UNITED STATES COURT OF FEDERAL CLAIMS

WALTER J. ROSALES, et al.	)	**CASE NUMBER:** 98-860-L
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	Judge Lawrence J. Block
	)	
	)	
Defendant.	)	
_____	)	

UNITED STATES' MOTION TO DISMISS

The United States of America respectfully moves, pursuant to Rule 12(b)(1) of the United States Court of Federal Claims ("RCFC"), or in the alternative pursuant to RCFC 12(b)(6), for dismissal with prejudice of Plaintiffs' Petition and Complaint. A memorandum in support of this motion follows.

Dated this 6th day of February, 2009.

Respectfully submitted,

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UPDATED BRIEF IN SUPPORT OF
UNITED STATES' MOTION TO DISMISS

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QUESTIONS PRESENTED

Does this Court have jurisdiction to hear this case: (1) where Plaintiffs lack standing to bring this suit on behalf of the Jamul Indian Village (the "Tribe" or "Village"); (2) where Plaintiffs lack standing as individuals to bring this suit; (3) where Plaintiffs' counsel is not authorized to represent the Tribe; (4) where Plaintiffs' tribal membership claims are based on a challenge, rejected in multiple forums, to a 1996 amendment to the membership provision of the Tribe's constitution, or otherwise implicate an area within the exclusive sovereignty of the Tribe; (5) where Plaintiffs fail to assert an actionable case under any money-mandating statute; (6) where Plaintiffs request injunctive and declaratory relief that is outside of this Court's authority to grant; and (7) where Plaintiffs attempt to secure relief in this Court against defendants in addition to the United States?

STATEMENT OF THE CASE

On November 5, 1999, the United States of America moved to dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims ("RCFC") 12(b)(1) and 12(b)(4).[1/] (Doc. 31). On April 19, 2000, the Court stayed this case pending disposition of challenges to a 1996 amendment of the membership provisions of the Tribe's constitution and tribal elections of leaders conducted in accordance with that constitutional amendment. (Doc. 39). In September 2008 that stay was lifted, and on January 7, 2009, this Court requested that the United States update and refile its brief in support of its motion to dismiss and to address two jurisdictional issues previously identified by the Court related to standing. (Doc. 81).

[1/] In 2002, RCFC 12(b) was revised to bring it into conformity with the corresponding subdivision of the Federal Rules of Civil Procedure, and so the United States now moves to dismiss pursuant to RCFC 12(b)(1) and 12(b)(6). *See* Rules Committee Notice 2002 Revision.

When this case was initially filed, it involved a conflict between rival factions within the Tribe over issues of tribal leadership, brought on by membership disputes, and ultimately challenges who has authority over the Tribe's land and resources. Plaintiffs, however, have not challenged any of the recent elections of tribal leaders, including the most recent elections in August and September 2008. Nevertheless, Plaintiffs continue to assert ten causes of action in a complaint filed over 10 years ago, all of which are based on their erroneous assertion that they are the elected leadership of the Tribe and that the United States has been dealing with "non-members" of the Tribe. Plaintiffs, however, are not the elected leadership of the Tribe and those purported "non-members" obtained membership pursuant to a valid constitutional amendment approved by the voters in 1996 in an election called by the Secretary of the Interior under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476. Indeed, challenges by many of the individual Plaintiffs to the 1996 constitutional amendment and several tribal elections before the Interior Board of Indian Appeals ("IBIA") and in federal courts in the Southern District of California and the District of Columbia have been wholly unsuccessful. The 1996 constitutional amendment stands, as do the results of all of the challenged tribal leadership elections, which have also been mooted by new, unchallenged, elections of officers.

This brief responds to two jurisdictional questions identified previously by this Court: (1) Whether any of the individual Plaintiffs have standing to bring suit in the Court of Federal Claims individually or on behalf of the Tribe; and (2) Whether Plaintiffs' counsel properly has been authorized to represent the Tribe. *See* Order, dated March 15, 2000. (Doc. 36). As requested, this brief also updates and refiles the motion to dismiss filed by the United States in November 1999. *See* Order, dated January 7, 2009. (Doc. 81).

Plaintiffs' Second Amended Complaint should be dismissed because Plaintiffs lack standing. Their claims are based on their erroneous assertion that they are the leadership of the Tribe and that the 1996 constitutional amendment pertaining to requirements for membership is not valid. However, these claims have previously been rejected by the IBIA and in federal court. Further, the Tribe has not authorized Mr. Webb to represent it in this litigation.

Additionally, dismissal is appropriate because Plaintiffs' claims require adjudication of matters not within this Court's subject matter jurisdiction, or in the alternative, fail to state a claim for which this Court may grant relief. First, any of Plaintiffs' claims regarding membership not previously resolved by other litigation in federal court are within the exclusive sovereignty of the Tribe and beyond the jurisdiction of this Court. Second, Plaintiffs fail to allege any claims that support jurisdiction under the Tucker Act, 28 U.S.C. § 1491. Third, to the extent that Plaintiffs request injunctive and declaratory relief, such relief is beyond this Court's jurisdiction to grant. Finally, Plaintiffs' claims against defendants other than the United States cannot be heard by this Court. Therefore, this Court should grant the United States' motion to dismiss Plaintiffs' Second Amended Complaint under RCFC 12(b)(1), or in the alternative under RCFC 12(b)(6).

FACTUAL BACKGROUND

A. Plaintiffs Have Made Nearly Identical Challenges to the Results of Tribal Leadership Elections and to the Amendment of the Tribal Membership Provisions in the Tribal Constitution and Have Been Rebuffed In Multiple Forums

In 1981, the Jamul Indian Village organized under the IRA, 25 U.S.C. §§ 461-479 (1994). *See Rosales v. Sacramento Area Director*, 32 IBIA 158, 159 (1998) ("*Rosales I*"). At that time, the Tribe's constitution restricted membership in the Tribe to persons who have at least

one half degree California Indian blood quantum.

1. Unsuccessful Challenges By Plaintiffs to the 1994 and 1995 Tribal Leadership Elections Before the IBIA and Two California District Courts

On September 3, 1994, a faction within the Tribe led by Plaintiff Jane Dumas held an election to recall the tribal leadership and to elect new leadership, which included several of the Plaintiffs in this case. This faction again held separate elections on June 17, 1995. On August 3 and 4, 1995, the Superintendent, Southern California Agency, Bureau of Indian Affairs ("BIA"), declined to recognize the results of that election and instead recognized the results of an election held pursuant to the Tribe's constitution as the legitimate leadership of the Tribe. *Rosales I*, 32 IBIA at 161. Shortly thereafter, Mr. Patrick Webb filed suit before the IBIA purportedly on behalf of the Jamul Indian Village and its members seeking, *inter alia*, review of the August 3 and 4, 1995 decisions. When the IBIA dismissed the lawsuit as premature, it questioned whether the Village was properly an appellant in an intra-tribal dispute. *See Jamul Indian Village v. Sacramento Area Director*, 29 IBIA 90 n.1 (1996) ("*Jamul*"). The BIA Sacramento Area Director subsequently affirmed the Superintendent's decisions on October 10, 1996. *Rosales I*, 32 IBIA at 161. In the subsequent appeal filed with the IBIA in 1997, *Rosales I*, the IBIA concluded that there was no evidence that the Tribe had admitted new members in accordance with its constitution and therefore reinstated recognition of the leaders elected in the last uncontested election, which took place in 1992. *Rosales I*, 32 IBIA at 166, 167.

Meanwhile, Jane Dumas, represented by Mr. Webb, purporting to represent "all other similarly situated members" of the Tribe, brought suit in the United States District Court for the Southern District of California, alleging a conflict between rival factions within the Tribe and seeking injunctive relief and unspecified damages. *Jamul Indian Village v. Hunter*, No.

