

1 **ALEXANDRA R. McINTOSH #166304**
Law Office of Alexandra R. McIntosh, APC
2 2214 Faraday Avenue
Carlsbad, CA 92008
3 (760) 753-5357

4 **CAROLYN CHAPMAN #141067**
Law Office of Carolyn Chapman
5 1510 Mesa Ranch Dr.
Escondido, CA 92026
6 (619) 916-8420
7 Attorneys for Plaintiffs

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

11 Cindy Alegre, an individual, et.al.,) Case No. 16-cv-2442-AJB-KSC
12) Consolidated with
13 Plaintiffs,) Case No. 17-cv-1149-AJB-KSC
14 vs.) **PLAINTIFFS' RESPONSE AND**
15) **OPPOSITION TO DEFENDANTS'**
16 UNITED STATES OF AMERICA,) **MOTION TO DISMISS THIRD**
17 et. al.,) **CAUSE OF ACTION IN**
18 Defendants.) **PLAINTIFFS' FOURTH**
19) **AMENDED COMPLAINT**

20 **I.**
INTRODUCTION

21
22 Defendants have moved to dismiss Plaintiffs' Third Cause of Action in their
23 4AC alleging violations of Plaintiffs' Fifth Amendment rights to Due Process and
24 Equal Protection for lack of subject matter jurisdiction. Rule 12(b)(1), Fed.R.
25 Civ.P. In their Third Claim of their 4AC Plaintiffs have alleged that the named
26 Federal Defendants violated Plaintiffs Due Process and Equal Protection Rights
27
28

1
2 under the Fifth Amendment based on ten specific acts as detailed in Plaintiffs’
3 4AC ¶125. The Federal Defendants “move to dismiss the third cause of action in
4 Plaintiffs’ 4AC . . . - the United States has not waived sovereign immunity over
5 such a claim, and therefore the Court lacks subject matter jurisdiction.” [citations
6 omitted]” [Doc #110, Pg. 3; Lines 3-8]. For the reasons stated below Defendants’
7 legal objections are insufficient for this Court to grant their Motion to Dismiss.
8
9

10
11 **II.**
JURISDICTION

12 Plaintiffs bring their 4AC pursuant to the following statutory authority: 28
13 U.S.C. 1331 (federal question) [4AC:1]; 5 U.S.C. 500-596, 701-706 (APA) [4AC:
14 2]; 28 U.S.C. 1361 (mandamus) [4AC:3]; 28 U.S.C. 2201-2 (declaratory
15 judgment) [4AC:4]; common law; and the Fifth Amendment to the Constitution of
16 the United States, and 28 U.S.C. §1343(a)(4). This Court has jurisdiction to award
17 damages pursuant to the following jurisdictional statutes, common law, and
18 constitutional law: 1) General Jurisdiction pursuant to 28 U.S.C. § 1331, 1343; 2)
19 Fifth Amendment to the Constitution; 3) 25 C.F.R. Indians; 4) 25 C.F.R. §48; 4)
20 Trust relationship established in 1831; 5) 28 U.S.C. §1491; 6) 28 U.S.C. §1505; 7)
21 and “Sue and be sued” clauses. The relevant source of substantive law can fairly
22
23
24
25
26
27
28

1
2 be interpreted as mandating compensation for damages sustained for constitutional
3 violations and for breach of trust duties.

4
5 As discussed below Sovereign Immunity is waived: 1) under the Fifth
6 Amendment; 2) pursuant to specific waivers of sovereign immunity; 3) pursuant
7 to general statutory waivers; 4) pursuant to the non-statutory doctrine; and 4)
8 pursuant to the Doctrine of Constitutional Waiver. Application of the doctrine of
9 sovereign immunity in this case would be unconstitutional because it would result
10 in denying Plaintiffs their due process and equal protection rights that are
11 guaranteed by the Fifth Amendment to the United States Constitution.
12
13

14
15 **III**
16 **RESPONSE TO CASES CITED IN**
17 **DEFENDANTS' MOTION TO DISMISS.**

18 As Justice Scalia remarked to general laughter at oral argument in a takings
19 case against the United States, "You can usually count on the government to file
20 the canned sovereign immunity brief." Transcript of oral argument at 22, *John R.*
21 *Sand & Gravel Co. v. United States*, 128 U.S. 730 (2008) (NO. 06-1164). See,
22 Gregory C. Sisk, *Litigation with the Federal Government*, West Academic
23 Publishing, St. Paul, MN (2016) at 99. [Hereinafter referred to as "Sisk"].The
24
25
26

1
2 Government cited twenty-three cases in its boiler plate motion to dismiss on the
3 basis of sovereign immunity. A closer look at each case shows that in the twenty-
4 one (21) cases that made references to sovereign immunity, the reference is simply
5 dicta because the cases were decided on other grounds. Only two (2) cases were
6 decided on the grounds of sovereign immunity and are not controlling in this case:
7

8
9 **1. *Lane v. Pena*, 518 U.S. 187 (1996).** Sovereign immunity was waived under
10 §§501 and 505(a)(1) of the Civil Rights Act of 1991; **2. *United States v. Testan*,**
11 **424 U.S. 392 (1976).** The Supreme Court en banc held that if it was determined
12 that the CSC had made an erroneous classification, the court was authorized to
13 award money damages under the Tucker Act [28 U.S.C. §1491] for back pay lost;
14
15 **3. *F.D.I.C. v Meyer*, 510 U.S. 471 (1994).** The Supreme Court stated that the
16 “sue and be sued” clause contained in the FSLIC’s organic statute constituted a
17 waiver of sovereign immunity; **4. *Gilbert v. Dagrossa*, 756 F.2d 1455 (9th Cir.**
18 **1985).** Title 5 U.S.C. §702 waives sovereign immunity. Citing *Hutchinson v.*
19 *United States*, 677 F.2d 1322, 1327 (9th Cir. 1982); **5. *McCarthy v. U.S.*, 850 F.2d**
20 **558 (9th Cir. 1988).** The District Court found that it did not have jurisdiction
21 because 33 U.S.C. §702c immunity applied; **6. *United States v. Park Place***
22 ***Associates*, 563 F. 3d 907(9th Cir. 2009).** The Federal District Court found that
23
24
25
26

1
2 the Government had waived its sovereign immunity as to binding arbitration
3 because it stepped into the shoes of private individuals. The Ninth Circuit held
4 that the FAA [arbitration award] did not itself confer jurisdiction on federal
5 district courts over actions to compel arbitration or to confirm or vacate arbitration
6 awards. Subsequently, the Court of Claims held that it did not have the
7
8 jurisdiction to enforce arbitration awards; 7. **Summer Peck Ranch v. Bureau of**
9 **Recl., 823 F.Supp. 715 (E.D.Cal. 1993)**. The Court held that the United States
10 retains immunity for torts committed in the exercise of a discretionary function.
11 *Sumner* at 740; 8. **Hughes v. United States, 953 F.2d 531 (9th Cir. 1992)**.
12 Plaintiffs sued to stop tax collection activities. Court lacked jurisdiction on
13 grounds of laches; and the anti-injunction act 26 U.S.C. §7421; 28 U.S.C. §2201
14 (exceptions for disputes with respect to federal taxes). Summary Judgment was
15 granted pursuant to Rule 7.10 [CDCA] because plaintiff failed to appear at the
16 hearing; 9. **Jachetta v. United States, 653 F.3d 898 (9th Cir. 2011)**. The Court
17 held that Jachetta's FTCA claims were barred because: 1) Plaintiff failed to
18 exhaust administrative remedies; 2) There was no final agency action for the APA
19 claim; 3) Plaintiff failed to join an indispensable party; 4) res judicata; and 5)
20 Wrong court because Plaintiff should have filed in Federal Court of Claims; 10.

