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, Case No. C 05-00093 MHP
The Honorable Marilyn Hall Patel, Presiding

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I. INTRODUCTION

This is not the first time this Court has been asked to decide whether a decades-old settlement agreement confirming an Indian tribe's sovereign status vis-à-vis the United States allows federal intervention in a membership dispute involving that tribe. This Court specifically rejected that argument in *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005)—a case involving several Appellants here and the same counsel of record—to hold that a class action lawsuit seeking to confirm the federally-recognized status of Table Mountain Rancheria Band of Indians effected no waiver of its sovereign immunity over tribal membership, giving federal courts no power to decide who belongs in the Tribe under its own laws. *Id.*, 962. The holding makes eminent sense, because a contrary ruling would have meant that Table Mountain, in exchange for federal recognition of its sovereignty, relinquished a sovereign tribe's "most basic powers"—"the authority to determine questions of its own membership." *United States v. Bruce*, 394 F.3d 1215, 1225 (9th Cir. 2005).

Undeterred, Appellants simply gloss over *Lewis v. Norton*, calling it a case involving a "different district court" and different defendants, as if that mattered. (Opening Brief ("Open. Brf"), p.39.) In addition to disregarding controlling law, Appellants have taken the "spaghetti approach" to brief-writing, "heav[ing] the entire contents of a pot against the wall in hopes that something would stick." *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.

2003). Nothing does. Appellants have a duty to support their contentions with concrete arguments tied to the record and the law, because "'[j]udges are not pigs, hunting for truffles buried in briefs.'" *Id.*

In the end, Appellants give this Court no reason to deviate from what Appellants dismiss as the "so-called precedent of the Court's cases..." (Open. Brf, p.1.) Specifically:

- Appellants fail to demonstrate the existence of federal subject matter jurisdiction over their claims, since they identify no substantial question of federal law they want this Court to resolve. To the contrary, Appellants confirm they seek to enforce tribal law—to wit, a constitution Appellants concede Table Mountain adopted after the *Watt* class action (the case Appellants invoke here) was over;

- Appellants never explain how federal courts could intervene in the face of Table Mountain's sovereign immunity, particularly under *Lewis v. Norton*'s square holding that the *Watt* settlement agreement effected no waiver of immunity for tribal membership disputes;

- Appellants never explain how this Court could even "enforce" the settlement agreement so as to grant Appellants' tribal membership, since the underlying *Watt* class action and resulting settlement agreement they invoke as their jurisdictional hook never even involved tribal membership; and

- Finally, Appellants never explain how the District Court could "enforce" a decades-old settlement agreement in which the Court explicitly limited its enforcement jurisdiction to one year, meaning such jurisdiction necessarily expired 22 years ago.

In sum, Appellants' theory requires this Court to ignore controlling law and pretend federal courts can and do adjudicate tribal membership; to pretend a judicially-approved, decades-old settlement agreement that nowhere mentions tribal

membership somehow adjudicated Appellants' membership within the Table Mountain tribe; and to ignore explicit language that separately defeats the district court's assertion of jurisdiction some 22 years later. The dismissal of Appellants' complaint should be affirmed.

II. JURISDICTIONAL STATEMENT

The District Court lacked subject matter jurisdiction over Appellants' Complaint on several grounds. The District Court agreed, entering a Judgment of Dismissal on December 6, 2005. (Excerpts of Record ("ER") 169-70.) Appellants filed a Notice of Appeal on January 17, 2006. (ER 171-72.) This Court possesses jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(1)(B).

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should affirm the District Court's dismissal because a lawsuit seeking to adjudicate an internal tribal membership dispute fails to "arise under" federal law, falling beyond the limited subject matter jurisdiction of the federal courts?

2. Whether this Court should affirm the District Court's dismissal because tribal sovereign immunity separately deprives the Court of jurisdiction?

3. Whether this Court should affirm the District Court's dismissal because: (a) the 23-year-old settlement agreement that Appellants seek to "enforce" did not even purport to adjudicate the Tribe's membership; and in any event,

because (b) the District Court's jurisdiction to enforce that agreement expired by its express terms more than two decades ago?

IV. STATEMENT OF THE CASE

On January 6, 2005, Appellants filed a complaint alleging four causes of action against the Tribe, individual members of the Tribe (including members of its Tribal Council), the United States and Secretary of the Interior Gail Norton. (ER 1-26.) The complaint sought an order directing the Tribe to recognize Appellants as its members and to provide them with all past, present and future benefits associated with tribal membership. (ER 26-28.)

The Tribal Defendants moved to dismiss the complaint on several jurisdictional grounds. (ER 190; Supplemental Excerpts of Record ("SER") 1-3.) Specifically, the Tribe moved to dismiss under Fed. R. Civ. P. 12(b)(1) because: (1) Appellants' claim turned on tribal, not federal, law, and the Tribe possesses exclusive jurisdiction over intra-tribal matters such as membership; (2) notwithstanding the absence of a federal claim for relief, the Tribe's sovereign immunity deprived the District Court of jurisdiction; (3) even assuming the District Court could adjudicate Table Mountain's membership, the judicially-approved settlement agreement that Appellants seek to "enforce" never even purported to do so; and (4) the Court's jurisdiction to enforce the settlement agreement expired by its own terms more than two decades ago. (SER 2-3.) The District Court granted the

motion, dismissing the complaint with prejudice. (ER 157-167; *see id.*, 165:10-15, 167:1-3, 192.)

The Federal Defendants also moved to dismiss for lack of jurisdiction. (ER 157:13-19, 160:9-10, 190.) The District Court granted the motion, but with leave to amend so as to allow Appellants the opportunity to allege claims that might possibly exist under the Administrative Procedures Act ("APA"). (ER 166:16-25.) Appellants notified the Court they were declining to seek reconsideration, or even amend their pleading, "because of the Court's disposition towards plaintiffs' claims." (SER 139; Open. Brf, p.6.) (Appellants now state they have abandoned their APA claim against the Federal Defendants. (Open. Brf, p.6).) The District Court entered a Judgment of Dismissal, and Appellants timely appealed. (ER 169-70, 171-72.)

V. FACTUAL AND PROCEDURAL BACKGROUND

A. The *Watt* Action.

In 1980, in an action filed in the Northern District of California styled *Table Mountain Rancheria Association et al. v. James Watt, Secretary of the Interior*, Case No. C-80-4594-MHP ("*Watt*" or "*Watt* Action"), the Table Mountain Rancheria Association (the legal entity representing the Tribe's then governing body) and several individuals sued the federal government in connection with the government's effort to terminate the Table Mountain Rancheria decades before.

(ER 54, 55:2-58:6, 60:14-65:18.) In the 1983 resolution of *Watt*, the parties entered a court-approved settlement agreement that confirmed the federal government had not, in fact, terminated the Tribe, and that Table Mountain's sovereign status, as a federally-recognized "tribal entity," remained intact. (ER 29-34, *id.*, 30:17-19 ("*Watt* Stipulation for Entry of Judgment"); *and see* ER 35-37 ("*Watt* Order").) The *Watt* Stipulation also confirmed that certain lands returned to the United States by the "terminated" Indians remained "Indian country." (ER 30:19-32:11.) In addition, it confirmed the class members retained their "status" "as Indians under the laws of the United States." (ER 30:13-15.) (As explained *infra* (p. 19-23), tribal membership and federal Indian status are related but distinct.)

By virtue of the *Watt* Stipulation, the individuals were deemed entitled to whatever federal benefits they had been denied by virtue of the purported termination of their federal "status as Indians" (ER 32:13-33:5), terminated lands were returned to federal trust status (*id.*, 31:7-32:11), and the Tribe was to be (and in fact was) listed in the Federal Register as a recognized tribe. (ER 30:13-15; 48 Fed. Reg. 56862, 56864 (Dec. 23, 1983) (listing "Table Mountain Rancheria of California" on the list of "Indian tribal entities" "recognized and eligible to receive services from the United States Bureau of Indian Affairs.").)

B. The *Lewis* Action.

On July 11, 2003, some 20 years after *Watt* ended, four of the Appellants in this action[1] sued various federal agencies in U.S. District Court in the Eastern District of California in an action styled *Lewis v. Norton.* (SER 13-29.) The *Lewis* plaintiffs sought declaratory and injunctive relief vis-à-vis certain officials of the Bureau of Indian Affairs, the National Indian Gaming Commission, and Department of Interior, contending they met Table Mountain's membership requirements, and that the law somehow obligated the federal officials to order the Tribe to recognize them as members. (SER 19-21.)

As here, the *Lewis* plaintiffs sought to use *Watt* as a vehicle for securing federal intervention. (SER 15:10-12.) Specifically, the *Lewis* Complaint alleged the Tribe's federally-recognized status, as confirmed in *Watt*, obligated the federal agencies to force the Tribe to comply with its own Constitution and membership ordinances, as well as a "tribal revenue allocation plan" the Tribe developed pursuant to the Indian Gaming Regulatory Act ("IGRA"), all of which plaintiffs alleged required the Tribe to recognize them. (SER 17-18.) The *Lewis* plaintiffs sought, among other things, an order directing the federal defendants to require the Tribe to either recognize plaintiffs as among its members (and pay them past and

[1] Kathy Lynette Lewis, Larry Paul Lewis, Jr., Jerry Lee Lewis and Chad Elliott Lewis.

future benefits afforded any other tribal member), or alternatively, to order the Tribe to cease "engaging in gaming." (SER 21-22.)

The district court concluded "the law affords no basis for allowing plaintiffs to proceed with their claims in federal court," and dismissed them in November 2003 for lack of jurisdiction on several distinct grounds. (SER 47:10-11.) Specifically, the court concluded it lacked the power to adjudicate "intratribal matters" (*id.*, 39:7-9), that the complaint presented no federal claim (*id.*, 44-46), and that the federal defendants possessed sovereign immunity in any event. (*Id.*, 46:11-20.)

