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UNITED STATES DISTRICT COURT

FOR EASTERN DISTRICT OF CALIFORNIA

CLIFFORD M. LEWIS, et al., Plaintiffs, v. KEN SALAZAR, et al Defendants.	CASE NO. 10-CV-01281 OWW DLB HON. OLIVER W. WANGER UNITED STATES DISTRICT JUDGE PLAINTIFF'S OPPOSITION TO TRIBAL DEFENDANTS MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES Date: August 1, 2011 Time: 10 a.m. Place: Courtroom 3

TO ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 1, 2011 at 10:00 a.m. in Courtroom 3 of the abovementioned court, Plaintiffs will and do oppose Defendants Ray Barnes, Marian Burrough, Ivdelle Castro. Irene Lewis, Lewis Barnes, William Walker, Aaron Jones; Carolyn Walker and Twila Burrough's Motion to Dismiss.[1] This Opposition will be based on this Notice, the Memorandum of Points and Authorities attached hereto, and any other evidence, written or oral, presented at the hearing on this matter.

Dated: July 11, 2011

/s/
Richard Hamlish
Attorney for Plaintiffs

[1] Defendants have chosen to identify themselves as "Tribal Defendants." Plaintiffs have sued these persons as individuals and not as members of any tribe. Plaintiffs will use the same terminology as Defendants but that is not any admission that Plaintiffs are suing the Tribe or any of its officials or members in their official capacity.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs refer to and by that reference, incorporate "PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS BY SALAZAR; MEMORANDUM OF POINTS AND AUTHORITIES" which was being filed concurrently with this Opposition. Many of the arguments and citations can be cross-referenced and used as to all Defendants in this matter. Plaintiffs refer to and incorporate by that reference the exhibits submits by Defendant with his motion.

Plaintiffs reiterate that they are not attempting to state a cause of action against the Table Mountain Band of Indians (hereinafter "Tribe"). The Defendants in this matter are the named Defendants in the captions and in ¶¶6.a through 6.i of the Second Amended Complaint.

The essence and basic claim of Plaintiffs is now admitted by Defendants in their moving papers. Therefore, there is no is as to what type of entity the Association is. Defendants state: "Upon distribution, both to the individual and ***a private association*** created to hold communal land (the "Association") . . ." (emphasis added) (Defendants' moving papers at Page 4:5-6) The Association was a private association not a tribal entity and not the Tribe.

Defendants argue that Plaintiffs have made contradictory arguments while it is Defendants who are making contradictory statements. Plaintiffs' statements like: "The Association was not and is not a tribal entity" and that "the Association . . . is the governing body of a community of Indians that resided on . . ." or that "the Association . . . is the legal entity that operates as the the governing body for the tribe" are not contradictory. These statements are not contradictory in that the Association is "a private association created to hold communal land." The Table Mountain Association (hereinafter "Association") is a statutory mandated legal entity that was created by Congress for the purpose of receiving the real property and the community water and sanitation systems at Table Mountain Rancheria. The Association's obligation was to hold and manage the property for the benefit of the community. The Association was not intended to be an Indian organization; it was intended to be an entity to oversee the land that was not distributed in 1958 and oversee and manage the water and sanitation systems. There is nothing contradictory about those statements.

Because the Association is separate and distinct from the Tribe, it is not entitled to sovereign immunity. The Association is not an Indian entity and is not a sovereign nation. The Association is a nonprofit association and has no further protection than any other nonprofit association.

The Association's members ***unlawfully*** and contrary to the Articles of Association of the Association, transferred the property of the Association to the United States to be held in trust for the Tribe. Although the dissolution of the Association was not, in itself, unlawful, the distribution of the assets was unlawful and not authorized by the Articles. The members of the Association that govern the Tribe are not entitled to any greater immunities than any member of any other board of directors of any other nonprofit association would enjoy.

Pursuant to the doctrine of continuing violations, the statute of limitations has not run. Defendants acted and are acting under color of law in that the Association is an entity created by federal law and Defendants are or should be carrying out the mandate of a federal statute. Defendants acted in concert with the Secretary; private actors who act in concert with public officials to deprive another of their rights, are acting under color of law. As with any other persons who take on a position of trust as to the members of the entity, Defendants had a fiduciary duty to protect the land and the water and sanitation systems.

