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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11	Cindy Alegre, an individual,)	Case No. 16-cv-2442-AJB-KSC
12	et. al,	)	PLAINTIFFS’ OPPOSITION AND
13		)	RESPONSE TO DEFENDANTS’
14	Plaintiffs,	)	MOTION TO DISMISS
15		)	PLAINTIFFS’ FIRST AMENDED
16	RYAN ZINKE, Secretary of the	)	COMPLAINT
17	Department of the Interior, in his	)	Fed.R.Civ.P. 12(b)(1); 12(b)(6)
18	official capacity, et. al.	)	DATE: August 10, 2017
19		)	TIME: 2:00 P.M.
20	Defendants.	)	CTRM: 4A
21	_____)	)	JUDGE: Hon. Anthony J. Battaglia

21 **PLAINTIFFS’ RESPONSE AND OPPOSITION TO DEFENDANTS’**
22 **MOTION TO DISMISS PLAINTIFFS’ FIRST AMENDED COMPLAINT**

23 COMES NOW PLAINTIFFS stating their opposition and response to
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25 Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint.
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Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. Law Review 327, 342 (1957)	32

Dated: July 9, 2017

/s/ Alexandra R. McIntosh

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