

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KAWAIISU TRIBE OF TEJON and DAVID  
LAUGHING HORSE ROBINSON, Chairman,  
Kawaiisu Tribe of Tejon,

Plaintiffs,

v.

KEN SALAZAR, in his official  
capacity as Secretary of the  
United States Department of the  
Interior, et al.,

Defendants.

1:09-cv-01977 OWW SMS

ORDER RE DEFENDANTS' MOTIONS  
TO DISMISS (DOCS. 81, 83, 85,  
100); AND PLAINTIFFS' REQUEST  
FOR LEAVE TO AMEND COMPLAINT  
(DOC. 100) AND FOR  
CERTIFICATION OF THE CEQA  
ADMINISTRATIVE RECORD (DOC.  
105)

I. INTRODUCTION

Plaintiffs, the Kawaiisu Tribe of Tejon ("Kawaiisu"), a non-federally recognized Indian group, and David Laughing Horse Robinson ("Robinson"), who claims to be the Kawaiisu Chairman, (collectively, "Plaintiffs"), challenge Kern County's authorization of a large construction project ("Project") on private property by Tejon Mountain Village LLC ("Tejon"). First Amended Complaint ("FAC"), Doc. 71. The FAC alleges that "the historical Tejon/Sebastian Indian Reservation" existed, at least at one time, on portions of the subject property. FAC at ¶¶ 12-22, 65. Plaintiffs allege that "[w]ithin the proposed project development area, there are over 50 pre-historic village sites,

1 numerous graves, and other sacred sites directly related to the  
 2 Tribe." FAC at ¶ 30. The FAC also alleges that the Department  
 3 of the Interior ("DOI" or "Federal Defendant") has failed to  
 4 "engage the Tribe and protect its interests pursuant to treaties,  
 5 Executive Orders, and other Acts of Congress." FAC at ¶ 1.

6  
 7 The first claim for relief in the FAC alleges that DOI  
 8 violated the Administrative Procedure Act ("APA"), 5 U.S.C. §  
 9 702, *et seq.*, by unreasonably delaying action on the Kawaiisu's  
 10 federal recognition petition before the Bureau of Indian Affairs  
 11 ("BIA"), a branch of DOI. FAC at ¶¶ 23-27, 42-48.

12 The second claim alleges that DOI has violated both the APA  
 13 and the Equal Protection Clause of the Fourteenth Amendment<sup>1</sup> to  
 14 the United States Constitution because "every other tribal  
 15 signatory" to an 1849 Treaty with Utah "has received some sort of  
 16 recognition," with the exception of the Kawaiisu. This is  
 17 alleged to be "arbitrary, capricious, and otherwise contrary to  
 18 law," in violation of the APA.  
 19

20 The third claim for relief names only Kern County, and  
 21 alleges that approval of the Project violates the California  
 22 Environmental Quality Act ("CEQA"), as well as the federal Native  
 23

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24 <sup>1</sup> The Fourteenth Amendment is, on its face, inapplicable to the federal  
 25 government. However, "the Fifth Amendment's Due Process Clause, subjects the  
 26 federal government to constitutional limitations that are the equivalent of  
 27 those imposed on the states by the Equal Protection Clause of the Fourteenth  
 28 Amendment." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1429 n.18 (citing *Bolling*  
*v. Sharpe*, 347 U.S. 497 (1954)). It is appropriate to read Plaintiffs'  
 Fourteenth Amendment claim as one arising under the Fifth Amendment. See  
*Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d  
 1157, 1171 n.4 (9th Cir. 2007).

1 American Graves Protection and Repatriation Act ("NAGPRA"), the  
2 National Historic Preservation Act ("NHPA"), and the  
3 Archaeological Resource Protection Act ("ARPA"). FAC at ¶¶ 53-  
4 60. Tejon, the developer of the Project, is named as the real  
5 party in interest.

6  
7 The fourth claim, brought under 42 U.S.C. § 1983 against  
8 only the California Native American Heritage Commission ("NAHC"),  
9 which allegedly plays a role in listing individuals as "Most  
10 Likely Descendants" of California Native American Tribes, alleges  
11 that NAHC violated Plaintiff Robinson's civil rights by not  
12 including him on the list of Native American Contacts for Kern  
13 County, despite being "almost identically situated to the other  
14 11 groups listed." See FAC at ¶ 61-63. NAHC allegedly had  
15 neither Plaintiff on its list of Native American Contacts. As a  
16 result, the FAC alleges that neither was contacted by Kern County  
17 for consultation on the Project's potential impacts to sacred,  
18 archeological, and historical sites. FAC at ¶ 32.

## 21 II. STANDARDS OF DECISION

### 22 A. Motion to Dismiss for Lack of Subject Matter Jurisdiction 23 Under Fed. R. Civ. Pro. 12(b)(1).

24 Federal Rule of Civil Procedure 12(b)(1) provides for  
25 dismissal of an action for "lack of jurisdiction over the subject  
26 matter." Faced with a Rule 12(b)(1) motion, a plaintiff bears  
27 the burden of proving the existence of the court's subject matter  
28 jurisdiction. *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir.

