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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of Interior; TEJON RANCH CORPORATION, a Delaware corporation; TEJON MOUNTAIN VILLAGE, LLC, a Delaware company; COUNTY OF KERN, CALIFORNIA; and DOES 1 through 100, inclusive,

Defendants,

TEJON RANCH CORPORATION, a Delaware corporation; TEJON MOUNTAIN VILLAGE, LLC, a Delaware company,

Real Parties in Interest.

Case No.: 1:09-cv-01977 OWW SMS

MEMORANDUM IN OPPOSITION TO DEFENDANTKEN SALAZAR'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Date: July 18, 2011
Time: 10:00 a.m.
Court: 3, 7th Floor
Before: Hon. Oliver W. Wanger

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Plaintiffs Kawaiisu Tribe of Tejon ("Tribe") and David Laughing Horse Robinson ("Robinson") (collectively "Kawaiisu" or "Plaintiffs"), submit this Memorandum in Opposition to Defendant Ken Salazar's ("Salazar" or "Defendant") Motion to Dismiss Plaintiff's Second Amended Complaint ("Motion").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Kawaiisu brought this lawsuit after discovery that the Tejon Ranch Defendants had damaged, destroyed and desecrated the graves of the Kawaiisu's ancestors as well as other cultural and religious items in connection with their preparation for and development of the Tejon Mountain Village project.

In light of the fact that the pristine and relatively undisturbed land on which Tejon intends to construct this more than 28,000 acre development, containing thousands of homes, commercial enterprises and various hotel, spa, and resort facilities, is land on which the Kawaiisu's ancestors have lived since the beginning of time, which the United States conferred on their tribe both in a ratified treaty and in the establishment of a Indian reservation. Since 1853, this land has been and ***remains today*** an Indian reservation established by Congress for the Kawaiisu's benefit, which has never been terminated. Despite the Kawaiisu's superior rights to this land, which can only be taken away by Congress, the Tejon Defendants claims to own the land and has excluded the Kawaiisu from it in violation of both Federal statutes and Federal common law.

The Kawaiisu turned to the Department of the Interior for assistance to assert their rights, to prevent the Tejon Defendants' from further damaging and desecrating graves of the Kawaiisu's ancestors, cultural and religious items located on the Tejon/Sebastian Indian Reservation by the Tejon Defendants' development of the Kawaiisu land. But Defendant Salazar refuses to provide any assistance to the Kawaiisu. The request relief has been refused notwithstanding the United States' commitment to provide same in the treaty with the Kawaiisu and in violation of Defendant Salazar's fiduciary obligation to the Kawaiisu, all because the Kawaiisu are not on the magic list of Federally Acknowledged Indian tribes.

The Kawaiisu merely seek a declaration of their rights and responsibilities vis-à-vis

Defendant Salazar.

It is undisputed that the Kawaiisu are ***not*** asserting a claim under the Administrative Procedure Act ("APA"). Based on ***very recent*** Ninth Circuit authority, the Court has subject matter jurisdiction over a claim arising under Federal law seeking non-monetary relief, such as the Kawaiisu's free standing claims for declaratory relief. *Veterans for Common Sense v. Shinseki*, __ F.3d __; 2011 U.S. App. LEXIS 9542 (9th Cir. May 10, 2011). In addition, the Kawaiisu's claim can independently be brought under *Ex parte Young*. *Id.*

Based on this binding Ninth Circuit precedent, and since the Kawaiisu's claim arises under Federal law and alleges facts that plausibly entitle them to relief, the Court has subject matter jurisdiction over the Kawaiisu's claim. Accordingly, Salazar's motion must be denied.

II. CLAIM ASSERTED AGAINST SALAZAR

The 2AC asserts a single Claims for Relief against Salazar for declaratory relief. 2AC ¶¶ 114-17. The claim is predicated on the fact that the Kawaiisu ***are*** a federally recognized Indian tribe by virtue of, *inter alia*, the 1849 Treaty With the Utahs entered into with the United States and that was ratified by Congress, 2AC ¶¶ 3, 18-23, Treaty D entered into with the United States in 1851, but which Congress did not ratify, 2AC ¶ 25, an Indian reservation that was established by Congress in 1853 for the Kawaiisu's benefit, and which was resurveyed as late as 1858, on which the Kawaiisu lived at one time on which there are more and which Congress has never disestablished, 2AC ¶¶ 26-28, 29, the receipt of federal benefits, including the issuance of allotments and the establishment of an Indian school. 2AC ¶ 30, and the Federal Government's acknowledgment of the Kawaiisu's inhabitance in and around Kern County for more than half of the 20th century 2AC ¶¶ 30-32.

