No. 11-17301

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD M. LEWIS, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

KENNETH LEE SALAZAR, SECRETARY OF THE INTERIOR
AND
CLARENCE JONES, ET AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE FEDERAL APPELLEE

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to several provisions including 28 U.S.C. § 1343(a)(3) and (4), 28 U.S.C. § 1331, 28 U.S.C. §§ 1357, 1361, and 1367. ER III 377.[1] The district court held that it lacked jurisdiction because plaintiffs had failed to identify a waiver of sovereign immunity that would permit the court to consider their damages action. ER I 573. The court entered final

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[1] Record citations are to Plaintiffs' Excerpts of Record, including volume and page number.

judgment on August 31, 2011. ER I 596. Plaintiffs filed a timely notice of appeal on September 26, 2011. ER I 603. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether this Court should summarily affirm the district court's determination that sovereign immunity barred plaintiffs' claims for money damages against the government, because plaintiffs have not challenged that holding in their opening brief and could not identify a valid waiver of sovereign immunity in any event.

2. Whether, in the alternative, the district court properly dismissed Plaintiffs' claims against the government because they are untimely and fail to state a cognizable legal theory.

STATEMENT OF THE CASE

Plaintiffs seek money damages from the Secretary of the Interior and members of the Table Mountain Band of Indians, alleging various claims relating to the nearly thirty-year-old class settlement in *Table Mountain Rancheria Association* v. *James Watt, Secretary of the Interior*, No. C-80-4595-MHP (N.D. Cal. 1983). The district court dismissed two previous suits asserting claims regarding the settlement for lack of jurisdiction, and this Court affirmed both rulings. *See Lewis* v. *Norton*, 424 F.3d 959 (9th Cir. 2005) (No. 03-17207); *Alvarado* v. *Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007) (No. 06-15351).

The district court held that it lacks jurisdiction over the present action as well because plaintiffs have identified no waiver of sovereign immunity that would permit them to assert a claim for money damages. ER I 574-75. The court found that dismissal would also be warranted because plaintiffs' "unintelligible" and "deficient" second amended complaint failed to state a cognizable claim. ER I 573, 574.

STATEMENT OF FACTS

I. Background

In 1916, the United States purchased a tract of land in Fresno County, California, from private individuals, and held it in trust for the Table Mountain Band of Indians. *See Alvarado* v. *Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007). The land became known as the Table Mountain Rancheria, "rancheria" being the Spanish word for a small Indian settlement. The Rancheria's residents were recognized as Indians for purposes of federal law. *Id.* at 1011–12.

By 1958, Congress had decided to terminate all 41 rancherias in California in order to "rapidly . . . end Indian dependence on federal services, curtail the Indian services bureaucracy, and assimilate Indians into the mainstream of the United States culture." *Duncan* v. *Andrus*, 517 F. Supp. 1, 3 (N.D. Cal. 1977). The California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), established a procedure for distributing each rancheria's property to its residents. The Act "authorized an exchange of title to Rancheria assets, and a promise that the Bureau of Indian Affairs

('BIA') would continue to provide essential benefits, such as irrigation and educational programs to Rancheria residents, if, in return, the [Rancheria] voluntarily relinquished its trust status, and the [Rancheria's] residents forfeited their Indian status." *Alvarado*, 509 F.3d at 1012.

In accordance with the Act, a plan was drafted and approved in 1959 to distribute parcels of the Table Mountain Rancheria to individual residents, with certain remaining parcels "earmarked for the Rancheria water system" to be distributed to the Table Mountain Rancheria Association. *Alvarado*, 509 F.3d at 1012. As a result, the Rancheria lost its trust status, and its residents lost their Indian status. *Id.*

II. Prior Litigation Involving The Table Mountain Rancheria

A. *Table Mountain Rancheria Association* v. *Watt*

In 1980, the Table Mountain Rancheria Association and several individual distributees brought a class action in the United States District Court for the Northern District of California against the federal government. *See Table Mountain Rancheria Association* v. *James Watt, Secretary of the Interior*, No. C-80-4595-MHP (N.D. Cal. 1983). The complaint "alleged that the [government] failed to inform the Rancheria residents who approved the distribution plan of 'the obligations of the United States under the Rancheria Act, the relative advantages and disadvantages of accepting termination, the options available to them under the Rancheria Act and the legal consequences of

exercising those options.'" *Alvarado*, 509 F.3d at 1012–13. The plaintiff class—those distributees who had been deemed to have lost their status as Indians, and their successors—thus "sought rescission of the distribution plan," and a declaration that termination of the plaintiffs' Indian status was void and that they remained eligible to participate in all federal benefit programs for Indians. *Id.* at 1013.

