Frank R. Lawrence (Bar No. 147531)
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, California 90071
Telephone: (213) 896-2400
Facsimile: (213) 896-2450

Attorneys for Defendants
MOORETOWN RANCHERIA/FEATHER FALLS CASINO, GARY ARCHULETA, FRANCINE McKINLEY AND DEBRA RASMUSSEN

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEANNE M. HALL, PRO SE,

Plaintiff,

v.

MOORETOWN RANCHERIA/FEATHER FALLS CASINO; GARY ARCHULETA; FRANCINE McKINLEY; DEBRA RASMUSSEN; and ENTERPRISE TRIBE,

Defendants.

Case No. 2:12-CV-01856 LKK GGH PS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY SPECIALLY APPEARING DEFENDANTS MOORETOWN RANCHERIA/FEATHER FALLS CASINO, GARY ARCHULETA, FRANCINE McKINLEY AND DEBRA RASMUSSEN

Fed. R. Civ. P. 12(b)(1)-(2), (6)

Date: March 11, 2013
Time: 10:00 a.m.
Judge: Hon. Lawrence K. Karlton
Courtroom No. 4s

//

//

//

//

//

//

//

//

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

TABLE OF CONTENTS

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

TABLE OF AUTHORITIES

Page(s)

CASES

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

STATUTES

OTHER AUTHORITIES

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

I. INTRODUCTION

Plaintiff Jeanne M. Hall filed this lawsuit against her daughter Debra Rasmussen, and the Indian Tribe of which Ms. Rasmussen is an enrolled member, the Mooretown Rancheria of Maidu Indians of California. The Complaint also names the Tribe's Chairman and its Director of Indian Child Welfare, as well as Mooretown's Feather Falls Casino, though does not allege any actions by Feather Falls.[1] Underlying this case is a custody dispute between Plaintiff and her daughter, Defendant Debra Rasmussen. Plaintiff has had custody of Defendant Rasmussen's daughter, Tiger Lily Rasmussen, since 2006. Last Spring, Defendant Rasmussen filed a petition in Butte County Superior Court, Case No. J-32214, to regain custody of her daughter, a matter in which is currently pending before that court and in which Plaintiff is represented by legal counsel and Ms. Rasmussen is also represented by other legal counsel. Soon thereafter, Plaintiff filed this lawsuit.

Because Plaintiff appears *pro se* in this case, Defendants have read the Complaint liberally and attempted a good faith effort at discerning the nature of Plaintiff's attempt to frame a claim here. Having done so, it is apparent to moving Defendants that the Complaint fails to state a claim, and that both personal and subject matter jurisdiction are absent here. Therefore, Defendants move to dismiss this lawsuit on several grounds.

Addressing the jurisdictional issue first, the Tribe has not waived its sovereign immunity, or that of its entities or officers, against unconsented suit. Absent an express, unequivocal immunity waiver or congressional abrogation, there is no personal or subject matter jurisdiction here as against Mooretown Rancheria, Feather Falls Casino, Gary Archuleta, and Francine McKinley and the case against them must be dismissed with prejudice for this reason.

The Complaint should be dismissed as against all Defendants for additional reasons as well. Reading the Complaint liberally as attempting to assert a federal civil rights claim, no such claim exists because none of the Defendants are alleged to have acted under color of state law, which is an essential element of a Section 1983 claim. Nor could they be alleged to have acted

[1] The Complaint also names Enterprise Rancheria as a defendant. Enterprise is not represented by the undersigned legal counsel.

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

under color of state law, for the Tribal Defendants were clearly acting in their capacity as Tribal Officers administrating the Tribe's interest in the biological child of an enrolled tribal member under the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963. And Debra Rasmussen was not, nor was she alleged to be, acting on behalf of any government in seeking to regain custody of her daughter. The Complaint also fails to state an equal protection claim under either the 5th or 14th Amendments because those constitutional provisions limit the federal government and the states, but not Tribal governments.

To the extent the Complaint is read as seeking to assert that ICWA violates equal protection principles by favoring Indians and/or Indian Tribes, the Supreme Court has consistently held that federal legislation that treats Indian Tribes and their members uniquely and preferentially as a class does not violate equal protection. The Court has long held that these classifications are political not racial. Moreover, the unique trust and fiduciary relationship between the United States and Indians supports Congress' legislative determinations generally in the area of Federal Indian law, and specifically in ICWA.

