UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 18-17008

JW GAMING DEVELOPMENT, LLC
a California limited liability company,

Plaintiff – Appellee,

v.

ANGELA JAMES; et al.

Defendants – Appellants

REPLY BRIEF

Appeal from the Judgment of the United States District Court
for the Northern District of California
D.C. No. 18-cv-002669-WHO
(Honorable William H. Orrick)

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INTRODUCTION

In their Opening Brief, the Tribal Defendants demonstrated that the district court adopted an exceedingly broad interpretation of the real party in interest test in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). If affirmed, it will constitute a serious infringement upon the immunity from suit traditionally afforded tribal officials. Nothing that JW Gaming presents in its Answer Brief requires this Court to reach a different conclusion.

In fact, JW Gaming concedes a number of critical points. It agrees that Chairperson Williams and Vice-Chairperson James were acting on behalf of the Tribe when negotiating plaintiff's investment in the Pinoleville Casino Project. It also agrees that they were agents of the Tribe when signing the notes in 2008 and 2012. It further agrees that the Tribal Council defendants created the Pinoleville Business Board, the entity authorized to make expenditures of JW Gaming's loan proceeds, through the official acts of passing tribal council resolutions. And it concedes that, if it obtains a judgment on its breach of contract claim, the prohibition against double recovery will bar a damage award on its fraud and RICO claims.

Nevertheless, based on the mere fact it alleges such claims against the Tribal Defendants "individually," JW Gaming argues it should be allowed to

pursue recovery of its contract damages through these other means, and subject the entire Tribal Council and key employees to intrusive discovery, a lengthy trial, and potentially devastating personal liability. It claims the Tribe's longtime Chairperson and her daughter are the masterminds of an elaborate scheme to defraud third party investors and the Tribe they have governed for decades, by funneling money to unspecified accounts for unspecified "personal uses." And it reaches this conclusion all because $324,000 of the $5.38 million invested with the Tribe was allegedly missing from a 2011 accounting of tribal expenditures.

In this manner, JW Gaming hopes to transform a run of the mill breach of contract claim into a federal RICO action, with the ultimate goal of deposing the sitting Tribal Council and installing new leadership at the Tribe which is aligned with its counsel of record, a Sacramento attorney who is personally interested in this case. As a result of the fundamentally contractual nature of the suit and, perhaps, these ulterior motives, JW Gaming is unable to allege the facts necessary to show that the Tribal Defendants, rather than the Tribe itself, is the real party in interest in this suit. It fails to present allegations showing the Tribal Defendants acted solely to further personal interests distinct from the interests of the Tribe. Nor can it explain how appointing a

receiver to manage "all business and affairs" of the Tribe is not an interference with the Tribe's public administration. Instead, it simply repeats the simplistic reasoning that the Tribal Defendants are the real parties in interest because in the event of an adverse judgment on the tort and statutory claims, they would be bound.

As explained below, the real party in interest test is more comprehensive than this. JW Gaming's attempt to support the district court's overly broad application of *Lewis v. Clarke* fails as a consequence. This Court should refuse plaintiff's invitation to re-write the law of sovereign immunity for tribal officials, and hold that sovereign immunity shields the Tribal Defendants from the burdens of litigation in this case.

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

JW Gaming's statement of the case, despite its length, requires only a brief response.

First, JW Gaming's statement fails to comply with the requirement that parties submit an accurate recitation of facts with appropriate citations to the appellate record. For example, it cites the allegation that a 2011 accounting of JW Gaming's investment with the Tribe contained false entries concealing $324,900 in expenditures. Answer at 11. Then, in footnote 4, it states

"[i]nitial discovery in the district court has revealed information that nearly triples this number. Because this information is not in the appellate record, however, JW Gaming references the smaller amount alleged in the complaint." *Id*. Of course, in doing this, JW Gaming *is* referencing the larger amount, which violates the basic rule that matters outside the record on appeal may not be presented.[1] *See* Fed. R. App. P. 28(a)(6); *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

Second, JW Gaming states in its fact section that "[t]he fraud against JW Gaming is exposed in a separate lawsuit against the Tribe." Answer Br. at 18. In support of this assertion, it cites allegations in its complaint which quote deposition testimony from a prior state court proceeding between the Tribe and an unrelated third party, Forster-Gill, Inc. *Id*. at 19. Given JW Gaming's characterization of this testimony, statements of Chairperson Williams and Vice-Chair James appear to bear on several of the disputed facts in this

[1] The apparent need to shore up this allegation is not surprising. Although the complaint alleges vast fraud and RICO conspiracies which aim to divert JW Gaming's and other investors' funds to personal uses, it does not contain a single allegation identifying how these diversions were achieved, when they occurred, or the personal uses to which the money was applied. In the absence of specific, non-speculative allegations on this point, JW Gaming's assertion that the Tribal Defendants acted to further strictly personal interests through fraud or racketeering is called into serious doubt.

matter.[2] *Id*. at 20. JW Gaming further attempts to create the false impression that this testimony would be admissible in evidence if this case proceeded to trial.

