No. 12-17151

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LAUGHING HORSE ROBINSON, an individual and Chairman, KAWAIISU TRIBE OF TEJON,

Plaintiff-Appellant,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, TEJON RANCH CORPORATION, a Delaware corporation, TEJON MOUNTAIN VILLAGE, LLC, a Delaware limited liability company, TEJON RANCHCORP, a California corporation, and COUNTY OF KERN, CALIFORNIA

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California, No. 1:09-cv-01977-BAM
The Honorable Barbara A. McAuliffe, United States Magistrate Judge

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BRIEF OF APPELLEE COUNTY OF KERN

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INTRODUCTION

This action was commenced in 2009 by an individual, David Laughing Horse Robinson, acting for himself and allegedly as "Chairman" of the federally-unrecognized "Kawaiisu Tribe of Tejon" ("the Kawaiisu"). After he filed his initial complaint *pro se* (SER0279-0371[1]), Mr. Robinson, acting on behalf of himself and, purportedly, the Kawaiisu (collectively hereafter, "Robinson") obtained a succession of different counsel and the district court allowed them to amend Robinson's complaint three more times before finally dismissing the remaining claims and the action in 2012. (SER0252-0273, SER0198-0222, SER0028-0152).

In the district court proceedings, Robinson's legal theories and arguments directed toward the County of Kern ("County") shifted. For example, Robinson's Second Amended Complaint included a claim against the County for "violation of the California Environmental Quality Act," California Public Resources Code sections 21000, *et seq.* ("CEQA"). (SER0214-0219). The Third Amended Complaint contained no CEQA claim but instead set out a "claim for equitable enforcement of treaty"

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[1] All references to "SER" are to the Supplemental Excerpts of Record filed in this case on August 27, 2013 by defendants-appellees Tejon Mountain Village, LLC, Tejon Ranchcorp and Tejon Ranch Company ("Tejon").

seeking the same relief against the County based on alleged treaties between the United States and the Kawaiisu. (SER0121-0123).

Robinson's opening brief on appeal ("Op. Br."), devotes one page in his summary of argument (at 9-10) and one page of argument (at 25-26) to "the Kawaiisu's CEQA claim," without any mention of the "equitable enforcement of treaty" claim or any other claim against the County. While Robinson argues that "the Rooker-Feldman doctrine does not bar the Kawaiisu's CEQA claim" (Op. Br. 25), he makes no argument against the district court's alternative bases for dismissing all claims against the County, including: (1) That, in the absence of a viable federal claim against the County that substantially relates to a CEQA claim, there is no basis for the exercise of supplemental jurisdiction over the CEQA claim (*see* Doc. No.[2] 130 at 2:14-20); and (2) That the court lacked subject matter jurisdiction over the Kawaiisu's claims because the recognition of the Kawaiisu as a tribe entitled to bring claims is a non-justiciable political question to be addressed by other branches of the U.S. government. (ER000028-000032). Also, Mr. Robinson has failed to challenge the district court's dismissal of any personal claims he may have asserted. (Op. Br. 1-26). Accordingly, Robinson's

[2] All references to "Doc. No." are to the documents filed with the district court as listed on the district court clerk's docket entries, a copy of which appears at ER000098-000124.

arguments about the *Rooker-Feldman* doctrine, even if they were correct, are unavailing. For the reasons set out below, those arguments also are wrong.

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court

Robinson sought to invoke the jurisdiction of the district court on "federal question" grounds pursuant to 28 U.S.C. § 1331, but the district court determined that it lacked subject matter jurisdiction. (ER000045). If the district court lacked subject matter jurisdiction over Robinson's federal claims, it also lacked supplemental jurisdiction over Robinson's prior CEQA claim under 28 U.S.C. § 1367. *See Herman Family Revocable Trust v. M/V Teddy Bear*, 254 F.3d 802, 805 (9th Cir. 2001) (". . . supplemental jurisdiction cannot exist without original jurisdiction.").

Jurisdiction of the Court of Appeals

The district court filed its final order and judgment disposing of all claims in this case on August 7, 2012. (ER000003-45, SER0001). Robinson (on behalf of himself and the Kawaiisu) filed a Notice of Appeal on September 24, 2012. (ER000001-2). Because an officer of an agency of the United States (Ken Salazar, as then-Secretary of the U.S. Department of the Interior) was a defendant in this action, the Notice of Appeal was timely under 28 U.S.C. § 2107(b). Robinson thereafter failed, however, to

prosecute his appeal by, *inter alia*, failing to timely file his opening brief.

