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GRINDSTONE RANCHERIA, ET AL

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

GRINDSTONE RANCHERIA, ET AL Plaintiffs, v. TERRANCE OLLIFF ET AL, Defendants	Case No.2:17-cv-02292-JAM-EFB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS COUNTER CLAIMS; [PROPOSED] ORDER** **[Fed. R. Civ. P. 12(b)(1), (6)]** Date: June 19 Time: 1:30 p.m. Courtroom: 6 Judge: John A. Mendez

I. INTRODUCTION AND FACTUAL BACKGROUND

This case concerns a boundary dispute between the Parties, Plaintiff, Grindstone Rancheria et al (hereinafter "Tribe") whose federal trust lands are located in Elk Creek, Glenn County, California and Terrance Olliff et al., adjoining property owners. The Grindstone Rancheria is comprised of descendants of Wintun-Wailaki Indians and have resided since time

immemorial in Glenn and surrounding counties. The Tribe's reservation was founded in 1907, part of the United States acquisition of land for homeless Indians in California, a result of an early 1900's survey of homeless California Indians performed by United States appointed Indian Agents, C.E. Kelsey and John J. Terrell.

The Tribes' reservation is approximately 120 + acres in size and is in federal trust with the United States, for the benefit of the Tribe. The Tribe is governed by a Constitution, adopted under the Indian Reorganization Act of 1934 and the Secretary of the United States Department of the Interior. Tribal leadership is comprised of a three (3) member Business Committee (Chair, Vice-Chair and Secretary/Treasurer). The Tribes' governing body is made of all tribal members eighteen (18) years or older. There are over 100 adults living within the interior boundaries of the Tribe's Glenn County, California, reservation, in addition to approximately 40 children.

In 1996, Modoc-Lassen Tribal Housing Authority (hereinafter "Modoc") purchased acreage for the purposes of building tribal housing. At the time of the purchase the lands were in fee simple. Subsequent to the purchase the lands were placed into trust with the United States for the benefit of the Tribe and its members. The land purchased shares a common boundary line with Defendants Olliff property.

As is usual with federal tribal trust acquisitions, the parcel was surveyed, title was searched and the land was placed into trust pursuant to United States Department of Interior trust acquisition regulations (43 U.S.C. §1601 et seq.), approved by both Houses of Congress and thereafter published in the Official Federal Register.

The Bureau of Land Management (BLM) is entrusted with the management of federal lands, including Indian trust lands, and periodically performs a survey of Indian lands. One such

survey was conducted by the BLM in 2011. (See DKT # 1-1, BLM Survey Correspondence, August 12, 2012 BLM Correspondence to Ollif). At the time the survey was performed correspondence went out from the BLM to adjoining landowners, including Defendant Olliff. Defendant Olliff had some questions about the survey, specifically with regards to the location of specific corner BLM identified as the marker of the boundary between the Tribes' reservation and Defendants Olliff's property. Although Olliff communicated his displeasure of the BLM survey conclusions, of which BLM rejected, the BLM provided Olliff, the opportunity to "protest" the BLM's survey decision pursuant to 43 C.F.R. 4.450-2, in an April 12, 2012 correspondence. (See Id. DKT # 1-1). Olliff did not protest the BLM decision, which he readily admits. (See DKT 1-1.and DKT 15, Amended Answer to FAC, at ¶5(f) and ¶8)

Thereafter, Olliff began a series of terrorist actions against the Tribe and its members. He cursed at the Tribe's chairman whenever he saw him. Tore down a fence line that was consistent with the BLM's survey findings; Poured a slippery substance on the road to prevent tribal members from accessing the disputed area; Yelled expletives at tribal members, children and guests. Removed pieces of equipment, belonging to the Tribe, to "his" property line and threatened harm to the tribe, its members and guests from himself or by letting his dog attack members and guests.