1
2 **Salazar v. Heckler, 787 F.2d 527 (10th Cir. 1986).** Court held that commissioned
3 PHS officers were not civilian employees, but were military employees. Section
4 717(a) exempts military members. Executive Order No. 11478 did not extend
5 federal policy of equal opportunity to members of uniformed services; **11. Beale**
6 **v. Blount, 461 F.2d 1133 (5th Cir. 1972).** The Court found that Beale failed to
7 exhaust administrative remedies. Case was dismissed. Title 39 U.S.C. §402(1)
8 empowers USPS “to sue and be sued in its official name.” The issue of sovereign
9 immunity was bypassed because the Court applied the Doctrine of Exhaustion of
10 Remedies; **12. Brian v. Gugin, 853 F. Supp. 358 (D. Idaho 1994) aff’d 46**
11 **F.3d 1138 (9th Cir. 1995).** The Court found no Fourth Amendment violation
12 because the prosecutor had statutory absolute immunity; **13. Easterly v. Dep’t of**
13 **the Army, No. CVS01712591JAMDADPS (E.D.Cal. Sept. 26, 2008).** This case
14 is inapplicable because the San Pasqual Plaintiffs did not plead Title 42 U.S.C.
15 §1983 or §1985; **14. Carruth v. United States, 627 F.2d 1068 (Ct.Cl. 1980).**
16 Texas Peanut Farmers sued under Title 7 U.S.C. §1357(1976) and 7 USC §§601-
17 02 (1976) and alleged a fifth amendment taking. The Court dismissed the case
18 based on doctrine of laches; application of 5 U.S.C. §701(a); and 7 U.S.C.
19 §1429(1976). [See also, (15 USC §714)"]; **15. Rivera v. United States, 924 F.2d**

1
2 **948 (9th Cir. 1991)**. A civilian librarian employed at an air force base alleged that
3 she was retaliated against. Court held that her remedy was through CSRA and not
4 the FTCA; **16. Clemente v. United States, 766 F.2d 1358 (9th Cir. 1985)**. The
5 Appellate court reverse and remanded the case to the district court for further
6 proceedings relating to plaintiff's Title VII claim; **17. Arnsberg v. United States,**
7 **757 F.2d 971 (9th Cir. 1985)**. The Court found no fourth amendment violation;
8
9 **18. Orion Ins. Grp. v. Washington's Office of Minority & Women's Bus.**
10 **Enterprises, 754 F. App'x 556 (9th Cir. 2018)**. Court held that DOT did not
11 violate the APA when it failed to make a decision on their appeal within 180 days
12 and dismissed the APA claim; **19. Nassiri v. Berryhill, No. 15-v-0583-WQH-**
13 **NLS, 2017 WL3055709 (S.D.Cal. July 19, 2017)**. The Court held that Title 42
14 U.S.C. §405 is the sole method whereby a plaintiff can appeal an adverse decision
15 concerning their social security benefits; **20. Boyd v. United States Dep't of the**
16 **Treasury, 713 F.App'x 648 (9th Cir. 2018)**. Case dismissed because Plaintiff
17 failed to file his claim under FTCA (CTCA) and Complaint was deficient
18 factually; **21. Hutchinson v. United States, 677 F.2d 1322 (9th Cir. 1982)**. The
19 Court dismissed the case based on the Anti-Injunction Act - IRC 7421(a) and
20 because Plaintiff failed to file his claim as required. **22. Gottschalk v. City &**
21
22
23
24
25
26
27

1
2 **City of San Francisco, 964 F.Supp.2d 1147 (N.N.Cal. 2013).** Case dismissed
3 pursuant to Rule 8 F.R.Civ.P . Therefore, it is not applicable to the case at bar.
4

5 **23. Campell v. U.S. Dep’t of Ed., No. 10-cv-266 JLS(WMc) 2010 WL**
6 **2605803, (S.D.Cal. June 28, 2010).** Case was dismissed with prejudice for failure
7 to state a claim. The reference to sovereign immunity is dicta. “The United States
8 has not waived its sovereign immunity for purposes of the False Claims Act.”
9

10
11 **IV.**
12 **THE BUREAU OF INDIAN AFFAIRS, THE DEPARTMENT**
13 **OF STATE, AND THE SAN PASQUAL BAND OF MISSION INDIANS.**

14 Congress formally established the Bureau of Indian Affairs (BIA) in the
15 Department of War in 1834, ostensibly to assist Indians, but also to subjugate and
16 in some cases exterminate them. Transferred to the newly created Department of
17 the Interior in 1849, the BIA oversaw gradual but dramatic shifts in federal Indian
18 policy, including the end of the Treaty Era in 1871. [See, The Appropriations Act
19 of March 3, 1871, 25 U.S.C. §71 (2000)]. The nineteenth century saw the
20 movement of tribes onto Indian Reservations and the breaking up of tribal land
21 holdings, with “excess” lands becoming available for settlement by non-Indians.
22 [General Allotment Act of 1887 (25 U.S.C. §331). The “Indian New Deal” was
23 marked by the Indian Reorganization Act of 1934, which put an end to allotment
24
25
26
27
28

1
2 of tribal lands, and promoted the revitalization of tribal governments. [Indian
3 Reorganization Act (Wheeler-Howard Act), 25 C.F.R. §461-479 (2000)]. In the
4 1970's Congress passed the Indian Self-Determination and Education Assistance
5 Act, [Pub.L. 93-638, 88 Stat. 2214 (§§458-458(e) (2000)]. [See, Robert
6 McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to*
7 *American Indians*, 19:1 BYU J.Pub.L. 4-5 (2004)].
8
9

10 The BIA has been adjudged “incapable” by the federal court in *Cobell v.*
11 *Norton*, 226 F. Supp. 2d 1, 11 (D.D.C. 2002), *vacated in part and remanded by* 334
12 *F.3d 1128 (D.C.Cir. 2003)*. In *Cobell*, the Court Referred to the Secretary of
13 Interior as a trustee-delegate. [See, *McCarthy*, nts 2, 16, 24, 25]. A series of articles
14 in the Arizona Republic in 1897 led to an investigation and a conclusion that
15 “[m]any of the Federal Indian programs are fraught with corruption and fraud.
16 Most of the others are marred by mismanagement, and some by incompetence.
17
18
19

20 The BIA has become emblematic of the federal trust responsibility to
21 Indians. This trust responsibility is rooted in the United States Constitution.
22 [McCarthy at 9] resulting in the United States becoming trustee or guardian for the
23 tribes. This role traces to the Supreme Court’s opinion in *Cherokee Nation v.*
24 *Georgia*, 30 U.S. (5 Pet.) 1 (1831), in which Chief Justice Marshall wrote that the
25
26

1
2 relationship of the tribes to the United States resembles that of a “Ward to its
3 guardian.” The role of the United States as guardian to trustee has several
4 consequences. The tribal and individual Indian status as ward entitles tribes to sue
5 offices of the United States when that standard of care is violated. [See, Lindsay G.
6 Robertson, *Native Americans and the Law: Native Americans Under Current*
7 *United States Law*, June 2011]; *Seminole Nation v. United States*, 316 U.S. 286,
8 296-97 (1942) (The Government has to be judged by the most exacting fiduciary
9 standards).
10
11
12

13 The San Pasqual Band of Mission Indians is a federally recognized Indian
14 tribe whose ancestors occupied the San Pasqual Valley, east of San Diego,
15 California. As part of these trust responsibilities, the BIA is entrusted with the
16 responsibility to help Tribes set up their own constitution. Article III, section 2 of
17 the Band’s Constitution gives the Secretary of the Interior final authority over tribal
18 enrollment decisions. [Ex 2 4AC]. This Constitution also expressly incorporates
19 federal regulations, promulgated in 1959, adopted in 1960, and formally codified
20 at 25 C.F.R. §48.1-48.15 (“the 1960 regulations”). Section 48 addressed tribal
21 enrollment criteria, the process for completing an initial membership roll, the
22 procedures for keeping the membership roll current, and the purposes for which the
23
24
25
26

1
2 roll was to be used. *Alto v. Black*, 738 F.3d 111 (9th Cir. 2013). (The Tribe’s own
3 governing documents vest the United States Department of Interior and BIA with
4 ultimate authority over membership decisions).
5

6 The BIA functioned as a trustee when its delegates promulgated 25
7 C.F.R.§48 to the San Pasqual Band of Mission Indians and persuaded them to
8 incorporate §48 into its constitution which was enacted and approved on November
9 29, 1970. [See, Ex 2 4AC]. In addition, the San Pasqual Constitution incorporated
10 in Article IX, Title II of the Civil Rights Act of 1968 (82 Stat. 77). As a result of
11 inserting itself into the San Pasqual Constitution, the United States has waived its
12 sovereign immunity concerning any constitutional violations of the San Pasqual
13 Constitution and/or 25 C.F.R. §48.
14
15
16

17
18 **V.**
HISTORY OF SOVEREIGN IMMUNITY

19 The words “sovereign immunity” do not appear in the Constitution. Rather,
20 it is a doctrine from English law that the Court has assumed as silently imported
21 into American law. *United States v. Lee*, 106 U.S. 196, 205-7 (1982). Today, more
22 than ever we have Constitutional rights that stand above Congress and so the broad
23 interpretation [of sovereign immunity] cannot be saved on that ground. [John
24 Lobato & Jeffrey Theodore, *Federal Sovereign Immunity*, Harvard Law School,
25
26
27
28

1
2 draft updated May 14, 2006, at 2]. “Just because a sovereign creates the law does
3 not mean that he should be immune to the law.” *Id.* at 3.

