No. 06-15351

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEARL ALVARADO, et al.,

Plaintiffs-Appellants,

v.

TABLE MOUNTAIN RANCHERIA, et al.,

Defendants-Appellees.

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

ANSWERING BRIEF OF THE FEDERAL APPELLEES

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ANSWERING BRIEF OF THE FEDERAL APPELLEES

ORDER BELOW

The unpublished order of the district court (Honorable Marilyn H. Patel) granting in part and denying in part defendants' motions to dismiss is available at 2005 WL 1806368 and is reproduced in the Appellants' Excerpts of Record (ER) at pages 157-170.

STATEMENT OF JURISDICTION

The district court's jurisdiction is in dispute. Appellants[1] alleged

[1] The 33 Appellants are 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

jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 5 U.S.C. § 701 (Administrative Procedure Act); and 28 U.S.C. § 1346 (United States as defendant). As set forth in this brief, however, the district court correctly dismissed for lack of jurisdiction because the district court lacked subject matter jurisdiction over this tribal membership dispute and because neither the United States nor the Table Mountain Rancheria (the Tribe), a federally recognized Indian tribe, has waived its sovereign immunity to suit.

The district court entered final judgment on December 7, 2005. ER170. Appellants filed a timely notice of appeal on January 17, 2006 (CR57). See Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Appellants (collectively the Membership Applicants or Applicants) sue the Secretary of the Interior[2/] and the United States (collectively, the Federal Appellees), the Tribe, and various other individuals with the goal of being

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Lewis, Clifford Lewis, Donald Lewis, Jerry Lee Lewis, Kathy Lynette 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. One of the original 34 plaintiffs, Corrine Lewis, was voluntarily dismissed as a party.

[2/] At the time they brought suit, the Secretary of the Interior was Gale Norton. Pursuant to Fed. R. App. P. 43(c), the current Secretary of the Interior, Dirk Kempthorne, is substituted for Gale Norton.

admitted as members of the Tribe and collecting past benefits and other damages. The questions on appeal are:

1. Whether federal court jurisdiction over the Applicants' claims to tribal membership is lacking under the precedent of Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005), which held that jurisdiction was lacking over the same tribal membership dispute.

2. Whether, even if Lewis itself does not control, the district court correctly dismissed this case for lack of subject matter jurisdiction based on the lack of federal government authority to compel resolution of tribal membership disputes.

3. In the alternative, whether the district court lacked jurisdiction because the Tribe and Federal Appellees are immune to suit.

STATEMENT OF THE CASE

This is the second of two recent cases to reach this Court in which individual Indians seek a court order directly or indirectly compelling their admission as members of the Tribe. The first case was Lewis v. Norton, No. CIV S-03-1476 LKK/DAD (E.D. Calif.), which was filed in the U.S. District Court for the Eastern District of California by four of the Lewis appellants in this case, and which named as defendants the Secretary of the Interior and the United States. Plaintiffs in that case claimed that a 1983 settlement agreement entered as a district court order (the Watt settlement agreement) provided jurisdiction over

their claims to membership status in the Tribe. On November 6, 2005, the district court dismissed the case for lack of subject matter jurisdiction.

In the meantime, the Applicants – consisting of 33 individuals, including the plaintiffs in Lewis – filed the instant case in the U.S. District Court for the Northern District of California, naming as defendants the Tribe and various individuals associated with the Tribe, in addition to the Secretary of the Interior and the United States. The Applicants allege that federal jurisdiction over their claims to tribal membership exists pursuant to the same 1983 Watt settlement agreement addressed in Lewis. The Federal Appellees and the Tribe moved to dismiss for lack of jurisdiction. The district court granted those motions on July 28, 2005.

Since the district court's dismissal of the instant case, this Court, on September 13, 2005, affirmed the district court's dismissal of the Lewis case based on lack of subject matter jurisdiction and the Tribe's sovereign immunity to suit. The Lewis ruling governs this appeal, which in any event was correctly dismissed by the district court.

STATEMENT OF FACTS

A. Factual Background

In 1959, pursuant to federal statute, the land holdings of the Table Mountain Rancheria, located near Fresno, California, were distributed to the Indian residents of the Rancheria. See California Rancheria Act of 1958, Pub. L. No. 85-671, 72

Stat. 619 (1958), amended by Pub. L. No. 88-419, 78 Stat. 390 (1964). The Secretary of the Interior distributed the Rancheria's assets to individuals listed on a distribution plan (distributees) and established the Table Mountain Rancheria Association (Association) to manage the Rancheria's former land and water system. ER52, 55-56.

