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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SAVE THE VALLEY, LLC, a California Limited Liability Company,

Plaintiff,

vs.

THE SANTA YNEZ BAND OF CHUMASH INDIANS, an Indian Tribe, VINCENT ARMENTA, Tribal Chairman for the Santa Ynez Band of Mission Indians; GARY PACE, KENNETH KAHN, RICHARD GOMEZ, and DAVID DOMINGUEZ as Business Committee Members for the Santa Ynez Band of Mission Indians,

Defendants.

Case No.: 2:15-cv-02463-RGK-MAN

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 22, 2015
Time: 9:00 a.m.
Dept.: 850

The Honorable R. Gary Klausner

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case goes to the heart of the legal status of 75 acres on which Defendants are now expanding and erecting structures in which they operate a gambling Casino/Resort in the rural Santa Ynez Valley.

Defendants' conclusion and explanation that the land was taken into trust in 1906 is false. Proof positive of the falsity is a March 28, 1934 correspondence attached to this opposition. In that correspondence, agents of the Bureau of Indian Affairs in Riverside, California wrote to the Indian Office in Washington, D.C. concerning the land at issue in this case. Mr. John W. Dady, Superintendent of the Mission Indians Agency wrote:

> Title to land of Santa Ynez Reservation is neither in the United States [or] the Indians who have right of occupancy only from the Catholic Church. Stop. Indians there requesting ECW work. Stop. See Section two of Circular five. Stop. Can Office approve ECW program this reservation. Wire reply. Dady. (Declaration of Matthew M. Clarke ("Clarke Decl."), para. 3, Exhibit A.)

Additional and similar evidence is discussed below.

Moreover, Defendants also ignore that the 75 acres of land was painstakingly and deliberately encumbered by the Superior Court. That encumbrance is embodied a Superior Court judgment dated 1906. The judgment states that no member of the Indian tribe is to ever have any right or interest in the property. Even the Indians' use of the property was curtailed by the judgment. The Indians were (and are) prohibited from using the property for anything other than "domestic use." This Judgment is the key to understanding why the land was never established as a Federal Indian reservation or taken into trust for the Santa Ynez Band of Mission Indians by the Federal Government.

With respect to Defendants' claims of tribal sovereign immunity, the recent case of *Michigan v. Bay Mills Indian Community* (2014) 134 S. Ct. 2024 confirmed that Save the Valley may sue the individual defendants for illegal conduct occurring

off-reservation. For this reason and all the other reasons discussed below, the Court should deny the motion to dismiss.

II. STATEMENT OF FACTS

A. The Property is Encumbered by the 1906 Judgment such that Defendants Have no Right, Title or Interest and May only Use It for "Domestic Use"

The history of the 75 acre property on which the Defendants are expanding their casino resort is critical to this case. On January 18, 1897, the Catholic Church filed a lawsuit to quiet title to its real property. The Defendants were Santa Ynez Area Indians who were recent converts to the Catholic faith, and the Catholic Church had allowed these Indians to use certain portions of the land for "domestic use" and for the "[w]atering of stock and for purposes of irrigation of said parcel or tract of land but for no other purposes." (Clarke Decl., ¶ 4; Ex. B.)

The Catholic Church sought to quiet title and impose those restrictions on the land which the "Santa Ynez" Indians, who were using the real property, for specific purposes. The real property involved in the quiet title action brought by the Catholic Church is the exact location of the Defendants' proposed project.

The Catholic Church prevailed in all respects. The Santa Barbara Superior Court entered judgment for the Catholic Church and against the United States of America and the Santa Ynez Indians on March 31, 1906. (Ex. B, p. 18.) The judgment was recorded in the Santa Barbara County Recorders Offices, quieting title to that approximately 75 acre parcel of land (the project).

Central to the status of the 75 acre property is a 1906 Judgment. Defendants acknowledge the Judgment, but ignore its substance and effect. The Judgment includes metes and bounds which describe the 75 acre parcel where the Defendants are expanding their casino operation. The Judgment states in the last full paragraph:

> And it is hereby further adjudged that except as aforesaid neither said band or village or Mission Indians know as Santa Ynez Indians nor any present

> or future member thereof nor any of the said defendants . . . [individual Indian names omitted] and Lucius A. Wright as Agent of the United States for the Indians of the Mission Tule River Agency in California, has or have any estate, right title or interest whatsoever in or to said two parcel of land last above described or either of them or any part thereof or of either of them or in or to the waters of said Zanja de Cota or Cota Creek or any part thereof and that said band or village of Mission Indians known as Santa Ynez Indians and all the present or future members thereof and said defendants and all and every of them be and are hereby are further enjoined, restrained and debarred from making or asserting in any way any claim whatsoever to said plaintiff in or to said two last above described parcels of land or either of them or in or to any part thereof or of either of them or to or in the waters of said Zanja de Cota or Cota Creek or to or in any part thereof.