95-0131, at 2 (S.D. Cal. June 22, 1995) ("*Dumas*") (order granting in part and denying in part Defendants' first motion to dismiss), attached hereto as Exhibit 1. As reflected in the District Court's order dismissing the complaint, Jane Dumas alleged then, as Plaintiffs do now in the instant case, numerous violations of several statutes and trust doctrines, while asserting that the district court action was "not a dispute over an election or about membership." *Id.* at 11-12, 15.

In addressing the claims before it, the California District Court first refused to recognize that Jane Dumas was authorized to bring suit on behalf of the Tribe, as that "assume[d] a result very much in dispute." *Id.* at 2. The California District Court then dismissed her claim that the BIA should recognize as her as a leader of the Tribe for failure to exhaust administrative appeals of the challenged elections. *Id.* at 4-11. Addressing her claims for damages against the United States, the court found that Jane Dumas had pointed to no "explicit language" permitting suits for damages under the Little Tucker Act against the United States under the IRA, the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-61, the Indian Gaming Regulatory Act, ("IGRA") 25 U.S.C.§§ 2701-21, or the Civil Rights Act, 42 U.S.C. §§ 1981, 1985, 1986. *Id.* at 11-14. The court also dismissed the claims against the tribal defendants, declining to exercise jurisdiction and "intrude into the internal affairs of a sovereign nation." *Id.* at 16.

The California District Court subsequently denied a motion for reconsideration. *Dumas*, No. 95-0131 (S.D.Cal. Dec. 20, 1995) (order denying plaintiff's motion for reconsideration), attached hereto as Exhibit 2. In addressing this request, the court "declined to give full faith and

credit to a "default judgment" of a "tribal court" created by the Dumas faction.[2/] *Id*. at 4-5.

Following additional filings and motions, the court ultimately granted the United States' second motion to dismiss the case for failure to state a claim upon which relief can be granted. *Dumas,* No. 95-0131 at 2 (S.D.Cal. Sept. 9, 1996) (order granting second motion to dismiss), attached hereto as Exhibit 3. The court found that the causes of action and the defendants remained the same, "thereby ignoring all effects of the court's prior ruling." *See id.* at 5. Specifically, the court found that none of the statutes relied upon by the plaintiff – the IRA, NHPA or IGRA – provided for a cause of action for damages under the Little Tucker Act in that case. In addition, the court found that the plaintiff failed to show that *United States v. Mitchell*, 463 U.S. 206 (1983), created a cause of action for damages under the Little Tucker Act. *Id.* at 16-19. The court also found that Jane Dumas could not bring a case under 28 U.S.C. § 1362 because she did not represent a "governing body duly recognized by the Secretary of the Interior." *Id.* at 20. The court further found that plaintiff failed to properly assert a claim under 28 U.S.C. § 1343 in conjunction with 42 U.S.C. §§ 1981-1982, and that § 1981 does not generally provide for damages under federal law or as against a federal agency. The court therefore found that no cause of action appeared to exist against the United States, BIA or the Department of the Interior. *Id.* at 24-31. The court then provided the plaintiff the opportunity to amend her cause of action under 42 U.S.C. § 1982 or to file a motion for leave to amend the complaint by September 30, 1996. *Id.* at 2, 35.

Rather than amend her cause of action or file an amended complaint, Jane Dumas instead

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[2/] It appears that this "tribal court" judgment is the action referred to in Paragraph 8 of the Second Amended Complaint in this Court.

chose to file a motion for voluntary dismissal without prejudice on September 30, 1996. *See Rosales v. United States of America*, No. 96-cv-6879 (C.D. Cal. April 16, 1997) ("*Rosales i*") at 2 (order granting defendants' motion to transfer action to Southern District of California), attached hereto as Exhibit 4. That same day, Mr. Webb, on behalf of eight individual plaintiffs, including Walter Rosales, and allegedly on behalf of the Tribe, filed a substantially similar cause of action in the United States District Court for the Central District of California. *Id.* The Central District transferred the case to the Southern District, finding, *inter alia*, that "practical trial considerations favor transfer since a Southern District court, having already reviewed the essential facts of the case twice and ruled on numerous issues, is more familiar with the facts of the case." *Id.* at 6.

Following that transfer, the United States again filed motions to dismiss. The Southern District of California District Court then "devoted substantial time and effort in preparing for the hearing on these motions," but "plaintiffs again sought to voluntarily dismiss their case without prejudice, this time doing so on the Friday before the court scheduled Monday hearing." *Rosales v. United States*, No. 97-cv-0769 (S.D. Cal. Jan. 27, 1999) ("*Rosales V*") at 3 (order declining to impose sanctions pursuant to Rule 11), attached hereto as Exhibit 5. Following this, the Court *sua sponte* issued a show cause order addressing the imposition of sanctions against the plaintiffs' attorney. *Id.* In its opinion, the court provided a short history of the litigations filed, explaining that while the current plaintiffs differed in name from the plaintiff in *Dumas*, their claims "were very similar to those alleged to the present case, contending that certain members of the Jamul tribe had been recalled from office but had wrongfully failed to surrender possession, and that federal officials had violated statutory and common law duties by

continuing to deal with his ousted faction." *Id.* at 2; *see also id.* at 3. Although the Southern California District Court found that "attorney Webb's actions suggest that he was engaging in a kind of 'forum shopping,'" the court ultimately declined to impose sanctions. *Id.* at 6.

2. Unsuccessful Challenges By Plaintiffs to the Amended Membership Provisions of the Tribal Constitution and Tribal Leadership Elections Pursuant to that Amendment Before the IBIA and The District of Columbia District Court

During the same time period, on August 31, 1996, the Tribe voted in a Secretarial election conducted under the IRA, 25 C.F.R. Part 81, to change the California Indian blood quantum required for membership in the Tribe from one-half to one-quarter. *See Rosales v. Sacramento Area Director,* 34 IBIA 50, 51 (1999) ("*Rosales II*"). Only original members of the Tribe voted, and the vote in support of the change was unanimous.[3/] The amendment was approved by Deputy Commissioner of Indian Affairs. Three of the Plaintiffs now before this Court challenged that vote before the IBIA. The IBIA dismissed the challenge because the appellants failed to show that they were among the original 23 members of the Tribe and thus could not be "qualified voters" in the election under 25 C.F.R. § 81.22.[4/] 34 IBIA at 53-54.

Many of the Plaintiffs also unsuccessfully challenged a number of elections of tribal officers that occurred after the constitution was amended. For example, in *Rosales v. Sacramento Area Director,* 34 IBIA 125 (1999) ("*Rosales III"*), the IBIA dismissed as moot challenges to the 1997 tribal election of officers because the 1999 tribal election results were

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[3/] All the original 23 members of the Tribe possessed one half or more California Indian blood. *See Rosales v. Pacific Regional Director,* 39 IBIA 12, 14 (2003) ("*Rosales IV*").

[4/] The appellants included Walter Rosales, Jane Dumas and Joe Comacho. *Rosales II,* 34 IBIA at 50.

approved by the BIA and appeared not to have been challenged.[5/] This decision was reconsidered and upheld in *Rosales IV*, 39 IBIA 12, in which the IBIA found that the challenge to the 1999 election was mooted out by a valid 2001 tribal election of officers conducted in accordance with the Tribe's amended constitution.[6/]

Two plaintiffs, including Walter Rosales, then unsuccessfully challenged the IBIA decisions set forth in *Rosales II-IV* in the District of Columbia District Court under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. *See Rosales v. United States*, 477 F. Supp. 2d 119 (D.D.C. 2007) ("*Rosales VIII*"), *aff'd*, 275 Fed. Appx. 1 (D.C. Cir. 2008), *petition for panel rehearing denied*, No. 07-5140 (May 20, 2008), attached as Exhibit 6, *motion for leave to file petition for rehearing en banc denied*, No. 07-5140 (Aug. 28, 2008), attached as Exhibit 7. As the DC District Court set out in its opinion, after the 1996 amendment to the Tribe's constitution was approved, "those who were in favor of the amendment, and those who deny its validity," "held separate elections in 1997, 1999, and 2001. Plaintiffs reject the amendment's validity and, before the Board, challenged all elections in which individuals with one-quarter Indian blood participated (and the Bureau Area Director's recognition thereof)." *Rosales VIII*, 477 F. Supp. 2d at 124. The plaintiffs also challenged the United States' failure to recognize them as the elected Chairperson and Secretary of the Village. *Id.* at 124. The court identified as "the key issue" whether the IBIA's determination that the plaintiffs were not qualified voters entitled to challenge the 1996 election amending the Tribe's constitution was

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[5/] The appellants included Walter Rosales, Jane Dumas, Joe Comacho, Marie Toggery, Gerald Mesa, Robert M. Mesa, William Mesa and Vivian Flores. *Rosales III*, 34 IBIA at 125.