4
5 Professor Kenneth Culp Davis contended that the doctrine of sovereign
6 immunity is unnecessary as a “judicial tool.” Gregory C. Sisk, *Yesterday and*
7 *Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39:2 Tulsa
8 L.Rev. 313 (2013). Professor Susan Randall contends that sovereign immunity
9 should be viewed as “a prudential rather than a jurisdictional doctrine. By this
10 approach, “courts would attempt to balance the needs of the political branches to
11 govern effectively with the rights of the citizenry to redress governmental
12 violations of law.” *Sisk* at 70, 71. [See also Katherine Florey, *Sovereign Immunity’s*
13 *Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign*
14 *Immunity Doctrine*, 43 Wake Forest L.Rev. 765, 796 (2008)]. “When mundane
15 government activity is involved, devoid of policy implications, we should expect
16 legislative waivers readily to be adopted.” Dean Harold J. Kent, *Reconceptualizing*
17 *Sovereign Immunity* 45 Vand.L.Rev. 1529, 1529-33 (1992)]. [e.g. Brettschneider
18 & McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*,
19 93 Tex.L.Rev. 1229, 1261, (2015). *Sisk* at 73. The conventional account of the
20 pertinent history and the one accepted by the majority of the Supreme Court, holds
21
22
23
24
25
26

1
2 that “[w]hen the Constitution was ratified, it was well established in English law
3 that the Crown could not be sued without consent in its courts.” *Alden v. Maine*,
4 527 U.S. 706, 715 (1999). *Sisk* at 73. But, it must be remembered that in the case
5 at bar, the plaintiffs and their forefathers were here centuries before the
6 Constitution. Binding sovereign peoples to limits on their civil rights through a
7 Constitution that they had no voice in ratifying is unconstitutional.
8
9

10 Congress may pierce federal sovereign immunity by enacting statutory
11 waivers. In this case, sovereign immunity is pierced historically and by the actions
12 of the Government, as will be discussed infra. “The term ‘judicial power’ is a broad
13 and encompassing term” that “extends to the national judiciary a fundamental
14 governmental authority” which supersedes sovereign immunity. *Sisk* at 74.
15
16

17 There are three identified basis for the staying power of the idea of federal
18 immunity. First, English law; Second, **the Constitution commits the power to**
19 **appropriate money to Congress;** [See, 31 U.S.C. §1304] and Third, Congress’
20 control over the jurisdiction of the federal courts. Sovereign immunity could be
21 described as a particularized elaboration of congress’ control over the lower court’s
22 jurisdiction. *Sisk* at 75. The American Revolution itself was a battle against
23 governmental sovereignty. At that time neither federal institutions nor state
24
25
26

1
2 governments were truly sovereign But rather “[o]nly the people were,” so that a
3 government “Could not . . . claim a sovereign’s immunity.” *Id.*

4
5 In 1882, the majority of Supreme Court justices in *United States v. Lee*, 106
6 U.S. 196 (1882) were not convinced that making the Government amenable to suit
7 would impair the essential workings of government. Although sovereign immunity
8 had become ‘established doctrine’ in the United States, Justice Miller suggested it
9 had assumed that position without careful analysis in prior decisions and without
10 any principled basis. See, *Sisk, supra* at 79; *Lee, supra* at 208-23.

13 The *Lee* case was a “taking” case in violation of the Fifth Amendment.
14 When property is taken by the United States without just compensation, the
15 Government’s conduct offends the Takings Clause of the Fifth Amendment. [U.S.
16 Const. Amend V]. The *Lee* case strongly reaffirmed the role of the Judicial Branch
17 as a guardian of the citizen from abuse of power by other branches of government.
18 It is clear that the *Lee* decision intended to open the door widely to citizen suits
19 against government officers. [See also, *Larson v Domestic & Foreign Commerce*
20 *Corp.*, 337 U.S. 682 (1949) (when a government employee acts beyond his
21 delegated authority, and/or when his actions are *ultra vires*, a suit for specific relief
22 against the officer may proceed. When an officer acts pursuant to statutory
23
24
25
26

1
2 authority, but his conduct crosses constitutional lines, the suit may proceed against
3 the officer individually. *Lee* was an example of a government officer acting in
4 contravention of a constitutional limitation on authority, specifically the Takings
5 Clause. Conduct that exceeds delegated authority, statutory or constitutional,
6 separates an individual officer from the sovereign government. [Justice Frankfurter
7 in *Larson* directly disputed the very concept of sovereign immunity. *Larson* at 705-
8 29 (*Frankfurter, J.*, dissenting). Frankfurter further stated: “[T]he policy behind the
9 immunity of the sovereign from suit without its consent does not call for disregard
10 of a citizen’s right to pursue an agent of the government for a wrongful invasion of
11 a recognized legal right unless the legislature deems it appropriate to displace the
12 right of suing the individual defendant with the right to sue the Government.” In
13 the case at bar, the Defendants acted beyond their statutory limits resulting in
14 actions that crossed constitutional lines.

15
16
17
18
19
20 Under the *Larson-Malone* sovereign immunity doctrine, a suit may be
21 maintained directly against a governmental officer under two circumstances: “First,
22 if the officer acted outside the authority conferred upon his or her office by
23 congress, that is, beyond delegated statutory power, then his or her conduct will be
24 treated as individual in nature and will be neither attributed to the sovereign nor
25
26

1
2 barred by sovereign immunity. [i.e. acting *ultra vires*]. Second, if the officer acted
3 within the conferred statutory prerogatives of the office, but his or her conduct
4 offended a provision of the Constitution, then sovereign immunity again is lifted.
5 The *Larson* Court described the rule permitting suit against a government officer
6 acting in violation of the Constitution as “**the constitutional exception to the**
7
8 **doctrine of sovereign immunity.**” *Larson v Domestic & Foreign Exchange Corp.*,
9 337 U.S. 682, 701-02 (1940) [See, *Sisk, supra* at 85-6; *Malone v. Bowdoin*, 369
10 U.S. 643 (1962).
11
12

13
14 **VI.**
WAIVERS AND EXCEPTIONS TO THE DOCTRINE OF SOVEREIGN IMMUNITY

15 A waiver of sovereign immunity means the United States is amenable to suit
16 in a court properly possessing jurisdiction. *Alvarado v Tale Mountain Rancheria*,
17 509 F.3d 1008, 1016 (9th Cir. 2007) [“To confer subject matter jurisdiction in an
18 action against a sovereign, in addition to a waiver of sovereign immunity, there
19 must be statutory authority vesting a district court with subject matter
20 jurisdiction.”). In the case at bar, Plaintiffs have invoked 28 U.S.C. §1331 for the
21 Court’s General Jurisdiction. Plaintiffs recognize that such a statute may create
22 subject matter jurisdiction yet not waive sovereign immunity. See *Powelson v.*
23 *United States*, 150 F.3d 1103, 1105 (9th Cir. 1998) (“holding that 28 U.S.C §1340
24
25
26
27
28

1
2 created subject matter jurisdiction but did not constitute a waiver of sovereign
3 immunity.”) See, *Hughes v United States*, 953 F.2d 531 n.5 (9th Cir. 1992).

4
5 Plaintiffs further recognize that they must demonstrate an unequivocal waiver of
6 immunity. *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986);

7
8 *United States v. Mitchell*, 463 U.S. 206 (1983). (The United States government may

9 only be sued if the government waives its sovereign immunity or the actions

10 alleged by the plaintiffs are included within the statutory exceptions to immunity).

11
12 See, e.g. *Villegas v. United States*, 926 F. Supp. 1185 (E.D. Wash. 2013) citing

13 *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991). *Arford* and *Villegas* do

14
15 not require a statutory exception, only a waiver of sovereign immunity. In the case

16 at bar, the BIA waived any sovereign immunity defense when it created 25 C.F.R.

17 §48, advised the San Pasqual Tribe to include §48 into its Constitution and then

18
19 approve the Tribal Constitution in 1971.

20 Historically, the judicial philosophy was that every legal injury deserved a

21 legal or equitable remedy. The Constitution set up Article III Federal Courts in

22
23 order to exercise that philosophy. Exclusive Article III federal jurisdiction was

24 created by Congress in, for example, Admiralty, Patents, IRS. Originally, when

25
26 exercising this general jurisdiction the federal courts would make damage awards.

