Case No. 11-17301
On Appeal From District Court No. 10-cv-01281-OWW-DLB (E.D. Cal.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD LEWIS, ET AL.,

Plaintiffs-Appellants,

v.

KEN SALAZAR, ET AL.,

Defendants-Appellees.

Answering Brief of Tribal Defendants-Appellees

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Preliminary Statement

This is the latest in a series of cases arising out of the federal restoration of Table Mountain Rancheria as a sovereign tribal government in 1983, after its federally recognized status had been terminated decades before under the California Rancheria Termination Act of 1958. Appellants are not members of Table Mountain Rancheria ("Tribe"), but they nevertheless claim entitlement to benefits available only to Tribal members, and more specifically, revenues from land the United States has held in trust for the Tribe for nearly thirty years. Appellants are disappointed that, over fifty years ago, when the United States purported to terminate the Tribe's sovereignty, and distributed Table Mountain's land and assets to the "residents of the Rancheria" in order to effect that termination, Appellants were not selected as users of the land entitled to distribution. They were again aggrieved, they claim, nearly thirty years ago, when Tribal Appellees (the people to whom the United States had distributed Table Mountain assets) restored the Tribe's federal recognition, through settlement of litigation against the United States (*Table Mountain Rancheria Association v. Watt*, No. C-80-4595-MHP (N.D. Cal.) ("*Watt*")), and thereafter, when the Tribe did not then include Appellants as members.

Of course, in two previous cases—involving this same essential dispute, and filed by some of these same Appellants—this Court has twice confirmed that federal courts may not control how a sovereign tribe determines membership, let

alone, distribute benefits associated with membership. *Lewis v. Norton*, 424 F.3d 959, 960-61 (9th Cir. 2005); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007). On this bedrock principle alone, Appellants' suit may not proceed. Appellants are, in fact, well aware by now that their grievance "cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Lewis v. Norton*, 424 F.3d at 960.

So Appellants offer new theories to do indirectly what this Court has ruled may not be done directly. Specifically, after court rulings that Tribal immunity bars claims against a tribe for membership and benefits, Appellants seek to seize the benefits of Tribal membership directly from Tribal members, to wit, Tribal Appellees. However, because Appellants seek to impose liability for Tribal Appellees' official acts of governance, their claims are still barred by sovereign immunity. Simply omitting the Tribe as a defendant, and suing individual Tribal officials, cannot defeat Tribal immunity.

Nor, as the District Court found, can Appellants' stale claims avoid dismissal under applicable statutes of limitations: The passage of time has rendered Appellants' claims time-barred. As Appellants have repeatedly alleged (E.R. 9:21-24, 390:7-13; S.E.R. 213:3-6), and as they admit now (Opening Brief, p. 26), they have been aware of their injuries "[f]or *twenty-eight years*." They do not (and cannot) explain how they can timely plead claims for decades-old injuries.

Indeed, Appellants do not even challenge, and thereby waive any objection to, the District Court's finding that their claims accrued "decades ago." (E.R. 577:4-6.) Instead they rely solely on an inapplicable legal principle that certain common law claims brought by Indian tribes are subject to no statute of limitations. Appellants are not an Indian tribe, and allege no common law claim. Accordingly, the District Court correctly found Appellants "failed to plead facts sufficient to establish any possibility that their claims are not time barred." (E.R. 576:27-28.)

Finally, lacking a federal claim to vindicate their demand for benefits from a Tribe to which they do not belong, Appellants proffer an array of vaguely defined tort claims. Even ignoring the lack of a federal or state right to relief, none of these claims lie against private individuals, let alone tribal officials governing an Indian tribal entity. Thus, in the end, and putting aside the time bar of Appellants' claims and the jurisdictional bar of sovereign immunity, Appellants simply cannot state any cognizable claim against Tribal Appellees. Given that futility, this Court should affirm the District Court's decision to deny Appellants a *third* opportunity to amend.

Jurisdictional Statement

As detailed below, the District Court lacked subject matter jurisdiction over Appellants' claims against Tribal Appellees. Each claim rests on Tribal Appellees' actions as the governing body of Table Mountain, and sovereign immunity thus

bars each claim. *Imperial Granite Co. v Pala Band of Mission Indians,* 940 F. 2d 1269, 1271 (9th Cir. 1991).

This Court has appellate jurisdiction to review the District Court's orders granting Appellees' motions to dismiss under 28 U.S.C. § 1291 because the District Court entered a final judgment.

Statement of the Issues Presented for Review

1. Did Appellants waive all issues not specifically discussed in their Opening Brief, including whether the District Court properly dismissed Appellants' second claim for conspiracy?

2. Do established statutes of limitations bar Appellants' federal and state law tort claims against Tribal Appellees based on injuries of which Appellants have been aware for 28 years?

3. Does sovereign immunity bar Appellants' claims against Tribal Appellees for actions taken through the "governing body" of Table Mountain Rancheria?

4. Do Appellants' conclusory allegations of "conspiracy" with the United States support constitutional tort liability against Tribal Appellees for their actions in seeking restoration of the Tribe's federal recognition and in the use and distribution of Tribal benefits (*i.e.*, revenues generated by Tribal trust land)?

5. Does federal or state law impose fiduciary duties on Tribal Appellees in their governance of an association created to hold communal assets for the

residents of Table Mountain Rancheria, and which Appellants allege was the Tribe's "governing body"?

Statement of the Case

On July 16, 2010, Appellants filed this action, the third in a series of lawsuits seeking to recover the benefits of Tribal membership that this Court has twice refused to grant. (S.E.R. 205.) On August 17, 2010, Appellants filed their First Amended Complaint. (E.R. 1.) On November 19 and November 23, 2010, respectively, Secretary Salazar and Tribal Appellees moved to dismiss Appellants' First Amended Complaint. (E.R. 15, 51.)[1] After an April 20, 2011 hearing, the District Court dismissed the complaint as "unintelligible," (E.R. 356:19-21), finding Appellants' allegations of the first claim "against the Secretary are legally and factually deficient" (E.R. 353:21-22), that the second claim alleging conspiracy "does not state any cognizable claim based on the Constitution or the *Watt* Judgment" (E.R. 354:11-17), and the "vague, conclusory and contradictory allegations regarding [Tribal Appellees'] purported fiduciary duty" did not "state any cognizable claim for relief." (E.R. 355:18-20.) Specifically, the District Court found Appellants had failed to allege facts showing "that violation of the *Watt* Judgment is tantamount to a constitutional violation" (E.R. 351:22-24), that any cognizable claim based on breach of the *Watt* Agreement was timely given the

[1] Tribal Appellees also filed a Request for Judicial Notice, which is included in the Excerpt of Record at E.R. 98-273.

statute of limitations (E.R. 353:23-25), that Tribal Appellees engaged in "any action under color of federal law" or state law (E.R. 355:9-11,355:15-17), or that Tribal Appellees owed any fiduciary duty (E.R. 355:18-20). Judge Wanger warned Appellants "they would be given only one more opportunity to amend their complaint in order to articulate cognizable claims." (E.R. 575:13-16.) The District Court granted both Motions to Dismiss on May 3, 2011. (E.R. 371, 373.)

Appellants filed their Second Amended Complaint on May 5, 2011. (E.R. 375.) Appellees timely moved to dismiss. (E.R. 411, 451.) On August 4, 2011, Secretary Salazar filed a supplemental exhibit in support of his Motion to Dismiss, to which Appellants filed a Reply. (E.R. 561, 566.) On August 29, 2011, the District Court filed a Memorandum Decision granting both Motions to Dismiss. (E.R. 573[1], 579.)[2] The District Court again found Appellants' first and second claims were "unintelligible." (E.R. 573[6:14].) The District Court stated that "[a]fter three attempts, [Appellants] have failed to allege facts sufficient to suggest that any of their claims for relief are not time-barred." (E.R. 579:4-7.) The Court entered orders granting the Motions on August 30, 2011 (E.R. 597, 619), and

[2] Appellants inaccurately numbered pages in Document 61 of the Excerpt of Record (August 29, 2011, Memorandum Decision): pages 1 and 6 are numbered 573 and pages 2 and 7 are numbered 574. For citations to these pages of the Memorandum, the actual page and line number (where applicable) is bracketed.

judgments on August 31, 2011. (E.R. 596, 599.) Appellants filed their Notice of Appeal on September 26, 2011. (E.R. 603.)

Statement of Facts

I. Relevant Historical Background

Appellants' claims revolve around a 1983 settlement of an action the Tribe and certain Tribal Appellees prosecuted against the United States to unwind the earlier, illegal termination of the sovereign status of the Tribe and its lands, and the federally recognized "Indian status" of the people who lived there.

A. The California Rancheria Act Purported to Terminate the Federally Recognized Sovereign Status Of Table Mountain Rancheria And The "Indian status" Of The People Who Lived There.

Congress enacted the California Rancheria Act in 1958 to terminate the trust relationship between the United States, on one hand, and 41 rancherias and reservations in California and the Indians who lived there, on the other. 85 Pub. Law No. 671, 72 Stat. 619-21 (1958) ("Rancheria Act" or "Act") (S.E.R. 118-120.) The Rancheria Act empowered the Secretary of the Interior to distribute rancheria assets to the "Indians of a rancheria or reservation"—defined as "distributees" and "dependants of distributees"—whose "Indian status" was thereby terminated, subject to certain procedural and substantive requirements. *See* Rancheria Act, §§ 6, 10(b) (S.E.R. 119-120); 25 C.F.R. § 242.2 (S.E.R. 126). Shortly after the Act's passage, the Secretary approved, and the Indians of Table Mountain

Rancheria voted to approve, a distribution plan disposing of the Rancheria's assets. (S.E.R. 57:1-26.) The assets were to be distributed to the "administratively selected users of the land" (85 S. Rep. No. 1874, at 3 (1958) (E.R. 92)), identified as the "distributees", who were those adult Indians living on the Rancheria by federal assignment. Rancheria Act, § 2(a) (S.E.R. 118); 25 C.F.R. §§ 242.2, 242.3 (S.E.R. 126). Upon distribution, as to both the individual Indians and the private association created to hold communal lands ("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 residents (*i.e.*, the distributees, their dependants and their heirs). (S.E.R. 48:2-15, 57:1-10, 27-30, 58:1-3.) The Rancheria Act's regulations state that, if any adult Indian living on a rancheria was wrongly 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. Rancheria Act, §§ 2(a), 10(a) (S.E.R. 120); *see also* 25 C.F.R. § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (S.E.R. 126).