1 1996). A federal court is presumed to lack jurisdiction in a  
2 particular case unless the contrary affirmatively appears. *Gen.*  
3 *Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968-969 (9th  
4 Cir. 1981).

5 A challenge to subject matter jurisdiction may be facial or  
6 factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A s  
7 explained in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038  
8 (9th Cir. 2004):

9  
10 In a facial attack, the challenger asserts that the  
11 allegations contained in a complaint are insufficient  
12 on their face to invoke federal jurisdiction. By  
13 contrast, in a factual attack, the challenger disputes  
the truth of the allegations that, by themselves, would  
otherwise invoke federal jurisdiction.

14 In resolving a factual attack on jurisdiction, the district court  
15 may review evidence beyond the complaint without converting the  
16 motion to dismiss into a motion for summary judgment. *Savage v.*  
17 *Glendale Union High School*, 343 F.3d 1036, 1039 n.2 (9th Cir.  
18 2003); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.  
19 1988). "If the challenge to jurisdiction is a facial attack,  
20 i.e., the defendant contends that the allegations of jurisdiction  
21 contained in the complaint are insufficient on their face to  
22 demonstrate the existence of jurisdiction, the plaintiff is  
23 entitled to safeguards similar to those applicable when a Rule  
24 12(b)(6) motion is made." *Cervantez v. Sullivan*, 719 F. Supp.  
25 899, 903 (E.D. Cal. 1989), rev'd on other grounds, 963 F.2d 229  
26 (9th Cir. 1992). "The factual allegations of the complaint are  
27  
28

1 presumed to be true, and the motion is granted only if the  
2 plaintiff fails to allege an element necessary for subject matter  
3 jurisdiction." *Id.*

4 The standards used to resolve motions to dismiss under Rule  
5 12(b)(6) are relevant to disposition of a facial attack under  
6 12(b)(1). See *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052  
7 n.2 (9th Cir. 2009), rev'd on other grounds en banc, 616 F.3d  
8 1019 (9th Cir. 2010) (applying *Ashcroft v. Iqbal*, 129 S. Ct. 1937  
9 (2009) to a motion to dismiss for lack of subject matter  
10 jurisdiction).

11  
12  
13 B. Motion to Dismiss for Failure to State a Claim Under Fed. R.  
14 Civ. P. 12(b)(6).

15 To survive a Rule 12(b)(6) motion to dismiss, a "complaint  
16 must contain sufficient factual matter, accepted as true, to  
17 'state a claim to relief that is plausible on its face.'" *Iqbal*,  
18 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.  
19 544, 570 (2007)). A complaint does not need detailed factual  
20 allegations, but the "[f]actual allegations must be enough to  
21 raise a right to relief above the speculative level." *Twombly*,  
22 550 U.S. at 555.

23 In deciding a motion to dismiss, the court should assume the  
24 veracity of "well-pleaded factual allegations," but is "not bound  
25 to accept as true a legal conclusion couched as a factual  
26 allegation." *Iqbal*, 127 S. Ct. at 1950. "Labels and  
27 conclusions" or "a formulaic recitation of the elements of a  
28

1 cause of action will not do." *Twombly*, 550 U.S. at 555. "'Naked  
2 assertion [s]' devoid of 'further factual enhancement'" are also  
3 insufficient. *Iqbal*, 127 S. Ct. at 1949 (quoting *Twombly*, 550  
4 U.S. at 557). Instead, the complaint must contain enough facts  
5 to state a claim to relief that is "plausible on its face."  
6 *Twombly*, 550 U.S. at 570.  
7

8 A claim has facial plausibility when the complaint's factual  
9 content allows the court to draw the reasonable inference that  
10 the defendant is liable for the alleged misconduct. *Iqbal*, 127  
11 S. Ct. at 1949. "The plausibility standard is not akin to a  
12 'probability requirement,' but it asks for more than a sheer  
13 possibility that a defendant has acted unlawfully." *Id.* (quoting  
14 *Twombly*, 550 U.S. at 556). "A well-pleaded complaint may proceed  
15 even if it strikes a savvy judge that actual proof of those facts  
16 is improbable, and 'that a recovery is very remote and  
17 unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*,  
18 416 U.S. 232, 236 (1974)).  
19

20 The Ninth Circuit summarizes the governing standard as  
21 follows: "In sum, for a complaint to survive a motion to dismiss,  
22 the non-conclusory factual content and reasonable inferences from  
23 that content, must be plausibly suggestive of a claim entitling  
24 the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d  
25 962, 969 (9th Cir. 2009) (quotations omitted).  
26

27 If a district court considers evidence outside the  
28

1 pleadings, a Rule 12(b)(6) motion to dismiss must be converted to  
2 a Rule 56 motion for summary judgment, and the nonmoving party  
3 must be given an opportunity to respond. *United States v.*  
4 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). "A court may,  
5 however, consider certain materials-documents attached to the  
6 complaint, documents incorporated by reference in the complaint,  
7 or matters of judicial notice-without converting the motion to  
8 dismiss into a motion for summary judgment." *Id.* at 908.