On December 24, 1980, the Table Mountain Rancheria Association and eight individuals[3/] filed Table Mountain Rancheria Association v. Watt, No. C-80-4595-MHP (N.D. Cal.), a class action complaint against the Secretary of the Interior and the United States, in the U.S. District Court for the Northern District of California. ER13-14, 54-96. Plaintiffs sought federal acknowledgment of the Table Mountain Rancheria as an Indian tribe. On March 25, 1983, the parties submitted a stipulated settlement agreement to the district court for its approval (the Watt settlement agreement). ER14-15, 29-34. The agreement required the Secretary of the Interior to list the Table Mountain Rancheria as an Indian tribal entity pursuant to 25 C.F.R. Part 83.6(b). ER30. The agreement also re-established the Rancheria boundaries and restored Indian Country status[4/] to

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[3/] The individuals included as class representatives five persons named in the distribution plan (distributees) and three dependent members of families of distributees, all of whom claimed to have lost their "status as Indians under the laws of the United States" pursuant to the Rancheria Act and its implementation. ER56-57.

[4/] Indian Country is generally defined as a territory over which tribes and the federal government have primary jurisdiction. See F. Cohen, Handbook of

certain lands therein, allowed plaintiff class members to restore trust status to their individual land holdings within the former Rancheria boundaries, restored the class members to their status as Indians, and retained the district court's jurisdiction to enforce the judgment for one year. ER29-34, 43-44. On April 8, 1983, the district court certified all distributees or their Indian dependents, heirs, assigns, executors, administrators, or successors in interest as a settlement class. ER41-42. On June 16, 1983, the district court entered judgment approving the settlement. ER35-37.

In December 1983, the Secretary of the Interior published a notice of tribal status for the Table Mountain Rancheria in the Federal Register. 48 Fed. Reg. 56862, 56865 (Dec. 23, 1983). The Tribe subsequently adopted a constitution, which designated its membership as "[a]ll lineal descendants of persons named on the base roll provided such descendants possess at least one-quarter (1/4) degree California Indian blood, regardless of whether the ancestor through whom eligibility is claimed is living or deceased." ER18. The Membership Applicants allege that they are descendants of individuals listed on the distribution plan and that they have at least one-quarter California Indian blood. Id.

According to the allegations in the Membership Applicants' complaint, when the Applicants learned the Tribe had gained recognition, they applied for

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Federal Indian Law 182 (Nell J. Newton ed., LexisNexis 2005); 18 U.S.C. § 1151 (1949).

federal benefits through the Tribe. ER15. Their applications were rejected by the tribal council and various committee members because the Applicants were not tribal members. ER16. The Applicants then allegedly wrote letters to "various federal Indian agencies requesting help" and launched protests in front of the tribal casino. Id. In August 2000, the Tribe granted distributees automatic membership. The Applicants went through an expedited enrollment process, for which decision is still pending. Id. ER16-17.

In July 2003, four of the Applicants in this case – Kathy Lynnette Lewis, Larry Paul Lewis, Jr., Jerry Lee Lewis, and Chad Elliott Lewis – filed suit against the Secretary of the Interior and the United States – the same federal defendants in the instant appeal – in the U.S. District Court for the Eastern District of California. See Lewis v. Norton, No. CIV S-03-1476 LKK/DAD. ER159. The Lewis plaintiffs argued that they were entitled to membership in the Tribe and that jurisdiction over their claims existed pursuant to the 1983 Watt settlement agreement. Lewis v. Norton, 424 F.3d 959, 960, 961 (9th Cir. 2005). On November 6, 2003, the district court dismissed the case for lack of subject matter jurisdiction, holding that the dispute concerned "intratribal matters" that the court lacked the power to adjudicate. ER159; id. at 961. The Lewis plaintiffs appealed.

B. Course of Proceedings and Disposition Below

On January 6, 2005, while the Lewis appeal was pending, the Membership Applicants filed a complaint for declaratory and injunctive relief against the Tribe,

its tribal council members, a former tribal council chairperson, the class-action representatives from Watt, the Secretary of the Interior, and the United States. ER1. The complaint alleged that the Tribe breached its fiduciary duty under the Watt settlement agreement and the tribal constitution because it did not ensure that all distributees on the base role and their dependents or offspring would automatically become members. ER12. It further alleged that current and former tribal council members had conspired to prevent the Applicants from becoming tribal members and from thereby receiving federal and tribal benefits (ER10); that the class-action representatives from Watt breached their duty to protect fairly and adequately the interest of the class (ER7-8); that the Secretary of the Interior had the power and obligation to order the Table Mountain Rancheria to comply with the Applicants' interpretation of the Watt settlement agreement and the Tribe's constitution, admit Applicants as members of the Tribe, and dispense equal benefits to Applicants (ER11); and that the Federal Appellees were bound by Watt to ensure compliance with the settlement agreement (ER11).

The Applicants seek declaratory and injunctive relief that would grant them tribal membership and benefits, compensatory damages equal to the benefits the Applicants would have received had they been recognized as tribal members since 1983, an accounting of all tribal and federal benefits, and punitive damages from the Tribe. ER26-28. They also ask that the class-action representatives, the Tribe, and the Federal Appellees be held in contempt of court for failure to comply

with the Watt settlement agreement and be held liable for sanctions and attorney's fees. ER26-28.