1
2 The prevailing party would have to go to congress or the department of the treasury
3 to collect his or her judgment. Not all judgments were able to be paid. This
4 situation created a separation of power problem. In order to protect the Treasury
5 Congress began to apply the doctrine of sovereign immunity. Strict enforcement of
6 this concept denied many justified and rightful litigants their day in court as a result
7 of an overreaching application of the doctrine. Since only Congress can waive the
8 United States' sovereign immunity [*Dunn & Black, PS v. United States*, 492 F.3d
9 1084, 1090 (9th Cir. 2007)], Congress began to carve out exceptions to the
10 application of the doctrine. *OPM v. Richmond*, 486 U.S. 414, 428 (1990). In an
11 effort to provide redress for constitutional claims and to protect the United States
12 treasury, Congress has created four categories of waivers of sovereign immunity: 1)
13 specific statutory waivers; 2) general statutory waivers; 3) the non-statutory
14 doctrinel and 4) the Constitutional waiver doctrine.
15
16
17
18
19

20 **A. SPECIFIC STATUTORY WAIVERS OF SOVEREIGN IMMUNITY**

21 Congress has provided for specific statutory waivers of sovereign immunity
22 in the following instances: 28 U.S.C. § 1346 (b)(1) [FTCA]; 46 U.S.C. §741)
23 [SAA]; 46 U.S.C. §781 [PVA]; 42 U.S.C. §2000e-5, 2 [Title VII which includes
24 Employment Discrimination Claims and the Equal Employment Opportunity Act ;
25
26
27
28

1
2 29 U.S.C. §621-34 [ADEA]; 42 U.S.C. ch. 126 § 1201 [DDA]; 42 U.S.C. §2000e-
3 16; 5 U.S.C. §552 and 552a [FOIA]; 42 U.S.C. §405(a)[SSA]; 38 U.S.C. §§1-
4 7907; 42 U.S.C. ch. 21B §2000bb; 17 U.S.C. §1-1332; 42 U.S.C. §7418, 7604
5
6 (a)(1). Congress has inserted “sue and be sued” clauses into many of its agencies
7 such as: FHA, HUD, SBA, USPS; the Department/Secretary of Commerce,
8
9 Department/Secretary of Interior; and Government Corporations such as: FSLIC
10 and FDIC, Pension and benefit Corporation, Export-Import Bank, and the
11
12 Tennessee Valley Authority. These statutory waivers show that Congress is willing
13 to create specific waivers of the Government’s sovereign immunity.

14 **B. GENERAL STATUTORY WAIVERS OF SOVEREIGN IMMUNITY**

15
16 Congress has created the following general statutory waivers of sovereign
17 immunity: The Tucker Act (28 U.S.C. §1491); The Little Tucker Act (28 U.S.C.
18 1346); The Indian Tucker Act (28 U.S.C. §1505); Administrative Procedures Act
19 [APA] (5 U.S.C. §500-702 et seq.); Government Benefit Claims; and the Equal
20
21 Access to Justice Act. The APA gives this court jurisdiction and waives sovereign
22
23 immunity for Plaintiffs’ first two causes of action. The Tucker and Indian Tucker
24
25 Act also waives the government’s sovereign immunity in this case, as will be
26
27 discussed infra.

1
2 **C. THE NON-STATUTORY WAIVER DOCTRINE**

3 The Supreme Court has moved away from an early jaundiced attitude toward
4 statutory waivers of sovereign immunity and has taken a path marked with a greater
5 respect for the legislative pledge of relief to those harmed by their government.
6

7 [*Sisk, supra* at 95]. As Justice Antonin Scalia and Bryan Garner put it, the supposed
8 corollary that “limitations and conditions upon which the Government consents to
9 be sued must be strictly observed and exceptions thereto are not to be ‘implied’
10 may have “made sense when suits against the government were disfavored, but not
11 in modern times.” Antonin Scalia & Bryan A. Garner, *Reading Law: The*
12 *Interpretation of Legal Texts*, 285 (West 2012).
13
14

15
16 The “**non-statutory review**” is applied when there is a “gap” in a statutory
17 waiver of sovereign immunity and the relief sought is not otherwise precluded by a
18 deliberately limited statutory remedy. This non-statutory review proceeds outside
19 of an express statutory waiver of federal sovereign immunity. [See, Kathryn E.
20 Koas, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity*
21 *and Nonstatutory Review*, 54 Drake L.Rev. 77, 98 (2005). The case at bar is a
22 perfect example where “non-statutory review” should be applied because: 1)
23 Plaintiffs are a unique group of indigenous persons; 2) The issues in this case are
24
25
26

1
2 unique; 3) The Constitution demands that Plaintiffs be made whole; and 4) There
3 has been a special relationship between the San Pasqual Indians and the
4 government ever since The Treaty of Santa Ysabel wherein the San Pasqual Indians
5 agreed to: 1) Not wage war; 2) Leave their native lands; and 3) Relocate to
6 assigned reservations. In addition, contract and fiduciary principles attached under
7 the Land Patent Act of 1891 and when the BIA inserted itself into tribal matters
8 and tribal affairs when it created 25 C.F.R. §48 in 1959, recommended that the
9 Tribe incorporate §48 into its tribal Constitution, and in 1971 approved the Band's
10 tribal Constitution containing §48. [See 4AC ¶¶38,39,49,55-63: pgs 9-15].
11
12
13

14 **D. THE CONSTITUTIONAL EXCEPTION TO THE DOCTRINE OF**
15 **SOVEREIGN IMMUNITY.**

16 The Constitutional exception to the Doctrine of Sovereign Immunity is
17 applied when a government employee acts beyond his delegated authority. When a
18 government employee acts beyond his delegated authority under a statute, his
19 actions beyond the statutory limitations are considered “individual and not
20 sovereign acts.” The officer’s actions are “*ultra vires*” and a suit for specific relief
21 against the officer may proceed. A second instance subjects the government to suit:
22 When an officer acts pursuant to statutory authority, but his conduct crosses
23
24
25
26

1
2 constitutional lines, the suit may proceed against the officer individually. This was
3 confirmed in: *Lee, supra*, 106 U.S. at 205-7; *Larson, supra*, 337 U.S. 682; *Malone,*
4 *supra*, 369 U.S. 643. As alleged in Plaintiffs’ 4AC at ¶¶28-49 [Pages 9-15],
5
6 Dutschke, Moore, and others exceeded their statutory authority resulting in a
7
8 waiver of sovereign immunity.

9
10 **VII.**
11 **PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE**
12 **DOCTRINE OF SOVEREIGN IMMUNITY.**

13
14 **A. SOVEREIGN IMMUNITY IS WAIVED UNDER THE**
15 **ADMINISTRATIVE PROCEDURES ACT**

16
17 The APA [Administrative Procedures Act] (5 U.S.C. §702) applies to
18
19 Plaintiffs’ first two causes of actions. Defendants do not challenge this.

20
21 **B. SOVEREIGN IMMUNITY IS WAIVED BY THE TUCKER ACT, THE**
22 **LITTLE TUCKER ACT, AND THE INDIAN TUCKER ACT.**

23
24 The Tucker Act (28 U.S.C §1491) is a jurisdictional statute by which the
25
26 United States Government has waived its sovereign immunity with respect to
27
28 certain lawsuits for monetary claims “**founded either upon the Constitution, or
any Act of Congress, or any regulation of an executive department, or upon
any express or implied contract with the United States, or for liquidated or
unliquidated damages in cases not sounding in tort.**” [Emphasis added]. 28

1
2 U.S.C. §1346(a)(2), 1491(a)(1). *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017
3 (1984), *Sisk* at 315. The District Court retains concurrent jurisdiction over Tucker
4 Act claims for \$10,000.00 or less under §1346 of Title 28, the “Little” Tucker Act.
5 §1346(a)(2). The substance of the statutory waiver of sovereign immunity is the
6 same whether a Tucker Act claim is heard in District Court or in the Court of
7 Federal Claims. See, *United States v. Testan*, 424 U.S. 392 (1976); Gregory C.
8 *Sisk, Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign*
9 *Immunity*, 39 Tulsa L. Rev. 313 (2013). See, *Simanonok v. Simanonok*, 918 F.2d
10 947, 950-51 (Fed. Cir. 1990). A plaintiff may remain in the district court under the
11 Little Tucker Act even if his damages exceed \$10,000 if he waives all recovery in
12 excess of \$10,000. E.g., *Zumerling v. Devine*, 769 F.2d 745, 748 (Fed. Cir. 1985);
13 *Stone v. United States*, 683 F.2d 449, 451 (D.C. Cir. 1982).

