No. 04-36167

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GROS VENTRE TRIBE, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana

APPELLEES' OPPOSITION TO THE TRIBES' PETITION FOR REHEARING *EN BANC*

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STATEMENT

On December 28, 2006, appellants Gros Ventre Tribe *et al.* (collectively "the Tribes") filed a petition for rehearing and rehearing *en banc* of a published opinion issued on November 13, 2006. *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006). On January 8, 2007, the Court directed appellees United States *et al.* to file a response setting forth their position on whether this case should be reheard *en banc*. For the reasons outlined below, rehearing *en banc* is not warranted in this case because the standards for *en banc* rehearing prescribed in Federal Rule of Appellate Procedure 35 are not satisfied.

A. The Zortman and Landusky mines. From 1979 until declaring bankruptcy and ceasing operations in 1998, Pegasus Gold Corporation (Pegasus) and its wholly owned subsidiary Zortman Mining, Inc. (ZMI) operated the Zortman and Landusky mines in the Little Rocky Mountains of north-central Montana. The mines are located on a combination of public lands managed by the Bureau of Land Management (BLM) and private lands.[1/] The mines are not located within the Fort Belknap Indian Reservation or on any Tribal lands. The

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[1/] Mining on private lands is regulated by the State of Montana.

mines are situated near the southern boundary of the Reservation. S.E.R. 61, 66.[2/]

B. Development of reclamation plans for the mines.

1. Acid rock drainage. In 1992, ZMI submitted proposed plans for a major expansion of the Zortman mine. In the course of reviewing that expansion proposal, BLM and the Montana Department of State Lands (DSL) determined that acid rock drainage (ARD) had become a widespread occurrence at both the Zortman and Landusky mines.[3/] In light of the ARD problem, ZMI submitted proposed modifications to its existing reclamation plans. *Id.* BLM and DSL decided in March 1994 to analyze the reclamation plan modifications for both mines in a single environmental impact statement (EIS). S.E.R. 62.

2. Administrative proceedings and closure of the mines. In October 1996, after completing a final EIS, BLM and the Montana Department of Environmental Quality (DEQ), a successor agency to DSL, issued a record of decision (ROD). S.E.R. 61 n.1, 63. The 1996 ROD approved additional mining operations at both mines, and required the implementation of reclamation plans,

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[2/] "S.E.R." refers to the United States' supplemental excerpts of record. "E.R." refers to the Tribes' excerpts of record.

[3/] ARD is produced when rock containing sulfides is exposed to air and water during mining operations. Water traveling through the rock becomes acidic, and sometimes contains metals such as lead, arsenic, zinc, copper, and silver at greater than background levels. *See* E.R. 45.

including specific measures to control the development of ARD. *Id.* at 63, 82-99, 100, 101-102. In late 1996, the Tribes (and other groups) appealed BLM's decision to the Interior Board of Land Appeals (IBLA). *Id.* at 63; *see Island Mountain Protectors*, 144 I.B.L.A. 168 (1998). IBLA stayed the mine expansion approvals pending disposition of the administrative appeal. S.E.R. 63.

In January 1998, while the Tribes' administrative appeal was pending before IBLA, ZMI and Pegasus declared bankruptcy. S.E.R. 63. In March 1998, the companies announced that they would not proceed with the approved mine expansion plans and instead would close and reclaim the mines. *Id.*; *Island Mountain Protectors*, 144 I.B.L.A. at 170. In light of these developments, BLM issued a second ROD in June 1998, which selected a mine closure/final reclamation alternative from the 1996 final EIS for implementation. S.E.R. 63, 80.

Simultaneous with BLM's issuance of the 1998 ROD, IBLA issued a decision on the Tribes' challenge to the 1996 ROD. S.E.R. 64. IBLA concluded, *inter alia*, that in approving the 1996 ROD, "BLM did not fully observe its trust responsibility to the Tribes." *Island Mountain Protectors*, 144 I.B.L.A. at 203. The case was remanded to BLM. *Id.*[4]

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[4] In November 1998, IBLA issued an order setting aside the 1998 ROD. IBLA directed that, before selecting a final reclamation alternative, "BLM must

(continued...)