B. *Watt* Confirmed The Sovereign Status Of Table Mountain As "A Federally Recognized Tribe," The "Indian Country" Status Of Certain Rancheria Lands, And The "Federal Indian Status" Of Certain Individuals Who Had Received Rancheria Lands.

Termination was an abysmal failure across California (S.E.R. 57:11-26, 58:4-13), and defectively implemented throughout the state. For their part, the *Watt* plaintiffs (the Tribal Appellees here) sued the United States in 1980 to rescind

the purported termination, which was alleged to be defective, and restore the parties, to the extent possible, to the same position before the purported termination decades earlier. They sought judicial confirmation that (1) Table Mountain's sovereign status as a federally recognized "tribal entity" remained intact (S.E.R. 49:2-21, 80:16-23, 83:9-84:8, 86:1-28); (2) the individuals who lived at the Rancheria retained their "status as Indians under the laws of the United States" (S.E.R. 48:1-49:1, 49:22-51:16, 80:25-81:8, 82:9-83:32); and (3) the property received by the "terminated" Indians and the Association (representing the Tribal government) would remain "Indian country" beyond state and local jurisdiction once returned to the United States. (S.E.R. 48:1-49:1, 80:25-81:27, 84:9-26, 84:9-85:14.)

In resolution of *Watt*, the parties entered a court-approved settlement agreement confirming the federal government had not, in fact, terminated the Tribe, and that its sovereign status, as a federally recognized "tribal entity," remained intact. (*See* Stipulation for Entry of Judgment ("*Watt* Stipulation") (S.E.R. 130:17-19); *see also Watt* Order & Judgment (S.E.R. 136-139).) The settlement also confirmed the "federal Indian status" of the individuals the government had purported to terminate, essentially the "residents of the Rancheria." (S.E.R. 130:14-16.) Through that settlement, the individuals were deemed entitled to whatever federal benefits had been denied them (S.E.R. 132:13-133:5), and the Tribe was listed in the Federal Register as a recognized tribe. *See*

48 Fed. Reg. 56862, 56864 (Dec. 23, 1983) (S.E.R. 141, 413) (listing "Table Mountain Rancheria of California" on the list of "Indian tribal entities" "recognized and eligible to receive services from the United States Bureau of Indian Affairs").

The stipulated agreement also confirmed that lands returned to the United States by the "terminated" Indians and Tribe remained "Indian country." (S.E.R. 130:19-28.) To that end, the Association was required to convey "to the United States all community-owned lands within the Table Mountain Rancheria" to be held by the United States for the Tribe's use, control and benefit. (S.E.R. 131:14-26.) However, the individual distributees who had received land as part of the termination effort had the option to restore such lands to "federal trust status" if they desired (S.E.R. 131:7-14), in which case, title would "be held by the United States in trust for such Indian class members(s) or entity *as the grantor(s) may specify*." (S.E.R. 131:26-132:8 (emphasis added); *see also* S.E.R. 130:19-132:8, 133:7-14.) Thus, while *Watt* returned the communal lands to the United States for the sovereign Tribe, it left the individually distributed lands in the distributees' control, with *the option* of converting the land into trust land, for their, or the Tribe's, benefit. (*See* E.R. 389:24-2.)

II. Appellants' Previous Unsuccessful Suits

This action is the third attempt to seek Tribal benefits available only to Table Mountain members. The District Court, like this Court twice before, properly refused to entertain such an action.

A. In *Lewis v. Norton*, This Court Rejected An Attempt To Couch Jurisdictionally Barred Intra-Tribal Disputes As A Suit For Declaratory Relief Against Federal Officials.

On July 11, 2003, three of the Appellants here[3] sued certain federal officials for declaratory and injunctive relief, alleging they met Table Mountain's membership requirements, and requesting the court direct those officials to order the Tribe to recognize them as members. *See Lewis v. Norton*, No. 2:03-cv-01476-LKK-DAD (S.E.R. 151). Filed in the Eastern District of California, *Lewis v. Norton* sought to use the 1980 *Watt* Action as a vehicle to secure federal relief in an intra-tribal membership matter. Specifically, the plaintiffs alleged the Tribe's federally recognized status, as confirmed in *Watt*, obligated federal officials to force the Tribe to comply with its own laws, which plaintiffs alleged required the Tribe to recognize them as members. (S.E.R. 155:9-156:28.) *Lewis v. Norton* sought an order directing Table Mountain to either recognize plaintiffs as members (and pay them past and future benefits afforded any other tribal

[3] Kathy Lewis, Jerry L. Lewis and Chad E. Lewis.

member), or alternatively, direct the Tribe to cease "engaging in gaming." (S.E.R. 159:24-160:19.)

The court dismissed the suit on several jurisdictional grounds (E.R. 209:10-11), finding it lacked the power to adjudicate "intratribal matters" (E.R. 201:7-9), that the complaint presented no federal claim (E.R. 206-208), and that the defendants possessed sovereign immunity in any event. (E.R. 208:11-20.)

This Court affirmed, noting that while the plaintiffs "did not sue the tribe directly" because of the Tribe's immunity, "[f]or the very reasons . . . that compel tribal immunity with respect to the plaintiffs' claims, their efforts to do an end run around tribal immunity must also fail." *Lewis v. Norton*, 424 F.3d at 963.

B. In *Alvarado v. Table Mountain Rancheria*, This Court Confirmed Federal Courts Lack Jurisdiction To Entertain Similar Claims Advanced By Certain Appellants.

On January 6, 2005, while *Lewis v. Norton* was on appeal, the attorney who brought that action filed yet another lawsuit involving the same membership dispute, this time in the Northern District, entitled *Alvarado v. Table Mountain Rancheria*, CV-05-00093-MHP ("*Alvarado*"). (S.E.R. 169.) In a slightly recast complaint, plaintiffs were added, including several Appellants here, and defendants were added, including Table Mountain Rancheria and certain Tribal Appellees

sued here.[4] (S.E.R. 169.) The complaint sought "to enforce" the *Watt* settlement and judgment. (S.E.R. 171:1-8; *see generally Watt* Stipulation, Order & Judgment, Order Certifying Class (S.E.R. 129-134, 136-139, 198-204).)

The plaintiffs alleged they were members of the class represented in *Watt* (S.E.R. 176:12-16, 183:20-21), and theorized that because they were class members, they were necessarily Tribal members and should be so recognized now. (S.E.R. 186:14-187:2.) The plaintiffs further alleged that "following" *Watt*, the Tribe established its Constitution, which contained membership requirements the plaintiffs purportedly satisfied. (S.E.R. 186:2-25.) The complaint sought, *inter alia*, (1) a declaration that plaintiffs were entitled to "the full privileges and benefits of other recognized members of the Table Mountain Rancheria," (2) an injunction requiring the Tribe to pay plaintiffs "retroactive" "Table Mountain Benefits, including casino profits," and (3) a "full accounting [of] . . . all benefits received [sic] any recognized members of the Table Mountain Rancheria" since 1983. (S.E.R. 194:17-24, 195:7-19, 195:24-196:5.)

The district court dismissed, concluding the case raised no substantial federal question and that it lacked power to adjudicate a tribal membership dispute. *Alvarado v. Table Mountain Rancheria*, 2005 WL 1806368, at *1, *5-6 (N.D. Cal.

[4] Tribal Appellees Lewis Barnes, William Walker, Aaron Jones, Carolyn Walker, Twila Burrough, and Ray Barnes were sued in *Alvarado*.

2005). This Court affirmed, agreeing the district court lacked subject matter jurisdiction, and further finding that "the *Watt* settlement did not establish membership in the TMR either expressly or by implication." 509 F. 3d 1008, 1011, 1017-18. Rather, the settlement simply addressed the plaintiffs' "Indian status," which was distinct from Tribal membership. *Id.* at 1018.

C. Appellants Now Recast This Long-Running Intra-Tribal Dispute Over Tribal Membership Benefits As A Suit To Seize Tribal Benefits Directly From Certain Tribal Members.

Appellants bring yet another lawsuit to recover the benefits of Table Mountain Tribal membership that this Court has twice refused to grant them. This time, Appellants drop their claims for orders requiring the Tribe's government to admit them as members, and instead, seek to recover Tribal benefits from individual Tribal members who had roles in the Tribe's restoration and governance, namely, Tribal Appellees. Appellants seek from these Tribal Appellees the revenue generated by the Tribe's trust land "through grazing rights, water rights and certain other rights connected to the land."[5] (E.R. 401:19-23.)

[5] Appellants do not appear to seek damages related to land distributed to individual Indians under the Rancheria Act (E.R. 389:25-399:8, 401:14-23), perhaps because *Watt* did not purport to grant the Tribe rights to land distributed to individual Indians (the "residents of the Rancheria"). Notably, the communal land once owned by the Table Mountain Association and returned to the United States for the Tribe's benefit holds a wastewater treatment facility, not a casino from which Appellants apparently seek revenues. (E.R. 427:20-22.)