14
15
16
17
18
19 The historical guardian-ward relationship between the federal government
20 and indigenous peoples also gives rise to a special cause of action, which is
21 presumptively redressable in money damages. Congress enacted the Indian Tucker
22 Act in 1946. [28 U.S.C. §1505] which directs the invocation of jurisdiction by the
23 Court of Claims. In the case at bar, Group A Plaintiffs are a specific identifiable
24
25
26
27
28

1
2 group of Indians, who should be protected from equal protection violations by the
3 Defendants.

4
5 The United States Government, through its actions as alleged in Plaintiffs'
6 4AC created many implied contracts and written treaties with the San Pasqual
7 Indians. Through these acts, the Courts have held the Government in the position
8 of having a high fiduciary relationship with the Plaintiffs. In this case, the
9 Defendants orchestrated their way into the San Pasqual tribal affairs and tribal
10 constitution. By inserting themselves into the San Pasqual Constitution by way of
11 25 C.F.R. §48, they not only waived sovereign immunity, but they created a
12 contract of good faith and fair dealings. It is clear this covenant of good faith and
13 fair dealings has been breached by the government, allowing Plaintiffs to sue for
14 damages in this Court and the Court of Federal Claims.
15
16
17
18

19 There are three core fundamental principles in the field of United States
20 Federal Indian Law: 1) Congressional Plenary Power doctrine, which holds that
21 Congress exercises plenary authority in Indian affairs; 2) The Diminished Tribal
22 Sovereignty doctrine, which holds that Indian tribe still retains those aspects of
23 their inherent sovereignty not expressly divested by treaty or statute, or implicitly
24 divested by virtue of their status; and 3) The Trust doctrine, which holds that in
25
26

1
2 exercising its broad discretionary authority in Indian affairs, Congress and the
3 Executive are charged with the responsibilities of a guardian acting on behalf of its
4 dependent Indian wards. The third doctrine - Trust Doctrine- gives substance to a
5 Tucker Act claim. *Sisk* 318. These three fundamental principles in the field of
6 United States Indian Law act as waivers of the doctrine of sovereign immunity.
7
8

9 **C. THE NON-STATUTORY DOCTRINE WAIVES STATUTORY**
10 **IMMUNITY.**

11 Federal sovereign immunity was a doctrine of limited effect in the early
12 years of this republic and allowed for a number of remedies for governmental
13 wrongdoing. The Constitutional provenance of federal “sovereign immunity” is
14 obscure, and was a matter of genuine uncertainty in early years. *Marbury v.*
15 *Madison*, 5 U.S. (1 Cranch) 137, 163 (1805). Among the strands of constitutional
16 structure behind federal “sovereign immunity” are Congress’ powers over
17 appropriations and the jurisdiction of the federal courts. These are powers that do
18 not coincide. *Jackson* at 521-22. The tension between the jurisdiction of the federal
19 courts to award damages and the Congress’ powers over appropriations has
20 resulted in an adverse effect of the doctrine of sovereign immunity of the courts’
21 capacities to provide individual justice. *Id.* [See, the Judgment Fund, 31 U.S.C.
22
23
24
25
26
27
28

1
2 §1304 where Congress has provided for payment of judgments in a special
3 appropriations fund].

4
5 The essence of *Marbury v. Madison* [5 U.S. (1 Crnch) 157, 168 (1805)]
6 holding is that the “essence of civil liberty” is that the law provide a remedy for the
7 violations of rights. The doctrine of “sovereign immunity” is nowhere explicitly
8 set forth in the Constitution. It was not until 1846 that the Supreme Court invented
9 the proposition that the United States was subject to suit only by its consent given
10 in legislation as a basis to deny relief. See, *United States v McLemore*, 45 U.S. (4
11 How) 286, 288 (1846). [See, *Jackson* pg 524 fn 6]. The Court in *United States v*
12 *Lee*, 106 U.S. 196 (1882) rejected sovereign immunity defense.

13
14
15
16 **VIII.**
17 **CONCLUSION**

18 Congress has “plenary power” over Indian affairs (*Lone Wolf v. Hitchcock*,
19 187 U.S.553 (1903) and has repeatedly acted to limit the scope of tribal and
20 individual Indian power; one dramatic example is the Indian Civil Rights Act
21 [ICRA] (25 U.S.C. §§1301-1304). *Tahon v. Maves*, 163 U.S. 376 (1896). Prior to
22 the enactment of the ICRA in 1968, the Tribes, who were non parties to the United
23 States Constitution, had been free historically to legislate to the extent allowed by
24 their own constitution. As part of Congress’ “plenary power” over Indian affairs, it

1
2 created the Bureau of Indian Affairs, who in turn promulgated 25 C.F.R. §48,
3 which was then enacted into the San Pasqual Band's Constitution.

4
5 **A. SOVEREIGN IMMUNITY IS WAIVED BY THE TUCKER ACTS.**

6 **1. BREACH OF IMPLIED CONTRACT**

7 The principal federal agency charged with carving out the trust responsibility
8 to the Indians is the BIA in the DOI. The trust responsibility runs to all federally
9 recognized tribes and individual Indians. Prior to 1871, the federal government
10 dealt with tribes by treaties, many of which remain in force today. Statutes
11 affecting Indians and Indian tribes are for the most part found in Title 25 U.S.C.
12 *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

13
14
15
16 Tucker Act jurisdiction can be based on written or implied contracts. As
17 discussed supra, the United States Government created many contracts with the
18 San Pasqual Indians and the Courts have held that the Government has a fiduciary
19 relationship with the San Pasqual Indians. This duty waives sovereign immunity.

20
21 **2. BREACH OF TRUST.**

22
23 The historical guardian-ward relationship between the federal government
24 and indigenous peoples also gives rise to a special cause of action, which is
25 presumptively redressable in money damages. In *Mitchell II* the Court of Claims

1
2 held that various timber management statutes enacted after the General Allotment
3 Act of 1887, together with other statutes regulating governmental handling of
4 Indian funds, imposed a fiduciary duty on the United States for management of
5 allotted lands. *United States v. Mitchell*, 463 U.S. 206, 211 (1983) (“Mitchell II”).
6 By virtue of this fiduciary duty the court ruled that the statutes were implicitly
7 money-mandating within the meaning of the Tucker Act. *Id.* On second *Certiorari*
8 review the Supreme Court through Justice Marshall explained: “[T]he Tucker Act
9 itself accomplishes the waiver of sovereign immunity, in addition to directing
10 claims to the appropriate forum through its jurisdictional directives.” *Mitchell II*,
11 463 U.S. at 212, 215-6. This duty is analogous to the duty that the Defendants owe
12 to Plaintiffs. After *Mitchell II* a party must find a substantive right [cause of action]
13 outside of the Tucker Act, but the party need not point to a separate waiver of
14 sovereign immunity. *Id.* at 218. The Tucker Act is the waiver of the Government’s
15 sovereign immunity. [See, citations in *Mitchell II* at 226].

16
17
18
19
20
21 In *Navajo Nation*, Justice Ginsburg wrote: “the axiomatic [doctrine] that the
22 United States may not be sued without its consent,” the now established
23 understanding that the Tucker Act - and the Indian Tucker Act - both confers
24 jurisdiction upon the Court of Federal Claims and provides the necessary consent
25
26

1
2 to suit. *Navajo Nation v. United States*, 537 U.S. 488, 502-3 (2003). Once a full
3 fiduciary duty has been identified in the pertinent statute (as in this case the Fifth
4 Amendment and 25 C.F.R. §48) the Court said that “the availability of ...damages
5 [as a remedy] may be inferred,” even if not expressly referenced in the statute. The
6 underlying statute must show that the federal government retained meaningful
7 protective duties and that the approval power was “a significant component of the
8 Government’s general trust responsibility.” *Id.* at 515.