DEFENDANTS HAVE STATED A CAUSE OF ACTION PURSUANT TO THE ACT OF 1916 AND ANY PRIOR OR SUBSEQUENT TREATIES, STATUTUES AND/OR JUDGMENTS BETWEEN THE RESIDENTS OF TABLE MOUNTAIN RANCHERIA AND THE UNITED STATES

> "[B]ecause § 1983 [Bivens] generally supplies a remedy for the vindication of rights secured by federal statutes[,] [o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983 [Bivens]." (citation omitted)). Section 1983 would likely provide a cause of action for damages in the case of a treaty violation in the same manner that §1983 [Bivens] provides a cause of action for remedying a statutory violation. (citation omitted) [A]n unambiguously conferred right phrased in terms of the person benefitted is essential before a statute — and by extension, a treaty having the force of federal law — may support a cause of action under § 1983 [Bivens].") **Mora v. New York** 524 F.3d 183, fn. 23 (2nd Cir. 2008)

Plaintiffs have stated a cause of action against Defendants in that the Act of 1916, the Act of 1958 and the Watts Stipulation are all similar to and synonymous to a treaty in that each of the acts confer a right to the Defendants and/or their ancestors. Plaintiffs [ancestors] were intended beneficiaries of the the aforementioned judgments, stipulations, statutes and treaties and as such beneficiaries, Defendants have standing to sue. **Mora supra**. also support the Plaintiffs' claim that this Court has subject matter jurisdiction.

THE IMPERIAL GRANITE CASE HAS NO APPLICATION TO THE CASE AT BAR.

Defendants contend that the holding in **Imperial Granite Corp. v. Pala Band of Indians**, 940 F.2d 1269 (9th Cir. 1991) bars this action. Defendants are wrong. **Imperial Granite** is easily distinguishable based solely on the parties to the action. This action does not name the Tribe as a defendant while in **Imperial Granite**, the tribe itself was a defendant. This action does not name any member of the Tribe as a defendant in their official capacity while **Imperial Granite** names each member in their official capacity. In the case at bar, every defendant is sued in their individual capacity.

The argument that Plaintiffs predicate their claims on the Tribal Defendants' sovereign and immune acts is without merit. Defendants had better read the Second Amended Complaint again; the acts complained of are not those of members of a sovereign entity. The Association is not a sovereign entity; it is a nonprofit association created by an act of the United States to oversee and govern the community lands at Table Mountain and manage the water and sanitation systems.

THE TABLE MOUNTAIN ASSOCIATION IS NOT AN INDIAN ORGANIZATION

Defendants argue that the Association is not only an Indian organization but it is the same entity as the Tribe, i.e. the two are one and the same. To the contrary, the Articles of Association of Nonprofit Association (hereinafter "Articles") for the Association specifically states: ". . . as a nonprofit organization for the purpose of holding and managing the following described property conveyed to the association by the United States . . ." (see Docket No. 52-2, page 1 of

7)[2] The Association was created pursuant to a federal statute. [**72 Stat. 619**] There is no mention anywhere in the Articles or the Statute that the Association is or should be an Indian organization. The Association's membership was limited to Table Mountain Distributees. However, a Distributee had the right to sell or otherwise transfer his/her property and the new owner [grantee] would become a member of the Association.(see Docket No. 52-2, page 2 of 7, ¶6) There is no limitation that the new owner [grantee] must be an Indian. Thus, if the original owners had sold their property to non-Indians, each of those non-Indians would have membership in the Association. However, absent some Indian heritage, the non-Indian property owners could not be members of the Tribe. Hence the Tribe and the Association are two separate and distinct organizations, one of which is distinctively Indian and the other non-Indian.

Therefore, there is no evidence that the Association is an Indian entity and subject to or entitled to special treatment under the laws of the United States. It is a nonprofit association subject to the same laws as any other nonprofit association.

THE TRANSFER OF THE ASSOCIATION PROPERTY TO THE UNITED STATES WAS NOT AUTHORIZED AND WAS UNLAWFUL

Defendants contend that the Association, pursuant to the Watt Stipulation, transferred the property of the Association to the United States to be held in trust for the Tribe. Defendants cite a Grant Deed dated November 27, 1984 as proof that the Association granted to the United States in trust for the Tribe. (see Docket No. 51-2, Page 20 of 40) Initially, the Watt Stipulation states in clear and unambiguous language: "Within one year of the date of the entry of judgment herein, ***plaintiff Band*** shall convey to the United States . . ." (emphasis added) (Docket No 51-2, Page 4 at line 14) The "plaintiff Band" could not convey the land specified in the Stipulation and/or the Grant Deed because it did not hold title to that land; the Association, not the Tribe, held title. The Watt Stipulation does not authorize the Association to convey any land to anyone at any

[2] It is difficult to refer to exhibits offered by Defendants in that they are not Bates stamped. Therefore, Plaintiffs will use the Docket Number and page number in the Docket Number.

time.[3] This transfer set forth in the Grant Deed was not a legal transfer in that neither the Articles or the statute provide for such a transfer and the "plaintiff Band" had no authority to transfer land that it did not own.

