IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17151

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

Plaintiffs-Appellants,

v .

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

Defendants-Appellees.

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

ANSWERING BRIEF OF THE FEDERAL GOVERNMENT DEFENDANT-APPELLEE

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* Secretary of the Interior, S.M.R. Jewell, is substituted for her predecessor, Ken Salazar, pursuant to Fed. R. App. P. 43(c)(2).

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STATEMENT OF JURISDICTION

Appellants, a group of individuals who claim to be an Indian tribe referred to as the "Kawaiisu Tribe of Tejon," and their purported chairman, David Laughing Horse Robinson, (collectively "the Kawaiisu Group" or "Group") asserted jurisdiction in the district court under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1337 (commerce and antitrust), and 25 U.S.C. 3013 (Native American Graves Protection and Repatriation Act). Dkt. 211; SER 31 at ¶13.[1/] On August 7, 2012, the district court granted the motion to dismiss filed by the Secretary of the United States Department of the Interior (the "Secretary") for lack of subject matter jurisdiction and failure to state a claim as to the Kawaiisu Group's claims against the Secretary. Dkt. 240; ER 3-45. The court concurrently granted the motions to dismiss filed by defendants-appellees, Tejon Mountain Village, LLC, and Tejon Ranchcorp and Tejon Ranch Company (collectively the "Tejon Defendants-Appellees" or "Tejon Appellees") (Dkt. 221), and defendant-appellee, the County of Kern (Dkt. 219). The court entered final judgment on August 7, 2012. Dkt. 241.

[1/] The designation "Dkt. __" refers to the docket number in the district court; "SER __" refers to the page number in the Supplement Excerpts of Record filed by the Tejon Appellees; "ER __" refers to the Kawaiisu Group's Excerpts of Record; and "OBr. __" refers to the Group's Opening Brief.

As we explain below, the Kawaiisu Group does not appeal from the district court's rulings dismissing the claims against the Secretary. Nonetheless, the Secretary continues to contest the Group's claim of district court jurisdiction.

The Kawaiisu Group filed a timely notice of appeal on September 25, 2012 (Dkt. 243). This Court's jurisdiction rests on 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the Kawaiisu Group has waived the challenges that it could have brought to the district court's rulings concerning the claims against the Secretary, where the Group's opening brief fails to present any particular issue, or make any specific argument, disputing any of the court's rulings.

2. Whether the Group has waived the newly-crafted estoppel argument against the "United States," where the argument was not raised in the district court; and, in any event, the United States is not a named party in this action, and the Group alleges no "affirmative misconduct" by the Secretary.

STATEMENT OF THE CASE

A. Nature of the Case

The Kawaiisu Group is a group of unidentified individuals claiming to be present-day successors of a historic Indian tribe. The Group's lawsuit primarily challenges Kern County's approval of a development project proposed by the

Tejon Appellees. The Kawaiisu Group's Third Amended Complaint ("Complaint") asserts title and rights of occupancy and use in approximately 270,000 acres of land in Kern County pursuant to treaties between the United States and a historic tribe from which the Group claims to descend. The Tejon Appellees are in possession of, claim ownership to, and plan to construct the development project on the land at issue.

The Complaint alleges that the Kawaiisu Group seeks and has sought certain federal government protections and services that could assist the Group in its challenge against Kern County and the Tejon Appellees. But, such protections and services are available only to tribes that have obtained "federal acknowledgment," or "federal recognition," as an Indian tribe.[2/] The Complaint's claims against the Secretary seek to establish that the Group is a federally acknowledged tribe, which would thereby establish its eligibility to apply for the federal government protections and services that it seeks. The Kawaiisu Group and the Secretary agree that the Group is not on the Department of the Interior's ("Department") list of federally recognized Indian tribes, but the Secretary and the Group dispute whether

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[2/] In this brief, we use the terms federal "acknowledgment" and "recognition" interchangeably to refer to the Department's federal acknowledgment of a tribe pursuant to the Department's regulations and statutory authority. *See*, *e.g.*, 25 U.S.C. 479a; 25 U.S.C. 479a-1; 25 C.F.R. Part 83.

the "Kawaiisu" is indeed an Indian tribe for purposes of federal law, and whether it is federally acknowledged as such.