On March 28, 2005, the Federal Appellees (the Secretary of the Interior and the United States) and the non-federal appellees (the Tribe and individuals other than the Secretary) each filed a motion to dismiss for lack of jurisdiction. CR31-37. On July 28, 2005, the district court issued an order granting in part and denying in part defendants' motions. ER157-168. The court first concluded that it lacked subject matter jurisdiction over claims against the Tribe because of the intra-tribal nature of the dispute and because there was no waiver of the Tribe's sovereign immunity. ER162-164. The district court recognized that this Court and other federal courts of appeals "have consistently recognized that an Indian tribe has the power to determine its own membership unless that authority is expressly limited by treaty or by federal statute." ER162. The district court concluded that the sole statute under which the Applicants could establish a waiver of sovereign immunity was the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701-2721, and related regulations, but concluded that "nothing in IGRA confers jurisdiction upon a district court to hear what is essentially a membership dispute between [the] plaintiffs and the Tribe." ER163 (internal quotations omitted).[5/]

[5/] The Applicants neither pled a cause of action under IGRA nor argued that IGRA contained a waiver of sovereign immunity applicable in this case.

The district court rejected the Membership Applicants' "frivolous" attempts to distinguish this case from the well-established federal precedent barring federal court adjudication of membership disputes. ER164. It rejected the Applicants' claims seeking relief from "some unspecified unlawful conduct committed by the government defendants" on the ground that it is the Tribe, not the federal government, that retains authority to determine tribal membership. ER163. It rejected the argument that review was warranted due to the Tribe's lack of a tribal court to adjudicate the dispute, concluding that the Tribe's Tribal Council and General Council are "competent law-applying bodies to which membership decisions could be appealed." ER164. Finally, in response to the Applicants' contention that the district court has continuing jurisdiction to enforce the stipulated judgment entered in the Watt action, the court concluded that the Watt settlement agreement did not purport to establish criteria for tribal members and did not provide for judicial enforcement after June 16, 1984. ER165. In any event, the court noted that because litigants cannot confer subject matter jurisdiction where none exists, the district court – even if it had jurisdiction to enforce the Watt settlement agreement – would not have jurisdiction to grant the relief that the Applicants seek. ER165.

The district court also addressed whether it had jurisdiction pursuant to the APA to review the Secretary's allegedly unlawful failure to compel the Tribe to admit the Applicants as members or to provide them certain benefits and

compensation for which they allegedly would have been eligible as tribal members. ER165-66. Because the Applicants failed to allege that they ever presented such claims for relief to the Secretary, the district court dismissed the claims without prejudice, with leave to file an amended complaint including such claims within 30 days. ER167. The Membership Applicants declined to amend their complaint and, on December 7, 2005, the district court entered final judgment dismissing with prejudice the case in its entirety. ER170.

SUMMARY OF THE ARGUMENT

The Membership Applicants' pursuit of a federal court order admitting or directing them to be admitted as members of the Tribe is jurisdictionally barred, for several reasons. First, this case is governed by the binding precedent of Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005), in which this Court dismissed identical claims to membership in the Tribe based on the "double-whammy" of lack of federal subject matter jurisdiction and lack of a tribal waiver of sovereign immunity. Second, even absent Lewis, the district court nevertheless correctly held it lacked subject matter jurisdiction over the Applicants' claims under the well-established principle that the federal courts lack jurisdiction to intervene in internal tribal membership matters. The Watt settlement agreement could not and did not confer subject matter jurisdiction on the district court over future tribal membership disputes. Third, the Applicants' claims against the Tribe are additionally barred because the Tribe has not waived its sovereign immunity to

this suit, in the Watt litigation or by any other means. And fourth, the Applicants' claims against the Federal Appellees are additionally barred because the United States, like the Tribe, has not waived its sovereign immunity to this suit, in the Watt litigation or otherwise. Accordingly, the district court's dismissal of this case for lack of jurisdiction should be affirmed.

ARGUMENT

Dismissals for lack of subject matter jurisdiction are reviewed de novo. Markham v. United States, 434 F.3d 1185, 1187 (9th Cir. 2006). Federal courts possess the power only to hear cases authorized by the Constitution or statute, which cannot be expanded by judicial decree. Kokkonen v. Guardian Life Ins. Co. Of Am., 511 U.S. 375, 377 (1994); Vacek v. USPS, 447 F.3d 1248, 1250 (9th Cir. 2006). The burden to establish jurisdiction is on the plaintiffs. Kokkonen, 511 U.S. at 377; Vacek, 447 F.3d at 1250.