This paragraph leaves no doubt that the Defendants are prohibited from claiming or owning any right, title or interest in the real property at issue in this case – not in the past, not in the present, and not in the future. Defendants do not contend, nor is there any factual or legal reason why the Judgment is now invalid.

The judgment allowed the Santa Ynez Indians and their successors to remain on the 75 acre parcel as occupants only. However, the judgment restricted their use of the real property and imposed on the Indians the obligation to use the land only for "domestic use" and for the "[w]atering of stock and for purposes of irrigation of said parcel or tract of land but for no other purposes." (Ex. B, p. 9.) In particular, Defendants' predecessors were permitted to reside and occupy that approximately 75 acre parcel of land, but Defendants and their predecessors had only a right of occupation and use for farming and residential use. Additional covenants, conditions, and restrictions set out in the 1906 judgment were recorded in 1906 in order to run with the land. (*See* Ex. B.)

These additional restrictions directly impacted, adjudicated, and decreed that the United States, the Santa Ynez Indians, and any descendant who might occupy the real property in the future, were forever barred and enjoined from claiming any right, title and interest in that land beyond the right of occupancy and for residential uses. The United States is bound by the judgment because it was a party to that lawsuit through Lucias Wright. Mr. Wright was the Indian agent for the United States for the Indians of the Mission Tule River Agency in California, in which this parcel of land

was located. The United States of America by Mr. Wright submitted to the jurisdiction of the Santa Barbara County Superior Court and was bound by all the covenants, terms, conditions and restrictions placed on the land, including those which were to run with the land and be binding upon any and all assigns and successors in interest of the owners holding legal title to the land in the future.

That judgment was not appealed nor was it later modified in any way. It is still legally enforceable today. Unfortunately, the Defendants have decided to disregard their obligations under the judgment and the covenants running with the real property. In particular, the project on the real property is a violation because it is not even remotely a domestic nor residential use, but rather a purely commercial endeavor.

B. The Quit Claim Deeds Attempted to Transfer Encumbered Property to the United States

On December 23, 1938, a quit claim deed was recorded whereby the Catholic Church attempted to transfer ownership of the property after the 1906 judgment was entered. (Clarke Decl., ¶ 5; Ex. C.) However, the same restrictions on the use of the land were contained in the quit claim deed, including "domestic use" and for the "[w]atering of stock and for purposes of irrigation of on that certain tract of land . . . ." (Ex. C.) The exact same quit claim deed was recorded by Petroleum Securities (successors to the property in question) on the exact same day.

The quit claim deeds executed by the Catholic Church and successor Petroleum Securities on December 23, 1938, only released the transferors' "reversionary" rights – nothing else. (Clarke Decl., ¶ 5, 6; Exs. C, D.) Importantly, these quit claim deeds did not "undo" or reverse the terms of the 1906 Judgment. Nor do Defendants claim the restrictions contained in the Judgment were somehow released. The Defendants, their predecessors and successors, have only the (inalienable) right to occupy the land and use water for their "domestic use."

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C. The Property does not Appear on Official Government Maps as a Federal Indian Reservation

Defendants rather casually claim that as soon as the land was called an "Indian reservation," it must have become one. But official maps depicting Federal Indian reservations do not indicate the land is a Federal Indian reservation. For example, a current map posted on the nationalatlas.gov website entitled "Indian Lands and Department of Interior Lands" does not indicate any Indian or Department of Interior Lands in Santa Ynez. (Clarke Decl., ¶ 7; Ex. E.) It is logical to assume that if the 75 acres were actually an Indian Land Federal Reservation, it would appear on maps depicting so.[1]

The U.S. Department of the Interior's/U.S. Geological Survey map referenced above posted on nationalatlas.gov is not an anomaly. The map attached to Plaintiff's complaint as Exhibit B generated by the United States Bureau of Land Management similarly and consistently shows no Federal Indian Reservation or any Land under the jurisdiction of the Bureau of Indian Affairs in Santa Ynez.