The Kawaiisu Group filed four complaints in this case, the first three of which were dismissed without prejudice. The district court dismissed the Group's Complaint, which is the subject of this action, and issued a lengthy, published decision in support of the dismissal. The district court denied the Group's request for leave to amend the Complaint, and this appeal followed.

B. Factual Background[3/]

The Complaint in this case alleges that the Kawaiisu Group "resides in and around the County of Kern, California," and has done so "since time immemorial." Dkt. 211; SER 29 at ¶2. The Complaint further alleges that the land at issue contains "the graves of [the Group's] ancestors and other important cultural and religious locations" (SER 118 at ¶287) and that the development of the Tejon Appellees' residential and commercial project has resulted in damage to sacred sites on the Group's alleged reservation (SER 122 at ¶311, ¶¶320-21).

[3/] For purposes of the factual background presented here, as with the Secretary's motion to dismiss in the district court, the Secretary "accepts factual allegations in the complaint as true." *Colony Cove Properties, LLC v. City Of Carson*, 640 F.3d 948, 955 (9th Cir.), *cert. denied*, 132 S. Ct. 456 (2011).

In the Complaint, the Group acknowledges that it is not on the Department of the Interior's list of federally recognized tribes (the "List"), *see* 25 U.S.C. §§ 479a, 479a-1, but alleges that it is "a federally recognized tribe by virtue of, *inter alia*, descending from signatories to of [sic] the 1849 Treaty with the Utahs and the Utah Tribes of Indians." SER 29 at ¶ 2. The Complaint alleges that by virtue of that purported recognition, the Group has a "property right in receiving the protection of the United States and its assistance in dealing with the Tejon [Appellees] and the County of Kern." SER 135 at ¶361. The Complaint alleges that the Group does not have pending with the Department any petition for federal acknowledgment as an Indian tribe. SER 116 at ¶275.

D. Procedural Background

1. The Original Complaint – The Kawaiisu Group filed its original complaint in November 2009 (Dkt. 1; SER 279-371) and primarily challenged Kern County's authorization of the development project proposed by the Tejon Defendants-Appellees. The complaint named both the Department of the Interior and the Secretary of the Interior as the federal government defendants and alleged that the development project was being allowed to proceed as a result of "administrative oversights" by the Department in: (1) omitting the Kawaiisu Group from the List of Indian groups that are recognized and eligible to receive

services from the Department, and (2) omitting the land on which the development project was proposed from the list of trust lands for the Kawaiisu Group. SER 280-81 at ¶¶1-3.

The federal government defendants moved to dismiss on various grounds, including the political question doctrine, lack of subject matter jurisdiction, failure to exhaust administrative remedies and other bases. Dkt. 53. Kern County (Dkt. 9) and the Tejon Defendants-Appellees (Dkt. 10) also moved to dismiss. The Kawaiisu Group moved for leave to file an amended complaint (SER 277-78), which the district court granted (SER 276). In its order, the district court explained that "[i]n the amended complaint, Plaintiffs must detail the rights violated, exactly what each Defendant did or failed to do, how the action or inaction of the Defendant is connected to each violation, and the specific injury suffered because of the Defendants' conduct." SER 276.

2. The First and Second Amended Complaints – In its First and Second Amended Complaints (Dkt. 71; SER 252-75 and Dkt. 133; SER 198-222, respectively), the Kawaiisu Group again named Kern County and the Tejon Defendants-Appellees. The Group named only the Secretary as the federal government defendant. *Ibid.* In both the First and Second Amended Complaints, the Group advanced claims against the Secretary based in part on the theories

raised in the original complaint and in the Third Amended Complaint, which is at issue here, *see infra*. Each of the defendants moved to dismiss the First and Second Amended Complaints (Dkt. 81, Dkt. 136 (Secretary); Dkt. 83, Dkt. 139 (Tejon Appellees); Dkt. 85, Dkt. 137 (Kern County)).

