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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KAWAIISU TRIBE OF TEJON and DAVID LAUGHING HORSE ROBINSON, Chairman, Kawaiisu Tribe of Tejon,

Plaintiffs,

vs.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of Interior; TEJON RANCH CORPORATION, a Delaware corporation; TEJON MOUNTAIN VILLAGE, LLC, a Delaware company; and COUNTY OF KERN, CALIFORNIA,

Defendants,

and

TEJON RANCH CORPORATION, a Delaware corporation; TEJON MOUNTAIN VILLAGE, LLC, a Delaware Company,

Real Parties in Interest.

Case No. 1:09 CV 01977 OWW SMS

DEFENDANT COUNTY OF KERN'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: July 18, 2011
Time: 10:00 a.m.
Courtroom: 3, 7th Floor
Before: Hon. Oliver W. Wanger

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CASES:

Defendant County of Kern ("County") submits this memorandum in support of its motion to dismiss the Second Amended Complaint ("SAC") of plaintiffs Kawaiisu Tribe of Tejon, David Robinson, individually and in his alleged capacity as Chairman of the federally-unrecognized "Kawaiisu Tribe of Tejon" (collectively "Plaintiffs" or "Robinson").

This Motion is made on the grounds that despite repeated opportunities, Plaintiffs in the SAC have once again failed to state any cognizable claim against the County and have demonstrated no prospect of stating a claim, so that their claims should be dismissed at this time pursuant to Rules 12(b)(1) and 12(b)(6), without further leave to amend. The grounds for this motion are particularly set forth in the points and authorities below, in the accompanying Defendant County of Kern's Request for Judicial Notice ("RJN"), and in the accompanying memoranda in support of the motions to dismiss of co-defendants Ken Salazar (in his official capacity as Secretary of the United States Department of the Interior), Tejon Ranch Corporation and Tejon Mountain Village, LLC, which are incorporated herein by reference to avoid duplication.

STATEMENT OF RELIEF REQUESTED

By this motion, the County seeks the following relief from the Court:

(a) An order, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing with prejudice all of Plaintiffs' purported federal claims against the County, including Plaintiffs' third claim for "violations of civil rights - 18 [*sic*] U.S.C. § 1983", for lack of subject matter jurisdiction and for failure to state a claim; and

(b) An order, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing all of Plaintiffs' purported state law claims against the County, including Plaintiffs' fourth claim for "violation of the California Environmental Quality Act ("CEQA") and Government Code § 65352.3", for lack of subject matter jurisdiction and for failure to state a cognizable claim linked to a federal claim or, in the alternative, declining to exercise jurisdiction over Plaintiffs' state law claims against the County pursuant to 28 U.S.C. § 1367(c).

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

A. Proceedings Before this Court

Robinson filed his original *pro se* complaint on November 10, 2009, (Dkt. No. 1). The County filed a motion to dismiss the complaint on December 3, 2009 (Dkt. Nos. 7, 9), and Plaintiff responded on February 5, 2010. (Dkt. No. 35). The County filed its reply in support of its motion on February 12, 2010 (Dkt. No. 37). Subsequently, Robinson obtained counsel and further responded to the County's motion to dismiss, arguing the motion was moot and requesting leave to amend his complaint as well as significant additional time. (Dkt. Nos. 62, 63).

The Court granted leave to amend (Dkt. No. 70), and on August 15, 2010, Plaintiffs filed their First Amended Complaint (Dkt. No. 71) adding as a defendant Larry Meyers (in his official capacity as Executive Secretary of the California Native American Heritage Commission) ("NAHC"), who was accused of "violation of civil rights/equal protection". Thereafter (on September 3 and 7), all parties except for defendant Meyers (who had not yet been served) once again filed motions to dismiss responding to the First Amended Complaint, which the Court set for hearing on December 6, 2010.

On November 14, 2010, Robinson, filed a second "request for submission of administrative record" and an "application for continuance for hearing" on defendants' motions to dismiss. (Dkt. No. 87). In response, the Court continued the December 6, 2010 hearing to January 24, 2011 "to ensure that Plaintiff has sufficient time to prepare an opposition" to the motions and directed Robinson to file his oppositions by December 6. 2010. (Dkt. No. 88).