The *Lewis* plaintiffs appealed the dismissal to this Court, and this Court affirmed, holding "their claim cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005).

C. The Present Action.

On January 6, 2005, while the *Lewis* Action was on appeal, the attorney who brought that action filed yet another lawsuit involving the same tribal membership dispute, but this time in the Northern District of California. (ER 1; Appellees' Request for Judicial Notice ("RFJN"), Exh. A.) Plaintiffs' counsel slightly recast that complaint, adding more plaintiffs and defendants, including Table Mountain and certain of its members. (*Compare* ER 1-28 *with* SER 13-22.) The complaint

invokes no federal statute, but relies solely on *Watt*, alleging Appellants "bring this new complaint" "to enforce" the stipulated settlement agreement and judgment in *Watt*. (ER 3:1-8; *see generally* ER 29-45.)

Specifically, Appellants allege they were members of the class represented in *Watt* (ER 8:12-16, 15:20-21), and theorize that because they were members of that class, they were members of the Tribe and should be so recognized now. (ER 18:14-19:2.) Appellants further allege that "following" the *Watt* Action, the Tribe established its Constitution, and that such governing document contained membership requirements that Appellants purportedly satisfy. (ER 18:2-25.) They claim they have applied for enrollment, and that even though they allegedly satisfy the Tribe's law governing membership, the Tribe has not acted on their applications and such remain pending. (ER 19:19-20, 20:2-4.) The complaint seeks declaratory, injunctive and monetary relief. (ER 26-28.)

The Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, and the District Court granted it, finding it lacked power to adjudicate a tribal membership dispute. (ER 157:18-19, 165:10-15.) Appellants appealed. (ER 171-72.)

VI. STANDARD OF REVIEW

As the Complaint was dismissed for lack of subject matter jurisdiction under Fed R. Civ. P. 12(b)(1), this Court's review is *de novo*. *Lewis v. Norton*, 424 F.3d at 961; *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).[2]

VII. ARGUMENT

Appellants' entire case rests on their incorrect and unsupported account of what the *Watt* Action effected. Notwithstanding this Circuit's prior determination that *Watt* creates no basis for federal jurisdiction to adjudicate Table Mountain's membership—in a case in which certain Appellants were themselves involved, and represented by the same counsel in this action (*see Lewis v. Norton*, 424 F.3d at 962)—Appellants proceed undeterred, pinning their jurisdictional theory on *Watt* and characterizing it as a lawsuit that involved federal "recognition of who the [Table Mountain] tribal members were." (Open. Brf, p.1.)

Notably, Appellants' assertion finds no support in the actual record from *Watt*, from which Appellants rarely quote, but liberally characterize and paraphrase. As shown below, with reference to the record and relevant law, *Watt* did not purport to

[2] The existence of jurisdiction is not "so intertwined with the merits," requiring "summary judgment procedures" (Open. Brf, p.26) because it does not depend upon the merits of Appellants' claims. Stated otherwise, regardless of whether Appellants satisfy Table Mountain's membership requirements (and Table Mountain does not concede they do), no federal subject matter jurisdiction would exist to adjudicate those claims.

adjudicate tribal membership—nor would it, since the right to determine tribal membership is "one of an Indian tribe's most basic powers." *Bruce*, 394 F.3d at 1225. As such, the District Court was correct to dismiss this lawsuit for lack of subject matter jurisdiction on several grounds.

First, no federal subject matter jurisdiction exists because Appellants' complaint contains no federal claim for relief, but rather, seeks the adjudication of an intra-tribal matter—namely, whether Table Mountain should recognize Appellants as its members under its own laws. Because the lawsuit fails to "arise under" federal law, it is beyond the limited subject matter jurisdiction of the federal courts. 28 U.S.C. § 1331; Fed. R. Civ. P. 12(b)(1).

Second, even assuming the efficacy of some federal claim in Appellants' complaint, the Tribe's sovereign immunity deprives the District Court of jurisdiction. That immunity was never waived, by *Watt* or otherwise, as this Court already held in *Lewis v. Norton, supra*. To the extent any individual Defendant might not share the Tribe's immunity, dismissal is still compelled because the Tribe is a necessary and indispensable party that cannot be joined. Fed. R. Civ. P. 12(b)(1), 12(b)(3), 19.

Finally, and distinct from the above jurisdictional bars, even assuming the District Court could have adjudicated who belonged to the Tribe in *Watt*, the Court was never asked to do so, and did not do so. Moreover, any jurisdiction to enforce the *Watt* Action settlement agreement expired more than two decades ago by the

express terms of the very agreement Appellants now seek to enforce. Fed. R. Civ. P. 12(b)(1), 12(b)(3).

A. The Court Should Reject Appellants' Effort to "Intrude" Upon An "Intra Tribal Matter" By Bootstrapping Jurisdiction From An Age-Old Case Having Nothing To Do With Tribal Membership.

Given the theory of Appellants' most recently-filed complaint, the starting point for this Court's jurisdictional analysis must be *Watt*, the 26-year-old case from which Appellants seek to bootstrap federal jurisdiction. While Appellants' factual allegations are generally assumed to be true for purposes of a motion to dismiss (*Cooper v. Pate*, 378 U.S. 546 (1964)), where the actual record belies those allegations (as here), the Court may review the record before it to draw its own conclusions. *Warren v. Fox Family Worldwide, Inc.*, 328 F. 3d 1136, 1139, 1141 (9th Cir. 2003) (court "may consider [uncontested] documents upon which the complaint necessarily relies" and is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.").

Relatedly, Appellants' legal characterization of *Watt* deserve no deference. *In re Fortune Systems Securities Litigation*, 604 F. Supp. 150, 159 (N.D. Cal. 1984) ("Court is not required to accept legal conclusions," particularly if "the legal effect of the events plaintiff has set out in these allegations do not reasonably flow from his description of what happened."); *see also Olpin v. Ideal National Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969) (court need not accept as true legal conclusions or

factual allegations at variance with instrument attached to complaint). As shown below, Appellants mischaracterize the purpose and effect of the *Watt* Action.

1. *Watt* Afforded Federal, Not Tribal, Relief: Federal Recognition of Table Mountain's Sovereignty, Restoration of Federal Trust Lands, And Recognition of the Individuals' "Federal Indian Status."

The purpose of *Watt* was to essentially unwind the United States' purported termination of the federally-recognized status of Table Mountain Rancheria and the Indians living there, a termination the government had purported to effect decades before under the Rancheria Act. (ER 66:12-28.) It was one of several class action lawsuits filed by California tribes and/or Indians contending the Secretary of Interior violated the Rancheria Act when purporting to terminate their status in the 1950s and 1960s. In these cases, the plaintiffs variously sought to unwind the purported terminations or to be compensated for damages caused by the unlawful termination. While the federal courts adjudicated several such cases to final resolution,[3] the *Watt* Action ended with a judicially-approved settlement agreement between the Tribe

[3] *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 257, 260-261 (N.D. Cal. 1981) ("a group of Indian people residing at the Table Bluff Rancheria" seeking restoration of "Indian status" and tribal entity seeking restoration of federally-recognized tribal status, and court granting same); *Duncan v. Andrus*, 517 F. Supp. 1, 6 (N.D. Cal. 1977) ("Both parties agree on the fundamental issue [that] Robinson Rancheria must be 'unterminated' and its distributees and their families must be given the opportunity to retain federal benefits lost through termination"); *Smith v. United States*, 515 F. Supp. 56, 59, 61 (N.D. Cal. 1978) (individual Indians seeking declaratory, injunctive and monetary relief in connection with unlawful terminations).

and the individual plaintiffs on the one hand, and the federal defendants on the other. (ER 29.) In the end, *Watt* restored: (1) Table Mountain's status as a federally-recognized "tribal entity"; (2) the individual plaintiffs' "status as Indians under the laws of the United States"; and (3) the "federal trust status" of the lands distributed to the individuals living on the terminated Rancheria. (ER 54-61, 87-93; *and see* ER 29-34.)

a) The Purpose of *Watt*: To Unwind What The Rancheria Act Purportedly Effected.

To understand *Watt* and what it did (and did not) effect, one must consider the purpose and language of the Rancheria Act itself and the context in which it was implemented. Congress had specifically enacted the Rancheria Act in 1958 to terminate the trust relationship between the United States and 41 rancherias and reservations in California and the Indians who lived there. 85 Pub. Law No. 671, 72 Stat. 619-21 (1958) ("Rancheria Act") (SER 52-54). The Act specifically listed Table Mountain Rancheria as one of the 41 rancherias targeted for termination. (SER 52.) Congress later amended the Act to include all rancherias and reservations lying wholly within the state. 88 Pub. L. No. 419, 78 Stat. 390-91 (1964) (SER 55-56). Termination could only occur, however, with the Indians' consent, and by the government's adherence to certain procedural and substantive requirements. (SER 52, 55.)

b) Just As Rancherias Were Settled Without Regard To Tribal Affiliation, The Termination Statute Targeted All Indians Living on Rancherias, Irrespective of Tribal Membership.