In February 2014, Defendant Olliff attempted to sue the Tribe for damages due to alleged emotional distress. Olliff caused a lawsuit to be filed against a Tribal employee, making allegations of being threatened, when his real defendant was the Tribe itself. The event sued upon never occurred and because the employee was entitled to sovereign immunity due to his

employment with the Tribe (which means the lawsuit would likely be dismissed because no waiver of tribal immunity existed), the lawsuit was voluntarily dismissed by Olliff' attorney.

After the Olliff lawsuit was dismissed in February 2014 through 2016 things were fairly quiet between the Tribe and Defendant Olliff. For whatever reason, Olliff began to terrorize the Tribe again beginning in early 2017. Mr. Olliff called the Glenn County Sheriff numerous times on the Tribe making fraudulent allegations as to trespass onto this land by tribal members and he blocked off access to the disputed area that he believes is within his property. Having had enough of Olliff's terrorist tactics, the Tribe thereafter filed suit in October 2017, for trespass, intentional and negligent infliction of emotional distress, Conversion and requesting a declaratory judgment as to the status of the land, e.g. whether the disputed parcel was in the Tribe's reservation or not.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their Complaint on or about October 31, 2017. Defendants thereafter answered Plaintiffs complaint with affirmative defenses. On March 8, 2018, Plaintiffs filed their First Amended Complaint for damages, pursuant to a stipulation, which was granted on the same day as the FAC was considered filed by the Court. (See DKT #11). Thereafter, Defendant filed their Answer to the FAC. The answer was identical to the original answer to Plaintiffs original complaint, save for the addition of four (4) Counter claims, (1) Trespass; (2) Quiet Title-Adverse Possession; (3) Quiet Title —Establishment of Prescriptive Easement (4) Declaratory Relief. As to damages, Defendants also included a claim for "punitive" damages.

Plaintiff, subsequent to the date required to respond to the counterclaims, thereafter contacted Defense counsel and requested they reconsider the addition of counterclaims because the Tribe had not waived sovereign immunity over them. Plaintiff provided legal authority for their position. Defendant then requested Plaintiff stipulate to the filing of an Amended Answer, that eliminated all counter claims but that of "trespass." Plaintiff, again informed Defendant of their belief that all counterclaims were barred by sovereign immunity. However, Plaintiff stipulated to the filing of the amended answer, but reserved the right to challenge the remaining counterclaim of trespass via a Motion to Dismiss.

Plaintiff, a federally recognized Indian Tribe, hereby challenges Defendants Counterclaims and damages and believes they are subject to a Motion to Dismiss for: (1) lack of jurisdiction due to tribal sovereign immunity; (2) failure to exhaust administrative remedies and (3) the counterclaims are not ripe as Defendant did not obtain a waiver of immunity and failure to exhaust and (4) barred by the six year statute of limitations.

III. SUBJECT MATTER JURISDICTION

A. Sovereign Immunity Shields Plaintiff/Defendant Grindstone Rancheria from Counterclaims

1. Standard for Rule 12(b)(1) motions.

In ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a federal court must find that the pleadings show, "affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and if he does not do so, the court on having the defect called to its attention . . . must dismiss the case, unless the defect can be corrected." *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

2. Sovereign Immunity prevents this Court from Assuming Jurisdiction over Plaintiff/Defendant Grindstone Rancheria as to Defendant's Counterclaims

Federal courts have long recognized that Indian Tribes possess the sovereign immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This immunity applies to all federal suits for damages, declaratory relief, and injunctive relief unless there is an express tribal waiver or congressional abrogation. *Id.* at 58-59; *see Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

The January 29, 2016, Vol 81, No.19, Federal Register of Lists of Federally Recognized Tribes supports the Tribe's claim to federal recognition and sovereign immunity. (RJN, #8, List of Federally recognized Indian Tribes, Federal Register, Vol. 81, No. 19). Hence, as a recognized Indian Tribe, Defendants are entitled to sovereign immunity against unconsented civil suit, including the counterclaims at issue in this case.

