that their "Indian status" remained intact. (*Id.*, 11:26-12-28, 14:5-16:7, 18:16-:20:4, 20:27-21:20, 31:30-32:6, 33:25-38:32.) At bottom, plaintiffs seek to conflate their "federal Indian status"—restored by virtue of *Watt*—with their right to be recognized members of a particular Indian tribe. However, tribal membership and "federal Indian status" are distinct concepts, as the Ninth Circuit has itself recognized. *See Bruce*, 394 F.3d at 1223-1225 & n.6 (recognizing that one can be an "Indian" irrespective of tribal membership, and that certain rights and benefits flow to federally-recognized "Indians" who lack tribal membership status).

Accordingly, and consistent with the nature of the *Watt* plaintiffs' allegations and the type of relief sought, the judicially-approved settlement simply confirmed the "Indian country" status of restored trust lands, the "federal Indian status" of the individuals who lived on the Rancheria, and the federally-recognized status of the Tribe as a sovereign "tribal entity." (*Watt* Complaint, 33:25-38:32 (RFJN, Ex. A); *see also Alvarado* Complaint, Ex. 1, at 2.) Because the purpose of that settlement was to unwind what the federal government had purported to accomplish—the termination of the Rancheria, its Indian occupants and the Tribe itself—the settlement did the following: (1) it entitled individual class members who had received rancheria property as part of the defective distribution plan (the "distributees" and "descendants of distributees") to convey the land to the United States and have such restored to federal trust status; (2) it entitled individual class members who previously had been denied federal benefits because of their purported termination to secure them since the federal government had not effectively terminated their "federal Indian status"; and (3) it required the United States to list the Tribe in the Federal Register as a recognized "tribal entity." (*Watt* Stipulation and *Watt* Order (*Alvarado* Complaint, Ex. 1, 2); *and see Alvarado* Complaint, 14:22-26, 17:25-18:18.)

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That is the sum and substance of what the *Watt* action effected. The fact that plaintiffs must rewrite the documents, to suggest this Court somehow adjudicated the Tribe's membership (*Id.*, 11:10-14, 12:19-23, 14:5-11) simply confirms plaintiffs recognize their grievance for what it is—an internal tribal matter beyond this Court's jurisdiction.

B. The Court Lacks Subject Matter Jurisdiction To Adjudicate An Intra-Tribal Membership Matter In Disguise.

It is well established that Indian tribes are sovereign political entities that possess the exclusive right to develop their own laws and govern their own internal affairs. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (noting "right of the Indians to govern themselves" and longstanding decisional law that has "consistently guarded the authority of Indian governments over their reservations"). This includes the right to determine who is, and is not, a member of the particular tribe, and indeed, "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." *Bruce*, 394 F.3d at 1225. Plaintiffs invite this Court to usurp this "most basic power[]" under the guise of an age-old class action lawsuit confirming the Tribe's sovereign status—a lawsuit that never even purported to adjudicate tribal membership. The invitation must be rebuffed.

1. There Is No Federally-Protected Right To Tribal Membership, And In Fact, Courts Lack Power To "Intrude" Upon "Intra-Tribal" Matters Such As Tribal Enrollment And Membership.

The principle that tribal membership is a unique attribute of tribal sovereignty, falling within the exclusive province of the tribe, was first enunciated by the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In that case, a female tribal member challenged a tribal enrollment ordinance that sexually discriminated against certain persons, denying membership to children of female members who married outside the tribe, while extending membership to children of male members who did so. After unsuccessfully trying to convince the tribe to change its membership requirements, the plaintiff sought relief from the federal courts, challenging the tribal ordinance on the ground that it violated the "equal protection clause" of the federal Indian Civil Rights Act ("ICRA"). The Supreme Court rejected the effort.

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Framing the question as "whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members," *Santa Clara Pueblo*, 436 U.S. at 51, the Supreme Court held it could not. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government," said the Court, and while "no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.' " *Id.* at 55.

The Court noted the "well-established federal 'policy of furthering Indian self-government,' " (*id.* at 62), and underscored the particular importance of tribal membership determinations to the protection of tribal sovereignty:

> 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. *See Roff v. Burney*, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

436 U.S. at 72 n.32.

On the basis of the broad principles of tribal sovereignty articulated in *Santa Clara Pueblo*, the federal courts have consistently declined to intervene in tribal membership disputes in a variety of contexts. Indeed, " '[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues.' " *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) (citation omitted); *see also Nero v. Cherokee Nation of Oklahoma, et al.*, 892 F.2d 1457, 1463 (10th Cir. 1989) (noting that "no right is more integral to a tribe's self-governance than its ability to establish its membership" and finding that court's review of the tribe's allegedly racist membership determinations "would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity' "); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) ("Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs were wrongfully denied enrollment in the Tribe.").

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Although the Ninth Circuit has yet to publish a decision squarely holding that the courts lack jurisdiction over tribal membership matters, the law in this Circuit is consistent with *Santa Clara Pueblo*, and recognizes that matters of tribal membership are left to the discretion of the tribe. *See Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("[U]nless limited by treaty or statute, a Tribe has the power to determine tribal membership"), *cert. denied sub.nom, Gros Ventre Tribe of Fort Belknap Indian Reservation, Montana v. United States*, 440 U.S. 958 (1979); *cf. Donovan v. Coeur d'Alene Tribal Farm.*, 751 F.2d 1113, 1116 (9th Cir. 1985) (federal statutes of general applicability will not apply to Indian tribes, unless expressly made applicable, where the subject matter involves "purely intramural matters such as conditions of tribal membership").