Congress' decision to terminate its trust relationship with willing California Indians constituted an abrupt reversal in federal Indian policy, as Congress had just 50 years earlier created Rancherias to settle California Indians who, having been dispersed from their homes by white settlers, were found to be landless and living in abject poverty. These homeless Indians came to occupy the Rancherias, sometimes by formal and informal "assignment" by the federal government and often without regard to tribal affiliation.[4] By thereafter embracing a new policy of termination, Congress sought "rapidly to end Indian dependence on federal services, curtail the Indian services bureaucracy, and assimilate Indians into the mainstream of the United States culture." *Andrus*, 517 F. Supp. at 3. To that end, the Rancheria Act empowered the Secretary of the Interior to distribute rancheria assets to the "Indians of the rancherias and reservations"—specifically defined in the Act as "distributees" and "dependants of distributees"—whose "status as Indians" was thereby terminated, subject to certain procedural and substantive requirements. *See* Rancheria Act, *supra*, §§ 6, 10(b) (SER 53, 54); 24 Fed. Reg. 4653, at § 242.2 (ER 99); *and see*

[4] *See* 85 S. Rep. No. 1874, p.3 (1958) (SER 59); *and see Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1176 (E.D. Cal. 2003) (noting rancheria occupied by Indians of different tribal affiliation).

Andrus, 517 F. Supp. at 3 (termination "objectives were to be accomplished in part by granting legal title to Rancheria land to individual Indians and terminating federal benefits and services to such Indians.").

Significantly, the Act and its regulations make no mention of tribal membership. *See* Rancheria Act, §§ 2-10 *et seq.* (SER 52-56); 24 Fed. Reg. 4653, at § 242.2 (1959) (ER 99). Indeed, as the Act's legislative history (and case law interpreting it) clarify, the "distributees" were simply those persons who lived on, and used, the rancheria. Such made sense given the manner in which rancherias in California were settled and occupied, without regard to tribal affiliation, as the legislative history underlying the Act underscored:

> 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. Moreover, the lands were for the most part acquired and 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. The bill provides for the distribution of the land, or the proceeds from the balance of the land, primarily on the basis of plans prepared or approved by those administratively selected users of the land.

85 S. Rep. No. 1874, at 3 (1958) (SER 59); *and see Kelly v. United States*, 339 F. Supp. 1095, 1100 (E.D. Cal. 1972) (Rancheria Act had nothing to do with

distributing assets to persons with tribal or even familial affiliation, but rather, simply involved distribution of assets to persons using and living on Rancheria).

Indeed, in describing the specific rancherias targeted for termination under the Rancheria Act, the Act's legislative history describes several in detail, noting that most maintained no current tribal membership rolls or even tracked membership. 85 S. Rep. No. 1874, pp.12-50 (1958) (SER 64-83). With respect to Table Mountain Rancheria, the legislative history states, "[t]here is no approved membership roll." *Id.*, p.46 (SER 81).

In sum, when seeking to terminate Table Mountain Rancheria and distribute its assets to the Indian "distributees" under the Rancheria Act, the United States never purported to decide who were (or were not) members of the tribe targeted for termination. Likewise, when seeking to unwind that unlawful termination, the individual plaintiffs in *Watt* nowhere alleged—let alone, sought to adjudicate—their membership in a tribe. (ER 54-96.) They sought instead a ruling that their "federal Indian status" remained intact, which as shown *infra*, is legally distinct from tribal membership. (ER 67:6-11, 88:28-90:8, 91:10-92:14; *see also id.*, 68:28-69:4, 69:28-70:1, 72:16-23, 73:12-13, 83:1-9, 83:23-31, 85:23-29.)

c) The Parameters of the *Watt* Settlement Agreement.

Consistent with *Watt's* allegations and requested relief, the judicially-approved settlement confirmed the federally-recognized status of the

Tribe as a sovereign "Indian Tribal entity," established the "Indian country" status of "terminated" lands, and confirmed the individual class members' status as "Indians under the laws of the United States." (ER 30:13-18, 30:25-26, 31:8-14, 32:12-27.) Because the purpose of that settlement was to unwind what the federal government had purported to effect—the termination of the federal status of the Rancheria, its Indian occupants and the Tribe itself—the settlement did the following: (1) it required the United States to list the Tribe in the Federal Register as a recognized "tribal entity"; (2) it entitled individual class members who previously had been denied federal, governmental benefits because of their purported termination to secure them since the federal government had not effectively terminated their federal "status as Indians"; and (3) it entitled individual class members who had received rancheria property as part of the defective distribution plan (the "distributees" and "descendants of distributees") to convey the land to the United States and have such restored to federal trust status. (ER 29-34; *see also* SER 120:25-121:4, 126:18-127:16.)[5]

[5] *Watt* allowed the individuals to have land restored, in trust, for their individual (as opposed to the Tribe's) benefit. (*See* ER 31:7-13 (restored trust land "to be held by the United States for the benefit of such Indian person(s) as the grantor may specify"); SER 125:13-126:17.) This is consistent with other termination cases, which distinguished between the tribes and the individual Indians, and allowed individuals to have trust land restored for their individual benefit. *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 260 (N.D. Cal. 1981).

That is the sum and substance of what *Watt* effected. Of course, if the Rancheria Act had terminated the "trust status" of rancherias and the "Indian status" of persons living there—by distributing rancheria assets to such persons, irrespective of tribal affiliation—a lawsuit (such as *Watt*) seeking to unwind that termination, and return the parties to the status quo, could not possibly have bestowed tribal membership on such persons by judicial fiat or otherwise.

2. Appellants Distort the *Watt* Record, Erroneously Conflating "Federal Indian Status" With Tribal Membership.

Appellants spend pages paraphrasing the *Watt* pleadings, asserting *Watt*'s restoration of federal "Indian status" necessarily conferred tribal membership on the individual *Watt* plaintiffs. (*See* Open. Brf, p.11 (the *Watt* plaintiffs "contended" they were "entitled to be members of the Table Mountain Rancheria, [to] share all of the benefits, both [federal] government and tribal, including casino gaming distributions..."); p.10 (*Watt* plaintiffs "claimed to be members of the Table Mountain"); p.25 (compliance with *Watt* requires Table Mountain to "admit the Plaintiffs as recognized members" of the Tribe); p.49 ("*Table Mountain v. Watt* [] specifically requires that Plaintiffs be recognized as members).) These assertions lack record support. Nowhere in *Watt* is there any mention that the individuals seeking restoration of their federal Indian status were thereby deemed to be members of the Table Mountain tribe. Likewise, the court-approved stipulation confirming the class members were repossessed of their federal Indian status, makes

no mention of any *membership in the Tribe*. Indeed, none of the *Watt* pleadings ever state the terminated Indians were seeking confirmation of their federal Indian status—in Rancheria Act parlance, the "distributees" and the "dependents of the distributees"—were also seeking membership in the Tribe. (*See* ER 30:5-7, 13-15 (confirming "status" of class representatives and class members "as Indians under the laws of the United States.").)

Obviously, if membership in Table Mountain was really an issue in *Watt*, the documents would have mentioned it. They did not. This makes sense given the purpose of the Rancheria Act, as well as the manner in which rancherias were held and later distributed—to Indians who lived on the rancherias, however they came to live there, irrespective of tribal affiliation. (*See, supra*, pp.15-17.) It also makes eminent sense for the simple fact that asking a federal court to confer tribal membership would have been inimical to the very relief the Tribe was seeking—federal recognition of its status as a politically-independent Indian nation, a sovereign entity whose most basic powers include the right to determine its own

membership. This is a point of dispositive significance that Appellants fail to address, let alone refute.[6]

No doubt cognizant that the record belies their theory, Appellants distort it to conflate class membership in *Watt* with tribal membership. Specifically, Appellants argue *Watt* must have conferred membership when it restored "federal Indian status" because the "only way to be declared an Indian through the laws of the United States... is [through] the recognition of the tribe." (Open. Brf, p.37; *id.*, p.38 ("There cannot be 'recognized Indians under the laws of the United States' unless there is a tribe to which they belong.").) That is simply wrong, and flies in the face of Ninth Circuit authority holding otherwise. *See United States v. Bruce*, 394 F.3d 1215, 1225 n.6 (9th Cir. 2005) (holding that a person can possess federally-recognized "Indian" status without being a member of a particular tribe, and noting that "unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior without statutory reference to enrollment," and providing specific examples); *see also* 25 C.F.R. §§ 27.1-27.2 (unenrolled Indians eligible for educational benefits); 25 U.S.C. §§ 1621,

[6] Appellants nowhere address that Table Mountain had "no approved membership roll" when the United States terminated it. (*See* p.17 *supra.*) If there was no approved membership at termination, it is difficult to conceive how a stipulation undoing that termination bestowed tribal membership on anyone. The lack of an "approved membership roll" likewise defeats Appellants' apparent assertion that anyone who was a class member in *Watt* was necessarily also a member of Table Mountain. (Open. Brf, pp.40-41, 44.)

1680-1680a (Indians entitled to health related benefits without regard to tribal membership).

While Appellants suggest there was no reason to distribute rancheria assets to distributees and dependants of distributees unless actual tribal membership was at stake (Open. Brf, p.38), Congress apparently thought otherwise. By passing the Rancheria Act, it sought to terminate all Indians living on rancherias, not simply those who were tribally-affiliated. (SER 52-54.) Conversely, when terminated Indians sought redress, a class action vehicle was appropriate—not because those persons sought tribal membership (Open. Brf, pp.5, 34-36)—but because they were numerous, they shared common legal claims, and the relevant facts were similar, *i.e.*, they satisfied the requirements for a class action, as the District Court specifically found some 23 years ago. (ER 39, 40:7-16, 41:15-42:1, 57:1-14.)