Despite the Federal Government's recognition of the Kawaiisu as an Indian tribe for over a century, Defendant Salazar refuses to provide any assistance to the Kawaiisu—despite being requested to do so—in the tribe's attempt to protect the tribe's rights, graves of their ancestors and the plethora of sacred sites and cultural artifacts from Defendants Tejon Ranch Corp. and Tejon Mountain Village's ("Tejon Defendants") desecration, that has and will continue to occur if Tejon Defendants are not stopped from constructing an more than 20,000 acre mixed use

development on the Kawaiisu's land, which the Tejon Defendants are poised to do, 2AC ¶¶ 34-37, 39-40, 52-59, 62-80.

Salazar refuses to provide any assistance because the Kawaiisu is not on the list of Federally Acknowledged tribes. 2AC ¶¶ 5, 6, 115.

III. DISCUSSION

A. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Claim

28 USC § 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

"[A] n action arises under federal law if that law creates the cause of action, or if a substantial question of federal law is a necessary element of plaintiff's cause of action." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1383 (9th Cir. Cal. 1988) (internal marks and citations omitted).

Here, the Kawaiisu's claim against Salazar are created by, *inter alia*, the Non Intercourse Act, Congressional actions, statutes as well as the fiduciary obligation that Salazar owes to the Kawaiisu under Federal common law. *See Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975); *see also Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); cert. denied, 503 U.S. 959, (1992) ("it is equally clear that the federal government is not obligated to provide particular services or benefits, nor to undertake any specific fiduciary responsibilities ***in the absence of a specific provision in a treaty, agreement, executive order, or statute***") (emphasis added).

The *Passamaquoddy Tribe* court explained, in relevant part:

> the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act . . . . The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, and ***clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances***.

528 F.2d at 379 (internal marks omitted and emphasis added); *Canadian St. Regis Band of Mohawk Indians v. New York*, 146 F. Supp. 2d 170, 186 (N.D.N.Y 2001); *see also United States v. Santa Fe P. R. Co.*, 314 U.S. 339, 348 (1941).

Moreover, Article 4 of the treaty entered into by the Kawaiisu and the United States, 2AC, the Treaty With the Utahs, states:

> The contracting parties agree that the laws now in force, and such other laws as may be passed, regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the government of the United States, shall be as binding and obligatory upon said Utahs ***as if said laws had been enacted for their sole benefit and protection***.

Kawaiisu RJN, Ex. 1 (emphasis added).

The Supreme Court has "previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citation omitted). Moreover, whereas here, the federal government has entered into a treaty with an Indian tribe or has enacted a statute on its behalf, the Government commits itself to a guardian-ward relationship with that tribe. *See generally Heckman v. United States*, 224 U.S. 413 (1912); *United States v. Kagama*, 118 U.S. 375 (1886). Moreover, "once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease." *Passamaquoddy Tribe*, 528 F.2d at 380. Congress has stated:

> Congress finds that--
>
> > (1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
> >
> > (2) ancillary to that authority, the United States ***has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes***;"
> >
> > (3) Indian tribes ***presently may be recognized by*** Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" ***or by a decision of a United States court***;
> >
> > (4) ***a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress***;

Federally Recognized Indian Tribe List Act of 1994, 103 P.L. 454, 103; 108 Stat. 4791 (1994) (emphasis added).

The claim against Salazar is also inextricably intertwined with the Kawaiisu's claims against the Tejon Defendants because it is in light of these facts and the tribe's history with the United States for which the Kawaiisu seek a declaration of their rights. *See, e.g., Alabama-*

Coushatta Tribe v. United States, 2000 U.S. Claims LEXIS 287, 164-166 (Fed. Cl. June 19, 2000) ("In light of that guarantee, the government may be statutorily obligated to protect the tribe's interests even if it did not actually participate in or assist a third party in the acts that harmed an Indian tribe.").

The Kawaiisu's claims against the Tejon Defendants arise from federal statutory law (e.g. 25 U.S.C. § 177), Federal common law (e.g. the federal restriction against the extinguishment of title to the land of Indian tribes or of the right of occupancy of said Indian tribes, except by action of the United States, and the fiduciary relationship between the United States and Indian tribes), and the Treaty With the Utahs. 2AC ¶ 14. Each of these raise a substantial question of federal law that is a necessary element of Plaintiffs' claims. As the above allegations demonstrate, and as more fully explained in the Kawaiisu's opposition to the Tejon Defendants' Motion to Dismiss, the 2AC alleges sufficient facts to state a cause of action under the Non Intercourse Act. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("To establish a prima facie case based on a violation of the Act, a plaintiff must show that (1) it is an Indian tribe, (2) the land is tribal land, (3) the United States has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned.").

Accordingly, the Court has subject matter jurisdiction over the Kawaiisu's request for declaratory relief.[1] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667 (1974); *Cayuga Indian Nation v. Village of Union Springs*, 293 F.Supp. 2d 183, 190 (N.D.N.Y 2003).