On February 26, 2013, this Court dismissed Robinson's appeal for failure to prosecute and electronically served its mandate dismissing the appeal on the district court. (Doc. No. 246). On May 2, 2013, the Appellate Commissioner granted the motion of Robinson's most recent counsel to reinstate the appeal, and on June 18, 2013, the Court of Appeals denied Tejon's motion (joined by the County) to reconsider the Appellate Commissioner's order. (Doc. No. 247). Reinstatement of an appeal "can be exercised only in extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("*Calderon*"). Because no such circumstances were shown by Robinson, this Court lacks jurisdiction to hear Robinson's appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction over this appeal after it was dismissed for failure to prosecute and the Court's mandate was issued, where the only argument presented for reinstatement of the appeal was the "inadvertent error" of Robinson's counsel in failing to submit an opening brief until three months after it was due?

2. Did Robinson and the Kawaiisu (collectively "Appellants") waive any objection to the district court's dismissal of their federal claim against the County for "equitable enforcement of treaty"?

3. Did Appellants waive any objection to dismissal of the state law CEQA claim against the County based on lack of jurisdiction?

4. Has David Laughing Horse Robinson waived any objection to the district court's order and judgment affecting his alleged rights against the County as an individual?

5. Did the district court err in determining that Appellants failed to state a claim against the County?

6. Did the district court err in determining that Appellants' CEQA claim against the County was an effort to "undo" rulings of the courts of the State of California upholding the County's CEQA determinations and project approvals, in violation of the *Rooker-Feldman* doctrine or similar doctrines?

STATEMENT OF THE CASE

Claims Asserted on Behalf of "the Kawaiisu Tribe of Tejon"

Robinson filed this action against the County and other defendants on November 10, 2009. In his initial Complaint, Robinson asserted that "[t]he United States Department of the Interior breached their fiduciary duty to the Kawaiisu Tribe of Tejon when, through administrative oversight, they omitted placing the tribe's name on the Federal Register." (SER0293, lines 19-23). The Complaint went on to aver that: "[t]he injury caused to the Kawaiisu Tribe of Tejon by omitting the Tribe from the Federal Register is

that the Tribe is unable to act in its official and legal authority with the County of Kern." (SER0295, lines 6-9). Thus, the Complaint admitted that the Kawaiisu, because they were not federally-recognized, could not bring an action against the County.

The County and other defendants moved to dismiss the Complaint (Doc. Nos. 7, 9, 10, 53). After opposing the motions to dismiss his Complaint, Robinson obtained his first counsel who obtained leave to file a First Amended Complaint, rendering the motions to dismiss moot. (SER0274-76).

In his First Amended Complaint filed August 15, 2010 (SER0252-0273), Robinson continued to acknowledge that the Kawaiisu were not federally recognized, but asserted that the Kawaiisu "had been waiting for over thirty years" for a response to a petition for acknowledgement. (SER0261, lines 27-28). Specifically, the First Amended Complaint alleged that "[o]n February 27, 1979, the Tribe engaged in the administrative process by filing a petition with the BIA . . . ." (SER0260, lines 13-14). The County and other defendants moved to dismiss Robinson's First Amended Complaint. (Doc Nos. 81, 83-85).

On December 2, 2010, four days before his oppositions to defendants' motions to dismiss Robinson's First Amended Complaint were due,

Robinson filed a request "for leave to voluntarily dismiss claims against defendant Salazar without prejudice," asserting that: "Plaintiffs are seeking to do exactly what the law requires: allow the agency to use its expertise to resolve a complex dispute before district court review is appropriate." (Doc. No. 94, at 5:2-3). By order filed February 7, 2011, the district court granted Appellants' request to voluntarily dismiss their claims against the Secretary of the Interior. (SER0246, lines 22-24). The district court also dismissed numerous other claims in Robinson's First Amended Complaint, most without leave to amend. (SER0246-0247).

Instead of pursuing recognition of the Kawaiisu before the Department of the Interior, as he told the district court he intended, Robinson on April 18, 2011 filed a Second Amended Complaint seeking a determination that Plaintiffs are "excused from exhausting administrative remedies, if such is otherwise required, because they are inadequate and futile" and asking the Court effectively to recognize the Kawaiisu as a tribe so that it could pursue claims against the County and others. (SER0219, lines 8-11).

