PAULA M. YOST (State Bar No. 156843)
paula.yost@snrdenton.com
IAN R. BARKER (State Bar No. 240223)
ian.barker@snrdenton.com
JESSICA LAUGHLIN (State Bar No. 271703)
jessica.laughlin@snrdenton.com
SNR DENTON US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

Attorneys for Defendants
RAY BARNES, MARIAN BURROUGH (erroneously sued as "MARIAN BURROUGHS"), IVADELLE CASTRO (erroneously sued as "IVDELLE CASTRO"), LEWIS BARNES, WILLIAM WALKER, AARON JONES, CAROLYN WALKER, TWILA BURROUGH (erroneously sued as "TWILA BURROUGHS"), and LORI CASTRO (erroneously sued as "Lorie Jones Castro")

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CLIFFORD M. LEWIS, et al.,

Plaintiffs,

vs.

KEN SALAZAR, et al.,

Defendants.

CASE NO. 1:10-CV-01281-OWW-DLB

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING TRIBAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Date: August 1, 2011
Time: 10:00 a.m.
Courtroom: 3

Judge: Hon. Oliver W. Wanger

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

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(415) 882-5000

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(415) 882-5000

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SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

I. INTRODUCTION

Plaintiffs are a group of individuals who claim entitlement to revenues from land now held in trust by the United States for a sovereign Indian tribal government, Table Mountain Band of Indians ("Tribe"). While certain Plaintiffs previously sought, in other failed litigation, Tribal membership as a means of securing a portion of Tribal revenues,[1] they now claim they are entitled to benefits otherwise payable only to the Tribe's members (as a matter of both federal and Tribal law) on the ground that their ancestors once lived at Table Mountain Rancheria, apparently before its sovereign status was purportedly terminated and its assets distributed by the United States government to individuals who lived there. The individuals the United States administratively selected to receive Table Mountain's assets are now members of the restored, federally-recognized Tribe and are the individual Tribal defendants named here ("Tribal Defendants"). Having previously failed to state a viable claim for relief on these alleged facts, and having been given "one more chance" to amend (Transcript of Hearing On Motions To Dismiss, April 4, 2011 (Doc. 45), 36:11-12)), Plaintiffs' Second Amended Complaint fares no better. Like the last two complaints, the Second Amended Complaint is largely nonsensical, internally inconsistent or contradictory, and unsupported by the law and the judicially-noticeable historical record.

Fundamentally, Plaintiffs seek assets owned and controlled by a sovereign government, whether through the Table Mountain Association created in 1959 to effectuate what was, in reality, the United States' failed termination of Table Mountain Rancheria under the California Rancheria Act, or through the Tribe's Community Council or Tribal Council established in 1983 when the Tribe's federal recognition was restored through litigation and a settlement between the Tribe and the United States. *See Table Mountain Rancheria Association v. Watt*, No. C-80-4595-MHP (N.D. Cal.).[2] Plaintiffs cannot avoid the bar of the Tribe's sovereign immunity by merely suing individual

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[1] Plaintiffs' unsuccessful claims in *Lewis v. Norton* and *Alvarado v. Table Mountain Rancheria* are detailed in Tribal Defendants' past briefing. (*See* Memorandum Supporting Tribal Defendants' Motion to Dismiss First Amended Complaint ("Motion to Dismiss FAC") (Doc. 23-1), filed Nov. 22, 2010, 6:23-9:15.)

[2] For a detailed discussion of *Watt*, *see* Motion to Dismiss FAC, 4:5-6:19.

Tribal members, who Plaintiffs allege (and who necessarily were) acting through and for the Tribal government in the purported denial of Tribal benefits.

Putting aside this formidable jurisdictional bar, which mandates dismissal of all of Plaintiffs' claims, Plaintiffs also fail to state a viable claim for relief. They allege no facts supporting the existence of a "conspiracy" to deprive Plaintiffs benefits under the Rancheria Act. Nor do Plaintiffs allege facts supporting a fiduciary duty owed by Tribal Defendants, and in fact, none exists to support a claim for its alleged breach. However, in the end, even if Plaintiffs could establish facts to support a valid claim, all of their claims, under any possible theory, are long since time barred. The longest possible statute of limitations for any of Plaintiffs' claims is four years, and the youngest of Plaintiffs' claims is approximately 30 years old. In the face of a record showing that Plaintiffs have had actual and constructive notice of the allegedly injurious acts that occurred some 30 and 50 years ago, Plaintiffs' allegations of concealment are insufficient to support a tolling theory. Accordingly, the Tribal Defendants respectfully ask that the Court bring this case to an end, and dismiss Plaintiffs' Second Amended Complaint without further leave to amend.

II. ALLEGATIONS OF PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs contend Secretary Salazar somehow failed to provide them services under the California Rancheria Act ("Rancheria Act" or "CRA"), apparently some 50 years ago when the United States purported to terminate the federally recognized sovereign status of the Table Mountain Rancheria and the "Indian status" of the people who lived there, and again in 1983, when the United States unwound the termination to restore the Tribe's federal recognition and the sovereign status of its lands. (Second Amended Complaint ("SAC"), ¶¶ 42-54.) Plaintiffs allege the individual Tribal Defendants harmed them as follows. First, they allege the Tribal Defendants conspired with Defendant Salazar to deprive them of real property and services supposedly guaranteed by the CRA. (*Id.*, ¶¶ 55-65 (Second Claim).) Second, they allege, in alternative theories, that Tribal Defendants breached an alleged fiduciary duty to Plaintiffs, by agreeing to transfer land held by the Association back to the United States, to be held in trust for the Tribe, after *Watt* restored its federal recognition. (*Id.*, ¶¶ 66-92.) Plaintiffs allege Tribal Defendants breached

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

this purported fiduciary duty either as a "quasi governmental agency" (*id*., ¶¶ 66-79 (Third Claim)), or as a "legal entity." (*Id.*, ¶¶ 80-92 (Fourth Claim).)

Their theory rests on the assertion that Defendant Salazar knew or should have known "the Tribe [Band] and Association were separate and distinct," and that by accepting the land in trust for the Tribe from the Association, "it was effectively transferring the Trust land from the Association to an Indian tribe and the land would no longer be Trust land and would be used for purposes other than those purposes set forth in the CRTA." (*Id.*, ¶ 61.) Doing so, Plaintiffs allege, deprived "the non-Tribe residents of the Rancheria the full use and enjoyment of Trust land, the water system, the sanitation system and the roads." (*Id.*, ¶ 62.) This alleged transfer, and the alleged breach, occurred "[o]n or about August 25, 1984." (*Id.*, ¶ 33.) Plaintiffs contend Tribal Defendants and the Secretary somehow "acted in concert" when Tribal Defendants sued the Secretary in federal district court in the Northern District, instead of the Eastern District. (*Id*., ¶ 63(a).) Plaintiffs contend Defendants thereby concealed the *Watt* case, tolling the limitations period. (*Id*., ¶ 76.)