D. Official Indian Affairs Documents Admit that no Federal Reservation was Created, even up to 1941

Not only do the maps fail to identify the land as a Federal Indian reservation, many other Indian Agency official documents also state the land is not a Federal Indian reservation or in Trust. For instance, a 1933 Annual Statistical Report by the Office of Indian Affairs indicates that, "**Indians have only right of occupancy in the 75.75 acres. Have no title. Land reverts to whites after Indian occupancy ceases**." (Clarke Decl., ¶ 8; Ex. F.)

Less than one year later, another document dated March 28, 1934, confirms the

[1] The map is also available online at http://nationalmap.gov/small_scale/printable/fedlands.html, scroll down to Map Name: "Department of the Interior Lands and Indian Lands".

land is not a Federal Reservation. Mr. John W. Dady, Superintendent of Mission Indians wrote:

> Title to land of Santa Ynez Reservation is neither in the United States [or] the Indians who have right of occupancy only from the Catholic Church. Stop. Indians there requesting ECW work. Stop. See Section two of Circular five. Stop. Can Office approve ECW program this reservation. Wire reply. Dady. (Ex. A.)

Mr. Dady was still trying to have the 75 acres transferred to the United States on November 7, 1941. He wrote to the Commissioner of Indian Affairs stating that, "respectfully resubmitted for consideration the title papers in the matter of the conveyance to the United States of America certain land and water rights for the perpetual use and occupancy of Santa Ynez Band of Mission Indians." **Mr. Dady's letter reveals that, contrary to the Defendants' assertions, the land at issue here was not transferred to the United States and was not taken into trust for the Defendants in 1906.** (Clarke Decl., ¶ 9; Ex. G.) It was based upon finding this and the other documents discussed above and below that the Plaintiff corrected its complaint to allege the property was not successfully transferred to the United States. These documents establish that no Federal Indian reservation was formed in the manner claimed by Defendants which is the key issue in this case.

III. ARGUMENT

A. Tribal Sovereign Immunity Does Not Shield Tribal Members and Officials from Lawsuits Based Upon Illegal Conduct Committed Off-Reservation

Tribal sovereign immunity does not protect an *individual member* of a tribe when he or she commits unlawful conduct off-reservation.[2] Plaintiff concedes that the

[2] Interestingly, a California Court of Appeal held on May 28, 2015, that tribal sovereign immunity did not protect tribal officials from a wrongful termination suit based on their illegal actions even *on the reservation*. (*Cosentino v. Fuller, et al.*, Case No. G050923; see http://www.courts.ca.gov/opinions/documents/G050923A.PDF.

tribe is immune from suit in general. The United States Supreme Court in *Michigan v. Bay Mills* noted that a State could sue tribal officials, but not the tribe itself, for engaging in illegal gambling off-reservation. "As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct." (*Bay Mills, supra*, 134 S. Ct. at 2035.)

Plaintiff concedes that tribal sovereign immunity applies to the Indian tribe generally, except for cases of *in rem* jurisdiction. *In rem* jurisdiction does not threaten the sovereignty of a nation but rather determines the status of real property only. Yet, Defendants challenge *Bay Mills* and claim that tribal sovereign immunity "extends beyond the collective tribal entity so as to protect tribal officials acting in their representative capacity and within the scope of their valid authority." (Motion at p. 6:21-23.) Defendants cite *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476, 479 and *Miller v. Wright* (9th Cir. 2013) 705 F.3d 919, 927-28.

The two cases on which Defendants rely are inapposite because they concern conduct that exclusively occurred on the reservation. Illegal conduct that occurs on the reservation is treated differently than the same illegal conduct that occurs off of the reservation.[3] The authorities Defendants cite support this. For example, in *Hardin*, a long-time resident of an Indian reservation was essentially evicted and forcibly removed by the tribe, its tribal council and members of the tribe. The plaintiff brought suit in the federal district court alleging wrongful exclusion from the

[3] Plaintiff explains below that the illegal conduct at issue here are Defendants' many misrepresentations concerning the project. Defendants got FAA approval based upon a 136 foot tall structure and promptly increased the height to 150 feet. Additionally, Defendants represented to all parties concerned with the project that the land was in Trust when it is not.

reservation. The *Hardin* Court noted:

> The Supreme Court has held that Indian tribes do not have inherent sovereign powers to try and to punish non-Indians for criminal acts. On the other hand, the Supreme Court has also acknowledged that Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations. Hardin's exclusion falls within the Tribe's civil powers. (*Hardin*, *supra,* 779 F.2d at 478 [internal citations omitted].)