Admission of a deposition from a prior proceeding is governed by Fed. R. Civ. P. 32(a)(8), which requires that the prior and present lawsuits involve the "same subject matter" and "the same parties or their representatives or successors in interest." *Hub v. Sun Valley Co*., 682 F.2d 776, 778 (9th Cir. 1982).

Here, the prior lawsuit does not involve the same subject matter as this suit. (SER 3 ("In December 2016, Forster-Gill filed suit against the Tribe for breach of various agreements and for water damage to the Hopland Inn.")). Nor does it involve the same parties or their representatives or successors in interest. (SER 3). The deposition testimony reproduced in the complaint will

[2] For example, on page 45 of the Answer, JW Gaming states:

> And, as alleged in the complaint, it is the sworn deposition testimony of Angela James and Leona Williams that implicated their co-council members, not any invention of JW Gaming. Specifically, both Angela James and Leona Williams testified that they do nothing without the approval of the whole council and cannot recall a time Leona ever took action without prior knowledge of the Tribal council.

therefore not be admissible in any trial in this case. *See Hub*, 682 F.2d at 778 (affirming district court's exclusion of deposition from prior lawsuit because subject matter of suits not sufficiently similar to satisfy Rule 32(a)). The statements are merely allegations and will have to be proven just as other allegations must be proven. JW Gaming's attempt to use this testimony to claim that the Tribal Defendants' fraud had been "exposed" or "confirmed" in the Forster-Gill suit is not an accurate statement of the facts.

ARGUMENT

I. The Real Party in Interest Test Requires Consideration of More Than Simply Which Party Will Be Bound By an Adverse Judgment.

In its Answer, JW Gaming asserts that *Lewis v. Clarke* makes clear that the main inquiry in determining the real party in interest is who will be legally bound by an adverse judgment. Answer at 29. However, while the question of who will be bound is certainly a factor in the analysis, this is an overly simplistic interpretation of the court's holding. *Lewis* provides the general framework for assessing the real party in interest, but it does not hold that district courts have unfettered discretion to allow claims to proceed as long as they are nominally against an individual officer or employee and seek a

judgment for damages. Case law from the Supreme Court and this Circuit confirms that a more nuanced analysis is required.

Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Thus, the general rules applicable in the Eleventh Amendment context are applicable in the context of tribal sovereign immunity. *See Lewis*, 137 S. Ct. at 1291.

In the Eleventh Amendment setting, it has long been the rule that courts assessing the real party in interest must consider more than the nominal parties to a suit. *Ex parte Ayers*, 123 U.S. 443 (1887), stated that it is "not conclusive of the principal question in this case that the [State] is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the [C]onstitution, must be determined by a consideration of the nature of the case as presented on the whole record." 123 U.S. at 492. Similarly, in *Ex parte New York*, 256 U.S. 490 (1921), the Court held that applicability of an exception to Eleventh Amendment immunity "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." 256 U.S. at 500. And in *Ford Motor Co. v. Department of Treasury of Indiana*, 323

U.S. 459 (1945), it likewise stated that "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." 323 U.S. at 464, *overruled on other grounds by Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

The Supreme Court has never departed from this rule. More recently, in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986), it held that the mere incantation of the term "individual capacity" is not enough to transform an official-capacity action into an individual-capacity action. 475 U.S. at 543. Then, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Court considered the scope of the *Ex parte Young* exception to Eleventh Amendment immunity.[3] In the process of concluding that the Coeur d'Alene Tribe could not avail itself of *Ex parte Young*, the Court stated:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer,

[3] The *Ex parte Young* doctrine permits certain suits seeking declaratory and injunctive relief against state officers in their individual capacities to proceed despite a state's Eleventh Amendment immunity. *See Ex parte Young*, 209 U.S. 123 (1908), *superceded in part by statute* 5 U.S.C. § 702 ("[a]n action in a court of the United States . . . stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States"). As an exception to states' immunity, cases interpreting *Ex parte Young* are instructive in this situation.

> named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe* [*of Florida v. Florida*, 517 U.S. 44 (1996)], that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.