[6/] The appellants included Walter Rosales, Jane Dumas, Joe Comacho, Marie Toggery, Gerald Mesa, Robert M. Mesa, William Mesa and Vivian Flores. *Rosales IV*, 39 IBIA at n.1.

arbitrary or capricious because their challenge to the results of the subsequent elections in 1997, 1999 and 2001 "hinge on their claim that the 1996 Secretarial election was invalid and must be overturned." *Id.* at 126.

The court first concluded that the plaintiffs, including Walter Rosales, had standing under the APA to bring their challenge. The court then rejected all of plaintiffs' challenges, finding that the IBIA determination rejecting challenges to the Secretarial election amending the Tribe's membership provisions in its constitution was not arbitrary and capricious under the APA.[7] *Id.* at 125-126, 129. In doing so, the court rejected the allegation that the 1996 Secretarial election was "illegally staged" and held further that the Department had jurisdiction to hold the election to amend the constitution. *Id.* at 127 n.9, 128. The district court also upheld the IBIA conclusion that only registered voters were qualified to challenge the Secretarial election under 25 C.F.R. §§ 81.6(d), 81.22, and that the plaintiffs were not registered voters. *Id.* Thus, the court upheld the IBIA's "determination that the Village Constitution was validly amended." *Id.* at 129.

The court then rejected the plaintiffs' challenges to the 1997, 1999 and 2001 tribal leadership elections on a number of grounds, including the argument that the constitution was not validly amended. The court also upheld the IBIA's determination that challenges to earlier

[7] The APA provides that a final agency action may only be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Rosales VIII*, 477 F. Supp. 2d at 125, citing 5 U.S.C. § 706. "If the agency's reasons and policy choices. . . conform to certain minimal standards of rationality. . . the agency decision is reasonable and must be upheld." *Id.* (internal citations and quotation marks omitted).

tribal officer elections are mooted by valid subsequent elections.[8/] *Id.* at 129-30. The court declined the request to require the United States to recognize elections of the plaintiffs, including Walter Rosales, as tribal leaders. *Id.* at 130. The D.C. Circuit affirmed the district court's decision, and denied subsequent requests for rehearing. *See* 275 Fed. Appx. 1; Exhibits 6, 7.

B. The Current Litigation

Following the decisions in the California District Court in *Dumas, Rosales i* and *Rosales V,* and the filing of the administrative appeal in *Jamul* and *Rosales II,* Plaintiffs commenced this lawsuit in 1998, seeking damages in excess of $800,000 and temporary, preliminary and permanent injunctive relief based upon ten claims for relief arising out of the alleged wrongful disbursement of monies and benefits. *See generally* Second Amended Complaint. The alleged wrongful actions purportedly involve numerous breaches of fiduciary duty under various statutes, breach of the "General Trust Responsibility," deprival of due process and equal protection, denial of usufructory and civil rights, breach of contract, interference with contractual relations and prospective economic advantage, taking without just compensation, and failure to account. *Id.* Each and every claim rests upon the same foundation presented in the earlier litigations before the IBIA and in the California and District of Columbia courts, *i.e.*, allegations of wrongdoing flowing from the United States respecting the results of the Secretarial election that altered the tribal membership criteria and the United States dealings with tribal leaders elected thereunder. Similarly, all of Plaintiffs' allegations concerning "non-members" are based on their refusal to accept that the tribal constitution was properly amended. This lawsuit was

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[8/] The most recent elections of officers in August and September of 2008 have not been challenged. *See* Declaration of James J. Fletcher ("Fletcher Decl."), ¶ 6.

stayed in 2000 pending the results of the outcome of the suits brought by many of these Plaintiffs concerning these issues in *Rosales II-V* and *Rosales VIII*, all of which were resolved in favor of the United States and against Plaintiffs.[9]

ARGUMENT

I. STANDARD OF REVIEW

Subject matter jurisdiction is a threshold issue that a court must consider before evaluating the merits of a case. *See Arakaki v. United States*, 71 Fed. Cl. 509, 521 (2006). Where the Court's jurisdiction is put in question in a RCFC 12(b)(1) motion, a plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Ullman v. United States*, 64 Fed. Cl. 557, 564 (2005). Where a motion to dismiss properly asserts that the Court lacks jurisdiction over the subject matter of the complaint, the action should be dismissed.

RCFC 12(b)(6) provides for dismissal based on the "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). This rule "addresses 'the question of whether in a specific case a court is able to exercise its general power with regard to the facts peculiar to the specific claim.'" *Warr v. United States*, 46 Fed. Cl. 343, 346 (2000) (citation omitted). Dismissal by this Court under RCFC 12(b)(6) constitutes an adjudication on the merits of a claim. *Id.* The Court will presume the facts alleged in the complaint to be true and correct, and

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[9] In addition to the lawsuits detailed above, certain of the individual plaintiffs have also brought other lawsuits against the United States concerning alleged violations of the Native American Graves Protection and Repatriation Act and beneficial ownership of the Tribe's land, including most recently a suit in this Court that is currently pending. *See Rosales v. United States*, No. 08-512 L (Fed. Cl.) ("*Rosales X*"); *Rosales v. United States*, 477 F. Supp. 2d 213, 214 n.1 (D.D.C. 2007); *Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed for failure to prosecute*, Case No. 08-55207 (9th Cir. August 12, 2008) ("*Rosales IX*").

the facts alleged will be construed in the light most favorable to the Plaintiffs. *Brown v. United States*, 42 Fed. Cl. 538, 551 (1998). However, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *See Sanders v. United States*, 34 Fed. Cl. 38, 43 (1995) (citation omitted), *aff'd*, 104 F.3d 376 (Fed. Cir. 1996).

To the extent that the United States relies on evidence outside the pleadings, the Court may properly consider such evidence in ruling on jurisdictional issues. *See Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 58 (2008); *Carter v. United States*, 62 Fed. Cl. 66, 67-68 (2004). "[I]f the truth of jurisdictional facts is challenged, then the court may consider relevant evidence in order to resolve the factual dispute." *Osage Nation v. United States*, 57 Fed. Cl. 392, 394 (2003), citing *Reynolds*, 846 F.2d at 747. Indeed, federal courts have taken judicial notice of a wide range of tribal laws, judgments and pleadings. *See, e.g., Wendt v. Smith*, 2003 WL 21750676 at *3 (C.D. Cal. 2003) (taking judicial notice of tribal ordinances and papers filed in an eviction proceeding before the tribal court); *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816, 819 n.3 (S.D. Iowa 2004) (taking notice of tribal laws), citing *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003). Further, citation to prior pleadings and opinions is wholly permissible especially in the context of *res judicata* and issue preclusion. *See, e.g., St. Pierre v. Norton*, 498 F. Supp. 2d 214, 216, n.1 (D.D.C. 2007) (taking notice of official court rulings in other cases and official agency rulings by the Department of the Interior); *Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002); *Hinton v. Shaw Pittman Potts & Trowbridge*, 257 F. Supp. 2d 96, 100 (D.D.C. 2003). Even when a defendant is not raising a collateral estoppel defense, courts can take judicial notice of documents or court records relevant to a plaintiff's claims. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988).