III. PLAINTIFFS MISCONSTRUE THE RANCHERIA ACT AND *WATT*

Plaintiffs fundamentally distort the effect and purpose of the Rancheria Act that terminated Table Mountain's federal recognition in 1959 and the *Watt* settlement that 25 years later restored it. Plaintiffs' theory depends on these distortions, and this Court should not accept as true Plaintiffs' allegations as to the purpose and effect of the Act and the *Watt* litigation and settlement, as both are subject to judicial notice and each involves questions of law. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (affirming dismissal as arbitration award "effectively and persuasively rebut[ted] [plaintiffs'] conclusory allegations"); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010) ("[i]nterpretation of a settlement agreement is a question of law"); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (district court properly dismissed complaint based on its consideration of key terms of written benefits plan plaintiff relied upon but failed to attach to complaint).

Shortly after the Rancheria Act's passage, the Secretary of the Interior approved, and the Indians of Table Mountain Rancheria voted to approve, a distribution plan disposing of the

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Rancheria's assets. (*Watt* Complaint (RFJN, Ex. A), ¶¶ 17-18.) The assets were to be distributed to the "administratively selected users of the land" (85 S. Rep. No. 1874, at 3 (1958) (RFJN, Ex. B)), identified as the "distributees" under a distribution plan, which were those adult Indians who lived on the Rancheria by federal assignment. CRA, § 2(a) (RFJN, Ex. C); 25 C.F.R. §§ 242.2, 242.3 (RFJN, Ex. E). Upon distribution, both to the individual Indians and a private association created to hold communal lands (the "Association"), the United States terminated its trust relationship with Table Mountain Rancheria, the "Indian country" status of the lands, and the federal "Indian status" of the people who lived there (*i.e.*, the distributees, their dependants and their heirs). (*Watt* Complaint (RFJN, Ex. A), ¶¶ 1, 17, 19.)

Termination was an abysmal failure across California (*Watt* Complaint (RFJN, Ex. A), ¶¶ 18, 20), so the *Watt* plaintiffs (the Tribal Defendants named here) sued the United States in 1980 to unwind the purported termination, and restore the parties, to the extent possible, to the same position before termination in 1959. To that end, and upon settlement of *Watt*, the United States agreed to (1) again recognize Table Mountain Band of Indians as a sovereign tribal entity;[3] (2) take ownership of lands transferred to the Association and hold them in trust for the restored "tribal entity"; and (3) acknowledge the "federal Indian status" of the people who participated in the distribution of the Rancheria's assets (the "distributees" and "dependants of distributees," and specifically here, the Tribal Defendants and their heirs). (*See Watt* Stipulation for Entry of Judgment ("*Watt* Stipulation") (RFJN, Ex. F), 2:14-19. 4:13-5:5; *see also Watt* Order & Judgment (RFJN, Ex. G)); *see also* 48 Fed. Reg. 56862, 56864 (Dec. 23, 1983) (RFJN, Ex. H). To the extent the distributees wanted to have the land they had received individually restored to "trust," they

[3] The United States listed the Tribe as "Table Mountain Rancheria of California," a name the Tribe currently uses. *Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 48 Fed. Reg. 56,862, 56,865 (Dec. 14, 1983); *see Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1013 & n.4 (9th Cir. 2007) (explaining that the Table Mountain Rancheria of California is a federally recognized Indian tribe even though the *Watt* materials referred to it by a slightly different name). It is not unusual for the United States to reference sovereign tribal governments by their land base. *See, e.g.*, 48 Fed. Reg. 56,862, 56,863 (listing "Berry Creek Rancheria of Maidu Indians of California," "Big Bend Rancheria of Pit River Indians of California," and "Big Sandy Rancheria of Mono Indians of California" as federally recognized tribes).

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could deed it to the United States, either to be held for the benefit of themselves individually, or for the tribal entity as a whole.[4] (*Watt* Stipulation (RFJN, Ex. F), 3:7-13, 3:26-4:7.)

Plaintiffs admit they seek damages associated with revenues generated by the land once held by the Association (upon the purported termination) and now held by the United States in trust for the sovereign "tribal entity" (upon restoration). However, Plaintiffs distort the Rancheria Act and *Watt* in various ways in an effort to support their flawed theory. For example:

- The Rancheria Act did not "call[] for the distribution of rancheria lands and assets to *the members of the Tribe as well as the other residents of the Rancheria*." (SAC, ¶ 16 (emphasis added).) The Act did not speak in terms of tribal membership at all, since Indians had been settled on Rancherias without regard for tribal affiliation, and indeed, many Rancherias (like Table Mountain) were not formally organized with membership rolls. (85 S. Rep. No. 1874, at 3 (1958) (RFJN Ex. B).) Rather, the Act sought to terminate the trust relationship with California rancherias and the people who lived there, and to that end, distributed assets to the "Indians of the Rancheria," which were the government's "administratively selected users of the land." (*Id.*)[5]

- Contrary to Plaintiffs' assertion, the Association that received fee lands upon termination is not distinct from the Table Mountain government. (SAC, ¶ 25.) While the Association was specifically created as the legal entity to receive the terminated trust lands under the Act (CRA, §2(a)), it also was "the governing body of the American Indian Tribe, Band or Community" for whose benefit the United States had created Table Mountain Rancheria. (*Watt* Complaint (RFJN, Ex. A), ¶ 2 ("Association is the Tribal entity into which the Rancheria *presently* is organized" (emphasis added)).) Upon Table Mountain's restored federal recognition, the Association returned the fee lands to the United States to be held in trust for the "tribal entity." (RFJN,

[4] Congressional history readily refutes Plaintiffs' allegation that the "only reason" the Association transferred land to the United States "was to build a casino" because "[a]n Indian casino can only be built on land … held in trust for an Indian tribe." (SAC, ¶ 35.) The transfer occurred in 1984 and Congress passed the Indian Gaming Regulatory Act in 1988. Further, to the extent Plaintiffs hope to recover gaming revenues from the land transferred by the Association, they would be disappointed to know that it holds the Tribe's wastewater treatment facility, not its casino.

[5] *See Kelly v. United States*, 339 F. Supp. 1095, 1100 (E.D. Cal. 1972) (CRA had nothing to do with distributing assets to persons with tribal or even familial affiliation, but rather, simply involved distribution of assets to persons using and living on Rancheria); *see also* 85 S. Rep. No. 1874, at 3 (1958) (RFJN, Ex. B) (Rancheria lands were set aside "for Indians in California, generally, rather than for a specific group of Indians, and the consistent practice has been to select by administrative action the individual Indians who may use the land"; accordingly termination sought to distribute assets to "these administratively selected users of the land"); *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1176 (E.D. Cal. 2003) (noting rancheria occupied by Indians of different tribal affiliations).

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Ex. I (Grant Deed).) With Table Mountain's federally recognized sovereign status restored, and its lands in trust, the Tribe's government no longer had a reason to function through the Association.

- Plaintiffs suggest the *Watt* Stipulation affected the status of persons "who had not participated in the 1958 distribution." (SAC, ¶ 28.) However, the *Watt* class consisted only of those who had participated in the distribution plan, and thereby lost their "federal Indian status," specifically, the "distributees," their "dependants" and heirs. (*Watt* Complaint (RFJN, Ex. A), ¶¶ 4, 5.)