I. THE MEMBERSHIP APPLICANTS' CLAIMS ARE JURISDICTIONALLY BARRED UNDER *LEWIS*.

This appeal is governed by this Court's recent ruling in Lewis. The Membership Applicants' arguments here are identical in relevant respects to those of the plaintiffs in Lewis; thus the Lewis Court's affirmance of the dismissal of those claims compels dismissal here as well.[9]

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[9] The claim of the four Lewis plaintiffs that jurisdiction exists over the Federal Appellees is additionally barred by issue preclusion. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); American Surety Co. v. Baldwin,

In Lewis, plaintiffs brought action against the United States claiming that they were entitled to recognition as members of the Tribe under the terms for membership set forth in the Tribe's constitution. They sought, as the Applicants do here, an order directing the federal defendants to order the Tribe to recognize them as members. The Lewis Court applied well-settled doctrine, established in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), barring federal intrusions into tribal self-government generally and into membership issues in particular (see infra, Part II), and held that the district court lacked jurisdiction over the tribal membership dispute. 424 F.3d at 961.

The Lewis plaintiffs attempted to circumvent this rule, as the Applicants do here (Br. 40, 57), by arguing that the Tribe waived its sovereign immunity to such governmental interference by bringing the Watt action. The Lewis Court again applied well-settled doctrines of tribal sovereign immunity and Circuit precedent (see infra, Part II) to conclude that, under the required narrow interpretation of the Tribe's waiver, the Tribe's participation in the Watt litigation did not waive the Tribe's immunity in later disputes regarding membership issues. Lewis, 424 F.3d at 961-62.

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287 U.S. 156, 166 (1932); United States v. Van Cauwenberghe, 934 F.2d 1048, 1057 (9th Cir. 1991). Issue preclusion bars reconsideration of a jurisdictional matter if – as is the case with the Lewis plaintiffs – the issue was actually litigated and necessarily decided, and the party against whom the doctrine is invoked was a party. Kendall v. Overseas Development Corp., 700 F.2d 536, 538 (9th Cir. 1983).

Finally, the Lewis plaintiffs argued, as the Applicants do here (Br. 45-47, 49-50), that there was a lack of a tribal remedy, which "should confer jurisdiction on the federal courts."[7] Id. at 962-63. The Lewis Court rejected the argument that the Tribal Council and General Council did not provide adequate judicial remedies, holding that they are competent law-applying bodies. Id. at 962-63.

The Membership Applicants contend (Br. 39-40) that this case is distinguishable from Lewis because unlike Lewis, which was filed in the Eastern District of California, this case was filed in the Northern District of California, the district court in which the Watt settlement was entered. Thus, the Applicants contend that the district court in this case had continuing authority to enforce the Watt settlement agreement, which the district court in Lewis lacked. Id. But this distinction is irrelevant under the reasoning of Lewis. In Lewis, the Court specifically rejected the proposition that the Tribe had waived its immunity for the purpose of enforcing internal membership disputes in federal courts, generally. 424 F.3d at 963. Under this reasoning, no federal court has jurisdiction over the case, including the district court that entered the Watt settlement agreement.

It is also immaterial that the Applicants here include the Tribe and various non-federal individuals as defendants, whereas the plaintiffs in Lewis named as defendants only the Secretary of the Interior and the United States. The Court in

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[7] Plaintiffs in Lewis also alleged that federal courts have jurisdiction under IGRA, a claim that the Applicants do not pursue here.

Lewis specifically addressed the question whether the outcome in that case would have been different if the plaintiffs had sued the Tribe rather than the federal government. The Court concluded that "plaintiffs cannot get around the Santa Clara rule by bringing suit against the government, rather than the tribe itself." 424 F.3d at 963. The Court characterized the plaintiffs' exclusion of the Tribe as a defendant as an "effort[] to do an end run around tribal immunity" and analyzed the case as though plaintiffs had sued the Tribe directly. Id. Hence, the Lewis Court's finding that the Tribe's sovereign immunity bars suit in federal court compels dismissal of the claims against both the Federal Appellees and the Tribe.

Because this case is indistinguishable in any relevant respect from Lewis, Lewis controls, and the district court's dismissal of the case for lack of jurisdiction should be affirmed.

II. EVEN IF *LEWIS* DOES NOT GOVERN, THE MEMBERSHIP APPLICANTS' CLAIMS ARE BARRED FOR LACK OF SUBJECT MATTER JURISDICTION.

Even if Lewis did not determine the result in this case, jurisdiction is lacking because, as the Lewis Court correctly decided, the case suffers from "the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." 424 F.3d at 960. It is well-established that federal courts lack authority to review tribal membership disputes. Santa Clara, 436 U.S. at 55, 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence

as an independent political community."); Lewis, 424 F.3d at 961 ("a tribe is immune from federal court jurisdiction in disputes regarding challenges to membership in the tribe"); Smith v. Babbitt, 100 F.3d 556, 559 (9th Cir. 1996) ("The great weight of authority holds that tribes have exclusive authority to determine membership issues."); Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978), cert. denied, 440 U.S. 958 (1979) ("unless limited by treaty or statute, a Tribe has the power to determine tribal membership"); Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971) (matters that turn on questions of tribal membership must be dismissed for lack of subject matter jurisdiction). See also Ordinance 59 Ass'n v. U.S. Dept. of Interior Sec'y, 163 F.3d 1150, 1160 (10th Cir. 1998) ("[T]ribes, not the federal government, retain authority to determine tribal membership."); cf. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) ("purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations" are presumptively outside the jurisdiction of federal courts).

