No. 06-15351

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEARL ALVARADO, ELISHIA ARENAS, MARIO ARENAS, JR., DANNY DANIELS, KATHLEEN DAVIS, CHERYL DURAN, JEANINE GONZALES, DIANE GRIGSBY, WAYNE GRIGSBY, PAULA ANN GUTIERREZ, CHAD ELLIOTT LEWIS, CHERYL LEWIS, CLIFFORD LEWIS, DONALD LEWIS, JERRY LEE LEWIS, KATHY LYNNETTE LEWIS, KEVIN LEWIS, LARRY PAUL LEWIS, Jr., LISA LEWIS, LOUELLA LEWIS, REGINA LEWIS, TRINA LEWIS-DAVIS, CARL MEKEALIAN, CONNIE MEKEALIAN, JENNIFER MEKEALIAN, LORI MEKEALIAN, MIKE MEKEALIAN, YVONNE MEKEALIAN, ALEX MONTGOMERY, CLIFF MONTGOMERY, FRANCINE MONTGOMERY, VINCENT MORENO, VALENTINA OLIVER, and DARREN SORONDO,

Plaintiffs/Appellants,

v.

TABLE MOUNTAIN RANCHERIA, (dba or successor to the TABLE MOUNTAIN RANCHERIA ASSOCIATION), LEWIS BARNES, WILLIAM WALKER, AARON JONES, CAROLYN WALKER, TWILA BURROUGH, LeANNE WALKER GRANT, CRAIG MARTINEZ, ROBBIE CASTRO, RAY BARNES, VERN CASTRO; GALE NORTON, in her official capacity as the Secretary of the Department of Interior; and THE UNITED STATES OF AMERICA,

Defendants/Appellees.

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

BRIEF FOR APPELLANTS

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May 19, 2006

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, each of the Appellants are individuals. Therefore they are not a publicly held corporation, nor do they have any parent company, subsidiary or affiliate, and they do not issue shares to the public.

May 19, 2006

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I. INTRODUCTION AND STATEMENT OF THE CASE

The initial reaction to this appeal might be to follow the so-called precedent of the Court's cases by proclaiming that the Court should not be involved in Indian tribal membership disputes because of the Indian tribes sovereign immunity. *This case is decidedly different.* It is different because the named individual defendants and the Table Mountain Tribe defendants/Appellees already waived tribal sovereign immunity in 1980 by bringing a *class action* lawsuit (which class necessarily included Appellants herein and who were represented collectively by one attorney firm) against the federal government (the other Appellee herein) seeking not only tribal recognition, but recognition of who the tribal members were. While admittedly – and unremarkably – the previous class action lawsuit did not name all of the represented members of the class, Appellants herein were indisputably members of the class. A stipulated judgment was reached in that prior class action case, not only stipulating to the class certification (which included the Appellants herein as members of the class; and a District Court finding and order of the same) but tribal recognition by the federal government and the District Court. None of the parties in that 1980 action have honored that class action resolution (except tribal recognition for a select few), and the District Court below (the same District Court Judge that rendered the decision in that 1980 action) did not honor it either. The District Court below erroneously

dismissed the action on the grounds of no subject matter jurisdiction, because the instant action involves a tribal membership dispute. The case presented here is *decidedly* different than all other previous cases wherein the Courts declined to get *involved* in tribal membership disputes. This case is not a tribal membership dispute: Appellants simply insist that Appellants receive not only what the District Court said Appellants received in that action in 1980, but to seek damages from those named "Indian" individuals and the Table Mountain Tribe that claimed to be representing the instant Appellants twenty-plus years ago, but have breached their fiduciary duty as a result of that "representation."

Plaintiffs/Appellants brought this action for the Court to declare that what Appellants' earned as class members represented by some of the Defendants herein should be ordered and that some of the Appellees here should be ordered to pay damages to the Appellants herein. Since Appellants were unnamed – but undisputed – members of the class beginning in 1980 with a court declaration through a stipulation between the named members of the class (Appellees herein) and the federal government, Appellants seek nothing more than to be recognized as prevailing class plaintiffs, plus backwards looking relief and money damages against the named class-action plaintiffs (Appellees herein) in that 1980 action and 1983 stipulated court order. The named 1980 class representatives and Table Mountain (Appellees herein)

have ostracized Appellants herein because of pure greed. Appellees rejection of Appellants as members of this now very wealthy (casino profits) Indian Tribe (which has utterly ignored *recognizing* Appellants as members despite the fact that Appellants were indisputably class members victorious in that 1980 action) violated the 1980 action court orders and wherein the Appellees herein have waived sovereign immunity.

Appellants are, through undisputed blood relations, Native Americans whose one and only tribe is Defendant/Appellee Table Mountain Rancheria. Since finally recognized by the federal government, through a class action lawsuit, brought by Appellants' blood relatives and Table Mountain, Table Mountain was not only recognized by the Bureau of Indian Affairs and the Court as a federally recognized tribe, its members were identified by blood relation. Appellants were identified by blood relations as those recognized by the U.S. District Court in the Northern District of California (San Francisco) and the United States. Once the then named class action representatives, Table Mountain and the federal government executed what amounted to be a consent decree, the U.S. District Court in 1983 granted class certification for the 1980 action named class representative plaintiffs, and for all those (including the Appellants herein) represented by the class plaintiffs and Table Mountain.

Under the imprimatur of the class action case, the approval by the federal government, and the stamp of approval of the U.S. District Court, Table Mountain and its "chosen" members were off and running receiving government benefits as well as a unique ability to begin, operate and realize the wealth of a large casino within miles north east of Fresno, which now generates profits enough to pay each *recognized* member over $20,000.00 per month plus pre-Christmas bonuses, plus pre-tax bonuses, *plus* recognition from the Bureau of Indian Affairs (BIA) to receive tutoring, health benefits, and all of the other largess provided by tax payers to rich and poor tribes alike – but not to Indians (like Appellants herein) who are not "recognized" members of the tribe who are arbitrarily without a tribe or without a court or government entity willing to provide relief. (Apparently – unless corrected by this Court – "un" recognized Indians have fewer rights than inmates or illegal aliens or even terrorists who all get their day in court.)

BIA states that it cannot get involved, and the District Court below, which entertained and adjudicated that action brought in 1980, held, erroneously that the 1980 action did not involve tribal membership, but only an acknowledgment that the federal government was required to recognize Table Mountain as a federally recognized tribe. But the Court below either ignored or refused to explain why that same judge, on the same date the Court recognized and approved what amounted to

be a consent decree in that 1980 action, granted class certification. There was utterly no reason to grant class certification for alleged members and their descendants and offspring unless membership was also the issue.

On July 27, 2005 (filed on July 28, 2005) (CR 51, ER 157), the District Court, the Honorable Marilyn H. Patel, granted the Appellees' motion to dismiss on all issues relevant to this appeal. (CR 51, ER 157)[1] It was not until December 7, 2005 (CR 56, ER169) that Judge Patel issued the judgment, dismissing the case. Appellants timely filed their appeal on January 17, 2006 (CR 57, ER 171).

II. STATEMENT OF PROCEDURAL FACTS

On January 6, 2005, Appellants filed a complaint (CR 1, ER 1) against the Table Mountain Rancheria, various tribal leaders, as well as the named class plaintiffs from the earlier case in the U.S. District Court for the Northern District of California, Civil Action No. C-80-4595 MHP who had received a favorable ruling through a settlement agreement/consent decree, class certification, and judgment issued by the District Court for the Northern District of California on June 16, 1983, wherein the Appellants herein alleged that they were real parties in interest to (and class members

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[1]While the District Court permitted Appellants to file an amended complaint – *only with respect to an APA issue* – (see CR 51, ER 157 at 165), Appellants decided not to amend the complaint on the APA issue, because of the relative unimportance of that issue, and because it would have delayed appeal of the matter.

of) that favorable judgment in that 1980 action. (See Exhibits 1-3 to the complaint, CR[2], ER 29-45.)