While Appellants' first claim is pled only against Secretary Salazar,[6] Appellants' second, third, and fourth claims seek relief from Tribal Appellees. (E.R. 394-402.) The second claim alleges Tribal Appellees conspired with Secretary Salazar to deprive them of real property and services the Rancheria Act supposedly guaranteed. (E.R. 394-397.) Their third and fourth claims allege Tribal Appellees breached a purported fiduciary duty to Appellants, by agreeing in *Watt* to transfer Association land back to the United States, to be held in trust for the Tribe. (E.R. 397-402.) In alternative theories, Appellants allege Tribal Appellees breached this claimed fiduciary duty as a "quasi-governmental agency" (E.R. 397-499 (third claim)) or as a "legal entity." (E.R. 400-402 (fourth claim).)

Appellants theorize Secretary Salazar knew or should have known "the Tribe [Band] and Association were separate and distinct" (even though Appellants themselves allege the Association was the "governing body" of the Tribe (E.R. 383:4-5, 383:17-20)). They further allege that by accepting the land in trust for the Tribe from the Association, "the land would no longer be Trust land and would be used for purposes other than those purposes set forth in the CRTA." (E.R. 395:18-22.) Doing so, Appellants allege, deprived them "the full use and enjoyment of

[6] In their first claim, Appellants contend Secretary Salazar failed to provide them services some 50 years ago when the United States purported to terminate the sovereign status of Table Mountain and the "Indian status" of the people who lived there, and again in 1983, when the United States rescinded the termination. (E.R. 391-393.)

Trust land, the water system, the sanitation system and the roads." (E.R. 395:23-396:2.) This alleged transfer, and the alleged breach, occurred "[o]n or about August 25, 1984." (E.R. 389:8.) Appellants allege Appellees somehow "acted in concert" when Tribal Appellees sued in federal district court in the Northern District of California, instead of the Eastern District, thereby concealing the *Watt* case and tolling the limitations period. (E.R. 396:3-13, 399:9-13.)

Appellants claim Tribal Appellees have distributed revenue from the Tribe's trust land "amongst themselves and have not distributed any of the revenue to [Appellants]" (E.R. 399:1-3, 401:16-18), seeking ten million dollars in compensatory damages from each Tribal Appellee. (E.R. 402:16-17.)

In essence, as in *Lewis v. Norton* and *Alvarado*, Appellants ask the Court to effectively second-guess the Tribe's intramural decisions to (1) decline to admit Appellants as members and (2) share revenue generated by tribal trust land with its members only, and they seek to hold individual Tribal members responsible for those sovereign acts.

Standard of Review

This Court reviews a district court's order granting a motion to dismiss *de novo*. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.,* 540 F.3d 1049, 1061 (9th Cir. 2008). However, this Court reviews a district court's denial to grant leave to amend a complaint for abuse of discretion. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).

This Court may affirm the dismissal on any ground fairly supported in the record, even if the District Court did not reach the issue or relied on different grounds or reasoning. *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295 (9th Cir. 1998).

Summary of Argument

The legal landscape this Court identified in Appellants' past attempts to recover Tribal benefits, by challenging the Tribe's internal governance, has left them with no path to relief.

The District Court correctly found well-established statutes of limitations bar Appellants' claims. Appellants waive any argument that the District Court erred in finding their claims accrued decades ago, asserting instead (for the first time) that no statute of limitations applies at all. While certain federal common law claims by an Indian tribe are not subject to statutes of limitations, Appellants are not an Indian tribe and have never alleged a federal common law claim. Nor do Appellants advance any reason to apply a rule preserving certain common law claims *for the benefit of Indian tribes* to a decades-old suit *against officials of an Indian tribe*. Accordingly, this Court should affirm the dismissal of Appellants' claims as time-barred.

This Court can separately and alternatively affirm dismissal because sovereign immunity bars Appellants' claims, as Appellants cannot skirt its jurisdictional barrier by suing tribal officials instead of the Tribe. Appellants try to

manufacture a distinction between actions governing the Tribe and actions governing the Association, but Appellants allege the Association was "a legal entity that operates as *the governing body for the Tribe*." (E.R. 383:18-20 (emphasis added).) The actions taken by Tribal Appellees, through the Tribe's governing body, are necessarily immune.

Finally, dismissal is separately appropriate because, despite three complaints, Appellants have yet to establish any right to relief under federal or state law. Their constitutional claims, whether couched as claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) ("*Bivens*") or 42 U.S.C. § 1983 ("§ 1983"), do not support claims against private individuals, much less individuals governing an Indian tribal entity. Nor do Appellants' conclusory and implausible "conspiracy" allegations render Tribal Appellees federal or state actors. Finally, Appellants advance no viable theory as to how federal or state law, or even the *Watt* Action, supports any right to relief against Tribal Appellees, let alone reveals the existence of any duties of Appellees to Appellants, including fiduciary duties.

Argument

I. Appellants Have Waived All "Issues" Not "Specifically and Distinctly" Discussed In Their Opening Brief, Including The District Court's Dismissal Of Their Second Claim for Conspiracy.

The District Court has twice determined that Appellants' allegations of conspiracy against Secretary Salazar and the Tribal Appellees are "unintelligible." (E.R. 356:19, 573[6:14], 576:26-28.) After providing Appellants with "only one

more opportunity" to articulate a cognizable conspiracy claim, the District Court found that, instead of doing so, the "SAC creates more confusion by invoking wildly divergent statutory claims unsupported by relevant factual allegations," and the Court properly dismissed the second claim without leave to amend. (E.R. 575:13-22).

On appeal, Appellants do not challenge the District Court's dismissal of the conspiracy claim, or suggest the District Court erred in finding they did not "come close" to alleging facts supporting conspiracy. (E.R. 575:19-21; *see* Opening Brief, pp. 7-11.) As such, any such arguments are waived. *Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485, 487 (9th Cir. 2010) (issues not "specifically and distinctly" discussed in opening brief are waived). Thus, this Court can and should summarily affirm those bases for dismissal Appellants have failed to dispute, including the second claim alleging conspiracy.

Similarly, Appellants purport to list a number of "issues" presented here (in their "Statement of Issues Presented"), and then fail to address them in any meaningful manner whatsoever, much less "specifically and distinctly," as this Court requires. *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 878 fn. 4 (9th Cir. 2010). As such, they are waived: "An issue not discussed in a[n opening or reply] brief, although mentioned in the Statement of Issues, is deemed to be waived." *Resorts Int'l v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1402

(9th Cir. 1995); *see also, Quan*, 623 F.3d at 878, fn. 4; *Simpson v. Union Oil Co.,* 411 F.2d 897, 900 n.2 (9th Cir. 1969), *rev'd on other grounds*, 396 U.S. 13 (1969).

Specifically, Appellants mention, but fail to develop, the following "issues":

- "whether land given to and held by the Table Mountain Rancheria Association in 1958 under the Termination Act, [sic] was unlawfully transferred . . ." (Opening Brief, p. 9);
- "whether the U.S, [sic] Government had and still has a fiduciary duty to the Indians in so far as the use and benefits [property rights] from that land owned by the Association which is now being held in trust by the United States for the benefit of the individual Respondents [sic]" (*id.*);
- whether "the parties to the Watt Stipulation and the federal Court waive both subject matter jurisdiction and personal jurisdiction when a lawsuit is instituted in a United States District Court . . ." (*id.* at 10);
- whether "the stipulated judgment and settlement ha[s] any force and effect as to third parties . . ." (*id.*);

Appellants do not discuss, explain or otherwise support these "issues" in their Opening Brief. (*See* Opening Brief, pp. 30-34.) Appellants have thus waived these arguments—and may not address them for the first time on reply. *Quan*, 623 F.3d at 878 fn. 4 (9th Cir. 2010) (appellant waived issue listed in its opening brief that it failed to develop with any supporting arguments).

II. The District Court Properly Found The Statute Of Limitations Bars Appellants' Claims.

Because Appellants alleged facts establishing their claims were barred by the applicable statute of limitations, the District Court properly dismissed them. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Conerly v. Westinghouse Electric Corp.*, 623 F.2d 117, 119 (9th Cir. 1980).

Dismissal for failure to state a claim is proper when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Additionally, "to survive a motion to dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief." *Id.* (citation omitted). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In connection with a 12(b)(6) motion, a court is not required to accept as true legal conclusions couched as factual allegations. *Id.* at 1949-1950; *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Although the District Court dismissed Appellants' second claim as "unintelligible" (E.R. 573[6:12-14]), and Appellants have waived any objection to that decision, the second claim is also properly dismissed as time-barred. *Steckman*, 143 F.3d at 1295.

Before the proceedings below, Appellants tried to dodge the statute of limitations raised by their complaint, by suggesting the "continuing violation doctrine" saves their claims, that the statute of limitations is an affirmative defense Appellants "do not have to anticipate and overcome in their complaint," and that Appellants did not learn about Tribal Appellees' conduct until within the applicable limitations period. (E.R. 286:18-287:15, 518:16-519:20.) However, on appeal, Appellants fail to advance, and thus waive, each of these arguments. (Opening Brief, p. 32.) *See Christian Legal Soc'y,* 626 F.3d 483 at 487. Instead, Appellants rely solely on a new argument not raised below, specifically, that no statute of limitations applies to their claims at all. (Opening Brief, pp. 31-32.) This argument fails.