The district court held a hearing on the motions to dismiss the First Amended Complaint (Dkt. 122) and issued an unpublished, 25-page written decision (Dkt. 123) that: (1) granted the Kawaiisu Group's motion to voluntarily dismiss its claims against the Secretary, (2) granted the motions to dismiss filed by the Tejon Defendants-Appellees and Kern County, and (3) granted the Group leave to amend its complaint as to certain claims. The district court also held a hearing on the motions to dismiss the Second Amended Complaint (Dkt. 203) and issued a 45-page published decision (Dkt. 205), granting each of the motions and, again, granting the Group leave to amend as to certain claims.

3. The Third Amended Complaint – On March 19, 2012, the Kawaiisu Group filed a 125-page Third Amended Complaint. Dkt. 211; SER 28-152. The Complaint asserts a total of seven Claims for Relief. The First and Third Claims for Relief are asserted against the Tejon Defendants-Appellees (SER 117-121; SER 123-126), and the Second Claim for Relief is asserted against Kern County (SER

121-123). The Fourth through Seventh Claims for Relief are asserted against the Secretary (SER 126-148).

As to the claims against the Secretary, the Kawaiisu Group alleged generally: (1) that the Secretary's failure to place the Group on the Department's List of federally recognized tribes was wrongful, (2) that the Secretary failed to correct the purported omission of the Group from the List, (3) that the Secretary failed to respond to the Group's request for assistance in this action against the Tejon Defendants-Appellees, and (4) that the Group is a federally recognized tribe by virtue of the Act of Congress of 1849. SER 126-148.

The Secretary moved to dismiss the claims on various grounds pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Dkt. 223. The Secretary argued, among other things, that: (1) there was no waiver of sovereign immunity from suit for the Kawaiisu Group's claims, (2) the question of whether the Group is entitled to acknowledgment as a federally recognized tribe is a non-justiciable political question, and (3) the Group failed to exhaust the Department's administrative remedies for acknowledgment of an alleged tribe. The Tejon Defendants-Appellees (Dkt. 221) and Kern County (Dkt. 219) also moved to dismiss. The district court held a hearing on all of the motions. Dkt. 239; ER 46-64.

4. Decision of the District Court – On August 7, 2012, in a published Order on All Defendants' Motions to Dismiss, the district court dismissed all of the claims as against each of the defendants. Dkt. 240; ER 3-45. The court, as an initial matter, "did not accept as true" the Kawaiisu Group's allegation that it was a federally recognized tribe, explaining that courts are not bound to accept as true a legal conclusion couched as a factual allegation. ER 21 n.11. The court further found, among other things: (1) that the "parties do not dispute that, generally, acknowledgment of tribal existence by the Department of the Interior is a prerequisite to the protection, services, and benefits from the federal government that are available to Indian tribes" (ER 21), (2) that each of the claims against the Secretary was "predicated upon the failure of the [Department] to recognize and/or 'list' the Kawaiisu as a recognized Indian tribe" (ER 24), (3) that there was no waiver of sovereign immunity under the Administrative Procedure Act or the *Ex Parte Young* doctrine, and the *ultra vires* doctrine was inapplicable (ER 26-28), (4) that the question of whether the Kawaiisu Group is entitled to federal recognition as a Indian tribe is a non-justiciable political question beyond the purview of the court (ER 28-32), and (5) that the Group is required to exhaust its administrative remedies with the Department for purposes of obtaining tribal recognition (ER 32-37).

Finally, the district court concluded that "[e]ven if the Court had subject matter jurisdiction, even if the plaintiffs alleged a plausibly valid claim for land, and even if the Court found recognition judiciable [sic], deferral to the [Department of the Interior] would be appropriate." ER 40. The court explained that the Kawaiisu Group "allege[s] land rights based upon aboriginal title, possibly, and fee title and based upon treaties from long ago[;]" it "claim[s] land rights under a complex array of historical federal statutes, federal treatises and official and unofficial communications[;]" and the genealogy the Group alleges "is disperse * * * encompassing numerous tribal names and location changes and with possibly differing factions." ER 40-41. The court concluded that "[d]eciding whether an Indian group is a tribe involves decisions of anthropological, political, geographical, and cultural considerations," and "[t]hese considerations are well within the expertise of the [Department of the Interior]." ER 41.