At bottom, Appellants' refusal to acknowledge that "federal Indian status" and "tribal membership " are distinct does not eliminate the distinction. And, as both the law and the record clarify, *Watt* was concerned not with tribal membership, but with returning the *Watt* plaintiffs to the status quo before termination. Accordingly, to the extent any class plaintiffs or class members had received an allotment of trust land, as part of the distribution, they were entitled to have such land restored in trust, to be held for their individual benefit. (ER 31:26-32:7.) Likewise, to the extent individuals had been denied certain federal benefits by virtue

of having had their "status as Indians" terminated, they could secure them. (ER 32:12-27.) That is the relief the *Watt* Stipulation provided the individual *Watt* plaintiffs, and that is the relief to which they would be entitled if the District Court had jurisdiction to enforce it now. The fact that Appellants must rewrite the documents to suggest *Watt* somehow adjudicated their alleged membership (Open. Brf, pp. 10-11, 25, 49) simply confirms Appellants recognize their grievance for what it is—an internal tribal matter beyond any court's jurisdiction.

B. The District Court Correctly Found It Lacked Subject Matter Jurisdiction To Adjudicate A Thinly Disguised Intra-Tribal Membership Matter.

That *Watt* did not—and would not—purport to adjudicate tribal membership is further clarified when one considers bedrock law and policy concerning tribal sovereignty. Under settled law, Indian tribes are sovereign political entities that possess the exclusive right to develop their own laws and govern their own internal affairs. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (noting "right of the Indians to govern themselves" and longstanding decisional law that has "consistently guarded the authority of Indian governments over their reservations."). This includes the right to determine who is, and is not, a member of the particular tribe, and indeed, "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." *Bruce*, 394 F.3d at 1225. Appellants seek to have this Court

usurp this "most basic power[]." The District Court declined Appellants' invitation, as has this Court once before, in *Lewis v. Norton*. This Court should do so again.

1. Indian Tribes Possess Exclusive Authority To Determinate Tribal Membership.

The principle that tribal membership is a unique attribute of tribal sovereignty, raising no substantial question of federal law and falling within the exclusive province of the tribe, was first enunciated by the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In that case, a female tribal member challenged a tribal ordinance that sexually discriminated against certain persons, denying membership to children of female members who married outside the tribe, while extending membership to children of male members who did so. After failing to convince the tribe to change its membership requirements, the plaintiff sought relief in federal court, challenging the tribal ordinance as violating the "equal protection clause" of the federal Indian Civil Rights Act ("ICRA"). The Supreme Court rejected the effort.

Framing the question as "whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members" (*Santa Clara Pueblo*, 436 U.S. at 51), the Supreme Court held it could not. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of self-government," said the Court, and while "no longer 'possessed of the full attributes of sovereignty,' they remain a

'separate people, with the power of regulating their internal and social relations.'" *Id.*, 55.

The Court noted the "well-established federal 'policy of furthering Indian self-government,'" (436 U.S. at 62), and underscored the particular importance of tribal membership determinations to the protection of tribal sovereignty:

> 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. *See Roff v. Burney*, 168 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Id., 72 n.32.

On the basis of the broad principles of tribal sovereignty articulated in *Santa Clara Pueblo* (which predated *Watt*), the federal courts have consistently declined to intervene in tribal membership disputes in a variety of contexts. Indeed, "'[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues.'" *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *and see Nero v. Cherokee Nation of Oklahoma et al.*, 892 F.2d 1457, 1463 (10th Cir. 1989) (stating "no right is more integral to a tribe's self-governance than its ability to establish its membership" and finding that court's review of tribe's allegedly racist membership determinations "would in effect eviscerate the tribe's sovereign power

to define itself, and thus would constitute an unacceptable interference 'with a tribe's ability to maintain itself as a culturally and politically distinct entity.'").

This Court already has applied *Santa Clara Pueblo* to Appellants' theory of jurisdiction, to conclude *Watt* does not support federal intervention. As noted, in *Lewis v. Norton*, four of the Appellants in this case (represented by the same counsel of record) sued federal officials from various agencies for allegedly unlawfully failing to order Table Mountain to recognize them as tribal members. (SER 13-22.) The district court dismissed the action for lack of jurisdiction and this Court affirmed, reasoning the action "cannot survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes." *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005).

Lewis v. Norton is obviously dispositive, and consistent with existing Circuit authority holding that tribal membership matters are left to the discretion of the tribe. *See Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribal membership"); *cf. Donovan v. Coeur d'Alene Tribal Farm.*, 751 F.2d 1113, 1116 (9th Cir. 1985) (federal statutes of general applicability will not apply to Indian tribes, unless expressly made applicable, where the subject matter involves "purely intramural matters such as conditions of tribal membership...").

Appellants work to distinguish *Lewis*, stating that "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." (Open. Brf, p. 39.) Appellants' strained reasoning aside, it bears noting they excluded from the Excerpts of Record the *Lewis* complaint and district court order—no doubt because the allegations in that case are not materially different, and indeed, specifically invoked *Watt*. (SER 15:10-16.) Moreover, in the briefing of the *Lewis* appeal before this Court, Appellants repeatedly advanced *Watt*'s purported significance. (*See* Appellees' RFJN, Exh. A (Opening Brief in *Lewis*) at pp.1, 2, 31, 48, 60, 61; *Id*, Exh. B (Reply Brief in *Lewis*) at pp. 1, 2, 6, 9, 17, 18, 23.) In sum, this Court has already considered and rejected Appellants' attempt to use *Watt* (some 20 years later) as a basis to invoke jurisdiction over their intra-tribal membership dispute. And, while the *Lewis* Court did so on a record that was far less developed than that presented here, the full record only underscores the correctness of that conclusion, not to mention the fallacy of Appellants' argument that *Watt* effected tribal membership. (*See, supra*, at pp.13-17 and fn.10).

2. Appellants May Not Elevate Their Tribal Claims To Federal Ones To Create Jurisdiction Where None Exists.

According to Appellants, this Court's approval of a settlement agreement confirming the Tribe's federally-recognized sovereign status somehow elevates their claims of tribal membership to federal ones within this Court's jurisdictional

reach. (Open. Brf, pp. 37-40.) Not so. Indeed, because of the longstanding policy of protecting tribal sovereignty, courts are particularly suspect of efforts to manufacture jurisdiction where none exists. In fact, in circumstances directly relevant here, several Circuits have refused to decide tribal membership matters under the guise of federal claims.

For example, in *Smith v. Babbitt, supra*, the appellants, members of the Mdewakanton Sioux Tribe, alleged the tribe had changed its membership criteria such that "some ineligible persons were improperly receiving [gaming-related] payments, and [] other eligible persons were being denied payments to which they were entitled." *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996). They claimed the tribe's actions violated a number of federal statutes, including the IGRA, the ICRA and others. *Id.* Affirming the district court's dismissal, the Eighth Circuit reasoned that "'[a] sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps *no greater intrusion upon tribal sovereignty* than for a federal court to interfere with a sovereign tribe's membership determinations.'" *Id.,* 559 (emphasis added, citation omitted). Federal jurisdiction does not reach such matters "simply because the Appellants carefully worded their complaint," requiring the action to be dismissed:

> Careful examination of the complaints and the record reveals that this action is an attempt by the plaintiffs to appeal the Tribe's membership determinations. It is true that appellants allege violations of IGRA, ICRA, IRA,

> RICO and the Tribe's Constitution. However, upon closer examination, we find these allegations are merely attempts to move this dispute, over which this court would not otherwise have jurisdiction, into federal court.

Id.

The Tenth Circuit held likewise in *Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150, 1151-52 (10th Cir. 1998), an action in which the court was asked to compel a federally-recognized tribe and the BIA to recognize the plaintiffs as duly enrolled tribal members. The plaintiffs had applied for membership under a tribal ordinance, and while their applications were pending, the tribe repealed the ordinance and took no action on their applications. *Id.*, 1152 & n.1. The court dismissed the claims for lack of subject matter jurisdiction:

> No matter how this case is approached, [plaintiffs are] asking this court to step in and tell a tribal government what to do in a membership dispute. Whether federal intervention would be right, wrong, or well-intentioned, that intervention is exactly the kind of interference in tribal self-determination prohibited by *Santa Clara*.

Id., 1157.

This lack of jurisdiction extends to situations where *even Congress itself* had some role in specifying a particular tribe's membership, as illustrated by *Apodaca v. Silvas*, 19 F.3d 1015 (5th Cir. 1994) (per curiam), a case somewhat analogous to this one. In *Apodaca*, the plaintiffs sought federal relief because they were removed from their tribe's membership roll after Congress had restored the tribe's sovereign

status pursuant to a specifically-enacted Restoration Act. The Act that Congress passed specifically identified whom "[t]he membership of the tribe shall consist of." 19 F.3d at 1016. The plaintiffs sued, claiming their subsequent removal from the membership roll violated both the Restoration Act and the ICRA, allegedly giving rise to a federal claim for relief. *Id.* The court disagreed, dismissing the action.

Concluding there was no federal claim, the court reasoned that regardless of "whether the plaintiffs belong to the class protected by the statute... the federal government and the tribe benefit most" from the Restoration Act. *Id.*, 1017. Fundamentally, the existence of a private remedy "would be inconsistent with a statute seeking to protect Indian sovereignty." *Id.* Such a "cause of action," said the court, "is one that has traditionally been relegated to tribal law because, as mentioned in *Santa Clara Pueblo*, the right to determine tribal membership is crucial to the existence of the tribe as an independent political community." *Id.*

The reasoning of *Apodaca* applies with greater force here, where there was no Act of Congress restoring the federal recognition of Table Mountain's sovereign status, let alone, a congressional pronouncement as to who belonged in the Tribe. *See Santa Clara Pueblo*, 436 U.S. at 72 ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."). Instead, there was simply a stipulation through which

the *Watt* plaintiffs agreed to relinquish certain claims in exchange for federal confirmation that the United States had never terminated their status—as a federally-recognized "tribal entity" and as "Indians," respectively. To conclude the District Court's approval of this settlement agreement means it could somehow—over 20 years later—resolve specific individual claims concerning who belonged in the Tribe, and thereby dictate tribal membership, "would be inconsistent" with—and indeed flout—one fundamental purpose of the settlement: To confirm that, in the eyes of the United States, the Tribe's sovereignty remained intact, including all powers attendant to such sovereignty.

