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Attorneys for Defendants and Counter-Claimants,
TERRENCE OLLIFF and DIANNE L. OLLIFF,
Individually, and as Trustees of the Olliff Family Trust

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(Sacramento Division)

GRINDSTONE INDIAN RANCHERIA) CASE NO.: 2:17CV-02292-JAM-EFB
and ONE HUNDRED PLUS MEN, WOMEN)
and CHILDREN LIVING ON GRINDSTONE)
INDIAN RESERVATION,)

Plaintiffs,)

vs.)

TERRENCE OLLIFF, individually, and as a)
beneficiary/trustee of the Olliff Family)
Trust; DIANNE L. OLLIFF, individually,)
and as a beneficiary/trustee of the Olliff)
Family Trust; DOES 1 - 10,)

Defendants.)

**COUNTER-CLAIMANTS' OPPOSITION
TO MOTION TO DISMISS
COUNTERCLAIM**

Date: June 19, 2018
Time: 1:30 p.m.
Courtroom: 6

AND RELATED COUNTERCLAIM

Defendants and Counter-Claimants TERRENCE OLLIFF and DIANNE L OLLIFF,
individually and as Trustees of the Olliff Family Trust (herein referred to as "OLLIFF") hereby
respectfully submit their Opposition to the Motion to Dismiss their Counterclaim filed by
Plaintiff and Counter-Defendant GRINDSTONE INDIAN RANCHERIA and ONE HUNDRED

1 PLUS MEN, WOMEN and CHILDREN LIVING ON GRINDSTONE INDIAN
2 RESERVATION (herein referred to as "GRINDSTONE").

3 I. BACKGROUND

4 a. Procedural Background

5 This case involves a dispute between adjoining property owners GRINDSTONE and
6 OLLIFF concerning the boundary and use of that properties located in Glenn County, California.
7 GRINDSTONE filed its initial Complaint for trespass and related land claims on October 31,
8 2017. Pursuant to Stipulation and Order dated March 8, 2018, GRINDSTONE filed its First
9 Amended Complaint ("Complaint") which clarified the identities of Defendants.
10 GRINDSTONE'S First Amended Complaint asserts claims for trespass, infliction of emotional
11 distress, and conversion and seeks damages and declaratory and injunctive relief. Pursuant to
12 Stipulation and Order, on April 9, 2018, OLLIFF filed their Amended Answer and Counterclaim
13 ("Answer" or "Counterclaim"). OLLIFF'S Counterclaim asserts a single claim of trespass
14 against GRINDSTONE and seeks damages and declaratory and injunctive relief. OLLIFF had
15 initially asserted several counterclaims, including a quiet title claim and claim for infliction of
16 emotional distress against GRINDSTONE but agreed in good faith to amend the counterclaim to
17 assert the single trespass claim.
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20 GRINDSTONE moves to dismiss the Counterclaim under FRCP 12(b)(1) on the ground
21 that the Court lacks subject matter jurisdiction over the Counterclaim because of Counter-
22 Defendants status as a sovereign entity which cannot be sued absent consent or waiver.

23 GRINDSTONE also moves to dismiss under FRCP 12(b)(6) on the ground that OLLIFF
24 has failed to state a claim upon which relief can be granted due to OLLIFF'S alleged failure to
25 exhaust an administrative remedy.
26

GRINDSTONE further asserts that OLLIFF'S Counterclaim is barred because, with regard to the two grounds identified above, OLLIFF'S Counterclaim is not ripe.

GRINDSTONE'S Motion to Dismiss should be denied because, in light of the specific allegations of the Counterclaim, the Court does have subject matter jurisdiction over OLLIFF'S trespass claim and because there is no administrative remedy applicable to OLLIFF'S claim. To the extent the Court is inclined to grant the Motion to Dismiss, leave to amend should be granted as any perceived defect can be cured by further amendment.

b. Factual Allegations Pertinent to Olliff's Counterclaim

Terrence Olliff and Dianne Olliff, as trustees of the Olliff Family Trust, own a 15 acre parcel of farm and residential land in Glenn County, California and have owned that land since 1977 (the "Olliff Parcel"). (Counterclaim, ¶¶3, 4)