- Nothing in the Rancheria Act or *Watt* record suggests the land the United States transferred to the Association upon termination was held for the benefit of Indians other than the distributees, their dependants and heirs. The record shows the land owned by the Association "contain[ed] the well which was the Rancheria's water source" (*Watt* Complaint (RFJN, Ex. A), ¶ 14), and such land was to be used for the Rancheria community, and in particular, the "Indians of the Rancheria." *See also* 25 CFR § 242.7 (RFJN, Ex. E) ("the distributees listed in the plan shall be the final list of Indians entitled to participate in the distribution of the assets of the rancheria."); CRA, § 2(a) (Indians of the rancheria may convey assets "to a corporation designated by the group" or "to the group as tenants in common"); *see also* 85 S. Rep. No. 1874, at 3 (1958) (RFJN, Ex. B) (same).

- Contrary to Plaintiffs' allegation that the Rancheria Act created a fiduciary duty to the "Indians of the rancheria" who did not participate in the distribution plan (SAC, ¶ 26), the Act's regulations state that to the extent any adult Indian living on a rancheria was excluded from a distribution plan, his or her only recourse was an administrative appeal to the Bureau of Indian Affairs within 30 days, and no right of action existed thereafter. CRA, §§ 2(a), 10(a); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (RFJN, Ex. E).

IV. ARGUMENT

A. Plaintiffs Predicate Their Claims On Tribal Defendants' Sovereign And Immune Acts Governing The Tribe And Association.

Because all of Plaintiffs' claims are predicated on actions of Tribal Defendants while governing either the Association or the Tribe, their claims are barred by sovereign immunity. Although Plaintiffs purport to sue Tribal Defendants as individuals, they base each claim either on actions of the Association—formed, in Plaintiffs words, to "operate as the governing body for the Table Mountain Band of Indians" (SAC, ¶¶ 7(c), 67)—or on actions of the Tribe itself. Specifically, each claim alleges Plaintiffs lost a vaguely defined interest in a parcel of land the

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Association conveyed to the United States in 1984 in trust for the Tribe. (*Id.*, ¶¶ 57, 62, 71, 85.) The Third and Fourth Claims further allege that, after conveyance of the parcel to the United States in 1984, the trust land produced revenue and Tribal Defendants "have distributed that revenue amongst themselves and have not distributed any of the revenue to Plaintiffs." (*Id.*, ¶¶ 75, 89.)

As only the Tribe itself controlled the parcel after 1984, any actions of Tribal Defendants in distributing revenue from that land were necessarily the actions of a sovereign tribal government, and thus protected by immunity. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Tribal Defendants' alleged actions governing the Association are also shielded by the Tribe's immunity because, as the *Watt* complaint alleged and the settlement confirmed, the Tribe's government never lost its sovereign status, even while functioning as the Association after its purported termination. However, even if, for argument's sake, the Tribe had lost such status in 1959, the Association's return of land in 1984 was necessarily as the governing body of the tribe to which the United States had already restored federal recognition. In short, sovereign immunity bars Plaintiffs' claims.

1. The Tribe's Immunity Is Broad And Protects Tribal Officials Sued In Their Individual Capacity From Liability Arising From Governance Of The Tribe.

As "'distinct, independent political communities' with sovereign powers that have never been extinguished, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez,*, 436 U.S. 49, 58 (1978). "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). It extends to governmental and commercial activities, whether on or off the tribe's reservation. *Kiowa Tribe of Okl.v. Mfg. Techs., Inc.* , 523 U.S. 751, 760 (1998); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). Tribal sovereign immunity protects tribal officials when acting in their official capacity and within the scope of their authority. *Cook*, 548 F.3d at 727; *Imperial Granite Co.*, 940 F.2d at 1271.

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Moreover, because a plaintiff cannot avoid tribal immunity through "a mere pleading device," sovereign immunity cannot be circumvented by naming individual tribal officials in place of the tribe itself. *Cook*, 548 F.3d at 727; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) (rejecting attempt to "circumvent the barrier of sovereign immunity by merely substituting tribal officials"); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984) (plaintiff "cannot now avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity"). Thus, tribal officials possess immunity from claims that an official action of an Indian tribe has injured plaintiff. *Imperial Granite Co.*, 940 F.2d at 1271-72 (sovereign immunity barred plaintiffs' suit against individual tribal officials who assertedly caused injury by denying access to Tribe's property in alleged violation of Constitution, since the suit was not "anything other than a suit against the Band").

2. Claims Arising From Tribal Defendants' Alleged Governance Of Rancheria Land After It Was Transferred To The United States In Trust For The Tribe In 1984 Necessarily Attack Actions Of The Tribe And Are Barred Under *Imperial Granite*.

Plaintiffs have acknowledged, as they must, that the Tribe possesses immunity preventing "interference from the federal courts" in the Tribe's governance. (Plaintiff's [sic] Opposition to Tribal Defendants' Motion to Dismiss (Doc. 25), filed Dec. 31, 2010, 10:11-13, 13:3-4.) Two allegations in the Second Amended Complaint appear to predicate liability on Tribal Defendants' management of the Rancheria land *after* the United States took the land in trust for the Tribe in 1984. (*Id.*, ¶¶ 75, 89.) Specifically, Plaintiffs allege that, after 1984, Tribal Defendants distributed certain revenues from the Tribe's Rancheria land amongst themselves, and not to Plaintiffs. (*Id.*) However, as a matter of federal Indian law, the Tribe's trust land and all profit derived therefrom have necessarily been controlled solely by the properly constituted sovereign government of the Tribe. *Cohen's Handbook of Federal Indian Law* ("*Cohen's Handbook*"), § 15.02 Tribal Property 966 (2005) ("The manner in which a tribe chooses to use its property can be controlled by individual tribal members only to the extent that the members participate in the governmental

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processes of the tribe."); *see, e.g.*, *United States v. Jim*, 409 U.S. 80, 82 (1972); *Sizemore v. Brady*, 235 U.S. 441, 446-47 (1914); *Cherokee Trust Funds*, 117 U.S. 288, 308-09 (1886); *Whitefoot v. United States*, 155 Ct. Cl. 127, 134 (Ct. Cl. 1961) (citing *Johnson v. M'Intosh*, 21 U.S. 543 (1823)).

Because Tribal Defendants could only possibly control tribal lands and tribal land revenue through the sovereign acts of the Tribe's governing body, Plaintiffs are seeking relief for an injury allegedly caused by an Indian tribal government. Even though nominally alleged against private persons, such claims fundamentally attack the actions of a sovereign tribal government, and are barred by the Tribe's immunity. *See Imperial Granite*, 940 F.2d at 1271.

3. As *Watt* Confirmed The Association Never Lost The Tribe's Immunity, Even Tribal Defendants' Pre-1984 Actions Governing The Association Are Immune.