Moreover, because of the importance and longstanding policy of protecting tribal sovereignty, courts are particularly suspect of efforts to create jurisdiction through artful pleading. Indeed, in circumstances directly relevant here, several Circuits have refused to decide tribal membership matters under the guise of federal claims. For example, in *Smith v. Babbitt*, *supra*, the plaintiffs, members of the Mdewakanton Sioux Tribe, alleged the tribe had changed its membership criteria such that "some ineligible persons were improperly receiving [gaming-related] payments, and [] other eligible persons were being denied payments to which they were entitled." 100 F.3d at 557. They claimed the tribe's actions violated a number of federal statutes, including the IGRA, the ICRA and others. The Eighth Circuit affirmed the district court's dismissal, noting that one "aspect of [Indian] sovereignty is the authority to determine tribal membership." *Id.* at 558. As the court there explained: "A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, *there is perhaps no greater intrusion upon tribal sovereignty* than for a federal court to interfere with a sovereign tribe's membership determinations." *Id.* at 559 (emphasis added, citation omitted). Because federal jurisdiction does not reach such matters "simply because the plaintiffs carefully worded their complaint," the action had to be dismissed:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA, RICO and the Tribe's Constitution. However, upon closer examination, we find these allegations are merely attempts to move this

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> dispute, over which the court would not otherwise have jurisdiction, into federal court.

100 F.3d at 559.

The Tenth Circuit held similarly in *Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150 (10th Cir. 1998), an action in which the plaintiffs asked a court to compel a federally-recognized tribe and the BIA to recognize plaintiffs as duly enrolled members of the tribe. In that case, the plaintiffs had applied for membership pursuant to a particular tribal ordinance, and while their applications were pending, the tribe repealed the ordinance and took no action on their applications. *Id.* at 1152. The court dismissed the claims, finding no federal subject matter jurisdiction:

> No matter how this case is approached, [plaintiffs are] asking this court to step in and tell a tribal government what to do in a membership dispute. Whether federal intervention would be right, wrong, or well-intentioned, that intervention is exactly the kind of interference in tribal self-determination prohibited by *Santa Clara*.

Id. at 1157.

So too, here. A 25-year-old class action judgment confirming an Indian tribe's sovereignty simply provides no jurisdictional basis for this Court to adjudicate what is, quintessentially, an internal tribal membership matter. Like the plaintiffs in *Ordinance 59* and *Smith v. Babbitt*, plaintiffs seek to elevate their claims to federal ones through artful pleading. Their complaint deserves the same fate—dismissal.

2. This Court Should Reject A Transparent Effort To "Intrude" Upon Tribal Sovereignty By Bootstrapping Jurisdiction From An Age-Old Case Having Nothing To Do With Tribal Membership.

According to plaintiffs, this Court's approval of a settlement agreement confirming the Tribe's federally-recognized sovereign status somehow elevates its tribal membership claims to federal ones within this Court's jurisdictional reach. Not so. Of particular significance is *Apodaca v. Silvas*, 19 F.3d 1015 (5th Cir. 1994) (per curiam), a case closely analogous to this one. In *Apodaca*, the plaintiffs sought federal relief because they were removed from their tribe's membership roll after Congress had restored the tribe's federally-recognized sovereign status pursuant to a specifically-enacted Restoration Act. The Act that Congress passed specifically

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identified whom "[t]he membership of the tribe shall consist of." *Id.* at 1016. The plaintiffs filed a federal action claiming their subsequent removal from the membership roll violated both the Restoration Act and the ICRA, allegedly giving rise to a federal claim for relief. *Id.* The court disagreed, dismissing the action. It concluded there was no federal cause of action, in part, because, irrespective of "whether the plaintiffs belong to the class protected by the statute… the federal government and the tribe benefit most" from the Restoration Act. *Id.* at 1017. Fundamentally, the existence of a private remedy "would be inconsistent with a statute seeking to protect Indian sovereignty." *Id.* Such "cause of action," said the Fifth Circuit, "is one that has traditionally been relegated to tribal law because, as mentioned in *Santa Clara Pueblo*, the right to determine tribal membership is crucial to the existence of the tribe as an independent political community." *Id.*

The reasoning of *Apodaca v. Silva* applies with greater force here, where there was no *Act of Congress* restoring an Indian tribe's federally-recognized status, let alone, a *congressional pronouncement* as to who belonged in the tribe. *See Santa Clara Pueblo*, 436 U.S. at 72 ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."). Instead, there was simply a stipulation in which the Tribe and individual plaintiffs agreed to relinquish certain claims (primarily those for monetary damages) in exchange for federal confirmation that the United States had never terminated their status—as a federally-recognized "tribal entity" and as "Indians," respectively. To conclude that this Court's approval of such agreement means it can now resolve specific individual claims concerning membership in the Tribe, and thereby dictate tribal membership, "would be inconsistent" with—and indeed flout—one fundamental purpose of the settlement: To confirm that, in the eyes of the United States, Table Mountain's sovereignty remained intact, *including all powers attendant to such sovereignty.*

Furthermore, the notion that the Tribe's federal recognition was itself a creature of federal law does not mean plaintiffs' claims that they are members of the Tribe "arise under" federal law. That is the teaching of *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642

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F.2d 276, 279 (9th Cir. 1981), where tribal members sought federal relief to adjudicate alleged violations of tribal election laws, which were themselves "adopted and promulgated pursuant to and under the authority of" the Indian Reorganization Act, 25 U.S.C. §§ 476, 477. As the Ninth Circuit explained, when rejecting the assertion of federal question jurisdiction:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends.