Grindstone Indian Rancheria is a federally recognized Indian tribe listed on the Federal Register. (Counterclaim, ¶2; Complaint, ¶4) The Grindstone Indian tribe resides on a parcel of land of about 100 acres known as the Grindstone Reservation in Glenn County California. (Counterclaim, ¶¶5, 6) The Reservation was established in 1909 through the Bureau of Indian Affairs as an 80 acre site (the Indian Reservation Parcel"). (Counterclaim, ¶5) Grindstone Rancheria acquired an additional 20 acre parcel appurtenant to the Olliff Parcel in 1993 and has developed housing for its residents on this parcel (the Rancheria Parcel"). (Counterclaim, ¶6)

GRINDSTONE acquired the Rancheria Parcel in 1993 with knowledge of a recorded public survey by George Pride dated June 26, 1974 clearly showing the corner markers of the Olliff Parcel (the "Pride Survey"). (Counterclaim, ¶7)

In 2011, the Bureau of Land Management ("BLM") surveyed the Grindstone Reservation (the "BLM Survey"). (Counterclaim, ¶8) The BLM Survey shows the east property line of the

Olliff Parcel in the same location as the 1974 Pride Survey except for a small (40' x 20' square feet) overlapping conflict of the North-East corner of the Indian Reservation Parcel onto the South-East corner of the Olliff Parcel (the "Corner Conflict Area"). (Counterclaim ¶8)

The Corner Conflict Area was determined by the BLM Survey to be the historical cedar post corner marker for the North-West corner of the Indian Reservation Parcel originally established by T.L. Knock in his 1893 survey and is different in that it lays with the South-East corner of the Olliff Parcel as set in 1974 by the Pride Survey establishing the corner marker position by more contemporary existent section control and the then current rules for subdividing sections. (Counterclaim, ¶8).

OLLIFF did not object to the 2011 BLM Survey of the Corner Conflict Area. (Counterclaim, ¶9)

GRINDSTONE contends that the North-West corner marker of the Indian Reservation Parcel which is set 40 feet into the South-East corner of the Olliff Parcel should be adjudicated to extend due north an additional 1,082 feet along the eastern boundary of the Rancheria Parcel appurtenant to the Olliff Parcel to give GRINDSTONE about 43,500 square feet of the Olliff Parcel (the "Disputed Area"). (Counterclaim, ¶10)

The Disputed Area has been the property of OLLIFF for about 40 years and the BLM Survey does not show the Disputed Area to be the property of GRINDSTONE. (Counterclaim, ¶11)

In 2014, GRINDSTONE purchased the parcel of land to the south of the Olliff Parcel and west of the Indian Reservation Parcel for use as a ballfield (the "Ballfield") (Counterclaim, ¶12) Since 1977, OLLIFF'S driveway access has been to the west of County Road 305 through a

1 portion of the Ballfield in an established easement area measuring about 26 x 350 feet.
 2 (Counterclaim, ¶12)

3 In 2013, GRINDSTONE built a dirt embankment about 240 feet long and 4 feet high
 4 with a sloped edge on the west side of the Rancheria Parcel next to the Olliff Parcel and sloping
 5 toward the Olliff residence. OLLIFF contends that GRINDSTONE built the dirt embankment
 6 with the intention of disrupting OLLIFF'S quiet enjoyment of the Olliff Parcel. (Counterclaim,
 7 ¶15) Since the dirt embankment was built, storm water and debris has run down the embankment
 8 toward the Olliff Parcel and Olliff residence forming a dirt and rock encroachment into the Olliff
 9 parcel. (Counterclaim, ¶16)

10 During the three year period preceding the filing of this case, GRINDSTONE has
 11 allowed and directed its residents to enter the Olliff Parcel with vehicles and equipment, remove
 12 fences from the Olliff Parcel, deposit earthen debris onto the Olliff Parcel, and carry out other
 13 disruptive conduct, without OLLIFF'S consent or permission, for the purpose of disrupting
 14 OLLIFF'S quiet enjoyment of the Olliff Parcel, (Counterclaim, ¶¶17, 18)

16 II. LEGAL DISCUSSION

17 a. Applicable Legal Standards for Ruling on a Motion to Dismiss Under 18 FRCP 12(b)(1) and 12(b)(6)

19 Federal Rule of Civil Procedure 12(b)(1) allows litigants to seek dismissal of a suit for
 20 lack of subject matter jurisdiction. If the complaint does not affirmatively and distinctly show
 21 the existence of whatever is essential to federal jurisdiction, the court must grant dismissal unless
 22 the defect can be corrected by amendment. *Tosco Corp. vv. Cmty's for a Better Env't*, 236 F.3d
 23 4495, 499 (9th Cir. 2001) Unless the purported jurisdictional defect is clearly incurable, courts
 24 should grant plaintiffs leave to amend to cure a jurisdictional issue, allow argument on the
 25 jurisdictional issue, or allow case to proceed to discovery to allow plaintiff an opportunity to
 26 discover facts necessary to establish jurisdiction. *Shockley v. Jones* 823 F.2d 1068, 1073 (7th Cir.