In 1983, the *Watt* parties stipulated to a settlement and judgment. *Ibid.*; *see* ER II 45–50. The stipulation directed the Secretary of the Interior to list the Table Mountain Band of Indians as an Indian Tribal Entity in the Federal Register, and declared that "[t]he status of the named individual plaintiffs and class members as Indians under the laws of the United States is confirmed." ER II 46. The stipulation further provided that the Table Mountain Band of Indians would convey back to the United States those "community-owned lands" that had been deeded to the Table Mountain Rancheria Association in 1959, which the United States would hold in trust for the tribe. ER II 47. Any class member who had received title to a parcel under the 1959 distribution could elect to restore that interest to trust status as well. ER II 47-48. The stipulation also provided that the plaintiffs would dismiss their damages claims against the government. ER II 49.

The district court approved the stipulated settlement and entered judgment in June 1983, and the court retained jurisdiction to enforce the judgment for one year after its date of entry. *Alvarado*, 509 F.3d at 1013.

B. *Lewis* v. *Norton*

Twenty years later, four siblings (of whom two are plaintiffs here) sued the United States, "claiming that they are entitled to recognition as members of the Table Mountain Rancheria . . . and therefore to share in the revenue of that tribe's very successful casino near Fresno, California." *Lewis* v. *Norton*, 424 F.3d 959, 960 (9th Cir. 2005). This Court affirmed the district court's dismissal of the action. Recognizing the established principle that "a tribe is immune from federal court jurisdiction in disputes regarding challenges to membership in the tribe," this Court held the plaintiffs could not "end run around tribal immunity . . . by bringing suit against the government, rather than the tribe itself." *Id.* at 961, 963.

C. *Alvarado* v. *Table Mountain Rancheria*

The Lewis siblings and a number of other individuals who had unsuccessfully petitioned the tribe for admission (of whom six are plaintiffs here) then filed an action against Table Mountain Rancheria, several tribal leaders, and a number of tribal members who served as representative class plaintiffs in *Watt*, as well as the federal government. The new suit asserted a breach of fiduciary duty and breach of "the covenant of good faith and fair dealing" for failing "to insure that [plaintiffs] 'were treated the same as the named parties in *Watt*.'" *Alvarado*, 509 F.3d at 1014. The plaintiffs sought damages against the tribal defendants, including "'any and all benefits provided by the [Rancheria] to any and all members . . . which would include . . .

casino profits,'" and various forms of equitable relief against all defendants, including "declaratory relief that [plaintiffs] are members of the [Rancheria] and equally entitled to benefits 'from the federal government and [the Rancheria]' as are other members of the tribe." *Ibid.*

The district court dismissed the complaint, and this Court again affirmed. This Court held that the plaintiffs had failed to establish that any statute conferred jurisdiction over their claims on the district court, because neither the Federal Tort Claims Act nor the Administrative Procedure Act encompassed plaintiffs' claims. *Id.* at 1017–20. The Court observed that the plaintiffs could not invoke the district court's ancillary jurisdiction to enforce the *Watt* settlement, because they did not allege any violation of the settlement. *Ibid.* In any event, this Court explained, "whatever ancillary jurisdiction the district court had" to enforce the settlement "expired on June 16, 1984," per the terms of the stipulated judgment. *Id.* at 1018.

III. The Present Action

In this latest action, plaintiffs have sued the Secretary of the Interior (in his official capacity) and a number of living and deceased members of the tribe.