On December 2, 2010 -- four days before his opposition papers were due -- Robinson's counsel filed a request "for leave to voluntarily dismiss claims against defendant Salazar without prejudice", asserting that: "Plaintiffs are seeking to do exactly what the law requires: allow the agency to use its expertise to resolve a complex dispute before district court review is appropriate". (Dkt No. 94, p. 5, lines 2-3). In response, the

Court called for the other parties to respond to Robinson's latest request by December 8 (which they did), extended the briefing schedule, but maintained the January 24, 2011 hearing date on defendants' motions to dismiss. (Dkt No. 95).

The Court heard argument on defendants' motions to dismiss as scheduled on January 24, 2011 and, on February 7, 2011 the Court filed its detailed Order granting all motions to dismiss (with and without leave to amend, in various cases) except for the motion to dismiss the claims against NAHC, which was denied as moot in view of Robinson's unopposed request for leave to amend his § 1983 claim against NAHC. (Dkt. No. 123). Thereafter, on April 1, 2011, the Court issued its further Order based on its February 7 Order, directing Robinson to file his Second Amended Complaint ("SAC") within fifteen days. (Dkt. No. 130).

Robinson filed his SAC on April 18, 2011 (Dkt. No. 133). The SAC: (1) Adds a *new defendant* (Tejon Ranch Corporation ("TRC")) and a new first claim for "unlawful possession under common law, violation of non-Intercourse Act, trespass, accounting"; (2) *Drops* the County as the defendant in its second claim for violations of the Native American Graves and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3501, *et seq.* and *substitutes* as new defendants TRC and Tejon Mountain Village, LLC ("TMV"); (3) *Drops* the NAHC as the defendant in its third (civil rights/§ 1983) claim (and all other claims against NAHC) and *adds* the County as the sole named defendant in Plaintiffs' civil rights claim; (4) Restates and expands Plaintiffs' fourth (state law CEQA) claims and adds a new reference to Government Code § 65352.3; and (5) Despite having obtained the Court's permission to dismiss defendant Salazar (as Secretary of the Interior) ("DOI") to "allow the agency to use its expertise", adds a *new,* fifth claim for "declaratory judgment" against DOI seeking a determination that Plaintiffs are "excused from exhausting administrative remedies, if such is otherwise required, because they are inadequate and futile" and asking the Court effectively to recognize the Kawaiisu as a tribe and to declare that the United States "has a duty to bring an action on behalf of the tribe against Defendants TRC and TMV".

While the SAC and the parties refer to "Plaintiffs" in the plural form, "Plaintiffs" still consist only of David Laughing Horse Robinson (an individual with no viable federal claims), and a federally-unrecognized group (the Kawaiisu) on whose behalf Robinson's counsel now purports to act.

B. The Parallel State Court CEQA Trial Court Judgment

In the meantime, while plaintiff Robinson has been adding and removing claims, parties, theories and counsel during the approximately eighteen (18) months that have elapsed since he initiated this federal action, the Kern County Superior Court has -- as it was required to do under the strict time deadlines of CEQA -- conducted a bench trial regarding the compliance of the Tejon Mountain Village project with CEQA and has issued its detailed judgment upholding the County's approval of the Tejon Mountain Village project under CEQA. *See* RJN, Exhibit A (Judgment). In order to facilitate prompt completion of the trial, which involved a massive administrative record, respondents in the CEQA case (which included the County and Real Parties) agreed to prepare the administrative record and to waive their right to seek from petitioners Center for Biological Diversity, *et al.* ("CBD") the significant costs of preparing the administrative record. *See* RJN, Exhibit B (Declaration of Respondents' Counsel Regarding the County of Kern's Certified Administrative Record). The Kern County Superior Court's Judgment is now the subject of a pending appeal before the California State Court of Appeal's Fifth Appellate District in Fresno, California. *See* RJN, Exhibit C (Notice of Appeal).

II. ARGUMENT

The SAC continues to acknowledge (at ¶ 5) that: "The Tribe is not currently on the list of federally recognized tribes maintained by the Bureau of Indian Affairs pursuant to 25 C.F.R. §83 *et seq.*". Robinson alleges that the Kawaiisu Tribe is a federally recognized tribe "by virtue of descending from signatories to the 1849 Treaty with the Utah" but goes on to acknowledge that the United States government has "failed to treat it as such". As a consequence, and for the reasons set out in the separate motions of co-defendants DOI, TRC and TMV in which the County has joined, the SAC fails to state any viable federal

cause of action because all of Plaintiffs' purported federal causes of action are premised on the notion that this Court can entertain aboriginal land claims and other claims brought in the name of the "Kawaiisu Tribe", even though this is not an entity that has been recognized as such by the United States.