B. Sovereign Immunity Does Not Bar Plaintiffs Non-APA Claim Seeking Non-Monetary Relief

The Kawaiisu agree with Salazar about one thing: the cause of action directed against him is **not** an APA claim. Nonetheless, the United States has waived its sovereign immunity for this claim pursuant to the *second sentence* of Section 702.

Although, as explained below, there was previously thought to be an "inter-circuit split"

[1] Thus, it is irrelevant that the Declaratory Judgment Act is not an independent grant of subject matter jurisdiction.

on this issue, and although this court previously found otherwise, the Ninth Circuit has very recently reconciled the apparent conflicting decisions and re-affirmed prior Ninth Circuit law with which this Court took issue.

1. The United States Has Waived Sovereign Immunity to Plaintiffs Non-APA Claim Because they Seek Non-Monetary Relief

By seeking declaratory relief against the Salazar, in his official capacity as Secretary of the Department of the Interior, Plaintiffs "have brought suit against the federal government." *Veterans for Common Sense v. Shinseki*, __ F.3d __; 2011 U.S. App. LEXIS 9542, *47 (9th Cir. Cal. May 10, 2011).

"[I]t is well-established that 'the United States cannot be lawfully sued without its consent in any case.'" *Veterans for Common Sense*, at *47 (quoting *United States v. Lee*, 106 U.S. 196, 205 (1882)). However, "sovereign immunity does not bar adjudication" of Plaintiffs' claims here against Salazar "because Congress has expressly waived such immunity." *Veterans for Common Sense*, at *48 (reversing District Court in relevant part and holding that the Plaintiffs' non-APA claims brought against the Department of Veterans Affairs and its agencies were not barred by sovereign immunity).

The second sentence of § 702 of the APA states:

> An action in a court of the United States ***seeking relief other than money damages*** and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added). "As the Supreme Court has held with regard to this provision, 'complaints [for] declaratory and injunctive relief [are] certainly not actions for money damages.'" *Veterans for Common Sense*, at *48 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988)). Accordingly, *Veterans for Common Sense* held that the Plaintiffs' "prayers for declaratory relief and an injunction thus fit squarely within this waiver." *Veterans for Common Sense*, at *48.

Veterans for Common Sense explained its holding and rejected the District Court's contrary ruling,[2] thusly:

> The district court nonetheless found that "waiver of sovereign immunity under § 702 of the APA is limited by § 704." Section 704 states, in relevant part, 'Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The district court reasoned that because the delays Veterans challenge are neither made reviewable by any statute nor a "final agency action," even their constitutional claims fall outside of § 702's waiver of sovereign immunity. This was error. Whether the challenged delays constitute "final agency action" is an inquiry that is relevant to Veterans's claims under the APA itself, which are addressed below. But ***§ 704 in no way limits § 702's broad waiver of sovereign immunity with respect to suits for injunctive relief against the federal government — suits for which the APA itself is not the cause of action***.

Id. at *48-49 (emphasis added).[3]

The Complaint here asserts a single cause of action against Salazar that prays for "declaratory relief." *See* 2AC, ¶¶ 114-117. The APA itself is not the basis for any of these claims. Thus, the United States has waived sovereign immunity for all of Plaintiffs claims. *Veterans for Common Sense*, at *48.

2. This Court is Bound to Follow *Veterans for Common Sense* Notwithstanding Its Ruling in *Delano Farms* to the Contrary.

Plaintiffs' counsel would normally leave it at that, but in this case a further word is in order, as this Court has previously ruled otherwise.

In *Delano Farms Co. v. Cal. Table Grape Comm'n*, 2009 U.S. Dist. LEXIS 100093 (E.D. Cal. Oct. 27, 2009), his Honor rejected the argument and various Ninth Circuit cases cited by the Plaintiff "for the proposition that APA § 702 waives sovereign immunity for any equitable civil action invoking a district court's federal question jurisdiction." *Id*. at *63. His Honor found that

---

[2] As discussed in more detail below, the ruling and reasoning of the District Court that was rejected by *Veterans for Common Sense* is all but identical this Court's ruling and reasoning on this issue in *Delano Farms Co. v. Cal. Table Grape Comm'n*, 2009 U.S. Dist. LEXIS 100093 (E.D. Cal. Oct. 27, 2009).

[3] As noted by *Veterans for Common Sense*, the plaintiffs there also asserted a claim against the VA under the APA. *Id*. The Court held that "given the provisions of the APA [5 U.S.C. § 706(1)] and controlling Supreme Court law, the district court properly denied Veterans's APA challenge[s]. . ." *Id*. at *59. As pointed out by Salazar in his motion, and as acknowledged above, the Second Amended Complaint ***does not*** assert any claim directly under the APA. However, in the event that the Court declines to follow *Veterans for Common Sense* and instead holds that the claims asserted in the 2AC are barred by sovereign immunity, Plaintiffs believe that they can adequately allege an APA claim, as described below regarding leave to amend.