### 10 III. DISCUSSION

#### 11 A. Claims Against Federal Defendant.

##### 12 1. Federal Defendant's Motion to Dismiss.

13 On September 3, 2010, Federal Defendant moved to dismiss  
14 both of the claims against DOI. As to the first claim alleging  
15 DOI's handling of Plaintiffs' recognition petition violated the  
16 APA, DOI argues that in 2006, the then-Chairman of the Kern  
17 Valley Indian Community, the name under which Plaintiffs allege  
18 they filed their initial recognition petition in 1979, wrote DOI  
19 requesting that the group's petition for recognition be  
20 withdrawn. DOI argues Plaintiffs' abandonment of the  
21 administrative process amounts to a failure to exhaust. In  
22 addition, DOI argues that the six-year statute of limitations  
23 applicable to civil actions against the United States, 28 U.S.C.  
24 § 2401(a), bars both Plaintiffs' APA and Equal Protection Claim.  
25 Doc. 81-1.

2. Plaintiffs' Request for Leave to Voluntarily Dismiss Claims Against Federal Defendant Without Prejudice.

On December 2, 2010, Plaintiffs filed a request for leave to voluntarily dismiss without prejudice their "two stated claims for relief" against DOI. As a threshold matter, while Plaintiff's request seeks dismissal of both claims against DOI, the final paragraph of their request specifies that they seek dismissal of only paragraphs 43-46; 50-52; and 69-70. This inexplicably fails to reference the final two paragraphs (47 and 48) of the first claim or four paragraphs of the prayer for relief against DOI (paragraphs 71 - 74):

47. Most recently, these injuries have manifested themselves from Interior's failure to step in and protect one of their most vital resources: the sacred places and burial grounds of their ancestors. Despite all parties clearly being within the zones of interest that NAGPRA, NHPA, and ARPA were designed to regulate and protect, Interior's insouciance has created a scenario where Kern County and TMV can deny accountability with no explanation needed other than to remind the Tribe that their name doesn't appear on the list.

48. Interior's lack of engagement with the Tribe has been arbitrary, capricious, and otherwise contrary to the law. 5 U.S.C. §706(2)(a). Without immediate action, there will certainly be irreparable injury to the Tribe in a manner that no monetary award could later compensate. For these reasons, the Tribe is entitled to relief prayed for below.

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71. Order Interior to remove jurisdiction from the Native American Heritage Commission to determine California Most Likely Descendants and return that jurisdiction to the National Park Service. Require that Interior work with the National Park Service to establish and incorporate a policy requiring all California Native American Consultants, Monitors and Most Likely Descendants working on California projects to present a California Certified Degree of Indian



1 Blood (CDIB) certificate from Interior.

2 72. Order Interior to restore the Tejon/Sebastian  
3 Indian Reservation School Building and land as Trust  
4 property of the Kawaiisu Tribe of Tejon pursuant to  
5 Public Law 85-31, May 16, 1957, S.998, 71 Stat 29.

6 73. Order Interior to restore to Trust status the  
7 Kawaiisu allotments that were sold without approval.

8 74. Order Interior to provide an accounting of accrued  
9 revenues from resources extracted from the  
10 Tejon/Sebastian Indian Reservation (oil, minerals,  
11 water, agricultural, leases).

12 Plaintiffs wish to dismiss the substantive claims against DOI,  
13 while retaining the right to obtain relief against Federal  
14 Defendant. Plaintiffs cannot have it both ways. Without a  
15 viable claim premised on a waiver of sovereign immunity, a court  
16 cannot enter judgment against an agency of the United States.

17 Plaintiffs' request for dismissal of the claims against  
18 Federal Defendant is governed by Federal Rule of Civil Procedure  
19 41.<sup>2</sup> The parties engage in a lengthy debate over whether  
20 dismissal should be with or without prejudice, without referring  
21 to the relevant language of Rule 41(a), which provides:

22 (a) Voluntary Dismissal.

23 (1) By the Plaintiff.

24 (A) Without a Court Order. Subject to Rules 23(e),  
25 23.1(c), 23.2, and 66 and any applicable federal  
26 statute, the plaintiff may dismiss an action  
27 without a court order by filing:  
28

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<sup>2</sup> Plaintiffs incorrectly suggest that Rule 15 governs here. While Rule 15 controls amendment and circumstances when a party seeks to dismiss some, but not all, claims against an individual defendant, Rule 41 applies where a party seeks to dismiss one or all of the defendants from an action. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988) noting that Rule 41 applies to complete dismissal as to all defendants, or partial dismissal of all claims against one codefendant).

1 (i) a notice of dismissal before the opposing  
2 party serves either an answer or a motion for  
summary judgment; or

3 (ii) a stipulation of dismissal signed by all  
4 parties who have appeared.

5 (B) Effect. Unless the notice or stipulation  
6 states otherwise, the dismissal is without  
7 prejudice. But if the plaintiff previously  
dismissed any federal-or state-court action based  
8 on or including the same claim, a notice of  
dismissal operates as an adjudication on the  
merits.

9 No answer or motion for summary judgment has been filed.

10 Plaintiffs may voluntarily dismiss the action against Federal

11 Defendants without leave of court. Such dismissal is

12 automatically without prejudice unless the plaintiff has

13 previously dismissed any federal or state court action based on

14 or including the same claim. No such previous dismissal has

15 taken place here. (The original complaint was amended after

16 counsel was retained, but this does not operate as a dismissal.)