On March 28, 2005, all of the Appellees, tribal appellees and the government filed motions to dismiss Appellants' complaint for lack of jurisdiction. (CR 31-36) On April 11, 2005, Appellants filed their opposition to the Appellees' motions to dismiss (CR 42; ER 110). Also on the same date, April 11, 2005, Appellants filed a request for judicial notice in support of Appellants' opposition to the Appellees' motions to dismiss (CR 43, ER 142). On April 18, 2005, Appellees filed their briefs in reply to Appellants' opposition to Appellees' motions to dismiss. (CR 46-47) Oral arguments on the Appellees' motions to dismiss were held on May 2, 2005 (CR 50, CR 58) On July 28, 2005, the District Court issued an order granting in major part and denying in minor part the Appellees' motions to dismiss. (CR 51, ER 157) The Court permitted Appellants to amend the complaint within thirty days only with respect to a cause of action (APA) which is not part of this appeal, and Appellants declined to amend. On December 7, 2005, the judgment was signed by the District Court dismissing the case with prejudice. (CR 56, ER 169) Appellants timely filed a notice of appeal on January 17, 2006. (CR 57, ER 171)

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[2]On January 24, 2005, Appellants voluntarily dismissed plaintiff Corrine Lewis only from the complaint. (CR 4, ER 46)

In the District Court's memorandum and order dismissing the complaint (CR 51, ER 157) the Court determined that pursuant to the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), federal courts have no jurisdiction regarding tribal membership disputes because tribes have sovereign immunity from said suits. (ER 161-165)

Absolutely ignoring the specific allegations in the complaint that alleged that Appellants were members or the class of plaintiffs represented by named class members in that 1980 action, the District Court, without explanation, alleged that Appellants were not parties to the 1980 Watts settlement agreement even though the settlement agreement included the then class plaintiffs. (ER 168, n. 3)

Further ignoring express and specific allegations of the complaint, the Court held that Appellants did not allege inadequacy of the representation provided by the named plaintiffs and their counsel in that 1980 action. (ER 168, n. 4) Factually, Appellants did expressly allege such claims. (CR 1, ¶¶ 59-66 and entire second through fourth causes of action; ER 15-20, 22-26)

III. STATEMENT OF ISSUES TO BE PRESENTED

Appellants raise the following issues on appeal:

1. Did the District Court err in ruling that the 1980 Action before it did not involve tribal membership or members?

2. Did the District Court err in refusing to exercise ongoing jurisdiction as a result of the stipulated order/consent decree issued in that 1980 Action to require compliance with that stipulated judgment/consent decree in that 1980 Action?

3. Did the District Court err in ruling that the plaintiffs herein did not allege "inadequacy of representation" of the class representatives in that 1980 Action?

4. Did the District Court err in ruling, on the Defendants' motion to dismiss, that the Appellants were not parties to that 1980 Action nor the 1980 Action judgment?

5. Did the District Court err in ruling that Table Mountain did not waive its sovereign immunity here by bringing a class action lawsuit against the government in that 1980 Action?

6. Did the District Court err in ruling that the government defendants had no obligation by law or pursuant to that 1980 Action to require Table Mountain to include as members the Indian parties that were members of the class of plaintiffs represented in that 1980 Action?

7. Did the District Court err in ignoring the fact that represented class plaintiffs must be treated identically to the named class plaintiffs as a result of that 1980 Action?

IV. STATEMENT OF JURISDICTION

The District Court had jurisdiction in order to enforce its own judgments. *Jeff D., etc., v. Kempthorn, et al*, 365 F.3d 844 (9th Cir. 2004). The District Court also had jurisdiction under 28 U.S.C. § 1331, and 28 U.S.C. § 1346, as the United States or an agency of the United States was a defendant in the matter. Pursuant to Title 28 U.S.C. § 1291, this Court has appellate jurisdiction from the final decision/judgment of the District Court of December 7, 2005 (CR 56, ER 169). Appellants timely filed

their notice of appeal on January 17, 2006 (CR 57, ER 171), as the appeal was taken within sixty days of the final judgment, as allowed, when the United States or its officer or agency is a party, pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

V. STATEMENT OF FACTS

Based upon the pleadings, the Court determined that it had no subject matter jurisdiction pursuant to Rule 12(b)(1) of the Fed. R. Civ. Proc. That being the case, the District Court's decision is reviewed *de novo*, and the Appellate Court must accept all uncontroverted factual assertions regarding jurisdiction as true. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir. 2002) amended, 298 F.3d 754. "We review *de novo* dismissals for lack of subject matter jurisdiction." *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005).

That being the case, the important factual assertions in Appellants' complaint (CR 1, ER 1) will be cited. These following facts are all located at CR 1, beginning at ER 1, and the following will simply designate paragraph numbers like they appeared in the complaint.

Appellants herein alleged in their complaint that they were the real parties in interest and intended beneficiaries and unnamed represented class members in a previous case brought in the United States District Court for the Northern District of

California in 1980, Civil Action C-80-4595-MHP which resulted in a class action settlement and judgment in that "1980 action." (Lead in paragraph, page 3 (ER at 3).) The complaint alleged that Appellants herein were the intended beneficiaries in that 1980 action and are direct descendants of and/or dependants of or off-spring of dependants of distributees of the 1958 distribution plan [importance of which is described later], and who were represented class plaintiffs in that 1980 action and who claimed to be members of the Table Mountain Rancheria, and as a result of that 1980 action, a federally recognized tribe located in the Eastern District of California, north of Fresno. Appellants claimed that they were members of the class of that 1980 action and were presented by the Table Mountain Rancheria Association, and the then plaintiffs in that 1980 action, which included Table Mountain Rancheria and several named class representative plaintiffs who were sued as defendants in this action. (ER 3, ¶ 1) The class action plaintiffs and Table Mountain in that 1980 action brought suit on behalf of themselves and all other persons similarly situated, and wherein said class prevailed against the United States and the Secretary of Interior with respect to a stipulated settlement/consent decree (although not denominated as a consent decree) and judgment, as fully recognized members of a fully recognized United States Indian Tribe, the Table Mountain Rancheria. (ER 3-4, ¶ 1) Each of the Appellants in **this** action is a direct descendant of distributees and dependants of distributees of the 1958

distribution plan, and are direct lienal descendants of those distributees of the 1958/59 distribution plan (a plan for the distribution of the assets of Table Mountain Rancheria, according to the provisions of Public Law 85-671, enacted by the 85th Congress, approved August 18, 1958, effectively July 31, 1959) and who contended that they were, in 1980, and are now, entitled to be members of the Table Mountain Rancheria, share all of the benefits, both government and tribal, including casino gaming distributions and other tribal benefits, of being recognized members of the Table Mountain Rancheria and who have sought those government and tribal benefits retroactively to the 1983 judgment in that 1980 action. (ER 4, ¶ 1) In addition, Appellants herein alleged that they are related through blood to every recognized Table Mountain member, and most, if not all, these Appellants are generationally closer to or as close to the original distributees as many now recognized members. (ER 4, ¶ 1)

The complaint listed thirty-five (35) named plaintiffs (Appellants herein), their dates of birth, their certified California Indian blood degree, who they were a direct lienal descendant of that was on the distribution plan, and their relationship to that distributee. (ER 4-7, ¶¶ 2-36)[3]

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[3]On January 24, 2005, Appellants dismissed then Plaintiff Corrine Lewis from the complaint. (CR 4, ER 46)

In that 1980 class action several then plaintiffs (now Appellees in this action) on behalf of themselves and all persons similarly situated, claimed to be, were granted by the court to be, either persons named in the final plan for the distribution of the 1958 "distribution plan" as being distributees, and/or claimed, and were granted to be, class representatives of all other persons named in the distribution plan as distributees, their heirs, assigns, executors, administrators or successors in interest. Those 1980 class action plaintiffs claimed that the representative plaintiff distributees would fairly and adequately protect the interest of the class. (ER 7, ¶ 37) (See also, ¶¶ 3 and 4 of the December 24, 1980, class action complaint, located herein at ER 50 at 54-57.) Also in that 1980 class action, the then plaintiffs (and now Appellees in this action) were listed as dependent members of the families of distributees, and purportedly claimed to represent, and the court granted that representation to be representatives, of "all Indian persons, other than distributees, who were named in the Table Mountain Rancheria Distribution Plan as dependents of distributees, and who, for that reason, were, are or have been deemed by the United States and/or another entity to have lost their status as Indians under the laws of the United States. They also claimed that the class included the "off-spring" of said dependents and that "the named plaintiff dependents will fairly and adequately protect the interest of the class." (ER 7-8, ¶ 37; ¶¶ 5 and 6 of the class action complaint filed in that 1980

action, ER 57-58.) The complaint herein alleged that the Appellants herein were the real parties in interest and the intended beneficiaries of the class and class determination and the resulting orders and judgment in that 1980 action. (ER 8, ¶ 37)

The then plaintiff in the 1980 action, now an Appellee in this action, Table Mountain Rancheria Association, claimed to be "the governing body of the American Indian Tribe, band or community consisting of the Indians and their descendants and/or Indian successors in interest for whose benefit the United States of American acquired and created the Table Mountain Rancheria. (ER 8, ¶ 38; ¶ 2 of the class action complaint filed in the 1980 action, ER 54-56.) All of the Appellants in this instant action "equally fit and belong to the government-created Table Mountain Rancheria." (ER 8, ¶ 38) "Plaintiffs in this new action were the specifically intended beneficiaries of the class action in 1980, as either or both all of the descendants and/or Indian successors in interest of the Table Mountain Rancheria, or the Indian heirs, assigns, executors, administrators, or successors in interest to the distributees, and/or dependents or off-spring of the distributees – precisely the class represented by all of the 1980 action plaintiffs including the then plaintiff Table Mountain Rancheria Association." (ER 8, ¶ 39)

Appellees Lewis Barnes and William Walker are recognized members of the Table Mountain Rancheria, and were class representatives of the distributees in that

1980 action, and have been receiving the benefits from the government and the Table Mountain Rancheria including casino profits and other tribal benefits for at least the last 15 years. (ER 8-9, ¶ 43-44)

Appellees Aaron Jones, Carolyn Walker and Twila Burrough were alleged to have been class representatives in that 1980 action for the dependents and the off-spring of the dependents of the distributees, who currently are and have been recognized members of the Table Mountain Rancheria and have for at least the last 15 years been receiving benefits from the United States and Table Mountain including casino profits and other tribal benefits. (ER 9-10, ¶ 45-47)