"Moreover, the question whether a statute can fairly be interpreted as money- mandating is one that directly bears on the issue of jurisdiction." *Wopsock v. Natchees*, 454 F.3d 1327, 1331 (Fed. Cir. 2006). As the Federal Circuit has explained,

> A court "should entertain and decide the jurisdictional and merits test in... [a] single step... in which the trial court determines both the question of whether the statute provides the predicate for its jurisdiction, and lays to rest... the question of whether the statute on its merits provides a money-mandating remedy. In other words, because a court is always responsible for its own jurisdiction, a court that entertains a complaint alleging a Tucker Act claim must determine at the outset whether the statute relied upon is one that is money-mandating. In the event that the court concludes that the source of substantive law does not meet the 'money-mandating test,' the court must dismiss the claim for lack of jurisdiction because 'the absence of a money mandating source [is] fatal to the court's jurisdiction under the Tucker Act.'"

Id., citing *Fisher v. United States*, 402 F.3d 1167, 1171- 72 (Fed. Cir. 2005) (en banc).

II. PLAINTIFFS DO NOT HAVE STANDING TO BRING THIS SUIT INDIVIDUALLY OR ON BEHALF OF THE TRIBE

The first jurisdictional question posed by this Court is "Whether any of the individual plaintiffs - Walter Rosales, Jane Dumas, Sarah Aldamas, Val Mesa, Joe Comacho, Bernice Mesa, Vivian Flores, Marie Toggery, Leslie A. Mesa, Gerald Mesa, Robert M. Mesa, and William Mesa - have standing to bring to bring suit in in the Court of Federal Claims individually or on behalf of Jamul Indian Village." *See* Doc. 36. The answer is unequivocally no.

As an initial matter, on information and belief, of the twelve individual plaintiffs, five are now deceased: Sarah Aldamas, Marie Toggery, William C. Mesa, Val Mesa and Vivian Flores. *See* Declaration of Kenneth Meza ("Meza Decl."), ¶ 7; *Rosales II*, 34 IBIA at n.1; *Rosales IV*, 39 IBIA at n.1; Fletcher Decl., ¶ 7. Further, attached to a complaint filed by the Tribe with the State Bar of California on September 30, 2008, requesting disciplinary action against Mr. Patrick

Webb, are statements or declarations from the following plaintiffs withdrawing their consent to be represented by Mr. Webb: William Mesa (Mar. 5, 1999, Oct. 29, 1999), Val Mesa (Oct. 29, 1999), Jane Dumas (Nov. 18, 2000), Robert M. Mesa (June 16, 2000), Vivian Flores (Sept. 19, 1998, Oct. 29, 1999), and Leslie Mesa (Nov. 20, 1999).[10/] *See* Meza Decl., ¶ 5, Ex. B.

A. Plaintiffs Do Not Have Standing As Individuals To Bring This Suit Because Their Claims Are Based on Their Alleged Status As the Tribal Leadership and On Their Assertion of Dealings with Purported "Non-Members," Premises Rejected By Other Tribunals

Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. Under Article III, courts use the doctrine of standing "to identify those disputes which are appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), citing *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). When challenged, the party invoking federal jurisdiction bears the burden of establishing the necessary elements of standing. *Lujan*, 504 U.S. at 560. To satisfy Article III standing, a plaintiff must demonstrate that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

1. Plaintiffs Are Barred By the Doctrine of Collateral Estoppel From Asserting They Are the Leadership of the Tribe

The underlying premises of the allegations in the Second Amended Complaint is

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[10/] In addition, two individuals signed declarations to this effect prior to the filing of this lawsuit: Gerald D. Mesa (Sept. 22, 1998) and Sarah Aldamas (Feb. 3, 1998). *See* Meza Decl., ¶ 5, Ex. B.

Plaintiffs' erroneous position that they are the recognized tribal government and that monies were "wrongfully diverted" when disbursed to the recognized tribal government, and that tribal assets are used wrongfully by alleged "non-members" possessing less than one-half California Indian blood. Consistent with these underlying premises, this litigation was stayed at the request of the parties pending resolution of various administrative appeals before the IBIA and in the District of Columbia District Court regarding the 1996 Secretarial election that amended the membership provisions of the tribal constitution and several subsequent tribal leadership elections conducted thereunder. As Plaintiffs themselves have conceded, final resolution of those appeals "will materially assist this court in the resolution of the claims in this action, particularly concerning the issues of membership in the JAMUL Indian Village, and the authority that membership confers to hire counsel to represent the village." *See* Plaintiffs' Non-Opposition to Stay Action Pending Final Decision of IBIA at 1 (punctuation and capitalization in original). (Doc. 38).

As discussed in detail above, those challenges to the amendment of the constitution and subsequent election of tribal leadership, as well as earlier challenges brought by several of the individual Plaintiffs, represented by Mr. Webb, were wholly unsuccessful before the Southern California District Court, the IBIA and the District of Columbia District Court. Indeed, the District of Columbia Circuit Court of Appeals ultimately denied the challenges to the vote amending the constitution and the subsequent tribal leadership elections. As Plaintiffs' attempts to overturn the results of the elections have been rebuffed multiple times, they cannot now claim in this Court that those results are not valid. Likewise, they cannot claim they are the elected leadership of the Tribe or that individuals admitted to the Tribe pursuant to the 1996

constitutional amendment are "non-members."

Specifically, on the basis of those decisions, Plaintiffs are barred under the doctrine of collateral estoppel from asserting any claims based on their alleged status as tribal leaders or based on purported dealings by the United States with alleged "non-members." "Under the doctrine of collateral estoppel, more accurately referred to as issue preclusion, 'issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in a subsequent suit involving the parties to the prior litigation.'" *DeVries v. U.S.*, 28 Fed. Cl. 496, 499 (1993) (citations omitted). The doctrine of issue preclusion derives from the general principle that "the same person may obtain a judicial determination of an issue only once." *See Cheyenne-Arapaho Tribes v. United States*, 33 Fed. Cl. 464, 466 (1995). Collateral estoppel "serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *United States v. Mendoza*, 464 U.S. 154, 158 (1984), quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

To establish issue preclusion, a party must demonstrate that: "(i) the issue previously adjudicated is identical with that now presented, (ii) the issue was 'actually litigated' in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action." *Kawa v. United States*, 77 Fed. Cl. 294, 307 (2007), quoting *Kroeger v. United States Postal Serv.*, 865 F.2d 235, 239 (Fed. Cir. 1988). Collateral estoppel applies only when, *inter alia*, the party being estopped "had a full and fair opportunity to litigate the issue in the first action." *Arkla, Inc. v. United States*, 37 F.3d 621, 624 (Fed. Cir. 1994). These four steps have been satisfied here.

First, many of the individual Plaintiffs' attempts to challenge leadership elections prior to 1996 were dismissed by a Southern District of California Court because they had failed to exhaust their administrative remedies and for failure to state a claim upon which relief can be granted. *See Dumas* and *Rosales V*. Following the vote in 1996 to amend the membership provision of the Tribe's constitution, challenges by many of the Plaintiffs to that vote, as well as to subsequent leadership elections, were also rejected by the IBIA and the DC District Court. *See Rosales II-IV; Rosales VIII*. Indeed, the DC District Court identified as "the key issue" whether IBIA's determination that the plaintiffs were not qualified voters entitled to challenge the 1996 amendment to the Tribe's constitution was arbitrary or capricious because their challenge to the results of the subsequent leadership elections in 1997, 1999 and 2001 "hinge on their claim that the 1996 Secretarial election was invalid and must be overturned." *Rosales VIII*, 477 F. Supp. 2d at 126.