Furthermore, the notion that the Tribe's federal recognition was itself a creature of federal law does not mean Appellants' claims that they are members of the tribe "arise under" federal law. That is the teaching of *Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 279 (9th Cir. 1981), where tribal members sought federal relief to adjudicate alleged violations of tribal election laws, which were themselves "adopted and promulgated pursuant to and under the authority of" the federal Indian Reorganization Act (25 U.S.C. §§ 476, 477). As this Court explained, when rejecting the assertion of federal question jurisdiction:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or

> controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends.

Boe, 642 F.2d at 279. As this Court further explained "[t]he federal nature of the right to be established is decisive not the source of the authority to establish it." *Id.* (internal citations and quotations omitted).

One need only briefly review Appellants' sweeping claims for relief to see the rights they seek to establish are tribal, not federal, in nature. They seek, in part:

- An order directing the Tribe to "immediately admit all [*Alvarado* plaintiffs] as members of the Table Mountain Rancheria" (ER 26:21-22);
- An order requiring a "full accounting" of tribal financial records to identify "any and all monetary and non-monetary benefits paid individually to any members of Table Mountain" (ER 27:24-28:5; *and see* ER 28:11-16);
- An order directing the Tribe and the individual Tribal Defendants to compensate Appellants for benefits they supposedly would have received had the Tribe recognized them, "including casino profits" (ER 26:21-24, 27:7-19);
- An order imposing punitive damages against the Tribe for allegedly improperly excluding Appellants from membership (ER 28:6-7);
- An order permanently requiring the Tribe to "continue to recognize" Appellants as members and affording them "all benefits that any other member receives from the United States and Table Mountain" (ER 27:5-6); and
- An order for the Court to "exercise continuing jurisdiction to insure" that all of the above occurs (apparently indefinitely). (ER 28:9-10.)

Of course, Appellants cannot establish their entitlement to any of the above relief with reference to federal law. Tribal law alone controls that determination, and Appellants themselves allege they seek to enforce the Tribe's Constitution (a governing document they further allege was passed after *Watt*). (Open. Brf, pp. 20-23; 48-49; SER 15:16-18, 18:2-6, 19:6-20:26, 21:25-22:13.) Federal courts are simply not empowered to interpret tribal law, let alone, grant relief for its alleged violation. *Boe*, 642 F.2d at 276-77; *and see Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (appellants' claims "necessarily require the district court to interpret the tribal constitution and tribal law is not within the jurisdiction of the district court.").

3. Appellants Either Distort Or Ignore Controlling Law.

Unable to meaningfully distinguish controlling law, Appellants either distort it or ignore it, not unlike they did below (to the understandable consternation of the District Court. *See* ER 164:19-20 (Appellants' efforts to distinguish relevant cases "could only charitably be characterized as frivolous....").) For example, Appellants suggest *Santa Clara Pueblo, Babbitt*, and *Ordinance 59, supra*, do not control because Table Mountain lacks a tribal court, or indeed, any tribal forum, in which Appellants can seek relief. (Open. Brf, pp.45, 47, 50.) However, as Appellants must know, this Court has held that Table Mountain in particular possesses "competent law-applying bodies" in its Tribal Council and General Council so as to justify

exclusive tribal jurisdiction over membership disputes. *Lewis v. Norton*, 424 F.3d at 962 ("The issue is not whether the plaintiffs' claims would be successful in these tribal forums, but only whether tribal forums exist that could potentially resolve [those] claims.").

Appellants go on to suggest the Eighth Circuit found the district court lacked jurisdiction in *Smith v. Babbitt* because the tribe's membership determination had the effect of increasing, as opposed to decreasing, its membership ranks, meaning more (not less) people would receive gaming revenues. (Open. Brf, pp.47-48.) Appellants' assertion lacks foundation. Nowhere did the Court state or even suggest that this was why it affirmed the dismissal. In fact, according to the allegations in that case, the challenged membership ordinance had the effect of adding unqualified persons to tribal rolls, removing qualified persons, and "indefinitely postpon[ing]" action on others' applications. *Smith v. Babbitt*, 100 F.3d at 559. Thus, the challenged tribal ordinance in *Babbitt* both broadened and narrowed membership, and the Eighth Circuit attached no jurisdictional significance to this fact in any event.

According to Appellants, *Smith v. Babbitt* "is also distinguishable" because the plaintiffs there alleged the tribe's membership decision "violated a number of federal statutes, including the Indian Gaming Regulatory Act [], the Indian Civil Rights Act [], and others." (Open. Brf, p.47.) It is difficult to conceive how

Appellants find solace in the fact that *Smith v. Babbitt* involved federal laws whereas their case does not. In the absence of "diverse" "citizens" (the case here),[7] the absence of federal laws only confirms there can be no federal jurisdiction. Further, the lesson of *Santa Clara Pueblo* and its progeny is that the invocation of federal law (even assuming Appellants had invoked one) is itself insufficient to establish federal jurisdiction where it involves an internal tribal matter subject to a tribe's exclusive sovereign authority, in which event, no federal claim may be implied. *Santa Clara Pueblo*, 436 U.S. at 68, 72; *see also Boe*, 642 F.2d at 279; *Smith v. Babbitt*, 100 F.3d at 559.

Appellants' portrayal of *Ordinance 59* is equally misplaced. Appellants argue *Ordinance 59* found no jurisdiction "because ... the tribe had a tribal court, and [] the tribal court was involved in the dispute already." (Open. Brf, p.49-50.) In fact, if the Tenth Circuit had found the existence or non-existence of a tribal remedy controlling, the result probably would have been different. The plaintiffs in that case had urged the court to assume jurisdiction because they had "no other forum," other than the federal courts, in which to secure relief. *Ordinance 59*, 163 F.3d at 1157. The plaintiffs had won before the tribal court, but that court was unable to compel

[7] *American Vantage Companies v. Table Mountain Rancheria*, 292 F. 3d 1091, 1095 (9th Cir. 2002) (Indian tribes are not "citizens" for federal diversity purposes).

the tribal government to comply with its ruling, leaving the plaintiffs "with a right, but not a remedy." *Id.*

The Tenth Circuit rejected the idea of a jurisdictional doctrine based on "absolute necessity"—which plaintiffs suggested applied in tribal cases in which no adequate tribal remedy existed—as a figment of the plaintiffs' imagination, "exist[ing] only in its own creative advocacy." *Ordinance 59*, 163 F.3d at 1158. Instead, the court made clear the case was controlled, and dismissal was compelled, by *Santa Clara Pueblo*—not because a tribal court existed (however ineffective), but because plaintiffs' invocation of the ICRA raised no federal claim in the context of a dispute that "involves tribal membership." *Id.*, at 1155.

* * *

In sum, the essence of Appellants' theory is that because they were represented in a class action lawsuit confirming the United States had never terminated the Tribe's sovereign status, and because they were (purportedly) members of the class whose federal "Indian status" was thereby restored, they were effectively recognized members of the Tribe. However, the 1980 class action never even involved, let alone, adjudicated, tribal membership—nor could it since the ability of the Tribe to define its own membership is "central to its existence" as a sovereign entity. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. Appellants' transparent effort to elevate their claims to federal ones is thus unavailing. Every Circuit

confronted with similar artifice has rejected such pleas, including this one in *Lewis v. Norton*. It should do so again.

C. Even Assuming Appellants Had Pled A Federal Claim for Relief, Sovereign Immunity Deprived The District Court Of Jurisdiction.

Even assuming, for the sake of argument, that Appellants' claims could be characterized as federal, as opposed to tribal, jurisdiction is still lacking under the doctrine of sovereign immunity.[8] As "'distinct, independent political communities" with sovereign powers that have never been extinguished, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 55, 58. As such, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Techns., Inc.*, 523 U.S. 751, 754 (1998); *and see United States v. USF&G Co.*, 309 U.S. 506, 512 (1940). Like the existence of a substantial federal question, sovereign immunity is jurisdictional in nature. *See Florida v.*

[8] Although related to tribal sovereignty, the Tribe's sovereign immunity is distinct from the question of whether Appellants' complaint "arise[s] under the Constitution, laws or treaties of the United States" as required for federal jurisdiction. 28 U.S.C. §1331; *see Boe*, 642 F.2d at 279 & n.5 ("Appellants did not state a claim for relief which would provide federal question jurisdiction," and "in view of our holding that no claim for federal relief was stated, we find it unnecessary to address the sovereign immunity issue.").

Seminole Tribe, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999) (noting "fundamentally jurisdictional nature of a claim of sovereign immunity.").

As shown below, the Tribe and the individual Tribal Defendants are immune from suit, and such immunity was never waived. To the extent any particular Defendant may not share the Tribe's immunity, sovereign immunity remains a jurisdictional bar, since the Tribe is a "necessary and indispensable" party that cannot be joined. Fed. R. Civ. P. 19.

1. *Watt* Did Not Waive The Tribe's Sovereign Immunity For Membership Disputes, As This Court Has Specifically Held.

Because preserving tribal resources and autonomy are matters of vital importance, tribal immunity is "broad" (*Boisclair v. Superior Court*, 51 Cal.3d 1140, 1157 (1990)), extending to both governmental and commercial activities, whether undertaken on or off the tribe's reservation. *See Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 636-37 (1999). Tribal immunity is, in fact, jealously guarded by Congress (*Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1987)), and broader than the immunity enjoyed by the States. *See In re Green*, 980 F.2d 590, 595 (9th Cir. 1992).[9]

[9] Appellants clearly recognize the Tribe's immunity, which is why, in the words of this Court, the *Lewis* Appellants had declined to sue the Tribe in that case: "[T]hey recognized that tribal immunity would create, at the least, a serious obstacle." *Lewis v. Norton*, 424 F.2d at 963.