The complaint also alleged that Appellees Leanne Walker Grant, Robbie Castro, Craig Martinez, Aaron Jones and Ray Barnes are current members of the Table Mountain Tribal Council instrumentality, that Appellee Vern Castro was the longtime previous Table Mountain Council Chairperson, and who have taken it upon themselves with the cooperation and conspiracy of others to determine who are recognized as members of the Table Mountain and who are not, and who, also, have carried out a conspiracy for at least 20 or more years to not admit Appellants as members, and that these Appellees only gained membership as a result of the 1980 action as represented class action plaintiffs, but who have no more right to be members of Table Mountain than the Appellants identified in this action. Those

Appellees have been receiving benefits from the federal government and Table Mountain, including the distribution of casino profits, and that all of these Appellees have been depriving Appellants of their inherent birth right as federally recognized Indians of the Table Mountain Rancheria, depriving Appellants of federal government benefits allocated specifically for members of federally recognized Indian tribe, depriving Appellants of benefits generated on trust lands set aside for members of the Table Mountain Rancheria, including casino profits, and depriving Appellants of tribal identity and all inherited tribal relationships as members. (ER 10; ¶ 48)

Appellees Gale Norton was then the Secretary of the Department of Interior, wherein the Secretary was also a party to that 1980 action and that 1983 stipulated settlement and consent decree, who Appellants alleged refused to honor that stipulated settlement agreement/consent decree and require Appellants being admitted as members to the Table Mountain Rancheria because Appellants are dependents of and off-spring of the plaintiff class representatives. (ER 11; ¶ 49) The United States was sued as a party because it was a party to and executed the stipulated settlement and consent decree. (ER 11; ¶ 50) No money damages were sought against the United States or the Secretary.

Appellee Table Mountain was sued as a defendant herein, was a party plaintiff in that 1980 action, claimed to be the "governing body of the American Indian Tribe, band or community consisting of the Indians and their descendants and/or Indian successors in interest for whose benefits the United States of America acquired and created the Table Mountain Rancheria." (ER 11; ¶ 51) Paragraph 51 (ER 11) alleges that since the stipulated judgment and order in that 1980 action "Table Mountain Rancheria has constantly consisted of only a select few of those more influential class representatives, dependents and off-spring, and said Appellee Table Mountain Rancheria has lead the instant Appellants to believe, only upon inquiry by these Appellants, that the current Appellants' memberships were, are, and will continue to be considered, but meanwhile the Table Mountain Rancheria and the other named Appellees in this action, have discriminately selected members' off-spring for membership, even as soon as they turn 18 years of age, while ignoring all of the Appellants in this action, even though there is no current member of the Table Mountain Rancheria, who was also represented by the class of plaintiffs in that 1980 action, that is more entitled to be members than any of the Appellants in this current action. That is, all of the current recognized members are dependents or off-spring of the distributees which reached an agreement through a stipulated judgment in that 1980 action. The Appellants in this action fit in that same identical class, but are

being excluded from all of the rights, privileges and benefits ... including, but not limited to casino profits, which, upon information and belief, currently exceeds over $500,000.00 per year per to each arbitrarily chosen member of the Table Mountain Rancheria." (ER 12, ¶ 51) Appellants allege that the current members of the Table Mountain Rancheria are no more entitled to membership than the Appellants named herein, and many of the Table Mountain-recognized members now are less entitled to membership from that 1980 action than the Appellants herein, if based upon date of birth and seniority and familial and/or generational closeness to the distributees and the dependents of distributees as represented by Table Mountain and the class action plaintiffs in that 1980 action. (*Id.*) The complaint alleges that Appellee Table Mountain (a plaintiff in that 1980 action) and as a result of that 1980 action "occupies the position as a fiduciary in insuring that all distributees, all dependents of distributees, and all off-spring of dependents or distributees of that 1958/59 role, would instantaneously become members upon birth, and voting members no later than 18th birthday, all of which include the Appellants in this action." (*Id.*)

A single law firm (California Indian Legal Services) represented *all plaintiffs* in that 1980 action. (ER 12; ¶ 52)

In that 1980 class action, among other relief requested, the then plaintiffs, including Table Mountain Rancheria and the then individually named plaintiffs as

class representatives for those including now the instant Appellants, sought, amongst other additional claims of relief, for the Department of Interior to recognize Table Mountain as a bonafide Indian tribe under the laws of the United States, and to recognize the distributees, dependents and descendants of the distributees of the 1958/59 base role as a recognized Indian tribe members, whose members would include not only the distributees, their successors, assigns, and heirs, but also dependents of said distributees, descendants and their off-spring, and all of the instant Appellants were members of the class represented in that 1980 action because they are heirs, descendants, dependents and/or off-spring of dependents of distributees. (ER 13-14; ¶ 56)

Not only in the complaint filed in that 1980 action, but also in the then plaintiffs moving papers for certification of the class, the named class action plaintiffs claimed, and the District Court agreed, that the representatives of the class would fairly and adequately protect the interests of the class. (ER 14; ¶ 57)

After considerable discovery, request for summary judgment and other proceedings, the parties in that 1980 action stipulated to a settlement and judgment (Exhibit 2 to the complaint herein, ER 29) on March 28, 1983, which required the Secretary of Interior, among other things, to list the Table Mountain Band of Indians

as an Indian tribal entity (ER 29), which stipulation and judgment was also in the form of injunctive relief and requiring further compliance. (*Id.*; and ER 14-15; ¶ 58)

Following the 1980 action parties' stipulation for entry of judgment the District Court Judge, who also ruled in the instant matter in dismissing the complaint, issued an order adopting and ordering the judgment be entered in the form of the parties stipulation, which Appellants allege also amounted to a consent decree. (ER 15, ¶ 15; Ex. 2 to the Comp. below at ER 35) Also, on April 11, 1983, between the time of the stipulation for entry of judgment, and the order for the judgment on June 16, 1983, the court in the 1980 class action issued an order on April 11, 1983 (Ex. 3 to the Comp. herein, ER 39) certifying the class and prescribing the notice of hearing on the settlement. That court found that the class representatives in that action "will fairly and adequately protect the interest of the class" (as well as other factual findings), finding that the named plaintiff class representatives were appropriate, and that "in order to insure adequate protection of the rights of all members of plaintiff classes under the proposed stipulation for entry of judgment agreed to by the named plaintiffs and the defendants"...the 1980 action plaintiffs' counsel was to send a notice to all members of the class for whom they had addresses. Said order of mailing was to advise the members of the classes that their interest "would be restored as to their status as Indians of the laws of the United States" and that "the members of the

classes of plaintiffs in these actions will be legally bound by the orders and judgments entered by the court herein (Ex. 3 to the Comp., p. 6)" ER 15, ¶ 59; Ex. 3 to the Comp., ER 44.

While all of the instant Appellants were intended to be and were part of the represented class in that 1980 action, none of them received any notices required by that 1980 action court order by plaintiffs or their counsel. (ER 15, ¶ 60) Appellants were left in the dark, were not consistently notified of anything, but through word of mouth they learned much later that as a represented class they prevailed in that 1980 action, they began contacting Table Mountain Tribal Council and various committee members, were told at first they were not members and would never become members, they began writing to various federal Indian agencies requesting help, received no response or were denied help without reason, Appellants then organized and began letter writing campaigns, Freedom of Information Act requests, etc. and in August of 2000 Table Mountain and the Defendants requested a meeting with Appellants and others of the same class of plaintiffs. (ER 15-16, ¶ 60) Table Mountain Tribal Council stated that they were not in compliance with the federal court order, nor with their Table Mountain Tribal Constitution's membership, Article 3, and promised to immediately "right their wrongs" and expedite the process of receiving Appellants as members. Appellants, however, were ordered to go through

an enrollment process and were told on August 2, 2000, their enrollments would be expedited. Then Assistant Secretary of Interior, began working with the Table Mountain Tribal Council to bring them into compliance with the Table Mountain Constitution and the 1980 action. However, nothing has been done as Appellants have been teased with membership but not admitted now for over 15 years [actually more than 20 years]. (ER 16, ¶ 60) During that entire period of time, the Appellees have made fluctuating claims that Appellants are being considered as members, membership applications had to be completed even though now recently recognized members did not have to complete applications, but Appellants completed the applications, Table Mountain then contended it did not have a sufficient quorum to vote on new members, and membership enrollment applications had been suspended because there were so many to process, that Appellants would have to take a blood test to determine the degree of Indian blood even though existing members did not have to perform such tasks, and new members hand picked by the Indian Appellees that were immediate family members of the Table Mountain Rancheria Council members immediately became voting members with all financial attributes of the same as soon as they turned 18 years of age. None of the Appellants could attend any of the Table Mountain meetings, guards prevented the Appellants from attending the meetings because Appellants were not "considered as recognized members," Table