Plaintiffs' first amended complaint alleged various failures by the Secretary to list and provide federal services, as required by the *Watt* settlement; it also alleged that the individual defendants had failed to share income from the trust lands. ER II 9–11. The district court dismissed the complaint as "unintelligible," ER I 356, noting that it

"fail[ed] to allege facts sufficient to establish that violation of the Watt Judgment is tantamount to a constitutional violation," and failed to "allege sufficient facts to establish the existence of any actionable fiduciary relationship between the federal government and Plaintiffs." The court also noted that "there is no apparent jurisdictional basis for Plaintiffs' claim." ER I 351, 354, 356.

The district court granted plaintiffs leave to amend, ER I 356–357, and plaintiffs filed a second amended complaint, ER III 375–402, which, the district court declared, "create[d] more confusion by invoking wildly divergent statutory claims unsupported by relevant factual allegations." ER I 575.

The second amended complaint alleges four causes of action, the first two of which are asserted against the Secretary. For each of the two causes of action against the Secretary, plaintiffs claim $10 million in general damages and $10 million in punitive and exemplary damages. ER III 393, 397, 402. Plaintiffs do not seek equitable relief.

The first cause of action appears to contain two components. First, plaintiffs allege that the Secretary failed to comply with obligations under the California Rancheria Act to make infrastructure improvements to the Rancheria's roads and water systems before the Rancheria was terminated in 1959. ER III 391 (citing California Rancheria Act, Pub. L. No. 85-671 § 3(b)-(c)). Plaintiffs contend that the Secretary thus breached a "fiduciary duty," failed to comply with 25 U.S.C. § 13

(concerning the Secretary's duty to spend appropriated funds for Indian benefits) and 25 U.S.C. § 1901 (the Indian Child Welfare Act), and violated the Fifth and Fourteenth Amendments. ER III 391-92.

The first cause of action also appears to allege that some individuals who lived on the Rancheria at the time it was terminated did not receive any land when the Rancheria was divided in 1959. ER III 387–388 (¶¶ 26, 29). Plaintiffs suggest that these individuals should not have lost their status as Indians, and thus were wrongly deprived of health, education, and housing benefits that they should have received as Indians from 1959 until Indian status was restored under the *Watt* settlement in 1983. ER III 390, 392.

The second cause of action is directed against both the Secretary and the individual defendants. It concerns the "remaining parcels" of land that "were earmarked for the Rancheria water system" and conveyed in 1959 to the Table Mountain Rancheria Association. *Alvarado*, 509 F.3d at 1012. Plaintiffs contend that when these parcels were deeded by the Association back to the United States in 1984 under the *Watt* settlement, to be held in trust for the tribe, those Rancheria residents who were not members of the tribe were improperly deprived of the benefits derived from these parcels. ER III 394–397.

The district court dismissed the second amended complaint with prejudice. ER I 579. The court held that "[n]o cognizable claim against the Secretary can be

discerned from the allegations set forth" in the second amended complaint, which "fail[ed] to satisfy the fundamental notice pleading requirement" of Federal Rule of Civil Procedure 8. ER I 573. The court noted that "[a]lthough the Secretary's motion [to dismiss] attempts to address the merits of Plaintiffs' specific claims, Plaintiffs' opposition states that 'Defendant's description and analysis of what the allegations are in the [complaint] are very different than what Plaintiffs believe they actually alleged.'" ER I 574. "The inability of the Secretary—and the court—to discern what the [complaint] intends to allege," the court concluded, "demonstrates the extent to which the [complaint] is deficient." *Ibid.*

The court also held that "Plaintiffs have not identified any valid waiver of sovereign immunity related to the claims advanced" in the complaint. ER I 574–75. As the court explained, the only waiver cited, 5 U.S.C. § 702, "does not effect a waiver for claims against the United States for money damages." ER I 575. Because "[a]fter three attempts, Plaintiffs have not come close to stating a single cognizable claim against the Secretary," the district court dismissed plaintiffs' claims with prejudice. *Ibid.*

SUMMARY OF ARGUMENT

This Court should summarily affirm the judgment below as to the Secretary because plaintiffs' opening brief does not challenge the district court's holding that no waiver of sovereign immunity allows plaintiffs' suit. Plaintiffs have sued the federal

government for tens of millions of dollars in damages. The district court correctly held that plaintiffs had identified no relevant waiver of sovereign immunity and that it therefore lacked jurisdiction over plaintiffs' suit. Plaintiffs fail to challenge that holding on appeal, and their brief does not even refer to sovereign immunity. This Court should therefore summarily affirm the dismissal of their complaint.