For the same reason an Indian tribe's immunity is broad—to preserve tribal assets and autonomy—tribal "[w]aivers of sovereign immunity are construed narrowly and in favor of the sovereign." *Soghomonian v. United States*, 82 F. Supp. 2d 1134, 1140 (E.D. Cal. 1999). Consistent with this "strong presumption against waiver of tribal sovereign immunity," *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001), it is "settled that [an abrogation or waiver] of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo*, 436 U.S. at 58; *see also C&L Enterprises v. Citizens Band of Potawatomi*, 532 U.S. 411, 418 (2001) (to relinquish its immunity, an Indian tribe's waiver must be "clear" (citation omitted)). Further, a tribe's immunity is not defeated by an allegation that it has exceeded its powers. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

In practice, these rules have resulted in strict construction of the actions necessary to waive an Indian tribe's immunity. *See, e.g., Quieletue Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (tribe's voluntary participation in proceedings "is not the express and unequivocal waiver of tribal immunity that we require in this circuit"); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715, 723 (9th Cir. 1986) (sovereign immunity barred state's counterclaim in suit filed by tribe). Indeed, as the nation's courts have long recognized, "the standard the Supreme Court has established for a waiver of tribal sovereignty is extremely

difficult to satisfy." *Smith v. Babbitt*, 875 F. Supp. 1353, 1361 n.4 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996); *see also Pan Amer. Co. v. Sycuan Band*, 884 F.2d 416, 419 (9th Cir. 1989) (sovereignty is not "subject to the vagaries of the commercial bargaining process or the equities of a given situation.").

Appellants cannot show the Tribe (or Congress) waived the Tribe's immunity so as to permit this action. Appellants do not even allege (by reference to a statute or otherwise) that Congress abrogated the Tribe's inherent common law immunity from suit. Nor do they allege the Tribe unequivocally waived its immunity to this action. Instead, they seek to circumvent tribal immunity by piggybacking on the *Watt* Action, to argue the Tribe somehow waived its immunity for purposes of this "tribal membership" case by seeking to confirm its federally-recognized sovereign status in that class action lawsuit decades ago. (Open. Brf, pp. 39-40.) Importantly, this Court rejected this argument the first time Appellants made it, in *Lewis v. Norton*:

> The Table Mountain Rancheria's waiver of sovereign immunity in 1983 to obtain federal recognition of the tribe and its membership roll at that time did not constitute a waiver of the tribe's sovereign immunity in perpetuity for the resolution of all claims to tribal membership.

424 F.3d at 962.[10]

As this Court further noted in *Lewis v. Norton*, its decision was entirely consistent with *McClendon v. United States*, 885 F.2d 627, 629-30 (9th Cir. 1989), which is particularly illustrative since the appellants in that case, like here, tried to pierce the tribe's immunity via an earlier lawsuit that resulted in a judicially-approved settlement. Specifically, the appellants sought to enforce the terms of a lease of certain tribal trust property on the ground the tribe waived its immunity in the context of an earlier settlement agreement involving the lease of the same property. This Court rebuffed the effort, noting an Indian tribe's "initiation of [a] suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation...." *McClendon*, 885 F.2d at 631. Rather, the Court held, "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits *of that particular controversy*," and the "'terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Id.*, 630.

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[10] Notwithstanding Appellants' unfounded allegations, Table Mountain had no membership roll when terminated, and *Watt* makes no reference to membership. (*See, supra,* at pp.13-15) The *Watt* record was not before the Court when it decided *Lewis*, and this Court had no way of knowing that Table Mountain had no membership roll when *Watt* was adjudicated, let alone, that Appellants' repeated assertions that *Watt* "established membership in Table Mountain" were simply wrong. (*See* Appellees' RFJN, Exh. A, at pp.1, 2, 31, 48, 60, 61; Exh. B, at pp. 1, 2, 6, 9, 17, 18, 23.)

The right to be a member of the Table Mountain Tribe under its own laws is not even a "collateral issue" arising out of *Watt*. Neither the District Court's Order granting class action status, nor the *Watt* settlement agreement, nor the District Court's order approving it, addressed tribal membership, let alone, purported to adjudicate it. (ER 29-45.) Moreover, as emphasized above, it is inimical to the very purpose of *Watt* to suggest the Tribe agreed to relinquish to the federal courts the sovereign power to decide who belonged within the Tribe. By seeking a declaration in *Watt* that its federally-recognized sovereign "status" remained intact, the Tribe accepted the risk of an adverse ruling that the United States had effectively terminated the Tribe's sovereign status vis-à-vis the United States, leaving it without a right to secure federal benefits otherwise available. That was the extent of any waiver, however. To put a point on it, the Tribe did not accept the risk that, in exchange for federal recognition of its sovereign status, it would lose a sovereign "tribe's most basic powers"—"the authority to determine questions of its own membership." *Bruce*, 394 F.3d at 1225.

2. The Individual Tribal Defendants Also Are Immune From Suit.

Appellants also cannot avoid the bar of immunity by suing the individual Tribal Defendants. Given the nature of this suit—which, at its core, requires the interpretation of tribal law and seeks to force a sovereign entity to take specific, affirmative action purportedly pursuant to that law—those tribal members also

possess sovereign immunity. However, as shown below (pp.49-54), even assuming any particular defendant somehow does not share the Tribe's immunity, dismissal is still required because the Tribe is a necessary and indispensable party that cannot be joined.

Individual tribal members sued in this action include two categories of defendants: (1) the Watt class representatives who are still living (ER 8:24-10:3, 22:19-23); and (2) the tribal officials whom Appellants allege are responsible for acting on membership matters on behalf of the Tribe. (ER 10:4-9, 22:23-23:4.) Notably, the very persons Appellants have sued, and their allegations with respect to those persons, undermines the theory that Appellants are only seeking to enforce the judgment in *Watt*. It also confirms the Tribe's immunity bars Appellants' claims against the individual Tribal Defendants.

a) The *Watt* Class Representatives Did Not And Cannot Confer Membership In Table Mountain.

Appellants nowhere allege the class representatives they sue have any ability to affect the Tribe's recognition of Appellants as tribal members. To the contrary, Appellants contend the class representatives were and are subject to the "control" of the Tribe with respect to the Tribe's alleged failure to recognize Appellants as members. (ER 23:13-23.) In effect, Appellants admit their grievance is with the Tribe, not the class representatives.

Notwithstanding this implicit concession, Appellants assert they are "collaterally attack[ing]" the "inadequacy" of the "representation" provided by the *Watt* class representatives, and harshly criticize the District Court for its purported failure to recognize these allegations. (Open. Brf, pp.27-31.) Appellants' argument confuses their claim for "breach of fiduciary duty" with a true "collateral attack" on the adequacy of the representation provided by the *Watt* class representatives. (*See* Open. Brf, p.27.) Specifically, while Appellants repeatedly complain the class representatives failed to treat Appellants "adequately," because they refuse to recognize that Appellants are entitled to be members of Table Mountain (a claim which the District Court expressly acknowledged it understood was at issue in this lawsuit (*see* ER 160:2-8)), that is simply not the same as a "collateral attack" on the "adequacy of representation" provided in *Watt*. (*See* ER 168 n.4.) As confirmed in the cases cited by the District Court, a true "collateral attack" on the adequacy of class representation would challenge, for example, whether due process was afforded during the class proceedings or whether the absent class members were properly bound by the terms of the terms of the class settlement. *See, e.g., Epstein v. MCA Inc.*, 179 F.3d 641, 648-49 (9th Cir. 1999) (absent class members' collateral challenge to the class settlement's validity—based on a claim that the proceedings did not satisfy due process—was denied due to the lower court's finding that the class representatives had fairly and adequately protected the class' interests); *Brown*

v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992) (where absent class members can show they were not adequately represented in the prior action or there was a denial of due process, the prior decision has no preclusive effect).

Here, Appellants have not asserted a due process challenge to the District Court's handling of *Watt*. Nor do they assert the *Watt* class representatives or class counsel failed to adequately represent the class in negotiating or accepting the settlement terms that restored Table Mountain's status as a federally-recognized tribal entity. Indeed, Appellants' complaint is not about the *Watt* Judgment at all. Instead, Appellants' complaint is with the class representatives' *subsequent* personal conduct in supposedly refusing to cast votes supporting their inclusion in the Tribe. (ER 15:20-17:24, 21:1-9, 25:19-26:2.)

As such, the District Court correctly found that because Appellants "had not elected to plead their case" on a "theory" that "collaterally attacked" the class action proceedings themselves, let alone the entry of the *Watt* Judgment, the District Court was not required to address whether it had any continuing jurisdiction on that basis. (ER 168 n.4). The District Court's refusal to consider a claim that was not factually advanced or legally supported is unassailable. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (where appellant's argument was not argued "specifically and distinctly" so as to apprise the court of precisely what theory was being advanced and how it was supported, the court would not "manufacture" the argument to

consider the claim) (citations omitted); *see also Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d. Cir. 1997) (rejecting claim not supported by legal argument).

b) The Tribal Officials Also Are Protected By The Tribes' Sovereign Immunity.

Appellants also sue tribal officials whom they say are empowered to act on the Tribe's behalf on membership matters, to wit, Tribal Council members. Of course, the very fact that Appellants sue these tribal officials, who were not even involved in the *Watt* Action, further reveals the true nature of Appellants' grievance—an internal membership matter, not an effort to enforce a class action settlement agreement whose class representatives have allegedly failed to represent the interests that were at stake in that litigation.