Finally, the Complaint fails to allege any operative facts whatsoever with respect to Defendant Feather Falls Casino and should therefore be dismissed against this Defendant.

For all of these reasons, the moving Defendants respectfully request that the Court dismiss the Complaint with prejudice.

II. BACKGROUND

A. Factual Background

The Mooretown Rancheria of Maidu Indians of California ("Tribe") is a federally recognized Indian Tribe. *See* 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012) (listing federally recognized tribes); Declaration of Mooretown Tribal Chairman Gary Archuleta ("Archuleta Dec.") at ¶ 2; Complaint at ¶ 4. Defendant Feather Falls Casino ("Feather Falls") is a Tribal governmental economic development project, wholly owned and operated by the Tribe on its federal Indian lands located near Oroville, in Butte County. *See* Archuleta Dec. at ¶¶ 1, 15. The Tribe operates Feather Falls pursuant to Federal and Tribal law, including the Tribe's gaming ordinance, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, and the Tribal-

State Gaming Compact between the Tribe and the State of California.[2] *See* Archuleta Dec. at ¶¶ 15, 17.

In all material respects, Feather Falls is in exactly the same situation as Berry Creek Rancheria's Gold Country Casino at issue in *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006), a case that arose in this Court. "Gold Country Casino is a tribal entity formed by a compact between the federally recognized Tyme Maidu Tribe and the State of California. The Casino is wholly owned and operated by the Tribe." *Id.* at 1045. Feather Falls, like Gold Country Casino,

> is no ordinary business. The Casino's creation was dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(1), required the Tribe to authorize the Casino through a tribal ordinance and an interstate gaming compact. The Tribe and California entered into such a compact "on a government-to-government basis.

Id. at 1046. The same is true of Feather Falls. *See* Archuleta Dec. at ¶¶ 5, 15-17.

Defendant Gary Archuleta is the Tribe's duly elected Chairman. *See* Archuleta Dec. at ¶ 2. All of Chairman Archuleta's actions mentioned in the Complaint, including writing the letter dated July 22, 2009 to Plaintiff that Plaintiff attached to the Complaint, were undertaken in the course and scope of his duties and within his authority as Tribal Chairman. *See id.* at ¶¶ 2-4,14. Defendant Francine McKinley is employed by the Tribe as its ICWA Director. *See* Archuleta Dec. at ¶ 8. All of Director McKinley's actions mentioned in the Complaint, including writing the letter dated November 16, 2010 to Plaintiff that Plaintiff attached to the Complaint, were undertaken in the course and scope of her duties and within her authority as Tribal ICWA Director. *See id.* at ¶¶ 8, 9, 14. Defendant Debra Rasmussen is the biological mother of Tiger Lily Rasmussen, and the biological daughter of Plaintiff. *See id.* at ¶¶ 8, 9(d); Complaint at pp. 1, 4. In March, 2012, Debra Rasmussen filed a petition to regain custody of her daughter in

[2] The Tribe's Compact can be found on the California Gambling Control Commission's website at http://www.cgcc.ca.gov/?pageID=compacts. This citation was accurate as of the date this brief was finalized, filed and served, February 4, 2013.

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

the Butte County Superior Court. *See id.* at ¶ 13. Debra Rasmussen's recovery and progress since 2006 when she lost custody of her daughter have been significant. *See id.* at ¶¶ 8-13.

B. Procedural Background

Plaintiff filed the Complaint on July 13, 2012. *See* Docket #1. Plaintiff's application to proceed *in forma pauperis* was granted on September 21, 2012. *See* Docket #3. On October 10, 2012, the U.S. Marshal mailed requests to Defendants to waive formal service within 60 days. *See* Docket ##3-11. Within that 60-day period, the undersigned entered an appearance on behalf of Defendants Mooretown Rancheria, Feather Falls, Gary Archuleta, Francine McKinley and Debra Rasmussen, all of whom executed the requested waiver of service. *See* Docket ## 7-11.

The Waiver of Service of Summons provided by the U.S. Marshal expressly provided that "It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the … court … lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections … and may later object to the jurisdiction of the court …." Docket ## 7-11. *See also* Fed. R. Civ. P. 4(d)(5) ("waiving service of a summons does not waive any objection to personal jurisdiction …").

This motion is timely filed under the terms of the Waiver of Service of Summons.

III. ARGUMENT

A. Legal Standards for Rule 12(b) Motions

A complaint needs to allege "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While detailed factual allegations are generally not required, *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), a "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal citations omitted).