A. Well-Established Statutes Of Limitations Govern Appellants' Claims.

Appellants do not dispute the District Court's findings that their claims accrued before they sued by more than four years, the longest statute of limitations the District Court identified. (E.R. 576:16-23.) Instead, Appellants argue "no federal statute of limitations exists with respect to Indian property rights claims." (Opening Brief, p. 32.) Appellants cite *County of Oneida v. Oneida Indian Nation (Oneida II)*, which held "[t]here is no federal statute of limitations governing *federal common-law actions* by Indians to enforce property rights." 470 U.S. 226, 240 (1985) (emphasis added). Because none of Appellants' claims are "common

law actions," let alone the sort of Indian tribal land claims *Oneida II* contemplated, the District Court properly applied the governing statutes of limitations to Appellants' claims.

Appellants allege claims under § 1983, *Bivens*, a taking claim under the Fifth Amendment, and a California breach of fiduciary duty claim against the Tribal Appellees (E.R. 377:6-11, 394:1-402:13), all of which are subject to statutes of limitations. Because § 1983 contains no specific statute of limitations, courts must "apply the forum state's statute of limitations for personal injury actions" to such claims. *Jones v. Blanas,* 393 F.3d 918, 927 (9th Cir. 2004).

Effective January 1, 2003, the California legislature extended to two years the one year statute of limitations for assault, battery, and other personal injury claims; this is the period applied to all § 1983 claims. *Id.* (citing Cal. Civ. Proc. Code § 335.1 (West Supp. 2004) and Cal. Civ. Proc. Code § 340.3 (West Supp. 2002)). Identical limitations periods govern *Bivens* claims (*Strum v. Lawn,* 940 F.2d 406, 409-10 (9th Cir. 1991)) and taking claims. *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; *William L. Lyon & Associates, Inc. v. Superior Court*, 204 Cal. App. 4th 1294, 1312 (2012).

B. *Oneida II* Does Not Modify The Statute Of Limitations For Appellants' Constitutional Tort Claims.

The Supreme Court has held that, despite "the wide diversity of claims" § 1983 embraces, "the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims." *Wilson v. Garcia,* 471 U.S. 261, 275 (1985). The application of a single statute for all § 1983 claims in a state is appropriate because "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Id.* Accordingly, this Court has rejected recourse to policy considerations to skirt the Supreme Court's rule that a single statute of limitations applies to all § 1983 claims. *Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 579 (9th Cir. 2012).

This Court has extended *Wilson's* reasoning, holding that "[l]ike § 1983 actions, the purposes of *Bivens* actions are best served through a uniform, easily applicable limitations period that is unlikely to discriminate against interests protected by the Constitution." *Van Strum,* 940 F.2d at 409-10. Accordingly, this Court has held "there should be a single period of limitations for all suits in which the Constitution supplies the remedy," and applied the § 1983 statute of limitations to all *Bivens* claims. *Id.* at 410 (citation omitted). Binding precedent thus forecloses Appellants' assertion that this Court should create an "Indian property"

exception to the established, uniform statute of limitations for constitutional tort claims.

C. Appellants Waive Any Argument That *Oneida II* Displaces California's Statute Of Limitations For Fiduciary Duty Claims.

Appellants assert only that *Oneida II* forecloses the application of statutes of limitations to certain "federal common-law actions." (Opening Brief, p. 32.) Appellants do not assert, and therefore waive, any argument that *Oneida II* could somehow trump a limitations period the California legislature established. *See* Cal. Civ. Proc. Code § 343 (four-year statute of limitations for breach of fiduciary duty). In any event, *Oneida II*'s reasoning about a federal claim for which Congress declined to adopt a federal statute of limitations in no way applies to a state law claim governed by a legislatively established statute of limitations. *Oneida II*, 470 U.S. at 240 (predicating holding on "the absence of a controlling federal limitations period"). Accordingly, the District Court correctly found the fourth claim is subject to a four-year statute of limtations. (E.R. 576:22-23.)

D. Appellants Concede Their Claims Accrued By 1984, Well Outside The Applicable Limitations Periods.

Appellants do not argue the District Court erred in ruling their claims accrued "decades ago." (E.R. 576:24-577:6.) Any such argument, which would fail in any event, is thus waived. *See Christian Legal Soc'y,* 626 F.3d 483 at 487.

Federal law determines when federal civil rights claims accrue. *Knox v. Davis*, 260 F.3d 1009, 1012-13 (9th Cir. 2001). Such 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." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110 (1988).

Appellants' Second Amended Complaint establishes their "conspiracy" claims accrued at the latest in 1983, when Tribal Appellees "filed a complaint" and allegedly "negotiated a Stipulation for Entry of Judgment" that allegedly "deprived [Appellants] of the use and enjoyment of the subject land, the water, sanitation systems and the roads." (E.R. 387:24-388:4, 396:17-20.) Appellants' 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." (E.R. 389:8-10, 398:12-21, 401:1-10.) Indeed, Appellants repeatedly admitted in all three of their complaints they have had notice of the alleged deprivations of their rights since the entry of the *Watt* Stipulation: "*For twenty-eight years*, [Appellants], 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." (E.R. 390:7-13 (emphasis added); *see also* E.R. 9:21-24; S.E.R. 213:3-6.) Appellants repeat this admission word for word in their Opening Brief. (Opening Brief, p. 26.) In sum, Appellants have waived any challenge to the District Court's finding that their claims accrued outside the

limitations period (and admitted it in any event), justifying affirmance on this ground.

E. Appellants' "Inadequate Notice" Argument Does Not Establish The District Court Erred In Finding Their Claims Time Barred.

Appellants argue they "were not given adequate notice" of the "1958 Termination Plan" or the "1983 Stipulation," but provide no explanation of why this assertion supports reversal of the District Court's order. (Opening Brief, p. 30.) It is unclear whether Appellants' notice argument relates to the accrual of their claims or is simply a vague attempt to resuscitate the second claim that Tribal Appellees and Secretary Salazar somehow conspired "to deprive [Appellants] of the full use and enjoyment of subject land and services *without any notice* or an opportunity to be heard . . . ." (E.R. 396:3-5 (emphasis added).)

Appellants fail to argue, and therefore waive any argument, that Tribal Appellees' or Secretary Salazar's alleged failure to provide "adequate notice" of the *Watt* Stipulation somehow undermines the District Court's statute of limitations finding. However, any such argument is wrong in any event.

It appears Appellants' "notice" argument reiterates their allegation that the parties to *Watt* failed to properly publish notice of the case, and the *Watt* Stipulation ultimately endorsed by the Court. (E.R. 297:1-3.) Appellants assert a series of facts, none of which appear in their complaint, without reference to the record. (Opening Brief, pp. 30-31) *See* Circuit Rule 28-2.8. They appear to be

trying to rebut Secretary Salazar's request for judicial notice of a pleading from *Watt* showing the parties did indeed publish in Fresno County notice of the hearing to approve the *Watt* Stipulation. (E.R. 561-565.) Assuming Appellants' notice argument is an implicit attempt to avoid the statute of limitations, it misses the point.

The District Court's dismissal on statute of limitations grounds did not rely on the document for which Secretary Salazar sought judicial notice, but rather, concluded Appellants "failed to *allege facts* sufficient to suggest that any of their claims for relief are not time barred." (E.R. 576:26-28, 579:4-6)(emphasis added). Appellants' allegation that they were denied notice of the *Watt* Stipulation, given their admissions and other allegations establishing their claims as stale, in no way "suggest[s] a right to relief that is beyond the 'speculative level.'" *In re marchFIRST Inc.*, 589 F.3d 901, 905 (7th Cir. 2009) ("[I]t is no longer sufficient for a complaint 'to avoid foreclosing possible bases for relief'" by omitting allegations about the statute of limitations (citing *Twombly*, 550 U.S. at 560-63)).

Never did any Appellant allege how and when he or she learned of any injury allegedly caused by Appellees' wrongdoing (*TwoRivers*, 174 F.3d at 991; *Jolly*, 44 Cal. 3d at 1110), let alone set forth a plausible theory for how they could have failed to learn or suspect that they had been dispossessed of land decades before. *Ashcroft*, 556 U.S. at 678.

Apart from their express admissions they knew of—and actually sought relief for—their alleged injuries decades ago (E.R. 9:21-24, 389:24-390:13, S.E.R. 213:3-6; Opening Brief, p. 26), Appellants 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 Appellees allegedly "evicted [Appellants] from their homes, ranches, and farms." (E.R. 386:13-22.) This alleged eviction necessarily put Appellants "on notice of a potential claim" that they were deprived of an interest in property. *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). Moreover, in 2003 and 2005, multiple Appellants initiated actions in the Eastern and Northern Districts of California, respectively, alleging the Tribe and its members injured them by virtue of the *Watt* settlement. (*See* S.E.R. 151-167, 169-196.) *See Rutledge*, 576 F.2d at 250 (plaintiff's expressed suspicion regarding defendant's conduct, and his prosecution of past litigation involving similar allegations outside the limitations period, established that the statute of limitations barred his claims).

Additionally, the proceedings and settlement in *Watt* were open to the public, included in public court files, and, as Appellants admit, publicly noticed in Fresno County. (E.R. 387:18-388:4; S.E.R. 201:10-202:7; E.R. 561-565; Opening Brief, pp. 30-31.) The Association's transfer of 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. (S.E.R. 147.)

On this record, Appellants do not explain how they received "inadequate notice," much less show how the District Court erred in concluding Appellants' claims accrued outside the applicable limitations period. (Opening Brief, pp. 30-31.) They nowhere explain how any Appellant could have failed to learn of public, and publicly noticed, proceedings and transactions that allegedly deprived them of "use and enjoyment" of Rancheria land from which they claim they were evicted. (E.R. 387:1-3, 395:23-396:2.) Indeed, it is unclear what plausible explanation could exist, and Appellants certainly provide none.

F. Appellants Have Never Alleged, And Cannot Allege, A "Common Law Action" To Enforce An Indian Property Right.

Not once in the proceedings below, and nowhere in Appellants' Opening Brief, do they argue the existence of a "common law action" within the meaning of *Oneida II*. Rather, in their attacks of the Tribe's restoration and use of Tribal lands, Appellants have only ever advanced tort claims with established statutes of limitations.