3. 2001 supplemental final EIS and 2002 reclamation ROD. After consultation with the Tribes, BLM and DEQ prepared a supplemental reclamation EIS (SEIS), which was completed in December 2001. S.E.R. 64, 65-70; *see* 40 C.F.R. § 1502.9(c)(1)(i). Based on the final SEIS, BLM and DEQ thereafter issued a reclamation ROD in May 2002. The reclamation alternative selected for each mine was chosen in part because it "place[s] only the relatively non acid-generating waste rock as backfill in the mine pits, and leave[s] the most strongly acid-generating waste rock on the lined leach pads where any leachate will be easier to control and treat." S.E.R. 60.[5/]

C. Proceedings in the district court

1. The Tribes' complaint. On April 12, 2000, the Tribes filed a complaint in the United States District Court for the District of Montana seeking declaratory, injunctive, and mandamus relief against the United States, BLM, and other federal agencies. S.E.R. 1-13. The Tribes asserted a claim alleging that BLM's approval of operations at the Zortman and Landusky mines and failure fully to reclaim them

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[4/](...continued)
separately analyze, and consult with the Tribes about, potential effects on Tribal water resources and report its actions in its decision." S.E.R. 64, 76-77.

[5/] The Tribes appealed the 2001 final reclamation SEIS and 2002 reclamation ROD to the IBLA. While the instant appeal was pending before this Court, IBLA dismissed the Tribes' administrative appeal as moot.

has negatively impacted the quantity and quality of water available to the Tribes, in violation of the United States' trust obligation to the Tribes. *Id.* at 10 (Complaint ¶¶ 57-58). The Tribes did *not* challenge the 2001 final reclamation EIS and 2002 reclamation ROD in their federal court suit.

2. The district court's decisions. In an initial decision issued on June 28, 2004, the district court granted summary judgment in favor of BLM. E.R. 168-180. Acting on the Tribes' motion to amend judgment, the court issued a second opinion on October 22, 2004, clarifying that summary judgment in favor of the United States was warranted because the court lacked subject matter jurisdiction over the Tribes' claims. E.R. 202-17 (reported at *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221 (D. Mont. 2004)).

In its October 22 decision, the district court ruled that its jurisdiction over the Tribes' breach of trust claim "must rest upon the challenged action being a 'final agency action'" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 704. 344 F. Supp. 2d at 1225.[9] Applying the final agency

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[9] The court explained (344 F. Supp. 2d at 1226 (second and third alterations in original)):

> [B]ecause the APA waives the government's sovereign immunity, the APA establishes the necessary prerequisites to the court's jurisdiction. "[T]he terms of [the government's] consent to be sued in

(continued...)

action requirement to the Tribes' breach of trust claim, the court found that the only such contested action falling within the six-year statute of limitations in 28 U.S.C. § 2401(a) was the vacated 1996 ROD, which the Tribes lacked standing to challenge because that decision was never implemented and the Tribes therefore lacked any injury flowing from it. *Id.* at 1229; *see also id.* at 1230.

In an alternative holding, the district court ruled that the Tribes' breach of trust claim could not proceed because the Tribes could not state a cognizable claim that the government had failed to satisfy any statutory obligation. 344 F. Supp. 2d at 1226-28. In reaching that alternative holding, the court applied the principle that "[i]n the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes." *Id.* at 1226 (citing *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 574 (9th Cir. 1998)).

The court noted that "[t]he only statute under which the Tribes challenge the BLM here" is the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, a claim "brought under APA § 706(1) [5 U.S.C.

[6/](...continued)

> any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Judicial review under § 702 is expressly conditioned, under § 704, on the existence of a "final" agency action.

§ 706(1)] for failure to act to prevent undue degradation of tribal lands." 344 F.3d at 1227. Applying *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), the court concluded that the Tribes' failure to act claim was not cognizable. 344 F.3d at 1227-28. The court thus concluded that the Tribes did not have a breach of trust claim against the United States. *See id.*

D. The panel's decision. The panel affirmed the district court. The panel concluded:

> Nothing within any of the statutes or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes. Because the Tribes do not have a common law claim for breach of trust – *i.e.*, one that can be raised independently of any applicable statutes or regulations – the Tribes are forced to rely on the APA for a private right of action. In applying the APA to the Tribes' claims, the district court properly concluded that the Tribes did not have standing to challenge the vacated 1996 EIS or ROD. Moreover, the Tribes did not have a cognizable failure to act claim because the Tribes could not assert that the government has failed to take a discrete agency action that it is legally required to take. Therefore, the district court correctly dismissed the Tribes' claims for lack of jurisdiction.

Slip op. 18492.