If the Court reaches the question, it should affirm the jurisdictional holding because it is clearly correct. Plaintiffs have at no time identified any statute that waives the government's immunity for their damages action.

Plaintiffs' claims against the Secretary are also subject to dismissal because they are untimely. Under 28 U.S.C. § 2401(a), any claim against the United States must be brought within six years of its accrual. Plaintiffs' claims allege various actions taken (and not taken) by the Secretary between 1959, when the Table Mountain Rancheria was terminated, and 1984, when the *Watt* settlement between the Secretary and a class of Rancheria members took effect. Plaintiffs' suit was filed in 2010, well after the limitations period had run.

Finally, the district court properly dismissed plaintiffs' claims against the Secretary for failing to state any cognizable legal theory. Plaintiffs' sweeping allegation that the Secretary breached his "fiduciary duty" neither identifies the source of that duty nor what specific actions constituted a breach. And plaintiffs have identified no private right of action created by any of the statutes on which they purport to rely.

STANDARD OF REVIEW

This Court "review[s] de novo . . . whether the United States has waived its sovereign immunity . . . and whether dismissal for lack of subject matter jurisdiction was correct." *Demontiney* v. *United States ex rel. Dep't of Interior*, 255 F.3d 801, 805 (9th Cir. 2001). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coal.* v. *EPA*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007).

This Court "reviews dismissal under Rule 12(b)(6) de novo." *Metzler Inv. GMBH* v. *Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). "Denial of leave to amend is reviewed for abuse of discretion," however, and "the district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously amended the complaint." *Id.* at 1072 (internal quotation and alteration marks omitted).

ARGUMENT

I. Plaintiffs' claims against the Secretary for money damages are barred by sovereign immunity.

A. Plaintiffs' suit against the Secretary of the Interior seeks money damages from the United States. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v.

Mitchell, 445 U.S. 535, 538 (1980) (internal quotation marks omitted). Thus, "[t]he waiver of sovereign immunity is a prerequisite to federal-court jurisdiction." *Tobar* v. *United States*, 639 F.3d 1191, 1195 (9th Cir. 2011). "Unless [plaintiffs] satisf[y] the burden of establishing that [their] action falls within an unequivocally expressed waiver of sovereign immunity by Congress, it must be dismissed." *McGuire* v. *United States*, 550 F.3d 903, 910 (9th Cir. 2008) (internal quotation marks omitted). Plaintiffs cannot meet that burden, nor have they sought to do so in this Court.

The district court determined that plaintiffs "have not identified any valid waiver of sovereign immunity related to the claims advanced" in the complaint. ER I 574–575. Plaintiffs do not challenge here the court's holding, and they make no attempt in their brief on appeal to identify any applicable waiver of sovereign immunity. Indeed, their opening brief does not discuss sovereign immunity at all. Any such argument is therefore forfeited. *See Padgett* v. *Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). Accordingly, this Court should summarily affirm the dismissal of plaintiffs' claims against the Secretary.

B. If this Court were to review the district court's holding notwithstanding plaintiffs' failure to challenge the ruling in their appellate brief, it should affirm the holding because it is clearly correct. The only statute cited by plaintiffs that waives the federal government's immunity in any respect is the Administrative Procedures Act ("APA"). The APA is a limited waiver for claims "seeking relief *other than money*

damages." 5 U.S.C. § 702 (emphasis added). But money damages are all that plaintiffs seek from the government here; they "claim damages from the [Secretary] in the amount of Ten Million Dollars" as compensation for the various breaches of "fiduciary duty," "omissions," and other violations they allege the Secretary has committed. ER III 392–393, 397, 402. Because what plaintiffs seek is plainly "compensatory relief" in the form of "money damages," it is clear that "the United States has not waived sovereign immunity under 5 U.S.C. § 702." *Harger* v. *Dep't of Labor*, 569 F.3d 898, 905 (9th Cir. 2009).