Mountain Rancheria advised current members they could not speak to the Appellants, but Table Mountain advised the Secretary of Interior through the Bureau of Indian Affairs that all membership processing was and is taking place for the Appellants, which was not true. (ER 16-17, ¶ 60) The complaint alleges that the Defendants for approximately 20 years have conspired to unlawfully, in violation of the orders entered in the 1980 class action, to deprive Appellants of the benefits of membership, which would include government benefits in the form of vocational training, education, health, dental, and other largess that Congress and the Secretary bestows upon "recognized" members, including recognized members of the Table Mountain Rancheria, as well as tribal benefits including full health and dental benefits with no deductible and no premium to be paid, large and ever increasing monthly distribution of the Table Mountain Casino profits in excess of $20,000.00 per month per member, Christmas bonuses, pretax-day tax bonuses, field trips, non-monetary benefits such as gifts, trips and vacations, free house purchase allowances in excess of $200,000.00 per recognized member. The Secretary of the Interior and the United States have contended that they will not be involved in "membership disputes" despite the 1980 action. (ER 17, ¶ 60)

Following the 1980 class action decision and order the government published in the Federal Register the fact that Table Mountain had government status as an

Indian tribe under the laws of the United States, Table Mountain established its constitution which stated as its membership all those distributes or dependent members of the distributes in the plan for distribution of the assets of the Table Mountain Rancheria as approved by the Commissioner of Indian Affairs on July 16, 1959 and all lineal descendant of persons named on the base roll provided such descendants possess at least one-quarter (1/4) degree of California Indian blood, regardless of whether the ancestor through whom eligibility is claimed is living or deceased. That same "membership" requirements of the Constitution of Table Mountain Rancheria exists to this day. (ER 17-18, ¶ 61) all of the Appellants herein not only were class members in that 1980 action, but fully qualify under Table Mountain's Constitution regarding membership. (ER 18, ¶ 62) Paragraphs 60-64 of the complaint (ER 15-19) discuss all of the mitigating factors as to why these Appellants waited until now to file their lawsuit, including the of lack of notice by the Defendants herein of that class action lawsuit and the court orders, and the years of misleading Appellants by the Appellees herein. Table Mountain became authorized in the early to mid-1990's to conduct casino operations just northeast of Fresno; there are huge pay-outs to recognized members – but not Appellants – there are only approximately 74 recognized members of Table Mountain, but approximately 62, including the Appellants qualify to be recognized under the Table Mountain

Constitution and the class 1980 action settlement/judgment but who are arbitrarily not recognized by the Appellees. (ER 20, ¶ 66-67)

The first cause of action alleged declaratory and injunctive relief against all Defendants to enforce the 1980 action court order, with a request for an order to show cause regarding contempt for not following the court order, and seeking retroactive benefits from the private Defendants and Table Mountain of at least five million dollars for each Plaintiff. (ER 21-22, ¶¶ 70-73) The second cause of action alleged a breach of fiduciary duty and for accounting against those Appellees who were named plaintiffs in the class action lawsuit for breach of the fiduciary duty owed to Appellants because these Appellees including Table Mountain Rancheria, purported to represent Appellants in that class action lawsuit as well as in the class certification, the stipulated judgment/consent decree and the court order on the stipulated judgment. Appellants sought the same benefit that the Appellee members had received since the relief that the "recognized" members received since that 1980 action judgment and orders and class certification, and with respect to the casino profits. (ER 22-24, ¶ 75-79)

The third cause of action alleged a breach of the covenant in good faith and fair dealings against all of the Defendants, and compensatory damages against the Table Mountain Defendants because Plaintiffs allege that they were entitled to be treated

the exact same way as the named class representatives including Table Mountain in that 1980 action. (ER 24-25, ¶¶ 81-84) The fourth cause of action was for declaratory and injunctive relief against the Secretary of Interior, the Table Mountain Rancheria and the Table Mountain Tribal Council members for violating the class action stipulated judgment/consent decree in that 1980 action, violating their own constitution and refusing to admit Plaintiffs as recognized members even though the Plaintiffs were part of the 1980 class action Plaintiffs, and requesting a declaratory judgment, a declaration that the Defendants named in the complaint must comply with the stipulated judgment and the court's order in that stipulated judgment, admit the Plaintiffs as recognized members and not discriminate against them. (ER 25-26, ¶¶ 86-89)

The District Court dismissed Plaintiffs' suit on the grounds that the court had no subject matter jurisdiction because the suit involved "tribal membership". (CR 51, ER 157)

VI. STANDARD OF REVIEW

A District Court order dismissing a complaint for lack of jurisdiction pursuant to FRCP 12(b)(1) is reviewed *de novo*; and the Appellate Court must except all uncontroverted factual assertions regarding jurisdiction as true. *McGraw v. United States, supra*, 281 F.3d 997, 1001 (9th Cir. 2002), amended, 298 F.3d 754; *King*

County v. Rasmussen, 299 F.3d 1077, 1088 (9th Cir. 2002); *Lewis v. Norton*, *supra*, 424 F.3d at 961 (9th Cir. 2005).

Where jurisdiction is so intertwined with the merits that its resolution depends on a resolution of the merits, summary judgment procedures are necessary, and a dismissal for lack of jurisdiction is appropriate only if there are no triable issues of material fact, but Appellate Court review remains the same *de novo* standard. *Steen v. John Hancock Mutual Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997).

VII. ARGUMENT

A. The District Court Misread, Misinterpreted, Or Ignored Specific Allegations In The Complaint Regarding Appellants' Claim Of Inadequacy Of The Representation Provided In That 1980 Watt Action

Throughout the District Court's Memorandum and Order (CR 51, ER 157) the court below erroneously stated that even though the Appellants pleaded a number of causes of action in their complaint "the relief that Plaintiffs (Appellants herein) ultimately seek is predicated on the court's ability to adjudicate disputes regarding their qualifications for tribal membership." (ER 161) The court below, citing the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) held that a district court has no subject matter jurisdiction to decide "tribal membership". All of the cases following *Santa Clara Pueblo v. Martinez* have decided the same thing – according to the District Court below. **But**, the court utterly

ignored a number of very salient – and decidedly different – issues, facts and allegations raised in the complaint. A glaring example of this is in the court "end notes" (No. 4 , ER 168) wherein the court claimed that Appellants have not pleaded their case on the theory of a collateral attack "based on the inadequacy of the representation provided by the named Plaintiffs and their counsel" in that 1980 action. First, that is demonstrably not the case, as throughout the Plaintiffs' complaint, and in numerous paragraphs (not the least of which are ¶¶ 56, 57 (ER 14), 59 & 60 (ER 15-17), 62-65 (ER 18-20), the entire second cause of action (¶¶ 75-79, ER 22-24) and a portion of the third and fourth causes of action, ¶¶ 81-88 (ER 24-25)), Appellants specifically allege (with documentary proof) claims of inadequacy of representation and breach of fiduciary duty through the class representation in 1980. Appellants' claims are *not* against the government but against the Table Mountain Defendants. Thus, the District Court must be reversed for failure to even entertain Plaintiffs' well-pleaded complaint against the Table Mountain Defendants with respect to the breach of the fiduciary duty, enforcement of the 1980 court action order, the breach of the implied covenant of good faith and fair dealing and the declaratory relief actions.

The complaint's heading, and virtually the entire pleading listed the prior lawsuit, claiming that Appellants were the real parties in interest and intended beneficiaries of that class action lawsuit, settlement and judgment in that 1980 action.

It was not refuted by the Appellees that Appellants were members of the class in that 1980 action. The then named class plaintiffs in that 1980 action, which are charged as Appellees herein, took actions and conspired with others to deprive the instant Appellants of the same remedies and benefits the named class representatives and their co-conspirators received, which have substantially harmed the named Appellants herein. (Second cause of action; ER 22-24)

This Court recently addressed named class action plaintiffs and their counsel responsibilities, as well as the Court's responsibility to unnamed class persons in *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005), which discussed the obligations of the class representatives, and why class action litigation is permitted in part "by allowing the class to proceed on a representative basis; a class representative functions as a stand-in for the entire class *and assumes duties on behalf of the class* [Citations omitted.]***...while class representatives stand in the stead of their fellow class members, Rule 23 recognizes that *the absent class members rights must be scrupulously observed.* [Citations omitted.]" *Id.* at 944 (Emphasis added.)

As this Court explained in *Cummings, supra*:

> "It is axiomatic that Rule 23 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation. [Citation omitted.] Consequently, the mere fact that a case is proceeding as a class action does not allow the district court to vindicate the rights of the individually named Plaintiffs *differently as compared to the absent class plaintiffs*." *Id.* at 944 (Emphasis added.)

This Court in *Cummings, supra*, then decried the District Court in that case providing nominal damages [albeit only $1.00] to only the named class representatives: "Awarding nominal damages to only the named class representatives results in a divergence of interest between the class representatives and the absent class members. This in direct contravention of *Rule* 23." *Id.* at 944.