The Articles specifically address this issue. "If title to association property is to be taken in the name of trustees, the President and Secretary-Treasurer shall be designated to act in that capacity on behalf of the association." (see Docket No. 52-2 page 3, ¶10) The Association property was not taken in the name of any trustees and the Articles do not provide for the transfer of the Association property into a trust for the benefit of any third party. The Articles provide that the Association may be dissolved and upon that dissolution, the Association property shall be distributed to the shareholders in proportion to their interests. (see Docket No. 52-2 page 4,, ¶12)

The Articles also provide that the Association property may be "otherwise conveyed." (see Docket No. 52-2 page 4, ¶11) However, that language implies that when only a tract or lot is sold or otherwise conveyed, not the entire property of the Association. ¶11 provides that the new owner may become a member of the Association and be issued stock in the Association representing his interest in the balance of the association property. The new owner is not required to be Indian.

The Articles do not provide for the transfer of the entire property except by dissolution of the Association.(see Docket No. 52-2 page 4, ¶12)

There is no record nor any evidence that the Association property was taken in trust by the Association. There is no record or evidence that there was a meeting where 2/3 of the membership of the Association voted to dissolve the Association or incorporate the Association into the Tribe. There is no record or evidence that there was a meeting where 2/3 of the membership of the Association voted to convey title of the Association property to the United States to be held in trust for the Tribe.

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[3] The Association is the first named plaintiff in the Watt case but other than in the caption, it is never mentioned again.

The Grant Deed (see Docket No. 51.2, Page 20) was unlawfully executed and is void on its face. Additionally, the Acceptance of Conveyance dated September 12, 1984, is void in that it accepts property unlawfully granted to it.[4] Evidence of an agreement between the Tribal Defendants and the government is the Grant Deed (see Docket No. 51-2, Page 20) and the Acceptance of Conveyance (see Docket No. 51-2 page 21). Pursuant to an agreement between the Defendants, Defendants executed the Grant Deed and the government accepted the property. Both the granting of the property and the acceptance of the property were unlawful in that Congress did not give the Association authority to transfer the property to the government in trust for a third party, the Tribe. The Articles did not give the Association authority to transfer the property to the government in trust for a third party, the Tribe. Congress did not authorize the Government to accept any land to be held in trust for an Indian tribe.

Based on the foregoing, the Association still owns the Association property and all revenues which have been produced by that property and all expenses attributable to the property are assets/liabilities of the Association not the Tribe. Plaintiffs by virtue of their residency on Table Mountain Rancheria are entitled to their pro-rata share of those assets/liabilities.

STATUTE OF LIMITATIONS HAS NOT RUN

As stated in a prior briefing, in **National Railroad Passenger Corp. v. Morgan**, 536 U.S. 101 (2002) the Supreme Court substantially limited the continuing violations doctrine, holding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." The **Morgan** court noted however, that it had no occasion to address the question of whether the continuing violations doctrine remained viable in the context of what the court referred to as "pattern or practice claims." **Id., at p. 123 fn. 9** However, several circuits have held that where the claim of a continuing violation alleges a pattern and/or

[4] The execution by the Secretary of the Acceptance of Conveyance is an agency action which triggers **5 U.S.C. §702** which provides this Court with subject matter jurisdiction and also waives the sovereign immunity of the United States.

practice, the statute of limitations is tolled.[5] Plaintiff argues that the continuing violations doctrine applies to the case at bar because the claims are based on an ongoing policy and/or practice and pattern of conduct by Defendants, the Association and the government.

The general rule is that a cause of action is not available for acts taken outside the statutory time period where plaintiff knew or should have known the conduct was unlawful when the acts occurred. The key is "when did the plaintiff know or should have known." In the case at bar, Defendants contend that Plaintiffs knew of the Watts Stipulation in 1983. For the following reasons, Plaintiffs did not know of the violations until approximately 2010.[6]

Despite the fact that all of the Plaintiffs [in the Watt case] resided in the Eastern District and the Department of the Interior which was charged with misconduct was located in the Eastern District, Defendants chose to file the action in the Northern District rather than the Eastern District. The only proper venue was the Eastern District The only reason the 1983 Watt case was filed in the Northern District was an attempt (which was successful) to make sure the Plaintiffs in this matter would not become aware of the matter. Defendants and the government filed the Watt case in the Northern District for the sole purpose of hiding the case and its final stipulation from these Plaintiffs. Many of these Plaintiffs did not learn of the Watts Stipulation until 2005 which is within the applicable statute of limitations. Many of these Plaintiffs did not learn of the Watt Stipulation until 2010 when told by their counsel.