Plaintiffs' purported claims against the County in the SAC are restricted to the Third Claim for Relief (for alleged "violations of civil rights" under 42 U.S.C. § 1983, on pages 16-17 of the SAC at ¶¶ 82-88) and the Fourth Claim for Relief (for alleged "violation of the California Environmental Quality Act ("CEQA" and Government Code § 65352.3", on pages 17-22 of the SAC at ¶¶ 89-113). Neither claim is viable.

A. Plaintiffs' "Civil Rights" Claim Is Not Viable

1. The Court Has No Jurisdiction To Consider "Civil Rights" Claims Brought in the Name of an Unrecognized Tribe

Plaintiffs' SAC is founded on an "aboriginal title" claim that Robinson seeks to assert on behalf of an unrecognized Tribe of which he purports to be "Chairman". The civil rights claim (third cause of action), which has now been redirected against the County instead of the (dropped) California Native American Heritage Commission, does not identify any civil right that is personal to David Laughing Horse Robinson, nor could it plausibly do so in the context of the sweeping land claims that Robinson now seeks to make on behalf of the "Kawaiisu Tribe". To the contrary, it is clear that the interests being asserted in the SAC's civil rights claim against the County are premised on the notion that the County's approval of the TMV Project somehow deprived the federally-unrecognized "Tribe" of its "rights to due process of law prior to the deprivation of property". SAC ¶ 84, *see also* ¶¶ 85-87. Similarly, the civil rights claim assumes that the TMV project is on "Federal or tribal lands", subjecting them to the provisions of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3004. But the "Kawaiisu Tribe", being unrecognized, is not an entity whose claims about land, title and grave sites give rise to a "case or controversy" that can be adjudicated by an Article III court. Instead, the recognition (or non-recognition) of the Kawaiisu is a political question.

2. Plaintiffs' Civil Rights Claim Fails on its Face

In addition to not being an entity whose rights this Court has the power to adjudicate in the absence of federal recognition, the Kawaiisu Tribe is not (for the same reason) a "citizen of the United States or other person" whose civil rights are subject to the protections of 42 U.S.C. § 1983. *See, e.g., Skokomish Indian Tribe v. U.S.* 401 F.3d 979, 987 (9th Cir. 2005), noting that:

> The Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a "private person[ ]." [citing Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701 at 712 (2003)]. Rather, the Tribe is attempting to assert communal . . . rights reserved to it, as a sovereign, by a treaty it entered into with the United States. *See United States v. Washington,* 520 F.2d 676, 688 (9th Cir.1975) ("The treaties must be viewed as agreements between independent and sovereign nations.... Each tribe bargained as an entity for rights which were to be enjoyed communally."). Recognizing that "[s]ection 1983 was designed to secure private rights against government encroachment," *id.* at 712, 123 S.Ct. 1887, as well as the "long-standing interpretive presumption that 'person' does not include the sovereign," *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 780, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), **we conclude that the Tribe may not assert its treaty-based . . . rights under section 1983.** [Emphasis added.]

Moreover, as the Court noted in its February 7, 2011 Order dismissing Plaintiffs' First Amended Complaint (Dkt No. 123) at 17:11-12): "It is undisputed that the land is currently private property." (Emphasis the Court's). It follows that Plaintiffs cannot plausibly assert a civil rights cause of action that is premised on the alleged "deprivation" of property that admittedly is not the property of the unrecognized "Kawaiisu Tribe of Tejon". In order to maintain a § 1983 claim against a the County, Plaintiffs must establish the requisite culpability (a "policy or custom" attributable to County policymakers) and the requisite causation (the policy or custom as the "moving force" behind the constitutional deprivation). *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018 (1978); *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002). Here, Plaintiffs have alleged no more than the County's acceptance of a well-established *status quo* (current ownership of land in the County) dating back to the nineteenth and early twentieth century

that was created by *federal* actors, not some recently-hatched County policy. *See generally, United States v. Title Ins. & Trust Co.,* 265 U.S. 472 (1924), rejecting Southern California land claims by native Americans who sought to challenge the property rights of persons holding title pursuant to Mexican land grants and noting (265 U.S. at 622) that:

> There is an essential difference between the power of the United States over lands to which it had had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power."