To the extent Appellants are suddenly alleging on appeal that they should receive an opportunity to file a third amended complaint, to try to plead a "common law action" to enforce an Indian tribal property right, such request would be untimely, as Appellants never argued to the District Court they could plead such

a claim (let alone, that this exception to the statute of limitations applied). *Ohel Rachel Synagogue v. United States*, 482 F.3d 1058, 1060 fn. 4 (9th Cir. 2007) (denying leave to amend where plaintiffs "neither relied on this proposed cause of action below nor sought leave of the district court to amend their complaint to add it"). In any event, as shown below, a third amendment would be futile, since the exception fails to apply here.

Oneida II, and cases following it, involve claims by an Indian tribe against non-Indians. Neither *Oneida II*, nor any principle of federal common law, countenances a claim attacking an Indian tribe's acquisition or use of trust land, or its decision to distribute Tribal benefits (such as trust land revenues) to its members.

Appellants present no authority, and none apparently exists, that a federal common law claim can be stated against an Indian tribe (or its officials) for the internal governance of membership, use of tribal resources, and distribution of tribal benefits. *Oneida II*, 470 U.S. at 229 (suit by Indian tribe against counties possessing unlawfully conveyed land); *Washoe Tribe of Nevada and California v. Southwest Gas Corp.*, 2000 U.S. Dist. LEXIS 7087, at *1 (D. Nev Jan. 12, 2000) (tribal suit against utility companies based on infringement of the tribe's property rights). Such a theory would, in fact, offend firmly established federal Indian law principles protecting a Tribe's sovereign right to govern its own intramural affairs. *Santa Clara Pueblo*, 436 U.S. at 55; *Lewis v. Norton*, 424 F.3d at 961; *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 processes of the tribe.").

Oneida II rests on "Congress' unique obligation toward the Indians." 470 U.S. at 253 (*citing Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see id.* at 244 (noting "Congress' concern that the United States has failed to live up to its responsibilities as trustee for the Indians.") Oneida Indian Nation's federal common law claim rested on the principle that "Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial." *Id*. at 233-34. Indeed, in the Oneida Indian Nation's previous appeal in its aboriginal land claims litigation, the Supreme Court distinguished the Nation's federal common law claim to vindicate "aboriginal title of an Indian tribe" from individual Indians' claims not involving "tribal rights to lands." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974) *(Oneida I)*; *see also Kawaiisu Tribe v. Salazar,* 2011 U.S. Dist. LEXIS 15952, at *15 (E.D. Cal. Feb. 7, 2011) (suggesting unrecognized tribes possess no common law claim under *Oneida II*). It would, in fact, turn *Oneida II* on its head to read it to support a common law claim *against* tribal officials—subject to no statute of limitations period, whatsoever—in favor of any individual Indian alleging injury by the United States' acquisition of land for a recognized tribal entity. Appellants' theory would permit suits for damages over

any parcel of land the United States has ever acquired in trust for a restored tribe, provided an individual Indian contended he or his ancestors had a connection to the land the tribe uses and from which it draws benefits.

III. Affirmance Is Separately Proper Because The Tribe's Sovereign Immunity Bars Appellants' Claims.

Even assuming Appellants' claims were not time-barred, the Tribe's sovereign immunity deprives the Court of jurisdiction to adjudicate them, requiring dismissal on this jurisdictional ground. *Steckman*, 143 F.3d at 1295. At bottom, Appellants seek to challenge the manner in which a Tribe uses its resources and distributes Tribal benefits. This effort to hold Tribal Appellees' personally responsible for their actions while serving on the Tribe's governing body is barred by the Tribe's immunity, as if Appellants had sued the Tribe itself.

A. The Tribe's Immunity Protects Tribal Officials From Liability Arising From Their 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, 55,58 (1978). "[T]ribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado*, 509 F.3d at 1015-16; *Lewis v. Norton*, 424 F.3d at 961. It extends to governmental and commercial activities on or off the tribe's reservation (*Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.* , 523 U.S. 751, 760 (1998)), and it

protects tribal officials acting within their official capacity and authority. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008).

Because a plaintiff cannot avoid tribal immunity through "a mere pleading device," sovereign immunity cannot be circumvented by naming individual tribal members 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); *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). Accordingly, Tribal officials possess immunity to claims arising out of their acts of governance. *Imperial Granite,* 940 F.2d at 1271-72. The inquiry concerns the nature of the conduct on which the alleged liability rests, not whether the plaintiff chooses to label its claim an "individual" or "official" capacity suit. *Id.*

B. Appellants' Claims Arise From Tribal Appellees' Alleged Actions Governing The Tribe.

Tribal Appellees were members of the Association established to hold the communal property for the "residents" of Table Mountain Rancheria, and which Appellants contend acted as the Tribe's governing body. Appellants predicate their claims on (1) the Association's transfer of Rancheria land to the United States in trust for the Tribe as part of the *Watt* settlement in 1984 (E.R.395:18-397:3, 398:12-24, 401:7-13) and (2) Tribal Appellees' management of the Rancheria land before and after that transfer. (E.R. 398:25-399:8, 401:14-23.)

Although Appellants ignore sovereign immunity in their Opening Brief, they argued in the proceedings before the District Court that they could circumvent the Tribe's immunity by suggesting Tribal Appellees acted at all times on behalf of the Association, not the Tribe. (E.R. 515:7-516:13.) Appellants' own allegations, however, foreclose the fiction that Tribal Appellees were not acting at all times on behalf of the Tribe.

Appellants repeatedly admit that, from its inception, "[t]he Association was created . . . to operate as the governing body for the Table Mountain Band of Indians" (E.R. 383:9-12), and that "the Association . . . is a legal entity that operates as the governing body for the Tribe." (E.R. 383:18-20; *see also* E.R. 383:4-5, E.R. 397:22-24 (contending Association was "governing body" and "governing Board" of Table Mountain).

These admissions aside, the *Watt* pleadings and settlement confirm the continuous sovereign existence of the Tribe. To wit, *Watt* alleged the termination was defective from the outset, and through its settlement, 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." (S.E.R. 83:9-84:8; *see also* S.E.R. 49:2-21, 85:1-28, 130:17-19.) *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 260-61 (N.D. Cal. 1981) ("The revocation of the Band's federally recognized status was not accomplished

pursuant to the Rancheria Act since the planned termination of the Rancheria was never successfully accomplished under the Act.").

Because the Tribe's sovereign powers "have never been extinguished" (*Santa Clara Pueblo*, 436 U.S. at 58), even between the purported termination and the *Watt* litigation to rescind that purported termination, the Tribe's immunity protects Tribal Appellees' alleged acts on behalf of the Association. Indeed, if the law were otherwise, the restoration of improperly terminated tribes would be undermined by costly litigation by anyone alleging that tribal officials' pre-restoration conduct wrongly excluded them from reaping the benefits of tribal membership. *See Alvarado*, 509 F.3d at 1015-16; *Lewis v. Norton*, 424 F.3d at 961.

Even if Appellants could somehow contradict their own allegations (*see* E.R. 383:9-16, 397:25-398:4), and the judicially noticeable historical documents in the record, and thereby assert the Association is separate and distinct from the Tribe, the Association is nonetheless immune from suit as an "arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (when the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe); *Cook,* 548 F.3d at 725.

In any event, Tribal Appellees' return of the Rancheria land to the United States in 1984 was itself necessarily a sovereign act, taken on behalf of a federally recognized tribe. Appellants themselves repeatedly allege Tribal Appellees were

acting for the benefit of "the Tribe of which they were also the governing body" when they conveyed the land to the United States for the Tribe. (E.R. 398:12-17, 401:7-10.) Appellants repeat this admission in their Opening Brief, stating that as of the land's conveyance to the United States, Tribal Appellees were "acting as the 'Plaintiff Band[.]'" (Opening Brief, p. 25; *see id.*, p. 24 (defining "Band" as the Tribe).) Consistent with these admissions, Tribal Appellees presented documents to the District Court (in an unopposed request for judicial notice) showing the United States expressly recognized the Tribe as a sovereign tribal entity when the land went into trust. *Compare* (S.E.R. 129-134) (*Watt* Stipulation dated March 25, 1983) *and* (S.E.R. 141, 144) (Federal Register listing "Table Mountain Rancheria of California" as a federally recognized tribal entity on December 23, 1983) *with* (S.E.R. 147-149) (November 27, 1984 Grant Deed, accepting land in trust for the Tribe).

Appellants further allege that after the United States accepted the land into trust for the Tribe, Tribal Appellees improperly distributed certain revenues from the Tribe's Rancheria land amongst themselves, and not to Appellants. (E.R. 399:4-8, 401:19-23.) However, under bedrock law, the Tribe's trust land and all profit derived therefrom have necessarily been controlled solely by the Tribe's properly constituted sovereign government, and not by any individual. *Cohen's Handbook*, § 15.02 Tribal Property 966; *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)).

Thus, Appellants' allegations about Tribal Appellees' distribution of trust land revenue necessarily seek relief for an injury allegedly caused by an Indian tribal government. While nominally alleged against private persons (albeit in their capacity as members of a Tribal governing body), such claims are barred by the Tribe's immunity. *Imperial Granite*, 940 F.2d at 1271.

C. Appellants' Admissions Establish, And Judicially Noticeable Documents Confirm, The United States Has Held The Rancheria In Trust For The Tribe Since 1984.

In a "Summary of Material Facts" that contains one solitary citation to the record, Appellants argue the 1984 return of land to the United States "is void and should have not [sic] force or effect." (Opening Brief, pp. 23-25.) This argument fails.