Additionally, Plaintiffs argue that the statute of limitations is an affirmative defense that Plaintiffs do not have to anticipate and overcome in their complaint.

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[5] **Tademy v. Union Pac. Corp**., 614 F.3d 1132, 1154 (10th Cir. 2008); **Hunter v. Sec. of U.S. Army**, 565 F.3d 986 (6th Cir. 2009); **Carpinteria Valley Farms v. City of Santa Barbara**, 334 F.3d 796, 803 fn.2 (9th Cir. 2003);Walsh v. **National Computer Systems, Inc**, 332 F.3d 1150, 1157 (8th Cir. 2003)

[6] Defendants contend there was no violation. The issue was not discovered until an attorney reviewed the documents in very great detail and understood the documents. After that examination in 2010, the unlawful conduct and transfer of property was exposed.

DEFENDANTS ACTED UNDER COLOR OF LAW

In order to state a cause of action under **42 U.S.C. §1983** and/or **Bivens v. Six Unknown Agents**, 403 U.S. 388 (1971), , the complaint must allege that Defendants were acting under color of law. If the Defendants who acted under color of law were state actors, **§1983** is applicable; if Defendants who acted under color of law were federal actors, **Bivens** is applicable. In the case at bar, these Defendants acted both as state actors and federal actors. Because the operative and enabling statute is a federal statute , **Bivens** is applicable. In addition, the breach of a fiduciary duty is a state law claim and any action filed alleging this violation triggers **§1983**. (see **Mora supra**.)

Defendants acted and are acting under color of law in that the Association is a quasi-governmental entity created by federal law and Defendants are or should be carrying out the mandate of a federal statute. Absent the enactment of **72 Stat. 619**, there is no legal basis for the Association; it was created by federal law and [should have been] operating under the guidelines set forth in the federal law. It is [or should be] operating in concert with the Secretary.

Private actors can be considered [government] actors if they are "willful participant[s] in joint action with the [government] or its agents . . . Private persons, jointly engaged with [government] officials in the challenged action, are acting `under color' of law for purposes of [Bivens] actions." **Dennis v. Sparks**, 449 U.S. 24, 27 (1980) "The involvement of a [government] official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's [constitutional rights], whether or not the actions of the [government official] were officially authorized, or unlawful." **Adickes v. S.H. Kress and Co.**, 398 U.S. 144, 152 (1970) "Private persons, jointly engaged with [government] officials in the prohibited action, are acting `under color' of law for purposes of [Bivens]."**United States v. Price**, 383 U.S. 787, 794 (1966)

Thus under either the doctrine of operating pursuant to federal statute or acting in concert with a federal official, Defendants are both state and federal actors who acted under color of law.

DEFENDANTS ARE NOT ENTITLED TO IMMUNITY

Defendants have asserted a tribal immunity which does not apply here because the Tribe is not a defendant. However, Defendants may attempt to assert an entitlement to qualified immunity in that Defendants are being sued in their individual capacity. There is no reason to go through a lengthy analysis of whether Defendants are entitled to qualified immunity based on their conduct because the general rule is that private parties who act in concert with public officials are not entitled to qualified immunity. "The district court assumed arguendo that a Bivens suit can be brought against a non-governmental party such as PRC and held that PRC is entitled to qualified immunity. Although the district court was correct in its assumption that in this circuit a Bivens suit may be brought against a private party, provided the defendants are engaged in federal action,(citations omitted), we hold that qualified immunity is not available as a defense to private parties in a Bivens suit." **F.E. Trotter Inc. v. Watkins**, 869 F.2d 1312, 1318 (9th Cir. 1989) "The availability of qualified immunity to private persons who act under color of law is no longer an open question. It is settled. Private persons cannot assert it." **Jordan v. Fox, Rothschild, O'Brien & Frankel**, 20 F.3d 1250, 1276 (3d Cir. 1994).