Boe, 642 F. 2d at 279 (internal citations and quotations omitted). As the court explained, "[t]he federal nature of the right to be established is decisive not the source of the authority to establish it." *Id.* (internal citations and quotations omitted).

One need only briefly review plaintiffs' sweeping claims for relief to see that the nature of the right plaintiffs seek to establish is tribal, not federal. They seek, among other things:

- an order directing the Tribe to "immediately admit all Plaintiffs as members of the Table Mountain Rancheria";
- an order requiring a "full accounting" of tribal financial records to identify "any and all monetary and non-monetary benefits paid individually to any members of Table Mountain";
- an order directing the Tribe and individual tribal members to compensate plaintiffs for benefits they assertedly would have received had the Tribe recognized them, "including casino profits";
- an order imposing punitive damages against the Tribe for allegedly improperly excluding plaintiffs from its membership;
- an order permanently requiring the Tribe to "continue to recognize" plaintiffs in the future, affording them "all benefits that any other member receives from the United States and Table Mountain"; and
- an order for the Court to "exercise continuing jurisdiction to insure" that all of the above occurs (apparently indefinitely).

(*Alvarado* Complaint, 26-28.)

Of course, plaintiffs cannot establish their entitlement to any of the above relief with reference to federal law. Tribal law alone controls that determination. And, of course, federal courts are simply not empowered to interpret tribal law, let alone, grant relief for its alleged violation. *Boe*, 642 F.2d at 276-77; *see also Runs After v. U.S.*, 766 F.2d 347, 352 (8th Cir. 1985) (plaintiffs' claims "necessarily require the district court to interpret the tribal constitution and tribal

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law is not within the jurisdiction of the district court").

* * *

The essence of plaintiffs' theory is that they were represented in a class action lawsuit confirming the United States had never terminated the Tribe's sovereign status, and because they were (purportedly) members of the class, they were and are members of the Tribe. However, the 1980 class action never even involved, let alone adjudicated, the Tribe's membership—nor could it, or would it, since the ability of the Tribe to define its own membership is "central to its existence" as a sovereign entity. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. To analogize, plaintiffs are not simply asking this Court to go through the back door to dictate membership to a sovereign tribe; they are asking the Court to do it through a side window. Every Circuit confronted with such artful pleas—in an effort to portray internal tribal matters as "federal questions"—have rejected them. This Court should as well.

C. The Tribe And Its Officials Are Immune From Suit, Separately Depriving This Court Of Jurisdiction Over The Tribal Defendants.

Even assuming, *arguendo*, that plaintiffs' complaint raised a substantial question of federal law, there is still no jurisdiction because the doctrine of sovereign immunity bars this lawsuit against the Tribe and its members. As "distinct, independent political communities," Indian tribes have "long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. 49 at 55, 58. As such, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *see also United States v. United States Fidelity & Guaranty Co.*, U.S. 506, 512 (1940).

Although related to tribal sovereignty, the Tribe's sovereign immunity is distinct from the question of whether plaintiffs' complaint "arise[s] under the Constitution, laws or treaties of the United States" as required for federal jurisdiction. 28 U.S.C. §1331; *see* Boe, 642 F.2d at 279, n.5 ("plaintiffs did not state a claim for relief which would provide federal question jurisdiction," and "in view of our holding that no claim for federal relief was stated, we find it unnecessary to address

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1 the sovereign immunity issue"). However, like the existence of a substantial federal question,
2 sovereign immunity is jurisdictional in nature. *See Florida v. Seminole Tribe*, 181 F.3d 1237, 1240
3 n.4 (11th Cir. 1999) (noting "fundamentally jurisdictional nature of a claim of sovereign
4 immunity"); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989)
5 ("Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over
6 Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims by or
7 against tribal defendants.").
8 As shown below, the Tribe and the individually-named defendants are immune from suit,
9 and such immunity was never waived. To the extent any particular individual tribal member does
10 not possess immunity, dismissal is still compelled because the Tribe is an indispensable party that
11 cannot be joined.