The Kawaiisu Group sought leave to amend the Third Amended Complaint, but the district court declined, pointing out that the Group had already been given four opportunities to state a claim for relief for which the court had jurisdiction but had been unable to do so. ER 45.

STANDARD OF REVIEW

This Court reviews the dismissal of the Kawaiisu Group's Complaint *de novo*. *See Colony Cove*, 640 F.3d at 955. While the Court "assume[s] [a] plaintiff's factual allegations to be true," the Court "do[es] not [] accept the 'truth of *legal* conclusions merely because they are cast in the form of factual allegations.'" *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (emphasis in original).

SUMMARY OF ARGUMENT

In this appeal, the Kawaiisu Group fails to present any challenge to the district court's dismissal of the claims against the Secretary for lack of jurisdiction and failure to state a claim on which relief can be granted. The judgment, therefore, should be affirmed as to those claims.

1. After receiving three opportunities to bring a judicially reviewable complaint as against the Secretary, the Kawaiisu Group filed its Third Amended Complaint, bringing claims that are all founded on the assertion that the Secretary wrongfully failed either to acknowledge the Group as a federally recognized Indian tribe or to include the Group on the Department of the Interior's List of federally recognized tribes. The district court rendered a detailed, reasoned decision correctly dismissing each of those claims on multiple grounds, including: (a) that there is no

waiver of the United States' sovereign immunity from suit for the claims, (b) that federal recognition of an alleged Indian tribe is a political question not subject to judicial review absent exhaustion of administrative remedies, and (c) that the Kawaiisu Group failed to exhaust the Department's administrative remedies for groups of individuals, such as the Kawaiisu Group here, seeking both federal acknowledgment as a tribe and the benefits for which acknowledged tribes are eligible to apply.

The Kawaiisu Group's opening brief, however, does not raise or present any argument that the district court erred as to those rulings or to any of the other rulings made by the court regarding the Secretary. Nor does the brief provide any reason or justification for the omission of such arguments. Accordingly, all challenges that the Group could have brought on appeal as to the Secretary are waived, and no exceptions to the waiver rule apply in this case.

2. The Kawaiisu Group also has waived its new estoppel argument against the "United States" because the Group did not raise or argue that issue in the district court. But, in any event, the argument fails because the United States is not a named party in this action, and the Group does not allege or identify any "affirmative misconduct" by the Secretary.

ARGUMENT

THE KAWAIISU GROUP'S OPENING BRIEF DOES NOT CHALLENGE ANY OF THE DISTRICT COURT'S RULINGS CONCERNING THE CLAIMS AGAINST THE SECRETARY; THUS, ANY SUCH CHALLENGES ARE WAIVED ON APPEAL AND ARE NOT BEFORE THIS COURT

A. The Kawaiisu Group Has Waived All Challenges to the District Court's Rulings as to the Claims Against the Secretary –

The Kawaiisu Group's Complaint brings separate and distinct claims against each of the three defendants-appellees. *See, e.g.*, SER 117-148; ER 24-44. The claims against the Tejon Appellees and Kern County include various allegations of a legal interest in the private lands of which the Tejon Appellees are in possession, and for which Kern County has authorized the Tejon Appellees to proceed with their development project. ER 4-5. The claims against the Secretary, in contrast, variously allege that the Secretary did not acknowledge the Group as a federally recognized tribe and did not include the Group on the List of federally recognized Indian tribes eligible to receive services provided by the United States. *See, e.g.*, SER 127 at ¶345:16-17; SER 141 at 395; ER 24; ER 31. The Kawaiisu Group alleges that, because of those alleged errors by the Secretary, it did not receive certain federal government services and protections on which it seeks to rely in

challenging the Tejon Appellees' development project. *See, e.g.*, SER 127 at ¶345:16-17; SER 135 at ¶¶361-62.