DEFENDANTS ARE FEDERAL ACTORS AND SUBJECT TO THE FIFTH AMENDMENT

Defendants argue that a Fifth Amendment taking claim can only be asserted against the United States and cites **American Bankers Mortg. v. Fed. Home Loan Mortgage Corp**. 75 f.3d 1401 (9th Cir. 1996) in support of that contention. Unfortunately, Defendants forget to include the second half of the sentence cited. "Because the Fifth Amendment Due Process Clause applies only to the federal government, (citation omitted) Freddie Mac is not restricted by that Clause ***unless it is part of the federal government or its actions constituted federal action***." **Id at 1406** (Emphasis added) Sometimes it helps one's argument to omit an important part of a citation but one must be careful. In this case, Defendants knew that Plaintiffs are alleging state (federal) action by Defendants and that Defendants are federal actors . If Defendants are found to be federal actors, a claim for a Fifth Amendment taking will be actionable.

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DEFENDANTS HAD AND STILL HAVE A FIDUCIARY DUTY TO PLAINITFFS

"The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage." **Pellegrini v. Weiss**, 165 Cal.App.4th 515, 524 (2008).

> "Indeed, in circumstances involving the disposition of corporate assets or corporate dissolution, corporate fiduciaries are held to a standard of `scrupulous good faith in the fiduciary role as guardians of the corporate welfare.' McDaniel, supra, 510 S.W.2d at 758 (trustees of incorporated nonprofit association)(citation omitted) Consistent with this obligation, such fiduciaries cannot exercise their power in order to satisfy their own self-interest. See Emergency Patient Services, Inc. v. Crisp, 602 S.W.2d 26, 28 (Mo.Ct.App. 1980) (directors prohibited from making "any self-serving disposition of [corporate assets] against the interests of the corporation"); Johnson v. Duensing, 351 S.W.2d 27 (Mo. 1961); accord Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264-265 (2d Cir. 1984); Greer Inv. Co. v. Booth, 62 F.2d 321, 325 (10th Cir. 1932) (business trustees must manage assets for benefit of shareholders and not "with an eye to their personal advantage or profits"). Such self-interest is demonstrated when directors or trustees enter into a transaction in order to acquire a benefit not shared by shareholders generally." **Terrydale Liquidating Trust v Barnes**, 611 F. Supp. 1006, 1018 (S.D.N.Y. 1984)

> "[T]he officers and directors of a not-for-profit organization stand in a fiduciary relationship to the members of the association. Fiduciary duties are often held to arise out of relationships in which one party represents, or is reasonably expected to protect, the interests of another. The plaintiffs point out that it is widely recognized that [t]he officers of an association are bound to act for the common interest of all members, should not reap secret profits at the expense of the association, and may be held personally liable for breach of their obligations toward the members of the association." **Association Casualty Insurance Co. v. Allsate Insurance Co.** (S.D.Miss. 7-29-2008)

The first prong of the test is satisfied in that trustees of incorporated nonprofit association are held to a standard of `scrupulous good faith in the fiduciary role as guardians of the association's welfare. The second prong of the test has been satisfied in that Defendants acted in their own self interests to the detriment of the Association. Defendants executed a Grant Deed transferring the property and assets of the Association to the United States and that property and those assets were to be held in trust for Defendants. As stated above, Defendants (acting as the Tribe) did not have title to the property and had no authority to convey the property to the United States. Defendants (acting as members of the Association) did not have any authority to convey the property to the United States to be held in trust for the Tribe. The third prong of the test has been satisfied in that Plaintiffs have suffered damages as a result of Defendants' breach.

The paragraph above shows that Defendants have breached their fiduciary duty and Plaintiffs have suffered damages. However, for purposes of this motion, Plaintiffs are only obligated to plead the breach not prove it. Plaintiffs have sufficiently pleaded the breach of fiduciary duty.

Defendants apparently are arguing that, as a matter of law, Defendants had no fiduciary duty to Plaintiffs. After reviewing the cases cited above, there is no doubt that the directors/board members/executives of a nonprofit association have a fiduciary duty to the members and beneficiaries of the association. The Defendants in this action are directors/board members/executives of a nonprofit association and Plaintiffs are part of the community of Indians who are the beneficiaries of the Association.

As with any other persons who take on a position of trust to the members of an entity, Defendants had a fiduciary duty to protect the land and the water and sanitation systems from exploitation by Defendants for their own benefit.

CONCLUSION

Based on the forgoing, Plaintiffs pray the Court deny Defendants' Motion to Dismiss. In the alternative, if the court finds the Second Amended Complaint does not sufficiently state a particular cause(s) of action, Plaintiffs request leave to amend to cure any defects in the pleadings.

Dated: July 11, 2011

/s/
Richard Hamlish
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury under the laws of the State of California and the United States of America that on July 11, 2011, I electronically filed the foregoing with the United States District Court for the Eastern District of California using the CM/ECF system, which will send notification of such filing to the following:

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Dated: July 11, 2011

/s/
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