In response to defendants' motions (Doc. Nos. 136-142), the district court dismissed all claims in Robinson's Second Amended Complaint. (SER153-197). But based on the assertion by Robinson's counsel at oral

argument that the Kawaiisu "are not seeking initial recognition but are challenging the BIA's failure to duly include the Tribe on recognition by virtue of [a] treaty" (SER0195, lines 13-14) the court allowed Robinson one more opportunity to make claims based on tribal recognition for the Kawaiisu.

On March 19, 2012, Robinson filed a 436-paragraph, 125-page Third Amended Complaint. (SER0028-0152, plus voluminous exhibits). In his Third Amended Complaint, Robinson averred that the Kawaiisu "have no petition for federal acknowledgement pending with the Bureau of Indian Affairs" (SER0116, lines 1-3) and went on to explain that his previous allegations to the contrary were mistaken. For a fourth time, defendants moved to dismiss all claims in the complaint. Finally, on August 7, 2012, the district court issued a 43-page Order rejecting all of Robinson's claims, including his tribal recognition claims for the Kawaiisu. (ER000003-000045).

On appeal in his Opening Brief, Robinson fails to challenge the district court's determinations in its order dismissing his Third Amended Complaint (ER000028-000032) that the issue of the Kawaiisu's federal recognition (at least as it relates to claims against the County) is a political question beyond the court's jurisdiction and that the court's adjudication of

the claims advanced by Robinson on behalf of the Kawaiisu would "necessarily require the court [to] place the Kawaiisu on the List and thus. . . inject the Court in processes expressly left to the province of the Executive, as delegated by Congress." (ER000031, lines 19-21). Instead, Robinson in his Opening Brief simply ignores these determinations, even though they were sufficient to dispose of all claims on behalf of "the Kawaiisu Tribe of Tejon" against the County.

All of the arguments in Robinson's Opening Brief purport to be on behalf of "the Kawaiisu." On appeal, David Laughing Horse Robinson does not seek to vindicate any alleged rights as an individual. (Op. Br. at 1-26). Also, Robinson does not argue on appeal that the district court abused its discretion in declining to allow further amendment of the complaint. Instead, Robinson argues (on behalf of the Kawaiisu only) that the Third Amended Complaint was sufficient to state a claim. (*Id.*).

Claims Asserted Against Kern County

In his Original Complaint (SER0308-0317) and First Amended Complaint (SER0267-0269), Robinson attempted to set out pendent state law CEQA claims. The district court granted the County's motion to dismiss the CEQA claim in the First Amended Complaint, finding that "there is essentially no evidentiary or legal overlap" between the other claims in the

First Amended Complaint and the CEQA claim, and that the claims "do not derive from the same common nucleus of operative fact," so that "there is no basis for exercising supplemental jurisdiction over the CEQA claim." (SER0244-0245). Nevertheless, because the district court was also allowing Robinson to amend some of his federal claims, it dismissed the CEQA claim with leave to amend. (SER0247).

In his Second Amended Complaint (SER0214-0219), Robinson again attempted to assert a state law CEQA claim against the County. The County and other defendants again moved to dismiss this claim (Doc. Nos. 136, 139). Importantly, in his opposition to the County's motion, Robinson *conceded* that: "Obviously, *if all of the Kawaiisu's federal claims are dismissed by the Court* [, it] *would be compelled to dismiss the CEQA claim as well*." (Doc. No. 163 at 5:25-26, italics added). Thus, Robinson has conceded that the court had no pendent jurisdiction over the CEQA claims if the federal claims were not viable for whatever reason.

Robinson went on to argue that:

> However, so long as the Kawaiisu's § 1983 claims, Land Claims and/or NAGPRA claims survive, the Court would have supplemental jurisdiction over the CEQA claim as *the facts of these claims are inextricably intertwined*. Whether or not Kern adequately evaluated the environmental effects of the Tejon Defendants' proposed development, especially the effect on cultural resources, such as the remains and other cultural items of Plaintiffs' ancestors is dependent

> on the Court's resolution of the Land Claims and the NAGPRA claims." (Doc. No. 163 at 5:27-6:4, italics added).