Without citation to the record, Appellants complain the Association transferred the Rancheria land to the United States a few months after the one-year period the *Watt* Stipulation contemplated. (Opening Brief, pp. 24-25 & n.14.) They reason that, because the *Watt* Stipulation provided the Rancheria land would be conveyed within one year, the United States could not take the land into trust thereafter. Of course, Appellants point to no language in the *Watt* Stipulation suggesting Tribal Appellees had any duty *to Appellants* to transfer the land at any particular time.

In any case, and in an argument elevating form over substance, Appellants suggest the United States' acquisition failed because the *Watt* Stipulation referenced the "plaintiff Band" as the conveying entity of "all lands within Table Mountain Rancheria" when the deed recites "Table Mountain Association" as transferring the land to be held in trust by the United States "for the Table Mountain Band of Indians of the Table Mountain Rancheria."[7] (S.E.R. 131:14-17, 147.)

In the end, Appellants' semantics fall flat. First, the *Watt* complaint used the terms Band, Association and Tribe interchangeably, consistent with the Tribal Appellees' theory that the entities were one and the same. (S.E.R. 47.) Further, the Stipulation's reference to the Tribe (and not the Association) confirms the Federal defendants and the Court shared that mindset, finding the Association constituted the Tribe's sovereign government (E.R. 383:4-20, 397:22-24). (Notably, this all actually comports with Appellants' own allegations that the

[7] 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*, 509 F.3d at 1013 & n.4 (Table Mountain Rancheria of California is a federally recognized Indian tribe even though the *Watt* materials referenced 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 (Dec. 22, 1983) (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).

Association *was the Tribe's governing body.*) Second, by virtue of the United States' purported termination, the Association "held the title in fee simple" (Opening Brief, p. 24), and it did transfer the land to the United States (S.E.R. 147), regardless of whether the *Watt* Stipulation directed it to do so. Finally, and more fundamentally, the United States possesses broad power to take land into trust for the Tribe, without the imprimatur of any court. 25 U.S.C. § 465; Wheeler Howard Act aka Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934); *see* 25 U.S.C. § 2202. And the United States exercised this broad power on behalf of Table Mountain in 1984. (S.E.R. 148.)

In the end, regardless of whether the *Watt* Stipulation compelled the Association to transfer land to the United States, or compelled the United States to accept the land in trust, they both did so 28 years ago, without challenge, and the land has been in trust for the Tribe's benefit ever since.

IV. Affirmance Is Also Separately Justified Because Appellants Failed To Allege Facts Supporting Any Claim Against Tribal Appellees.

Despite Appellants' three opportunities to present a viable pleading (an original complaint and two amendments), the District Court properly found Appellants "repeatedly failed to allege a cognizable claim against Tribal [Appellees]." (E.R. 598:8-10.) Appellants do nothing to explain this failure on appeal, apparently unconcerned that this Court may affirm dismissal on any ground

fairly supported in the record, irrespective of whether the District Court reached it or relied on other grounds. *Steckman*, 143 F.3d at 1295.

Appellants' reluctance to explain their claims is not surprising, owing perhaps to the need to avoid "the double jurisdictional whammy" this Court already has identified as barriers to membership disputes seeking Tribal benefits (*Lewis v. Norton*, 424 F.3d at 960; *Alvarado*, 509 F.3d at 1011), and apparently leading Appellants to distort their claims to the point that they are, in the words of the District Court, "unintelligible." (E.R. 573[6:12-14], 576:27.)

A. Appellants Lack Any Federal Right To Relief Against Private Persons Or Tribal Officials.

Appellants' second and third claims appear to seek recovery from Tribal Appellees on due process or taking claims under the Fifth and Fourteenth Amendments in the U.S. Constitution. (E.R. 394:6-7; E.R. 397:25-398:17.) The purported vehicles for these claims are *Bivens*, the Fifth Amendment, and § 1983.

Although Appellants' "vague and conclusory complaint 'aims in the general direction of the federal Constitution with buckshot'" (*Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992)), the constitutional provisions Appellants invoke impose "state action" requirements that Appellants cannot possibly satisfy as to Tribal Appellees. None of their allegedly injurious conduct occurred on behalf of a federal or state government. To the contrary, even according to Appellants, Tribal Appellees acted through a tribal governing body

(an Association and then a Tribal Council), and they necessarily did so on behalf of an Indian tribal government, federally recognized or not.

1. The Fifth And Fourteenth Amendments Do Not Apply To Private Persons Or Persons Acting On Behalf Of An Indian Tribal Entity.

Neither the Fifth nor Fourteenth Amendments protect individuals from violations of constitutional rights by private actors. *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.,* 75 F.3d 1401, 1406 (9th Cir. 1996). Likewise, consistent with Indian tribes' status "[a]s separate sovereigns pre-existing the Constitution" (*Santa Clara Pueblo*, 436 U.S. at 56), the Fifth and Fourteenth Amendments do not bind Indian tribes or tribal actors. *Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Claims alleging an Indian tribe has violated an individual's due process rights, or rights against taking of property without just compensation, cannot arise under the Constitution. *Id.* at 476; *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 981-82 (9th Cir. 1983).

2. No Procedural Vehicle Exists To Bring Constitutional Claims Against Tribal Officials.

Consistent with the principle that the Fifth and Fourteenth Amendment constrain only state or federal actors, Appellants cannot properly allege Tribal Appellees acted under color of federal or state law, which are essential prerequisites of these claims.

a) *Bivens* And Taking Claims

Both *Bivens* and taking claims require actions under color of federal law that Appellants do not and cannot allege. "[A] *Bivens* action can be brought only against one who is engaged in governmental (or 'state') action." *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567 (9th Cir. 1987). Similarly, a Fifth Amendment taking claim only lies against actions by the federal government. *American Bankers Mortgage Corp.,* 75 F.3d at 1406; *see Talton v. Mayes*, 163 U.S. 376, 382-83 (1896) (Indian tribe not bound by the Fifth Amendment, which applies only to federal government).

As this Court has explained, whether private conduct constitutes governmental action depends on factors the U.S. Supreme Court has identified: (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. *Vincent*, 828 F. 2d at 567 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)); *Morse v. North Coast Opportunities*, 118 F.3d 1338, 1342 (9th Cir. 1997).

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. *Morse*, 118 F.3d 1338, 1341 (9th Cir. 1997)

("[G]overnmental funding and extensive regulation without more will not suffice to establish governmental involvement in the actions of a private entity." (citing *Rendell-Baker*, 457 U.S. at 842-43)); *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 engage in the "substantial cooperation" required to establish a "symbiotic relationship" with the federal government supporting *Bivens* liability); *see Boney v. Valline*, 597 F. Supp. 2d 1167, 1172 (D. Nev. 2009) (Officer of federally funded and regulated tribal law enforcement program did not act under color of federal law as "the enforcement of a tribe's own tribal laws against members of the tribe is certainly within the scope of the tribe's inherent sovereignty.").

If Tribal Appellees acted under any law in the course of controlling the land and resources held by the Association and the Tribe (E.R. 398:25-399:8, 401:14-23), it was 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, Appellants' allegations establish Tribal Appellees acted within the "scope of the tribe's inherent sovereignty" (*Boney*, 597 F. Supp. 2d at 1175), which encompasses determinations about membership, the use of trust land and other resources, and the distribution of tribal benefits. *Lewis v. Norton*, 424 F.3d at 961; *Cohen's Handbook*, § 15.02 Tribal Property 966.

Appellants nowhere allege 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 land. *Rendell-Baker*, 457 U.S. at 840-43; *Morse*, 118 F.3d at 1342. Indeed, such a relationship would be inimical to the historic relationship between tribes and the United States, which respects tribes' sovereign right to govern themselves without federal interference. *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Santa Clara Pueblo*, 436 U.S. at 55.

b) Section 1983 Claims

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).

Appellants suggest they can recover under § 1983 "if the Court finds the Association to be a state quasi-governmental agency." (E.R. 397:25-398:4.) However, Appellants allege no facts suggesting Tribal Appellees acted under the color of the state law, or had any connection to any state law or entity whatsoever. Nor would such an allegation make 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.*, 719 F.2d at 981-82 (emphasis added). Appellants' conclusory allegation that unspecified state action supports § 1983 relief cannot survive dismissal. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

B. Tribal Appellees Are Not Federal Actors By Virtue Of Allegations They Governed The Association.

Appellants cannot save their constitutional claims 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." (E.R. 383:4-8, 395:13-15, 397:25-398:4.)

First, as Appellants admit, and consistent with judicially noticeable documents the District Court received without objection, the Association constituted the Tribe's government, which never lost its sovereign status. (E.R. 383:4-20, 397:22-24; S.E.R. 49:3-21, 83:9-84:8, 86:1-28, 130:17-19.) As an Indian tribe, it was necessarily a separate sovereign, predating the United States, and not created by federal law. *Santa Clara Pueblo*, 436 U.S. at 56.

Second, even assuming the Association was "created by" federal law, this alone would not expose it to liability under *Bivens* and the Fifth Amendment. Even entities created under federal law act under "color of federal law" in limited circumstances: specifically, where 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." *American Bankers Mortgage Co.,* 75 F.3d at 1408.

Of course, the Association is not a corporation, and was not chartered under any special law, but was simply the "governing Board of the Indian Band

(Tribe)"). (E.R. 397:22-24.) Nor was the Association formed to serve the federal government's purposes, but rather, as Appellants allege, 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." (E.R. 383:9-16, 384:1-7.) Appellants do not allege, nor can they plausibly suggest, the United States retained any control over the Association, much less "permanent authority" over its governance. *See Williams v. Lee*, 358 U.S. at 223. Because Appellants' allegations establish only that Tribal Appellees acted on behalf of an Indian tribe and not under color of federal law, Appellants cannot state a claim under *Bivens* or the Fifth Amendment.