"Supreme Court precedent . . . make it clear that § 702's waiver is conditioned upon overcoming § 701 and 704's requirements." *Id.*

Although this Court's reasoning in *Delano Farms* is reasonable, the Ninth Circuit has rejected it in *Veterans for Common Sense*. "The first and second sentences of § 702 play quite different roles, each one significant." *Veterans for Common Sense*, at *52. "The first sentence entitles aggrieved individuals to 'judicial review of federal agency action.' The second sentence, added to the statute decades later, waived sovereign immunity for '[a]n action in a court of the United States seeking relief other than money damages . . . .'" *Id.* One such action, of course, is a suit for "judicial review of federal agency action" of the sort authorized by the first sentence. But other actions exist too." *Id.* The claims asserted against Salazar in the 2AC are precisely such "other actions."

In a footnote, his Honor noted that "[t]he Ninth Circuit still recognizes the existence of an intra-circuit split concerning the relationship of § 704 to § 702's waiver of sovereign immunity." *Id.* at n.5 (citing *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that Congress did not limit § 702's sovereign immunity waiver to those acts listed in § 551(13)) and *Gallo Cattle Co. v. U.S. Dept. of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998) (holding that the APA "waiver of sovereign immunity contains several limitations" including those in § 704 which requires "final agency action" and "no other adequate remedy in a court"). After noting the apparent "inter-circuit split," his Honor stated: "It is not at all clear how any aspect of *The Presbyterian Church*'s 'agency action' holding survives *Lujan* and related Ninth Circuit precedent," citing "*Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1058 (N.D. Cal. 2008) (noting that *Lujan* 'made clear that waiver of sovereign immunity under § 702 is constrained by the provisions contained in § 704')." *Delano Farms Co.*, 2009 U.S. Dist. LEXIS 100093, at *63-64 n.5. The District Court's reasoning in *Veterans for Common Sense v. Peake* was rejected, respectively, by the Ninth Circuit in *Veterans for Common Sense v. Shinseki*. 2011 U.S. App. LEXIS 9542, at *48-49.

Finding "*Presbyterian Church* and *Gallo Cattle* readily distinguishable," *Veterans for Common Sense*, at *55 n.22, *Veterans for Common Sense* reconciled the apparent inter-circuit

split by distinguishing and harmonizing those cases. *Id.* at *49-55.

On the one hand, in *Presbyterian Church*, the Ninth Circuit held that "'§ 702's waiver of sovereign immunity is [not] limited to instances of "agency action"' as defined by the APA." *Veterans for Common Sense*, at *49 (quoting *Presbyterian Church*, 870 F.2d at 525). The Ninth Circuit held "that the first sentence of § 702 does address 'agency action' specifically" but "determined that the waiver of sovereign immunity in the second sentence, which was added to the statute in 1976, 'contains no such limitation.'" *Id.* "To the contrary, '[n]othing in the language of the amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling in the narrow definition of "agency action."'" *Id.*[4] *Presbyterian Church* "therefore found that sovereign immunity had been waived as to the Church's First and Fourth Amendment challenges to surveillance conducted by the Immigration and Naturalization Service in its congregations, even though the INS's investigations did not constitute 'agency action' under the APA." *Id.*.

On the other hand, "*Gallo Cattle* considered a challenge to an agency order denying the plaintiffs preliminary relief while they adjudicated the merits of their petition before an administrative board — that is, interim relief to which the plaintiffs believed themselves entitled by statute and the agency's regulations." *Veterans for Common Sense*, at *53 (quoting *Gallo Cattle*, 159 F.3d at 1198). Importantly, *Gallo Cattle* plaintiffs appealed "only from the agency's denial of its request 'to pay [the challenged] assessments into escrow pending a decision on the merits of the petition' — a matter solely of the agency's procedure for adjudicating disputes through its administrative process." *Id.* at n.21 (quoting *Gallo Cattle*, 159 F.3d at 1196). "For that type of suit, ***the plaintiffs' cause of action was the APA itself***, so we applied § 704's limitation on what agency action is reviewable — meaning subject to 'judicial review' under the first sentence of § 702 — and concluded that because § 704's terms were not satisfied, the *first* sentence of § 702 did not authorize judicial review." *Id.* (first emphasis added). "Consequently, sovereign immunity could not be waived because the plaintiffs failed to bring a cognizable 'action' in court. *Id.*

[4]

Because the constitutional claim (as opposed to their APA claim) raised by the plaintiffs "does not depend on the cause of action found in the first sentence of § 702," "Section 704's limitation of that first sentence is thus inapplicable, and the district court's reliance on *Gallo Cattle* was incorrect." *Veterans for Common Sense*, at *55. Instead, reaffirming *Presbyterian Church*, the Court held that as to the plaintiffs claim, "'[a]n action in a court of the United States seeking relief other than money damages'" not brought under the APA, "sovereign immunity has been waived by § 702's second sentence." *Id*.