12 **1. Table Mountain Rancheria Has Never Waived Its Sovereign**
13 **Immunity.**

14 Because preserving tribal resources and autonomy are matters of vital importance, tribal
15 immunity is "broad" (*Boisclair v. Superior Court*, 51 Cal.3d 1140, 1157 (1990)), extending to both
16 governmental and commercial activities, whether undertaken on or off the tribe's reservation. *See*
17 *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 636-37 (1999). Tribal immunity is, in
18 fact, jealously guarded by Congress (*Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S.
19 877, 890 (1987)), and broader than the immunity enjoyed by the States. *See In re Green*, 980 F.2d
20 590, 595 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994).
21 For the same reason an Indian tribe's immunity is broad—to preserve tribal assets and
22 autonomy—tribal "[w]aivers of sovereign immunity are construed narrowly and in favor of the
23 sovereign." *Soghomonian v. United States*, 82 F. Supp. 2d 1134, 1140 (E.D. Cal. 1999).
24 Consistent with this "strong presumption against waiver of tribal sovereign immunity,"
25 (*Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001)), it is "settled that [an abrogation
26 or] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "
27 *Santa Clara Pueblo*, 436 U.S. at 58; *see also C&L Enterprises v. Citizens Band of Potawatomi*, 532
28 U.S. 411, 418 (2001) ("to relinquish its immunity, [an Indian] tribe's waiver must be 'clear' ").

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Further, a tribe's immunity is not defeated by an allegation that it has exceeded its powers. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

In practice, these rules have resulted in strict construction of the actions necessary to waive an Indian tribe's immunity. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (tribe's voluntary participation in proceedings "is not express and unequivocal waiver of tribal immunity that we require in this circuit"); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (sovereign immunity barred state's counterclaim in suit filed by tribe); *Chemehuevi Indian Tribe v. California State Bd of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (same), *rev'd on other grounds*, 474 U.S. 9 (1985). Indeed, as courts throughout the nation have recognized, "the standard the Supreme Court has established for a waiver of tribal sovereignty is extremely difficult to satisfy." *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 n.4 (D. Minn. 1995); *see also Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 298 (Minn. 1996) (noting "high threshold on the issue of a tribe's waiver of its sovereign immunity"), *cert. denied,* 524 U.S. 911 (1998). The federal appellate decisions are uniformly in accord with the above propositions.[6]

Plaintiffs cannot show the Tribe (or Congress) waived the Tribe's immunity so as to permit this suit. (Plaintiffs clearly recognize the Tribe possesses immunity to suit which, as the district court in the *Lewis* Action noted, is why they elected not to sue the Tribe in that case. (*Lewis* Order, 7:1-3).) Plaintiffs do not allege here (by reference to a particular statute or otherwise) that Congress abrogated the Tribe's inherent common law immunity from suit. Nor do they anywhere allege the Tribe itself unequivocally waived its immunity to this suit. Instead, they apparently hope to circumvent the Tribe's immunity by piggybacking on the *Watt* Action, and arguing the Tribe waived its immunity in this case by seeking to confirm its federally-recognized status in that class

[6] *See Bassett v. Mashantucket Pequot Tribe* 204 F.3d 343, 357 (2d Cir. 2000) ("tribe does not waive its immunity merely by participating in" off-reservation commercial activities); *Ute Distribution Corp. v. Ute Indian Tribe* 149 F.3d 1260, 1267 (10th Cir. 1998) ("Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case."); *Pan Amer. Co. v. Sycuan Band*, 884 F.2d 416, 419 (9th Cir. 1989) (sovereignty is not "subject to the vagaries of the commercial bargaining process or the equities of a given situation."); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) ("[A] tribe may consent to be sued, it is imperative to caution, however, that such consent 'cannot be implied but must be unequivocally expressed.' ").

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action lawsuit 25 years ago. The argument fails under settled law.

First, to the extent the Tribe waived its immunity by initiating the *Watt* Action, any such waiver was strictly limited to the issues adjudicated in that case. *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) (an Indian tribe's "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of *that particular controversy*" (emphasis added).) That is because the " 'terms of [a sovereign's] consent to be sued in any court define the court's jurisdiction to entertain the suit.' " *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)); *see also Great Western Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1420 (1999)) ("tribe agreed to waive its sovereign immunity and consent to suit [] only in a narrowly defined situation" that did not exist), *cert. denied*, 531 U.S. 812 (2000).

Moreover, the *Watt* Action simply provides no basis to find the Tribe waived its immunity to suits involving membership matters. As demonstrated above, the termination the Tribe and individual plaintiffs sought to rescind in that class action did not even involve who was—and who was not—a member of the Tribe. While *Watt* sought to confirm the Tribe's status as a "federally-recognized Indian tribe," it sought different relief with respect to the individuals—namely, to secure confirmation of their "federal Indian status" and retroactive entitlement to any federal benefits that were lost by virtue of the termination of that status. Indian status is distinct from tribal membership. *See Bruce*, 394 F.3d at 1125 n.6 (noting that "unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indians *without statutory reference to enrollment*." (emphasis in original)).

The *McClendon* case is particularly illustrative since the plaintiffs in that case, like here, tried to pierce the tribe's immunity via an earlier lawsuit that resulted in a judicially-approved settlement. Specifically, the plaintiffs sought to enforce the terms of a lease of certain tribal trust property on the ground the tribe waived its immunity in the context of a settlement agreement involving the lease of the property at issue. The Ninth Circuit rebuffed the effort, noting an Indian tribe's "initiation of [a] suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation..." *McClendon*, 885 F. 2d at 631.

