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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

GRINDSTONE INDIAN RANCHERIA,

Plaintiff,

vs.

TERRENCE OLLIFF, AND DOES 1-10,

Defendants

Case No.: 2:17-cv-02292-JAM-EFB

**REPLY TO DEFENDANTS OPPOSITION  
TO MOTION TO DISMISS TRESPASS  
CLAIM**

**PLAINTIFF’S, GRINDSTONE INDIAN RANCHERIA ET AL, PROVIDE THE  
FOLLOWING REPLY TO DEFENDANTS OPPOSITION TO MOTION TO DISMISS  
TRESPASS CLAIM DUE TO TRIBAL SOVEREIGN IMMUNITY, FAILURE TO EXHAUST  
ADMINISTRATIVE REMEDIES, VIOLATION OF THE STATUTE OF LIMITATIONS AND  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

**I.**

**DEFENDANTS CITATION TO IMPERIAL GRANITE DOES NOT HELP THEM  
BUT CONFIRMS SOVEREIGN IMMUNITY BARS THE TRESPASS CLAIM**

Defendants Olliff et al’s, citation to *Imperial Granite v Pala Band of Indians*, 940 F.2<sup>nd</sup>  
1269, (9<sup>th</sup> Cir. 1991) does not support their opposition, but rather, the case supports Plaintiffs  
position that sovereign immunity bars Plaintiffs cross-claim. In *Imperial Granite*, Plaintiff,  
Imperial, leased a plot of land surrounded by the Pala reservation trust lands, in pursuit of a

1 mining operation. For whatever reason the Tribe and Imperial's relations soured and the Tribe is  
2 alleged to have denied road access through the Pala reservation to access the Imperial leased  
3 mine.

4  
5 Imperial thereafter sued the Tribe and tribal officials and the court threw the case out  
6 based upon tribal sovereign immunity. Imperial does not stand for the proposition that if a non-  
7 Indian party or any party for that matter, is contesting their landowner rights, these rights or legal  
8 claims trump tribal sovereign immunity. In fact, Imperial didn't even touch upon landowner  
9 rights or claims, but the court analyzed the sole issue of jurisdiction and whether the court had it  
10 in light of the Tribe's sovereign immunity. The Imperial court stated the following about the  
11 Tribe's immunity:  
12

13 **"It is absolutely clear that the Pala Band, as an Indian tribe, possesses "the**  
14 **common-law immunity from suit traditionally enjoyed by sovereign**  
15 **powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670,**  
16 **1677, 56 L.Ed.2d 106 (1978). The immunity extends to suits for declaratory**  
17 **and injunctive relief. See id. at 59, 98 S.Ct. at 1677. The tribe's immunity is**  
18 **not defeated by an allegation that it acted beyond its powers. Chemehuevi**  
19 **Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1052**  
20 **(9th Cir.), rev'd on other grounds, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9**  
21 **(1985). The district court was consequently quite correct in concluding that**  
22 **the Band is immune from suit."**

23 **Imperial 942 F.2<sup>nd</sup> 1269 at p. 1269.**

24 Here, as in Imperial, the Tribe retains sovereign immunity and the counter claim should  
25 be barred. Defendant's did not plead they had a waiver, and no waiver exists, and their claim  
26 that landowner rights somehow magically trump (no pun intended) tribal sovereign immunity are  
27 without merit under established federal Indian law precedent, the court is without jurisdiction  
28 and the claim must be dismissed.

1           **i.       DEFENDANTS COUNTER CLAIM DOES NOT NAME TRIBAL**  
2           **OFFICIALS, EVEN IF IT DID THEY WOULD BE SHIELDED BY**  
3           **TRIBAL SOVEREIGN IMMUNITY**

4           Here as in Imperial, Plaintiff makes bald allegations against the Tribe's officials in a  
5           veiled attempt to circumvent tribal sovereign immunity. Defendants allege that Grindstone, not  
6           tribal officials, have "directed, acquiesced or failed to supervise and/or control its membership."