As noted, tribal immunity is "broad," extending to activities on and off the reservation, and indeed, extending to tribal officials acting in their representative capacity. *Imperial Granite*, 940 F.2d at 1271. Thus, the tribal officers named here are protected by the Tribe's sovereign immunity while acting in their official capacity and within the scope of their authority. Such immunity may only be pierced, under the doctrine of *Ex Parte Young*, if Appellants can show the officials violated federal law. *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds, Big Horn v. Adams*, 219 F.3d 944 (2000). Here, Appellants do not allege—nor could they—that the tribal officials have violated federal law. No such allegation is made because Appellants' claim of

membership in the Tribe turns on tribal law, not federal law. *See Boe*, 642 F.2d at 279 (tribal ordinances and constitutions are not "federal law"); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) (any fiduciary duties owed to putative members of tribe flow from tribal law). Of course, claimed violations of tribal law are not properly before this Court anyway. *Boe*, 642 F.2d at 279 (district courts lack federal question jurisdiction to adjudicate alleged violations of tribal law); *Runs After*, 766 F.2d at 352 (same).

Despite Appellants' various theories, this lawsuit is fundamentally a claim against a sovereign tribe, not the tribal members who purportedly acted (or failed to act) on Appellants' membership applications. *See Imperial Granite*, 940 F.2d at 1271 (lawsuit challenging tribal officials' vote was not "anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury."). Appellants cannot change the lawsuit's basic character—an action against a sovereign—by simply adding individual tribal members as defendants. Rather, where "'the essential nature and effect' of the relief sought" is that against the tribe, the tribe is the "real, substantial party in interest," and its immunity bars suit, irrespective of claims against tribal members:

> A suit may fail, as one [against] the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the

> cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Shermoen v. United States, 982 F.2d 1312, 1320 (9th Cir. 1992) (citation omitted).

Appellants' own allegations confirm the relief they request—an order directing the Tribe to recognize Appellants as members of the Tribe, and to pay Appellants all benefits associated with tribal membership—would "require affirmative action by the sovereign [and] the disposition of unquestionably sovereign property." *Shermoen*, 982 F.2d at 1320. The membership status and benefits Appellants seek can only be granted by the Tribe, not any tribal member (official or otherwise). *See Imperial Granite*, 940 F.2d at 1271 (legal rights are created by tribe's official actions, not tribal officials). Because the requested relief "would expend itself on the public treasury or domain...restrain the Government from acting, or [] compel it to act," Appellants' claims are against the sovereign itself. *Shermoen*, 982 F.2d at 1320. Accordingly, Appellants' claims against the tribal members constitute "an attempted end run around tribal sovereign immunity" (*Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1160 (9th Cir. 2002)), which cannot defeat their immunity to suit.

3. The Tribe Is A Necessary and Indispensable Party, Requiring Dismissal Irrespective of The Extent To Which Other Defendants Share Its Immunity.

Even assuming, for argument's sake, that a particular defendant did not share the Tribe's immunity, the claims must still be dismissed. The Federal Rules of Civil Procedure mandate dismissal of any action to which a necessary and indispensable party cannot be joined. Fed. R. Civ. P. 19. The Tribe is such a party.[11]

a) The Tribe Is A Necessary Party.

A party is "necessary" if (1) its absence would prevent the Court from according complete relief among other parties to the action, *or* (2) it claims an interest in the action and is so situated that its absence would either impair the Court's ability to protect that interest or leave other parties subject to a substantial risk of incurring multiple inconsistent obligations. Fed. R. Civ. P. 19(a). If a party meets either standard, it is "necessary" to the action. *Dawavendewa*, 276 F.3d at 1155-57. The Tribe meets both.

The Tribe's absence would preclude the award of complete relief among other parties to the action. Appellants seek tribal membership and tribal benefits. That relief must come from the Tribe itself. No other party can grant tribal membership or distribute tribal benefits generated on trust property. Therefore, even assuming

[11] Although the District Court's order does not analyze the Tribe's necessary and indispensable status, the issue was raised below. (*See* ER 138:7-12, 140:2-8; SER 4-9, 86-88.)

Appellants prevailed, they could not obtain complete relief unless the Tribe is a party to the action.

The Tribe also is a necessary party by virtue of two distinct (though certainly related) interests in this action. First, the Tribe claims an interest in preserving its own sovereign immunity, including the "concomitant right not to have [its] legal duties judicially determined without [its] consent." *Shermoen*, 982 F.2d at 1317; *see also Pit River Home and Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (tribe's claim of sovereign immunity is sufficient to render it "necessary" under Rule 19). Second, the Tribe has an interest in maintaining its sovereign right to self-governance. *See Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (tribes are necessary parties to actions implicating their interest in preserving governmental authority); *and see Santa Clara Pueblo*, 436 U.S. at 59-60 (resolution of internal tribal disputes in a foreign forum "cannot help but unsettle" tribal government). That right includes the ability to determine tribal membership and to regulate the distribution of tribal benefits. *Id.*, at 60 (sovereignty includes right to regulate internal affairs); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (Stevens, J. dissenting) (Tribes have broad powers to define rules of membership, and thus determine entitlement to tribal benefits); *Bruce*, 394 F.3d at 1225 (controlling membership is "one of an Indian tribe's most basic powers"); *Shermoen*, 982 F.2d at 1320-21 (Tribes retain

power to adjust relations among members). In sum, the Tribe is "necessary" because Appellants' claims necessarily implicate its most basic sovereign powers, and if adjudicated, would impair its ability to preserve and safeguard its sovereignty and consequent right to self-governance.

b) The Tribe Is An Indispensable Party.

A party is "indispensable" if "equity and good conscience" dictate that an action should not proceed in its absence. Fed. R. Civ. P. 19(b); *Dawavendewa*, 276 F.3d at 1161. To determine indispensability, courts balance four factors: (1) the extent to which a judgment rendered in a party's absence might prejudice that party or other parties; (2) the extent to which relief can be shaped to lessen that prejudice; (3) the extent to which an adequate remedy, even if incomplete, can be awarded in the party's absence; and (4) whether plaintiff may seek relief in an alternative forum. *Id.* In weighing these factors, the Ninth Circuit recognizes tribal sovereignty as a separate, "compelling" consideration favoring dismissal. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (although four factors did not clearly favor dismissal, "concern for the protection of tribal sovereignty" did so). Here, all factors, as well as the Tribe's sovereignty, favor dismissal of all claims.

The Tribe and the individual tribal defendants would suffer considerable prejudice if this action were to proceed without the Tribe. Prejudice to the Tribe stems from the same legal interests—preserving its sovereignty and right to

self-governance—that rendered it a necessary party in the first place. *See Confederated Tribes*, 928 F.2d at 1499 (prejudice inquiry under Rule 19(b) is virtually identical to Rule 19(a) test measuring interest in the action). Allowing Appellants to proceed would significantly prejudice the Tribe's ability to assert those interests. *See Shermoen*, 982 F.2d at 1318-19 (impairment of sovereignty constitutes prejudice); *Confederated Tribes*, 928 F.2d at 1499 (altering Tribe's "authority to govern" constitutes prejudice). The individual tribal defendants also would suffer prejudice in the Tribe's absence. Assuming Appellants obtained a judgment against individual tribal officials (or, for that matter, against Secretary Norton), those individuals' ability to carry out their duties within the Tribe (or, in the Secretary's case, duties to the Tribe) would be severely prejudiced. *See Pit River*, 30 F.3d at 1101 (Tribe's absence would prejudice Tribal Council's ability to govern).

The second factor of indispensability also favors dismissal. Appellants seek tribal membership and tribal benefits. There is no way to "shape" this relief in a manner that would lessen or avoid prejudice to the Tribe. Even if the Court could somehow fashion relief granting membership or directing the payment of tribal benefits without the Tribe's participation (a theoretical impossibility), any such relief would inherently prejudice the Tribe's sovereignty and self-governance. Indeed, as previously noted, " 'there is perhaps no greater intrusion upon tribal

sovereignty than for a federal court to interfere with a sovereign tribe's membership determination.' " *Smith v. Babbitt*, 100 F.3d at 559.

Likewise, Appellants cannot recover an "adequate" remedy in the Tribe's absence. The individual tribal members cannot force the Tribe to accept Appellants as its members. *See Imperial Granite*, 940 F.2d at 1271 (Tribe is source of legal rights, not individual tribal officials). Appellants' prayer for relief reveals this suit for what it is—an attempt to circumvent the Tribe's sovereignty to secure tribal membership and benefits Appellants claim they are owed under tribal law. *See Shermoen*, 982 F.2d at 1320 (actions designed to compel tribal action or to obtain tribal benefits are suits against the tribe itself). Accordingly, Appellants cannot possibly recover an "adequate" remedy in the Tribe's absence.

Finally, the fourth indispensability factor favors dismissal. Appellants have alternative fora in which to seek relief. The Tribe maintains both a Tribal Council and a General Council to decide and adjudicate membership matters. *Lewis v. Norton*, 424 F.3d at 962. The Supreme Court has specifically endorsed such non-judicial tribal institutions as "competent law-applying bodies" (*Santa Clara Pueblo*, 436 U.S. at 66), and this Court has held Table Mountain's bodies so qualify. *Lewis v. Norton*, 424 F. 3d at 962. However, even if such fora did not exist, this last factor does not prevent dismissal of Appellants' claims against the individual tribal defendants. Society has "consciously opted to shield Indian Tribes from suit

without....consent." *Quileute Tribe*, 18 F.3d at 1461. Stated otherwise, the Tribe's interest in maintaining its sovereignty outweighs Appellants' interest in litigating their claims. *Id.*; *Pit River*, 30 F.3d at 1102-03.