On a motion to dismiss under Rule 12(b) the plaintiff bears the burden of proving that the court has jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994); *Rio Properties, Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1009 (9th Cir. 2002). In adjudicating a

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

motion under Rules 12(b)(1) and 12(b)(2), because jurisdiction is at issue, the court is not restricted to allegations in the complaint but may consider materials outside the pleadings, such as Chairman Archuleta's Declaration filed in support of this motion. *See Data Disc, Inc. v. Sys. Tech. Assocs., Inc,* 557 F.2d 1280, 1289 (9th Cir. 1997); *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989); *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir. 1988).

A Rule 12(b)(6) motion to dismiss "'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (*quoting Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001)). Dismissal for failure to state a claim under Rule 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.'" *Id.* (*quoting Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1988)). "To survive a motion to dismiss, a plaintiff's complaint must have sufficient facts 'to state a facially plausible claim to relief.'" *Id.* (*quoting Shroyer v. New Cingular Wireless Servs., Inc.,* 622 F.3d 1035, 1041 (9th Cir. 2010)). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," *Ashcroft,* 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (*quoting Bell Atl. Corp.,* 550 U.S. at 557). In deciding whether a plaintiff has stated a claim, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Cruz v. Beto,* 405 U.S. 319, 322 (1972).

While usually 12(b)(6) motions are decided based on the Complaint alone, the Court may look to extrinsic evidence under certain limited circumstances. There are at least "two exceptions to the general rule that consideration of extrinsic evidence converts a Rule 12(b)(6) motion to a summary judgment motion. First, a court may consider material that the plaintiff properly submitted as part of the complaint or, even if not physically attached to the complaint, material that is not contended to be inauthentic and that is necessarily relied upon by the plaintiff's complaint. Second, under Federal Rule of Evidence 201, a court may take judicial notice of matters of public record." *San Francisco Patrol Special Police Officers v. City and County of San Francisco*, 13 Fed. Appx. 670, 675 (9th Cir. 2001) (*citing Lee v. City of*

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)). In this case, the Court may consider the documents Plaintiff attached to her Complaint, but need not consider Chairman Archuleta's declaration in adjudicating Defendants' 12(b)(6) motion.

Finally, because Plaintiff appears *pro se*, her Complaint "must be liberally construed." *Allen*, 464 F.3d at 1048.

B. Absent An Express Tribal Waiver Of Immunity This Court Lacks Jurisdiction Over Mooretown, Feather Falls, Tribal Chairman Gary Archuleta and Tribal ICWA Director Francine McKinley

As a federally-recognized Indian tribe, Mooretown Rancheria -- including its officers and economic development entities -- is immune from this lawsuit. Congress mandated that "[t]he Secretary [of Interior] shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Inclusion on the Federal Register listing of Indian tribes conclusively establishes federal recognition of a tribe, as a matter of political relations. "To determine whether … the United States recognizes a particular tribe -- we defer 'to the political departments.' *See Baker v. Carr,* 369 U.S. 186, 215 (1962). The Bureau of Indian Affairs ("BIA") . . . has compiled a comprehensive list delineating which Indian tribes are acknowledged by the federal government." *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (internal parallel cites omitted). As noted above, Mooretown Rancheria is listed as a federally recognized tribe. *See* 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012); *see also* Archuleta Dec. at ¶ 2. The fact that the Tribe is so listed conclusively establishes that the federal government recognizes the Tribe as an Indian tribal government. The Complaint makes no allegation to the contrary, and indeed, appears to recognize this fact. *See, e.g.*, Complaint at p. 1 (referring to "Mooretown Rancheria" as "tribe"); *id.* at p. 2 ("Gary Archuleta was as of that date July 22, 2009 the Tribal Chairman of Mooretown Rancheria"); *id.* at p. 3 ("I believe this tribe Mooretown Rancheria…").

Courts may not exercise jurisdiction over federally recognized Indian tribes, including their entities and officers, absent an effective waiver of sovereign immunity. *See Puyallup Tribe,*

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Inc. v. Dep't of Game, 433 U.S. 165, 172 (1977). "Suits against Indian tribes are … barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*citing Santa Clara Pueblo,* 436 U.S. at 58-59). *See also Kiowa*, 523 U.S. at 754; *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986). "The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as governments in the Indian commerce clause." *Cohen*, at § 7.05[1][a] (*citing* U.S. Const. Art. 1, § 8). As the Supreme Court has stated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). A waiver of tribal sovereign immunity may not be implied but rather must be unequivocally expressed. *See Santa Clara Pueblo*, 436 U.S. at 58; *A.K. Mgmt. Co.*, 789 F.2d at 789. "[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d. 1374, 1378 (8th Cir. 1985).