17 Plaintiffs may voluntarily dismiss the claims against Federal

18 Defendants without prejudice without leave of court. Their

19 request to do so is GRANTED.  
20

21 3. Plaintiffs' Opposition to Federal Defendants' Motion to  
22 Dismiss.

23 Adding to the procedural confusion in this case, on December

24 17, 2010, just seven days after seeking leave to voluntarily

25 dismiss their claims against Federal Defendant, Plaintiffs filed

26 an opposition to DOI's motion to dismiss. Plaintiffs do not

27 address the arguments raised by Federal Defendant in its motion  
28

1 to dismiss; rather, Plaintiffs assert entirely new bases for  
2 federal jurisdiction. Plaintiffs now argue that their claims in  
3 the FAC are "land based claimed" seeking "to enforce their  
4 aboriginal land rights." Doc. 103 at 7.

5 Specifically, Plaintiffs claim the Court has federal  
6 question jurisdiction to adjudicate these land-based claims  
7 because "Tribes have a federal common law right to sue to enforce  
8 their aboriginal land rights," citing *County of Oneida v. Oneida*  
9 *Indian Nation*, 470 U.S. 226, 235 (1985) (*Oneida II*), which  
10 permits Indian tribes to maintain actions for violation of  
11 "possessory rights" to aboriginal lands based on federal common  
12 law. Plaintiffs are correct that *Oneida II* held "there is no  
13 federal statute of limitations governing federal common law  
14 actions by Indians to enforce property rights." 470 U.S. at 240.  
15 However, there are several fundamental problems with Plaintiffs'  
16 reliance on *Onieda II*. First, Plaintiffs do not allege a current  
17 possessory interest in the lands in question. Second, although  
18 the FAC arguably contains "land-based" claims against the other  
19 Defendants, no such claims are asserted against DOI. Finally, at  
20 least one court has held that a federal common law action for  
21 enforcement of aboriginal land rights cannot be maintained by an  
22 unrecognized Indian tribe. See *United States v. 43.47 Acres of*  
23 *Land*, 855 F. Supp. 549, 551 (D. Conn. 1994) (absent certification  
24 as a Tribe by the BIA, no action to protect tribal lands may be  
25  
26  
27  
28

1 maintained).

2       Alternatively, Plaintiffs argue that jurisdiction arises  
3 under 25 U.S.C. § 345 or 28 U.S.C. § 1353. Neither statute could  
4 possibly apply here. Title 25 U.S.C. § 345 provides a cause of  
5 action for persons "of Indian blood or decent" who claim to be  
6 "entitled to land under any [federal] allotment Act or under any  
7 grant made by Congress, or who claim to have been unlawfully  
8 denied or excluded from any allotment or any parcel of land to  
9 which they claim to be lawfully entitled by virtue of any Act of  
10 Congress...." Title 28, United States Code, section 1353  
11 provides that district courts shall have original jurisdiction  
12 over "any civil action involving the right of any person, in  
13 whole or in part of Indian blood or descent, to any allotment of  
14 land under any Act of Congress or treaty." The waiver of  
15 sovereign immunity contained in section 345 is limited to Indians  
16 seeking to obtain an original allotment. *United States v.*  
17 *Mottaz*, 476 U.S. 834, 844-45 (1986). Likewise, 28 U.S.C. § 1385  
18 was "enacted for the narrow purpose of giving district courts  
19 jurisdiction over claims of right of original allotments or  
20 allotments in the first instance." *Dry Creek Lodge v. United*  
21 *States*, 515 F.2d 926, 935 n.11 (10th Cir. 1975). Nowhere in the  
22 FAC do Plaintiffs claim a right to an original allotment.  
23 Rather, Plaintiffs request that allotments already issued to its  
24 members be declared Indian Country and "tribal Land."  
25  
26  
27  
28

1 In sum, Plaintiffs have voluntarily dismissed the first and  
 2 second causes of action against the United States. Their  
 3 argument that the Court can otherwise exercise jurisdiction over  
 4 Federal Defendant is meritless. They have not asserted claims  
 5 against Federal Defendant under federal common law, 25 U.S.C. §  
 6 345, or 28 U.S.C. § 1353, and have not shown any basis on which  
 7 they can do so.  
 8

9 B. Remaining Claims Against Kern County and Tejon.

10 The single claim against Kern County (and Tejon as real  
 11 party in interest), set forth in paragraphs 54 through 60 of the  
 12 FAC, cites numerous statutory provisions, including the  
 13 California Environmental Quality Act ("CEQA"), Cal. Pub. Res.  
 14 Code § 21000, *et seq.*, and the federal National Historic  
 15 Preservation Act ("NHPA"), Archaeological Resources Protection  
 16 Act ("ARPA"), 16 U.S.C. § 470aa, *et seq.*, Native American Graves  
 17 Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001, *et*  
 18 *seq.*, and National Environmental Policy Act ("NEPA"), 42 U.S.C. §  
 19 4321, *et seq.*  
 20  
 21

22 1. Federal Claims against Kern County and Tejon.