Like their post-1984 claims, Plaintiffs' claims based on conduct of the Association leading up to and including its transfer of the property to the United States are also based solely on the actions of an Indian tribal government, and barred by sovereign immunity. Plaintiffs assert, without explanation, that the Association "was not and is not a tribal entity" and is "separate and distinct from the Tribe or any tribe." (SAC, ¶ 59.) This assertion is inconsistent with Plaintiffs' other allegations, not to mention judicially noticeable historical documents. (*Id.*, ¶ 7(b) ("The Association . . . is the governing body of a community of Indians that resided on Table Mountain Rancheria"); *id.*, ¶¶ 7(c) ("The Association was created . . . to operate as the governing body for the Table Mountain Band of Indians"); *id.*, ¶ 8 ("the Association . . . is a legal entity that operates as the governing body for the Tribe"); *id.*, ¶ 67 ("The Association was the governing Board of the Indian Band (Tribe).").

Putting aside Plaintiffs' contradictory allegations, a review of the judicially noticeable *Watt* pleadings and settlement confirms the continuous sovereign existence of the Tribe and Association. To wit, the *Watt* litigation established that, despite the Tribe's purported termination and formation of the Association in its place, "the Secretary of the Interior never lawfully has revoked the status of the Association as a federally-recognized Indian Band having a governing body." (*Watt* Complaint (RFJN, Ex. A), ¶¶ 2 & pp. 36:9-37:8, 39:1-28); *Watt* Stipulation (RFJN, Ex. F), 2:17-19.) Because

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(415) 882-5000

the sovereignty of the Tribe's government remained intact, even in the period between the purported termination and the *Watt* litigation to unwind that termination, the Tribe's immunity protects Tribal Defendants' alleged acts on behalf of the Association. Of course, even if the Tribe's Association somehow lost its sovereignty in 1959—an assertion the Tribe does not concede since *Watt* alleged the purported termination was legally defective—the Association's return of the land to the United States in 1984 (the ultimate act Plaintiffs contend caused their injury) was itself necessarily undertaken as the sovereign government and on behalf of a federally recognized tribe. *Compare Watt* Stipulation (RFJN, Ex F) (dated March 25, 1983) *and* 48 Fed. Reg. 56862, 56864 (Dec. 23, 1983) (RFJN, Ex. H) (listing "Table Mountain Rancheria of California" as a federally recognized tribal government) *with* Grant Deed (dated November 27, 1984) (RFJN, Ex. I).

B. Plaintiffs' Second Attempt To Amend Their Complaint Confirms They Cannot Possibly State A Claim Entitling Them To Relief.

Given Plaintiffs' failure to enunciate a viable claim for relief, the Court emphasized at the hearing on Defendants' previous motions to dismiss that Plaintiffs would get "one more chance" to amend to try to state a coherent theory entitling them to relief. (Transcript of Hearing On Motions To Dismiss, April 4, 2011 (Doc. 45), 36:11-12.) Plaintiffs have failed to do so, confirming that dismissal with prejudice is appropriate, putting aside sovereign immunity's independent bar to Plaintiffs' claims.

A complaint that fails to state a claim upon which relief can be granted must be dismissed. Fed. R. Civ. P. 12(b)(6); *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). In ruling on a 12(b)(6) motion, the Court is not limited to the face of the complaint, but may properly consider limited extrinsic evidence, such as matters subject to judicial notice. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Accordingly, conclusory allegations or legal characterizations disguised as fact allegations may be disregarded. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

1. All Of Plaintiffs' Claims Are Time Barred.

Plaintiffs' Second Amended Complaint confirms they had actual and constructive notice of their claims for decades. Their allegation that Defendants somehow "concealed" from Plaintiffs public court proceedings and public title documents cannot salvage their time-barred claims.

Defenses based on statute of limitations may be raised under Rule 12(b)(6). *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). Specifically, it is well-settled that, where the facts and dates alleged in the complaint indicate the claim is barred by the statute of limitations, a motion to dismiss for failure to state a claim is properly granted. *Conerly v. Westinghouse Electric Corp*., 623 F.2d 117, 119 (9th Cir. 1980) (if the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss).

a) Applicable Statutes Of Limitations

"Because 42 U.S.C. § 1983, contains no specific statute of limitations, federal courts borrow state statutes of limitations for personal injury actions in 1983 suits." *Provencio v. Vazquez*, 258 F.R.D. 626, 631 (E.D. Cal. 2009); *see also Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004). Effective January 1, 2003, the California statute of limitations for assault, battery, and other personal injury claims is two years. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (citing Cal. Civ. Proc. Code § 335.1). Before that it was one year. *Jones*, 393 F.3d at 927 (citing Cal. Civ. Proc. Code § 340.3 (West Supp. 2002)). The applicable statute of limitations for Plaintiffs' Section 1983 claim is two years, or one year if it accrued in 2002 or earlier. *Id.* The statute of limitations for *Bivens* claims is identical. *Van Strum v. Lawn*, 940 F.2d 406, 409-10 (9th Cir. 1991). Takings claims are also subject to the same limitations period. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). The statute of limitations for a state law breach of fiduciary duty claim is four years. Cal. Civ. Proc. Code § 343; *Robertson v. Denton (In re Denton)*, 2009 Bankr. LEXIS 426, at *60 & n.79 (Bankr. D. Ariz. Feb. 17, 2009).

In sum, the longest limitations period for Plaintiffs' federal claims is two years, and the longest limitations period for Plaintiffs' state law claim is four years. Because Plaintiffs filed this

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

lawsuit on July 16, 2010, any state claims accruing before July 16, 2006, and any federal claims accruing before July 16, 2008, are time barred.

b) Plaintiffs' Claims Alleging They Suffered Injury From The Association's Governance Of Rancheria Land Necessarily Accrued By 1984, When The Tribe Assumed Control Of The Rancheria.

Federal law determines when federal civil rights claims accrue. *Knox v. Davis*, 260 F.3d 1009, 1012-13 (9th Cir. 2001). Under federal law, a claim accrues when the plaintiff "knows or has reason to know" of the injury upon which the action rests. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Similarly, under California law, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing." *Velarde v. City of Union City*, 2006 U.S. Dist. LEXIS 82325 (N.D. Cal. Oct. 30, 2006) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110 (1988)).

Plaintiffs' Second Amended Complaint establishes their conspiracy claims accrued at the latest in 1983, when Tribal Defendants "filed a complaint" and allegedly "negotiated a Stipulation for Entry of Judgment" that allegedly "deprived Plaintiffs of the use and enjoyment of the subject land, the water, sanitation systems and the roads." (SAC, ¶¶ 28, 63(c).) Plaintiffs' breach of fiduciary duty claims accrued in 1984 when the Association "conveyed the Trust lands which it held in fee simply to the United States of America." (*Id.*, ¶¶ 33, 71, 72, 85, 86.) Indeed, Plaintiffs admit they have had notice of the alleged deprivations of their rights since the entry of the *Watt* Stipulation: "*For twenty-eight years*, Plaintiffs, their heirs, assigns, executors, administrators and successors, has [sic] expended great sums of their own funds to gain access to services, benefits and programs which the Secretary failed to provide to them."[6] (*Id.*, ¶ 37 (emphasis added).) Plaintiffs have admitted each of their claims accrued decades ago, so they are all time-barred.