Sovereign immunity is a jurisdictional bar to *any* claims against an Indian tribe, "irrespective of the merits of the claim." *Chemehuevi Indian Tribe v. California Bd. of Equalization,* 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California ex rel. Dep't of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). *See also Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989); *Wendt v. Smith*, 273 F.Supp.2d 1078, 1082 (C.D. Cal. 2003). Moreover, because sovereign immunity is jurisdictional in nature, its recognition by the Court is not discretionary. *Puyallup Tribe*, 433 U.S. at 172-73; *Quechan Tribe*, 595 F.2d at 1154-55. "[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation." *Chemehuevi*, 757 F.2d at 1052 n.6. "'Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to

recognize.'" *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (*quoting Quechan Tribe*, 595 F.2d at 1155).

The Supreme Court has expressly rejected the application of equitable considerations in the context of tribal sovereign immunity: "The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 893 (1986). *See also McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989). Thus "the requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (*citing Chemehuevi*, 757 F.2d at 1052 n.6).

When, as here, a Tribe has not expressly waived its immunity, courts lack jurisdiction over the Tribe regardless of the specific facts involved in the lawsuit. Thus this Court lacks jurisdiction over Mooretown Rancheria absent a valid, express and unequivocal waiver. *Id.* The Complaint fails to point to any express or unequivocal waiver of immunity, and Mooretown has not granted any such waiver. *See* Archuleta Dec. at ¶¶ 5-7.

The Supreme Court has made it clear that Tribal sovereign immunity extends to tribally-owned businesses and other tribal entities such as Feather Falls. *See Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759-60 (1993) (sovereign immunity extends to "governmental and commercial activities of a tribe"); *id.* at 755 (refusing to "confine immunity from suit … to governmental activities"). The Ninth Circuit concurs. *See Allen,* 464 F.3d at 1046-47 ("This immunity extends to business activities of the tribe, not merely to governmental activities"); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006) (sovereign immunity extends to both the corporate and governmental activities of a tribe); *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002) ("A tribe does not shed immunity merely by embarking on a commercial enterprise").

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

In *Allen*, both this Court and the Ninth Circuit recognized that tribal economic development projects like Feather Falls are immune from suit. The Ninth Circuit held that

> "[w]ith the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit."

Allen, 464 F.3d at 1047 (citations omitted). Here, the Tribe also wholly owns and operates Feather Falls. Its economic and other advantages, such as employment for tribal members, insures to the Tribe's benefit. Feather Falls generates the revenue that funds the Trial government, and thus its sovereign immunity directly protects the Tribe's treasury. *See* Archuleta Dec. at ¶¶ 5, 15-16.

"In addition, tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) (*citing U.S. v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981). *See Marceau*, 455 F.3d at 974; *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985); *Davis v. Littell*, 398 F.2d 83, 84-84 (9th Cir. 1968).

Defendants Chairman Gary Archuleta and ICWA Director Francine McKinley have been sued for actions taken in the course and scope of their jobs as tribal officers. All of the Complaint's allegations against these Defendants relate to their administration of tribal governmental interests under ICWA and their duties to the Tribe as Chairman and ICWA Director. *See, e.g.,* Complaint at p. 2 ("Gary Archuleta was [as] of that date July 22, 2009 the Tribal Chairman of Mooretown Rancheria/Feather Falls Casino"); *id.* ("ICWA/Social Services Director Francine McKinley of Mooretown Rancheria/Feather Falls Casino maintains this is an ICWA case").

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

For example, Plaintiff complains about Chairman Archuleta's letter to her dated July 22, 2009. That letter, which Plaintiff attached to the Complaint as an unlabeled exhibit, informed Plaintiff that the Butte County Juvenile Court case regarding Tiger Lily Rasmussen had been dismissed, that Children's Services "no longer has an open case regarding this child," and that the "guardianship that you have for Tiger Lily Rasmussen was approved and continues to be recognized." *Id.* The letter explained that Debra Rasmussen wanted to have visits with her child, and "highly recommended that a written visitation schedule be made between you and Debie." *Id.* The letter further explained that "[i]t is at your discretion and judgment to work with Debie in keeping the relationship open. Understandably, there is reason to proceed with caution from looking back, but it is also refreshing to know that Debie has made great strides in her recovery and life skills that are quite evident." *Id.* This letter is plainly written in Defendant Archuleta's capacity as Tribal Chairman, and was within the course and scope of his authority as Tribal Chairman. *See* Archuleta Dec. at ¶¶ 2-4, 8-14.