The Membership Applicants' attempt to avoid the governing authority of Santa Clara and its progeny by distinguishing this case on the ground that here, the Tribe lacks tribal courts and thus provides no adequate tribal forum for appeal. This attempt fails because Santa Clara held that tribal courts are not the only appropriate forums for adjudicating internal tribal disputes. Instead, it specifically held that "[n]onjudicial tribal institutions have also been recognized as competent

law-applying bodies." Santa Clara, 436 U.S. at 66. The Tribe's constitution provides for both a Tribal Council and a General Council that are competent law-applying bodies and that provide venues for appeals of membership decisions. ER164; Lewis, 424 F.3d at 962.

The Applicants further allege that the Watt settlement agreement provides continuing jurisdiction to enforce this suit. This claim fails for several reasons. First, as the district court correctly concluded, "'it is well-established that litigants cannot confer [subject matter] jurisdiction by consent where none exists.'"[8] ER165 (quoting United States v. Judge, 944 F.2d 523, 525 (9th Cir. 1991)). "[N]o

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[8] The Applicants' reliance on Jeff D. v. Kempthorne, 365 F.3d 844 (9th Cir. 2004) (Br. 8, 53, 56), and Hook v. Arizona, 972 F.2d 1012 (9th Cir. 1992) (Br. 52), is unavailing. The Applicants cite Kempthorne for the unsurprising proposition that a court has jurisdiction to enforce its own consent decree. Kempthorne recognized, however, that a court must have subject matter jurisdiction before it may enter a settlement agreement subject to future enforcement. 365 F.3d at 852 ("a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction"). Kempthorne is thus not only irrelevant to the Applicants' argument but in fact supports the United States' argument here that the Watt settlement agreement could not have conferred subject matter jurisdiction on the district court to order resolution of tribal membership matters. Furthermore, the consent decree at issue in Kempthorne expressly allowed for continuing jurisdiction, id. at 853, whereas the agreement in Watt limited the court's jurisdiction to one year.

In Hook, as in Kempthorne, there was no question that the judgment sought to be enforced was within the subject matter jurisdiction of the federal courts, and thus it is immaterial to the question here. Furthermore, in Hook, the court intended to recognize certain rights indefinitely, unlike here, where the court specifically limited its oversight to one year.

action of the parties can confer subject-matter jurisdiction upon a federal court." Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701-702 (1982). Specifically, "parties may not confer jurisdiction upon [a federal court] by stipulation." California v. LaRue, 409 U.S. 109, 112 n.3 (1972); see also Indus. Addition Ass'n v. Comm'r, 323 U.S. 310, 313 (1945) ("[w]ant of jurisdiction * * * may not be cured by consent of the parties"); Guzman-Andrade v. Gonzales, 407 F.3d 1073, 1077 (9th Cir. 2005) ("The parties' agreement * * * cannot create subject matter jurisdiction nor waive its absence."). Thus, even if the parties had agreed in Watt to provide for future tribal membership enrollment of certain individuals, such agreement is not enforceable in federal court.

Second, the Watt settlement agreement provides no basis for compelling the resolution of this membership dispute. As the district court found, "the Watt settlement neither purports to establish criteria for tribal membership nor provides for judicial enforcement of its provisions after June 16, 1984." ER165. The Watt settlement agreement declared that "the status of the named individual plaintiffs and class members as Indians under the laws of the United States is confirmed." ER30. But the declaration of an individual's Indian status is not tantamount to a declaration of an individual's membership status in an Indian tribe.

The determination of "[w]ho counts as an Indian for purposes of federal Indian law varies according to the legal context. There is no universally applicable definition." F. Cohen, Handbook of Federal Indian Law 171. See, e.g.,

United States v. Rogers, 45 U.S. 567, 572-573 (1846) (an Indian for federal criminal statutes purposes is a person who has Indian ancestry and is recognized as an Indian by a tribe); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(d) (1975) (an Indian is "a person who is a member of an Indian tribe"); Indian Child Welfare Act, 25 U.S.C. §§ 1901, 1903(4) (an Indian child is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe, or (b) is eligible for membership in an Indian tribe and is a biological child of a member of an Indian tribe"). Courts have recognized that an individual may be recognized as having Indian status without being a tribal member. See United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005) ("tribal enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative") (internal quotations and citation omitted); Ex parte Pero, 99 F.2d 28, 31 (7th Cir. 1938) ("the refusal of the Department of the Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian"); St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D.S.D. 1988) ("a person may still be an Indian though not enrolled with a recognized tribe").