23 Plaintiffs' NEPA and NAGPRA claims are set forth in  
 24 paragraphs 57 and 58:  
 25

26 57. Despite the land in question being an Indian  
 27 reservation with no record of termination, federal  
 28 statutory guidelines were not followed with respect to  
 NEPA 42 U.S.C § 4321 *et. seq.*, or as required when  
 Indian remains are found on federal land. 25 U.S.C. §  
 3001, *et. seq.*

1                   58. Federal law mandates that when any Native American  
2                   cultural items (human remains/funerary objects) are  
3                   excavated on federal or tribal lands, priority for  
4                   their ownership shall be given to the Indian tribe that  
5                   has the closest cultural affiliation with those objects  
6                   and upon being given notice, states a claim for such  
7                   objects. 25 U.S.C. § 3002(2) (b).

8                   NEPA applies only to "major Federal actions significantly  
9                   affecting the quality of the human environment." 42 U.S.C. §  
10                  4332(C). There is no suggestion that any "major Federal action"  
11                  has taken place in this case.

12                  Likewise, NAGPRA is only applicable when Native American  
13                  cultural items are discovered or excavated on "Federal or tribal  
14                  lands." 25 U.S.C. §§ 3001-3004. For the purposes of NAGPRA,  
15                  "tribal land" means:

16                       (A) all lands within the exterior boundaries of any  
17                       Indian reservation;

18                       (B) all dependent Indian communities;

19                       (C) any lands administered for the benefit of Native  
20                       Hawaiians pursuant to the Hawaiian Homes Commission  
21                       Act, 1920, and section 4 of Public Law 86-3.

22                  25 U.S.C. § 3001(15). NAGPRA's implementing regulations define  
23                  "tribal lands" to mean "all lands which":

24                       (i) Are within the exterior boundaries of any Indian  
25                       reservation including, but not limited to, allotments  
26                       held in trust or subject to a restriction on alienation  
27                       by the United States; or

28                       (ii) Comprise dependent Indian communities as  
                      recognized pursuant to 18 U.S.C. 1151; or

                      (iii) Are administered for the benefit of Native  
                      Hawaiians pursuant to the Hawaiian Homes  
                      Commission Act of 1920 and section 4 of the  
                      Hawaiian Statehood Admission Act (Pub. L. 86-3; 73  
                      Stat. 6).

1 (iv) Actions authorized or required under these  
2 regulations will not apply to tribal lands to the  
3 extent that any action would result in a taking of  
4 property without compensation within the meaning of the  
Fifth Amendment of the United States Constitution.

5 43 C.F.R. § 10.2(f)(2). There is no suggestion that the lands in  
6 question, which are currently private property, qualify for  
7 coverage under any of these provisions.<sup>3</sup>

8 Plaintiffs also mention two additional federal statutes in  
9 Paragraph 56, NHPA and ARPA:

10 56. The Tribe's long recognized presence in the area  
11 along with the centrality of maintaining the integrity  
12 of sacred sites to their socio-cultural existence  
13 clearly bring them within the zone of interests  
14 contemplated under CEQA, NHPA, ARPA, and NAGPRA.  
Likewise, both TMV and the County are clearly within  
the zones of interest to be regulated under these  
statutes.

15 This allegation lacks any specific basis for a NHPA and/or ARPA  
16 claim in violation of *Iqbal* and *Twombly's* requirement that "a  
17 complaint must contain sufficient factual matter, accepted as  
18 true, to "state a claim to relief that is plausible on its face."  
19 *Iqbal*, 129 S. Ct. 1949 (quoting *Twombly*, 550 U.S. at 570).

20 Like NEPA, the NHPA applies only where there is a "federal  
21 or federally assisted undertaking." 16 U.S.C. § 470f.

22 Plaintiffs have alleged no such federal undertaking.  
23

24  
25 <sup>3</sup> Defendants question whether an individual who is not a member of a  
26 recognized Indian tribe has standing to bring suit under NAGPRA. 25 U.S.C. §  
27 3013 provides district courts with jurisdiction over "any action brought by  
28 any person alleging a violation of this chapter...." The Ninth Circuit has  
held that the "any person" language in § 3013 'may not be interpreted  
restrictively to mean only 'any American Indian person' or 'any Indian  
Tribe.'" *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004).  
Nevertheless, Plaintiffs' NAGPRA claims fail on multiple alternative grounds.

1 ARPA applies only to "public lands or Indian lands." See 16  
2 U.S.C. § 470cc(a)-(c) and 470ee(a). ARPA's regulations define  
3 these terms:

4 (d) "Public lands" means:

5 (1) Lands which are owned and administered by the  
6 United States as part of the national park system,  
7 the national wildlife refuge system, or the  
8 national forest system; and

9 (2) All other lands the fee title to which is held  
10 by the United States, except lands on the Outer  
11 Continental Shelf, lands under the jurisdiction of  
12 the Smithsonian Institution, and Indian lands.

13 (e) "Indian lands" means lands of Indian tribes, or  
14 Indian individuals, which are either held in trust by  
15 the United States or subject to a restriction against  
16 alienation imposed by the United States, except for  
17 subsurface interests not owned or controlled by an  
18 Indian tribe or Indian individual.