The challenges on appeal are directed only to the Kawaiisu Group's land claims as against the Tejon Appellees and Kern County. Specifically, the arguments on appeal are: (1) that the Group allegedly has a historic claim to the land at issue (OBr. 11-15, 23), and (2) that the purported tribal reservation of the Group's alleged predecessor tribe survived the Act of 1851 and the Act of 1864 (OBr. 11, 17-23).[4] The Group's opening brief fails to raise any challenge to the district court's rulings dismissing all of the claims against the Secretary. Moreover, the brief does not account for, or offer any explanation for, the omission. Accordingly, any such challenges that the Group could have brought are

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[4] The issues raised in the Group's opening brief as to the Tejon Appellees and Kern County are directed almost exclusively to the underlying *merits* of the case, but the district court did not rule on the merits because the Group provided no ground on which the court could do so. Given that the district court did not even reach the underlying merits, the merits-based issues raised in the opening brief are not properly before this Court. *Cf. Golden Gate Hotel Ass'n v. City & County of San Francisco*, 18 F.3d 1482, 1487 (9th Cir. 1994) (observing the general rule that a district court should pass on an issue in the first instance and declining to reach the issue because the outcome was not beyond doubt). The district court in this case ruled only on the question of whether the Group's Complaint presented a reviewable cause of action against the Tejon Appellees and Kern County. And, to the extent the district court considered, for example, the language of certain treaties between the United States and historical tribes, the court did so for the purpose of determining whether the Complaint stated a reviewable claim as against those Defendants, not to decide the underlying merits of any of the Group's claims.

waived in this appeal and are not before this Court. *See, e.g., Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) ("Arguments not raised by a party in its opening brief are deemed waived."); *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 884 n.4 (9th Cir. 2010) (argument made in reply brief deemed waived because appellant "did not raise th[e] argument in her opening brief").[5/]

This Court has made plain that a party's opening brief shall "present a *specific*, *cogent* argument for [this Court's] consideration." *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* ("*Entertainment Research Group*"), 122 F.3d 1211, 1217 (9th Cir. 1997) (quoting *Greenwood v. F.A.A.* ("*Greenwood*"), 28 F.3d 971, 977 (9th Cir. 1994)). And, Fed. R. App. P. 28(a)(9)(A) requires a brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." The opening brief does not satisfy these minimum requirements as to any of the district court's rulings concerning the claims against the Secretary.

[5/] *See also AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012); *Blanford v. Sacramento County*, 406 F.3d 1110, 1114 n. 8 (9th Cir. 2005); *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999)); *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir. 1986); *International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

Thus, any arguments or contentions regarding those rulings are deemed waived in this appeal.

B. None of the Exceptions to the Waiver Rule Applies Here – This Court has identified three main exceptions to the waiver rule, and none of them applies here. First, the Court will review an issue not presented in an opening brief for "good cause shown" or "if a failure to do so would result in manifest injustice." *Koerner v. Grigas*, 328 F.3d 1039, 1048-49 (9th Cir. 2003) (citations omitted). Here, the Kawaiisu Group had four opportunities to plead its case in the district court. Dkt. 1, Dkt. 71, Dkt. 133, Dkt. 211. And, in response to its current Complaint, the district court rendered a 43-page, detailed and well-reasoned decision, ruling, among other things, that the claims against the Secretary must be dismissed on various grounds. The opening brief, however, does not advance a single specific argument challenging the district court's findings. This omission strongly suggests that the Group made an affirmative decision to waive such challenges. Therefore, no "manifest injustice," *Koerner*, 328 F.3d at 1048, will result if, in this fourth iteration of the Group's lawsuit, the Court does not review the various possible issues that the Group could have but failed to raise and argue in its opening brief. Thus, this first exception to the waiver rule does not apply,

and the Court need not consider any issues or arguments that the Group failed to present.