Nothing in the Watt case or agreement suggests that "Indian status" was the equivalent of membership status. Indeed, the specific legal context of the Watt agreement demonstrates that it did not intend to equate Indian status with tribal membership. Prior to the Watt agreement, Table Mountain was a California

rancheria for which "there [was] no approved membership roll." S. Rep. No. 85-1874 at 46 (1958). The House and Senate Reports on the Rancheria Act make clear that "Indian" status did not equal membership for California rancherias: "Attention is directed to the fact that no provision is made for preparing a membership roll for each rancheria or reservation. The preparation of such rolls would be impracticable because the groups are not well defined." Id. at 3, cited in Solicitor's Opinion, August 1, 1960, 2 Op. Sol. on Indian Affairs 1882, 1884 (2003)[9]; H. Rep. No. 85-1129 at 4. Congress's reasoning for not creating membership roles was that the rancherias were "for the most part acquired or set aside by the United States for Indians in California, generally, rather than for a specific group of Indians, and the consistent practice has been to select by administrative action the individual Indians who may use the land." S. Rep. No. 85-1874 at 46; H. Rep. No. 85-1129 at 4-5. The individuals on the 1958 distributee roll were such administratively selected users of the land. They were Indians, but not members of any particular tribe.

Finally, even if the Watt settlement agreement did provide for membership status, the agreement contained an express one-year termination date for federal court supervision. ER33-34. The Applicants failed to bring their claim within the one-year period specified by the settlement agreement and thus any such

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[9] The Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 is available at http://thorpe.ou.edu/solicitor.html.

enforcement action is out of time.

In sum, the Watt settlement agreement provides no basis for overriding the well-established rule against federal court intervention in tribal membership disputes. Accordingly, the district court correctly determined that it lacked subject matter jurisdiction.

III. THE MEMBERSHIP APPLICANTS' CLAIMS AGAINST THE TRIBE ARE ADDITIONALLY BARRED BY THE TRIBE'S SOVEREIGN IMMUNITY.

Even if this case centered on more than an internal tribal matter over which federal courts could exercise subject matter jurisdiction, the district court would still lack jurisdiction to hear the claims against the Tribe because it is immune to this suit. Indian tribes have sovereign immunity from suit in state and federal courts. Santa Clara, 436 U.S. at 58; Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050 (9th Cir.), rev'd on other grounds, 474 U.S. 9 (1985); United States v. Oregon, 657 F.2d 1009, 1012 (9th Cir. 1981). A tribe's sovereign immunity is waived only where a tribe unequivocally expresses a waiver or where Congress specifically authorizes the suit. Santa Clara, 436 U.S. at 58-59, 63. There is a presumption against finding waivers of tribal sovereign immunity. Demontiney v. United States, 255 F.3d 801, 811 (9th Cir. 2001). Tribal sovereign immunity is jurisdictional. Chemehuevi, 757 F.2d at 1051.

Here, the Tribe did not unequivocally express a waiver of its immunity, nor did Congress authorize this suit. Even assuming the Tribe consented to federal

jurisdiction by virtue of the Table Mountain Rancheria Association's filing of the Watt litigation, such waiver was narrow and limited. As this Court explained in McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989): "[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts."

As the Lewis Court correctly concluded, the reasoning of McClendon supports the conclusion that the Tribe did not waive its immunity to this suit. McClendon arose from a 1972 suit in which the United States government claimed ownership of certain land on behalf of a tribe, seeking to eject a lease holder. 885 F.2d at 628. The parties settled the suit, and a stipulated judgment was entered specifying that the United States owned the land in trust for the tribe. Id. McClendon subsequently succeeded to the leasehold at issue in the initial action, and eventually filed suit against the tribe for its alleged breach of the lease agreement. Id. McClendon argued that the tribe waived its immunity to suit in the 1972 action, and that the tribe's subsequent actions violated the settlement agreement reached in that action.

For the purposes of McClendon, the Court deemed the tribe to have brought the 1972 suit on its own behalf, but nevertheless held that the waiver of immunity resulting from that action did not extend to future litigation over the lease

agreement. The stipulated judgment did not mention the lease, nor did it expressly reserve district court jurisdiction over the lease; and the lease did not contain a waiver of sovereign immunity. Id. The McClendon Court concluded: "By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question. The initiation of the suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation, such as interpretation or enforcement of the lease agreement." Id. at 631.

Similarly, here, the Tribe's initiation of litigation to regain its federal recognition does not manifest broad consent to suit into the traditional, sovereign matter of tribal membership. As we established supra, Part II, the Watt settlement agreement does not by its terms encompass matters of tribal membership, just as the 1972 suit in McClendon did not encompass the disputed lease. As this Court recognized in McClendon, a waiver of tribal sovereign immunity must be unequivocally expressed. Id. at 632-33; see also Santa Clara, 436 U.S. at 58-59, 63. Such an unequivocal expression is lacking in the Watt agreement.