In its Order on Motions To Dismiss (SER0188-0190, SER0197), the district court granted the motion of the County to dismiss the CEQA claim without leave to amend. The court did so on two independent bases.

First, the district court took judicial notice that the issue of Kern County's compliance with CEQA had been fully litigated and decided in a state court proceeding. (SER0188). The court then held that, under the *Rooker-Feldman* doctrine, which ". . . bars any suit that seeks to disrupt or 'undo' a prior state-court judgment . . . .," the CEQA claim was precluded. (SER0190, *quoting Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003)).

Second, the district court also found that ". . . the only other claim . . . against Kern is the section 1983 claim which will be dismissed. Again, as before, the allegations in the SAC do not overlap with any claim against Kern and the CEQA claims." (SER0190, lines 6-8). The district court further found that:

> Here, the CEQA claim is not related transactionally to the Indians' claim to ownership or possession of the property. This case is about title and/or right of possession. It does not decide environmental impacts of a proposed development project and assessing the impacts of such a project . . . . In short, the only commonality between the federal claims in this case and the CEQA claim is that the lands are generally located in the same area. (SER0910, lines 23-28).

Having dismissed all extant claims against the County *without* leave to amend, the district court allowed Robinson to file a Third Amended Complaint for the purpose of attempting, one last time, to set out land claims against the Tejon defendants and a declaratory relief cause of action against the Secretary of the Interior. (SER0197).

Undeterred by the district court's dismissal of all claims against the County in his Second Amended Complaint without leave to amend, Robinson filed a Third Amended Complaint seeking essentially the same relief against the County, but under the heading of "Equitable Enforcement of Treaty." (SER0121-0123; *compare* SER0221, lines 3-14 (prayer for relief on CEQA claim against the County) *with* SER0149-0150 (prayer for relief on "equitable enforcement of treaty" claim against the County)). The County (along with the other named defendants) once again moved to dismiss the reformulated claims against them. (Doc. Nos. 219, 221, 223).

Robinson, after again switching counsel (Doc. Nos. 218, 225), also sought to switch legal positions with regard to his CEQA/Equitable Enforcement of Treaty Claim. Instead of arguing that his CEQA claim against the County was "inextricably intertwined" with the Kawaiisu's federal claims (Doc. No. 163 at 6:1), Robinson argued through his new counsel (in opposition to the County's motion to dismiss his Third Amended

Complaint) that: "Plaintiff's Treaty Claim *is in no way 'inextricably intertwined'* with the State CEQA claim and an order protecting tribal rights, human remains and ancestral artifacts would in no way overrule a state court order that only sought to review and protect **environmental** concerns." (Doc. No. 234 at 10:15-17, italics added, bolding in original). Thus, in his Third Amended Complaint against the County and in opposition to its dismissal, Robinson *abandoned* any claim that was factually or legally related to the County's approvals under CEQA, and instead sought to characterize these claims as arising separately under federal treaties between the Kawaiisu and the United States.

In dismissing the Third Amended Complaint (including the claim against Kern County), the district court agreed with the County that the "Equitable Enforcement of Treaty" claim was simply a rebranding of the previously-dismissed CEQA claim and therefore dismissed the claim again, for the same reasons. (ER000042-000044). The district court's dismissal order focused on the *Rooker-Feldman* doctrine and did not address the lack of pendent jurisdiction over a state law CEQA claim against the County because all of the claims in the Third Amended Complaint purported to be based on federal laws, treaties, regulations and the U.S. Constitution, not state law.

In his Opening Brief on appeal, Robinson correctly asserts that "[t]he district court dismissed the Kawaiisu's California Environmental Quality Act (CEQA) claim based on the Rooker-Feldman doctrine." (Op. Br. at 9). This dismissal was in the district court's order dismissing Robinson's Second Amended Complaint. (SER0188-0191). On appeal, Robinson ignores the fact that the district court also dismissed the CEQA claim for lack of supplemental jurisdiction, and that he himself (through new counsel thereafter) disavowed any factual or legal connection between his claim against the County and the County's CEQA approvals or state court decisions upholding those approvals. (Doc. No. 234 at 10:15-17). Accordingly, there is no basis for Appellants to assert on appeal that the court had subject matter jurisdiction to entertain the CEQA claim, which is the *only* claim against the County urged by Robinson on appeal.