The plaintiff in *Hardin* was a non-Indian who entered into the Indian's sovereign jurisdiction and brought suit when the Indians removed him from the reservation. The Court held, "Under the special circumstances of this case, where a nonmember entered the reservation under color of a lease in which the Tribe had specifically reserved its power of exclusion, and where Hardin had already been convicted under the laws of a separate sovereign, we conclude that the Tribe acted within its civil jurisdiction when it ordered Hardin's removal." (*Id.* at 479.) It stands to reason and logic that the tribe and its officials were protected from suit by tribal sovereign immunity. *Hardin* holds that tribal officers are immune from suit for acts they commit on reservation in the furtherance of their duties. It does not hold that tribal members or officials are immune from suit based on illegal conduct committed off-reservation.

In *Miller*, again, the facts concern activity which occurred on an Indian reservation. The Plaintiffs alleged that the Tribe and officials forced them to pay more for cigarettes by adding illegal charges. Their complaint sought an injunction, a declaratory judgment, damages, and a refund of fees paid as a result of the charges imposed by the Tribe. The Court held that, "The Tribe's sovereign immunity thus extends to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." (*Miller, supra,* 705 F.3d at 927.) While *Miller* and *Hardin* accurately state that a tribal official acting within the scope of their authority on an Indian reservation is immune from suit, the facts of our case are quite different.

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1. Defendants have Fraudulently Misrepresented the Height of the Casino Tower to the Federal Aviation Administration

Defendants have made significant fraudulent misrepresentations during the process of giving themselves approval to expand the casino. First, Defendants represented to the Federal Aviation Administration (the "FAA") that they would build a casino/hotel tower in close proximity to an airport runway. Defendants promised the FAA that the tower would not exceed 136 feet in height. The FAA confirmed the tribe could build a casino/hotel tower not taller than 136 feet. The FAA stated that any additional height would require a new determination of Hazard to Air Navigation. Defendants proudly inform the Court of the FAA's approval of their hotel tower. But the Defendants omit the fact that their 150 foot tower has never been approved by the FAA. After obtaining the FAA's approval to construct a 136 foot tower, the Defendants promptly and unilaterally decided to build a 150 foot tower. The Tribe's approval by the FAA is based upon a structure that is only 136 feet tall and no higher. (*See* Clarke Decl., ¶ 10; Ex. H ["Any height exceeding 136 feet above ground level (685 feet above mean sea level), will result in a substantial adverse effect and would warrant a Determination of Hazard to Air Navigation"].)

The "anomaly" in the height approved by the FAA and the actual height of the project was pointed out by lawyers Mullen & Henzell who wrote on behalf of the Santa Ynez Valley Airport Authority, Inc. (Clarke Decl., ¶ 11; Ex. I.) The Indians ignored this correspondence.

It also bears mentioning that the Tribe sought comments from the general public and received numerous comments from all levels of Government, private organizations and the public. Defendants motion to dismiss only references the commentary by the FAA. The Court can rest assured that the commentaries by the State of California, through its Attorney General, the County of Santa Barbara by its County Counsel and many others, are highly critical of the casino expansion project as clearly pointed out and displayed in Plaintiff's Complaint. The Indians' response to

the bulk of the commentary and criticism was in essence: "Thank you for your comments. We are not obligated to comply with those generally applicable laws because the land is in trust for the Tribe."

2. Defendants have Fraudulently Misrepresented that the Land is in Trust to Avoid Compliance with Generally Applicable Law

Defendants hired consultants to perform an environmental evaluation of impacts their project might have on land not part of the reservation, i.e., off-reservation impact. Defendants make it clear that they are not concerned with environmental evaluation on the 75 acres. In other words, Defendants wrongly assert and represent they are free to impact their 75 acres any way they see fit because the land is in Trust for the Tribe.

Defendants proclaim, "To the extent a comment regarding the EE relates to a potential environmental impact that occurs only on the Tribe's Reservation, that impact is not 'off-Reservation' and is therefore outside of the scope of the EE process. Comments beyond the scope of the EE process are noted but not addressed in this Final EE." (http://www.chumashee.com/wp-content/uploads/2014/09/Hotel-Expansion-Final-EE-September-2014.pdf [page 1-1].)

Further, in response to strong criticisms that their project did not comply with various generally applicable laws, the Defendants wrote, *inter alia*, "Comment noted. As stated in Section 3.7.1 of the EE, the Comprehensive Plan and Santa Ynez Valley Airport Land Use Plan do not apply to trust land." (*Id.* at pp. 3-32.) Throughout their environmental assessment, the Defendants apply their slogan, "comment noted, but it does not apply to trust land," ten separate times in response to criticisms that their project violates various federal, state and local laws.