7           This is a similar claim as made by the Imperial Plaintiffs of which the court wholly  
8           rejected and in so doing stated:

9           **"The complaint alleges no individual actions by any of the tribal officials**  
10          **named as defendants.<sup>2</sup> As far as we are informed in argument, the only**  
11          **action taken by those officials was to vote as members of the Band's**  
12          **governing body against permitting Imperial to use the road. Without more, it**  
13          **is difficult to view the suit against the officials as anything other than a suit**  
14          **against the Band. The votes individually have no legal effect; it is the official**  
15          **action of the Band, following the votes, that caused Imperial's alleged injury.**

16          **Even if the complaint is liberally construed to allege that the tribal officials**  
17          **themselves "blocked" the road, Imperial's claim that they exceeded their**  
18          **authority fails. There is no allegation that closing the road to Imperial**  
19          **exceeded the officials' authority granted by the Band; quite the contrary, the**  
20          **Band clearly authorized the closure. Imperial does allege that the blocking of**  
21          **the road constitutes a "taking" of its property in violation of the due process**  
22          **and equal protection clauses of the Constitution and the Indian Civil Rights**  
23          **Act, 25 U.S.C. Sec. 1302(5) and (8). These claims are fraught with substantive**  
24          **and jurisdictional problems of their own,<sup>3</sup> but we need not reach them.**  
25          **Imperial's complaint fails to allege facts giving it any property right in the**  
26          **road at all. It follows that the defendant tribal officials acted within the**  
27          **proper scope of their authority in exercising jurisdiction over the road."**

28          **Imperial 942 F.2<sup>nd</sup> 1269 at p. 1272.**

          Here as in Imperial, even if the Tribe's officials, who are unnamed in the Olliff cross-  
claim, took some type of official action, they did so in their official capacities as tribal officials  
and did not act outside their official duties as tribal officials. These officials are entitled to  
sovereign immunity. (See also Ex A, Rose Brown et al v. Augustine Garcia et al, A150374, CA.

1 1<sup>st</sup> District, Oct 31, 2017, holding that plaintiffs may not just make bald accusations against tribal  
2 officials to strip them of immunity and allow a case to avoid dismissal, the court must determine  
3 the scope of the actions of the official and whether their action was related to the performance of  
4 their official duties).

5  
6 Additionally, defendants cite to no case that the failure to act in supervising of unnamed  
7 alleged individual defendants that act on an adjoining property owner's rights provides an  
8 exception to the tribal sovereign immunity bar to unconsented civil suits. Defendant has failed to  
9 cite to a single case because no such case exists. As such, because sovereign immunity bars the  
10 cross-claim, the claim should be dismissed.

11  
12 **II.**  
13 **DEFENDANT'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS**  
14 **FATAL TO THEIR CLAIM**

15 Defendants readily admit in both their answer and opposition to the Tribe's Motion to  
16 Dismiss, that they *failed* to exhaust their federal administrative remedies, which is fatal to their  
17 cross claim. Defendant's jovially claim that this failure is not a bar to their cross-claim-this is  
18 not the law. Defendants were aware that the Tribe claimed the north-east corner of the property,  
19 and relied on the Knox marker, when the BLM survey was produced in 2011. (See Plaintiff's  
20 MTD DKT 14-4, Ex 1-1, Letter from BLM to Olliff)). Defendants were informed at that time of  
21 the BLM's position on the Knox marker and were provided an opportunity to exhaust their  
22 administrative remedies to challenge the BLM's position prior to filing suit. But they failed to  
23 do so.

24  
25 As noted in the Tribe's Motion to Dismiss, at pp. 12 of 16, the exhaustion doctrine  
26 dictates that "a party is not entitled to judicial relief for a proposed or threatened injury until the  
27 prescribed administrative remedy has been exhausted." *McKart v United States*, 395 U.S. 185,  
28

193 (1969) (citations omitted). Because Defendants failed to exhaust their BLM remedies, their trespass claim, which is based on the BLM survey, must be dismissed for failure to exhaust.

Finally, in addition to failure to exhaust, there is an additional hurdle that bars Plaintiffs' complaint, because the parcel at issue is in trust with the United States, they have failed to join the United States as a party to this action. As held in *Imperial*:

“There is another insuperable hurdle to Imperial's attempting to establish title to an easement in the road. The United States is an indispensable party to any suit brought to establish an interest in Indian trust land. *Minnesota v. United States*, 305 U.S. 382, 386, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). While the United States has consented to be sued in actions to quiet title in most public lands, it has expressly excluded Indian trust lands from that waiver of immunity. 28 U.S.C. Sec. 2409a(a). Inability to join the United States as an indispensable party must result in dismissal. *Carlson v. Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir.1975)”

*Imperial*, 942 F.2<sup>nd</sup> 1269 at p. 1274.

#### CONCLUSION

For the foregoing reasons the Defendants cross-claim should be dismissed, **with prejudice**, due to tribal sovereign immunity, official immunity, failure to exhaust and failure to state a claim upon which relief should be granted.

Dated: May 23, 2018

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