In so concluding, the panel found that "there is a conflict in our caselaw" on the issue of whether the APA's waiver of sovereign immunity in 5 U.S.C. § 702 for non-monetary actions against the government is conditioned upon the party's challenging a "final agency action" as set forth in 5 U.S.C. § 704. Slip op. 18479.

See id. at 18480-82 (discussing *Gallo Cattle Co. v. U.S. Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998), and *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989)). However, the panel determined that "we need not make a sua sponte en banc call to resolve this conflict because * * * the Tribes do not have a common law cause of action for breach of trust." *Id.* at 18482.

The panel explained (as had the district court) that, under prevailing Ninth Circuit case law, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Slip. op. 18483 (quoting *Morongo Band*, 161 F.3d at 574) (alterations by panel)). After carefully reviewing several treaties cited by the Tribes, the panel concluded that "nowhere do we find the government 'unambiguously agreeing' to manage off-Reservation resources for the benefit of the Tribes." *Id.* at 18487 (quoting *United States v. Mitchell*, 445 U.S. 535, 542 (1980)).

Having concluded that the Tribes cannot allege "an independent common law cause of action for breach of trust," the panel considered the Tribes' statutory failure to act claim. Slip op. 18489. Applying *SUWA*, the panel explained that a

failure to act claim under the APA, 5 U.S.C. § 706(1), can proceed "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 18490 (quoting *SUWA*, 542 U.S. at 64). "Even assuming that the government has a common law trust obligation that can be tied to its statutorily mandated duties under FLPMA," the panel concluded that "the Tribes have no basis for arguing that these obligations require the government to take discrete nondiscretionary actions." *Id.*

ARGUMENT

FURTHER REVIEW OF THE PANEL'S DECISION IS NOT WARRANTED

The Tribes contend that further review of the panel's decision is necessary for three reasons: (1) to resolve the intra-circuit conflict noted by the panel between this Court's decisions in *Gallo Cattle Co.* and *Presbyterian Church*; (2) to review the panel's interpretation of the treaties relied upon by the Tribes for their breach of trust claim; and (3) to revisit the validity of the principle exemplified by *Morongo Band* concerning the scope of the government's general trust obligation toward Indian tribes. Pet. 2-18. We demonstrate below that none of these grounds justifies *en banc* review here.

A. The panel correctly ruled that the intra-circuit conflict it identified need not be resolved in this case. The Tribes are incorrect in maintaining that the intra-circuit conflict noted by the panel between *Gallo Cattle Co.* and *Presbyterian Church* must be resolved in this case. Pet. 2-7. As the panel correctly explained, there is no need in this case to resolve any tension that may exist between those decisions on the question of whether the waiver of sovereign immunity in the APA, 5 U.S.C. § 702, is conditioned by the APA's "final agency action" requirement, 5 U.S.C. § 704. That is so because resolution of that issue is not necessary to the proper disposition of this case.

Although the district court answered that sovereign immunity question in the affirmative (*see supra*, pp. 5-6 & n.6), its ruling was only an alternative basis for its entry of judgment in favor of the United States. In other words, even assuming that § 702's waiver of sovereign immunity is not subject to § 704's final agency action requirement, the Tribes' breach of trust claim still could not proceed because, as the district court and the panel correctly concluded, the Tribes are unable to state a cognizable claim within the framework of *Morongo Band.*

In these circumstances, the panel properly concluded that *en banc* resolution of any conflict between *Gallo Cattle Co.* and *Presbyterian Church* is unnecessary in this case because "the Tribes do not have a common law cause of action for

breach of trust." Slip op. 18482. *Cf. United States v. Torres-Hernandez*, 447 F.3d 699, 704 (9th Cir.) (declining to make a sua sponte *en banc* call to address an intra-circuit conflict when the panel could affirm under either of two different standards), *cert. denied*, 127 S. Ct. 699 (2006). *En banc* resolution of any intra-circuit conflict as to the scope of the waiver of sovereign immunity in § 702, if necessary, should await a case in which resolution of that issue actually affects the outcome.[7]

Contrary to the Tribes' contention, the panel's "inability to resolve the [intra-circuit] conflict" did not "prejudice[ ] the outcome of the case to the Tribes' detriment." Pet. 5. Although the Tribes argue (*id.*) that they would have been entitled to a remand for proceedings on the merits of their common law and statutory claims if the panel had reversed the district court's ruling on the sovereign immunity issue, that argument is based on a misinterpretation of the panel's decision. As discussed above, the panel in effect recognized that, even if the sovereign immunity issue were resolved in the Tribes' favor, the Tribes still