Given that the 75 acre parcel is not held in Trust for the Tribe, Defendants' representations to the public are false. Defendants' refusal to acknowledge and respond to comments and criticism is based on their false claim that the land is held in trust by the federal government for the Indians.

B. Indians Are Subject To Generally Applicable Laws When They Are Off Reservation

It is tragic, but perhaps not surprising, that a construction worker has already fallen to his death in the last several weeks while working on the casino expansion project. The tribe argues that is it not required to comply with generally applicable laws on its claimed federal reservation, Santa Barbara County Land Use and Development Code Regulations. Very likely, these regulations may have prevented the aforementioned death.

But since the 75 acre parcel has never been legally converted into a Federal Indian reservation, Defendants are subject to the laws of California and Santa Barbara County. The law of tribal sovereign immunity treats Indians differently when they are not on a Federal Indian reservation. Unless federal law provides differently, "Indians going beyond reservation boundaries" are subject to any generally applicable state law. (*Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 113, 126 [quoting *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148].)

The Supreme Court meant what it said – when Indians are not on a Federal Indian reservation, the law treats them just like everybody else. Because Defendants casino expansion project is not on a Federal Indian reservation, Defendants must comply with generally applicable laws. These include zoning, safety, County regulations, Santa Barbara County Ordinance requiring that within one mile of an airport, population density is limited to twenty-five people per acre[4], Uniform Building Codes and many, many more important generally applicable laws. Routine building inspections by Santa Barbara Planning and Development Department would have occurred in a normal construction project of this magnitude may have exposed the dangerous conditions that lead to the worker's death.

[4] The Defendants intend to have an additional 250 employees and approximately 10,000 gamblers per day.

In *Puyallup Tribe, Inc. v. Department of Game of State of Wash.* (1977) 433 U.S. 165, the Court allowed a state to enforce its laws against individual tribe members:

> On the other hand, the successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction. That court had jurisdiction to decide questions relating to the allocation between the hatchery fish and the natural run, the size of the catch the tribal members may take in their nets . . . and like questions. Only the portions of the state-court order that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity. (*Id*. at 172-73.)

The gravamen of this case is that the real property on which Defendants are constructing a high rise hotel/casino expansion is not a Federal Indian reservation. Plaintiff has documentary support that the land was not transferred into a Federal Indian trust. The Supreme Court confirmed in *Bay Mills* that tribal sovereign immunity does not extend to individual tribe members who engage in illegal conduct away from an Indian reservation. In the *Bay Mills* case, the illegal conduct was off-reservation gambling. Here, the Defendants' fraudulent misrepresentations constitute the illegal conduct committed off-reservation.

In *Bay Mills*, even the United States of America, which created the BIA to protect the Indians, conceded that tribal members could be sued by Michigan for off-reservation illegal conduct. In its *amicus curiae* brief submitted to the Supreme Court on behalf of the Indians, the United States conceded:

> Courts below have not passed on that question, and this Court has not held (nor is it the position of the United States) that tribal sovereign immunity would bar an action for injunctive relief against the responsible individuals, including tribal officials [citations omitted] at least for conduct outside of Indian country.

Based on this, the individual Defendants in this suit are not protected by tribal sovereign immunity.

C. The 2012 Memo from the Department of the Interior Addressing whether It may Take Land into Trust for Defendants is not on Point

Defendants attach a 2012 memorandum from the Department of the Interior

analyzing whether certain case law prohibits the Bureau of Indian Affairs from taking land into trust for the Defendants. (Defendants' Exhibit 1.) Plaintiff does not contend that the BIA is prohibited from taking land into trust for the Defendants. In fact Plaintiff takes no position on that issue at all. Plaintiff's position is simply that the 75 acres at issue in this case has not been taken into trust for the Defendants. Thus, the analysis by the Department of the Interior does not bear on the issues the Court is now facing.