19 (f) "Indian tribe" as defined in the Act means any  
20 Indian tribe, band, nation, or other organized group or  
21 community, including any Alaska village or regional or  
22 village corporation as defined in, or established  
23 pursuant to, the Alaska Native Claims Settlement Act  
24 (85 Stat. 688). In order to clarify this statutory  
25 definition for purposes of this part, "Indian tribe"  
26 means:

27 (1) Any tribal entity which is included in the  
28 annual list of recognized tribes published in the  
Federal Register by the Secretary of the Interior  
pursuant to 25 CFR Part 54;

(2) Any other tribal entity acknowledged by the  
Secretary of the Interior pursuant to 25 CFR Part  
54 since the most recent publication of the annual  
list; and

(3) Any Alaska Native village or regional or  
village corporation as defined in or established  
pursuant to the Alaska Native Claims Settlement  
Act (85 Stat. 688), and any Alaska Native village



1 or tribe which is recognized by the Secretary of  
2 the Interior as eligible for services provided by  
the Bureau of Indian Affairs.

3 43 C.F.R. § 7.3. There is no assertion that the lands in  
4 question here currently qualify under either of these  
5 definitions.

6  
7 Plaintiffs allege that the land in question is actually  
8 "tribal land" to which the Kawaiisu hold "aboriginal title."  
9 Accordingly, Plaintiffs ask for a declaration that the Kawaiisu  
10 are a "tribe" and the historical Tejon/Sebastian Reservation is  
11 "tribal land" for purposes of NAGPRA, ARPA, and NHPA. It is  
12 undisputed that the land is currently private property. There is  
13 no mechanism under NAGPRA, ARPA, or NHPA to re-classify tribal  
14 groups or parcels of land.

15  
16 Only the BIA can declare the Kawaiisu to be a federally-  
17 recognized Tribe (and therefore able to possess "Indian Land"  
18 under ARPA). *See Western Shoshone Business Council for and on*  
19 *behalf of Western Shoshone Tribe of the Duck Valley Reservation,*  
20 *1 F.3d 1052, 1056-58 (10th Cir. 1993).*<sup>4</sup> Plaintiffs have  
21 voluntarily dismissed their claim against the BIA. Nor do  
22 Plaintiffs' allegations that the lands in question may have at  
23

24  
25 <sup>4</sup> *Western Shoshone* rejected the underpinnings of the line of cases cited by  
26 plaintiffs, e.g. *Masshpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D.C.  
27 Mass. 1977); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.  
28 Supp. 649, 655-56 (D.C. Me. 1975); *Narragansett Tribe of Indians v. Southern*  
*Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.C.R.I. 1976), in  
which courts did not defer to the BIA's acknowledgment procedures, reasoning  
that those cases predated or closely followed the passage of the  
acknowledgment regulations. *See Western Shoshone*, 1 F.3d at 1057.

1 one time been an Indian Reservation establish that the lands are  
2 today within the boundaries of Indian Reservation for the  
3 purposes of NAGPRA or otherwise. Before Plaintiffs can assert a  
4 claim under NAGPRA based on aboriginal title arising out of the  
5 historic Tejon Reservation, the current status of that alleged  
6 Reservation must be clarified. Plaintiffs have not alleged any  
7 claim to quiet title to or otherwise assert possession over the  
8 lands in question (currently in private hands).  
9

10 Kern County and Tejon's motions to dismiss the NEPA and ARPA  
11 claims are GRANTED WITHOUT LEAVE TO AMEND AND WITH PREJUDICE,  
12 because these claims turn on the presence of a federal  
13 undertaking, which cannot plausibly be alleged.  
14

15 Kern County and Tejon's motion to dismiss the ARPA claim is  
16 likewise GRANTED WITHOUT LEAVE TO AMEND BUT WITHOUT PREJUDICE,  
17 because that claim turns on federal recognition by the BIA, which  
18 Plaintiffs are pursuing in the administrative arena.

19 Finally, Kern County and Tejon's motion to dismiss the  
20 NAGPRA claim is GRANTED WITH LEAVE TO AMEND. Plaintiffs have  
21 requested leave to amend the complaint to assert a claim based  
22 upon aboriginal title. Plaintiffs shall be afforded the  
23 opportunity to assert such a claim directly, not under NAGPRA.  
24 However, if Plaintiffs can allege a claim based on aboriginal  
25 title through some other mechanism and are ultimately successful,  
26 the result of such a claim may be the recognition of an Indian  
27  
28

1 Reservation, which would trigger the operation of NAGPRA.<sup>5</sup>

2 Therefore, the NAGPRA claim is DISMISSED WITH LEAVE TO AMEND.

3  
4 2. Remaining State Law Claims against Kern County and  
5 Tejon.

6 Plaintiffs' claims against Federal Defendant have been  
7 voluntarily dismissed, and the remaining federal claims against  
8 Kern County and Tejon have been dismissed for failure to state a  
9 claim under any of the relied-upon statutes. One federal claim  
10 remains: the section 1983/equal protection claim against NAHC.  
11 The propriety of exercising supplemental jurisdiction over the  
12 remaining state law claim depends on their relationship to any  
13 extant federal claim.

14  
15 C. Claims Against NAHC and Defendant Meyers.