Here, the right to be a member of the Tribe under its own laws is not a "collateral issue"

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arising out of *Watt*. Neither the settlement agreement, nor the Court's order approving it, addressed the issue of tribal membership, let alone, purported to adjudicate it. (*See Watt* Stipulation and *Watt* Order (*Alvarado* Complaint, Ex. 1-2).) Moreover, it is simply inimical to the purpose of the *Watt* case to suggest the Tribe agreed to relinquish its sovereign powers, and consented to having the federal courts decide its membership. By seeking a declaration that its federally-recognized status remained intact, the Tribe accepted the risk of an adverse ruling that the United States had effectively terminated the Tribe's sovereign status vis-à-vis the United States, leaving it without a right to secure federal benefits otherwise available. That was the extent of any waiver, however. The Tribe did not accept the risk that, in exchange for federal recognition of its sovereign status, it would lose a sovereign "tribe's most basic powers"—"the authority to determine questions of its own membership." *Bruce*, 394 F.3d at 1225.

2. The Individual Tribal Defendants Also Are Immune From Suit.

Plaintiffs also cannot avoid the bar of immunity by suing individual tribal members. Given the nature of this suit—which, at its core, requires the Court to interpret tribal law and seeks to force a sovereign entity to take specific, affirmative action purportedly pursuant to that law—those tribal members also possess sovereign immunity. However, even assuming any particular tribal member somehow does not share the Tribe's immunity, dismissal is still required because the Tribe is a "necessary" and "indispensable" party that cannot be joined. Fed. R. Civ. P. 19.

a) The Tribal Members Possess Immunity From Plaintiffs' Lawsuit.

Plaintiffs have sued several individual tribal members who fall into two categories: (1) the class representatives from the 1980 *Watt* Action who are still living (*Alvarado* Complaint, 22:19-23); and (2) the tribal officials whom plaintiffs allege are responsible for acting on membership matters on behalf of the Tribe. (*Id.*, 22:23-23:4, 25:20-26.) Notably, the very persons plaintiffs have sued, and plaintiffs' allegations with respect to those persons, undermines their theory that they seek simply to enforce the judgment from the 1980 class action. It also confirms the Tribe's immunity bars plaintiffs' claims against the tribal members.

For example, plaintiffs nowhere allege that the class representatives they sue had or have

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any ability to affect the Tribe's recognition of plaintiffs as members. To the contrary, plaintiffs contend the class representatives were and are subject to the "control" of the Tribe with respect to the Tribe's alleged failure to recognize them as members. (*Alvarado* Complaint, ¶ 77.) In effect, plaintiffs admit their grievance is with the Tribe, not the class representatives.

Plaintiffs also sue tribal officials whom they say are empowered to act on the Tribe's behalf on membership matters. Of course, the very fact that plaintiffs sue these tribal officials, who were not even the class representatives in the 1980 *Watt* Action, reveals plaintiffs' grievance for what it is—an internal membership matter, not an effort to enforce a class action settlement agreement whose class representatives have allegedly failed to represent the interests that were at stake in that litigation.

As noted above, tribal immunity is "broad," extending to activities on and off the reservation, as well as to tribal officials acting in their representative capacity. *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899, 901-902 (9th Cir. 1991), *overruled on other grounds*, *Big Horn v. Adams*, 219 F.3d 944 (2000); *Imperial Granite*, 940 F.2d at 1271. Accordingly, the Tribal Council members named here are protected by the Tribe's sovereign immunity while acting in their official capacity and within the scope of their authority. Further, such tribal immunity may only be pierced, under the doctrine of *Ex Parte Young*, if plaintiffs can show the officials violated federal law. *Blackfeet Tribe*, 924 F.2d at 901. Plaintiffs do not allege—nor could they—that the tribal officials have violated federal law, since their purported right to be members of the Tribe turns on tribal law. *See Boe*, 642 F.2d at 279 (tribal ordinances and constitutions are not "federal law"); *Flandreau*, 905 F. Supp. at 746 (any fiduciary duties owed to putative members of tribe flow from tribal law). Of course, claimed violations of tribal law are not properly before this Court anyway. *Boe*, 642 F.2d at 279 (district courts lack jurisdiction to adjudicate alleged violations of tribal law); *Runs After*, 766 F.2d at 352 (same).

More fundamentally, this is a lawsuit against a sovereign tribe, not the tribal officials who purportedly acted (or failed to act) on plaintiffs' membership applications. *See Imperial Granite*, 940 F.2d at 1271 (lawsuit challenging tribal officials' vote was not "anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band,

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following the votes, that caused Imperial's alleged injury."). Plaintiffs cannot change the basic character of this lawsuit—an action against a sovereign—by simply adding individual tribal members as defendants. As the Ninth Circuit has explained, where " 'the essential nature and effect' of the relief sought" is that against the tribe, the tribe is the "real, substantial party in interest," and its immunity applies to bar suit, irrespective of claims against tribal officials:

> A suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Shermoen v. United States, 982 F.2d 1312, 1320 (9th Cir. 1992) (citation omitted).