In sum, the Tribe is both a necessary and indispensable party that cannot be sued, requiring dismissal of all claims under the Federal Rules' mandatory joinder requirements.

D. Putting Aside the Above Jurisdictional Bars, The District Court Could Not "Enforce" The *Watt* Settlement To Confer Membership In Table Mountain Because The *Watt* Action Did Not Purport To Effect Tribal Membership, And The Court's Power To Enforce That Settlement Expired Long Ago In Any Event.

Even assuming the *Watt* Stipulation supported the assertion of a federal claim that pierced the Tribe's immunity, the District Court correctly found that it lacked power to enforce it. As shown, the court-approved *Watt* stipulation only restored "federal Indian status" for the individual class members, and provided the federal (as opposed to tribal) benefits associated with such federal recognition. Thus, that is the only relief to which Appellants' would be entitled if the District Court possessed continuing "enforcement" jurisdiction. But those are not the benefits Appellants seek. Recognizing this disparity, the District Court correctly found the tribal membership relief Appellants seek cannot be "enforced" through the *Watt* Judgment because there is simply no provision within the Judgment (and Appellants certainly

cite none) that "purports to establish criteria for membership" in Table Mountain Rancheria. (ER 165:1-9.)

Although Appellants take issue with the manner in which the District Court phrased their claim for relief (by arguing they are not contesting the "criteria" for membership, because they believe they meet it (Open Brf, p.38)), the point remains the same. If Appellants really sought to enforce the *Watt* Judgment, their right to relief would be strictly limited to the four corners of the Judgment—*i.e.*, the right to have Rancheria property restored to federal "trust" status; the individuals' right to secure services and benefits provided by the BIA; and, as related to Table Mountain, the right to be federally-recognized as a "tribal entity." (*See* pp.18-19 *infra*). Although such relief is of no interest to Appellants, it nonetheless remains all to which they would be legally entitled through an actual "enforcement" action. *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) ("We rely on basic contract principles to interpret the Stipulation. An agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract law."); *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998) (courts must ascertain

contractual intent " 'solely from the plain language of the contract' and may not consider extrinsic evidence outside the 'four corners' of the document itself').[12]

In addition, the District Court correctly found it lacked continuing jurisdiction to enforce the *Watt* judgment, since it retained jurisdiction to enforce the settlement's provisions for only one year—until June 16, 1984. (ER 165:1-3; *see also* ER 33:22-28.) This means the District Court has lacked jurisdiction over *Watt* for the last 22 years! Not only does the *Watt* Judgment's plain language compel this conclusion, it is in accord with a long line of cases following the Supreme Court's ruling in *Kokkonen v. Guardian Life Ins. Co. of American*, 511 U.S. 375, 377-82 (1994), holding courts possess no "inherent" or "continuing" jurisdiction to enforce court-approved settlement agreements; rather the district court must explicitly retain such jurisdiction. *See Ortolf v. Silver Bar Mines*, 111 F.3d 85, 87 (9th Cir. 1997) (no authority to enforce settlement agreement where district court did not retain such jurisdiction); *O'Connor v. Colvin*, 70 F.3d 530, 531 (9th Cir. 1995) (district court lacked jurisdiction to enforce settlement agreement filed with court, even where

[12] Further, even assuming the *Watt* Judgment could be construed as a "consent decree" (as Appellants urge), the same principle of strict construction still applies. *See City of Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Cir. 1985) (A consent decree must be interpreted according to "its four corners."); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (same); *see also Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000) (plaintiffs' use of consent decree from prior action to enforce new claims constituted gross abuse of legal process, as there clearly was no actual violation of the decree).

court order stated it was dismissing action based on settlement agreement); *Hagestad v. Trafesser*, 49 F.3d 1430, 1433 (9th Cir. 1995) (court did not retain "inherent" subject matter jurisdiction to enforce a settlement simply because the dismissal of the federal action served as part of the consideration for the settlement agreement). Here, as noted, the District Court did expressly retain jurisdiction over the settlement, but only for one year.[13]

Trying to avoid the adverse consequences compelled by this explicit jurisdictional limitation, Appellants argue the *Watt* Judgment "amounted to" a "consent decree" for which the District Court retains unlimited, continuing enforcement authority. (Open. Brf, p.3.) Appellants' argument takes it nowhere. Nothing in the record suggests the District Court's Judgment was a "consent decree"—and certainly the Court did not refer to it at such. It also fails to meet the basic design of a "consent decree," because it was not intended to be carried out over a number of years, or under circumstances in which long-term judicial supervision was contemplated. *See, e.g., United States v. State of Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (citation omitted).

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[13] Appellants' invoke *Hook v. State of Arizona, Dept' of Corrections*, 972 F. 2d 1012, 1014 (9th Cir. 1992) for the proposition that a district court always retains jurisdiction to enforce its judgments. (Open. Brf, p.52.) The reliance is misplaced. *Kokkonen* and its progeny (decided after *Hook*) confirm this is not the law.

However, regardless of what the Judgment is called, and assuming arguendo that it constituted a "consent decree," it is beyond dispute that the District Court retained enforcement jurisdiction over the settlement for only one year.[14] The legal effect of that limitation, as the District Court itself found, is that the Court's power to enforce the settlement expired by its own terms on June 16, 1984. (ER 33:22-28, 165:1-3.) Appellants offer no authority suggesting a court possesses continuing jurisdiction to enforce a stipulated judgment that explicitly limits such jurisdiction to a finite period.[15] Appellants' omission is not surprising since the authority is to the contrary. *See Taylor v. United States*, 181 F.3d 1017, 1022 (9th Cir. 1999) (motion to terminate consent decree "moot" since decree expired by its own terms); *Hallett v. Morgan*, 296 F.3d 732, 739-40 (9th Cir. 2002) (under consent decree's terms, court's jurisdiction would end by date certain unless the parties moved for an extension, and when no such motion was timely made, jurisdiction was lost); *see also Price v. Austin Independent School District*, 945 F.2d 1307, 1311 (5th Cir.

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[14] The Stipulation states as follows: "For the purpose of resolving any disputes which arise among the parties in the course of implementing the judgment to be entered pursuant to this stipulation, the court shall retain jurisdiction over this matter for a period of one year from entry of judgment, or for such longer time as may be shown to be necessary on a motion duly noticed by any party within one year from entry of judgment." (ER 33:22-28.) No party moved to extend jurisdiction.

[15] The case upon which Appellants principally rely, *Jeff D. v. Kempthorne*, 365 F.3d 844, 852-53 (9th Cir. 2004), is inapposite because the district court there expressly retained continuing jurisdiction to enforce the judgment.

1991) (consent decree concerning school desegregation expired by its terms); *Equal Employment Opportunity Comm'n v. Local 40*, 76 F.3d 76, 78-80 (2d Cir. 1996) (same).

In sum, the District Court correctly recognized that nothing in the *Watt* settlement purported to establish or confer tribal membership status, let alone, the consequential tribal benefits that Appellants now seek. The Court also correctly found that its power to enforce the *Watt* settlement (whatever its terms) expired long ago. There is, therefore, no basis to overturn the District Court's ruling that it lacked jurisdiction to "enforce" the *Watt* settlement—assuming the Tribe's sovereignty is not otherwise a complete bar to the assertion of federal jurisdiction in this matter. As the record and the law compellingly show, it is.

VIII. CONCLUSION

This Court, and two separate district courts, have already ruled on the issue Appellants ask the Court to address yet one more time, specifically, whether a 26-year-old class action confirming Table Mountain's sovereignty may be used to

usurp the Tribe's exclusive authority over its own membership. The answer, under bedrock law, and this Court's own precedent, is that it may not be. The District Court's dismissal should be affirmed.

Dated: August 10, 2006

Respectfully submitted,

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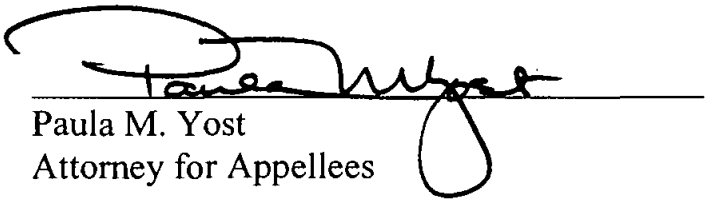

Paula M. Yost
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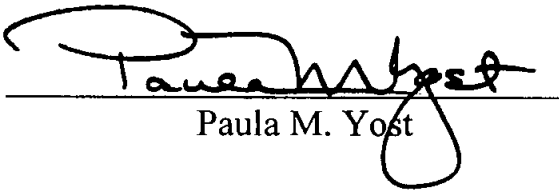
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and (C), and the Local Rules of this Court, I hereby certify that the foregoing brief is in a proportionally spaced typeface of 14 points and contains a total of 13,987 words (including footnotes) as counted by Microsoft Word 2002, the word processing software used to prepare this brief.



Paula M. Yost

CERTIFICATE OF SERVICE

I, Sandy LeCompte, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Sonnenschein Nath & Rosenthal LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On August 10, 2006, I served a copy of **APPELLEES' RESPONSIVE BRIEF** on the interested parties in this action by placing a true copy thereof, on the above date, enclosed in a sealed envelope, following the ordinary business practice of Sonnenschein Nath & Rosenthal LLP, as follows:

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☒ U.S. MAIL: I am personally and readily familiar with the business practice of Sonnenschein Nath & Rosenthal LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

☐ FACSIMILE TRANSMISSION: I caused such document to be sent by facsimile transmission without attachments at the above-listed fax number for the party.

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☐ HAND DELIVERY: I caused such document to be served by hand delivery.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on August 10, 2006, at San Francisco, California.

Sandy LeCompte

Sandy LeCompte