Id. at 270. Instructively, the Court also stated "[t]he course of our case law indicates the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, the real affront to a State of allowing a suit to proceed." *Id*. at 277. *Coeur d'Alene* is thus confirmation that suits against state officials must be carefully and fully examined in order to avoid erosion of the immunity afforded by the Eleventh Amendment. Merely determining who will be bound by a judgment is not sufficient.

This teaching is no less applicable here. Although *Lewis* found that the plaintiffs' claims against Clarke were not barred by sovereign immunity, the Court remained "cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity." *Lewis*, 137 S. Ct. at 1291. With this, the Court signaled that a plaintiff cannot bypass sovereign immunity by simply naming government officials or employees as defendants. It left open the possibility that an official could be named individually and be

the target of a damages claim, but nonetheless found not to be the real party in interest if other factors were present.[4] In other words, *Lewis* did not disturb the Supreme Court's earlier pronouncements that claims must be carefully examined to determine the underlying nature of the suit and effect of the relief sought.

This Circuit's precedents are largely in accord. In *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), this Court stated that its "remedy-focused analysis" was "less categorical" than the plaintiff's proposed rule. 708 F.3d at 1088. It held that courts undertaking the analysis in any suit against tribal officers "must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Id*. (quoting *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (alteration in original)). This language, which is not addressed in JW Gaming's brief, dispels any

[4] Those other factors are present in this case. They include (i) a consensual contract claim, (ii) the lack of clear allegations showing that the Tribal Defendants' conduct was intended to further personal interests distinct from the Tribe's, and (iii) the request for appointment of a receiver to take control of the Tribe.

suggestion that the court need only look to who will be bound by a judgment to determine the real party in interest.

Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015), is no different. Although, like *Maxwell*, it ultimately holds that sovereign immunity did not bar claims against tribal employees,[5] it confirms that the analysis adopted by JW Gaming and the district court is not the law in this Circuit. *Pistor* reiterates that instead of only looking to who will be bound by a judgment, courts must examine whether the judgment would "interfere with [tribal] administration, . . . [or] restrain the [Tribe] from acting." *Pistor*, 791 F.3d at 1114 (internal quotations marks omitted) (alterations in original).

JW Gaming contends that *Shermoen* is distinguishable because it involved claims for declaratory and injunctive relief rather than a claim for damages. Answer at 40-41. However, the presence of injunctive relief is one of the reasons the Tribal Defendants rely on *Shermoen*. As with the declaratory and injunctive relief in that case, plaintiff's request for

[5] *Lewis*, *Maxwell*, and *Pistor* involve claims brought by tort plaintiffs who would have been left without a remedy if sovereign immunity applied. They do not address the situation where a contract claim which is not barred by sovereign immunity is brought in conjunction with tort and statutory claims seeking the same underlying damages. Therefore, while the analysis in those cases is instructive, their underlying facts are distinguishable from this case.

appointment of a receiver, if granted, will unquestionably restrain the Tribe from acting and require disposition of its property. Injunctive relief, like a receivership, is an equitable remedy. *Shermoen's* focus on the "essential nature and effect" of the relief sought makes it applicable here. *Shermoen*, 982 F.2d at 1320.

The above cases clarify that the so-called remedy-focused analysis is more nuanced than plaintiff lets on. It focuses on the allegations, claims and remedies in the complaint as a whole, not merely who will be bound by an adverse judgment. This undermines JW Gaming's assertion, and the effective holding of the district court, that a plaintiff can simply name and seek damages against tribal officials in their individual capacities in order to avoid sovereign immunity.

II. The Nature and Effect of the Claims and Relief Sought Confirms that the Tribe is the Real Party in Interest.

Repeating the refrain that naming an officer in his or her individual capacity is sufficient to avoid sovereign immunity's bar, JW Gaming claims that the presence of the contract claim, the receivership request and the capacity in which the defendants were acting are irrelevant to the real party in interest analysis. However, as discussed above, this ignores the Supreme

Court's clear instruction that courts must determine the essential nature and effect of a proceeding based on the record as a whole. Once taken into account, the record here shows that the Tribe—not the Tribal Defendants—is the real party in interest under the law.

A. The actions of the Tribal Defendants were not taken to further personal interests distinct from interests of the Tribe.

Relying mainly on *Pistor*, JW Gaming claims that the capacity in which the Tribal Defendants were acting is irrelevant because "JW Gaming sued James to hold her personally liable for her conduct, not because her position would enable her to provide the relief requested." Answer Br. at 44. However, this argument ignores entirely the test for distinguishing between personal and official capacity claims.