16 The FAC's fourth claim, brought under 42 U.S.C. § 1983  
17 against NAHC and its director Larry Meyers, alleges that NAHC's  
18 failure to include Plaintiff Robinson in its Native American  
19 contact list violated the equal protection clause of the  
20 Fourteenth Amendment. The substantive portion of this claim  
21 alleges:

22  
23 62. NAHC violated Plaintiff Robinson's civil rights by  
24 not including him on the list of Native American  
Contacts for the Kern County despite being almost  
identically situated to the other 11 groups listed.

25 63. The 'input' from these other listed consultants  
26 has resulted in the potential destruction of numerous

27 <sup>5</sup> No opinion is expressed as to the viability of any claim to aboriginal title  
28 in the Tejon Reservation or any other related parcel of land. The parties  
have not briefed whether jurisdiction even exists to entertain such a claim.

1 graves and other sacred sites that are of incalculable  
2 value both to Plaintiff Robinson and the Tribe. For  
3 these reasons, the Plaintiff Robinson is entitled to  
the relief prayed for below.

4 NAHC moved to dismiss this claim on December 17, 2010, Doc. 100-  
5 1, but, in lieu of filing an opposition, Plaintiffs requested  
6 leave to amend as to that claim only. Doc. 110. NAHC does not  
7 object. Doc. 118.

8 The viability of any amended 1983 claim remains to be  
9 determined. Assuming the claim against NAHC is not expanded to  
10 include additional conduct, the exercise of supplemental  
11 jurisdiction over the remaining state law claims is unjustified.  
12 A district court may decline to exercise supplemental  
13 jurisdiction over state law claims. 28 U.S.C. § 1367(c)(3)  
14 (district court may decline to exercise supplemental jurisdiction  
15 over a state law claim if "the district court has dismissed all  
16 claims over which it has original jurisdiction."). "When federal  
17 claims are dismissed before trial ... pendant state claims also  
18 should be dismissed." *Religious Tech. Ctr. v. Wollersheim*, 971  
19 F.2d 364, 367-68 (9th Cir. 1992) (internal quotation marks  
20 omitted); see also *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182,  
21 1189 (9th Cir. 2001) (recognizing the propriety of dismissing  
22 supplemental state law claims without prejudice when the district  
23 court has dismissed the federal claims over which it had original  
24 jurisdiction).

25 Even assuming Plaintiffs could allege a viable 1983 claim  
26  
27  
28

1 against NAHC, 28 U.S.C. 1367(a) only permits a district court to  
2 exercise supplemental jurisdiction over state law claims "that  
3 are so related to claims in the action within [the district  
4 court's] original jurisdiction that they form part of the same  
5 case or controversy under Article III of the United States  
6 Constitution." This requires that "[t]he state federal claims  
7 must derive from a common nucleus of operative fact." *United*  
8 *Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). "[I]f,  
9 considered without regard to their federal or state character, a  
10 plaintiff's claims are such that he would ordinarily be expected  
11 to try them all in one judicial proceeding, then, assuming  
12 substantiality of the federal issues, there is power in federal  
13 courts to hear the whole." *Id.* Here, Plaintiffs' CEQA claim  
14 does not substantially overlap with the 1983/equal protection  
15 claim against NAHC.

16  
17  
18 The CEQA claim is set forth in Paragraphs 54-55:

19 54. The California Environmental Quality Act requires  
20 that any project that causes a substantial adverse  
21 change in the significance of a historical or  
22 archeological resource is a 'significant effect'  
23 requiring the preparation of an EIR. [Cal.] Code Reg. §  
24 15064.5(b)(c)(f). In the EIR, the lead agency is  
25 required to assess whether the project will have an  
26 adverse impact on these resources within the area of  
27 potential effect and, if so, to mitigate that effect.  
28 §15382. Lead agencies should consider avoidance when  
significant cultural resources could be affected by a  
project. §§ 15064.5, 15370. In the event of an  
accidental discovery of any human remains, construction  
or excavation must stopped until the county coroner or  
medical examiner can determine whether the remains are  
those of Native Americans. Health and Safety Code  
§7050.5, Pub. Res. Code §5097.98, CEQA §15064.5(d).

1           55. The factors considered and procedures used in  
2           completing the EIR were deficient under CEQA for, but  
3           not limited to, the following reasons:

4           A. Failure to adequately analyze the impacts of  
5           the Project on cultural resources and failure to  
6           adequately analyze the mitigation measures that  
7           would substantially lessen the Project's  
8           significant irreversible environmental impacts;

9           B. Omission of proper notice to, adequate  
10          consultation with, and establishing Most Likely  
11          Descendant status with the Tribe and the Tribe's  
12          Chair, David Laughing Horse Robinson;

13          C. Native American Monitors and Most Likely  
14          Descendants on this project were not properly  
15          documented California Native Americans;

16          D. Inadequacy of disclosure and lack of  
17          transparency on the part of the County and EIR  
18          tribal consultants.