As confirmed by plaintiffs' own allegations, the relief they request—an order directing the Tribe to affirmatively recognize plaintiffs as past, present and future members, as well as the payment of all past, present and future benefits they would have received (and would receive) as tribal members—will "require affirmative action by the sovereign [and] the disposition of unquestionably sovereign property." *Id.* The membership status and benefits plaintiffs seek can only be granted by the Tribe, not any particular tribal member (official or otherwise). *See Imperial Granite*, 940 F.2d at 1271 (legal rights are created by official actions of the tribe, and not by the votes of individual tribal officials). Because the requested relief "would expend itself on the public treasury or domain...restrain the Government from acting, or [] compel it to act," plaintiffs' claims are against the sovereign itself. *Shermoen*, 982 F.2d at 1320. Accordingly, plaintiffs' claims against the tribal members constitute nothing more than "an attempted end run around tribal sovereign immunity" (*Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1160 (9th Cir. 2002)), and those members are immune from suit.

b) Irrespective Of Whether The Individual Tribal Defendants Possess Immunity, They Cannot Be Sued Because The Tribe Is A Necessary And Indispensable Party That Cannot Be Joined.

Even assuming, for argument's sake, that any particular tribal members did not share the Tribe's immunity, the claims against them must still be dismissed. That is because the Federal

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Rules of Civil Procedure mandate dismissal of any action to which a "necessary" and "indispensable" party cannot be joined (Fed. R. Civ. P. 19), and the Tribe is such a party.

(i) The Tribe Is A Necessary Party.

A party is "necessary" if (1) its absence would prevent the court from according complete relief among other parties to the action or if (2) it claims an interest in the action and is so situated that its absence would either impair the court's ability to protect that interest or leave other parties subject to a substantial risk of incurring multiple inconsistent obligations. Fed. R. Civ. P. 19(a). If a party meets either standard, it is "necessary" to the action. *Dawavendewa*, 276 F.3d at 1155-57. The Tribe meets both.

The Tribe's absence would prevent this Court from according complete relief among other parties to the action. Plaintiffs seek tribal membership and tribal benefits. That relief must come from the Tribe itself. No other party can grant tribal membership or distribute tribal benefits generated on trust property. Therefore, even assuming plaintiffs prevailed, they could not obtain complete relief unless the Tribe is a party to the action.

The Tribe also is a necessary party by virtue of two distinct (though certainly not unrelated) interests in this action. First, the Tribe claims an interest in preserving its own sovereign immunity, including the "concomitant 'right not to have [its] legal duties judicially determined without [its] consent.' " *Shermoen*, 982 F.2d at 1317; *see also Pit River Home and Agricultural Cooperative Ass'n v. Babbitt*, 30 F.3d 1088, 1099 (9th Cir. 1994) (tribe's claim of sovereign immunity is sufficient to render it "necessary" under Rule 19). Second, the Tribe has an interest in maintaining its sovereign right to self-governance. *See Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (Tribes are necessary parties to actions implicating their interest in preserving governmental authority); *see also Santa Clara Pueblo*, 436 U.S. at 59-60 (resolution of internal tribal disputes in a foreign forum "cannot help but unsettle" tribal government). That right includes the ability to determine tribal membership and to regulate the distribution of tribal benefits. *Santa Clara Pueblo*, 436 U.S. at 59-60 (sovereignty includes right to regulate internal affairs); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J. dissenting) (Tribes have broad powers to define rules of membership, and thus

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1 determine entitlement to tribal benefits); *Bruce*, 394 F.3d at 1225 (controlling membership is "one
2 of an Indian tribe's most basic powers"); *Shermoen*, 982 F.2d at 1320-21 (Tribes retain power to
3 adjust relations among members). In sum, the Tribe is "necessary" because plaintiffs' claims
4 necessarily implicate the sovereign's "most basic powers" and if adjudicated, would impair its
5 ability to preserve and safeguard its sovereignty and right to self-governance.

6 **(ii) The Tribe Is An Indispensable Party.**

7 A party is "indispensable" if "equity and good conscience" dictate that an action should not
8 proceed in its absence. Fed. R. Civ. P. 19(b); *Dawavendewa*, 276 F.3d at 1161. To determine
9 indispensability, courts balance four factors: (1) the extent to which a judgment rendered in a
10 party's absence might prejudice that party or other parties; (2) the extent to which relief can be
11 shaped to lessen that prejudice; (3) the extent to which an adequate remedy, even if incomplete, can
12 be awarded in the party's absence; and (4) whether plaintiff may seek relief in an alternative forum.
13 *Id.* at 1161-1162. In weighing these factors, the Ninth Circuit recognizes tribal sovereignty as a
14 separate, "compelling" consideration favoring dismissal. *See Kescoli v. Babbitt*, 101 F.3d 1304,
15 1311 (9th Cir. 1996) (although four factors did not clearly favor dismissal, "concern for the
16 protection of tribal sovereignty" did so). Here, all factors, including the Tribe's sovereignty, favor
17 dismissal of all claims.