The distinct tribal purview of membership disputes makes an express waiver of tribal jurisdiction over membership all the more necessary. Moreover, as the Tribe's brief discusses more fully, a waiver of tribal immunity for matters related to tribal membership would run counter to the Tribe's essential purpose for filing suit in the Watt litigation – to obtain recognition of its sovereign tribal status –

because a tribe's ability to determine for itself the composition of its membership is a matter critical to tribal self-government.[10] Santa Clara, 436 U.S. at 60 ("[R]esolution in a foreign forum of intratribal disputes of a more 'public' character, such as the [membership dispute] in this case, cannot help but unsettle a tribal government's ability to maintain authority. * * * [A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we treat lightly in the absence of clear indications of legislative intent.")

Furthermore, although the Watt agreement provided that the district court would retain jurisdiction to enforce the settlement agreement (ER33), that jurisdiction was expressly limited to one year. To the extent that any waiver of the Tribe's immunity could be read into the Watt settlement agreement, such waiver would be limited to this one-year period, and cannot be extended beyond that

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[10] In addition, because the Table Mountain Rancheria Association filed suit as co-plaintiff with the distributees and their dependents, all of whom sued the United States as defendant for recognition of tribal and Indian status, waiver of sovereign immunity by the Tribe in the Watt action could only be construed as a waiver to resolve controversies with the United States, not to construe future controversies between the Tribe and its co-parties. See McClendon, 885 F.2d at 630 ("Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy.") (emphasis added); cf. F. Cohen, Handbook of Federal Indian Law 643 (counterclaims may not be asserted in suit brought by Tribe absent explicit waiver) (citing Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991)); see also United States v. U.S. Fidelity and Guar. Co., 309 U.S. 506, 512 (1940) (in suit brought by United States on behalf of tribe, no waiver of sovereign immunity to cross-claims).

express term.[11/]

In Lewis, this Court held that the Tribe's participation in Watt did not waive its sovereign immunity with respect to future membership disputes. 424 F.3d at 962. Under Lewis and McClendon, this Court should continue to find that "the initiation of [a] suit, in itself, does not manifest broad consent to suit over

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[11/] The Applicants assert (Br. 40) that, under United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), the Tribe's waiver of immunity applies to future matters arising out of the Watt settlement. Oregon is distinguishable for at least two reasons. In Oregon, unlike here, the tribe expressly consented to continuing federal court jurisdiction in the settlement agreement, which stated that "in the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, *the parties agree to submit the issues to federal court for determination.*" 657 F.2d at 1016 (citations omitted, emphasis added). The agreement further added that "In any event, the court shall retain jurisdiction over the case of U.S. v. Oregon," thus – unlike here – leaving jurisdiction open-ended. Id.

In addition, McClendon itself recognized that Oregon was decided in a unique context making it analogous to an equitable action in rem. Id. at 1015. McClendon explained that "the rationale of United States v. Oregon does not extend to this case [because] unlike the initial action in United States v. Oregon, no ongoing equitable remedy [is] necessary [here]; and there [is] no *res* over which the district court ha[s] to maintain control in order to do equity." 885 F.2d at 631. In Oregon, the district court constructively assumed custody over salmon in the Columbia River in order to apportion rights between competing sovereigns (the state and Columbia River Basin tribes). 657 F.2d at 1015-16. Thus, the court was later able to limit the tribes' fishing rights because in addition to the tribe expressly consenting to federal jurisdiction in a settlement agreement, the fishing rights at issue in the agreement hinged on the preservation of the salmon. Id. Here, as in McClendon, there is no similar constructive assumption of custody by the court over the matter at issue. Tribal membership is not *res* over which the district court did or could assume authority in the Watt action.

collateral issues arising out of the settlement of the litigation, such as interpretation and enforcement of the [] agreement." McClendon at 631. Given the Watt agreement's failure to expressly waive the Tribe's sovereign immunity and preserve federal court jurisdiction for more than one year, the strong presumption against finding waivers of tribal sovereign immunity is not overcome.

IV. THE MEMBERSHIP APPLICANTS' CLAIMS AGAINST THE UNITED STATES ARE ADDITIONALLY BARRED BY FEDERAL SOVEREIGN IMMUNITY.

The Applicants' claims against the Secretary of the Interior and the United States are barred not only by the lack of subject matter jurisdiction but also by the United States' sovereign immunity to suit. Absent the government's consent, sovereign immunity shields the United States, together with its agencies and employees, from suit. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); United States v. Dalm, 494 U.S. 596, 608 (1990). The United States' sovereign immunity serves as a jurisdictional bar that the Applicants must overcome before proceeding with this case. See United States v. Mitchell, 463 U.S. 206, 215 (1983); Balser v. U.S. Dept. of Justice, 327 F.3d 903, 907 (9th Cir. 2003). Any waiver of the United States' sovereign immunity must be express, and it must be construed strictly and narrowly in favor of the government. Siddiqui v. United States, 359 F.3d 1200, 1204 (9th Cir. 2004).

To the extent the Applicants allege jurisdiction under 28 U.S.C. § 1331, that allegation is unavailing because section 1331 does not provide the government's

consent to suit. North Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir. 1985). Rather, in alleging jurisdiction pursuant to section 1331, a party must identify a waiver of the United States' sovereign immunity under another statute. Malone v. Bowdoin, 369 U.S. 643, 645, 648 (1962).