9
10
11 *United States v. White Mountain Apache Tribe*, is a very instructive case. In
12 1870, the United States Army established Fort Apache in the White Mountains of
13 east-central Arizona. In the early 1920's control of the fort was transferred to the
14 DOI. In 1960, Congress declared that Fort Apache be held by the United States in
15 trust for the White Mountain Apache Tribe . . .” Pub.L.No. 86-392, 74; Stat. 8, 8
16 (1960). In 1976 the fort was designated as a National Historic Site and in 1998 it
17 was placed on the list of 100 Most Endangered Monuments. The Secretary of the
18 Interior allowed Ft. Apache to fall into disrepair which would cost fourteen [14]
19 million dollars to rehabilitate the property. *United States v. White Mt. Apache*
20 *Tribe*, 537 U.S. 465, 469 (2003). In 1999 the White Mountain Apache Tribe filed
21 suit in the Federal Claims under the Tucker Act and the Indian Tucker Act for
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

damages for Breach of Trust. In 2001 the US Court for Appeals for the Federal Circuit recognized an actionable fiduciary obligation on the part of the federal government. The court of appeals held, “**control alone is sufficient to create a fiduciary relationship.**” [Emphasis added]. *White Mt. Apache*, 249 F.3d at 1375. Justice Stouter stated: “[A]lthough an unequivocal waiver of sovereign immunity is a predicate to any suit against the United States, the Tucker Act and its companion statute the Indian Tucker Act, provide such consent. . . . Because the Tucker Act itself provides the necessary sovereign immunity waiver, a strict construction rule does not apply to this stage of analysis. Thus, the pertinent statute need only “be reasonably amenable to the reading that it mandates a right of recovery in damages”, that is, a “fair inference will do.” *Id.* at 479. The Defendants had a fiduciary duty not to discriminate against Plaintiffs. They breached that duty as evidenced by their actions and the creation of 25 C.F.R. §48, and its inclusion in the Tribe’s Constitution. Since a full fiduciary relationship between the Government and Plaintiffs was created, then any breach of the government’s obligations is redressable in money damages. (See, *Navajo Nation, supra* at 516).

B. SOVEREIGN IMMUNITY IS WAIVED PURSUANT TO THE CONSTITUTIONAL RESTRICTIONS AGAINST A FIFTH AMENDMENT TAKING.

1
2 “Actions brought under the taking clause of the Fifth Amendment are . . . an
3 exception to the rule that sovereign immunity is a bar to damages against the
4 United States for direct constitutional violations.” *Duarte v. United States*, 532
5 F.2d 850, n3 (2d Cir. 1976). When the San Pasqual Tribal Enrollment Committee
6 enrolled Plaintiffs as members of the Tribe, they gave Plaintiffs a property right
7 (i.e. membership in the Band) that can not be taken from them unless the Fifth
8 Amendment is satisfied. [See 4AC ¶¶28-31]. This property right was given to
9 Group A Plaintiffs on April 10, 2005, by the constitutionally formed business
10 committee. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court
11 defined the property interest protected by the Fifth Amendment, as a “legitimate
12 claim of entitlement” to the item or benefit in question. Such “entitlements” are
13 “created and their dimensions are defined by existing rules or understandings that
14 stem from an independent source such as state law-rules or understandings that
15 secure certain benefits and that support claims of entitlement too those benefits.”
16 *Id.* at 577. It has been over fourteen [14] years, and the BIA has refused to
17 federally recognize Plaintiffs’ membership in the Band. As a result, Group A
18 Plaintiffs have not been able to enjoy the benefits of tribal membership. The courts
19 have held that actions brought under the takings clause of the Fifth Amendment are

1
2 an exception to the rule that sovereign immunity is a bar to damages against the
3 United States for direct constitutional violations. *Arnsberg v. United States*, 757
4 F.2d 971, 981 (9th Cir. 1984) citing *Duarte*, 532 F.2d 850, 852, n3 (2d. Cir. 1976).
5
6 See, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 989 (1984). Thus a Tucker Act
7 taking claim is a claim for just compensation required by the Fifth Amendment or
8 implied contract with the United States. *Hayward v. Henderson*, 623 F.2d 596, 598
9 (9th Cir. 1980). [Also see, Carols Manuel Vasquez, *Sovereign Immunity, Due*
10 *Process, and the Alden Trilogy*, 109 Yale L.J. (2000) n 91].
11
12

13 **C. SOVEREIGN IMMUNITY IS WAIVED BY THE CONSTITUTIONAL**
14 **EXCEPTION TO THE DOCTRINE OF SOVEREIGN IMMUNITY.**

15 Title 25 C.F.R. §48 is an unconstitutional statute because it treats similarly
16 situated San Pasqual Indians differently. It is unconstitutional facially and as
17 applied to Plaintiffs. There is no rational basis for a statute that violates the
18 guarantees of equal protection. As a result, Plaintiffs have been denied the Fifth
19 Amendment guarantees of equal protection. This unconstitutional statute that was
20 created by the Defendants waives the Government's sovereign immunity.
21

22 [See, Plaintiffs' 4AC ¶¶ 51-62; 108-140; Pages 30-38; 15-21]. (See, e.g.,
23 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); see also *Gerhart v.*
24 *Lake City*, 637 F.3d 1013, 1022 (9th Cir. 2011). The facts as alleged in Plaintiffs'
25
26
27
28

1
2 4AC clearly show that Group A San Pasqual Plaintiffs have received direct and
3 objective different treatment resulting in a violation of equal protection.
4

5 **D. SOVEREIGN IMMUNITY IS WAIVED BY THE NON-STATUTORY**
6 **DOCTRINE.**

7 **1. THE APPROPRIATIONS DOCTRINE AS A BASIS FOR**
8 **APPLYING SOVEREIGN IMMUNITY NO LONGER EXISTS.**

9 One basis for the doctrine of federal sovereign immunity is the constitutional
10 commitment of appropriations to Congress. [*Jackson* at 539] . The establishment of
11 the federal “judgment fund”, which is a permanent, indefinite appropriation” for
12 the payment of most judgments against the United States, removed the uncertainty
13 of a litigant being able to collect his judgment from Congress or the Treasury. [35
14 *Geo. Wash. Int’l L. Rev*, 594 (2003). As early as the 1850's, the Court identified the
15 appropriations power as the basis for requiring a specific statute authorizing awards
16 of monetary relief against the treasure before judicial relief could be granted. See
17 *Reeside v. Walker*, 52 U.S. 11 How.) 272, 291 (1850). See, Vicki C. Jackson, *Suing*
18 *the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35
19 *Geo. Wash. Int’l L. Rev.* 521-609 (2003). As outlined in this Response and
20 Opposition, there is no longer a need to cite a specific statute waiving immunity.
21
22
23
24
25
26 There are at least four (4) different approaches and avenues for this Court to use to

1
2 find that the Defendants have waived their defense of sovereign immunity. One
3 such basis for waiver is when the Government “steps into the shoes” of the private
4 person - here the San Pasqual Indians - and participates in their affairs as if they
5 were a member of the tribe.
6

7 **2. DOI IS A “SUE AND BE SUED” GOVERNMENTAL ENTITY.**

8
9 Congress has inserted “sue and be sued” clauses into many of its agencies
10 and one such agency is the Department of Interior through the Secretary of Interior.
11 As an alternative to proceeding directly against the United States pursuant to the
12 Tucker Act, the Supreme Court in *FHA v. Burr*, 309 U.S. 242 (1940) stated that
13 **Congress may organize sue and be sued agencies and such agencies may be**
14 **sued in any court of otherwise competent jurisdiction as if it were a private**
15 **litigant, as long as the agency is to pay the judgment from its own budget, not**
16 **from the United States Treasury.** See *United States v. Testan*, 424 U.S. 392
17 (1976). The DOI is a “sued and be sued” agency, therefore sovereign immunity is
18 waived in this case. [See, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984),
19 citing 28 U.S.C. §1491].
20
21
22
23

24 **3. THE CONSTITUTIONAL EXCEPTION TO THE DOCTRINE**
25 **OF SOVEREIGN IMMUNITY IS APPLICABLE.**
26

1
2 Plaintiffs' claims are based on the Equal Protection Clause of the Fifth
3 Amendment, The Tucker Act, and 25 C.F.R. §48 as the Statutory basis for their
4 claims. This Court should apply the Constitutional Exception to the Doctrine of
5 Sovereign Immunity enunciated in *Larson, supra*, 337 U.S. 682 and *Malone, supra*,
6 369 U.S. 643. The Government's sovereign immunity is waived pursuant to the
7 following: 1) General Jurisdiction pursuant to 28 U.S.C. § 1331, 1343; 2) Fifth
8 Amendment; 3) 25 C.F.R. Indians; 4) 25 C.F.R. §48; 4) Trust relationship
9 established in 1831; 5) 28 U.S.C. §1491; 6) 28 U.S.C. §1505; 7) and "Sue and be
10 sued" clauses. The relevant source of substantive law can fairly be interpreted as
11 mandating compensation for damages sustained for constitutional violations and
12 for breach of trust duties. Since this is a Constitutional claim, Plaintiffs are not
13 required to show a specific statutory waiver of sovereign immunity. Defendants'
14 Motion to Dismiss should be DENIED.

15 Dated: November 17, 2019

16 Respectfully submitted,

17 /s/ Carolyn Chapman, Esq.