The Court also found "additional support for [its] conclusion" in *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006), which based on "an analysis identical to [that] in Presbyterian Church," rejected the arguments that "'(1) the waiver [of sovereign immunity under § 702] applies only to actions arising under the APA; and (2) since review under APA § 704 is limited to 'final agency action,' the waiver of sovereign immunity is similarly restricted to conduct that falls within that compass.'" *Veterans for Common Sense*, at *55 (quoting *Trudeau*, at 187).

Like the claims at issue in *Veterans for Common Sense* and *Trudeau*, plaintiff's claim against Salazar seeks declaratory relief and it is not brought pursuant to the APA. Accordingly, the second sentence of Section 702 waives Defendant's sovereign immunity.

Even if the language was clear on its face, which it is not, such a reading will not be adopted when it leads to an absurd result. Cite. In other words, where the interpretation would be in contravention of the clear and explicit intent of Congress, it will be rejected for an interpretation that comports with Congress' intent.

Congress' intent in amending Section 702 in 1976 to add the second sentence is unmistakable, as shown by the legislative history of the amendment and as the Ninth Circuit has explained *Presbyterian Church* and reaffirmed in *Veterans for Common Sense*:

> Congress observed that before the amendment to § 702, litigants seeking such nonmonetary relief were forced to resort to the "legal fiction" of naming individual officers, rather than the government, as defendants an approach that was "illogical" and "becloud[ed] the real issue whether a particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate." The need to channel and restrict judicial control over administrative agencies, Congress concluded, could better be achieved through doctrines such as statutory preclusion, exhaustion, and justiciability, rather than through "the confusing doctrine of sovereign immunity." Accordingly, [adding the second sentence to] ***§ 702 was designed to "eliminate the defense of sovereign immunity***

> ***as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency***."

Veterans for Common Sense, at *50-51 n.19 (quoting *Presbyterian Church*, 870 F.3d at 524 (internal citations and footnote omitted) (citing H. Rep. No. 1656, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S.C.C.A.N. 6121, 6123-6130))) (emphasis added). The Ninth Circuit "assumed that the 'legal fiction' referred to by Congress was that created by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and its progeny." *Veterans for Common Sense*, at *51 n.19 (citing *Presbyterian Church*, 870 F.3d at 524 n.7.

Accordingly, after *Veterans for Common Sense*, there can be no serious argument (in the Ninth Circuit) that the waiver of sovereign immunity in Section 702 for non-APA claims seeking non-monetary relief is condition of final agency action and the absence of anther avenue of judicial review. This Court is bound to follow *Veterans for Common Sense*. *United States v. Duran*, 59 F.3d 938, 940-941 (9th Cir. 1995) (resolving apparent "intra-circuit split" by reconciling the cases and holding that there was therefore "no conflict" between the prior opinions); *United States v. Sarno*, 73 F.3d 1470, 1485 n.8 (9th Cir. 1995) (noting that although the Ninth Circuit "previously recognized the existence of an intra-circuit split," the apparent "conflict" was "resolved" by *Duran*).

Lujan did not address the issue raised here because the only claim addressed in *Lujan* was a claim brought pursuant to the Section 10(a) of APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Specifically, *Lujan* states:

> Respondent does not contend that either the FLPMA or NEPA provides a private right of action for violations of its provisions. Rather, ***respondent claims a right to judicial review under § 10(a) of the APA***, which provides:" person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U. S. C. § 702.

Id. (emphasis added); *see also id*. ("When, as here, review is sought . . . only under the general review provisions of the APA . . .").

Thus, in order for the Court to have jurisdiction over the claim, the plaintiff/respondent in *Lujan* was required to meet "two separate requirements. First, . . . [he had to] identify some 'agency action' [as defined in 5 U. S. C. § 551(13)] that affect[ed] him in the specified fashion,"

and "[s]econd, [he had to show] . . . that he ha[d] 'suffered legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action 'within the meaning of a relevant statute.'" *Id*. at 882-83 (U.S. 1990).

Since the plaintiff in *Lujan* did not assert any non-APA, the Supreme Court no occasion to and did not address this issue. As to do so would have been to render an advisory opinion, in violation of Article III.

Moreover, although this court was under the belief that "[a]fter *Lujan* it cannot seriously be argued that an APA claim can survive unless 'agency action,' as that term is defined in 5 U.S.C. 551(13), is alleged." *Delano Farms Co. v. Cal. Table Grape Comm'n*, 2009 U.S. Dist. LEXIS 100093, at *63 n.5 (E.D. Cal. Oct. 27, 2009), in addition to the Ninth Circuit's recent pronouncement in *Veterans for Common Sense*, almost every other circuit court to address the issue has also held that even after Lujan, the second sentence of Section 702 waived sovereign immunity for all non-APA claims seeking non-monetary relief.