19          FAC at ¶¶ 54-55.

20               The only issue raised by the 1983 claim is whether NAHC  
21               violated the equal protection clause of the Fourteenth Amendment  
22               by failing to include Plaintiff Robinson in its contact list for  
23               Kern County. There is essentially no evidentiary or legal  
24               overlap between this claim and the CEQA claim. They do not  
25               derive from the same common nucleus of operative fact.<sup>6</sup>

26               Therefore, even if the fourth cause of action remains in this

---

27               <sup>6</sup> This case is distinguishable from *Communities for a Better Environment v.*  
28               *Cenco Refining Company*, 180 F. Supp. 2d 1062 (C.D. Cal. 2001), cited by  
              Plaintiffs. In that case, the federal claim, a Clean Air Act ("CAA")  
              challenge to the issuance of an emissions permit to a refinery, was deemed  
              sufficiently intertwined with an allegation that defendant violated CEQA by  
              failing to properly acknowledge potential CAA violations. Likewise, *League to*  
              *Save Lake Tahoe v. Tahoe Regional Planning Agency*, 2009 U.S. Dist. Lexis 65753  
              at \*5-6 (E.D. Cal. Jul. 30, 2009), also cited by Plaintiffs, involved a NEPA  
              challenge to a project. The district court exercised supplemental  
              jurisdiction over a CEQA claim that involved approval of the same project  
              using the same EA/EIR document. Here, in contrast, the CEQA claim does not  
              substantially overlap with the equal protection claim.

1 case, there is no basis for exercising supplemental jurisdiction  
2 over the CEQA claim.

3 The third claim for relief against Kern County arguably  
4 contains one additional state law claim:

5 59. By not consulting with the Tribe and cataloging  
6 their sacred places within Kern County, the County in  
7 conjunction with the Native American Heritage  
8 Commission have violated [Cal. Pub. Res. Code] section  
5097.94 (a) and SB 18.

9 This alleges a failure to catalog sacred places under state law.  
10 This is totally unrelated to any alleged failure by NAHC to  
11 include Plaintiff Robinson in its contact list. The state law  
12 claim does not arise out of the same common nucleus of operative  
13 fact as the section 1983 claim.

14 There is no basis for exercising supplemental jurisdiction  
15 over the state law CEQA, California Public Resources Code section  
16 5097.94, or SB 18 claims.

17  
18 D. Request for Submission of Duplicate CEQA Administrative  
19 Record.

20 Plaintiffs have requested that Kern County provide a  
21 certified copy of the CEQA administrative record. To support  
22 this request, Plaintiffs cite CEQA, which requires the public  
23 agency to prepare and certify an administrative record whenever a  
24 request for one is served upon that agency. Cal. Pub. Res. Code  
25 § 21167.6. Plaintiffs also maintain that the CEQA administrative  
26 record will "provide Plaintiffs with facts necessary to pursue  
27 claims in Federal Court" in connection with NAGPRA, ARPA and  
28

1 NHPA. Plaintiffs appear to suggest that the administrative  
2 record should be produced as some form of discovery. This  
3 request is meritless for several reasons.

4 First, as discussed above, there is no basis upon which to  
5 exercise supplemental jurisdiction over Plaintiffs' CEQA claim.  
6 CEQA's requirement for production of an administrative record has  
7 no application in this case.  
8

9 Second, Plaintiffs' NAGPRA, ARPA, and NHPA claims fail as a  
10 matter of law. No amount of additional discovery can overcome  
11 the admitted fact that the Project is not a federal undertaking,  
12 nor that the Project is not taking place on lands currently  
13 considered "public," "Indian," or "federal." Plaintiffs may have  
14 recourse in a federal common law action to enforce their alleged  
15 aboriginal land rights, but no such claim has been alleged.  
16

17 Plaintiffs have presented no basis upon which this Court  
18 could order Kern County to certify and serve a copy of its CEQA  
19 administrative record on the Court or Plaintiffs.  
20

#### 21 IV. CONCLUSION

22 For the reasons set forth above:

23 (1) Plaintiffs' request to voluntarily dismiss its  
24 claims against Federal Defendants is GRANTED;

25 (2) Kern County and Tejon's motions to dismiss:

26 (a) the NEPA and ARPA claims are GRANTED WITHOUT  
27 LEAVE TO AMEND AND WITH PREJUDICE;  
28



(b) the ARPA claim is likewise GRANTED WITHOUT  
LEAVE TO AMEND BUT WITHOUT PREJUDICE;

(c) the NAGPRA claim is GRANTED WITH LEAVE TO  
AMEND;

(3) Plaintiffs' unopposed request for leave to amend  
its section 1983/equal protection claim against NAHC is  
GRANTED and NAHC's motion to dismiss is DENIED AS MOOT;

(4) There is no basis for the exercise of supplemental  
jurisdiction over Plaintiffs' CEQA, California Public  
Resources Code section 5097.94, and SB 18 claims.

Accordingly, the County and Tejon's motions to dismiss  
these claims are GRANTED WITH LEAVE TO AMEND;

(5) Plaintiffs' request that the Court order the County  
to produce a CEQA administrative record is DENIED;

(6) Plaintiffs shall be afforded the opportunity to  
assert a land-based claim for enforcement of aboriginal  
title in any amended complaint;

(7) Plaintiffs shall have 15 days to file an amended  
complaint.

Defendants shall file a form of order consistent with this  
memorandum decision within 5 days of electronic service.

SO ORDERED

Dated: February 4, 2011

/s/ Oliver W. Wanger  
Oliver W. Wanger  
United States District Judge