In their complaint, the Applicants cite to the APA, which provides a limited waiver of sovereign immunity to certain suits for injunctive or declaratory relief. See 5 U.S.C. § 702. Jurisdiction under the APA is limited to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704 (emphasis added). The Applicants fail to identify in their complaint any final agency action that is the subject of any of their claims. The district court dismissed the Applicants' APA claim with prejudice after they failed to amend their complaint to make such an allegation and/or to provide documentation showing that claimants had made a formal complaint to the BIA. ER169-170. The Applicants did not raise the issue of their purported APA claim in their opening brief on appeal; thus it is waived. Martinez-Serrano v. INS, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (party who fails to brief an argument is deemed to have waived or abandoned the argument); accord Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("on appeal, arguments not raised by a party in its opening brief are deemed waived").

The Applicants' resort to 28 U.S.C. §§ 1346(a)(2), the Little Tucker Act, also fails. The Little Tucker Act grants jurisdiction to district courts over claims

against the United States for damages not exceeding $10,000 that are founded on the Constitution, a statute or regulation, or an express or implied contract. 28 U.S.C. § 1346(a)(2). The Little Tucker Act also provides a limited waiver of sovereign immunity with respect to the classes of claims described in the Act. United States v. Mitchell, 463 U.S. 206, 215 (1983) (addressing Tucker Act, 28 U.S.C. § 1491); North Star Alaska v. United States, 9 F.3d 1430, 1432 (9th Cir. 1993) (addressing Little Tucker Act). The Applicants' allegations do not come within the jurisdictional grant and waiver afforded by the Little Tucker Act. First, the Applicants allege no violation of the Constitution or a statute or violation or breach of contract. Second, the Applicants seek declaratory and injunctive relief recognizing them as members of the Tribe, which cannot be provided under the Little Tucker Act. Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 733 n.3 (1982); North Side Lumber Co., 753 F.2d at 1485; Cermak, 234 F.3d at 1361. To the extent that the Applicants seek damages against the United States (which is not clear from the complaint), those damages cannot be awarded under the Little Tucker Act because they flow only from the equitable relief that the Applicants seek (to be deemed members of the Tribe) and because the amounts sought exceed the per-person $10,000 limit of the Little Tucker Act.[12/]

Similarly, 28 U.S.C. § 1346(b) does not provide a waiver of the United

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[12/] The complaint seeks in excess of $15 million in damages per plaintiff. ER22, 24.

States' sovereign immunity. Section 1346(b) is the jurisdictional component of 28 U.S.C. § 2674, the Federal Tort Claims Act, which grants a limited waiver of sovereign immunity for tort claims where the United States would be liable if it were a private individual. The Applicants do not assert any tort claim against the United States. In addition, the Applicants failed to meet the pre-litigation requirement to present tort claims against the United States before the appropriate federal agency and await final denial.[13] See United States v. Kubrick, 444 U.S. 111, 117-18 (1979); Flamingo Indus. (USA) v. U.S. Postal Serv., 302 F.3d 985, 994-95 (9th Cir. 2002), rev'd on other grounds, 540 U.S. 736 (2004) (no jurisdiction over breach of implied covenant of good faith and fair dealing claim asserted against Post Office because tort claim was not exhausted administratively).

While the United States may be subject to enforcement of judgments in cases to which it was a party, the United States' participation in the Watt case and settlement agreement does not render it subject to suit to compel the Tribe to accept the Applicants as members. As this Court recognized in Lewis, neither the United States nor any of its agencies has authority to compel a tribe to enroll specific individuals as members. 424 F.3d at 963. Furthermore, as established in

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[13] The administrative claim must be submitted within two years after it accrues and court proceedings must be instituted within six months of final agency action or be forever barred. The Applicants have failed to present their claims to the Bureau of Indian Affairs and have failed to act within the prescribed period of time.

Part II above, the Watt settlement agreement makes no provision with respect to tribal membership. In addition, even if the agreement could be interpreted to pertain to tribal membership, it establishes no role for the Secretary or the United States in such a matter. And finally, even if there were any such waiver in the Watt settlement agreement, it would necessarily be strictly limited to the express one-year period that the settlement provides for continuing federal court jurisdiction. Thus, the Applicants' claims against the Federal Appellees must be dismissed.

CONCLUSION

For the foregoing reasons, the district court's order and judgment should be affirmed.

Respectfully submitted,

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[14/] Substantial work on this brief was done by Ethel Branch, Class of 2008, Harvard Law School and a law clerk in the Environment and Natural Resources Division.

STATEMENT OF RELATED CASES

The United States is unaware of any related cases.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,493 words.

Dated: August 10, 2006

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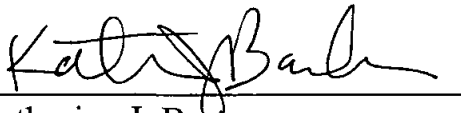

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