STATEMENT OF FACTS

Appellants' claims were dismissed by the district court for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (ER000045). The factual and procedural history of Appellants'

unsuccessful efforts to invoke the jurisdiction of the federal courts and to state legally-cognizable claims is summarized in the Statement of the Case above.

The district court's rulings dismissing Robinson's' claims were based on the pleadings submitted to the court and on a number of matters that were the subject of judicial notice and not the subject to genuine factual dispute. Among such matters was the fact that the Kern County Superior Court had entered a final judgment finding that the County had complied fully with CEQA in every respect with regard to its approvals of the Tejon Mountain Village Project that was the subject of those state court proceedings as well as of the CEQA claim before the district court. (Doc. No. 138, Exhibit A; SER0158-0159, SER0188). It also was uncontested that this judgment had been upheld on appeal by the California Court of Appeal, Fifth District. (Doc. No. 219-2, Doc. No. 234 at 4:26-28; *see Ctr. for Biological Diversity v. Kern County*, 2012 WL 1417682 (Cal. App. Apr. 25, 2012)).

For purposes of the dismissal of Robinson's' claims, the purely factual allegations in the complaints were accepted, despite their implausibility, as true unless contradicted by other facts alleged or incorporated in the complaints. But as the district court observed: "Courts, however, 'are not bound to accept as true a legal conclusion couched as a factual allegation['].

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)." (ER000021, n. 11).

Pursuant to *Twombly*, the district court did "not accept as true the allegation that the Kawaiisu is a federally recognized Tribe. . . .Whether the Kawaiisu has attained the status of 'recognized' by the United States is a legal question based upon the application of facts to law." (*Id.*). Accordingly, the district court concluded that ". . . it is undisputed that the Kawaiisu has never been recognized under the DOI/BIA's acknowledgement regulations." (ER000032, lines 19-20). Appellants effectively acknowledged this in their first three complaints. (SER0279-0371, SER0252-0273, SER0198-0222).

SUMMARY OF ARGUMENT

This Court's jurisdiction to entertain Robinson's appeal ended when it issued its mandate dismissing the appeal. The authority to reinstate an appeal after the mandate has been issued may be exercised "only in extraordinary circumstances" involving "grave, unforeseen contingencies." *Calderon*, 525 U.S. at 550. No such circumstances or contingencies were demonstrated by Robinson and accordingly this Court lacks jurisdiction to consider Robinson's appeal, which in any event is without merit.

In his Opening Brief, Robinson simply ignores, and thereby waives, numerous arguments raised below. In his most recent (third amended) complaint, Robinson's only claim against the County was for "equitable enforcement of treaty." He has abandoned this "treaty" claim on appeal in favor of the state law "CEQA" claim set out in his second amended complaint.

Robinson's only quarrel with the dismissal of his CEQA claim is with the district court's reliance on the *Rooker-Feldman* doctrine.[3] Robinson ignores, and thereby waives, the district court's additional bases for dismissing his CEQA claim, including lack of jurisdiction because the CEQA claim is a state law claim that does not relate to any viable federal claim. Robinson also fails to challenge the district court's alternative determination that the claim of the Kawaiisu against the County is not justiciable because (as Robinson has admitted) the Kawaiisu are not a federally-recognized tribe.

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[3] As noted in *Reusser v. Wachovia Bank*, 525 F.3d 855, 858-59 (9th Cir. 2008): "The *Rooker-Feldman* doctrine is a well-established jurisdictional rule prohibiting federal courts from exercising appellate review over final state court judgments. *See Henrichs v. Valley View Dev.*, 474 F.3d 609, 613 (9th Cir. 2007); *see also D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 . . . (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 . . . (1923)."

Robinson has failed to challenge the district court's dismissal as to any claims that David Laughing Horse Robinson may have had as an individual. Instead, the only claims against the County pursued on appeal are non-justiciable claims purportedly on behalf of "the Kawaiisu."

Robinson's claims against the County also are not viable because they depend upon his land claims against the Tejon defendants. Because those claims fail for the reasons set out in Tejon's brief, Robinson's claims against the County also must fail for this reason as well.

Finally, Robinson's reading of the *Rooker-Feldman* doctrine is incorrect. The core inquiry is whether the federal action is a de facto appeal from a final state court judgment. This is precisely what Robinson seeks to accomplish here. Specifically, Robinson seeks a federal trial to litigate *de novo* the same California Environmental Quality Act ("CEQA") issues already decided by the courts of the State of California when they upheld the County's approval of the *same project* that Robinson seeks to challenge.