Ultimately, the DC District Court upheld the IBIA's "determination that the [1996] Village Constitution was validly amended." *Id.* at 129. The court also rejected plaintiffs' challenges to the 1997, 1999 and 2001 tribal leadership elections on a number of grounds, including the argument that the constitution was not validly amended to allow persons of less than one-half California Indian blood to vote. *Id.* at 129. The court held that challenges to the earlier officer elections were mooted by the valid subsequent election of officers. The court declined to grant the plaintiffs' request to require the United States to recognize elections of the plaintiffs, including Walter Rosales, as tribal leaders. *Id.* at 130. The D.C. Circuit affirmed the district court's decision, and denied subsequent requests for rehearing. *See* Exhibits 6, 7. Of note, none of the Plaintiffs in this action have challenged the most recent tribal elections of

leaders held in August and September of 2008. *See* Fletcher Decl., ¶¶ 3-6.

As detailed above, the four steps required to establish issue preclusion have thus been satisfied here. The underlying issue in this litigation is whether the membership criteria in the tribal constitution was validly amended, thus determining who may vote in leadership elections for the Tribe. There can be no question that the attempts by many of the Plaintiffs to challenge the validity of the 1996 constitutional amendment and the subsequent tribal elections, was front and center in the litigation before the IBIA and in federal court, and that Plaintiffs' arguments were fully considered in all of the forums. Nor can there be any question that the determination that Plaintiffs' challenge to the results of these elections were without merit was necessary to the decision by the DC District Court to uphold the IBIA determinations. Those Plaintiffs were represented by the same counsel representing them here, and thus they were fully represented in those prior actions.

2. Plaintiffs Have Suffered No Injury In Fact Related to the United States' Dealings with the Recognized Tribal Leadership

Plaintiffs fail to allege any injury to a legally protected interest they possess as individuals. They cite to no duty that runs to them as individuals rather than to the Tribe as a whole through its elected officers. Individuals, even if members of the Tribe, lack standing to claim an injury to tribal property, tribal assets or any tribal interests. This is because tribal property interests and governmental authority flow from reserved treaty rights and are secured to recognized Indian tribes as distinguished from individual Indians. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *see also Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962). As explained in *Short v. United*

States:

> An individual Indian's rights in tribal or unallotted property arises only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

12 Cl. Ct. 36, 42 (Cl. Ct. 1987), citing *United States v. Jim*, 409 U.S. 80, 82-83 (1972); *Gritts v. Fisher*, 224 U.S. 640, 642 (1912)) (additional citations omitted).

Numerous cases hold that tribal members lack standing to sue to protect a tribe's rights. *See e.g.*, *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 54 n.1 (2d Cir. 1994) (members could not assert tribe's claim to land); *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994) (member lacks standing to sue as to tribal asset); *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983) (individual Indians had no standing to assert tribal rights to land), *cert. denied*, 469 U.S. 1209 (1984) (citations omitted); *see also Seneca Constitutional Rights Foundation v. George*, 348 F. Supp. 51, 59 (W.D.N.Y. 1972) ("it is established that a tribe has full authority to use and dispose of tribal property and that no individual Indian has an enforceable right in the property") (citations omitted). Thus, Plaintiffs as individuals have no standing to assert any of their claims.

Further, Plaintiffs are estopped from alleging that the results of the 1996 constitutional amendment vote or the leadership elections are invalid, and therefore Plaintiffs are unable to allege that they are the leadership of the Tribe. Nor can they show that they have suffered injury in fact by the actions of the BIA dealing with the recognized leadership of the Tribe elected under the amended constitution or with purported "non-members." No challenge to the 1996 amendment to the constitution has been upheld. Tribal leaders elected subsequent to that amendment have not included any of the individual Plaintiffs. The 2008 election of leaders has not been challenged. *See* Fletcher Decl., ¶ 6. Plaintiffs, therefore, are precluded now from

asserting that they are the leadership and attempting to assert that the constitutional amendment and subsequent elections are not valid.

The alleged wrongful actions in the Second Amended Complaint include numerous purported breaches of a fiduciary duty under various statutes, breach of the "General Trust Responsibility," deprival of due process and equal protection, denial of usufructory and civil rights, breach of contract, interference with contractual relations and prospective economic advantage, taking without just compensation, and failure to account. Each and every claim asserted rests upon the same foundation presented in *Rosales II-IV* and *Rosales VIII*, *i.e.*, allegations of wrongdoing flowing from the amendment to the constitution and the subsequent elections of tribal leaders pursuant to that amendment.

Specifically, the first and fourth claims for relief in the Second Amended Complaint ("SAC") are for breach of contract and grants with the Tribe, or for interference with contracts, which implicates tribal property and tribal interests. *See* SAC, ¶¶33-35, 46-50. Plaintiffs do not have standing as individuals to bring such claims on behalf of the Tribe. The contracts are with the Tribe, and the United States has dealt with the recognized tribal leadership in these contracts. *Rosales II-IV* and *Rosales VIII* rejected challenges to the tribal elections, and Plaintiffs may not now assert in this Court claims for damages that are based on their disagreement with such results. There is no injury to Plaintiffs - they are not the leadership of the Tribe. The seventh claim requesting an accounting is similarly based on dealings by the United States with the recognized tribal government, which is not Plaintiffs. SAC, ¶¶ 64-66.

The second claim for relief concerns "tribal monies and properties" of the Tribe and the United States allowing the use by the Tribe of these assets, claims which Plaintiffs clearly do not

have standing to assert as individuals, as they do not have standing to bring a suit to protect a tribal right. *See* SAC, ¶¶ 37-39. Further, Plaintiffs cannot claim they are the leadership of the Tribe and that those individuals who are members under the amended constitution do not deserve to participate in the assets as they "are not members." The IBIA and the federal court have upheld the constitutional amendment changing membership criteria and the subsequent tribal elections in which new members participated, and Plaintiffs cannot now claim in this Court that the constitutional amendment or the tribal elections results are not valid.

The third and fifth claims for relief are for violations of trust duties and statutory rights based on the United States' alleged "policy and practice of dealing with non-members of JAMUL, as if they were, in fact, members of JAMUL" and by allowing the participation of the alleged "non-members" in tribal affairs. SAC, ¶¶ 41, 53 (capitalization in original); *see* ¶¶ 41-45, 52-56. Again, Plaintiffs, as individuals, do not have standing to assert claims regarding tribal interests. And again, Plaintiffs' allegations that these unnamed persons are "non-members" is based on their premise that the tribal constitution was never amended, and that the United States failed to comply with *Rosales I*. SAC, ¶ 25. But, the IBIA rejected these allegations in *Rosales IV*:

> Appellants contend that the Regional Director has disregarded the Board's decision in *Rosales I*, by failing to meet with the "true majority of the actual members of the JAMUL tribe to address their membership and leadership problems." . . . This contention is based on Appellants' continued argument that the blood quantum for membership in the Village cannot be lowered to less than ½ degree, and therefore only persons with ½ or more blood quantum can be "actual members" of the Village. The Board rejected this contention in *Rosales I*.

39 IBIA at 15. As concluded in *Rosales IV*, "[t]he Board rejects Appellants' contention that the

Regional Director has not taken action in response to its decision in *Rosales I*." 39 IBIA at 15.[11/] The IBIA confirmed that "[t]he results of the Secretarial election [amending the constitution] became final for the Department of the Interior with the issuance of the Board's July 29, 1999, decision in *Rosales II*." *Id.* As stated by the IBIA, "[t]he bottom line in these appeals is that Appellants failed successfully to challenge the 1996 Secretarial election, and the [Tribe's] Constitution was amended to allow membership with a 1/4-degree blood quantum." *Id.* These IBIA decisions were upheld in *Rosales VIII*. Thus, these alleged "non-members" are actually members of the Tribe. Therefore, there is no injury in fact that supports Plaintiffs' claims, posited yet again before this Court.

Similarly, Plaintiffs lack standing as individuals to assert the sixth, eighth and ninth claims for relief, which concern the alleged taking of tribal property and alleged violation of civil rights, as they assert tribal injuries. Further, the claims are based again on the erroneous premise that "non-members'" use of the property and "non-members'" political agenda and participation in tribal elections is illegal. *See* SAC, ¶¶ 58, 68, 73.