3. The Claim Need Not be Brought Directly Under the Constitution to Invoke the Waiver of Sovereign Immunity

There is no merit to the argument that *Veterans for Common Sense*'s holding is limited to constitutional claims. Although there is isolated language that one could take out of context to make that argument, the analysis of the Court demonstrates that the holding is not so limited. The reason for this isolated language is simple, there were only two types of claims before the Court, those asserted directly under the APA and those asserted under the Constitution. *Veterans for Common Sense* did not specifically address other types of non-APA claims for the same reason that *Lujan* only discussed claims brought directly under the APA, because to discuss any type of claim not presented would have been to impermissibly render and advisory opinion. when read in context, *Veterans for Common Sense*'s holding clearly applies to any non-APA claims, including Constitutional claims because none of them rely on the APA's grant of subject matter jurisdiction.

Further support can be found by reviewing *Trudeau*, discussed above, where the Ninth Circuit found "additional support for [its] conclusion." *Veterans for Common Sense*, at *55.

In *Trudeau* at issue were claims brought directly under the APA and the Constitution as *as well as* a non-statutory claim for non-monetary relief. The Court held all of the claims, including the nonstatutory claim fell within the waiver of sovereign immunity. *Trudeau*, 456 F.3d at 187 ("we hold that APA § 702's waiver of sovereign immunity permits not only Trudeau's APA cause of action, ***but his nonstatutory*** and First Amendment actions as well.") (emphasis added); *see also States Army Corps of Eng'rs*, 2010 U.S. Dist. LEXIS 127376, at *54 (N.D. Ill. 2010) ("The waiver also appears to go beyond particular statutes, reaching civil matters arising under the 'laws' of the United States.")

Almost every other Circuit to address this issue after Lujan as reached the same conclusion as the Courts in *Veterans for Common Sense* and *Trudeau*. *See Mich. v. United States Army Corps of Eng'rs*, 2010 U.S. Dist. LEXIS 127376, at *51-55 (noting that "[s]everal circuits have reached the same conclusion about the breadth of the § 702 waiver," and collecting cases); *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (§ 702 "expressly waives sovereign immunity as to any action for nonmonetary relief brought against the United States"); *United States v. City of Detroit*, 329 F.3d 515, 520, 521 (6th Cir. 2003) (en banc) holding (under § 702 of the APA the government "has waived its immunity with respect to non-monetary claims" and noting that each of the five other circuits "that have addressed this issue agree that 'the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA'"); *Blagojevich v. Gates*, 519 F.3d 370, 371, 372 (7th Cir. 2008) (§ 702 is "a law of general application."); accord *Nattah v. Bush*, 605 F.3d 1052, 1056 (D.C. Cir. 2010); *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 788 (D.C. Cir. 2010); *Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007); *Robbins v. United States Bureau of Land Management*, 438 F.3d 1074, 1080 (10th Cir. 2006); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10th Cir. 2001); *Snyder Computer Systems, Inc. v. LaHood*, 2010 U.S. Dist. LEXIS 80639, *2 (S.D. Ohio Aug. 10, 2010); *Tonkawa Tribe of Indians of Okla. v. Kempthorne*, 2009 U.S. Dist. LEXIS 21484, at *9 (W.D. Okla. Mar. 17, 2009); *see also City of Detroit*, 329 F.3d at 521 (noting that each of the five other circuits "that have addressed this issue agree that 'the waiver of sovereign immunity contained in § 702 is not limited to suits brought

under the APA"').

4. Plaintiffs' Claim Also Falls Within the *Ex parte Young* Exception to Sovereign Immunity.

"Prospective relief requiring, or having the effect of requiring, governmental officials to obey the law has long been available. Sovereign immunity does not bar such relief." *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. Ariz. 2010). "The case often cited for this proposition is *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), which permitted an injunction against the Attorney General of Minnesota despite the Eleventh Amendment." *Id.*

"For a number of years, prospective relief against federal officials was available under the fiction of *Ex parte Young*." *Id.* "For example, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the Supreme Court allowed prospective relief against a federal official despite an asserted defense of sovereign immunity." *Id.* The Supreme Court wrote:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. . . . [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."

Peabody, 610 F.3d at 1085 (quoting *Larson* at 689).

The Ninth Circuit has "explicitly followed the 'legal fiction' described in *Larson*" in various cases. *Peabody*, 610 F.3d at 1085; *see, e.g.*, *Washington v. Udall*, 417 F.2d 1310, 1314-16 (9th Cir. 1969) (holding that the "complaint in this case falls within the ultra vires exception to the bar of sovereign immunity" because the complaint " alleged that the federal officials violated a plain legal duty and were arbitrary and capricious in their actions because of their allegedly erroneous interpretation of [law].")