1 1987) In considering a motion to dismiss under Rule 12(b)(1), the complaint must be construed
2 broadly and liberally and the pleading must be read as a whole with any relevant specific
3 allegations found in the body of the complaint taking precedence over a formal jurisdictional
4 allegation and all uncontroverted factual allegations being accepted as true. (See *MacKenzie v.*
5 *International Union of Operating Engineers* 472 F.Supp. 1025, 1031 (N.D. Miss 1979)),

6 When reviewing a motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(6) the
7 COMPLAINT is construed in the light most favorable to plaintiff; the allegations of the
8 complaint are taken as true and all reasonable inferences that can be drawn from the complaint
9 are drawn in favor of plaintiff. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2007); *National*
10 *Audubon Soc., Inc. v. Davis*, 307 F. 3d 835 (9th Cir. 2002). Under federal notice pleading
11 standards, courts are required to construe complaints liberally. *Conley v. Gibson* 355 U.S. 41
12 (1957)

13 The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to rule
14 on its merits. Dismissal is appropriate only if the plaintiff has failed to allege any set of facts
15 upon which relief can be granted. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.
16 1990) In analyzing the motion, the court must accept the well-pleaded allegations as true, and
17 view those allegations in the light most favorable to plaintiff. *McMillan v. Collection*
18 *Professionals, Inc.*, 455 F.3d 754, 758 (7th Cir. 2006).

19 Application of these standards to OLLIFF'S Counterclaim supports the conclusion that
20 OLLIFF has sufficiently pled a claim for trespass against GRINDSTONE upon which the Court
21 may grant relief and that the grounds for dismissal asserted by GRINDSTONE do not support an
22 order of dismissal. In the interest of justice, the case should continue to discovery to afford
23 OOLLIFF the opportunity to substantiate the allegations of the Counterclaim.
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b. The Motion to Dismiss Should Be Overruled Because Olliff Has Effectively Asserted a Claim for Relief for Trespass Which Is Not Barred by Any Ground Upon Which Grindstone Moves to Dismiss

1. The Court Does Not Lack Subject Matter Jurisdiction Because Sovereign Immunity Does Not Apply to Olliff's Counterclaim Against Grindstone

Pursuant to Federal Rule of Civil Procedure, Rule 13(a), 'a pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require adding another party over whom the court cannot obtain jurisdiction.' OLLIFF'S counterclaim for trespass against GRINDSTONE meets the requirements of a compulsory counterclaim under Rule 13(a). OLLIFF'S claim concerns the same property line dispute which GRINDSTONE defines in its Complaint against OLLIFF and there are no parties required to be joined over which the Court cannot obtain jurisdiction. GRINDSTONE does not raise an argument in its Motion to Dismiss that OLLIFF'S Counterclaim is not a compulsory counterclaim in the context of this case. GRINDSTONE challenges OLLIFF'S Counterclaim on the ground that due to its status as a federally recognized Indian tribe, it is protected from suit by the doctrine of sovereign immunity

"It has long been recognized that Indian tribes enjoy sovereign immunity from unconsented suit subject to the plenary control of Congress. *United States v. United States Fidelity and Guaranty Co.* 309 U.S. 506 (1940) An Indian tribe does not consent to suit on a counterclaim merely by filing an action as a plaintiff. *Id.* However, while sovereign immunity affords Indian tribes broad protection from suit, it is not an absolute immunity and, as discussed below, in light of the allegations set forth in OLLIFF'S Counterclaim, the Counterclaim is not barred by sovereign immunity and the Court does not lack subject matter jurisdiction over the Counterclaim.