D. The Facts Concerning the Merits of the Case and the Facts Concerning Subject Matter Jurisdiction are Inextricably Intertwined such that a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) should be Denied

The case law establishes that when the facts underpinning subject matter jurisdiction and the facts concerning the merits of the case are inextricably intertwined, courts will typically deny a motion to dismiss under Fed. R. Civ. P. 12(b)(1). In those cases, courts require that the defendant proceed under Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56, and "the court should resolve the relevant factual disputes only after appropriate discovery." (*Kerns v. United States* (4th Cir. 2009) 585 F.3d 187, 193; *see In re Wilshire Courtyard* (9th Cir. 2013) 729 F.3d 1279, 1284, fn. 4.) "We first consider [plaintiff's] argument that the district court could not dismiss [plaintiff's] condemnation claim for lack of subject matter jurisdiction. As a general rule, when '[t]he question of jurisdiction and the merits of [the] action are intertwined,' dismissal for lack of subject matter jurisdiction is improper [citation omitted]." (*Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold and Easement in the Cloverly Subterranean, Geological Formation* (9th Cir. 2008) 524 F.3d 1090, 1094.)

Here, Plaintiff alleges that Defendants are constructing a casino and hotel expansion on land that has not been established as a Federal Indian reservation and engaged in fraudulent misrepresentations to Plaintiff, and all levels of government

leading up to construction. Subject matter jurisdiction depends on whether Defendants' conduct occurred on or off of a Federal Indian reservation. Pursuant to *Bay Mills*, individual tribe members may be sued for illegal conduct off of the reservation. The Court in *Bay Mills* specifically stated that, "A State therefore has many tools to enforce its law on state land that it does not possess in Indian territory, including, e.g., bringing a civil or criminal action against tribal officials rather than the tribe itself for conducting illegal gaming." (*Bay Mills, supra,* 134 S. Ct. at 2027.) Clearly, our Supreme Court contemplates that if the individual Defendants in this case have engaged in illegal conduct concerning land that is not part of a Federal Indian Reservation, those individual Defendants are not protected by tribal sovereign immunity.

If we assume that the land is held in fee either by the United States government or by the Catholic Church, or even by the Defendants, their construction project which does not comply with generally applicable laws is illegal. This critical factual issue is at the heart of the merits of this case. This factual issue also goes to the heart of Defendants' argument that tribal sovereign immunity deprives the Court of subject matter jurisdiction. The motion should be denied, discovery should be allowed to proceed and Defendants may later bring a motion pursuant to FRCP Rule 56.

Given the factual dispute about the status of this 75 acre parcel, the Court should allow discovery on this issue. The Court has discretion to allow jurisdictional discovery when there are legitimate factual disputes concerning jurisdiction. (*Boschetto v. Hansing* (9th Cir. 2008) 539 F.3d 1011, 1020; *In re MPF Holdings US LLC* (5th Cir. 2012) 701 F.3d 449, 457.) The discovery which is warranted concerns the status of the land. Plaintiff has done significant research on this issue which turned up correspondence from the 1930s and 1940s. Digging through archived materials is time consuming, but productive in this case which concerns dated documents. This correspondence Plaintiff has already discovery creates significant doubt that the 75 acres was ever accepted by the U.S. into a Federal Indian trust or

even accepted by the U.S. at all. However, more discovery is needed on this issue and the Court should allow Plaintiff time to do so.

E. The Court should Find that Tribal Sovereign Immunity does not Apply to this *In Rem* Action

Tribal sovereign immunity does not apply in this case because it is in the nature of an in rem proceeding. (*See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation* (1992) 502 U.S. 251, 268 [contrasting *in rem* jurisdiction over fee-patented land within reservation boundaries with *in personam* jurisdiction over nonmembers on the reservation]; *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township* (N.D. 2002) 643 N.W.2d 685 [tribal sovereign immunity did not apply to state's *in rem* condemnation action against non-reservation fee land held by the Tribe]; *Lyon v. State* (1955) 283 P.2d 1105 [a suit to quiet title is not a claim against sovereignty, but an attempt to retain what they allegedly own]; *Anderson & Middleton Lumber Co v. Quinault Indian Nation* (1996) 929 P.2d 379 [sovereign immunity did not bar the in rem action for partition and quiet title of fee patented land subsequently acquired by the Nation]; *Smale v. Noretep* (2007) 208 P.3d 1180, 1181 [sovereign immunity did not apply to adverse possession claim against property subsequently deeded to a tribe]; *Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot.* (Fl. Dist. Ct. App. 2011) 78 So.3d 31, 34.)

This Court should find that the reasoning in those decisions is persuasive and adopt that doctrine in this case. Additionally, if the Court agrees that this action is *in rem*, and also decides that the United States is a necessary and indispensable party, Plaintiff asks for leave of court to join the United States as a defendant. The *in rem* status of the litigation would also allow the Plaintiff to sue the United States because sovereignty is not challenged in an in rem proceeding.