18 Carolyn Chapman, Esq,

19 Dated: November 17, 2019

20 /s/ Alexandra R. McIntosh

21 Alexandra R. McIntosh, Esq,

1 **ALEXANDRA R. McINTOSH #166304**
Law Office of Alexandra R. McIntosh, APC
2 2214 Faraday Avenue
Carlsbad, CA 92008
3 (760) 753-5357

4 **CAROLYN CHAPMAN #141067**
Law Office of Carolyn Chapman
5 1510 Mesa Ranch Dr.
Escondido, CA 92026
6 (619) 916-8420
7 Attorneys for Plaintiffs

8
9 **UNITED STATES DISTRICT COURT**

10 **SOUTHERN DISTRICT OF CALIFORNIA**

11
12 Cindy Alegre, an individual, et.al.,) Case No. 16-cv-2442-AJB-KSC
13) Consolidated with
14 Plaintiffs,) Case No. 17-cv-1149-AJB-KSC
15) **PLAINTIFFS' RESPONSE AND**
16 vs.) **OPPOSITION TO DEFENDANTS'**
17) **MOTION TO DISMISS THIRD**
18 UNITED STATES OF AMERICA,) **CAUSE OF ACTION IN**
19 et. al.,) **PLAINTIFFS' FOURTH**
20) **AMENDED COMPLAINT**
21 Defendants.)
22)

23 **TABLE OF CONTENTS**

24 I. INTRODUCTION 1
25 II. JURISDICTION 2
26 III. RESPONSE TO CASES CITED 3
27 1. Lane v. Pena, 518 U.S. 187 (1996). 4
28 2. United States v. Testan, 424 U.S. 392 (1976). 4
3. F.D.I.C. v Meyer, 510 U.S. 471 (1994). 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 4 Gilbert v. Dagrossa, 756 F.2d 1455 (9th Cir. 1985). 4
5. McCarthy v. United States., 850 F.2d 558
(9th Cir. 1988). 4
6. United States v. Park Place Associates,
563 F. 3d 907 (9th Cir. 2009). 4
7. Summer Peck Ranch v. Bureau of Recl., 823 F.Supp.
715 (E.D.Cal. 1993). 5
8. Hughes v. United States, 953 F.2d 531 (9th Cir. 1992). 5
9. Jachetta v. United States, 653 F.3d 898 (9th Cir. 2011). 5
10. Salazar v. Heckler, 787 F.2d 527 (10th Cir. 1986). 6
11. Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972). 6
12. Brian v. Gugin, 853 F. Supp. 358 (D. Idaho 1994)
aff'd 46 F.3d 1138 (9th Cir. 1995). 6
13. Easterly v. Dep't of the Army, No. CVS01712591-
JAMDADPS (E.D.Cal. Sept. 26, 2008). 6
14. Carruth v. United States, 627 F.2d 1068 (Ct.Cl. 1980). 6
15. Rivera v. United States, 924 F.2d 948 (9th Cir. 1991). 6
16. Clemente v. United States, 766 F.2d 1358 (9th Cir. 1985). 7
17. Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985). 7
18. Orion Ins. Grp. v. Washington's Office of Minority & 7
Women's Bus. Enterprises, 754 F.App'x 556 (9th Cir. 2018)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

19.	Nassiri v. Berryhill, No. 15-v-0583-WQH-NLS, 2017 WL3055709 (S.D.Cal. July 19, 2017); 2018 WL 295974 (S.D.Cal. Jan. 3, 2018).	7
20.	Boyd v. United States Dep’t of the Treasury, 713 F.App’x 648 (9 th Cir. 2018).	7
21.	Hutchinson v. United States, 677 F.2d 1322 (9 th Cir. 1982).	7
22.	Gottschalk v. City & City of San Francisco, 964 F.Supp.2d 1147 (N.N.Cal. 2013).	7,8
23.	Campell v. U.S. Dep’t of Ed., No.10-cv-266 JLS(WMc) 2010 WL 2605803, (S.D.Cal. June 28, 2010).	8
IV.	THE BUREAU OF INDIAN AFFAIRS, THE DEPARTMENT OF STATE, AND THE SAN PASQUAL BAND OF MISSION INDIANS	8
V.	HISTORY OF SOVEREIGN IMMUNITY	11
VI.	WAIVER AND EXCEPTIONS TO THE DOCTRINE OF SOVEREIGN IMMUNITY	16
A.	SPECIFIC STATUTORY WAIVERS OF SOVEREIGN IMMUNITY	18
B.	GENERAL WAIVERS OF SOVEREIGN IMMUNITY	19
C.	NON STATUTORY WAIVER DOCTRINE	20
D.	CONSTITUTIONAL EXCEPTION TO THE DOCTRINE OF SOVEREIGN IMMUNITY	21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VII. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY	22
A. ADMINISTRATIVE PROCEDURES ACT [APA]	22
B. THE TUCKER ACT, THE LITTLE TUCKER ACT, AND THE INDIAN TUCKER ACT.	22
C. THE NON-STATUTORY DOCTRINE	25
VIII. CONCLUSION	26
A. SOVEREIGN IMMUNITY IS WAIVED BY ALL THREE OF THE TUCKER ACTS FOR BREACH OF IMPLIED CONTRACT.	27
1. BREACH OF CONTRACT	27
2. BREACH OF TRUST	27
B. SOVEREIGN IMMUNITY IS WAIVED BY THE CONSTITUTIONAL RESTRICTION AGAINST A FIFTH AMENDMENT TAKING	30
C. SOVEREIGN IMMUNITY IS WAIVED BY THE CONSTITUTIONAL EXCEPTION TO THE DOCTRINE OF SOVEREIGN IMMUNITY	32
D. SOVEREIGN IMMUNITY IS WAIVED BY THE NON STATUTORY DOCTRINE	33
1. THE APPROPRIATIONS DOCTRINE AS A BASIS FOR APPLYING SOVEREIGN IMMUNITY NO LONGER EXISTS	33

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 2. DOI IS A “SUE AND BE SUED”
GOVERNMENTAL ENTITY. 34

- 3. THE CONSTITUTIONAL EXCEPTION
TO THE DOCTRINE OF SOVEREIGN
IMMUNITY IS APPLICABLE 34

TABLE OF CASES

CASES	PAGE
<i>Alaska v. Native Village of Venetie Tribal Government</i> , 522 U.S. 520 (1998)	27
<i>Alden v. Maine</i> , 527 U.S. 706 (1999)2	13
<i>Alto v. Black</i> , 738 F.3d 111 (9 th Cir. 2013)	11
<i>Alvarado v Tale Mountain Rancheria</i> , 509 F.3d 1008 (9 th Cir. 2007)	16
<i>Arford v. United States</i> , 934 F.2d 229 (9 th Cir. 1991)	17
<i>Arnsberg v. United States</i> , 757 F.2d 971 (9 th Cir. 1984)	7, 32
<i>Beale v. Blount</i> , 461 F.2d 1133 (5 th Cir. 1972)	6
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	31
<i>Boyd v. United States Dep't of the Treasury</i> , 713 F.App'x 648 (9 th Cir. 2018)	7
<i>Brian v. Gugin</i> , 853 F. Supp. 358 (D. Idaho 1994) aff'd 46 F.3d 1138 (9 th Cir. 1995)	6
<i>Campell v. U.S. Dep't of Ed.</i> , No.10-cv-266 JLS(WMc) 2010 WL 2605803, (S.D.Cal. June 28, 2010)	8
<i>Carruth v. United States</i> , 627 F.2d 1068 (Ct.Cl. 1980)	6
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	9,10
<i>Clemente v. United States</i> , 766 F.2d 1358 (9 th Cir. 1985)	7
<i>Cobell v. Norton</i> , 226 F. Supp. 2d 1 (D.D.C. 2002), <i>vacated in part and remanded by</i> 334 F.3d 1128 (D.C.Cir. 2003)	9
<i>Cunningham v. United States</i> , 786 F.2d 1445, 1446 (9 th Cir. 1986)	17
<i>Duarte v. United States</i> , 532 F.2d 850 (2d Cir. 1976)	31, 32
<i>Dunn & Black, PS v. United States</i> , 492 F.3d 1084 (9 th Cir. 2007)	18
<i>Easterly v. Dep't of the Army</i> , No. CVS01712591-JAMDADPS (E.D.Cal. Sept. 26, 2008)	6
<i>F.D.I.C. v. Meyer</i> , 510 U.S. 471 (1994)	4
<i>FHA v. Burr</i> , 309 U.S. 242 (1940)	33