"However, since 1976 federal courts have looked to § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to serve the purposes of the *Ex parte Young* fiction in suits against federal officers," for the reasons explained in *Presbyterian Church*, discussed in

detail above. In summary, "after § 702 was amended in 1976, it replaced the *Ex parte Young* fiction as the doctrinal basis for a claim for prospective relief," because "'*Congress' plain intent in amending § 702 was to waive sovereign immunity for all such suits, thereby eliminating the need to invoke the Young fiction*." *Peabody*, 610 F.3d at 1085. (quoting *Presbyterian Church* at 525-26, omitted citations and adding emphasis).

After the above discussion, *Peabody* noted "the tension between" *Presbyterian Church* and *Gallo Cattle*, determined that it need "not resolve this tension [t]here," because it held that both avenues of relief were available in that case. Id. at 1086 ("Therefore, under § 702 of the APA, as would be the case under the Ex parte Young fiction, either Peabody or the Nation may assert a claim against the Secretary requesting injunctive or declaratory relief.").

As explained above, *Veterans for Common Sense* resolved the tension between the cases. However, the Court went on to state that "even if [it] did not find a waiver of sovereign immunity here," the plaintiffs' non-APA claims "could proceed against all individual defendants under *Ex Parte Young* — precisely the fiction for which Congress sought to eliminate the need in adding the second sentence of § 702." 2011 U.S. App. LEXIS 9542, at *56 n.23. In other words, if the second sentence of § 702 does not waive sovereign immunity for non-monetary claims brought against agencies of the United States, then there would no longer be any justification for no longer invoking *Ex parte Young*.

The 2AC alleges that Salazar has violated federal law by depriving Plaintiffs of what they are entitled to under statute, common law and pursuant to their treaty rights. The 2AC seeks prospective relief. Thus, Plaintiffs' claims against Defendant Salazar can likewise proceed under *Ex Parte Young* if the Court does not find a waiver of sovereign immunity. *Veterans for Common Sense*, at *56 n.23.

C. Plaintiffs Do Not Seek to "Compel" Salazar to Bring Suit

Contrary to Defendant's suggestion, Plaintiffs do not ask the court to "compel the United States to bring an action on their behalf against other Defendants." Salazar Motion, p. 14:4-5. To the contrary, the 2AC is clear and unambiguous, the only remedy (currently) being sought is declaratory relief.

The same argument as Salazar makes here was rejected by the court in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), where the Court wrote:

> The thrust of the argument is that the Attorney General has absolute discretion to institute litigation, and that judicial review of his exercise of that discretion is barred by the doctrine of prosecutorial discretion. This contention is based on two fundamental misconceptions. In the first place, plaintiffs do not ask this Court to order the Attorney General to bring suit on their behalf; in the present action, plaintiffs seek only a declaratory judgment that the Nonintercourse Act establishes a trust relationship between the United States and the Passamaquoddies. In the second place, the doctrine of prosecutorial discretion cannot shield legal error.

Id. at 665, affirmed by, *Passamaquoddy Tribe* 528 F.2d at 80 ("We affirm, on the basis set forth herein, the finding of a trust relationship and the finding that the federal government may not decline to litigate on the sole ground that there is no trust relationship."); *see also United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998) (expressly leving open the question of "whether a tribe may sue the United States to compel it to sue" under certain circumstances).

Finally, even if it is true that the Court cannot compel *Salazar* to bring suit, that does not mean that the Court cannot declare that Salazar has an obligation to bring suit. The *Passamaquoddy Tribe* Court explained:

> We emphasize what is obvious, that the "trust relationship" we affirm has as its source the Nonintercourse Act . . . . Once this is said, there is little else left, since it would be inappropriate to attempt to spell out what duties are imposed by the trust relationship. This dispute arises merely from the defendants' flat denial of any trust relationship; no question of spelling out specific duties is presented. It is now appropriate that the departments of the federal government charged with responsibility in these matters should be allowed initially at least to give specific content to the declared fiduciary role.

Passamaquoddy Tribe 528 F.2d at 379.

In other words, the Court can declare what Salazar's obligations, but what he does with that declaration is ultimately up to him. In this case, even if the Court declared that Salazar had a specific obligation and if Salazar refused, the Kawaiisu would be able to take their case directly to Congress or the President or even to the press.

D. The Kawaiisu have attempted to seek from Salazar to no avail and all further attempts are doomed to fail

The Kawaiisu have requested that Salazar provide them the very relief that they seek in this suit to no avail. 2AC ¶ 6; see also Granowitz Decl., Exs. 4-5.

Moreover, any further attempts to obtain relief from Salazar are doomed to fail by virtue of his own regulations.