3. Defendants Counterclaims are Subject to Dismissal under Existing Precedent

In addition to civil suit, counterclaims are subject to dismissal based on lack of jurisdiction based on tribal sovereign immunity that has not been waived. In general, filing suit does not result in a wholesale waiver of immunity. The Supreme Court has proclaimed that "a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

Tribal immunity even extends to compulsory counterclaims in excess of the original claims—despite the fact that compulsory counterclaims by definition arise out of the same transaction or occurrence. *See id.* at 509–10; *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). On this point, "Supreme Court precedent couldn't be clearer . . . : a tribe's decision to go to court doesn't

automatically open it up to counterclaims—even compulsory ones." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1451 (2016). Thus, the mere fact that the Tribe filed the initial action in federal court is not enough for the Defendant without offending the Tribe's immunity.

4. **Defendants Counter Claims are not Recoupment Claims.**

The legal basis for permitting adjudication of matters in recoupment is straightforward. In the analogous scenario where the United States brings suit, the Supreme Court has held that the United States impliedly waives its immunity to counterclaims for recoupment. *Bull v. United States*, 295 U.S. 247, 260–63 (1935). Those claims do not directly implicate sovereignty interests because they seek merely an offset to the sovereign's requested relief instead of affirmative relief from the sovereign. *See id.* at 262 ("[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded."); *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970) (stating that claims for recoupment "defeat or diminish the sovereign's recovery" but provide no "affirmative relief"). That rule and rationale holds for tribes. *See Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1971) (explaining that a tribe's sovereign immunity is generally; See also *Quinault Indian Nation v. Pearson*, No. 15-352263 (9th Cir. August 29, 2017)

Here, only one counter claim, "Trespass", is analogous to Plaintiff Tribe's claims. The other claims request affirmative action by the Court, above and beyond what the Tribe has requested. The "Claim for Quiet Title - Adverse Possession", requests the court give Defendants the property due to their alleged "open and obvious possession of it" over time. Nothing can be further from the truth. It was only when the BLM surveyed the property in 2011 that Defendant Olliff began his actions against the Tribe to allegedly reclaim what he believes to be his. The Tribe has not requested similar relief in their complaint.

Likewise, the counterclaim of "Quiet Title-Prospective Easement", should receive a similar fate as Adverse Possession, the Tribe didn't ask for it in their complaint, and to grant it would go beyond the remedies the Tribe is seeking. Thus, it should not be considered a claim having been waived by the Tribe's filing suit against Defendant.

Defendant's counterclaim of declaratory relief, is not a counterclaim at all. Moreover, it is the mirror image of Plaintiff Tribe's claim for declaratory relief, which the Court should deny outright. Further the Declaratory Judgment Act does not create a substantive cause of action. A declaratory judgment action is merely a vehicle by a party to obtain an early adjudication of rights under substantive law. Federal courts have broad discretion to grant or refuse declaratory judgment. Since its inception, the DJA has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.

The DJA is an authorization, not a command. It gives federal courts the competence to declare rights, but it does not impose a duty to do so. (See *Schrader-Scalf v. CitiMortgage, Inc.*, 2013 WL 625745, at *3 (N.D. Tex. Feb. 20, 2013) (Fitzwater, C.J.) (quoting *Turner v. America Home Key Inc.*, 2011 WL 3606688, at *5 (N.D. Tex. Aug.16, 2011) (Fitzwater, C.J.), aff'd, 2013 WL 657772 (5th Cir. Feb. 22, 2013)). As relief under the DJA is not a counterclaim, the claim should be barred by Tribal sovereign immunity.

Finally, defendant has demanded "punitive damages" from the Tribe for their alleged trespass. This counterclaim, again exceeds the relief sought by the Tribe. Further, although the Tribe requested punitive damages, it is in relation to their claims of "Intentional infliction of emotional distress", a claim not made by Defendant Olliff. Moreover, the counterclaim should also be dismissed *sua esponte*, because Defendant has not pled that the Tribe's trespass was

intentional. For the above reasons, the Tribe requests the counterclaims be dismissed as they are barred by the tribal sovereign immunity, which as noted below, has not been expressly and unequivocally waived the Tribe.