In the present case, as the complaint alleges, which is not disputed, named class plaintiffs in that 1980 action, as well the named class plaintiffs' *favored* relatives were awarded membership in the tribe with the huge government and tribal benefits that the other unnamed class plaintiffs, like Appellants herein, were not. As this Court said in *Cummings, supra*:

> "Finally, and perhaps most importantly, the union's assertion that only the class representatives should receive the damage award fails to appreciate the significance attached to the fact that a class was certified. The purpose of a class action is to obviate the need for all similarly situated persons to file separate lawsuits when impractical to do so. This purpose is defeated if only the named individuals recover nominal damages. *It would also create the anomalous situation in which class members would be*

> *bound by a judgment if they lose, but can receive no individual vindication if they win.*" *Id.* at 945 (Emphasis added.)

As the complaint in this case expressly and specifically states, the named class representatives – and their favorite relatives – as well as Table Mountain itself, received the reward of the class action litigation, the class certification and the government's agreement to that in designating Table Mountain as a federally recognized tribe and its membership determined by the 1958/1959 base rolls, and their descendants, heirs, dependants and off spring as found from the stipulated judgment, the class certification, the designation of Table Mountain as a federally recognized tribe, and who the membership consists of. The Appellants herein, *undisputedly members of the class action and of the tribe, have received nothing*, not even "nominal" damages, nor any government benefits.

For the court below to claim that this case is only a "membership" dispute which is beyond the jurisdiction of the court, and to state that the Appellants herein failed to allege a collateral attack on the judgment based upon the inadequacy of the representation is absolute error, erroneous, and, for the most part, insulting to the well drafted complaint and the 1980 action records filed with the court in this case. Appellants thus alleged a collateral attack on the judgment based upon the inadequacy of the representation provided by the named plaintiffs in that 1980 class action, as

well as Table Mountain, that more than adequately alleges such a cause of action. See also *Epstein v. Mca. Inc.,* 179 F.3d 641, 648-49 (9th Cir.), cert. den'd, 528 U.S. 1004 (1999); *Brown v. Ticor Title Insurance Company*, 982 F.2d 386, 290 (9th Cir. 1992), cert. granted in part, 510 U.S. 810 (1993), and cert. dismissed, 511 U.S. 117 (1994).[4] For all the foregoing reasons, the court erred in dismissing (with no leave to amend) Plaintiffs' first through third causes of action, as well as the fourth cause of action as it applied to the non-government Defendants.

B. The District Court Erred In Ruling That The Appellants Were Not Parties To That 1980 Action Nor The 1980 Action Judgment.

In the District Court's Memorandum and Order below (CR 51, ER 157 at 165) the District Court erroneously held that "...The *Watt* settlement neither purports to established criteria for tribal membership nor provides for judicial enforcement of its provisions after June 16, 1984". (ER 165) The District Court then referenced its "endnote" No. 3 that: "While Plaintiffs claim that they should not be bound by the settlement agreement's one-year limitations because they failed to receive timely notice of the settlement, this argument overlooks the fact that Plaintiffs are not parties to the judgment and thus, under the terms of the settlement agreement, they had no

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[4]Any claim by the Defendant/Appellees that Plaintiffs waited too long to bring such a challenge is defied by the allegations in the complaint, more specifically outlined in ¶ 48, ER 10, as well as ¶ 51, ER 11-12, and ¶ 60, ER 15-17. Besides the breach of the Appellees' duty is continuing on a daily basis.

right to file a motion to extend the court's supervisory jurisdiction." (ER 168) The District Court and the Appellate Court must accept as true all uncontroverted factual assertions regarding jurisdiction. *McGraw v. United States, supra*, 281 F.3d 997, 1001 (9th Cir. 2002), amended, 298 F.3d 754.

However, never once below did the Appellees dispute the factual allegations in the complaint, which alleged, numerous times, that Plaintiffs were represented class Plaintiffs in that *Watt* class action lawsuit as being dependents of distributees and/or off-spring of distributees or dependants of distributees, all of whom were unnamed class action Plaintiffs in that 1980 class action. As stated above, Plaintiffs allege this on numerous occasions: Comp. ¶¶ 1 (ER 1-2), 37 (ER 7), 39 (ER 8), 51 (ER11-12), 56 (ER 13-14) ("as stated above, all of the now listed Plaintiffs were members of the class represented by the '1980 action' Plaintiffs as the current Plaintiffs are all heirs, successors, assigns, descendants, dependants or off-spring of dependants of that 1980 class action case Plaintiff"), 57 (ER 14) ("In that 1980 action, this Court certified the class as requested by the Plaintiffs in that action, which class necessarily included the Plaintiffs in this instant action who were also then the real parties in interest in that 1980's action"), 60 (ER 15-16) ("As stated above, all of the instant Plaintiffs were intended to be and were part of the represented class of

Plaintiffs in that 1980 action"), 62 (ER 18), 63 (ER 19) as well as **the first through fourth causes of action.** (ER 21-26)

Despite the uncontroverted specific and express allegations in the complaint, it was clear error for the District Court below to claim that Plaintiffs were not parties to that 1980 action. "Consequently, the mere fact that a case is proceeding as a class action does not allow the District Court to vindicate the rights of the individually named Plaintiffs differently as compared to the absent class Plaintiffs." *Cummings v. Connell, supra,* 402 F.3d at 944.

Thus, the District Court critically erred in ignoring the specific and express uncontroverted factual allegations in the complaint that the Appellants were necessarily class plaintiffs.

C. The District Court Critically Erred In Holding That The Watt Action Had Nothing To Do With The Protection Of Tribal Membership

The first error the Court made with respect to what the Watt action was about was the Court's statement that: "The Watt plaintiffs brought suit against the Secretary of the Interior and the United States seeking federal recognition of the Table Mountain Rancheria as an Indian tribal entity and the restoration of 'Indian county' [sic] status to tribal lands that had been transferred to individual tribal members pursuant to the California Rancheria Act of 1958 [...]." (CR 51, ER 158) The District

Court followed that up with another erroneous statement that "the Watt settlement neither purports to establish criteria for tribal membership nor provides for judicial enforcement of its provisions after June 16, 1984." (CR 51, ER 165)

That is a clear misreading of the class action lawsuit as well as the class certification ordered by the court in that Watt case. *If* the only issue in the 1980 Watt case (as stated by the District Court here) was to seek "federal recognition of the Table Mountain Rancheria as an Indian tribal entity and the restoration of 'Indian country' status tribal land, it would not be a class action case, there would be no certification of the class, as Table Mountain itself would need to be the only plaintiff in the action. (See, CR 37, ER 54-56, ¶ 2 which was the class action complaint filed in the Watt action.) But in addition to Table Mountain suing the government, there were named class plaintiffs representing unnamed class plaintiffs (¶ 3 of that complaint) who were the persons named in the final plan for the distribution of the assets and were being considered to be distributees. As paragraph 4 (of the 1980 complaint) alleges, not only were these named Appellees representing the class of distributees (the non-deceased named representatives are also sued in this instant case), but also the Indian heirs, successors in interest, etc. (¶ 4 of the 1980 class action suit, ER 57) Further, there was an additional set of named plaintiffs representing class plaintiffs (who were also sued in this instant case) who were

deemed to be, and were class certified to represent the dependent members of the families of distributees, as well as the off-spring of said dependents. (¶ 5-6, ER 57-58.)

In that 1980 class action lawsuit, the named Indian plaintiffs and the respective classes they represented sought declaratory relief to be recognized under the laws of the United States and their status with the Rancheria with their tribe being the Table Mountain Rancheria Association. See for example, the first and second claims for relief, at ER 65-70, seeking not only recognition for all the class members, but recognition under the Table Mountain Rancheria and to receive government benefits permitted to other recognized tribes and their respective members. Table Mountain Association's equitable claims, the third and sixth claims for relief (ER 70 & 75) claimed that it was seeking intervention by the court for tribal recognition which has precluded government-to-government relations "with the result that the Association [Table Mountain] is unable to effectively govern the Rancheria, provide for the needs and welfare of the people thereof, participate in federal programs and benefits available to recognized Indian band or tribe . . .." (See ¶¶ 34-37, ER 70-72)

Further, when the District Court in the 1980 class action issued its order granting the motion for class action determination and certifying the class (Exhibit 3 to the complaint herein, CR 1, ER 39), it declared that the classes were so numerous

that joinder of all members was impracticable, there are common questions of law and fact, the claims of the representative parties are "typical of the claims of the classes" that "the representative parties will fairly and adequately protect the interests of the classes;" "that defendants have acted or refused to act on grounds generally applicable to the classes, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole ... ." (ER 40)

The Court then declared the class of plaintiffs of distributees (ER 41) which consisted of distributees of the assets of the Table Mountain Rancheria, the heirs, assigns and successors, and the Court declared the class of plaintiff dependents who "consist of Indian persons listed as or otherwise considered to be dependent members of the families of distributees of the Table Mountain Rancheria ... ." (ER 42) The Court in Watt then declared in the class certification order:

> "The parties in these actions have entered into stipulations for entry of judgment under which the Indian distributees and Indian dependent members of the families of distributees of... and Table Mountain Rancheria, and their Indian heirs, assigns, executors, administrators, or successors in interest would be restored to their status as Indians under the laws of the United States, tribal lands at each Rancheria would be returned to federal trust status, ... Rancheria lands not sold or exchanged pursuant to Rancheria distribution plans would be restored to Indian Country status and federal recognition of a government-to-government relationship with each Rancheria would be formalized." (ER 43-44)

The Court also declared "the members of the classes of plaintiffs in these actions will be legally bound by the orders and judgments entered by the Court herein." (ER 44)

The stipulation entered into by the parties and confirmed by the Court (ER 29-37) again lists the class representations regarding the distributees and the dependent members of distributees (the ones not deceased are Appellees in this instant action), and said stipulation states: "The status of the named individual plaintiffs and class members as Indians under the laws of the United States is confirmed" (ER 30, ¶ 3) and that the Table Mountain Rancheria is reestablished "as is the status of said lands as Indian Country (ER 30, ¶ 5).