Similarly, Plaintiff complains about the letter dated November 16, 2010, written by Defendant Francine McKinley to "Whom It May Concern," which Plaintiff also attached to the Complaint as an unlabeled exhibit. ICWA Director McKinley's letter stated her opinion that "[t]he best interests of Tiger Lily Rasmussen, a native child, and eligible for ICWA services would be to have a relationship with her mother Debra Rasmussen, and contact with her tribe." *Id.* Her letter then explained that "ICWA was made possible so that tribal children would have relationships with their tribes and their tribal cultural ties made a part of their lives." *Id.* She further explained that "Tiger Lily's mother and other immediate relatives are enrolled members of Mooretown Rancheria." *Id.* For those reasons, her letter concluded that in her opinion "[i]t would be in the best interests of Tiger Lily to have her culture and tribal family ties reestablished by giving her biological mother Debra Rasmussen more contact with her child." Defendant Debra Rasmussen was plainly acting within the course and scope of her duties as Tribal ICWA Director. *See* Archuleta Dec. at ¶¶ 8-14.

In sum, Defendants Mooretown, Feather Falls, Tribal Chairman Gary Archuleta and Tribal ICWA Director Francine McKinley possess tribal sovereign immunity from suit and

cannot be sued absent an express and unequivocal waiver of that immunity. Here, Plaintiff has not even alleged – and cannot prove – that there was an express and unequivocal waiver of tribal sovereign immunity. Indeed, Mooretown has not waived its sovereign immunity in connection with this lawsuit. *See* Archuleta Dec. at ¶¶ 2-7. Sovereign immunity is jurisdictional in nature and its recognition by the Court is not discretionary. *See Puyallup Tribe*, 433 U.S. at 172-73; *Quechan Tribe*, 595 F.2d at 1154-55.

Because Plaintiff has failed to meet her burden of alleging and proving a clear, unequivocal waiver of sovereign immunity, Defendants Mooretown Rancheria, Feather Falls, Tribal Chairman Gary Archuleta and Tribal ICWA Director Francine McKinley respectfully request that the Court grant this Motion to Dismiss with prejudice on the grounds that it lacks personal and subject matter jurisdiction.

C. The Complaint Fails to State a Federal Civil Rights Claim Against Any of the Moving Defendants, and Thus Should be Dismissed Under Rule 12(b)(6)

Read liberally, the Complaint attempts to allege a Section 1983 claim for violation of Plaintiff's federal civil right to equal protection of the laws. *See* Complaint at p. 1 ("Violation of the 14th Amendment, Main Article: Equal Protection Clause On the Basis of Race").

"An essential element of a claim under 42 U.S.C. § 1983 is that the defendants acted under color of state law. To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Yet nowhere does the Complaint allege that any defendant acted under color of state law.

Moreover, the Ninth Circuit has expressly held that "no action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978); *see United States v. Wheeler,* 435 U.S. 313, 331 (1978), and are not constrained by the provisions of the fourteenth amendment." *R.J. Williams Co. v. Fort Belknap Hous. Auth.,* 719 F.2d 979, 982 (9th Cir. 1983) (*citing Talton v. Mayes,* 163 U.S. 376

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

(1896); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 533 (8th Cir. 1967); *Martinez v. Southern Ute Tribe,* 249 F.2d 915, 919 (10th Cir.1957)).

The Ninth Circuit has reasoned that "[a]s the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, *Monroe v. Pape,* 365 U.S. 167, 171 (1961) …, it follows that actions taken under color of tribal law are beyond the reach of § 1983 …." *Id.* (internal cites and parallel cites omitted). In *Allen*, the Ninth Circuit held that this Court "properly dismissed Allen's claim under 42 U.S.C. § 1983 because there is no allegation that any defendant was acting under the color of state law." *Allen*, 464 F.3d at 1048 (*citing West v. Atkins*, 487 U.S. 42, 45-46 (1988)).

Here, the Complaint does not allege that any defendant acted under color of state law. Dismissal is therefore warranted given "the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force*, 646 F.3d at 1242.