F. The United States is not an Indispensable Party to this Suit and Dismissal is not Required

Defendants contend that the United States is both necessary and indispensable

party to this action such that dismissal is required since the United States cannot be joined as a party. Courts agree that the analysis under Fed. R. Civ. P. 19(a) requires evaluation of whether (1) complete relief is possible among the existing parties and (2) the absent party has a legally protected interest in the outcome of the litigation. In this case, the United States likely has a legally protected interest in the litigation because its Bureau of Indians Affairs is charged with protecting and improving the trust assets of American Indians, Indian tribes and Alaska Natives. (http://www.bia.gov/WhoWeAre/BIA/.) However, Plaintiff contends that complete relief is possible among the existing parties. That is because the Defendants already in this suit can adequately represent the interests of the United States. The Court in *Shermoen v. United States* (9th Cir. 1992) 982 F.2d 1312, 1318 discussed that if a legally protected interest exists, the court must further determine whether that interest will be impaired or impeded by the suit. Impairment may be minimized if the absent party is adequately represented in the suit.

Defendants' legal interest is to prove that the land is already in trust for their benefit. Plaintiff contends the opposite. Defendants have the same legal interest as the United States – to argue the land is already in trust and already a Federal Indian reservation. If the United States were actually brought into this action, it would assert the same factual and legal arguments on behalf of the Indians, not on its own behalf. The United States' interest stems from Congress which has mandated that the Bureau of Indian Affairs act as trustee for the Indians to fulfill the above-referenced responsibilities. But the existing Defendants have a focused and direct, rather than indirect, interest in the outcome of this litigation. This is analogous to the direct interest of a beneficiary in the *res* of trust and the secondary interest of a trustee who manages and protects the trust property for the beneficiary. Thus, the existing Defendants are the "real parties in interest" rather than the United States. The Court should not require Plaintiff to join a party to litigate an issue for the Defendants when the Defendants are capable, motivated and interested to litigate the issue themselves.

But even if the Court determines that the United States is a necessary party under Rule 19, the United States is not an indispensable party and dismissal is not required. First, since this is an *in rem* proceeding, the lawsuit concerns the real property and sovereign immunity is not a bar to bringing the United States into the suit. Thus, under the case law noted above, Plaintiff may sue the United States without implicating sovereign immunity.

Additionally, under the Rule 19(b) analysis, the Court should find that this action may proceed even if the United States is not made a party. To determine whether a party is indispensable, Rule 19(b) requires consideration four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Fed. R. Civ. P. 19(b).)

1. No Prejudice Will Result if the United States is not Brought into this Lawsuit

Plaintiff contends that if the United States is not brought into the lawsuit, no prejudice will result. This suit will determine whether the property is held in a Federal Indian reservation, nor not. If the process by which the 75 acres becomes a Federal Indian reservation has not occurred, this simply means the United States still owns the property is some form other than as trustee. The Catholic Church has already given up its interest in the property by its quit claim deed. Plaintiff is not seeking to take property away from the United States or reverse the attempted transfer the attempted transfer from the Catholic Church. A finding that the land is not in a Federal Indian trust is not prejudicial when it only establishes a historical fact. The BIA can take steps to address this "out of trust" status.

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2. The Court can Shape the Relief to Avoid any Potential Prejudice

The Court can shape the relief to avoid any potential prejudice. The Court does not need to address the actual ownership of the property. That is, Plaintiff is not asking the Court to adjudicate that the United States owns the property or that the the Catholic Church owns the property. In fact, Plaintiff does not want to deprive any party of ownership of the property. The sole issue in this case is the *status* of the land – that the land is not a Federal Indian reservation. A decision adverse to the Defendants, that the 75 acres is not a Federal Indian reservation, does not harm the United States. It only establishes that the administrative process of taking the 75 acres into trust has not occurred.

3. The Court can Enter an Adequate Judgment in Absence of the United States as a Party

Plaintiff only seeks a declaration from the Court concerning whether the land is a Federal Indian reservation. As stated, the ownership of the property is not an issue so no party will be deprived of real property ownership rights. There is no claim that the Defendants own the 75 acres. Only the scope of their right to use the property is at issue. If the property is already a Federal Indian reservation, as Defendants claim, their use may be consistent with this status. If the property is not a Federal Indian reservation, the Defendants' use may only be consistent with that legal status until the status changes.