Under the second exception to the waiver rule, this Court "ha[s] discretion to review an issue not raised by appellant . . . when it is raised in the appellee's brief." *Id.* at 1048-49 (citation omitted). This exception does not apply because the Kawaiisu Group has not presented *any* issues as to the Secretary, and the Secretary, therefore, has no need to "raise[]," *ibid.*, any issues in response.

The last exception provides that the Court "may review an issue if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Id.* at 1049 (citation omitted). Here, the Secretary's defense has been prejudiced by the Group's failure to raise and argue any issues concerning the Secretary. The Group has not argued error *at all* as to the district court's rulings, so there simply are no issues or arguments to which the Secretary can respond in defense of the court's rulings in the Secretary's favor. Consequently, the Secretary would be unnecessarily denied a proper opportunity to litigate the appeal if the Court were to consider, *sua sponte*, any or all of the potential arguments concerning the district court's holdings on the claims against the Secretary. The Secretary would likewise be prejudiced if the Group attempts to use its reply brief to present, for the first time, specific challenges to any of the district court's rulings concerning the claims

against the Secretary. The last exception to the waiver rule, therefore, does not apply.

Where, as here, there is no reasonable basis for disregarding the waiver rule, this Court "review[s] only issues which are argued specifically and distinctly in a party's opening brief." *Entertainment Research Group*, 122 F.3d at 1217 (quoting *Greenwood*, 28 F.3d at 977). The Court "will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Ibid.* Here, the Kawaiisu Group has not argued "specifically" or "distinctly," *ibid.*, as to any of the district court's rulings concerning the claims against the Secretary. In fact, the opening brief does not present even a "bare assertion," *ibid.*, as to those rulings. These failures on appeal constitute a clear waiver of any challenges that could have been presented regarding the district court's rulings on the claims regarding the Secretary.

Nor may the Group's reply brief be used to present new arguments concerning the claims against the Secretary or to offer new interpretations of the arguments in the opening brief. It is in the opening brief that challenges and issues must be argued "specifically," "distinctly," and "cogent[ly]," *Entertainment Research Group*, 122 F.3d at 1217; *Greenwood*, 28 F.3d at 977. The Kawaiisu

Group has plainly failed to do that as to any rulings concerning the Secretary. Therefore, any challenges or issues that could have been pressed on appeal are waived and are not before this Court. The judgment of the district court dismissing the claims against the Secretary should be affirmed.[6/]

C. The Kawaiisu Group's Newly-Minted Estoppel Argument Is Waived and, in Any Event, Is Inconsequential as to the Claims Against the Secretary – As part of its land-rights arguments in the opening brief, the Kawaiisu Group contends, for the first time in this case, that "[t]he U.S. should be estopped from arguing that Treaty D wasn't ratified." OBr. 17.[7/] As a threshold matter, the Group never raised this estoppel argument in its Complaint or in any prior or subsequent

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[6/] The district court granted dismissal of the Kawaiisu Group's claims against the Secretary on multiple grounds but did not rule on every ground advanced by the Secretary. For purposes of this appeal, the Secretary preserves each ground for dismissal on which it relied in the district court.

[7/] For background purposes, the Kawaiisu Group relied on Treaty D to present an alternative argument in support of its land-rights claims. *See* SER 111 at ¶262(b); *Id.* at ¶262(c). It alleged that "in the alternative" to the express land-claim requirements of the 1851 Act, the Kawaiisu purportedly satisfied the requirements of the 1851 Act by "presenting their land claim to the United States government upon negotiating and entering into Treaty D," *id.* at ¶262(b):6-8. The district court rejected the argument, finding: (1) that Treaty D "cannot provide any basis for plaintiffs' claim to land," because the treaty "was never ratified," ER 16, (2) that Treaty D's "express terms provided it had no[] force until it was ratified," *ibid.*, and (3) that "the descendants of tribes in Treaty D were compensated for the failure to ratify the treaties," *ibid.*

pleadings in the district court. Likewise, the district court did not address this question. Accordingly, the argument is waived. *See, e.g., Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007) ("It is a long-standing rule in the Ninth Circuit that, generally, 'we will not consider arguments that are raised for the first time on appeal.'") (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)). Moreover, the pleadings make plain that, in the district court, the Secretary did not even rely on the non-ratification of Treaty D to support dismissal of the Group's claims against the Secretary. That is because the Complaint's allegations involving Treaty D concern land claims as against the Tejon Appellees. *See* ER 16-17. Consequently, the Group's estoppel argument is wholly inconsequential.