D. The Tribe is Not Subject to Either the 5th or 14th Amendment

The Complaint's claim is that defendants violated the equal protection clause of the 14th Amendment. *See* Complaint at p. 1. That assertion fails to state a claim as a matter of law.

The Supreme Court long ago held that the U.S. Constitution only restricts the federal and state governments, but not tribal governments. *See Talton v. Mayes,* 163 U.S. 376, 382-85 (1896). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The Ninth Circuit has also held that "Indian tribes are not bound by the United States Constitution in the exercise of their powers …." *Means v. Navajo Nation*, 432 F.3d 924, 930 (9th Cir. 2005). *See Valenzuela v. Silversmith*, 699 F.3d 1199, 1202 (10th Cir. 2012); *Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000); *United Nuclear Corp. v. Clark*, 584 F. Supp. 107, 110 (D.D.C. 1984) ("it is clearly established that the Indian tribes are not bound by the proscriptions of the Fifth Amendment"); *Martinez v. S. Ute Tribe,* 249 F.2d 915, 919 (10th Cir. 1957) (Due Process Clause of the Fifth Amendment does not apply to tribes); Felix S. Cohen, *Handbook of Federal*

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Indian Law § 4.01 (2005 Lexis/Nexis, Supp. 2009) ("*Cohen*")[3] ("Indian tribes are not constrained by the provisions of the United States Constitution, which are framed specifically as limitations on state or federal authority").[4] Similarly, Defendant Rasmussen, a private individual seeking to regain custody of her daughter in state court, is not subject to the 5th or 14th amendments. *See, e.g., Lee v. Katz,* 276 F.3d 550, 554-55 (9th Cir. 2002) (private individuals only subject to constitutional restrictions when they are "are endowed by the State with powers or functions governmental in nature) (*citing Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

For this reason, the Complaint "lack[s] … a cognizable legal theory" such that the Court should grant the motion to dismiss. *Conservation Force*, 646 F.3d at 1242.

E. The Indian Child Welfare Act Does Not Discriminate Based on Race

The Complaint might also be read as claiming that ICWA is racially discriminatory. For example, the Complaint's caption reads: "Violation of the 14th Amendment, Main Article: Equal Protection Clause On the Basis of Race." Complaint at p. 2. Even if the Complaint had alleged that defendants acted under color of state law, and even if the Constitution applied to limit their actions, it still would not state a claim because ICWA is based on the United States' recognition of Indian tribes and their members as political entities, not a racial class.

Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal

---

[3] *Cohen* is the leading treatise on the subject of federal Indian law, and has routinely been cited by the United States Supreme Court in federal Indian law cases since it was first published. *See, e.g., City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 204 (2005); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 159 (1973); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 n. 5 (1942).

[4] Tribes *are* subject to the Indian Civil Rights Act, 25 U.S.C. § 1301-03, which "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez,* 436 U.S. at 62. However that Act does not abrogate tribal sovereign immunity, with the limited exception of *habeas corpus* actions. *See id.* at 58 (the Indian Civil Rights Act's "only remedial provision expressly supplied by Congress [is that] the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.'" *Id.* (*quoting* 25 U.S.C. § 1303).

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." 25 U.S.C.A. § 1902. *See also Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1044-45 (9th Cir. 2003).

The Complaint's purported equal protection challenge is meritless. The Supreme Court has consistently rejected equal protection attacks on federal laws that treat Indians as a distinct class. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463 (1979); *United States v. Antelope,* 430 U.S. 641 (1977); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *Fisher v. District Court,* 424 U.S. 382 (1976); *Morton v. Mancari,* 417 U.S. 535 (1974).

In *Morton v. Mancari,* the Court upheld an Indian hiring preference at the federal Bureau of Indian Affairs: "The preference … is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities …." 417 U.S. 535, 554 (1974). The Court explained that

> "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."

Id. at 552. The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The Court upheld the BIA hiring preference because it "is reasonable and rationally designed to further Indian self government …." *Id.* at 555.