[6] To the extent Plaintiffs allege Tribal Defendants breached fiduciary duties after the 1984 transfer of the land to the United States to be held for the Tribe, these claims are barred by the Tribe's immunity, as discussed above. On the other hand, to the extent Plaintiffs are claiming they continued to suffer injury after 1984 from the Association's conduct leading up to and including the 1984 transfer, the "continuing ill effects" of this time-barred conduct do not save Plaintiffs' claims. *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 701

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

c) Plaintiffs' Allegations Establish They Had Notice Of The *Watt* Litigation And The Transfer Of The Trust Land To The Tribe Decades Ago, Preventing Equitable Tolling As A Matter Of Law.

Plaintiffs, realizing that their claims accrued outside the applicable limitations periods, attempt to invoke a bizarre tolling theory to revive their time-barred claims. Plaintiffs' theory is that Defendants somehow conspired to conceal from them the *Watt* litigation, the associated class action settlement, and the publicly recorded transfer of the property from the Association to the United States. (SAC, ¶¶ 63(d), 76, 90.) Plaintiffs' tolling theory fails as a matter of law.

"The burden of alleging facts which would give rise to tolling falls upon the plaintiff." *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993) (citations omitted). Indeed, following the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007), "it is no longer sufficient for a complaint 'to avoid foreclosing possible bases for relief'" by omitting allegations about the statute of limitations; rather "[t]he plaintiff must plead some facts that suggest a right to relief that is beyond the 'speculative level.'" *In re march FIRST Inc.*, 589 F.3d 901, 905 (7th Cir. 2009) (citing *Twombly*, 550 U.S. at 560-63).

For federal claims that borrow state statutes of limitations, like *Bivens* and Section 1983 claims, the forum state's tolling rules apply. *TwoRivers*, 174 F.3d at 992. To plead fraudulent concealment under California law, "the same pleading and proof is required as in fraud cases: the plaintiff must show (1) the substantive elements of fraud, and (2) an excuse for late discovery of the facts."[7] *Community Cause v. Boatwright*, 124 Cal. App. 3d 888, 900 (1981). Merely pleading "the legal conclusion of fraud is insufficient" and details of the fraudulent concealment must be alleged with "specificity." *Id.* at 901. "As for the belated discovery, the complaint must allege (1) when

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(9th Cir. 2009). (*See also* Reply Brief Supporting Tribal Defendants' Motion to Dismiss First Amended Complaint (Doc. 31), filed February 11, 2011, 14:19-17:13.)

[7] The elements of fraud under California law are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996).

the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Id.* (quoting *Baker v. Beech Aircraft Corp.*, 39 Cal. App. 3d 315, 321 (1974)). However, "[t]he doctrine of fraudulent concealment [for tolling the statute of limitations] does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Rita M. v. Roman Catholic Archbishop*, 187 Cal.App.3d 1453, 1460-61 (1986)); *accord Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). "[Defendant]'s silence or passive conduct does not constitute fraudulent concealment" and "[Plaintiffs'] mere ignorance of the cause of action does not, in itself, toll the statute." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987); *Baker*, 39 Cal. App. 3d at 320-321.

Plaintiffs' Second Amended Complaint does not even hint at a plausible theory tolling their time barred claims, much less set forth allegations of equitable tolling with particularity. Most importantly, Plaintiffs assert that "[f]or twenty-eight years" they have sought access "to services, benefits and programs," including "education, adequate housing, prompt and adequate medical services, and water, irrigation and sanitation service" they allegedly lost through the *Watt* settlement. (SAC, ¶¶ 36-37.) Apart from their express admission they were on notice of—and actually sought relief for—their alleged injuries decades ago, Plaintiffs also allege several facts that put them on notice of their alleged injuries. For instance, following the United States' purported termination of the Tribe, Tribal Defendants allegedly "evicted [Plaintiffs] from their homes, ranches, and farms." (*Id.*, ¶ 22.) Plaintiffs' eviction from the property necessarily put them "on notice of a potential claim" that Defendants allegedly deprived them of an interest in that property. *See Rita M.*, 187 Cal. App. 3d at 1460-61. Moreover, in 2003 and 2005, multiple Plaintiffs in this action initiated actions in the Eastern and Northern Districts of California, respectively, alleging they were injured by conduct of the Tribe and its members in connection with the *Watt* settlement. *See Lewis v. Norton* Complaint (RFJN, Ex. J); *Alvarado* Complaint (RFJN Ex. K); *see Rutledge*, 576 F.2d at 250 (plaintiff's expression of suspicion regarding defendant's conduct and his

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

prosecution of past litigation involving similar allegations outside the limitations period precluded him from invoking fraudulent concealment); *Pritkin v. Comerica Bank*, 2009 WL 3857455, at *3 (N.D. Cal. 2009) (public records of prior lawsuits initiated by certain of the 64 plaintiffs were "directly relevant in determining whether Plaintiffs' claims against Comerica are barred by the applicable statute of limitations or are subject to equitable tolling").

Moreover, the proceedings and settlement in the *Watt* litigation were open to the public, included in public court files, and publicly noticed in Fresno County. (SAC, ¶¶ 27-28; *see Watt* Order Certifying Class (RFJN, Ex. L), at 4.) Additionally, the Association's transfer of its land to the United States, and the United States' acceptance of that land in trust for the Tribe, have been recorded and publicly available in the Fresno County Recorder's Office since 1984. (Grant Deed (RFJN, Ex. I).)

Plaintiffs simply fail to allege any of the elements of fraud to show concealment, much less explain when and how they discovered such fraud. *See Baker*, 39 Cal. App. 3d at 321. Nor do Plaintiffs even try to explain how they were not themselves at fault for failing to discover Defendants' conduct, even after allegedly learning that they had lost a host of rights connected to Rancheria land, being evicted from their land, and filing two past lawsuits to vindicate those alleged rights. Because Plaintiffs' admissions and judicially noticeable facts preclude Plaintiffs' tolling theories as a matter of law, Plaintiffs' claims must be dismissed with prejudice.

2. Plaintiffs Fail To State A Federal Claim Because The Constitution Does Not Constrain Private Persons Acting On Behalf Of An Indian Tribal Entity.

Plaintiffs' Second Amended Complaint again attempts to recover from Tribal Defendants on constitutional theories, despite apparently conceding that the Fifth and Fourteenth Amendments do not apply to private or tribal actions. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978); *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394, 1405 (9th Cir. 1987); *Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Specifically, Plaintiffs bring conclusory and legally defective allegations that the Association, despite being the governing body of an Indian

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525 MARKET STREET, 26TH FLOOR
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(415) 882-5000

tribe that was never effectively terminated, is somehow a federal entity. They further advance a conclusory and implausible theory that Tribal Defendants conspired with federal officials in the course of prosecuting the *Watt* litigation to rescind the Tribe's unlawful termination. As these theories fail as a matter of law, Plaintiffs are left with no cognizable federal claim for relief.

a) Plaintiffs' *Bivens* And Takings Claims Fail Because They Do Not And Cannot Allege That Tribal Defendants' Actions On Behalf Of The Tribe Or Association Were Under The Color Of Federal Law.