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[7] The Tribes are mistaken in asserting that "[o]n appeal, the panel affirmed the district court on the basis that the lower court's holding turned on the sovereign immunity issue." Pet. 5. To the contrary, as explained in the text above, the panel found it unnecessary to address any intra-circuit conflict on the sovereign immunity issue because it could resolve this case on an alternative ground, *i.e.*, on the ground that the Tribes do not have a cognizable claim for breach of trust within the framework of *Morongo Band*.

could not state a cognizable breach of trust claim within the framework of *Morongo Band*. Concerning statutory claims, the panel correctly held (and the Tribes do not contest) that, even if the sovereign immunity issue were resolved in the Tribes' favor, the Tribes cannot state a failure to act claim under FLPMA within the framework of 5 U.S.C. § 706(1) and the Supreme Court's decision in *SUWA*. *See* slip op. 18489-90. In short, the Tribes were in no way "prejudiced" (Pet. 5) by the panel's decision not to call for hearing *en banc* to resolve any intra-circuit conflict on the sovereign immunity issue.

B. The panel's interpretation of the treaties relied on by the Tribes in support of their breach of trust claim does not raise an issue warranting rehearing *en banc*. The Tribes are incorrect in contending that *en banc* rehearing is necessary in this case to review the panel's interpretation of the treaties relied upon by the Tribes for their breach of trust claim. Pet. 7-13. After carefully reviewing several treaties cited by the Tribes,[8] the panel concluded that "nowhere do we find the government 'unambiguously agreeing' to manage off-Reservation resources for the benefit of the Tribes." Slip op. 18487 (quoting *United States v. Mitchell*, 445 U.S. 535, 542 (1980)). The Tribes have not demonstrated that those

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[8] These are: the Treaty of Ft. Laramie, 11 Stat. 749 (Sept. 17, 1851); the Treaty with the Blackfeet, 11 Stat. 657 (Oct. 17, 1855); an Act of May 1, 1888, 25 Stat. 113; and the Grinnell Agreement, 29 Stat. 350 (1895). *See* slip op. 18472–74.

treaties have been given a contrary interpretation by the Supreme Court, this Court, or another court of appeals. Review of that issue *en banc* is therefore not warranted. *See* Fed. R. App. P. 35(b)(1)(A), (B).

Nor, contrary to the Tribes' contention, does the panel's ruling on that issue otherwise raise a question of exceptional importance. Rather, this case ultimately turns on the interpretation of particular treaties and whether or not they create an enforceable duty on the part of the United States to protect the Tribes from activities of private persons occurring on non-tribal land. The panel took a careful look at the treaties cited by the Tribes and concluded that nothing therein "gives any indication that Congress intended to impose such a [fiduciary] duty on the government." Slip op. 18488. The Tribes have advanced no sound reason for disturbing that case-specific conclusion.

The Tribes' only specific criticism of the panel's conclusion is that the panel gave an unduly narrow reading to a provision in the Treaty with the Blackfeet, 11 Stat. 657 (Oct. 17, 1855), that the United States would "protect said Indians against depredations * * * which white men residing in or passing through their country may commit." Pet. 9-10; *see* slip op. 18473. The panel concluded that "[t]his provision obligates the government to protect only against those depredations that occur on Indian land." Slip op. 18488. Although the Tribes

argue that the panel should have consulted such sources as the history of the treaty and should have resolved ambiguities in the Tribes' favor, Pet. 10 (citing *Choctaw v. United States*, 318 U.S. 423 (1943), and *Winters v. United States*, 207 U.S. 564 (1908)), the Tribes do not offer any explanation how resort to such interpretive principles would have compelled a different conclusion from that reached by the panel.[9/]

Nor, contrary to the Tribes' assertion, is the panel's treaty interpretation inconsistent with other Ninth Circuit decisions. Pet. 10-11. In *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), the Court emphasized that Indian fishing rights, whether they arise from treaty, statute, or executive order, are to be treated the same under the Magnuson Act. No such issue is presented here. In *White Mountain Apache Tribe v. Hodel,* 784 F.2d 921, 925 (9th Cir. 1986), the Court noted that the federal government's dual role as trustee for Indians as well as representative of other federal water interests does not disable it from making water claims for Indians. Again, this case does not involve such an issue.[10/]

[9/] "The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 506 (1986).

[10/] The Tribes also cite a decision of the United States Court of Claims. Pet. 11 (continued...)