The Court (Mr. Justice Van Devanter) concluded that all claims challenging property rights created by Mexican land grant that were not timely presented to the Commission created by Act of Congress in 1851 were cut off and ended by reiterating that:

> "Where questions arise which affect titles to land, it is of great importance to the public that, when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." [*quoting Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332, 334 (1865).

For the foregoing reasons, Plaintiffs fail to present a viable claim against the County for "civil rights" violations under 42 U.S.C. § 1983 and this claim should be dismissed with prejudice at this time. It is clear that further amendments would be futile.

B. <u>The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' State Law Claims</u>

Plaintiffs' purported CEQA claims related to the TMV EIR (fourth claim for relief) are the only allegations that are remotely relevant to actions taken by the County, as opposed to the federal government. (SAC ¶¶ 89-113). But even if the Court were to find that Plaintiffs have articulated a CEQA claim--or any other state claim-- that meets federal pleadings standards, the court still should dismiss those claims based on lack of subject matter jurisdiction.

The court has subject matter jurisdiction under 28 U.S.C. § 1367(a) to decide state law claims when the court has original jurisdiction over federal claims pleaded in a complaint, and the state law claims are "so related" to the federal claims "that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* This means that "[t]he state and federal claims must derive from a common nucleus of operative fact." *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). The Court lacks subject matter jurisdiction here because there is no basis for the Plaintiffs' federal claims, the federal claims that purportedly grant subject matter jurisdiction over the County fail both for lack of jurisdiction and on their face, and the CEQA claims are unrelated to the federal claims. *See* 28 U.S.C. § 1367(a). Alternatively, the Court should decline to exercise supplemental jurisdiction in this case.

1. Plaintiffs' State Law Claims Must Be Dismissed if the Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Related Federal Claims

As set out in the TRC/TMV ("Tejon") and DOE motions to dismiss, this Court lacks subject matter jurisdiction over Plaintiffs' alleged federal claims (first and second causes of action) because the "Kawaiisu Tribe of Tejon" is not a federally-recognized Indian Tribe and must first exhaust its administrative remedies with DOI, which has primary jurisdiction to determine whether Plaintiffs have standing to pursue claims in that capacity. Further, Plaintiffs' "aboriginal land" claims fail on their face because any such claims were extinguished by Plaintiffs' failure to present such claims, within two years, to the Commission established by the "Act to ascertain and settle the private Land Claims in the State of California" passed by the United States Congress and enacted as the Act of Mar. 3, 1851, ch. 41, 9 Stat. 631. *See U.S. v. Fossatt*, 62 U.S. (21 How.) 445, 448 (1859) and *United States v. Title Ins. & Trust Co.,* 265 U.S. 472 (1924), *supra*. Therefore, because this Court lacks subject matter jurisdiction over Plaintiffs' purported federal claims, it must also dismiss Plaintiffs' alleged state claims against the County. *See Herman Family Revocable Trust v. Teddy Bear*, 25 F.3d 802, 805-06 (9th Cir. 2001) (holding that "if the

court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims," including any state law claims).

2. Plaintiffs' Federal Claims Against the County Are Frivolous

As explained above and in the accompanying Tejon and DOI motions, all of Plaintiffs' purported federal claims that would otherwise grant independent subject matter jurisdiction over state law claims fail both for lack of subject matter jurisdiction (since Plaintiffs are not a recognized tribe) and on their face. The land claims can only be brought by a recognized tribe (which Plaintiffs admittedly are not) and these claims are also precluded under the 1851 Act and cases decided under that Act. The NAGPRA claim fails because, as the Court stated in its February 7, 2011 Order (Dkt. No. 123, page 14, lines 10-12), "NAGPRA is only applicable when Native American cultural items are discovered or excavated on 'Federal or tribal lands.' 25 U.S.C. §§ 3001-3004." Plaintiffs have not alleged any facts that could establish that the activities of which they seek to complain are on "Federal or tribal lands". For the reasons set out above, Plaintiffs' purported civil rights (42 U.S.C. § 1983) claims also fail on both primary jurisdiction/exhaustion grounds (Plaintiffs have not been recognized by DOI as a tribe) and as a matter of law (even if Plaintiffs were or became a recognized tribe, they could not present what are in essence treaty claims in the guise of a private civil rights claim under § 1983). *Skokomish Indian Tribe v. U.S.* 401 F.3d 979, 987 (9th Cir. 2005), *supra.*