ICWA easily passes this test. As noted above, Congress' aims in enacting ICWA included "… promot[ing] the stability and security of Indian tribes and families…." 25 U.S.C. § 1902. The Act does not require any specific quantum of Indian blood for a person to come

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

under its protection. Nor does it prohibit adoption of Indian children by non-Indians, but rather only provides procedural protections for the Indian parents and Tribal governments. While "ICWA confers exclusive jurisdiction upon tribal courts over an Indian child who is domiciled on a reservation … [a]n Indian child who is not domiciled on a reservation is subject to the concurrent jurisdiction of tribal court and state court." *Navajo Nation*, 331 F.3d at 1045. Thus many ICWA cases, including the one underlying this case, are routinely heard in state courts. ICWA's goal of protecting Indian tribes and families against disruption was enacted pursuant to congressional findings that many Indian children have been inappropriately removed from Indian families and that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children …." 25 U.S.C. § 1901(3), (4).

There is no doubt that the "continued existence … of Indian tribes …" *id.*, and "the protection of the integrity of Indian families [are] permissible goal[s] that [are] rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians and that the ICWA is therefore not unconstitutional." *In re Application of Angus*, 60 Or. App. 546, 555-56 (1982), *rev. den.* 294 Or. 569 (March 1, 1983), *cert. den.* 464 U.S. 830 (Oct. 3, 1983). "ICWA is rationally related to the protection and preservation of Indian tribes and families and to the fulfillment of Congress's unique guardianship obligation toward Indians." *In re Baby Boy C.*, 27 A.D.3d 34, 51-52 (NY 2005) (finding ICWA does not violate equal protection principles) (citations omitted). *See Cherokee Nation v. Nomura*, 160 P.3d 967, 974 (2007) (upholding ICWA based on a recognition that "the U.S. Supreme Court has consistently rejected claims that laws which treat Indians as a distinct class violate equal protection"); *In the Interest of A.B,* 663 N.W.2d 625, 636 (2003). "The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe. We apply the rational basis test to [the] County's … equal protection challenges, and we conclude ICWA is rationally related to the protection of the integrity of American Indian families and tribes and is rationally related to the fulfillment of Congress's unique guardianship obligation toward Indians." *In re Adoption of Hannah S.,* 142 Cal. App. 4th 988, 996 (2006) (internal quotations and citations omitted).

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

The federal government's recognition of Tribes as sovereign governments and treatment of Tribes and Tribal membership as political classifications mean that ICWA's distinctions are political, not racial, and thus not subjected to heightened scrutiny. Congress' exercise of its "plenary and exclusive" plenary power over Indian affairs, *U.S. v. Lara*, 541 U.S. 193, 200 (2004), including the federal government's long-standing "trust," *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983), and "fiduciary," *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993), relationship with Indians, more than justify ICWA. Thus to the extent that the Complaint may be read as posing an equal protection challenge to ICWA, it fails to state a claim and should be dismissed with prejudice.

F. The Complaint Does Not Make Any Substantive Allegations Whatsoever Against Feather Falls Casino

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy the pleading requirements of Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Porter v. Jones,* 319 F.3d 483, 494 (9th Cir. 2002). Plaintiff's Complaint makes no allegations whatsoever of any wrongdoing against Feather Falls. For this reason, the Complaint should be dismissed as against Feather Falls.

IV. CONCLUSION

For all of these reasons, moving Defendants respectfully request that the Court grant their motion and dismiss this lawsuit with prejudice.

Date: February 4, 2013

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/ Frank R. Lawrence, Esq.
Frank R. Lawrence

Attorneys for Defendants
MOORETOWN RANCHERIA, FEATHER FALLS CASINO, GARY ARCHULETA, FRANCINE McKINLEY, DEBRA RASMUSSEN

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 South Hope Street, 8th Floor Los Angeles, California 90071.

On **February 4, 2013**, I caused the foregoing document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY SPECIALLY APPEARING DEFENDANTS MOORETOWN RANCHERIA/FEATHER FALLS CASINO, GARY ARCHULETA, FRANCINE McKINLEY AND DEBRA RASMUSSEN** to be served on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeanne M. Hall
P.O. Box 212
Challenge, CA 95925

Enterprise Tribe
2133 Monte Vista Ave.
Oroville, CA 95966

Maier Pfeffer Kim & Geary LLP
Jenny Y. Kim, Esq.
1440 Broadway, Suite 812
Oakland, CA 94612

[X] (BY MAIL) Following ordinary business practices, I placed the document for collection and mailing at the offices of HOLLAND & KNIGHT LLP, 400 South Hope Street, 8th Floor, Los Angeles, California 90071, in a sealed envelope. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

[X] (FEDERAL) I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

Executed on **February 4, 2013**, at Los Angeles, California.

Bobbette Mack

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450