The Tribes are also mistaken in contending that, even under the panel's treaty interpretation, they have stated a valid breach of trust claim because it is "undisputed" that depredations to tribal resources have occurred *on* the reservation. Pet. 12-13. For that contention, the Tribes rely on a statement by the district court, in its initial June 2004 decision, that it is "undisputed" that "the Zortman-Landusky mines * * * will have effects on the surrounding area, *including the Fort Belknap Reservation*, for generations." E.R. 179 (emphasis added). The district court's statement, however, is dictum and, moreover, it is incorrect: there is considerable dispute as to whether the mines have caused adverse effects on the reservation and, if so, whether that effect is attributable to the United States.[11/]

[10/](...continued)
(citing *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852 (Cl. Ct. 1982) (per curiam)). That case, however, addressed a claim for monetary relief under section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a. 684 F.2d at 853-54; *see id.* at 861. The Tribes have not pursued such a claim here.

[11/] Briefly, BLM maintains, *inter alia*, that: (1) the quality of water upstream from the reservation meets applicable standards at the reservation boundary (*cf.* Pet. 2, 12 n.5); (2) the Tribes have not shown that the quantity of water flowing onto the reservation from the Little Rocky Mountains is insufficient to meet their needs; and (3) Spirit Mountain (also known as Gold Bug Butte), located on private land, was unavailable for traditional cultural practices and was covered by a dense grid of exploration roads and prospect pits that existed prior to the permitting of the
(continued...)

C. There is no warrant for *en banc* review of this Court's ruling in *Morongo Band*. The Tribes are incorrect in contending that *en banc* review is necessary to clear up "extensive confusion" in this Court's case law "on the important question of the nature and scope of the government's general trust obligation to Native American tribes." Pet. 14. There is no confusion; rather, that question is clearly answered by *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 574 (9th Cir. 1998), where this Court ruled:

> [A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

The Tribes have presented no good reason for reconsidering the ruling of *Morongo Band* and earlier similar cases.

Contrary to the Tribes' contention, *Morongo Band* is not in conflict with *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980), or *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. 2005). Pet. 16. In *Rincon Band*, the Court concluded that a federal agency had breached a statutory responsibility to the plaintiffs. The Court therefore did not reach the issue of

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[11/](...continued)
the Landusky mine by Montana in 1979 (*cf.* Pet. 12 n.5).

whether the agency had breached a trust duty. 618 F.2d at 570. The Court expressly "d[id] not reach the trust question and therefore ma[d]e no determinations with respect to duties which the government may have as a result of the general trust relationship that exists between the United States and the Indians." *Id.* at 575 n.8. In *Hoopa Valley*, the Court concluded that a federal program to improve a fishery "honors the trust obligation *recognized in*" a specific statute. 415 F.3d 993 (emphasis added). Although *Hoopa Valley* did not refer to *Morongo Band*, its holding is therefore entirely consistent with the rule of that case.[12/]

Finally, the Tribes have cited no decisions of the Supreme Court or of another court of appeals to support their broad general trust theory. Rather, the Tribes rely on a law review article. Pet. 18 (citing Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994)). Relying on that article, the Tribes argue that cases such as *Morongo Band* have "led to the illogical result that, despite

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[12/] The Tribes suggest, incorrectly, that *Morongo Band* is inconsistent with *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). Pet. 16-17 n.6. That case did not address the validity of the *Morongo Band* rule. Rather, the Supreme Court concluded that a particular federal statute "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and potentially liable in damages for breach." 537 U.S. at 474. The Tribes have not pursued such a claim here.

acknowledging a general trust obligation, the federal government owes no greater obligation to tribes than to any citizen." Pet. 18. That argument is unpersuasive. The panel noted that the government may be "required to take special consideration of tribal interests" in the course of "complying with applicable statutes and regulations." Slip op. 18484 n.10. The panel expressly left that question open here. *Id.*

CONCLUSION

For the foregoing reasons, the Tribes' petition for rehearing *en banc* should be denied.

Respectfully submitted.

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90-2-4-09940

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 40-1(a)

I certify that, pursuant to Ninth Circuit Rule 40-1(a), the foregoing Appellees' Opposition to the Tribes' Petition for Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points, and contains 4,195 words (as counted by WordPerfect 12).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Appellees' Opposition to the Tribes' Petition for Rehearing *En Banc* were served this 9th day of February 2007 by first-class U.S. mail, postage prepaid, upon counsel listed below:

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