4. Defendants Have Not Waived Sovereign Immunity from Counterclaims

To successfully initiate a suit against Defendants, Plaintiffs must demonstrate that defendants waived immunity from suit with respect to Plaintiffs' counterclaims. *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc.* (1989) 523 U.S. 751, 754-56; *Cheyanne Arapahoe Gaming Comm'n. v National Indian Gaming Comm'n* (N.D. Okla. 2002) 214 F. Supp.2d 1155, 1164 (because immunity is assumed until proven otherwise Plaintiff bears the burden of proving that sovereign immunity has been waived).

Absent sufficient proof of a waiver, Defendants are inherently immune from suit. *Kiowa*, 523 U.S. at p. 754; *Cheyenne Arapahoe Gaming Comm'n* at 214 F.Supp 2d at 1164.

Plaintiff/Defendant Tribe has not waived immunity from civil suit or Defendants counterclaims, and Defendants have not pled that they, Defendants, have received a clear and unequivocal waiver of immunity from civil suit (of the counter claims) within the four corners of its counter claims suit. (See DKT #15 Amended Answer/Counterclaim to FAC; Declaration of Jack Duran at ¶1-4). It is well settled that a waiver of tribal immunity *cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 (holding that suit against the Tribe was barred without an unequivocal waiver of tribal immunity).

As such, the Court must find that it lacks personal and subject matter jurisdiction over defendants' counter claims and grant this motion to dismiss.

5. Plaintiffs' Complaint Must be Dismissed Under the Ripeness Doctrine.

Ripeness is designed to prevent a federal court from prematurely adjudicating matters by asking it to conduct a preliminary evaluation of: (1) the fitness of the issues for review, and (2) the hardship to the parties of withholding consideration. *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 802, 807-08 (2003).

Here, the issues of federal court intervention into this matter are not ripe for review because Defendants have not alleged that they have exhausted their administrative remedies as to their appeal of the final agency action of the BLM in the August 12, 2012 BLM correspondence or that their exhaustion of remedies is somehow excused. In fact, Defendant admits that they failed to "protest" the BLM survey within the required sixty (60) day period under 43 C.F.R. 4.450-2). (See Answer to FAC at DKT# 12 at ¶8, p.6.

Thus, Plaintiffs, by their own admission have not yet fully exhausted their administrative remedies, if they could do so at all, and seeking federal relief is premature. Plaintiffs' counter claims are not ripe for federal review and should therefore be dismissed.

IV. FAILURE TO STATE A CLAIM

A. Standard for Rule 12(b)(6) Motion

Dismissal under Rule 12(b)(6) is proper where there is a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The Court may properly dismiss the case where "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Plaintiffs Failed to Exhaust Their Administrative Remedies.

Defendant's counterclaims should be dismissed because Defendant failed to exhaust their administrative remedies as to the BLM survey, prior to filing suit. On August 12, 2012, the BLM wrote to Defendant concerning his objection to the 2011 BLM Survey. At the close of the BLM correspondence, the correspondence stated the following:

> If you disagree with this resurvey, you have the right to protest any decision of this office which is adverse to your interests.
>
> In past and current practice, the Bureau of Land Management accepts "written protests against specific corners and/or lines of official resurveys and surveys" as conducted by the Cadastral Survey staff and accepted by the Bureau. The Bureau carefully considers all evidence and data submitted with any such protest, along with the official record of the survey being protested. and the protestor is notified of the decision by this office.
>
> Should you decide to pursue such a protest, please be advised that the protest must be filed with this office no later than 60 days after receipt of this letter. A statement which clearly expresses your reasons for believing that the Bureau's resurvey is erroneous must accompany your notice of protest, along with any additional evidence you can provide in support of your protest. This does not include the materials accompanying your inquiry of August 8, 2012, as that evidence was already evaluated in the resurvey.
>
> Please be aware that the burden of proving a government survey to be in error is upon the person who challenges the survey. It is well established in law that an appellant challenging a Government resurvey has the burden of establishing by a preponderance of evidence that the resurvey is not an accurate retracement or reestablishment of the original survey. Consequently, it is imperative that you precisely state your reasons for disagreeing with the survey. It is essential that any such statements of reasons be solidly based on facts. It is important to identify specific corners and/or lines in contention and to include explicit facts pertaining to the items objected to, together with all available substantiation and documentation. Generalities, accusations, and claims based on adverse possession against the United States are not proper criteria for protest and should be avoided.
> (See DKT #1-1, referencing 43 C.F.R. 4.450-2))

Pursuant to 43 Code of Federal Regulations, 4.450-2, Defendant was provided the opportunity to exhaust administrative remedies by filing a "protest" of the BLM Rancheria Re-survey. Defendant admits he did not file a protest as offered. (DKT #15, ¶5(f) and ¶8). Had the

protest been denied by the BLM, Defendant would have been able to file an appeal of the denial of the BLM "protest" pursuant to (43 CFR 4.410 (a)). Again, Defendant did not file a "protest" of the BLM survey that would have triggered an opportunity for appeal under the regulations, which were the administrative remedies offered by BLM that were offered in the BLM August 12, 2012 correspondence (See DKT #1-1) and ignored by Defendant Olliff. Subsequent to the running of the sixty (60) day protest period, the Grindstone Rancheria Re-Survey was confirmed and published in the federal register.

Defendant has admitted in their Answer to Plaintiffs FAC that they did not pursue a "protest" of the BLM's 2011 Re-survey of the Grindstone Rancheria. (DKT #12 ¶5(f) and ¶8, pg. 6). Filing the BLM protest was a prerequisite for the full exhaustion of BLM Administrative remedies, pursuant to §43 C.F.R. §§4.450-2 and 43 CFR 4.410 (a)).

The Exhaustion Doctrine

The exhaustion doctrine dictates that a party is not "entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 185, 193 (1969) (citation omitted). Thus, exhaustion of administrative remedies is a necessary jurisdictional prerequisite to judicial review. *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1295-96 (10th Cir. 2003). "A party must exhaust administrative remedies when a statute or agency rule dictates that exhaustion is required." *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir. 1994) (citing *White Mountain Apache Tribe*, 840 F.2d at 677).

The exhaustion requirement "recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government that, agencies, not the courts,

ought to have primary responsibility for the programs that Congress has charged them to administer." *United Tribe of Shawnee Indians*, 253 F.3d at 550 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), superseded by statute as stated in *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). As explained by the Tenth Circuit, "the purposes of the doctrine of exhaustion of administrative remedies include avoidance of premature interruption of administrative process, allowing the Agency to develop the necessary factual background on which to decide the case, giving the Agency a chance to apply its expertise or discretion and [the] possibility of avoiding the need for the court to intervene." *Franks v. Nimmo*, 683 F.2d 1290, 1294 (10th Cir. 1982) (citation omitted); see also *St. Regis Paper Co. v. Marshall*, 591 F.2d 612, 613-14 (10th Cir.1979).

Here, a party is required to exhaust administrative remedies under the APA when expressly required by statute, or "when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

In the present case, exhaustion is mandated by United States Bureau of Land Management ("BLM") regulations governing cadastral surveys found in 43 C.F.R. Part 4, 450-2 and 43 CFR 4.410 (a)). The BLM regulations provide that decisions may be first "protested" under 43 C.F.R. 4.450-2 and then "appealed" pursuant to 43 C.F.R. Part 4.410(a)). Under the C.F.R. if an agency decision is subject to appeal to a superior authority within the Department, a party must appeal the decision to the highest authority within the agency before judicial review is available. See *Coosewoon*, 25 F.3d at 924-25 (citing 25 C.F.R. § 2.6(a)); see also 43 C.F.R. § 4.314(a) ("No decision of [a] . . . BIA official that at the time of its rendition is subject to appeal

to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. [§] 704 . . . ."). Exhaustion "requires that a litigant 'complete the administrative review process' before seeking judicial review." *Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (quoting Jones v. Bock, 549 U.S. 199, 218 (2007)).