A federal court cannot exercise supplemental or pendent jurisdiction over CEQA or other state claims when the federal claims that give the court original jurisdiction are frivolous or entirely implausible, as they are here. *See Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1994) (supplemental jurisdiction does not attach where federal claims are "absolutely devoid of merit or obviously frivolous"); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Cf. Satey v. JPMorgan Chase & Co.*, 521 F.3d 1087, 1091 (9th Cir. 2008).

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3. Plaintiffs' CEQA and Other State Law Claims Are Not "So Related" to the Federal Claims as to Establish Jurisdiction

This Court also lacks subject matter jurisdiction because Plaintiffs' purported federal claims are unrelated to their state claims. *See* 28 U.S.C. § 1367(a). Plaintiffs' federal claims attempt to set out an aboriginal land claim against Tejon based on federal law and treaty (first cause of action), a NAGPRA claim that presumes -- contrary to the admitted fact -- that Plaintiffs have a viable claim that activities are occurring on "Federal or tribal lands" (second cause of action), and that Plaintiffs have been deprived of "property" (land) without due process (third cause of action). There is no sufficient factual or legal connection between Plaintiffs' three defective federal claims (which relate to stale federal land title claims by an unrecognized Indian tribe) and the remaining state law claims concerning the County's October, 2009 approval of the TMV Project and the Project EIR. *See United Mine Workers of America v. Gibbs*, 383 U.S. at 725. Thus, Plaintiffs' state law claims are insufficiently related to the federal and constitutional claims to establish subject matter jurisdiction under 28 U.S.C. § 1367(a).

4. The Court Should Decline To Exercise Supplemental Jurisdiction Here

Alternatively, if the Court were to find the state law claims somehow satisfy the requirements set out in the Court's February 7, 2011 Order (Dkt. No. 123), and are "so related" to the federal causes of action as to establish supplement jurisdiction under 28 U.S.C. § 1367(a), the Court may (and should) decline to exercise supplemental jurisdiction for each or any of the following four reasons:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling factors for declining jurisdiction.

28 U.S.C. § 1367(c).

The four reasons listed above provide overwhelming grounds for the Court to decline to exercise supplemental jurisdiction over Plaintiffs' CEQA and other state claims.[1] First, CEQA claims are considered complex, which is in part why each superior court assigns a CEQA judge under California law. *See* Cal. Pub. Res. Code § 21167.1 ("designation of judges to develop expertise"); *Stockton Citizens for Sensible Planning v. City of Stockton* 48 Cal.4th 481, 500 (2010). *See* 28 U.S.C. § 1367(c)(1). Second, the CEQA claims, which directly relate to the approval of the TMV Project under complex California environmental laws and regulations, predominate over the alleged stale federal land and treaty claims intimated by Plaintiffs. Finally, based on the discussion above, the Court should dismiss all federal question claims as none of the purported federal claims are related to the CEQA or other state law claims. Thus, this Court does not have original jurisdiction over the fourth cause of action against the County and should dismiss it without leave to amend. *See* 28 U.S.C. § 1367(c)(3) and *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989) (holding that after dismissal of federal claims, the preferable course of action is dismissal of any state law claims as well); *Wren v. Stetten Constr. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) (holding same).

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[1] The fourth cause of action in Plaintiffs' SAC relates to the California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000, *et seq.* ("CEQA") and state CEQA regulations. The heading for this cause of action also mentions Cal. Gov. Code § 65352.3, although this provision is not elsewhere discussed in the SAC. Gov. Code § 65352.3 pertains to a consultation process with "California Native American tribes that are on the contact list maintained by the Native American Heritage Commission." Plaintiffs allege in their SAC (at ¶ 99), on information and belief, that "Defendants failed to contact NAHC in 2005 and request such a list" but they fail to set out a viable cause of action based on this allegation. Moreover, it should be noted that in their First Amended Complaint (Dkt No. 71), Plaintiffs alleged (not on information and belief but as a matter of fact) that "*NAHC* violated Plaintiff Robinson's civil rights by not including him on the list of Native American Contacts for the Kern County . . . ." [Italics added.]