Thus, the 1980 class action not only determined Table Mountain Rancheria would be federally recognized as an Indian tribe, but that its members would be the distributees' descendants and heirs [for which all of the listed plaintiffs herein are direct lineal descendants], dependent members of distributees [all of the instant Appellants are direct lineal descendants and heirs and successors to the dependents of the distributees as well as the distributees] and were declared to be Indians under the laws of the United States. The only way to be declared an Indian through the laws of the United States as plaintiffs were in that 1980 action, is with the recognition of their tribe, which is in this case the Table Mountain Rancheria. That is why there was

a class action lawsuit by Table Mountain, class representatives of all of the distributees, and class representatives of all dependents of distributees including their off-spring. Obviously, there cannot be an Indian tribe without members. There cannot be "recognized Indians under the laws of the United States" unless there is a tribe to which they belong. Thus, as Appellants herein, fully, expressly and specifically alleged in the complaint, which allegations are uncontroverted [nor can they be controverted] the 1980 action involved membership in the Table Mountain tribe. Table Mountain and the 2 groups of class representatives were represented by a single attorney setting forth who the named class representatives represented, which necessarily included the Appellants herein. Thus, the District Court critically committed reversible err by holding that that 1980 class action did not involved tribal membership.

While the District Court correctly stated that the Watt 1980 class action did not "establish criteria for tribal membership" (CR 51, ER165) Appellants herein are not asserting the establishment of "criteria" for membership; instead, and clearly Appellants are claiming that that class action lawsuit (since they were represented plaintiffs) established them as members because the members included the distributees, the dependents of distributees and their off-spring and heirs. All of these

Appellants are heirs of distributees as shown in ¶¶ 1 through 36 of the complaint, and are off-spring of dependent members of the distributees.

The recent decision by the Ninth Circuit in *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) is not to the contrary. That case involved a separate lawsuit against only government officials by four siblings filed in a U.S. District Court in the Eastern District Court of California (that is a U.S. District Court different from the one that had jurisdiction over the class action lawsuit in 1980). The suit did not involve Table Mountain or any Indian Appellees. The Ninth Circuit held that that Watt 1980 class action and Table Mountain's waiver of sovereign immunity "to obtain federal recognition of the tribe and its membership roll at that time did not constitute a waiver of the tribes sovereign immunity in perpetuity for the resolution of all claims to tribal membership. *Lewis* at 962. While the Ninth Circuit agreed with the District Court in the Eastern District of California's statement that the case was deeply troubling "on the level fundamental substantive justice," it simply held that under the facts alleged in that case, and before a different district court, and against those defendants the court had no jurisdiction.

The present case is different. Appellants have sought through this action in the U.S. District Court in San Francisco (the same court that decided the Watt case) to be recognized as the beneficiaries of the class action lawsuit, class certification,

stipulation and judgment because they were represented plaintiffs in that action. That is clearly within the waiver of sovereign immunity as outlined in *McClendon v. United States,* 885 F.2d 627, 629-630 (9th Cir. 1989) since Appellants are back in the same court seeking confirmation that the judgment in the class action lawsuit applies to the Appellants as being the beneficiaries of that stipulation and judgment and class certification as recognized members of that tribe. See also, *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) and *Confederated Tribes etc. v. White*, 139 F.3d 1268, 1270-1271 (9th Cir. 1998). As this Court stated in *United States v. Oregon*, where the Yakima Tribe intervened in a Court action and became a party to a consent decree, and when several years later an action was brought to enforce the decree, the tribe was held to have waived its sovereign immunity by intervening in the first action. (*Id.* at 1014) As this Court in *Oregon* held, when tribal entities voluntarily join a lawsuit, they "enter the suit with the status of original parties and are fully bound by all future court orders." *Id.* at 1014. From the District Court, the government Appellees, Table Mountain and the named Indian Appellees, Appellants simply seek a declaration that they receive the same benefits as the named plaintiffs in that action and the other class represented plaintiffs in that action.[5] Thus, the Court clearly erred

[5]Money damages are also sought against Table Mountain and the named non-government individuals for the breach of fiduciary duty relating to class (continued...)

in holding that Appellants had no standing to bring such a suit to declare that Appellants were fully entitled to the same benefits the other class plaintiffs received from that 1980 action since the 1980 action involved who it was that made up Table Mountain, which included the distributees, dependents of distributees and their off-spring and heirs, which necessarily include Appellants, and also involved who would be recognized as Indians. Because the Indian Appellees and Table Mountain have excluded Appellants the government refuses to recognize Appellants even as Indians, despite ¶ 3 of the stipulated judgment (ER 30).

D. Table Mountain And The Individually Named Non-Government Defendants Waived Sovereign Immunity By Filing And Receiving The Judgment In That 1980 Class Action

This issue has also been addressed above in a different context. The District Court below erroneously held that it had no jurisdiction to entertain Appellants' complaint, because the Indian Appellees had tribal sovereign immunity. It cited a host of cases, beginning with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and cases following that decision. The District Court erroneously did not even discuss whether the tribe and the individually named Indian Appellees had waived

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[5](...continued)
representation, and conspiring with others to preclude Appellants from receiving the same relief that they and their favorite relatives received as a result of that 1980 class action.

sovereign immunity as a result of that 1980 action. Clearly they waived sovereign immunity. Further sovereign immunity does not apply to the suit against the individually named Appellees for breach of their fiduciary obligation as a result of their class representation of the Appellants and conspiring with others who were class representatives to preclude Appellants from receiving the same benefits from the settlement and judgment and class certification order as the named plaintiffs in that class action lawsuit and those they conspired with to preclude the instant Appellants.

The 1980 Table Mountain v. Watt class action suit had as its two centerpieces for the government to recognize Table Mountain Rancheria as a recognized Indian tribe and which tribe consisted of those named in that action, the named class representatives and the unnamed class members which included Appellants, who were represented by the class plaintiffs in that action as determined by the 1958/59 base roll of distributees, heirs and descendants of distributees, dependents of distributees, and descendants of those dependents of distributees. That necessarily included all of the Appellants herein. If that suit *really* did not involve who was to receive the benefit of the recognition of Table Mountain as a federally recognized Indian tribe, there was absolutely no reason for class status, there was no reason to divide up the class into distributees, etc., and dependents, etc., and absolutely no reason whatsoever to have class certification. Virtually every "recognized" member

of the tribe of Table Mountain, as determined by the self-appointed "chosen" ones have no more claim to "membership" in that tribe as the Appellants do, because all of the recognized members were in the same class as the represented Appellants in this matter. It is clear that named class plaintiffs and their counsel owed an absolute equal obligation to members of the class as they do themselves. *Staton v. Boeing Company*, 313 F.3d 447, 468-470 (9th Cir. 2002) (named members of the class and their counsel cannot pursue self-interests and that there are strict substantive and procedural rules "designed to protect the interest of class members." (*Id.* at 469)

Santa Clara Pueblo v. Martinez, and its progeny do not and cannot defeat Appellants' claims herein.

In *Santa Clara*, the plaintiff sought an order holding the tribal membership ordinance to be in violation of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq*. There, the Santa Clara Pueblo accepted only the offspring of its male members (but not female members) to be eligible for enrollment in the tribe, an ordinance that was adopted shortly before plaintiff's marriage to a Navaho Indian. 436 U.S. at 52. Despite her own tribal membership and her children's residence on the reservation, plaintiff's children were barred from membership in the tribe because of the patrilineal descent requirement. 436 U.S. at 52-53. Plaintiff attempted, unsuccessfully, to convince the tribe to change its enrollment criteria, and when it did

not, she sought relief from the federal court. The court held that the tribe has a right to define its own membership. 436 U.S. at 71-73 and n. 32. Thus, in *Santa Clara*, the plaintiff sought the court's intervention to force the tribe to change its constitution and enrollment ordinance, whereas in this case, Plaintiffs seek to have the Defendants comply with the decision in *Table Mountain v. Watt*, (which is consistent with its own constitution) recognizing Plaintiff as the class members of that suit and members of the tribe pursuant to that suit and Table Mountain's constitution and the recipients of the favorable judgment.

As the Supreme Court stated in *Santa Clara*, the congressional "central purpose of the ICRA (Indian Civil Rights Act) and in particular of Title I was to 'secure for the American Indian the broad constitutional rights afforded to other Americans, and thereby to protect individual Indians from arbitrary and unjust actions of tribal governments. [Citations.] There is no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. [Citations.] Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. [Citation.] *Santa Clara Pueblo, supra*, 436 U.S. at 60-61.