Sovereign immunity will not serve to shield an Indian Tribe from suit where, as is the case here, the claim against the Tribe is premised on allegations that the Tribe is unlawfully

1 interfering with the property rights of the claimant. (See; *Imperial Granite Co. v. Pala Band of*
 2 *Mission Indians* 940 F.2d 1269 (9th Cir. 1991)) In *Imperial Granite*, Appellant Imperial Granite
 3 sued the Pala Band Tribe after the tribe denied it access to a road on tribal property which it had
 4 previously used to access a quarry. Appellant sought an easement to allow it to continue to use
 5 the road. Appellant did not allege that it had any right to the land on which it sought an
 6 easement. The Court affirmed the dismissal of the claim against the Pala Band Tribe on the basis
 7 of sovereign immunity. In its analysis of the claim, the Court indicated that sovereign immunity
 8 would not have applied had there been allegations by Appellant of a right to the subject property
 9 and a viable claim of a violation of Appellant's property rights. *Imperial Granite Co. v. Pala*
 10 *Band of Mission Indians, supra*, 940 F. 2d at pp. 1272-1273

11 OLLIFF has unequivocally alleged in the Counterclaim that OLLIFF owns the property
 12 upon which GRINDSTONE has allegedly been trespassing. (Counterclaim, ¶¶3, 4, 11, 15)
 13 While, as the *Imperial Granite* Court noted, substantive laws protect Indian tribal lands from
 14 prescription and acquisition, such laws are certainly not intended to serve as a device by which
 15 an Indian Tribe can interfere with or acquire the property outside of its tribal domain which is
 16 owned by private landowners.

17 The Ninth Circuit's decision in *Imperial Granite* provides another basis for denying the
 18 Motion to Dismiss in this case. The Court noted that sovereign immunity does not extend to
 19 tribal officials who abuse or act outside of the scope of their authority. "When [tribal] officials
 20 act beyond their authority, they lose their entitlement to the immunity of the sovereign." *Imperial*
 21 *Granite Co. v. Pala Band Tribe of Mission Indians, supra*, 940 F.2d at p1272, citing *Santa Clara*
 22 *Pueblo v. Martinez* 436 U.S. 48, 59 (1978). OLLIFF has alleged in the Counterclaim that
 23 GRINDSTONE "has directed, acquiesced to and failed to supervise and control some of its
 24 members and agents such that they have come onto the Olliff Parcel with vehicles and
 25 equipment, removed fences from the Olliff Parcel, and placed or created conditions to deposit
 26 dirt and boulders on the Olliff Parcel without the permission or consent of [OLLIFF]."

(Counterclaim, ¶17) OLLIFF also alleges in the Counterclaim that GRINDSTONE directed its members and agents to construct the referenced dirt barrier along the edge of the Olliff Parcel with the intention of interfering with OLLIFF'S quiet enjoyment of the Olliff Parcel. (Counterclaim, ¶¶15, 16) These allegations certainly indicate action by GRINDSTONE officials which exceeded the scope of their authority as tribal officials. Purposefully violating property rights of adjacent landowners would certainly be in excess of any tribal member's authority. In this regard, rather than dismiss the Counterclaim, the Court should adhere to the liberal standards applicable to ruling on 12(b)(1) motions and allow OLLIFF "to proceed to discovery to allow [OLLIFF] an opportunity to discover facts necessary to establish jurisdiction" based on alleged acts by tribal officials outside the scope of their authority. *Shockley v. Jones, supra*, s 823 F.2d at p. 1073 (7th Cir. 1987)

It is noted that, while GRINDSTONE has cited to a number of authorities which address general principles relative to sovereign immunity, GRINDSTONE has not cited to any authority which supports the proposition that where an Indian Tribe is alleged to have interfered with or otherwise violated the property rights of one who owns property outside of the tribal lands, that landowner is barred from suing the Indian Tribe on the basis of sovereign immunity

GRINDSTONE'S Motion to Dismiss should be denied because GRINDSTONE is not entitled to sovereign immunity based on the specific allegations of intentional interference with and violation of OLLIFF's property rights. To the extent the Court is inclined to grant the Motion to Dismiss, OLLIFF should be afforded leave to amend because any perceived defect in regard to jurisdiction can be cured through further amendment.

GRINDSTONE'S argument that OLLIFF'S Counterclaim should be dismissed because, absent express waiver of sovereign immunity or consent to the counterclaim by GRINDSTONE, OLLIFF'S claim is not ripe, is without merit because, as discussed above, GRINDSTONE is not shielded by sovereign immunity based on the factual allegations of the Counterclaim.