18 The Tribe and the individual tribal defendants would suffer considerable prejudice if this
19 action were to proceed without the Tribe. Prejudice to the Tribe stems from the same legal
20 interests—preserving its sovereignty and right to self-governance—that rendered it a necessary
21 party in the first place. *See Confederated Tribes*, 928 F.2d at 1499 (prejudice inquiry under Rule
22 19(b) is virtually identical to Rule 19(a) test measuring interest in the action). Allowing plaintiffs
23 to proceed would significantly prejudice the Tribe's ability to assert those interests. *See Shermoen*,
24 982 F.2d at 1318-19 (impairment of sovereignty constitutes prejudice); *Confederated Tribes*, 928
25 F.2d at 1499 (altering tribe's "authority to govern" constitutes prejudice). However, the individual
26 tribal defendants also would suffer prejudice in the Tribe's absence. Assuming plaintiffs obtained a
27 judgment against individual tribal officials (or, for that matter, against Secretary Norton), the ability
28 of those individuals to carry out their duties within the Tribe (or, in the Secretary's case, duties to

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1 the Tribe) would be severely prejudiced. *See Pit River*, 30 F.3d at 1101 (tribe's absence would
2 prejudice ability of its Tribal Council to govern).
3 The second factor of indispensability also favors dismissal. Plaintiffs seek tribal
4 membership and tribal benefits. There is no way to "shape" this relief in a manner that would
5 lessen or avoid prejudice to the Tribe. Even if the Court could somehow fashion relief granting
6 membership or directing the payment of tribal benefits without the Tribe's participation (a
7 theoretical impossibility), any such relief would inherently prejudice the Tribe's sovereignty and
8 self-governance. Indeed, as noted, " 'there is perhaps no greater intrusion upon tribal sovereignty
9 than for a federal court to interfere with a sovereign tribe's membership determination.' " *Smith v.*
10 *Babbitt*, 100 F.3d at 559 (quoting district court).
11 Likewise, plaintiffs cannot recover an "adequate" remedy in the Tribe's absence. The
12 individual tribal members cannot force the Tribe to accept plaintiffs as its members. *See Imperial*
13 *Granite*, 940 F.2d at 1271 (tribe is source of legal rights, not individual tribal officials). Plaintiffs'
14 prayer for relief reveals this suit for what it truly is—an attempt to circumvent the Tribe's
15 sovereignty to secure tribal membership and benefits plaintiffs claim they are owed under tribal
16 law. At its core, this is a suit against the Tribe. *See Shermoen*, 982 F.2d at 1320 (actions designed
17 to compel tribal action or to obtain tribal benefits are suits against the tribe itself). Accordingly,
18 plaintiffs cannot possibly recover an "adequate" remedy in the Tribe's absence.
19 Finally, the fourth indispensability factor also favors dismissal. Plaintiffs do have
20 alternative fora in which to seek relief. Table Mountain has both a Tribal Council and a General
21 Council to decide and adjudicate membership matters. *See Lewis* Order (RFJN, Ex. B) at 12
22 (noting that plaintiffs have alternative fora in the Tribal Council and General Council). The
23 Supreme Court has specifically endorsed such non-judicial tribal institutions as "competent law-
24 applying bodies." *Santa Clara Pueblo*, 436 U.S. at 66. However, even if such fora did not exist,
25 this last factor does not prevent dismissal of plaintiffs' claims against the individual tribal
26 defendants. Because society has "consciously opted to shield Indian Tribes from suit
27 without....consent," the Tribe's interest in maintaining its sovereignty outweighs plaintiffs' interest
28 in litigating their claims. *Quileute Tribe*, 18 F.3d at 1460-61; *and see Pit River*, 30 F.3d at 1102-

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03. Therefore, the plaintiffs' claims cannot proceed.

In sum, the Tribe is both a necessary and indispensable party that cannot be sued, requiring dismissal of all claims under the Federal Rules' mandatory joinder requirements.

D. Even Assuming Tribal Sovereignty Did Not Bar This Lawsuit, The Court's Jurisdiction To Enforce The 22-Year-Old Settlement Agreement Ceased To Exist, Decades Ago, By Its Own Terms.

Finally, even assuming the Tribe's sovereignty was not an absolute bar to the assertion of jurisdiction over this lawsuit, and assuming the plaintiffs did, in fact, seek to enforce the terms of a 22-year-old settlement agreement (as opposed to securing an order dictating internal membership to a tribe), the Court still lacks jurisdiction to grant the requested relief. As the U.S. Supreme Court has held, there is no "inherent" or "continuing" jurisdiction to enforce court-approved settlement agreements that result in dismissal of an action; rather, the court must explicitly retain such jurisdiction in its order. *See Kokkonen*, 511 U.S. at 381-382 (no jurisdiction over Stipulation and Order of Dismissal, which did not reserve jurisdiction to enforce settlement). As the *Kokkonen* court explained, a "judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his [or her] order" subject to subsequent enforcement. *Id.* at 381. Accordingly, the court must either expressly " 'retain[] jurisdiction' over the settlement agreement" or it must "incorporat[e] the terms of the settlement agreement in the order." *Id.* Absent either action, and without some independent basis for federal jurisdiction, there is no basis to proceed in federal court. *Id.* at 382.[7]

With respect to the decades-old *Watt* Action, neither the order approving the settlement, nor the judgment giving it judicial effect, mentions the retention of jurisdiction. However, the settlement agreement itself, which this Court approved and referenced in its order and judgment, expressly retained the Court's jurisdiction for one year (or for longer with good cause shown within one year of the judgment's entry). Specifically, the Stipulation that the parties entered and that the Court approved provides:

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[7] The Ninth Circuit has repeatedly followed *Kokonnen* to find district courts lacked jurisdiction over actions seeking to enforce judicially-approved settlement agreements. *See Ortolf v. Silver Bar Mines*, 111 F.3d 85 (9th Cir. 1997); *O'Connor v. Colvin*, 70 F.3d 530 (9th Cir. 1995); *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995).