The tenth claim for relief amalgamates the above claims, and is premised again on the underlying premise that Plaintiffs are the recognized leadership and that the constitution of the Tribe has not been amended. Attempts to establish this underlying premise, however, were rejected by the IBIA and in federal court. Therefore, Plaintiffs here suffer no injury in fact and

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[11/] The IBIA noted that while *Rosales I* was pending before the Board, the BIA contracted with Dr. Michael G. Baksh to conduct a genealogical study to help resolve the membership issues within the Tribe. The study, completed after *Rosales I*, confirmed that all 23 original members were in fact eligible to be members of the Tribe and to participate in tribal elections. *See Rosales IV*, 39 IBIA at 14. Because no new members had ever been validly admitted, as of 1996, these 23 members constituted the entire membership of the Tribe.

their claims should be dismissed.

Additionally, in several status reports filed in this case, Plaintiffs assert that they have usufructuary rights in a 4.66 acre parcel that is held in trust for the Tribe.[12/] For example, in the March 10, 2006 Joint Status Report Requesting Continuance of the Stay, Plaintiffs state that "among" their claims is "that Parcel No. 597-080-01, as recorded in San Diego County, California, is held in trust by the United States for the Plaintiffs" and that "certain non-members of the Village are presently threatening not to maintain the status quo" with respect to it, which "would violate the Plaintiffs' usufructory property rights in their designated allotment of the Parcel."[13/] Doc. 63 at 9-10; *see also* SAC, ¶¶ 10, 13. Other status reports make similar references to the United States' alleged failure to protect Plaintiffs' "usufructuary rights in this trust property for which the Plaintiffs are the designated beneficiaries." *See, e.g.*, Doc. 58 at 4, Doc. 59 at 2-3, Doc. 64 at 2-5, Doc. 65 at 2-6, Doc. 67 at 2-4.

To the extent that such assertions are based on Plaintiffs' alleged status as the leadership of the Tribe and their allegations that there are "non-members" illegally voting in elections, such positions were rejected in *Rosales I-IV* and *Rosales VIII*, discussed above. Additionally, in the Second Amended Complaint, Plaintiffs accurately describe the land as "federal Indian reservation real property." *See, e.g.*, SAC, ¶¶ 23, 27, 28, 41, 53. Thus, they do not appear to assert in the Second Amended Complaint that the land is held in trust for them as individuals, but

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[12/] This parcel is also at issue in *Rosales IX* and *Rosales X*.

[13/] As has been made clear in the Complaint filed in *Rosales X*, Parcel No. 597-080-01 is also known as Parcel No. 597-080-04. *See Rosales X*, Doc. 1 at 11 ("On December 12, 1978, title to 4.66 acres of land then occupied by the Plaintiffs' families, *Parcel 597-080-01, now known as Parcel 597-080-04*...) (Emphasis added).

rather that the land is held in trust for them as members of the Tribe. Indeed, they cannot make such an individual claim here, as the Ninth Circuit and a California District Court have held that Plaintiffs may not assert ownership of this land in the absence of the Tribe, a necessary and indispensable party to such proceedings. *See Rosales v. United States*, 73 Fed. Appx. 913 (9th Cir. 2003) ("*Rosales VII*"), *affirming Rosales v. United States*, 01-cv-951 (S.D. Cal.) February 14, 2002 Order, attached hereto as Exhibit 8; *Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. 2007) ("*Rosales IX*"), *appeal dismissed for failure to prosecute*, No. 08-55207 (9th Cir. August 12, 2008), attached as Exhibit 9.

Finally, Plaintiffs have not shown they would suffer any harm different in kind from any harm allegedly experienced by other members of the Tribe from the United States dealings with the elected tribal leadership and membership. *See Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1143 (D. Or. 2005) (finding no standing where plaintiffs "allege nothing more than generalized grievances shared by the public at large"); *Willis v. Fordice*, 850 F. Supp. 523, 528-29 (S.D. Miss. 1994) (finding no standing where plaintiff had not alleged harm different in type for the type of harm which may be suffered by other members of the tribe or the community at large), *aff'd*, 55 F.3d 633 (5th Cir. 1995) (unpublished).

3. Plaintiffs Have Not Shown It Is Likely, As Opposed to Merely Speculative, That Their Alleged Injury Will Be Redressed by a Favorable Decision

The United States' actions with regard to the recognized leadership of the Tribe and to those who became members subsequent to the amendment of the constitution cause no injury to Plaintiffs. As such, there is no injury that will be redressed by a favorable decision by this Court. Further, to the extent Plaintiffs have requested declaratory and injunctive relief, this Court does not have the authority to grant such relief, as discussed below in Section VII. Thus,

this Court should find the individual plaintiffs do not have standing to bring this lawsuit.

B. Plaintiffs Do Not Have Authority to Represent the Tribe In This Litigation

As plainly stated in the accompanying affidavit of the Tribe's Chairperson, none of the individually named Plaintiffs are authorized to represent the Tribe in this litigation. *See* Meza Decl., ¶¶ 8, 9. Plaintiffs have previously admitted that final resolution of the appeals before the IBIA, which were then subject to challenge in federal court, "will materially assist this court in the resolution of the claims in this action, particularly concerning the issues of membership in the JAMUL Indian Village, and the authority that membership confers to hire counsel to represent the village." *See* Plaintiffs' Non-Opposition to Stay Action Pending Final Decision of IBIA at 1 (punctuation and capitalization in original). The court in *Rosales VIII* plainly rejected challenges to the 1996 constitutional amendment and the subsequent leadership elections, a decision which was upheld by the DC Circuit. Therefore, Plaintiffs cannot claim to be the elected leadership of the Tribe, nor claim to have any authority to represent the Tribe.

Further, at least three district courts have found that certain of the individual Plaintiffs named here did not have authority to represent the Tribe. *See Rosales IX*, 2007 WL 4233060 at *1 n.1 (noting that two other courts had held that the plaintiffs, including Walter Rosales and the estate of Marie Toggery, lacked authority to bring suit on behalf of the Tribe and stating that for "clarity and consistency" with those decisions, the District Court's references to plaintiffs did not include the Tribe); *Rosales IX*, 477 F. Supp. 2d 213, 214 n.1 (D.D.C. 2007) (in decision transferring the case to the Southern District of California, finding that the court had recently decided that certain individuals, including Walter Rosales, "lack authority" to represent the Tribe); *Rosales VIII*, 477 F. Supp. 2d at 121 n.1 (finding plaintiffs, including Walter Rosales,

"lack authority" to represent the Tribe); *Dumas*, No. 95-0131, Exhibit 1 at 2 (rejecting Jane Dumas' claim that the action was brought on behalf of the Tribe as it "assumes a result very much in dispute"). This Court should similarly find that none of the individual Plaintiffs have standing to bring this suit on behalf of the Tribe.

III. MR. PATRICK WEBB IS NOT AUTHORIZED TO REPRESENT THE TRIBE IN THIS LITIGATION

Nor do Plaintiffs have the authority to hire Mr. Patrick Webb to represent the Tribe in this litigation. First, as discussed above, none of the individual Plaintiffs are the elected leadership of the Tribe. Second, as plainly stated in the accompanying declaration of Tribal Chairman Kenneth Meza, Mr. Webb is not authorized to represent the Tribe in this litigation. *See* Meza Decl., ¶ 4. Indeed, on September 29, 2008, the Tribe filed a formal complaint against Mr. Webb with the State Bar of California because he "has filed numerous unauthorized lawsuits in the name of the Jamul Tribe, and has made numerous unauthorized appearances in the name of the Tribe."[14] Meza Decl., Ex. A at 1.

Second, at least three district courts have found in cases where Mr. Webb has asserted claims on behalf of the Tribe that such cases were not brought on behalf of the Tribe. *See Rosales IX*, 2007 WL 4233060 at *1 n.1; *Rosales IX*, 477 F. Supp. 2d at 214 n.1; *Rosales VIII*, 477 F. Supp. 2d at 121 n.1; *Dumas*, No. 95-0131, Exhibit 1 at 2.