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2. Olliff's Counterclaim Is Not Barred Due to Failure to Exhaust an Administrative Remedy Because There Is No Administrative Procedure or Remedy Applicable to Olliff's Trespass Claim

GRINDSTONE moves to dismiss on the ground that OLLIFF'S claim is barred because OLLIFF did not exhaust a purported administrative remedy relative to objecting to the referenced 2011 BLM Survey. GRINDSTONE'S position is without merit in this regard because OLLIFF'S Counterclaim does not rest on whether OLLIFF made an objection to a boundary line established by the BLM Survey.

OLLIFF acknowledges in the Counterclaim that the Bureau of Land Management conducted a survey of the Grindstone Reservation in 2011 and that OLLIFF did not object to that survey. (Counterclaim, ¶¶8, 9) However, OLLIFF also alleges that the Disputed Area, upon which OLLIFF alleges GRINDSTONE has been trespassing, has been OLLIFF'S property for 40 years and that "the BLM Survey did not and does not show the Disputed Area as being the property of [GRINDSTONE]" (Counterclaim, ¶11) This allegation is of great significance as it wholly undermines GRINDSTONE'S assertion that OLLIFF was required to exhaust an administrative remedy by challenging the BLM Survey through procedures set forth under 43 CFR. 4.410 and 43 CFR 4.450-2. Assuming for purposes of ruling on the Motion to Dismiss, that OLLIFF'S allegations that OLLIFF owns the property identified as the Disputed Area and that the BLM Survey shows the property as belonging to OLLIFF are true, it necessarily follows that OLLIFF would have had no reason to, nor been required to, protest the BLM Survey with regard to its depiction of the Disputed Area because, as alleged, the BLM Survey establishes that the Disputed Area is the property of OLLIFF.

To the extent GRINDSTONE takes the position that the BLM Survey establishes that the Disputed Area is the property of GRINDSTONE, then what remains is a dispute as to a factual allegation contained in the Counterclaim, rather than a basis for dismissal under FRCP 12(b)(6).

GRINDSTONE'S Motion to Dismiss should be denied as to the 'failure to exhaust an administrative remedy' ground. To the extent the Court is inclined to grant the motion on this

1 ground, OLLIFF should be afforded leave to amend as any perceived defect in this regard can be
2 cured and clarified by further amendment. Because, as discussed above, an administrative
3 procedure and remedy is not applicable to the allegations of OLLIFF'S Counterclaim,
4 GRINDSTONE'S position that OLLIFF'S claim is not ripe for failure to exhaust an
5 administrative remedy is without merit.

6 III. CONCLUSION

7 For the reasons stated herein, and consistent with the standards applicable to ruling on
8 motions to dismiss under FRCP 12(b)(1) and 12(b)(6), the Court should issue an order denying
9 GRINDSTONE'S Motion to Dismiss and allowing OLLIFF to proceed on the Counterclaim. To
10 the extent the Court is inclined to grant GRINDSTONE'S Motion to Dismiss, the Court should
11 grant OLLIFF leave to amend because any perceived defect in OLLIFF'S Counterclaim with
12 regard to the grounds on which GRINDSTONE'S motion is based can be cured by further
13 amendment.

14
15 GRIFFITH & HORN, LLP

16
17 Dated: May 21, 2018.

18 _____
19 David R. Griffith, Esq.
20 Attorneys for Defendants and Counter-Claimants,
21 TERRENCE OLLIFF and DIANNE L. OLLIFF,
22 Individually, and as Trustees of the Olliff Family
23 Trust
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25
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PROOF OF SERVICE

I am employed in the County of Butte, State of California, I am over the age of 18 years and not a party to the within action; my business address is 1530 Humboldt Road, Suite 3, Chico, California 95928. On this date, I served the foregoing document described as:

**COUNTER-CLAIMANT'S OPPOSITION TO MOTION TO DISMISS
COUNTERCLAIM**

Said document was served on the interested party or parties in this action by placing a true copy thereof, enclosed in a sealed envelope, and addressed as noted below.

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I am familiar with our firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Chico, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one working day after the date of deposit for mailing in this declaration.

 x (By Express Mail/Overnight Delivery) I delivered this document to a driver authorized by the express services carrier to receive such documents in a package designated by the express service carrier with delivery fees paid and addressed to the person set forth above at the address last given by that person for purpose of effectuating service in this matter and with direction for delivery of the document to that person at that address on the next business day.

 x (By Electronic Mail) Such document was delivered by electronic mail to the persons at the addresses set forth above, with prior consent.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I further declare that I made the service set forth herein on the date set forth below.

Executed on May 21, 2018, at Chico, California.

By:


Jameson Sheehan