C. Appellants' Allegations Do Not Establish Tribal Appellees Conspired With Any Federal Actor.

Not surprisingly, a plaintiff to alleging a conspiracy—*i.e.*, an agreement to violate the law—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 (citations omitted).

Accordingly, Appellants 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,* 968 F.2d at 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 "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). 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 Appellants allege to support this alleged conspiracy are Tribal Appellees' filing of a complaint and entry of a settlement. (E.R. 396:3-20.) Secretary Salazar's only alleged act was to acquiesce to venue in the Northern District of California. (E.R. 396:6-16.) These bald assertions, devoid of any actual facts alleging intent or agreement, are insufficient as a matter of law to establish Tribal Appellees' knowledge of or involvement in any conspiracy.

Conspicuously absent is any specific factual allegation that either establishes Tribal Appellees' involvement in the alleged conspiracy or reveals any illegal agreement between Tribal Appellees and Secretary Salazar. Appellants allege no facts indicating Secretary Salazar had any role in the Tribal Appellees' decision to sue in the Northern District. *See Degrassi v. Glendora,* 207 F.3d 636, 647 (9th Cir.

2000) (court properly dismissed claims alleging City and private defendants conspired to file suit against plaintiff because plaintiff alleged "no facts indicating that the City defendants had any involvement in the *Andrewses' decision* to file that action" (emphasis in original)).

Unable to allege an agreement to violate Appellants' purported rights, Appellants ask the Court to infer such an unlawful agreement from Appellees' lawful actions in settling *Watt*. Appellants suggest *Watt's* very settlement "implies Defendants negotiated an agreement which they knew or should have known" injured Appellants. (E.R. 396:17-20.) Such allegations, however, in no way "plausibly suggest an entitlement to relief" because, even if they suggested a conspiracy, they would be equally consistent with an "obvious alternative explanation" (*Ashcroft,* 129 S. Ct. at 1951): that Tribal Appellees and the *Watt* defendants simply sought to undo the unlawful termination which, like many others, left Indians across California destitute and landless. (S.E.R. 57:11-26, 58:4-13) *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).

The *Watt* defendants also had an undeniable interest in resolving potentially expensive litigation in which they faced potential liability for damages of $10,000 per class member for a host of claims, along with payment of all of plaintiffs' attorney fees. (S.E.R. 86:1-89:17.) Cooperation between Tribal Appellees and federal officials for that legitimate purpose—settling litigation to unwind a flawed

termination—does not support a conspiracy claim. *Iqbal,* 129 S. Ct. at 1951; *cf. Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948) (for state court suit to support claimed conspiracy to deprive plaintiff of property without due process, "the state court proceedings must have been a complete nullity").

Appellants' suggestion that the *Watt* parties somehow conspired to manipulate venue of the action is even more implausible. (E.R. 396:3-397:3.) Indeed, it defies common sense that the *Watt* parties would conceive that laying venue for public court proceedings in the Northern District of California would somehow conceal the public court proceedings from Appellants. Such a scheme is especially implausible since the *Watt* plaintiffs provided notice of the settlement, as the Court ordered, "in a newspaper of general circulation published in the vicinity of . . . Table Mountain Rancheria[] in Fresno County California, three times at weekly intervals." (S.E.R. 201:19-27, E.R. 561-565.) A plausible explanation is that the Northern District was a convenient forum for the *Watt* plaintiffs, whose attorneys' offices were in Oakland (S.E.R. 129), and for the United States Attorney, whose San Francisco office had experience handling unlawful termination cases.[8] *See, e.g.*, *Duncan,* 517 F. Supp. 1 (N.D. Cal. 1977);

[8] To be sure, Appellants 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).

Smith, 515 F. Supp. 56 (N.D. Cal. 1978). Appellants' bare speculation that the *Watt* litigation constituted a conspiracy between the Tribe and the United States does not subject Tribal Appellees' conduct to constitutional scrutiny, and in the end, simply presents no basis for relief.

D. Appellants Fail To Allege Any Interest Protectable By The Constitution.

Even if a decades-stale taking claim was possible against persons governing an Indian tribal entity, Appellants fail to allege a constitutionally protectable interest in Rancheria lands. They do not allege they owned Rancheria lands at any time, or that they otherwise had a property interest recognized under federal, state, or tribal law. Appellants 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" (E.R. 395:6-395:12, 395:23-396:2, 398:9-11, 400:24-26.)

This 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*, 155 Ct. Cl. at 134 (citing *Johnson*, 21 U.S. 543); *Cohen's Handbook*, § 15.02 Tribal Property 966. Mere occupation or use of tribal lands does not support a taking claim unless Congress, by treaty or other agreement, has declared the party seeking compensation possesses the right to hold the lands permanently. *Tee-Hit-Ton*

Indians v. United States, 348 U.S. 272, 277-78 (1955) (no taking claim lay where Indians alleged "tribal predecessors have continually claimed, occupied and used the land from time immemorial"). Because Appellants can point to no treaty, act of Congress, or other source of a vested property right in the Tribe's Rancheria lands, they cannot predicate liability on the loss of that alleged interest.

E. Appellants Cannot Save Their Constitutional Claims By Characterizing The *Watt* Stipulation As A "Treaty."

Appellants identify as an issue on appeal that "a violation of the *Watt* Stipulation [is] tantamount to a constitutional violation." (Opening Brief, p. 11.) They go on to vaguely assert that *Watt* "implicated both the laws of the United States and the Constitution," and bizarrely state the *Watt* Stipulation "is, in reality, a Treaty between the Watt Appellants and the United States government and jurisdiction to challenge that Treaty, *i.e.* enforcement validity etc. lies in the District Court." (*Id.*)

The argument fails. Putting aside the doubtful issue of whether the tort claims Appellants advance lie for violation of a treaty, as opposed to the Constitution itself (*see Bothke v. Fluor Eng'rs & Constructors, Inc.*, 834 F.2d 804, 814 (9th Cir. 1987) (Beezer, J., concurring); *Boney*, 597 F. Supp. 2d at 1172 (D. Nev. 2009)), the *Watt* Stipulation is simply *not* a treaty. Appellants nowhere allege the *Watt* Stipulation satisfied any of the prerequisites for creating a treaty, such as concurrence of a supermajority of the U.S. Senate. U.S. Const. art. II, cl. 2; *SEC v.*

International Swiss Inv. Corp., 895 F.2d 1272, 1275 (9th Cir. 1990). More fundamentally, Congress outlawed treaties with Indian tribes in 1871, over 100 years before *Watt*. Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281 (9th Cir. 2004).

Despite the District Court's admonition in dismissing the First Amended Complaint that Appellants "identify the operative language of the *Watt* Judgment" supporting their claims (E.R. 356:17-18), Appellants have never identified, below or on appeal, any language of the *Watt* Stipulation creating rights in their favor. Because the *Watt* Stipulation is not a treaty, and creates no rights in favor of Appellants in any event, Appellants' last ditch argument cannot salvage their claims.

F. Appellants Do Not And Cannot Allege A Breach Of Fiduciary Duty Claim Against Tribal Appellees, Who Have No Fiduciary Duty To Appellants As A Matter Of Law.

Appellants' third and fourth claims, for breach of fiduciary duty, fail because no such duty exists.

1. Federal Law Breach Of Fiduciary Duty Claim

Appellants' third claim alleges Tribal Appellees owed fiduciary duties as members of the "quasi-governmental" board of the Association, which Appellants contend are cognizable under *Bivens* or § 1983. (E.R. 397:25-398:8.) However, no federal claim for breach of fiduciary duty exists, except those expressly created by statute (s*ee, e.g.*, 29 U.S.C. § 1109 (creating claim for breach of fiduciary duty

by ERISA fiduciary)), none of which is triggered here. The Rancheria Act also created no fiduciary duty. Rather, it created a single exclusive administrative remedy for those claiming they were wrongfully excluded from a distribution plan. Rancheria Act, §§ 2(a), 10(a) (S.E.R. 120); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (S.E.R. 126). As Appellants have alleged no facts giving rise to a fiduciary duty under federal law, their third claim necessarily fails.

2. State Law Breach Of Fiduciary Duty Claim

Appellants' fourth claim asserts Tribal Appellees have "a fiduciary duty to [Appellants] under the same legal theory that the Board of Directors of a homeowner [sic] association has a fiduciary duty to the homeowners." (E.R. 400:17-19.) Appellants apparently attempt to assert a breach of fiduciary duty claim under California law. The effort is unavailing, as Tribal Appellees owe Appellants no such duty.

To establish a cause of action for breach of fiduciary duty under California law, a plaintiff must demonstrate: "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damages." *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" and rejecting fiduciary relationships in other contexts).

Consistent with California law, homeowners associations only possess fiduciary duties imposed by statute or in accordance with a specific written instrument defining their obligations. *Cohen v. Kite Hill Community Association,* 142 Cal. App. 3d 642, 646-47 (1983); *Oakland Raiders*, 131 Cal. App. 4th at 636; *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).

Appellants identify no relationship between Tribal Appellees and Appellants that California recognizes as fiduciary in nature. Appellants simply suggest, without explanation, that Appellants owe a fiduciary duty because they allegedly comprised the "governing board of the Association" or alternatively because the Association is, in some unspecified respect, like a "homeowner [sic] association." (E.R. 400:15-19.) 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, let alone, duties that could be vindicated in the courts of another sovereign. *Santa*

Clara Pueblo, 436 U.S. at 72 fn. 32; *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp 740, 746 (D.S.D 1995) (fiduciary duties of an Indian tribe must be interpreted in a tribal forum under tribal law, and courts lack jurisdiction to consider whether a tribe has breached such a duty). And Appellants do not allege the Association or Tribe actually *is* a homeowners association or that it was incorporated and registered under the California nonprofit corporation statute. (E.R. 400:15-19.) *See* Corp. Code § 5231.