For all of the foregoing reasons, Robinson's appeal should not be entertained. If it is entertained, the district court's judgment should be affirmed in all respects.

STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Manzarek v. St. Paul Fire & Marine Ins., Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 526 (9th Cir. 2008); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

The same *de novo* standard applies to this court's review of the district court's dismissals for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 944-45 (9th Cir. 1999).

ARGUMENT

I. THIS COURT LACKS JURISDICTION

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the County of Kern joins in, and incorporates by reference herein, Part I (pages 13-17) of the brief filed on behalf of Tejon in this case on August 27, 2013 (the "Tejon Brief"). Reinstatement of Robinson's appeal (including any recall of the Court's mandate) cannot be justified under the facts of this case. *See Calderon*, 523 U.S. 538, 550.

II. APPELLANTS HAVE FAILED TO PURSUE THEIR "EQUITABLE ENFORCEMENT OF TREATY" CLAIM AGAINST THE COUNTY

"[O]n appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999), *cited in Reusser*, 525 F.3d at 858 n. 4.

Appellants' Opening Brief makes no mention whatever of the "equitable enforcement of treaty" claim against the County. This was the *only* claim against the County set out in the Third Amended Complaint. (SER0028-0152, *see* SER0121-0123). Accordingly, Appellants have abandoned this claim.

III. APPELLANTS WAIVED ANY OBJECTION TO THE DISTRICT COURT'S DISMISSAL OF THE CEQA CLAIM AGAINST THE COUNTY FOR LACK OF SUBJECT MATTER JURISDICTION

To the extent it even relates to claims against the County, Robinson's Opening Brief refers only to the pendent state law CEQA claim previously set out in the Second Amended Complaint. (Op. Br. at 9-10, 25-26; SER0214-0219). Robinson's Opening Brief fails to address the district court's holding (independent of the *Rooker-Feldman* doctrine) that it lacked subject matter jurisdiction over the CEQA claim because it "is not related transactionally to the Indians' claim to ownership or possession of the property. . . ." (SER0190). Accordingly, the district court's judgment and

order of dismissal of all claims against the County (ER000045, SER0001) should be summarily affirmed if (contrary to the County's position that this Court lacks jurisdiction), this Court nevertheless determines to entertain this appeal.

IV. DAVID LAUGHING HORSE ROBINSON HAS ABANDONED ANY INDIVIDUAL CLAIMS PRESENTED TO THE DISTRICT COURT

All claims set out in Robinson's Third Amended Complaint purported to be federal claims raised by the Kawaiisu as a Tribe. Consistent with this, and in any event, Appellants' Opening Brief seeks to vindicate *only* rights allegedly belonging collectively to "the Kawaiisu." Appellants do not assert on appeal, or seek to vindicate, any rights allegedly belonging to David Laughing Horse Robinson as an individual. (Op. Br. at 4 ("The Kawaiisu filed this appeal in the district court. . . . [T]he allegations relate to the federal government's treaties and other interactions with the Kawaiisu"); Op. Br. at 5 ("This is an appeal from a judgment dismissing the Kawaiisu's case . . . . The Kawaiisu brought this lawsuit to vindicate their rights . . . ."); Op. Br. at 6 ("This case involves both questions of law and fact that the Kawaiisu argue were improperly decided by the district court."); Op. Br. at 7 ("The Kawaiisu alleged several causes of action related to treaties."); Op. Br. at 9 ("The district court dismissed the Kawaiisu's California Environmental

Quality Act (CEQA) claim based on the Rooker-Feldman doctrine."); Op. Br. at 11 ("The Kawaiisu own the subject land because their right has been established via treaties."); Op. Br. at 23 ("The district court dismissed all of the Kawaiisu's land-related claims, including unlawful possession, violation of the non-intercourse act, trespass, and violation of NAGPRA . . . ."); Op. Br. at 25 ("The Rooker-Feldman doctrine does not bar the Kawaiisu's CEQA claim because they were not a party to the state case . . . ."); Op. Br. at 26 ("The Kawaiisu respectfully ask this Court to reverse the district court. . . .")).

Because the only arguments raised on appeal are on behalf of "the Kawaiisu" collectively and not Mr. Robinson as an individual, he has forfeited any arguments he might otherwise have had to the effect that the district court's order and judgment deprived him of any individual right. It follows that, if the court does not have subject matter jurisdiction to entertain claims against the County brought in the name of the Kawaiisu as a federally-unrecognized Tribe, no other claim remains.