Despite this pronouncement by the Supreme Court in *Santa Clara Pueblo*, it stated that the District Court had no jurisdiction to entertain the claim because it was an attempt to change the tribe's constitution to allow female offspring as members, and since there was a "Tribal Court" (presumably disinterested) available to the plaintiff's claim, that was a sufficient remedy, without invoking the jurisdiction of the District Court. *Santa Clara Pueblo, supra*, 436 U.S. at 65-66 and fns. 20-22.

The "tribal court" forum discussed in *Santa Clara* is not available with respect to Table Mountain. Thus there is no disinterested court available except for this Court.

In *Santa Clara Pueblo*, the Supreme Court held that the Indian Civil Rights Act [Add. 2; § 1302(8)], which requires equal protection and due process to be applied by tribes to members and nonmembers, could not be adjudicated in Federal Court because "tribal forums are available to vindicate rights created by ICRA ... ." (Emphasis added.) As the *Santa Clara* Supreme Court stated:

> "Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by ICRA and Section 1302 has the substantial and intended effect of changing the law of which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive

> adjudication of disputes affecting important personal and property interests of both Indian and non-Indians. [Citations omitted.] Non judicial tribal institutions have also been recognized as competent law-applying bodies. [Citation omitted.] Under these circumstances we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing for only habeas corpus relief." *Id.* at 65-66; footnotes omitted. (Emphasis added.)

Also, in footnote 22 of the court's opinion (*Id.* at 66), the court stated:

> "Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, *though not that of Santa Clara Pueblo*, include provisions requiring the tribal ordinances not be given effect until the Department of Interior gives its approval. [Citation omitted.] In these instances, persons aggrieved by tribal law may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior." (Emphasis added.)

In this case, the Department of Interior has insisted on the approval of the Table Mountain Constitution (see Exhibit "1" to Plaintiffs' request for judicial notice, CR 43, ER 144-146), the complaint herein has alleged that neither the Table Mountain Council, nor the federal Defendant have provided any relief despite incessant requests for them to do so, and therefore *Santa Clara* does not control for that reason and/or all of the others.

The court below also cited *Smith v. Babbit*, 100 F.3d 556 (8th Cir. 1996) (Court order at ER 109-110) regarding the issue of "tribal courts" but in *Smith v. Babbit*, the

Court found that the District Court had no jurisdiction over the Indian gaming revenue issue, because: (1) the tribe had the right to change its constitution to allow even more people to be members, thus diluting their per capita gaming revenue to each member; (2) the Secretary approved of that constitutional change; and (3) the facts of this case further showed that the dispute needs to be resolved at the tribal level. "We note that the Mdewakanton Tribe has expressly waived sovereign immunity from suit in tribal courts for actions disputing an individual's qualified status to receive per capita payments." *Babbit* at 559. (Emphasis added)

The Court in *Babbit* even noted: "Several of the appellants involved in this action have previously brought similar actions in tribal court. In fact, at different stages of this action, suits of this very nature were pending in tribal court." *Id.* However, there is no tribal court available here, and because of the 1980 class action suit here the District Court had ongoing jurisdiction to enforce its judgment and orders. *Smith v. Babbit* is also distinguishable because, there, members of the tribe claimed that changes in the allocation of per capita distribution of gaming proceeds violated a number of federal statutes, including the Indian Gaming Regulatory Act ("IGRA"), Indian Civil Rights Act ("ICRA"), and others. However, there, the tribe chose (through procedures) and received BIA approval to change its tribal membership criteria, broadening eligibility and, as a result, diluting the per capita

distribution of the gaming proceeds. The court affirmed the dismissal of plaintiff's suit for lack of subject matter jurisdiction because the tribe had the right, through its procedures, to broaden its membership criteria. The court made clear that the tribe had membership requirements, then amended the requirements to add additional people as members which received approval from BIA. *Id.* at 558-59. This also shows here that BIA does have authority, particularly when it comes to disbursing gaming revenue to members.

Here, on the other hand, Plaintiffs are members based upon *Table Mountain v. Watt*, and the tribes constitution, which constitution required Secretary of Interior approval. Plaintiffs are not seeking to have the tribe "change" its constitution herein, but seeking the Defendants to obey the *Table Mountain v. Watt* decree which is also consistent with its own constitution, and seeking money damages against the named tribal Defendants for breaching their fiduciary obligation to the Plaintiffs as a result of the refusal to comply with their fiduciary obligations as named class plaintiffs and conspiring with other tribal council members who currently are operating the Star Chamber, and who directly benefitted from *Watt* – but who now ignore Plaintiffs herein.

The court below also heavily relied on upon the Tenth Circuit decision in *Ordinance 59 Ass'n v. U.S. Department of Interior Secretary*, 163 F.3d 1150 (10th

Cir. 1998) which had held that it lacked jurisdiction or authority to order the Secretary of the Interior to compel a tribe to enroll the applicants as members.

However, that case is also very distinguishable. There, the plaintiffs sought an order from the court to compel the federally-recognized Eastern Shoshone Tribe and the Bureau of Indian Affairs to recognize them as duly enrolled members of the tribe. However, the tribe had a detailed membership ordinance, Ordinance Number 59, under which the plaintiffs applied for membership. 163 F.3d at 1152. However, while their applications were pending, the tribe repealed Ordinance No. 59, and then took no final action on plaintiffs' applications. *Id.* at 1152 and n. 1. First, the case had nothing to do with the tribe and its members only being recognized through their own instigated court action. The court held that since the tribe had a right to change its ordinance, and once changed, left the plaintiffs out in the cold as non members, it was a matter over which the court had no jurisdiction. That is distinctly different from the instant case since Plaintiffs are not seeking to have the tribe amend its Constitution to allow them in, or to change an enrollment ordinance to allow them in, because Table Mountain's Constitution–and *Table Mountain v. Watt*– specifically requires that Plaintiffs be recognized as members.

In addition, in *Ordinance 59*, the Court stated that one of the principal reasons for claiming it did not have jurisdiction was precisely because of the fact that the tribe

had a tribal court, and that the tribal court was involved in the dispute already, and appellants should go back to the tribal court to enforce the tribal court's order protecting the appellants. *Ordinance 59, supra* at 1152-53, 1157-59.

The court in *Ordinance 59* described *Santa Clara Pueblo* as follows:

> "We also observe that the *Santa Clara* court placed strong emphasis on the existence of a tribal forum for the plaintiffs' claim. *Id.* Further, we believe the Supreme Court's decision to limit federal jurisdiction in *Santa Clara* was based on the nature of the dispute (a purely internal tribal matter) and the availability of an alternate remedy (a tribal court system)." *Id.* at 1156. (Emphasis added.)

Appellants here have no tribal court to go to because none exists – and the Watt case requires the District Court here to enforce its orders.

The District Court also cited other cases that are totally inapplicable under this fact pattern and legal procedural history. Curiously, the Court cites *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), but those cases had nothing to do with tribal membership disputes at all as *Adams* dealt with the tribe making additional criteria for the distribution of congressional funds than what Congress described as to who should receive those funds, and the court noted that the tribe cannot dictate to Congress who should receive the money; and in *Donovan*, this Circuit merely held

that a tribes commercial activities had to comply with the Occupational Safety and Health Act.

For all of the foregoing reasons *Santa Clara Pueblo* and its progeny did not deprive the district court of jurisdiction. It did not deprive this Court of jurisdiction because all of the cases cited by the Court below are decidedly distinguishable *and* because of the fact that Table Mountain and the individually named Appellees herein waived sovereign immunity because they brought that 1980 class action seeking tribal recognition and recognition by the government as to who the tribal members were. See, *United States v. Oregon, supra*; *McClendon v. United States, supra.*

The United States Supreme Court said in *Puyallup Tribe, Inc., et al v. Department of Game of Washington*, 433 U.S. 165, 171-172 (1977) that while a tribe (may have immunity) individual members of the tribe do not. Appellants assert herein that the tribe does not have immunity either since it waived that immunity in its pursuit as a party plaintiff in that 1980 class action.