In any event, even assuming that the estoppel argument is not waived, and that the non-ratification of Treaty D is somehow relevant to the claims against the Secretary, it fails for several reasons. The Group contends (OBr. 16-17) that, although the district court correctly determined that Treaty D was never ratified, the "United States" should be estopped from arguing that Treaty D was not ratified because the United States allegedly "concealed" the non-ratification from the Kawaiisu until 1905, and the Kawaiisu allegedly "relied upon the Treaty to their detriment by investing in the land, [and] burying their ancestors there," among other things (OBr. 17). The sole basis for the Group's argument is a single

sentence from the 1905 Congressional Record. ER 69. There, in a sentence that is prefaced by the title "Treaties with Indians in California," the Record states: "The injunction of secrecy was removed January 18, 1905, from the eighteen treaties with Indian tribes in California, sent to the Senate by President Filmore June 7, 1852." *Id.*

The Kawaiisu Group's estoppel argument fails because neither the argument, nor the Congressional Record's references to "concealment" (OBr. 16-17), are directed to the Secretary, the sole federal government defendant in this case. Rather, the opening brief directs the argument vaguely to the "United States," OBr. 16, 17, which is not a named party in this lawsuit. And, the Complaint actually alleges that "the *Senate* imposed an injunction of secrecy over Treaty D and related proceedings that was not lifted until January 18, 1905," SER 70 at ¶113:22-24 (emphasis added). So, whether this Court relies on the allegations in the Group's opening brief or its Complaint, the Group has not established any grievance with the Secretary. The estoppel argument, therefore, is inconsequential in this case.

But even if the Kawaiisu Group had directed its argument to the Secretary, this Court recently reaffirmed that equitable estoppel can be applied against an agency of the United States "only where the government engages in 'affirmative misconduct,' which is defined 'to mean a deliberate lie or a pattern of false

promises.'" *Elim Church of God v. Harris*, 732 F.3d 1137, 1143-44 (9th Cir. 2013) (citation omitted). Here, no such affirmative misconduct by the Secretary is alleged, rendering the estoppel argument meritless.

Finally, the Group's reliance (OBr. 16) on *LaMantia v. Voluntary Plan Administrations, Inc.*, 401 F.3d 1114 (9th Cir. 2005), is misplaced. There, the issue was whether the corporate administrator of the plaintiff's employee benefits income protection plan could be estopped from relying on a statute of limitations defense or contractual limitations defense. *Id.* at 1118-21. The Court set forth three requisite conditions for applying estoppel against a party asserting such limitations defenses. *Id.* at 1119. The Kawaiisu Group seeks to apply those conditions to support estoppel here. OBr. 16. But those conditions have no application as to the Secretary because the Secretary did not advance any limitations defenses in response to the Group's Treaty D allegations. In short, the Kawaiisu Group's newly-crafted estoppel argument should be rejected.

CONCLUSION

The Kawaiisu Group has waived any challenges on appeal to the district court's holdings concerning the claims against the Secretary. The judgment should be affirmed as to those claims.

Respectfully submitted,

/s/ Tamara N. Rountree

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STATEMENT OF RELATED CASES

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

/s/ Tamara N. Rountree
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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(A)(7)(C) AND NINTH CIRCUIT RULE 32-1

I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 5126 words.

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CERTIFICATE OF SERVICE

I electronically filed the Answering Brief for the Federal Government Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on September 17, 2013. According to the Court's electronic docket, all counsel of record are active participants in the Court's electronic filing system and will be served automatically with notices of electronic filing.

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