C. **By Demanding His Own Federal Court CEQA Trial, Robinson Seeks Unprecedented Relief That Would Nullify the Judment of a State Court, Thwart the Intent of the California Legislature in Enacting CEQA, and Unfairly Force the County to Defend its Compliance with CEQA Twice.**

The relief sought by Robinson in this case-- the exercise of federal jurisdiction over an already-adjudicated claim under CEQA -- is unprecedented, and with good reason. As the Court recognized in its February 7 Order (Dkt. No. 123, at p. 22 and n. 6), the cases previously presented by Plaintiffs in an effort to make their extraordinary claims appear to be normal are not apposite. *League To Save Lake Tahoe v. Tahoe Regional Planning Agency*, 2010 WL 3715658 (E.D. Cal. Case No. Civ. S-08-2828 LKK, decided September 16, 2010) did not arise under CEQA, but instead involved amendments to the Lake Tahoe Shoreline Plan administered by the Tahoe Regional Planning Agency (an interstate agency run by the States of Nevada and California). In evaluating the interstate agency's EIS, the parties (and Judge Karlton, in rendering his decision) referred to CEQA only by way of *analogy* in evaluating the interstate agency's EIS. The court was *not* (as Robinson asks this Court to do) passing judgment on the action of a California county in approving a project under CEQA without any interstate or federal involvement.

The other case previously cited by Robinson in an effort to justify the unprecedented relief sought here, *Communities for a Better Environment v. Cenco Refining Company*, 180 F.Supp.2d 1062 (C.D. Cal. 2001) ("*Cenco*"), also does not support his position because it involved compliance with a *federal* environmental statute (the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*) in connection with the reactivation of a refinery. Judge Matz in that case found that Clean Air Act emissions permit issues were sufficiently intertwined with CEQA issues relating to the refinery to support supplemental jurisdiction. By contrast, plaintiff Robinson here has identified, and can identify, no applicable federal

environmental statute or scheme that was implicated in the County's approval of the TMV Project under CEQA.

The question of the County's compliance with CEQA has been fully litigated and decided, while plaintiff Robinson stood by, in the Kern County Superior Court. Judgment has been entered in favor of the County and TMV after they undertook the expense of preparing the administrative record in order to expedite the judgment, and an appeal is now pending before the Fifth District of the California Court of Appeal. (*See* Exhibits A, B and C to the County's accompanying Request for Judicial Notice). If plaintiff Robinson were permitted (as he now requests) to have a trial *de novo* on this issue, the effect would be essentially to nullify the effect of Kern County Superior Court's judgment upholding the County's approval of the TMV Project and to inject the very uncertainty and interminable delay that the California Legislature sought to eliminate when it enacted CEQA. *See Board of Supervisors v. Superior Court*, 23 Cal.App. 4th 830, 837 (1994). It is difficult to overstate how extraordinarily inappropriate it would be to conduct a second CEQA trial after the state court has entered judgment, but it is fair to say that it is unheard-of and would be tantamount to having this Court act as a reviewer of the Kern County Superior Court's previously-issued judgment under CEQA.[2]

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[2] While Robinson elected not to be a party to the CEQA case in the Kern County Superior Court, the result he seeks is otherwise the same as that condemned under the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923); *Feldman v. Hickey*, 460 U.S. 462 (1983). The County recognizes that the Supreme Court has narrowed this doctrine (*see, e.g., Lance v. Dennis* 546 U.S. 459 (2006)), but the fact remains that the relief sought by plaintiff Robinson would be indistinguishable in its effect from a *de novo* review of the Kern County Superior Court's CEQA judgment by this Court.

III. CONCLUSION

The County of Kern joins in the motions to dismiss of TMV, TRC and DOI and respectfully submits that the only appropriate disposition of this matter is a dismissal of all of Plaintiffs' claims without leave to amend and a termination of this action.

May 5, 2011

Respectfully submitted,

THERESA A. GOLDNER, COUNTY COUNSEL

By /s/ Charles F. Collins
Charles F. Collins, Deputy

Attorneys for Defendant
COUNTY OF KERN