As part of the Federally Recognized Indian Tribe List Act of 1994 Congress enacted 25 USC § 1212, which states:

> The Congress finds and declares that--
>
> (1) the United States has acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska ***pursuant to the Act of June 19, 1935*** (49 Stat. 388, as amended, commonly referred to as the "Jurisdiction Act") [unclassified], as a federally recognized Indian tribe;
>
> (2) ***on October 21, 1993, the Secretary of the Interior*** published a list of federally recognized Indian tribes pursuant to part 83 of title 25 of the Code of Federal Regulations ***which omitted the Central Council of Tlingit and Haida Indian Tribes of Alaska***;
>
> (3) ***the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress***;
>
> (4) ***the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress***; and
>
> (5) the Central Council of Tlingit and Haida Indian Tribes of Alaska continues to be a federally recognized Indian tribe.

(emphasis added).

Notwithstanding Congress' clear findings and declarations, Salazar has "terminate[d] the federally recognized status of an Indian tribe as determined by Congress," and has "administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress," by omitting the Kawaiisu from the official list of Acknowledged tribes and refusing to provide assistance to the tribe, Salazar has done precisely what Congress prohibited.

This is doubly true given that Salazar has enacted regulations that provided:

> ***Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes***. Acknowledgment shall also mean that the tribe is

> entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.

See 25 C.F.R. Part 83, § 83.2 (1996) (emphasis added).

§ 83.2 ***proves*** that any attempt to obtain the relief that the Kawaiisu seek from Salazar would be doomed to fail.

E. Prior Iterations Of The Complaint Are Irrelevant

At various places in his motion, Salazar attempts to rely on allegations contained in prior iterations of the complaint in this case to support his argument. Many of the allegations identified are not factual in nature, but are legal conclusions, which the Court does not accept as true when ruling on a motion to dismiss even in the operative pleading. Others of the alleged allegations are simply arguments made in the alternative, which do not prejudice the Kawaiisu. *See, e.g., Sea Hawk Seafoods v. Exxon Corp. (In re Exxon Valdez),* 484 F.3d 1098, 1102 (9th Cir. 2007) ("Arguing in the alternative does not invoke judicial estoppel--it is good lawyering."). In any event,"[a]s a general rule, when a plaintiff files an amended complaint, '[t]he amended complaint supercedes the original, the latter being treated thereafter as non-existent.'" *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010). Even judicial admissions may be amended, and superseded portions of amended pleadings cease to be binding judicial admissions. *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996).; *see also Nat'l Steel & Shipbuilding Co. v. Am. Home Assur. Co.*, 2010 U.S. Dist. LEXIS 73280, at *6-7 (S.D. Cal. July 21, 2010). Moreover, "[w]here . . . the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995). The Kawaiisu have attempted to provide such explanation herein and are willing and able to do so by amendment should the Court find it necessary.

IV. IF THE MOTION IS GRANTED IT SHOULD BE WITH LEAVE TO AMEND

Courts are free to grant a party leave to amend whenever "justice so requires," FED. R. CIV. P. 15(a)(2), and requests for leave should be granted with "extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (quoting *Morongo Band of*

Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). While the Court has considerable discretion to deny leave to amend after having afforded prior opportunities to do so, *see Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990), "'[d]ismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.'" *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002). Thus, "leave to amend should be granted unless the district court determines that the pleading could not possibly be cured by the allegation of other facts." *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001).

If the Court grants Salazar's motion it should do so with leave to amend as the Kawaiisu have not had an opportunity to attempt to cure any defects in the specific claim that it asserted against Salizar in the 2AC, which was the first time that the specific claim had been made and only after events that transpired after the First Amended Complaint was filed. *Reddy v. Litton Indus.*, 912 F.2d 291, 297 n.8 (9th Cir. 1990).

Over the last 100+ years, the Kawaiisu have had their property taken, they have been enslaved and slaughtered and had their rights trampled or ignored, as explained herein, including by Salazar. The Kawaisu finally have a forum where they *might* be able to vindicate some of their rights and prevent further abuse.

The principle that leave to amend "should [be] freely give[n] . . . when justice so requires, is designed to facilitate decision on the merits, rather than on the pleadings or technicalities." *Chudacoff v. Univ. Med. Ctr.*, 2011 U.S. App. LEXIS 11586, at *18-19 (9th Cir. June 9, 2011). Moreover, delay alone is insufficient to justify denial of leave to amend. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Salazar will not be prejudiced by a short delay in resolving this lawsuit.

Moreover, the Court should also take into account that in light of Salazar's refusal to assist the Kawaiisu made it very difficult to find adequate representation. *See* 25 U.S.C. § 175; *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953) (although not mandatory that section is meant "to insure the Indians adequate representation in suits to which they might be parties.").

///

V. CONCLUSION

For all of the forgoing reasons, Salazar's motion should be DENIED.

WOLF GROUP L.A.

Dated: July 6, 2011

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