Plaintiffs' Second and Third Causes of Action appear to attempt to allege federal claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) ("*Bivens*") and under the Fifth Amendment. Both require actions under color of federal law that Plaintiffs do not and cannot allege. To state a *Bivens* claim, "Plaintiff must allege: (1) that a right secured by the Constitution of the United States was violated, and (2) that the alleged violation was committed by a federal actor." *Boney v. Valline*, 597 F. Supp. 2d 1167, 1172 (D. Nev. 2009) (citing *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991)). Similarly, a Fifth Amendment Takings claim only lies against actions by the federal government. *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1406 (9th Cir. 1996).

Courts consider the following factors to determine whether a private actor's conduct makes him a federal actor subject to constitutional liability: (1) sources of funding; (2) the impact of federal regulations on the conduct of the non-federal actor; (3) whether the non-federal actor was performing a function that is traditionally the exclusive prerogative of the federal government; and (4) whether a symbiotic relationship existed between the non-federal actor and the federal government. *Boney*, 597 F. Supp. 2d at 1174 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). Under this rubric, actions under color of tribal law do not support constitutional tort liability, even where the tribal action is funded and regulated by the federal government. *Id.* at 1177; *see also Bressi v. Ford*, 575 F.3d 891, 898 (9th Cir. 2009) (tribal officers who operated a roadblock alongside federal officers and who alerted federal authorities of federal law violations did not

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(415) 882-5000

engage in the "substantial cooperation" required to establish a "symbiotic relationship" with the federal government supporting *Bivens* liability).

If Tribal Defendants acted under any law in the course of allegedly distributing revenue from the land held by the Association and the Tribe (FAC, ¶¶ 17, 18, 27), they acted only under tribal law. *Jim*, 409 U.S. at 82; *Sizemore*, 235 U.S. at 446-47; *Cherokee Trust Funds*, 117 U.S. at 308-09. Indeed, to the extent Tribal Defendants had authority to distribute such revenue, they were not acting under color of federal law but, rather, necessarily acting within the "scope of the tribe's inherent sovereignty" (*Boney*, 597 F. Supp. 2d at 1175), which encompasses its determinations about the use of trust land, the distribution of tribal revenues, and the benefits of tribal membership. *Santa Clara Pueblo*, 436 U.S. at 55; *Lewis v. Norton*, 424 F.3d at 961; *Cohen's Handbook*, § 15.02 Tribal Property 966 (2005). Nothing in Plaintiffs' Second Amended Complaint suggests the United States had a "symbiotic relationship" with the Association, such that it profited from, or exercised plenary control over, the Association's decisions regarding the trust land. Indeed, such a relationship would be inimical to the historic relationship between Indian tribes and the United States, which respects Indian tribes' right to govern themselves without federal interference. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (noting "right of the Indians to govern themselves" and longstanding decisional law that has "consistently guarded the authority of Indian governments over their reservations."); *Santa Clara Pueblo*, 436 U.S. at 55.

Plaintiffs try to salvage this claim by suggesting the Association acted under color of federal law because it was "created by federal law," "operating under the laws of the United States," and was "formed by federal statute." (SAC, ¶¶7(b), 59, 68.) The effort fails. First, as discussed above, the Association was comprised of the government of the Tribe, which never lost its sovereign status. (*Id.*, ¶ 7(c); *Watt* Complaint (RFJN, Ex. A), ¶¶ 2 & pp. 36:9-37:8, 39:1-28; *Watt* Stipulation (RFJN, Ex. F), 2:17-19.) As an Indian tribe, it was necessarily a separate sovereign, predating the United States' government, and not created by federal law. *Santa Clara Pueblo*, 436 U.S. at 56.

Second, even if Plaintiffs were correct that the Association was "created by" federal law, this would not mean its actions would be subject to liability under *Bivens* and the Fifth Amendment.

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(415) 882-5000

Even an entity created under federal law only acts under color of federal law in certain narrow circumstances. *American Bankers Mortgage Co.*, 75 F.3d at 1408. Indeed, an entity created under federal law is only subject to constitutional restrictions if the United States creates "a corporation by special law, for the furtherance of [federal] governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation." *Id.*

Of course, the Association is not a corporation, and was not chartered under any special law. (*See* SAC, ¶ 67 ("The Association was the governing Board of the Indian Band (Tribe)").) Even accepting Plaintiffs' allegations, the Association was not formed to serve the purposes of the federal government, but rather is alleged to operate as the "governing body for the Table Mountain Band of Indians" and to manage land "for the benefit of all of the residents of the Rancheria." (*Id.*, ¶¶ 7(c), 10.) Plaintiffs do not allege, nor would it be plausible to suggest, the United States retained any control whatsoever over the Association, much less "permanent authority" over its governance. *See Williams v. Lee*, 358 U.S. at 223. Because Plaintiffs' allegations establish only that Tribal Defendants acted on behalf of an Indian tribal government and not under color of federal law, Plaintiffs cannot state a claim under *Bivens* or the Fifth Amendment.

b) Plaintiffs Do Not Even Attempt To Allege Facts Suggesting Tribal Defendants Acted Under Color Of State Law.

Section 1983 "permits 'citizen[s]' and 'other person[s] within the jurisdiction' of the United States to seek legal and equitable relief from 'person[s]' who, under *color of state law*, deprive them of federally protected rights." *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 708 (2003) (quoting 42 U.S.C. § 1983) (emphasis added). Plaintiffs merely assert that Tribal Defendants each "acted under *color of law*." (SAC, ¶ 6 (b)-(i) (emphasis added).)

Plaintiffs suggest they can recover under Section 1983 "if the Court finds the Association to be a state quasi-governmental agency." (*Id.*, ¶68.) However, Plaintiffs allege no facts in any way suggesting that Tribal Defendants acted under the color of the law of the State of California, or had any connection to any state law or state entity whatsoever. Nor would such an allegation make

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(415) 882-5000

sense, as "Indian tribes are separate and distinct sovereignties" from states and "actions taken under *color of tribal law* are beyond the reach of § 1983." *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 981-82 (9th Cir. 1983) (emphasis added). Plaintiffs' conclusory allegation that unspecified state action supports Section 1983 relief cannot survive a motion to dismiss. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

c) Plaintiffs' Allegations Do Not Establish Tribal Defendants Conspired With Any Federal Actor.

Not surprisingly, the Supreme Court has emphasized that, in the context of an alleged conspiracy—*i.e.*, an agreement to violate the law—a plaintiff must allege "plausible grounds to infer such an agreement." *Twombly*, 550 U.S. at 556. The reason is clear: "[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the enormous expense of discovery in cases with no "'reasonably founded hope that the discovery process will reveal relevant evidence'" to support a [conspiracy] claim." *Id.* at 559.