Plaintiffs' prior litigations brought by Mr. Webb were wholly unsuccessful, and the District of Columbia Circuit Court of Appeals ultimately rejected all challenges to the

[14] On November 12, 2008, the State Bar of California concluded that the matter does not warrant action at this time, stating that there was no evidence that Mr. Webb has named the Tribe as a party in any lawsuit following the dismissal of *Rosales IX*. *See* Meza Decl., Ex. C at 1.

constitutional amendment and to the subsequent tribal leadership elections. Plaintiffs' attempts to overturn the results of the elections have been rebuffed multiple times. They cannot now claim in this Court that the constitutional amendment is invalid, and likewise they cannot claim they are the leadership of the Tribe authorized to hire counsel to represent the Tribe in litigation. Therefore, this Court should find that Mr. Webb does not have authority to represent the Tribe in this litigation.

IV. CLAIMS BASED UPON A TRIBAL MEMBERSHIP DISPUTE ARE WITHIN THE EXCLUSIVE SOVEREIGNTY OF THE TRIBE AND BEYOND THE JURISDICTION OF THIS COURT

To the extent Plaintiffs have a theory to support their claims that is not based on their allegation that the 1996 amendment to the constitution was invalid, it would necessarily implicate an intratribal dispute over membership, and at least since the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), federal courts have been extremely reluctant to meddle in tribal decisions concerning their own membership.[15/] *See, e.g., Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994) (per curiam) ("[P]roviding a federal forum for the resolution of [membership] disputes would illegitimately interfere with tribal autonomy and self-government."), citing *Santa Clara Pueblo*, 436 U.S. at 59-60; *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F. Supp. 966, 967 (E.D. Mich. 1997) *aff'd*, 156 F.3d 1230 (6th Cir. 1998) ("[T]his court finds that it lacks jurisdiction to hear what is essentially a membership dispute between Plaintiffs and the Tribe."); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F.

[15/] "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. 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." *Santa Clara Pueblo* at 72, n.32 (internal citations omitted).

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.").

Whereas district courts have jurisdiction to review Secretarial elections, which are federal elections,[16/] as the court did in *Rosales VIII* regarding a Secretarial election that amended the constitution's provisions for membership in the Tribe, courts have otherwise treated membership disputes as exclusively a matter for the Tribe. To the extent Plaintiffs challenge the criteria for membership in the Tribe, they are impermissibly collaterally attacking the decision in *Rosales II* and *Rosales VIII*, which rejected challenges to the change in membership criteria. To the extent they challenge whether a particular person was properly admitted into membership, federal courts, including the Southern California District Court in *Dumas*, have consistently acknowledged that disputes over tribal membership are internal, intratribal disputes that must be resolved through tribal forums.

The Plaintiffs undoubtedly will claim here, as did Jane Dumas in the Southern California District Court litigation, that the present action does not involve questions of membership or leadership, rather they seek a judicial determination of respective rights of the parties "so that the parties may ascertain their rights and duties with respect to each other." *See, e.g.*, SAC, ¶¶ 79-80. This argument belies the true nature of Plaintiffs' case, however, for virtually every General Allegation and Claim for Relief asserted against the United States alleges misconduct resulting from the federal government dealings with alleged "non-members." By necessity,

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[16/] *See, e.g., Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977), *cert. denied* 439 U.S. 820 (1978).

resolution of these claims begins with a determination of what constitutes membership in the Tribe, which in turn, depends on the terms of the Tribe's constitution as amended. Thus, the Plaintiffs' Complaint is nothing more than a circuitous and collateral attack upon the Secretarial election approving the 1996 constitutional amendment, the subsequent leadership elections conducted thereunder and the decisions upholding those elections. As discussed above, these issues have previously been litigated and decided and Plaintiffs are estopped from attempting to challenge those results in this Court. Therefore, this Court should dismiss the Plaintiffs' Complaint for lack of subject matter jurisdiction.

V. PLAINTIFFS HAVE FAILED TO DEMONSTRATE AN ACTIONABLE CASE UNDER THE TUCKER ACT

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell v. United States*, 445 U.S. 535, 538 (1980) ("*Mitchell I*"), quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In determining whether such consent is present, the Supreme Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538, quoting *United States v. King*, 395 U.S. 1, 4 (1969).

Congress has consented to suit against the United States for certain claims for money damages in the Court of Federal Claims ("CFC"). The Tucker Act grants the CFC jurisdiction with respect to any claim against the United States founded either upon the Constitution, any Act of Congress, any regulation of an executive department, upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1). However, the Tucker Act "does not create any substantive right of

recovery enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"). Thus, in order "to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Greenlee County v. United States*, 487 F.3d 871, 875 (Fed. Cir. 2007) (citations omitted). The Supreme Court also has held that a party claiming a breach of trust, as Plaintiffs do here, must specifically identify a statute, regulation, executive order, constitutional provision, or an express or implied contract with the United States: (1) which provides a "substantive right" (the basis of the claim); and (2) which can be fairly interpreted to mandate payment of money damages. *See Mitchell II*, 463 U.S. at 216; *Sanders*, 34 Fed. Cl. at 78 (1995).

A statute is money-mandating "where the statutory text leaves the government no discretion over payment of claimed funds." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005). Money-mandating duties have also been found with certain discretionary statutory schemes, but only when the statutes at issue (1) "provide 'clear standards for paying money' to recipients;" (2) "state the 'precise amounts' that must be paid;" or (3) "as interpreted, compel payment on satisfaction of certain conditions." *Id.* at 1364. "Moreover, the question of whether a statute can fairly be interpreted as money- mandating is one that directly bears on the issue of jurisdiction." *Wopsock*, 454 F.3d at 1331.

Plaintiffs' Second Amended Complaint utterly fails to satisfy these requirements. Instead, they simply repeatedly assert that the United States has acted wrongfully and then couple this mantra with general references to various federal statutes. As this Court has previously stated, "[t]he mere recitation of statutes cannot make express what is only dubiously

implied." *Erikson v. United States*, 12 Cl. Ct. 754, 756-57 (1987). To invoke this Court's jurisdiction, the Plaintiffs must specifically identify the legal requirements that "establish a fiduciary relationship" and specifically "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, 463 U.S. at 224.

Rather than provide this Court with specific allegation demonstrating benefits and obligations that would support this Court's jurisdiction, however, Plaintiffs provide only general assertions that they claim support Tucker Act jurisdiction. For example, Plaintiffs claim violations of NEPA and the NHPA. *See* SAC, ¶¶ 13-14. Yet Plaintiffs fail to point to a provision in those acts that provides for money damages of any kind, and indeed they cannot, as such procedural review statutes do not create any right to money damages. Further, such claims have been explicitly rejected by the California District Court in *Dumas*, and Plaintiffs are collaterally estopped from bringing such claims here. *See* Exhibit 1 at 11-12 (finding Dumas pointed to no explicit language permitting suits for damages under NEPA or the NHPA); Exhibit 3 at 18-19 (finding Dumas pointed to no explicit language permitting suits for damages under the NHPA). The California District Court also found that the complaint brought by Jane Dumas failed to state a claim under the Little Tucker Act under the IRA and IGRA, and therefore Plaintiffs are also barred from asserting that those statutes provide jurisdiction in this case under the Tucker Act. *See id.* at 18-19.