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> 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 entry of judgment, or for such longer time as may be shown to be necessary on a motion duly noticed by any party within one year from entry of judgment.*

(*Watt* Stipulation (*Alvarado* Complaint, Ex. 1) ¶ 14, 5:22-28 (emphasis added).) Judgment was entered on June 16, 1983. (*Watt* Judgment (*Alvarado* Complaint, Ex. 3).) The Court's docket reflects no motion made to extend jurisdiction during the following year, let alone, an order granting such motion (*Watt* Docket (RFJN, Ex. G)), and indeed, plaintiffs acknowledge the case was both closed and archived long ago. *See* Reply to Tribal Defendants' Opposition to Statement of Related Case, 2:11-13. In effect, this Court either elected not to incorporate the terms of the settlement agreement into its judgment, or if it did so, it expressly limited its jurisdiction to one year. In either event, there is no continuing jurisdiction under *Kokkonen* and its progeny, and this Court lacks jurisdiction to "enforce" the terms of a settlement agreement now 22-years stale. *See Arata v. Nu Skin International*, 96 F.3d 1265, 1268-69 (9th Cir. 1996) (court had discretion to terminate its continuing jurisdiction in order approving class action settlement agreement); *compare York v. County of El Dorado*, 119 F. Supp. 2d 1106, 1107-09 (E.D. Cal. 2000) (court lacked continuing jurisdiction over class settlement where it did not explicitly retain jurisdiction).

Recognizing the inherent difficulty in resurrecting a 22-year-old settlement agreement and judgment, plaintiffs repeatedly characterize the Court's judgment as a "consent decree" (*Alvarado* Complaint, 3:4, 11:4, 11:7, 11:17, 11:20-21, 13:5-16, 15:1-3, 21:22, 23:24), even though the documents make no use of that term. (*Id.*, Ex. 1-3.) The "central purpose of consent decrees" "is to enable parties to avoid the expense and risk of litigation while still obtaining the greater enforceability (compared to an ordinary settlement agreement) that a court judgment provides." *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004). Consent decrees are common "in institutional reform" type cases where ongoing court supervision is necessary. *Id.* at 851. Assuming the Court's judgment in *Watt* was a "consent decree"—there are many reasons it was not, and the Court's failure to call it such is certainly indicative that it was not—plaintiffs' effort is futile since the Court expressly limited its jurisdiction to enforce the settlement agreement to one

1 year. *See Hallett v. Morgan*, 296 F.3d 732, 739-40 (9th Cir. 2002) (under consent decree, court's
2 jurisdiction was to terminate by date certain absent motion to extend, and when no such motion was
3 timely made, court lost jurisdiction); *Taylor v. United States*, 181 F.3d 1017, 1022 (9th Cir. 1999)
4 (motion to terminate consent decree "moot" since decree expired by its own terms, and there is
5 "no… consent decree left to be terminated"). In sum, even if one were to accept plaintiffs'
6 theory—*i.e.*, that they seek merely to enforce a "stipulated settlement agreement/consent decree and
7 judgment" entered 22 years ago—the lawsuit is time-barred by the very terms of the document
8 plaintiffs seek to enforce.

9 **IV. CONCLUSION**

10 At bottom, plaintiffs ask this Court to accomplish indirectly what it cannot accomplish
11 directly: interpret tribal law, order a sovereign tribe to recognize plaintiffs as members, and direct
12 the Tribe to pay plaintiffs the past and future benefits afforded the Tribe's members. Bedrock law
13 compels dismissal. Plaintiffs claims do not "arise under" federal law "simply because [they]
14 carefully worded their complaint"; artful pleading aside, the complaint seeks judicial interference in
15 an intra-tribal matter falling within the Tribe's exclusive jurisdiction. The Tribe's sovereignty also
16 deprives the Court of jurisdiction because the Tribe, and its members, are immune from suit, and
17 such was never waived. And, finally, the "settlement agreement" plaintiffs seek to enforce does not
18 deal with tribal membership, but even if it did, it expired 21 years ago by its own terms.

19 The jurisdictional implications of plaintiffs' theory cannot be overstated. If plaintiffs are
20 correct, and if a class action lawsuit confirming a sovereign tribe's federally-recognized *status* is
21 enough to give federal courts jurisdiction over internal tribal *membership* matters, then no tribe is
22 truly sovereign when it comes to defining its own membership. This Court and every other federal
23 court will now be the arbiters of who are, and who are not, members of a federally-recognized tribe
24 under its own laws, particularly those whose federal recognition was at some point improperly
25 terminated and judicially reinstated. Of course, such a result would not only flout an entire body of
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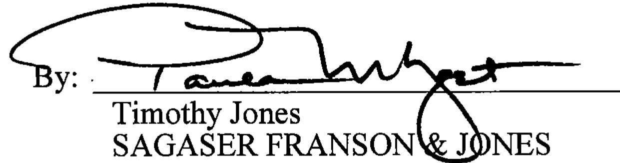
law, it would turn the doctrine of Indian sovereignty on its head, since a tribe's right to define its own membership is "central" to its very existence as a sovereign entity.

Dated: March 28, 2005

By: 

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