Accordingly, Plaintiffs must "allege specific facts" to survive a motion to dismiss a claim predicating constitutional liability on a conspiracy between a private actor and a government official. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). Specifically, to prove such a conspiracy between private parties and the government, "an agreement or 'meeting of the minds' to violate constitutional rights must be shown." *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). The Ninth Circuit has emphasized it "ha[s] been careful to require a substantial degree of cooperation before imposing civil liability for actions by private individuals that impinge on civil rights." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002). Thus, a party's "mere acquiescence" to the injurious conduct is insufficient, as each conspirator "must at least share the general conspiratorial objective." *Fonda*, 707 F.2d at 438. Moreover, a complaint does not state a claim for conspiracy where there is an "obvious alternative explanation" for the allegedly conspiratorial conduct. *Twombly*, 550 U.S. at 567.

The only acts to which Plaintiffs can point in support of this alleged conspiracy are Defendants' filing a complaint and negotiating a settlement. (SAC, ¶¶ 63(a)-(c).) Defendant

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Salazar's only alleged act was to acquiesce to venue in the Northern District of California. (*Id.*, 63(a)-(b).) These bald assertions, devoid of any actual facts alleging intent or agreement, are insufficient to establish Tribal Defendants' knowledge of or involvement in any conspiracy.

Conspicuously absent from the allegations is any specific factual allegation that either establishes Tribal Defendants' involvement in the alleged conspiracy or demonstrates any illegal agreement among Tribal Defendants and the Deputy Salazar. Plaintiffs allege no facts indicating that Deputy Salazar had any involvement in the Tribal Defendants' decision to file the action in the Northern District. *See Degrassi v. Glendora*, 207 F. 3d 636, 647 (9th Cir. 2000) (conspiracy claims alleging City and private defendants conspired in filing a civil action against plaintiff were properly dismissed because plaintiff alleged "no facts indicating that the City defendants had any involvement in the *Andrewses' decision* to file that action" (emphasis in original)). In no way can these allegations overcome the "require[ment] of a substantial degree of cooperation by private individuals that impinge on civil rights." *Franklin,* 312 F.3d at 445. .

Unable to allege an agreement to violate Plaintiffs' purported rights, Plaintiffs ask the Court to infer such an unlawful agreement from Defendants' lawful actions settling *Watt*. Plaintiffs suggest that, because Defendants negotiated a settlement of *Watt*, this "implies Defendants negotiated an agreement which they knew or should have known" injured plaintiffs. (*Id.*, 63(c).) Such allegations, however, in no way "plausibly suggest an entitlement to relief" because, even if they were consistent with a conspiracy, they would be equally consistent with an "obvious alternative explanation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). That alternative explanation, of course, is that neither Tribal Defendants nor the *Watt* defendants had knowledge or intent to deprive plaintiffs of their alleged constitutional rights, but rather simply sought to undo the unlawful and devastating termination which left Indians across California—including themselves and their dependants—destitute and landless. (*Watt* Complaint (RFJN, Ex. A), ¶¶18, 20.)

Apart from any humanitarian motives for settling the *Watt* litigation, the *Watt* defendants also had an undeniable interest in resolving potentially expensive litigation in which they faced exposure to a substantial judgment. (*Watt* Complaint (RFJN, Ex. A), 39-42 (seeking damages of

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

$10,000 per class member for a host of claims, along with payment of all of plaintiffs' attorney fees).) Cooperation between Tribal Defendants and federal officials for that legitimate purpose—settling litigation to unwind unlawful termination—does not support a conspiracy claim. *Iqbal*, 129 S. Ct. at 1951; *see In re Citric Acid Litig.*, 996 F. Supp. 951, 959 (N.D. Cal. 1998); *cf. Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948) (to state a constitutional tort claim based on conspiracy to use a state court proceeding to deprive plaintiff of his property without due process of law, "the state court proceedings must have been a complete nullity"). There also was a general recognition that termination was a federal policy failure, and like Table Mountain, many tribes, through litigation or negotiation and settlement with the government, sought and managed to rescind it. *See, e.g., Duncan v. Andrus*, 517 F. Supp. 1, 3 (N.D. Cal. 1977); *Smith v. United States*, 515 F. Supp. 56, 62 (N.D. Cal. 1978).

Plaintiffs' suggestion that the *Watt* parties somehow conspired to manipulate venue of the action is even more implausible. (SAC, ¶ 63.) Indeed, it defies common sense to speculate that the *Watt* parties would conceive that laying venue in the Northern District would somehow conceal the public court proceedings from Plaintiffs. Such a scheme is especially implausible given that the Federal Rules required the Court to provide adequate notice of the settlement, and that the Court in fact ordered notice of the settlement "in a newspaper of general circulation published in the vicinity of . . . Table Mountain Rancheria[] in Fresno County California, three times at weekly intervals." (*Watt* Order Certifying Class (RFJN, Ex.L), at 4.) The more plausible explanation is that the Northern District was a convenient forum for the *Watt* plaintiffs, whose attorneys' offices were located in Oakland (*Watt* Stipulation (RFJN, Ex. F), 1), and for the United States Attorney, which had experience handling unlawful termination cases out of its San Francisco office.[8] *See, e.g.*, *Duncan*, 517 F. Supp. 1 (N.D. Cal. 1977); *Smith*, 515 F. Supp. 56 (N.D. Cal. 1978). Plaintiffs'

[8] To be sure, Plaintiffs fail to allege facts establishing venue in the Northern District was objectionable, as they do not allege where the *Watt* Plaintiffs resided. A single *Watt* Plaintiff residing anywhere in the Northern District would appear to make that district a proper venue. 28 U.S.C. §§ 1391(e)(3), 1402(a)(1).

conclusory allegations that the *Watt* litigation constituted a conspiracy do not subject the conduct of Tribal Defendants to constitutional scrutiny, and simply present no plausible basis for relief.

d) Plaintiffs Fail To Allege Any Interest Protectable By The Fifth Amendment.

Even if a decades-stale takings claim was possible against private individuals governing an Indian tribal entity, Plaintiffs simply fail to allege a constitutionally protectable interest in Rancheria lands. Plaintiffs do not allege that they owned Rancheria lands at any time or that they otherwise had a property interest recognized under United States, California, Tribal, or any other law. Plaintiffs variously suggest, without explanation, that they were "beneficiaries of the Trust land," that they had "full use and enjoyment of Trust land," and that they were "residents of [sic] Rancheria" (SAC, ¶¶ 58, 62, 70, 84.)

Plaintiffs' alleged "right to use [tribal] land is, however, the property of the band, tribe, or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty." *Whitefoot v. United States*, 155 Ct. Cl. 127, 134 (Ct. Cl. 1961) (*Johnson v. M'Intosh*, 21 U.S. 543 (1823)); *Cohen's Handbook*, § 15.02 Tribal Property 966 (2005). Simple occupation or use of tribal lands does not support a takings claim unless Congress by treaty or other agreement has declared that the party seeking compensation has the right to hold the lands permanently. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955) (no takings claim lay where Indians alleged their "tribal predecessors have continually claimed, occupied and used the land from time immemorial"). Because Plaintiffs can point to no treaty, act of Congress, or other source of a vested property right in the Tribe's Rancheria lands, they cannot state a claim for compensation for the loss of their alleged interest.