Further, the Federal Circuit has explicitly held that many of the statutes relied upon by Plaintiffs are not money-mandating, including the Snyder Act and the Indian Self Determination Act, absent a contract. *See Samish Indian Nation*, 419 F.3d at 1364–68. The IRA and the Indian Civil Rights Act of 1968 also cannot be the basis of money mandating duties for actions taken by

the federal government related to membership and election disputes. *See Wopsock*, 454 F.3d at 1332-33. Courts have also repeatedly held that the general trust responsibility, standing alone, is insufficient to establish a money-mandating duty. In *United States v. Navajo Nation*, for example, the Supreme Court specifically noted that the general trust relationship can reinforce a conclusion that the relevant statute or regulation imposes enforceable duties, but "that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act. Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S. 488, 506 (2003). Here, as demonstrated above, Plaintiffs have failed to focus on "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.*

To the extent that the causes of action are based on tortious conduct (*see, e.g.*, SAC, Prayer for Judgment, ¶ 3), or violations of civil rights and equal protection (*see, e.g.*, SAC, eighth and ninth claims for relief), such claims do not involve economic benefits of any sort and are beyond the jurisdiction of this Court. *See, e.g.*, *Cottrell v. United States*, 42 Fed. Cl. 144, 149-50 (1998) (no jurisdiction over tort claims or claims based upon civil rights).

Plaintiffs bear the burden of demonstrating the existence of jurisdiction, and therefore they must do more than present "[c]onclusory allegations unsupported by any factual assertions" in order to withstand a motion to dismiss. *See Sanders v. United States*, 34 Fed. Cl. 38, 43 (1995). Here, Plaintiffs do not identify any specific provisions or obligations arising under any of the cited statutes that establish a fiduciary obligation on the part of the United States and subject the United States to money damages for breach of any such duty. Therefore, this Court should reject Plaintiffs' presumptive, unsupported allegations and dismiss their complaint.

Finally, it bears repeating that the essence of Plaintiffs' action is the proper

administration of the listed statutes and regulations listed in their Second Amended Complaint. Therefore, the core of this action is the question of to whom the statutes and regulations should be applied. As discussed supra, the answer to this question is with the elected leadership and membership of the Tribe as already determined in litigation. Therefore, the United States asks that this Court dismiss the Plaintiffs' complaint.

VI. THIS COURT DOES NOT HAVE JURISDICTION TO GRANT THE TYPE OF INJUNCTIVE RELIEF REQUESTED BY PLAINTIFFS

The Court of Federal Claims is a court of limited jurisdiction. While the Tucker Act and other statutes provide this Court "certain limited equitable powers," this Court "has no *general* equitable power to issue injunctions in cases other than those in which such power has explicitly been granted." *Beck v. Sec'y of the Dep't of Health and Human Servs.*, 924 F.2d 1029, 1036 (Fed. Cir. 1991) (emphasis in original). For example, the Tucker Act allows the Court to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records..." 28 U.S.C. § 1491(a)(2).

Plaintiffs in this case request injunctive relief. *See, e.g.*, SAC, third claim for relief (¶¶ 43, 44), fourth claim for relief (¶¶ 49, 50), fifth claim for relief (¶¶ 55, 56), sixth claim for relief (¶¶ 61, 62), eighth claim for relief (¶¶ 70, 71), ninth claim for relief (¶¶ 75, 76). Plaintiffs also request generally incidental injunctive and declaratory relief as their tenth claim for relief. *See* SAC, ¶¶77-82. However, they point to no particular statute that provides this Court with the authority to issue injunctive or declaratory relief of the type they request. As such relief is outside of this Court's jurisdiction, it cannot be granted here.

VII. THE UNITED STATES IS THE ONLY PROPER DEFENDANT IN A TUCKER ACT CLAIM

In addition to seeking a judgment against the United States, Plaintiffs seek a judgment against the Department of the Interior, Bureau of Indian Affairs, Department of Health and Human Services, Department of Housing and Urban Development, and Does 1-20. It is elementary that the Tucker Act vests jurisdiction in this Court for relief only against the United States. Claims against anyone other than the United States are beyond this Court's jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 588 (1941); *Howard v. United States*, 74 Fed.Cl. 676, 679 (2006) ("The only defendant against whom suit may properly be brought in this court is the United States government." (citation omitted)); *see* 28 U.S.C. § 1491(a)(1). "[I]f the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court." *Sherwood*, 312 U.S. at 588. "[I]f ... maintenance [of the suit] against private parties is prerequisite to prosecution of the suit against the United States[,] the suit must be dismissed." *May v. United States*, 80 Fed. Cl. 442, 444-445 (2008) (internal citation omitted). Thus, all the claims against the agency defendant and the Doe Defendants must be dismissed as outside the jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the United States' motion to dismiss Plaintiffs' Second Amended Complaint.

Dated this 6th day of February, 2009.

Respectfully submitted,

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APPENDIX 1

LIST OF OTHER CASES BROUGHT BY PLAINTIFFS

Dumas	*Jamul Indian Village v. Hunter*, No. 95-cv-0131 (S.D. Cal.)
Jamul	*Jamul Indian Village v. Sacramento Area Director*, 29 IBIA 90 (1996)
Rosales i	*Rosales v. United States of America*, No. 96-cv-6879 (C.D. Cal.)
Rosales I	*Rosales v. Sacramento Area Director*, 32 IBIA 158 (1998)
Rosales II	*Rosales v. Sacramento Area Director*, 34 IBIA 50 (1999)
Rosales III	*Rosales v. Sacramento Area Director*, 34 IBIA 125 (1999)
Rosales IV	*Rosales v. Pacific Regional Director*, 39 IBIA 12 (2003)
Rosales V	*Rosales v. United States*, No. 97-cv-0769 (S.D. Cal.)
Rosales VI	*Rosales v. United States of America*, No. 98-860 (Fed. Cl.)
Rosales VII	*Rosales v. United States*, 73 Fed. Appx. 913 (9th Cir. 2003), *affirming Rosales v. United States*, 01-cv-951 (S.D. Cal.) February 14, 2002 Order
Rosales VIII	*Rosales v. United States*, 477 F. Supp. 2d 119 (D.D.C. 2007), *aff'd*, 275 Fed. Appx. 1 (D.C. Cir. 2008), *petition for panel rehearing denied*, No. 07-5140 (May 20, 2008), *motion for leave to file petition for rehearing en banc denied*, No. 07-5140 (Aug. 28, 2008)
Rosales IX	*Rosales v. United States*, 477 F. Supp. 2d 213, 214 n.1 (D.D.C. 2007); *Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. 2007), *appeal dismissed for failure to prosecute*, Case No. 08-55207 (9th Cir. August 12, 2008)
Rosales X	*Rosales v. United States*, No. 08-512 L (Fed. Cl.) (pending)

APPENDIX II

LIST OF EXHIBITS

Exhibits	Description
1	*Jamul Indian Village v. Raymond Hunter*, No. 95-0131-R (BTM) (S.D. Cal.), Order Granting In Part And Denying In Part Defendants' Motion To Dismiss, Dated June 22, 1995
2	*Jamul Indian Village v. Raymond Hunter*, No. 95-0131-R (BTM) (S.D. Cal.), Order Denying Plaintiff's Motion For Reconsideration, Dated December 20, 1995
3	*Jamul Indian Village v. Raymond Hunter*, No. 95-0131-R (BTM) (S.D. Cal.), Order Granting Second Motion To Dismiss, Dated September 9, 1996
4	*Rosales v. United States of America*, No. 96-6879 (C.D. Cal.), Order Granting Defendant's Motion To Transfer Action To Southern District of California, Dated April 16, 1997
5	*Rosales v. United States*, No. 97-cv-0769 (S.D. Cal.), Order Declining To Impose Sanctions Pursuant to Rule 11, Dated January 28, 1999
6	*Rosales v. United States*, No. 07-5140 (D.C. Cir.), Order, Dated May 20, 2008
7	*Rosales v. United States*, No. 07-5140 (D.C. Cir.), Order, Dated August 28, 2008
8	*Rosales v. United States*, 01-cv-951 (S.D. Cal.), Order (1) Granting Defendants' Motion For Summary Judgment ; and (2) Denying Defendants' Motion To Dismiss Or For Judgment On The Pleadings, Dated February 14, 2008
9	*Rosales v. United States*, No. 08-55207 (9th Cir.), Order, Dated August 12, 2008