In this case, Defendants do not allege that they have exhausted administrative remedies as required by BLM regulations. In fact, Defendants readily admit in their answer that they did not file a protest or appeal of the 2011 BLM Re-Survey as required by in 43 C.F.R. Part 4, 450-2 and 43 CFR 4.410 (a)), which form the basis of Defendant's counter claim. (See DKT #15, ¶5(f) and ¶8.

This Court should find that because Defendants have not exhausted administrative remedies for the agency actions at issue as required by BLM regulations, that all claims challenging the Grindstone Re-survey should be dismissed. Plaintiffs have failed to exhaust administrative remedies, and the Court lacks jurisdiction over those claims and counter claims. Accordingly, all counterclaims (1-4) as they relate to the BLM survey objected to by defendant must be dismissed for failure to exhaust administrative remedies.

C. Plaintiffs Counterclaims are Barred by the Six Year Statute of Limitations

Because Defendant did not file their claims within the six (6) year statute of limitations pursuant to 28 U.S.C., §2401(a), their claims are forever barred. Defendant's admit that the Tribe purchased the 80 acres, a small portion of which is in dispute, in **1993**. (See DKT #15, ¶5(d). Defendants did not bring claims against the Tribe within the six (6) year period after the purchase was allegedly made, the six-year period expiring in 1999.

The BLM survey results were completed on or about September 14, 2011, and defendant was on Notice (and admits he objected to the BLM findings) at that time that the BLM had determined that the Knock's corner and not Pride's corner, was the "center south 1/16th corner," for Rancheria Re-survey purposes. (See DKT#1-1, BLM August 12, 2012 correspondence to Olliff). Hence, the six (6) year statute of limitations, upon which Defendant could have file suit on their claims, counter or otherwise, ran on **September 14, 2017**.

Finally, the BLM correspondence of August 12, 2012, provided Defendant Olliff an opportunity to appeal to the BLM under 43.C.F.R. 4.450-2 and 43 C.F.R. 4.410(a)). However, at no time did Defendant Olliff appeal the BLM Rancheria Re-Survey findings prior to filing suit.

Thus, Defendant Olliff has had ample opportunity to raise claims over the years, but failed to do so. Defendants counter claims, which expired on **September 14, 2017**, are barred by the six-year statute of limitations and should be dismissed.

D. Plaintiffs Have Failed to State a Claim from Which Relief Can Be Granted

As previously mentioned, Rule 12(b)(6) applies where the Complaint lacks a cognizable legal theory or does not allege sufficient facts to support one. *Balisteri,* 901 F.2d at 699.

Here, because Defendants have not obtained an unequivocal waiver of the Tribe's immunity as to the counter claims, or have exhausted their administrative remedies in failing to appeal the BLM's findings as to the 20111 survey, Plaintiffs claims fail. A *controversy* does not presently exist because Petitioners have not exhausted their administrative remedies. While a *dispute may* exist between the parties as to the proper boundary marker, this controversy has not transfigured into a federal controversy. It is doubtful that the Court will *ever* have jurisdiction

over the counterclaims in the absence of a waiver of immunity or exhaustion of administrative remedies or an excuse, because neither exist. As such no controversy exists for the Court to resolve and Plaintiffs' complaint should be dismissed.

Finally, Defendants claims fail to state a claim for which relief can be granted because the claims are time barred pursuant to the six(6) year statute of limitations

V. CONCLUSION

For the reasons presented in this Motion to Dismiss, Plaintiffs' counterclaims should be dismissed.

Respectfully Submitted this: April 17, 2018

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By

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