V. IN ANY EVENT, APPELLANTS HAVE FAILED TO STATE A CLAIM BASED ON ALLEGED RIGHTS IN TEJON RANCH

Robinson's appeal is directed toward the dismissal of the claims of "the Kawaiisu" to land. (Op. Br. at 5). If the land claims fail, then Robinson's appeal (including any claim against the County) also fails.

The district court correctly found that the land claims articulated by Robinson on behalf of "the Kawaiisu" failed to state a claim. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the County of Kern joins in, and incorporates by reference herein, the Statement of Facts relating to land claims (pages 3-6) and Part II (pages 18-31) of the brief filed on behalf of Tejon in this case on August 27, 2013 (the "Tejon Brief"). This provides an additional, alternative basis to uphold the judgment in favor of the County.

VI. APPELLANTS' CEQA CLAIM IS BARRED UNDER THE *ROOKER-FELDMAN* DOCTRINE

Appellants' sole argument against affirmance of the district court's judgment in favor of the County is to the effect that the *Rooker-Feldman* doctrine was inapplicable because Robinson was not a party to the state court CEQA proceedings involving the Tejon Mountain Village Project. (Op. Br. at 9-10, 25-26). Appellants' argument is based on an overly-narrow and incorrect reading of cases addressing the *Rooker-Feldman* doctrine.

Robinson quotes the *syllabus* in *Exxon Mobil Corporation v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005) ("*Exxon*") for the proposition that "The Rooker-Feldman doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the

federal district court proceedings commenced . . . ." In so arguing, Robinson ignores the note ("FN*") at the beginning of this and every other syllabus (544 U.S. at 280) reminding the reader that: "The syllabus constitutes no part of the opinion of the Court . . . ."

In any event, the situation in the *Exxon* case bears no resemblance to the circumstances before this Court. In *Exxon*:

> ExxonMobil plainly has not repaired to federal court to undo the Delaware judgment in its favor. Rather, it appears ExxonMobil filed suit in Federal District Court . . . to protect itself in the event it lost in state court on grounds . . . that might not preclude relief in the federal venue. [544 U.S. at 293-94].

Here, by contrast, Robinson does not have a purported "federal" CEQA claim or indeed any other viable federal claim. Instead, the CEQA claim against the County admittedly was a state law claim that could be entertained only if it related to a separate federal cause of action.

Here, also unlike the situation in *Exxon*, Robinson does, in effect, seek to use the federal courts to pursue a *de facto* appeal of final state court CEQA decisions that were the functional equivalent of *in rem* decisions approving the Tejon Mountain Village Project under CEQA.

Robinson also mischaracterizes *Lance v. Dennis*, 546 U.S. 459 (2006). As the district court noted in dismissing Robinson's CEQA claim (SER0190, lines 1-3): "The Court left open the issue of whether there are any

circumstances in which *Rooker-Feldman* may be applied against a party not named in an earlier state proceeding. [546 U.S.] at 466 n. 2." Specifically, the Court in *Lance v. Dennis* stated that ". . . we need not address whether there are *any* circumstances, however limited, in which Rooker-Feldman may be applied against a party not named in an earlier state proceeding . . . ." (546 U.S. at 466, note 2, italics in original).

More recent cases confirm that Robinson's interpretation of the *Rooker-Feldman* doctrine is overly narrow. As this Court stated in *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 860 n. 6 (9th Cir. 2008) ("*Reusser*"), " . . . while the *Rooker-Feldman* doctrine has been pared back of late, it remains a viable jurisdictional bar."

Reusser also is instructive because it involved, in part, bankruptcy proceedings that are analogous to CEQA proceedings in their *in rem* nature. As the court observed in *Reusser*, 525 F.3d at 861:

> The Supreme Court recently noted that "[b]ankruptcy jurisdiction, at its core, is *in rem*," such that it "is premised on the debtor and his estate, and not in the creditors." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 … (2006). . . . Thus, a final order lifting an automatic stay is binding as to the property or interest in question - the *res* - and its scope is not limited to the particular parties before the court.