Appellants also assert, without elucidation, that *Watt* imposed a fiduciary relationship on Tribal Appellees (E.R. 390:23-391:2), apparently ignoring the District Court's requirement that Appellants "identify the operative language of the Watt Judgment" that creates a fiduciary relationship. (E.R. 356:17-18.) Of course, the Court need not and should not accept Appellants' conclusions as to the effect of the *Watt* Stipulation. *Sprewell*, 266 F.3d at 988; *see Parrino*, 146 F.3d at 706.

A review of the 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. (S.E.R. 131:14-18.) The Association complied.[9] (S.E.R. 147.) Notably absent from the *Watt* Stipulation

[9] As discussed above, Appellants erroneously assert the Association failed to timely convey the land. *See supra* III.C. In any event, Appellants do not, and cannot, suggest the delay injured them in any way. Indeed, as Appellants claim the Association's transfer of the land to the United States caused their injury, it is unclear how delaying such transfer could possibly have caused them harm.

(and 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 of the Table Mountain's assets under the Rancheria Act of 1958. Rancheria Act, §§ 2(a), 10(a) (S.E.R. 120); *see also* 25 CFR § 242.5, 24 Fed. Reg. 4653 (June 9, 1959) (S.E.R. 126.) Moreover, such a duty would have been inimical to the very purpose and effect of *Watt*: to federally 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 to be 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))).

Because neither the *Watt* Stipulation, nor any other agreement or provision of California law, impose on Tribal Appellees any duties to Appellants, Appellants cannot state a claim for breach of fiduciary duty under California law. *See Parrino*, 146 F.3d at 706.

V. The District Court Properly Ordered Dismissal Without Leave to Amend.

After three attempts to allege facts sufficient to support a cognizable claim for relief that is not time-barred, the District Court properly dismissed Appellants' second amended complaint without leave to amend. (E.R. 579:4-7, 579:10-13.) This Court will not disturb the District Court's discretion "[a]bsent a definite and firm conviction that the district court committed a clear error of judgment." *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Allen*, 911 F.2d at 373; *Chodos v. West Pub. Co., Inc.*, 292 F.3d 992, 1003 (9th Cir. 2002) (denying leave to file a second amended complaint). A plaintiff's failure to provide additional facts when given the opportunity is "a strong indication that the plaintiffs have no additional facts to plead." *Fischer v. Vantive Corp. (In re Vantive Corp. Sec. Litig.)*, 283 F.3d 1079, 1097 (9th Cir. 2002).

During the hearing on Appellees' motions to dismiss Appellants' First Amended Complaint, the District Court specifically identified Appellants' pleading failures and admonished Appellants "that they would be given only one more opportunity to amend their complaint in order to articulate cognizable claims." (E.R. 575:13-18). Appellants' amendments resulted only in "more confusion" and continually "unintelligible" claims. (E.R. 575:16-19, 573[6:14].) The futility of

Appellants' efforts is not surprising, given that this Court has already twice ruled that some of these very same Appellants lack any basis for federal court relief. *Lewis v. Norton*, 424 F.3d at 960-61; *Alvarado*, 509 F.3d at 1011.

Appellants' Opening Brief does not contend the District Court abused its discretion by denying them leave to amend, much less enunciate any viable claim they could allege if given a chance to amend for the fourth time. (Opening Brief, p.29.) Nor did Appellants' counsel present to the District Court, either in briefing or during any hearing, any explanation of how Appellants might successfully amend their claim. *See Ohel Rachel Synagogue*, 482 F.3d at 1060 fn. 4. As nothing in the record suggests the District Court committed "a clear error in judgment" in denying Appellants leave to amend, this Court should not disturb that holding and permit Appellants to file a fourth complaint. *Allen*, 911 F.2d at 373.

Conclusion

Appellants have twice sought to circumvent the jurisdictional barriers to challenging the manner in which a sovereign Indian tribe grants membership benefits, and twice been rejected by this Court. This latest attempt to bring a decades-stale dispute regarding the Tribe's self-governance fares no better. Because the District Court properly found Appellants did not, and could not, state a timely and coherent claim, this Court should affirm.

Dated: July 30, 2012

Respectfully submitted,

/s/ Paula M. Yost

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Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, Appellees Ray Barnes, Marian Burrough, Ivadelle Castro, Lewis Barnes, William Walker, Aaron Jones, Carolyn Walker, Twila Burrough, and Lori Castro state they are aware of no related cases before this Court.

Certificate of Compliance

The undersigned certifies that, according to the word count provided by Microsoft Word 2002, the body of the foregoing brief contains 13,926 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B). The text of the brief is in 14-point Times New Roman, which is proportionately spaced. *See* Fed. R. App. P. 32(a)(5), (6).

/s/ Paula M. Yost

Addendum

The California Rancheria Termination Act, 85 Pub. Law No. 671, 72 Stat. 619-21 (1958)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with the provisions of this Act: Alexander Valley, Auburn, Big Sandy, Big Valley, Blue Lake, Buena Vista, Cache Creek, Chicken Ranch, Chico, Cloverdale, Cold Springs, Elk Valley, Guidiville, Graton, Greenville, Hopland, Indian Ranch, Lytton, Mark West, Middletown, Montgomery Creek, Mooretown, Nevada City, North Fork, Paskenta, Picayune, Pinoleville, Potter Valley, Quartz Valley, Redding, Redwood Valley, Robinson, Rohnerville, Ruffeys, Scotts Valley, Smith River, Strawberry Valley, Table Bluff, Table Mountain, Upper Lake, Wilton.

SEC. 2. (a) The Indians who hold formal or informal assignments on each reservation or rancheria, or the Indians of such reservation or rancheria, or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and

distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common. The Secretary shall provide such assistance to the Indians as is necessary to organize a corporation or other legal entity for the purposes of this Act.

(b) General notice shall be given of the contents of a plan prepared pursuant to subsection (a) of this section and approved by the Secretary, and any Indian who feels that he is unfairly treated in the proposed distribution of the property shall be given an opportunity to present his views and arguments for the consideration of the Secretary. After such consideration, the plan or a revision thereof shall be submitted for the approval of the adult Indians who will participate in the distribution of the property, and if the plan is approved by a majority of such Indians who vote in a referendum called for that purpose by the Secretary the plan shall be carried out. It is the intention of Congress that such plan shall be completed not more than three years after it is approved.

. . .

SEC. 6. The Secretary of the Interior shall disburse to the Indians of the rancherias and reservations that are subject to this Act all funds of such Indians that are in the custody of the United States.

. . .

SEC. 10. (a) The plan for the distribution of the assets of a rancheria or reservation, when approved by the Secretary and by the Indians in a referendum vote as provided in subsection 2 (b) of this Act, shall be final, and the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who receives or is denied a part of the assets distributed.

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

. . .

Approved, August 18, 1958.

"Establish Regulations for Distribution of Assets of California Rancherias and Reservations," 25 C.F.R. part 242, 24 Fed. Reg. 4653 (June 9, 1959)

§ 242.2 Definitions.

As used in this part, terms shall have the meanings set forth in this section.

(a) "Adult Indian" means any Indian who is an adult under the laws of the State in which he is domiciled.

(b) "Distributee" means any Indian who is entitled to receive, under a plan prepared pursuant to section 2 of the Act of August 18, 1958 (72 Stat. 619), any assets of a rancheria or reservation.

(c) "Dependent members", as used in the phrase "dependent members of their immediate families", includes all persons for whose support the distribute is legally liable according to the laws of the State of California and who are related by blood or adoption or by marriage, including common law or customary marriage, who are domiciled in the household of the distributee, and who receive more than one-half of their support from such distributee.

(d) "Formal assignment" means any privilege of use and/or occupancy of the real property of a rancheria or reservation which is evidenced by a document in writing.

(e) "Informal assignment" means any privilege or claim of privilege of use and/or occupancy of the real property of a rancheria or reservation, not based on an instrument in writing.

. . .

§ 242.3 Plan of distribution.

The plan of distribution to be prepared under section 2 of the Rancheria Act shall be in writing and may be prepared by those Indians who hold formal or informal assignments on the rancheria or reservation involved, or by those Indians who have or claim to have some special relationship to the particular rancheria or reservation involved, not shared by Indians in general, or may be prepared by the Secretary of the Interior after consultation with such Indians. Any such plan must be approved by the Secretary before submission to the distributees for approval. Such plan shall provide for a description of the class of persons who shall be entitled to participate in the distribution of the assets and shall identify, by name and last known address, those persons to be distributees under the plan and dependent members of their immediate family.

. . .

§ 242.5 Objections to plan.

Any Indian who feels that he is unfairly treated in the proposed distribution of the property of a rancheria or reservation as set forth in a plan prepared and approved under § 242.3 may, within 30 days after the date of the general notice, submit his views and arguments in writing to the Area Director, Bureau of Indian Affairs, P.O. Box 749, Sacramento, California. The Area Director shall act for persons who are minors or non compos mentis if he finds that such persons are

unfairly treated in the proposed distribution of the property. Such views and arguments shall be promptly forwarded by the Area Director for consideration by the Secretary.

Certificate of Service

The undersigned certifies that a copy of the foregoing Answering Brief for Defendants-Appellees Ray Barnes, Marian Burrough, Ivadelle Castro, Lewis Barnes, William Walker, Aaron Jones, Carolyn Walker, Twila Burrough, And Lori Castro was served on July 30, 2012 on all counsel of record via this Court's CM/ECF system.

/s/ Paula M. Yost

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