CASES	PAGE
<i>Gerhart v. Lake City</i> , 637 F.3d 1013 (9 th Cir. 2011)	32
<i>Gilbert v. Dagrossa</i> , 756 F.2d 1455 (9 th Cir. 1985)	4
<i>Gottschalk v. City & City of San Francisco</i> , 964 F.Supp.2d 1147 (N.N.Cal. 2013)	7,8
<i>Hayward v. Henderson</i> , 623 F.2d 596 (9 th Cir. 1980)	32
<i>Hughes v United States</i> , 953 F.2d 531 (9 th Cir. 1992)	5,17
<i>Hutchinson v. United States</i> , 677 F.2d 1322 (9 th Cir. 1982)	7
<i>Jachetta v. United States</i> , 653 F.3d 898 (9 th Cir. 2011)	5
<i>John R. Sand & Gravel Co. v. United States</i> , 128 U.S. 730 (2008) (N0. 06-1164)	3
<i>Lane v. Pena</i> , 518 U.S. 187 (1996)	4
<i>Larson v Domestic & Foreign Commerce Corp.</i> , 337 U.S. 682 (1949)	14-16 22,35
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903)	26
<i>Malone v. Bowdoin</i> , 369 U.S. 643 (1962)	14-16,22,35
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1805)	25,26
<i>McCarthy v. United States</i> , 850 F.2d 558 (9 th Cir. 1988)	4
<i>Nassiri v. Berryhill</i> , No. 15-v-0583-WOH-NLS, 2017 WL3055709 (S.D.Cal. July 19, 2017); 2018 WL 295974 (S.D.Cal. Jan. 3, 2018)	7
<i>Navajo Nation v. United States</i> , 537 U.S. 488 (2003)	28,29
<i>OPM v. Richmond</i> , 486 U.S. 414 (1990)	18
<i>Orion Ins. Grp. v. Washington's Office of Minority & Women's Bus. Enterprises</i> , 754 F.App'x 556 (9 th Cir. 2018)	7
<i>Powelson v. United States</i> , 150 F.3d 1103 (9 th Cir. 1998)	16
<i>Reeside v. Walker</i> , 52 U.S. 11 How.) 272 (1850)	33
<i>Rivera v. United States</i> , 924 F.2d 948 (9 th Cir. 1991)	6,7
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984)	23,31,34

1	CASES	PAGE
2	<i>Salazar v. Heckler</i> , 787 F.2d 527 (10 th Cir. 1986)	6
3	<i>Seminole Nation v. United States</i> , 316 U.S. 286 (1942)	10
4	<i>Simanonok v. Simanonok</i> , 918 F.2d 947 (Fed. Cir. 1990)	23
5	<i>Stone v. United States</i> , 683 F.2d 449 (D.C. Cir. 1982)	23
6	<i>Summer Peck Ranch v. Bureau of Recl.</i> , 823 F.Supp. 715 (E.D.Cal. 1993)	5
7	<i>Tahon v. Maves</i> , 163 U.S. 376 (1896)	26
8	<i>United States v. Mitchell</i> , 463 U.S. 206 (1983) [Mitchell II]	17,27,28
9	<i>United States v McLemore</i> , 45 U.S. (4 How) 286 (1846)	26
10	<i>United States v. Lee</i> , 106 U.S. 196 (1982)	11-14,22,26
11	<i>United States v. Testan</i> , 424 U.S. 392 (1976)	4,23,33,34
12	<i>United States v. Park Place Associates</i> , 563 F. 3d 907 (9th Cir. 2009)	4
13	<i>United States v. White Mt. Apache Tribe</i> , 537 U.S. 465 (2003)	29,30,33
14	<i>Villegas v. United States</i> , 926 F. Supp. 1185 (E.D. Wash. 2013)	17
15	<i>Willowbrook v. Olech</i> , 528 U.S. 562 (2000) (per curium)	32
16	<i>Zumerling v. Devine</i> , 769 F.2d 745 (Fed. Cir. 1985)	23
17	UNITED STATES CONSTITUTION	
18	U.S. Const. Amend V	Passim
19	FEDERAL STATUTES	
20	Title 5 U.S.C. §§500-596	2
21	Title 5 U.S.C. §§701-706	2, 22
22	Title 5 U.S.C. §§552, 552(a)	19,22
23	Title 17 U.S.C. §§1-1332	19
24	Title 25 U.S.C. §331 [General Allotment Act of 1887]	8
25	Title 25 U.S.C. §71 (2000) The Appropriations Act of March 3, 1871	8
26		
27		
28		

1	FEDERAL STATUTES	PAGE
2	Title 25 C.F.R. §§461-479 (2000)	9
3	Title 25 U.S.C. §§1301-1304 [Indian Civil Rights Act]	26
4	Title 28 U.S.C. §1331	2,16,34,35
5	Title 28 U.S.C. §1334	34
6	Title 28 U.S.C. §1340	16
7	Title 28 U.S.C. §1343(a)(4)	2,,18,35
8	Title 28 U.S.C. §1346(a)(2); (b)(1)	18,22,23
9	Title 28 U.S.C. §1361	2
10	Title 28 U.S.C. §1491 [Tucker Act]	2,19,22,
11	Title 28 U.S.C. §1505 [Indian Tucker Act]	34,35
12	Title 28 U.S.C. §§2201-2	2,19,23,34,
13	Title 29 U.S.C. §§621-34	35
14	Title 31 U.S.C. §1304	2
15	Title 38 U.S.C. §§1-7907	19
16	Title 42 U.S.C. §405(a)	13,25
17	Title 42 U.S.C. § 1201	19
18	Title 42 U.S.C. §2000bb	19
19	Title 42 U.S.C. §2000e-5, 2	19
20	Title 42 U.S.C. §2000e-16	19
21	Title 42 U.S.C. §7418, 7604 (a)(1)	19
22	Title 46 U.S.C. §741	19
23	Title 46 U.S.C. §781	19
24	CODE OF FEDERAL REGULATIONS	
25	Title 25 C.F.R. Indians	2, passim
26	Title 25 C.F.R. §48	2, passim
27		
28		

1	ACTS	PAGE
2	General Allotment Act of 1887	28
3	Indian Reorganization Act of 1934	8
4	Indian Reorganization Act (Wheeler-Howard Act)	9
5	25 C.F.R. §461-479 (2000)]	9
6	Indian Self-Determination and Education Assistance Act,	
7	[Pub.L. 93-638, 88 Stat. 2214 (§§458-458(e) (2000)]	9
8	Title II of the Civil Rights Act of 1968 (82 Stat. 77)	11
9	Title VII - Employment Discrimination	18
10	Title VII - Equal Employment Act	18
11	Pub.L.No. 86-392, 74; Stat. 8, 8 (1960)	29
12	MISCELLANEOUS	
13	Antonin Scalia & Bryan A. Garner, <i>Reading Law:</i>	
14	<i>The Interpretation of Legal Texts</i> , 285 (West 2012)	20
15	Brettschneider & McNamee, <i>Sovereign and State: A Democratic</i>	
16	<i>Theory of Sovereign Immunity</i> , 93 Tex.L.Rev. 1229 (2015)	12
17	Carols Manuel Vasquez, <i>Sovereign Immunity, Due Process,</i>	
18	<i>and the Alden Trilogy</i> , 109 Yale L.J. (2000)	32
19	Dean Harold J. Kent, <i>Reconceptualizing Sovereign Immunity</i>	
20	45 Vand.L.Rev. 1529, 1529-33 (1992)	12
21	Gregory C. Sisk, <i>Litigation with the Federal Government,</i>	
22	West Academic Publishing, St. Paul, MN (2016)	8
23	Gregory C. Sisk, <i>Yesterday and Today: Of Indians, Breach of</i>	
24	<i>Trust, Money, and Sovereign Immunity,</i>	
25	39 Tulsa L. Rev. 313 (2013)	12,23
26	John Lobato & Jeffrey Theodore, <i>Federal Sovereign Immunity,</i>	
27	Harvard Law School, draft updated May 14, 2006	11,12
28	Katherine Florey, <i>Sovereign Immunity's Penumbra: Common Law,</i>	
	<i>"Accident," and Policy in the Development of Sovereign</i>	
	<i>Immunity Doctrine</i> , 43 Wake Forest L.Rev. 765 (2008)	12
	Kathryn E. Koas, <i>Revealing Redundancy: The Tension Between</i>	
	<i>Federal Sovereign Immunity and Nonstatutory Review,</i>	
	54 Drake L.Rev. 77 (2005)	20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MISCELLANEOUS

PAGE

Lindsay G. Robertson, *Native Americans and the Law: Native Americans Under Current United States Law*, June 2011];

10

Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19:1 BYU J.Pub.L. (2004)

9

Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521-609 (2003)

33