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), cited by plaintiffs as a basis for jurisdiction (Br. 5), has no application to an action brought against a federal official in his official capacity. As the district court noted, plaintiffs "concede[d]" that *Bivens* "does not provide a jurisdictional basis for their constitutional claims against the Secretary because the Secretary is being sued in his official capacity," ER I 351–352 (internal quotation marks omitted), and a "Bivens action can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity." *Consejo de Desarrollo Economico de Mexicali, A.C.* v. *United States*, 482 F.3d 1157, 1173 (9th Cir. 2007).

Plaintiffs similarly err in suggesting (Br. 33) that Article III of the Constitution provides jurisdiction in district court because it mentions "Controversies to which the United States shall be a party." "The Constitution has defined the *limits* of the judicial

power of the United States, but has not prescribed how much of it shall be exercised by" a given federal court. *Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850) (emphasis added). Because "Article III is not self-executing . . . the jurisdiction of inferior federal courts depends on an affirmative statutory grant." *Veterans for Common Sense* v. *Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (*en banc*).

II. Plaintiffs' claims are untimely.

Dismissal is independently warranted because plaintiffs' claims against the Secretary are untimely. *See Alvarado*, 509 F.3d at 1019 (This Court "may affirm a district court's judgment on any ground supported by the record.") (internal quotation marks omitted).

A. "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This statute of limitations begins to run when a plaintiff has all the necessary facts underlying his claims. *See United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). It is not tolled pending the plaintiff's understanding of the legal implications of those facts. *Ibid.*

With regard to the first component of plaintiffs' first cause of action (alleging that the Secretary failed to provide infrastructure improvements required by the California Rancheria Act prior to termination of the Rancheria in 1959), plaintiffs' claim accrued over fifty years ago, in 1959, when the Rancheria was allegedly

terminated without the Secretary having first made the required improvements.

The second component of plaintiffs' first cause of action alleges that, because plaintiffs did not receive any land when the Rancheria was terminated, they did not lose their status as Indians and should have received benefits available to Indians from 1959 until 1983. That claim accrued no later than 1983, when the district court entered the stipulated judgment in *Watt*, which directed that the Table Mountain Rancheria residents retain their status as Indians.

Plaintiffs' second cause of action alleges injuries stemming from the parties' fulfillment of the *Watt* settlement in 1984, when the Association deeded back to the United States the parcels that the Association had received pursuant to the California Rancheria Act in 1959, and the United States, in turn, agreed to hold these parcels in trust for the Table Mountain Band of Indians, rather than "the community of Indians" who had previously inhabited the Rancheria. Plaintiffs did not bring their claim within six years of 1984, so this claim is time-barred too.

B. Plaintiffs' only argument that their claims are timely is that "no federal statute of limitations exists with respect to Indian property-rights claims." Br. 32. In support of that contention, they cite *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985), a case concerning Indian tribes' suit against New York counties under the tribes' "federal common-law right to sue to enforce their aboriginal land rights." *Id.* at 235. The Court determined in that case that "[t]here is no federal statute of limitations

governing federal common-law actions by Indians to enforce property rights," and that it should not borrow the state limitations period for an analogous claim. *Id.* at 240.

County of Oneida has no application to plaintiffs' suit against the *federal* government for alleged failures to provide various government benefits. As this Court has explained since *County of Oneida*, "Indian Tribes are not exempt from statutes of limitations governing actions against the United States." *Sisseton-Wahpeton Sioux Tribe* v. *United States*, 895 F.2d 588, 592 (9th Cir. 1990). Indeed, no federal common law could supersede the express statutory limitations period imposed on suits against the United States, particularly where that limitations period is "a condition of the waiver of sovereign immunity" and where "courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended." *Ibid.*

III. Plaintiffs fail to state a claim upon which relief could be granted.

Finally, even if plaintiffs' claims against the Secretary were not barred by sovereign immunity and the statute of limitations, they were properly dismissed for failure to state any cognizable legal theory of relief against the Secretary. "A district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force* v. *Salazar*,

646 F.3d 1240, 1242 (9th Cir. 2011), cert. denied, sub. nom., *Blasquez* v. *Salazar* 132 S. Ct. 1762 (2012) (quoting *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)).