4. Plaintiff will have no Adequate Remedy if the Action is Dismissed for Nonjoinder

Plaintiff is unaware of an alternative forum where the Plaintiff can seek declaratory and injunctive relief regarding the ownership of the 75 acres. The lack of an alternative forum militates in favor of finding the suit may continue without the United States as a party. The Court should not deny Plaintiff a forum in which to have this grievance heard so that the United States can litigate an issue which the

Defendants are perfectly able to litigate themselves.

G. Plaintiff did not Delay for Six Months before Filing this Lawsuit

Defendants assert that construction began in October of 2014 and nearly 6 months later, Plaintiff filed this action in the United States District Court. The fact is that on December 2014, the Bureau of Indian Affairs filed their Notice of Decision (the "NOD") to take 1400 acres in the Santa Ynez Valley into Trust. The 1400 acres, also known as "Camp 4," is approximately two miles from where the Defendants are building their casino tower.

It was the NOD that triggered Plaintiff to explore options that would assist other Community Organizations in Appealing the NOD. Save The Valley discovered that the 75 acres was not a Federal Reservation nor in Trust for the Santa Ynez Band of Mission (Chumash) Indians. In fact, Plaintiff discovered the 75 acre site and the 1400 acres (known as Camp 4) are both the same exact 11,500 acres that the Superior Court Judge ruled that "all the present and future members of thereof and said defendants and all and every of them be and hereby are further enjoined, restrained and debarred from making or asserting in any way any claim whatever adverse to said plaintiff in or to said two last described parcels of land or either of them or in or to any part thereof or of either of them or in or to the water of said Zanja Cota Creek or Cota Creek or to or in any part thereof." The "said two last described parcels of land" referenced in the judgment and above are the 11,500 acre Tribal Consolidation Area (TCA) in the Santa Ynez Valley which includes the 75 acres where the current Hotel/Casino expansion construction is taking place and also includes the 1400 acres known as Camp 4. Very soon after Plaintiff discovered and confirmed with research that the 75 acres were never taken into trust and no Federal Indian reservation was ever formed, Plaintiff brought suit.

H. The Existence of Gambling Compact with the State of California does not Prove the 75 Acres is a Federal Indian Reservation

Defendants suggest that since they have entered into a Compact with the State

of California, the 75 acres must therefore be a Federal Indian reservation. This is not the case. The compact, when carefully reviewed, does not describe the nature, ownership or trust status of the land on which the casino is operated. The Compact states, "The Tribe is currently operating a tribal gaming casino offering Class III gaming activities on its land." (Compact, page 2, Section C.) In other locations, and in a similarly generic fashion, the Compact refers to "the Tribe's Indian lands." Even these generic descriptions of the land would be incorrect if the land were actually a Federal Indian reservation. When land is actually taken into trust, the Indians must release their entire interest in the land in favor of the United States so it is not "their land" in any event.

IV. CONCLUSION

The individual tribe members have abrogated their sovereign immunity by committing illegal acts – misrepresentations regarding their project and the status of the 75 acres to Plaintiff, FAA and state and local governments. Plaintiff may continue the suit against these defendants. Furthermore, the United States is not an indispensable party. The suit may continue without the United States for the reasons stated above. Plaintiff respectfully requests that the Court deny the motion to dismiss, or in the alternative, allow discovery on jurisdictional issues before making its ruling.

DATED: June 1, 2015 CHRISTMAN, KELLEY & CLARKE, PC

By: /s/ Matthew M. Clarke
Matthew M. Clarke
Dugan P. Kelley
Matthew N. Mong
Attorneys for Plaintiff SAVE THE VALLEY, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 years and not a party to this action. My business address is 1334 Anacapa Street, Santa Barbara, CA 93101. On June 1, 2015, I served the foregoing document described as: **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action:

SEE ATTACHED SERVICE LIST

☐ **BY U.S. POSTAL SERVICE:** This document was served by United States mail. I enclosed the document in a sealed envelope or package addressed to the person(s) at the address(es) above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Santa Barbara, California, in a sealed envelope with postage fully paid.

☐ **BY FACSIMILE:** The document(s) were served by facsimile. The facsimile transmission was without error and completed prior to 5:00 p.m. A copy of the transmission report is available upon request.

☐ **BY OVERNIGHT DELIVERY:** The document(s) were served by overnight delivery via FedEx. I enclosed the document in a sealed envelope or package addressed to the person(s) and the address(es) above and placed the envelope(s) for pick-up by FedEx. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with this courier service, for overnight delivery.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **BY HAND DELIVERY:** The document(s) were delivered by hand during the normal course of business, during regular business hours.

☒ (Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 1, 2015 at Santa Barbara, California.

/s/ Danielle Abbott

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