Because the situation presented by Robinson's federal court CEQA claim is unprecedented as far as the County can determine, there appears to

be no case other than this one in which a federal court has been required to consider the applicability of the *Rooker-Feldman* doctrine in the context of CEQA issues decided long ago by the state courts of California while a *separate* "CEQA" action involving the *same* project has dragged on for years in the federal system. A CEQA action is analogous to a bankruptcy action to the extent it is, in effect, an *in rem* proceeding that focuses on a single *res* (the approvals of a "Project"[4] under CEQA), regardless of the identities of the interested parties or members of the public who participate in the CEQA proceeding.

The California Legislature took pains to ensure that CEQA proceedings would be brought, and disposed of, promptly by the courts so that the parties (including project proponents and governmental agencies) would have certainty, with reasonable promptness, as to whether a project would or would not proceed. Accordingly, a *30-day* statute of limitations is prescribed under California Public Resources Code section 21167

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[4] "Project" is a defined term under CEQA. California Public Resources Code section 21065, in relevant part, defines "Project" as ". . . an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: . . . (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." Here, the "Project" is the Tejon Mountain Village project and the County is the public agency that issued the relevant permits and approvals pursuant to CEQA.

subdivisions (b) and (c) for the bringing of an action to challenge a CEQA approval. The statute contemplates, of course, that litigants will bring their claims (which have to do with the exercise of local police powers by California governmental entities such as the County) in the state courts. With this in mind, the Legislature also provided, in California Public Resources Code section 21167.1, subdivision (a), that, for CEQA proceedings:

> . . . [A]ll courts in which an action or proceeding on appeal is pending shall give the action or proceeding *preference over all other civil actions*, in the matter of setting the action or proceeding for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding *shall be quickly heard and determined*. The court shall regulate the briefing schedule so that, to the extent feasible, the court shall commence hearings on an appeal within one year of the date of the filing of the appeal. [Italics added].

Pursuant to these legislative commands, the Superior Court of the State of California completed its trial of the CEQA claim on November 5, 2010, within one year of its filing. (Doc. No. 138, page 6, lines 1-4). After extensive briefing on a massive (nearly 100,000-page) administrative record, the California Court of Appeal for the Fifth Appellate District affirmed the trial court's rulings upholding County's approvals of the Tejon Mountain Village project under CEQA. (*Ctr. for Biological Diversity*, 2012 WL 1417682).

In the meantime, Robinson's CEQA claim (from his Second Amended Complaint dismissed by the district court in January, 2012) has not received the expedited treatment that is one of the core features of CEQA and is instead the subject of the present appeal in late 2013. If Robinson were to be permitted to pursue his "CEQA" claim in the federal courts at this point, this would amount to an effort to have the federal courts overturn final state court decisions regarding the County's compliance with CEQA in approving the Tejon Mountain Village Project in 2009. Regardless of Robinson's non-participation in the state court CEQA proceedings, this would be contrary to the *Rooker-Feldman* doctrine. As the district court recently stated in *Rosebud Sioux Tribe v. Duwyenie*, 2010 WL 2534193 at *4 (D. Ariz. Jun. 18, 2010), this Court in *Reusser* "emphasized that the core inquiry is whether the federal action is a de facto appeal from a final state court judgment." It is clear that this is what Robinson seeks through his CEQA claim. Accordingly, the district court was correct in ruling that such an action is barred by the *Rooker-Feldman* doctrine.

VII. CONCLUSION

For all of the reasons set forth above, as well as those in the brief of the Tejon parties, the Court should dismiss this appeal because it lacks

jurisdiction to hear it. If this Court nevertheless determines to entertain this appeal, it should affirm the district court's order and judgment in full.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the County are not aware of any pending related cases within the meaning of Ninth Circuit Rule 28-2.6.

/s/ Charles F. Collins (SBN 104318)

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COUNTY OF KERN

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance with Rule 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,202 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 a proportionally spaced typeface using Microsoft Word Version 2007 in type face of Times New Roman 14 points per inch.

Dated: September 17, 2013 /s/ Charles F. Collins (SBN 104318)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LAUGHING HORSE ROBINSON, an individual and Chairman, KAWAIISU TRIBE OF TEJON,

Plaintiff-Appellant,

v.

SALLY JEWELL, Secretary, U.S. Department of the Interior, *et al.*,

Defendants-Appellees.

Case No. 12-17151

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF APPELLEE COUNTY OF KERN with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 17, 2013. 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/ Yvonne Salazar