A. The district court correctly found that "[n]o cognizable claim against the Secretary can be discerned from the allegations set forth" in the complaint and that "[n]one of the claims Plaintiff seeks to allege in the first cause of action are pled with sufficient clarity to permit reasoned analysis." ER I 573–574.

Plaintiffs allege broadly, for example, that the Secretary "breached his fiduciary duty to Plaintiffs" by "failing to provide" various services. ER III 391–392. But Plaintiffs have never explained what statute gives rise to any "fiduciary duty." *Cf. United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' that trust is defined and governed by statutes rather than the common law.") (internal citation omitted). Nor have plaintiffs identified which of them were denied which services at which times since 1959, or whether they even applied for such benefits.

The second amended complaint makes passing reference to three statutes, *see* ER III 391, but plaintiffs have never demonstrated how any of these statutes affords them a cause of action. "[P]rivate rights of action to enforce federal law must be created by Congress," and unless a statute "displays an intent to create not just a

private right but also a private remedy," it provides no basis for suit. *Alexander* v. *Sandoval*, 532 U.S. 275, 286–287 (2001).

The Snyder Act, 25 U.S.C. § 13, contains only broad language about the Secretary's duty to administer congressional appropriations for Indian benefits, but it imposes no specific statutory duty on the Secretary, *see McNabb* v. *Bowen*, 829 F.2d 787, 792 (9th Cir.1987), nor does it provide a private right of action, *see White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001), aff'd and remanded, 537 U.S. 465 (2003). It cannot therefore provide a "cognizable legal theory" for plaintiffs' action.

Plaintiffs also invoke the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. ER III 391. At least one provision of the Act creates a federal cause of action, *see Native Vill. of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 552–54 (9th Cir. 1991) (concerning 25 U.S.C. § 1911(d)), but others do not, *see, e.g.*, *Navajo Nation* v. *Superior Court*, 47 F. Supp. 2d 1233, 1242–43 (E.D. Wash. 1999), aff'd sub nom., *Navajo Nation* v. *Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041 (9th Cir. 2003). Plaintiffs have consistently failed to offer any explanation, however, as to which provision of the Act the Secretary allegedly violated, or why their claims have any connection to child welfare at all. They have thus failed repeatedly to plead with sufficient clarity why they are entitled to sue under the Act.

Plaintiffs next cite the California Rancheria Act, but, again, have never attempted to demonstrate that it provides a private right of action, or that Congress intended to have courts imply one. "Without [such intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*, 532 U.S. at 286–87.

On appeal, plaintiffs urge that the notice provided by the Secretary of the *Watt* settlement in 1983 was flawed. Br. 30–31. The various facts plaintiffs aver in their brief do not appear in their complaint, however, and this is neither the proper time nor place to seek to add new allegations. In any event, plaintiffs fail to offer any explanation of how their claim of inadequate notice relates to their claims against the Secretary or could be the basis for a damages claim in district court.

B. The district court plainly did not abuse its discretion in dismissing plaintiffs' second amended complaint with prejudice. District courts have "broad" discretion to dismiss complaints that are "confusing, distracting, ambiguous, and unintelligible," particularly "where [the] plaintiff has previously amended the complaint" but has still failed to plead with clarity. *United States ex rel. Cafasso* v. *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058–1059 (9th Cir. 2011) (internal quotation marks omitted). In dismissing plaintiffs' first amended complaint, the district court "admonished Plaintiffs that they would be given only one more opportunity to amend their complaint in order to articulate cognizable claims." ER I 575. Because, "[a]fter three

attempts, Plaintiffs have not come close to stating a single cognizable claim against the Secretary," the district court was within its discretion to dismiss the claims with prejudice. ER I 575.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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JULY 2012

STATEMENT OF RELATED CASES

Counsel for the United States is unaware of any related cases currently pending in this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,794 words, excluding the parts of the brief exempted by the Rule.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Garamond, a proportionally spaced typeface, using Corel WordPerfect X5.

s/ Abby C. Wright
ABBY C. WRIGHT

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
ABBY C. WRIGHT