3. Plaintiffs Do Not And Cannot Allege A Breach Of Fiduciary Duty Claim Against Tribal Defendants, Who Have No Fiduciary Duty To Plaintiffs As A Matter Of Law.

Plaintiffs' breach of fiduciary duty claim fails because they cannot allege any law, agreement, or relationship with Tribal Defendants giving rise to a fiduciary duty respecting Plaintiffs' vague interest in Rancheria property. Under California law, to establish a cause of action

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

for breach of fiduciary duty, a plaintiff must demonstrate: "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damages."[9] *Benasra v. Mitchell Silberberg & Knupp LLP*, 123 Cal. App. 4th 1179, 1183 (2004). "There are two kinds of fiduciary duties—those imposed by law and those undertaken by agreement." *Gab Bus. Servs. v. Lindsey & Newsom Claim Servs.*, 83 Cal. App. 4th 409, 416 (2000). Thus, absent a "recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client," a person only owes a fiduciary duty where he "knowingly undertake[s] to act on behalf and for the benefit of another." *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621, 631-32 (2005). Indeed, California courts have refused to extend fiduciary obligations to relationships lacking such an affirmative duty. *Id.* at 633 (collecting "numerous cases" rejecting fiduciary relationships in other contexts).

Consistent with California law, homeowners associations only possess fiduciary duties imposed by statute and only in accordance with a specific written instrument defining their obligations. *Cohen v. Kite Hill Community Association*, 142 Cal. App. 3d 642, 646-47 (1983) (the determination of whether homeowners' association owed a duty to its members and whether it breached those duties "must be based on the terms and conditions of the Declaration" incorporated into the deeds of all homes in the tract); *Oakland Raiders*, 131 Cal. App. 4th at 636 (cabining fiduciary duties recognized in *Cohen* to nonprofit corporations formally organized and registered under the California Corporations Code and refusing to extend *Cohen*'s rule to an ordinary nonprofit association); *see* Cal. Corp. Code § 5231 (imposing fiduciary duties on directors of nonprofit corporations formally organized and registered with the Secretary of State under Cal. Corp. Code § 5120); *accord Raven's Cove Townhomes, Inc. v. Knuppe Developmental Co. Inc.*,

[9] Plaintiffs allege their breach of fiduciary duty claims are cognizable under *Bivens* or Section 1983, presumably assuming Tribal Defendants' alleged breaches violate federal law. However, there does not appear to be any federal claim for breach of fiduciary duty, save those fiduciary duty claims expressly created under particular statutes. *See, e.g.*, 29 U.S.C. § 1109 (creating claim for breach of fiduciary duty by ERISA fiduciary). The Rancheria Act also created no fiduciary duty. Rather, it created a single administrative remedy for those claiming they were wrongfully excluded from a distribution plan. CRA, §§ 2(a), 10(a); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (RFJN, Ex. E).

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

114 Cal. App. 3d 783, 799 (1981) (homeowner's association owed fiduciary duties based on its formal registration as a California nonprofit corporation under Cal. Corp. Code. § 5231).

Plaintiffs fail to identify any relationship between Tribal Defendants and Plaintiffs that California recognizes as a fiduciary relationship. Plaintiffs simply suggest, without explanation, that Plaintiffs owe a fiduciary duty because they allegedly comprised the "governing board of the Association" or alternatively because the Association is a "legal entity" and, in some unspecified respect, like a "homeowner association." (SAC, ¶¶ 69, 82.) Simply governing an unincorporated association does not give rise to fiduciary duties. *Oakland Raiders*, 131 Cal. App. 4th at 636. Nor does an Indian tribal government owe fiduciary duties it has not expressly assumed. *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp 740, 741 (D.S.D 1995) (fiduciary duties of an Indian tribe must be interpreted in a tribal forum under tribal law, and a federal court lacks jurisdiction to consider whether a tribe has breached such a duty). Nor do Plaintiffs allege the Association or Tribe actually *is* a homeowners association or that it was incorporated and registered under the California nonprofit corporation statute. *See id.*; Corp. Code § 5231.

Plaintiffs also assert, without explanation, that *Watt* imposed a fiduciary relationship on Tribal Defendants (SAC, ¶ 41), apparently ignoring the Court's requirement that Plaintiffs "identify the operative language of the Watt Judgment" that creates a fiduciary relationship. (Order at 11:17-18.) Of course, the Court need not and should not accept Plaintiffs' legal conclusions about, or characterization of, the language upon which it relies from the *Watt* Stipulation. *Sprewell*, 266 F.3d at 988; *see Parrino*, 146 F.3d at 706.

A review of the *Watt* Stipulation reveals it imposed just one duty on any named plaintiff in *Watt*: it required the Association to convey its Rancheria lands to the United States to be held in trust for the Tribe. (*Watt* Stipulation (RFJN Ex. F), 3:14-18.) The Association complied. (*Watt* Deed (RFJN Ex. I), 1.) Notably absent from the *Watt* Stipulation and from the Rancheria Act is any language imposing any duty on the class representatives—or on the Association, the Tribe, or anyone else, for that matter—to allocate trust land revenue or land-related benefits to anyone, let alone persons the United States did not administratively select to participate in the distribution plan

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525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

of the Table Mountain Rancheria under the Rancheria Act of 1958. CRA, §§ 2(a), 10(a); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (RFJN, Ex. E). Such a duty would have been inimical to the very purpose and effect of *Watt*, namely, to restore to the Tribe its sovereign rights and powers, which necessarily include the right to determine its own members, and control and distribute its assets as it determines is in the best interest of those members. *Alvarado*, 509 F.3d at 1018 (*Watt* Stipulation did not "determine[] the *Watt* plaintiffs' membership in a tribe simply because it made findings regarding the plaintiffs' Indian status" (citing *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005))); *see Cohen's Handbook*, § 15.02 Tribal Property 966 (2005). Because the *Watt* Stipulation imposes no duties on Tribal Defendants to share trust land revenue with Plaintiffs, Plaintiffs' Second Amended Complaint fails to state—and cannot be amended again to state—a claim for breach of fiduciary duty. *See Parrino*, 146 F.3d at 706.

V. CONCLUSION

For all of the foregoing reasons, the Tribe respectfully asks this Court to bring this case to an end, and dismiss Plaintiffs' Second Amended Complaint with prejudice, without further leave to amend.

Dated: June 1, 2011

SNR DENTON US LLP

By: /s/ Paula M. Yost
Paula M. Yost
Ian R. Barker
Jessica Laughlin

Attorneys for Defendants
RAY BARNES, MARIAN BURROUGH (erroneously sued as "MARIAN BURROUGHS"), IVADELLE CASTRO (erroneously sued as "IVDELLE CASTRO"), LEWIS BARNES, WILLIAM WALKER, AARON JONES, CAROLYN WALKER, TWILA BURROUGH (erroneously sued as "TWILA BURROUGHS"), and LORI CASTRO (erroneously sued as "Lorie Jones Castro")

SNR DENTON US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

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