Appellees, as the (plaintiff) class representatives in 1980 owe a fiduciary obligation to members of the class in connection with any settlement to ensure it is fair to the class as a whole. A settlement that unfairly benefits the class representatives at the expense of the class members whom they represent would be contrary to public policy and unenforceable. See *Cummings v. Connell, supra*; *Staton*

v. Boeing Company, supra at 4691 *Holmes v. Continental Can Company*, 706 F.2d 1144, 1147-48 (11th Cir. 1993). Further, the class action attorney (only one attorney in this 1980 action represented all of the class plaintiffs, including Table Mountain) owed a duty to the class as a whole, not just the class representatives. Thus the attorney may not recommend a settlement which is collusive or give the class representative a "special deal." *Kincade v. General Tire and Rubber Company*, 635 F.2d 501, 508 (5th Cir. 1981) See also *Cummings v. Connell, supra.*

The fiduciary obligation owed by the named Indian Appellees and the tribe from that 1980 class action, continues to this date. The District Court below ruled that it only maintained jurisdiction for up to one year after the judgment was entered. However, that is not really the case because, as Appellants alleged in the complaint, they never received notice of the stipulation, class certification, the judgment and all of the requirements the Court issued with respect to the class certification and the judgment. In addition, the Court always has continuing jurisdiction to enforce its orders. For example, in *Hook v. Arizona*, 972 F.2d 1012 (9th Cir. 1992) there was a suit that was never certified as a class action, prison reform orders were adopted in that case, and over 9 years later, new inmates filed suit to enforce the court's previous judgment. This Court in *Hook* stated: "A district court retains jurisdiction to enforce its judgments, including consent decrees." [Citation omitted.] *Id.* at 1014. The

government in that case argued that since the previous case was not a class action case, and since the current complainers were not parties to that previous judgment, they had no standing. This Court, however, noted that even non-parties, as intended third party beneficiaries, may enforce that judgment. *Id.* at 1014-15 The judgment entered by the District Court in the Table Mountain v. Watt class action case was in essence a consent decree in that it formed a contract between all of the plaintiffs, including the class plaintiffs and the government where the government was required to act after the judgment was entered, and the named class plaintiffs were to fulfill their fiduciary responsibility to the named Appellants herein to the same degree they rewarded themselves with the judgment in their favor – but all of them have ignored the Appellants herein for over 20 years. See also *Jeff D., etc., v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004) holding that the District Court, over 20 years later, had continuing jurisdiction to enforce a consent decree. Again, in the present case, none of the Appellees dispute that the Appellants herein were members of that class in that Table Mountain v. Watt case and were to benefit from the class certification, the stipulated judgment and all of the other orders in that case. Indeed, the Secretary of Interior insisted at least two years after the judgment was entered in this class action case that Table Mountain must comply with the Table Mountain v. Watt decision. (ER 143) There, Table Mountain submitted to the Secretary of Interior Table

Mountain's proposed constitution, and attempted to sneak in a "residency on the reservation" requirement for Table Mountain membership. The Secretary flatly told Table Mountain it could not, but instead stated Table Mountain had to follow *Table Mountain v. Watt* which would mean the distributees listed on the 1959 base roll and their lineal descendants as members. (See Ex. "1" attached to Plaintiffs' request for judicial notice; CR 43, ER 143). Therein on March 22, 1985 the Bureau of Indian Affairs in Washington, D.C. issued a letter to the BIA director in Sacramento advising him that the proposed constitution of the Table Mountain Rancheria submitted on January 8, 1981 could not be approved as written because of the change due to the *Table Mountain v. Watt* case necessitating "changes reflected in the enclosed version are to make the proposal legally and technically sufficient and to conform to bureau policy" and importantly regarding the tribes attempt to define membership including a residency requirement, BIA rejected that and noted: "membership is too nebulous and the Rancheria may have problems later defining who met the criteria for being considered a basic member. A specific role of the tribal members should always be designated as the base roll. Consequently, we have used a list of distributees and dependent members of distributees prepared in connection with the plan for the distribution of assets of the Table Mountain

Rancheria, approved by the Commissioner of Indian Affairs on July 16, 1959." (*Id.*)

Further down in that letter the Department of Interior specifically states:

> "Section 3 has been modified to include secretarial approval of the enrolment ordinance governing future membership, loss of membership, and adoption of members. Tribal membership is essential for access to tribal trust funds and to the benefit, privileges and distributions which accompany the possession and use of those assets. The Secretary's trust responsibilities for the proper and non-wasteful use of trust assets is thus related to tribal membership. Thus, it has been the long-standing policy of this office that enrolment ordinances which could affect the substantive requirements of membership are subject to secretarial approval." (*Id.*)

As stated in *Kempthorne, supra*:

> "The defendants argue that there is no longer a federal interest involved in this case, but they overlook the strong federal interest in insuring that the judgments of federal courts are meaningful and enforceable. * * * Thus, even assuming the defendants are no longer in violation of federal law, the district court continues to vindicate federal interests by insuring that its judgment is enforced. [Fn omitted.] For this reason, the defendants' argument that the provision of certain services is not mandated by the Constitution misses the point: After a consent decree is properly entered, it is the defendants' voluntary assumption of an obligation to provide those services that requires them to comply." *Id.* at 853.

So, from the time the *Table Mountain v. Watt* suit was filed before the same district court in 1980 and continuing thereafter through March of 1985, almost two

years after this court's judgment in *Table Mountain v. Watt* (and still continuing today), some named class representatives and some favored unnamed class members appointed themselves as the tribal council, and then cherry-picked those who would be members, despite the fact that the class action status in *Table Mountain v. Watt* precisely described who would benefit from that court's judgment and class certification – including Appellants herein. Thus, the court below had continuing jurisdiction to enforce its orders.

A class action judgment is *res judicata* as to the claims of class members who did not "opt out" so long as their interests were adequately represented. Although not formal parties to the action, absent class members are bound on the rationale that their interests were before the Court. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Simer v. Rios*, 661 F.2d 655, 664(7th Cir. 1981). A class action judgment is conclusive as to the cause of action adjudicated. It binds all class members on every matter which was or could have been offered to sustain or defeat the claims sued upon. *Besinga v. United States*, 879 F.2d 626, 628 (9th Cir. 1989). Further, a judgment on behalf of the class binds all persons belonging to the class and those who subsequently come into the class if included in the certified class. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853, n. 6 (9th Cir. 2000).

Based on all of the foregoing, the District Court below had jurisdiction to entertain Appellants' claims of breach of fiduciary obligation and the breach of the covenant of good faith and fair dealing causes of action (second and third cause of action), and the District Court below also had jurisdiction to entertain Appellants' complaint for declaratory and injunctive relief seeking enforcement of the 1980 class action orders and judgment.

E. The Government Appellees Were Bound By The Stipulated Judgment And The Various Court Orders Entered In That 1980 Class Action

This argument needs no extensive briefing. As stated above, government Appellees, the Table Mountain tribe and the class representatives entered into a stipulated judgment which conferred, among other things, that the Table Mountain Band of Indians would be federally recognized and that "the status of the named individual plaintiffs and class members as Indians under the laws of the United States is confirmed." (CR 1, ER 30, ¶ 3) The District Court below had continuing jurisdiction to order the federal Appellees to comply with that stipulated judgment and orders. Instead, since that judgment was entered, the government refuses to recognize Appellants as Indians under the laws of the United States.

VIII. CONCLUSION

There was an itchy trigger finger by the District Court below because of the *mantra* that tribes have sovereign immunity and that the courts cannot get involved in "tribal membership" issues. The cases relied upon by the District Court are decidedly distinguishable – as they do not involve (among other things) a waiver of sovereign immunity like what has occurred in this case. The District Court below took the proverbial shortcut to its conclusion, ignored specific and express – and indisputable – allegations in Appellants' complaint, ignored the fact that the 1980 class action lawsuit was certified as a class action and ignored that Appellants were unnamed members of that class who not only are entitled to enforce the judgment, but to seek compensatory and punitive damages against the named class representative individuals, now sued as Appellees herein, for their breach of fiduciary obligations. The same is true with respect to Table Mountain itself and the conspiracy alleged between Table Mountain, the class representatives, and the other non-government Appellees identified in the complaint.

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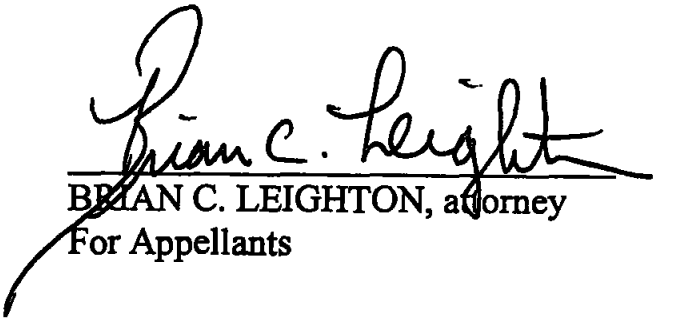
For all of the foregoing reasons, the District Court must be reversed.

DATED: May 19, 2006

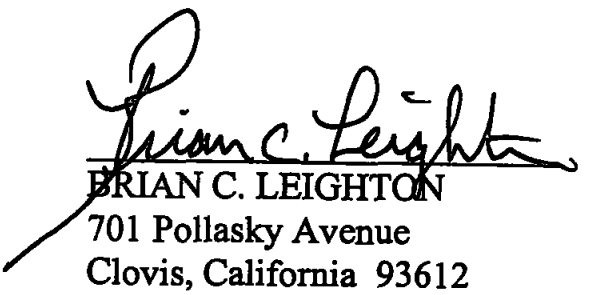
Respectfully submitted.



BRIAN C. LEIGHTON, attorney
For Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(B) and (C) of the Local Rules of this Court, I hereby certify that the foregoing brief is produced in a proportionally spaced font (Times New Roman) of not less than 14 point typeface, utilizes double line spacing, except in footnotes, headings and extended quotations which are single spaced, and contains 13,815 words.



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PROOF OF SERVICE BY U.S. MAIL

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 701 Pollasky, Clovis, California 93612.

On May 19, 2006, I served a copy of the attached **BRIEF FOR APPELLANTS** on the interested parties herein by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Clovis, California, addressed as follows:

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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 19th day of May, 2006, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Kimberly R. Barker