As the Tenth Circuit explains, the bar against official capacity claims "means that tribal officials are immunized from suits brought against them *because* of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Native Am. Distrib. V. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (emphasis original). The Tribal Defendants who serve on tribal council *do* collectively possess the power to provide the relief plaintiff

seeks in this case. Repayment of the loan balance with interest (the relief requested on the breach of contract claim), requires formal action by the tribal council. Because the complaint seeks the same damages on the fraud claim, (JW Gaming posits the fraud claim as an alternative theory of recovery), this rationale applies to relief on the tort claims as well.[6] It is therefore because of their official capacities that Leona Williams, Angela James, Jason Steele, Cassandra Steele, Donald Williams, Andrew Stevenson, and Veronica Timberlake were sued.

The Fourth Circuit puts the official-personal capacity question a different way. It holds that in assessing whether a claim is brought against a defendant in their official or personal capacity, courts must ask: "if the state [or tribal] officials had authorized the desired relief at the outset, would the burden have been borne by the State [or tribe]"? *Martin v. Wood*, 772 F.3d 192, 196 (4th Cir. 2014) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 109 (1984)).

[6] In its request for relief on the RICO claim, JW Gaming states it seeks treble damages "based on the damages to which the Company is entitled under the Promissory Note" between the Tribe and JW Gaming. (ER 154). Thus, it too is tied to the contract claim.

Here, it is undeniable that if the Tribal Defendants had authorized repayment of the JW Gaming note prior to the maturity date, the financial burden would have been borne by the Tribe. The Tribe is a party to the note with JW Gaming, not the individual defendants. This understanding of the real party in interest analysis disposes of JW Gaming's claim that the capacity in which the Tribal Defendants were acting is irrelevant.

Further, as described above, the Supreme Court's real party in interest cases require courts to examine the substance of the claims stated in a complaint. This Circuit has never examined this requirement in detail. The Fourth Circuit, however, explains that the requirement obligates courts to "look beyond the form of the complaint and the conclusory allegations," *Wood*, 772 F.3d at 196, and pose inquiries such as: (i) "were the allegedly unlawful actions of the state officials tied inextricably to their official duties;" (ii) "were the actions of the state officials taken to further personal interests distinct from the State's interests;" and (iii) "were the state officials' actions *ultra vires*." *Id.* (citing *Lizzi v. Alexander*, 255 F.3d 128, 136 (4th Cir. 2001); *Pennhurst*, 465 U.S. at 111).

Here, JW Gaming's complaint alleges that the Tribe, as the Tribal Defendants' employer, failed to repay the note *because* of actions Chairperson

Williams and Vice-Chair James took while administering the Tribe's business. (ER 117). It alleges further that the Chair and Vice-Chair, along with the other members of tribal council, exercised their authority to create the Business Board and make expenditures of the proceeds of JW Gaming's loan and that, in the exercise of that authority, they diverted funds to unspecified personal uses in violation of state and federal law. (ER 113, 138). Finally, the complaint admits that during this entire period, the Tribe acting through the tribal council continued to pursue a casino development, but that one never came to fruition. (ER 113). These allegations confirm that during all relevant time periods, the Tribal Defendants were administering the Tribe's business and taking related official action. In other words, they were furthering the interests of the Tribe. The complaint includes no allegation that, in so acting, the Chair, Vice-Chair, or any other member of tribal council or employee, acted in an *ultra vires* manner or attempted to serve their personal interests distinct from the Tribe's.

In substance and effect, JW Gaming's complaint alleges that the Tribal Defendants had authority to enter into the 2012 note and authorize its repayment. The allegations also confirm that if they had authorized repayment, the payments would have been funded by the Tribe. The

inevitable conclusion follows that the Tribal Defendants' allegedly unlawful actions were "inextricably tied" to their official duties within the Tribe. In these circumstances, the Tribe is the real party in interest, not the individual defendants as JW Gaming claims. *See Wood*, 772 F.3d at 196; *see also Pennhurst*, 465 U.S. at 101.

B. The contract claim confirms this is a suit against the Tribe.

Significantly, JW Gaming cites no case in which this Court, or any other court, has held that tort claims could proceed against tribal or state officials where the plaintiff also brings a consensual claim for breach of contract arising out of the same set of facts. This is not surprising; such a holding would have untold consequences. It would incentivize plaintiffs to sue in tort the officials responsible for negotiating or executing a contract as a means to put additional pressure on the sovereign to settle the contract claim. It would also result in depletion of the sovereign's finances by obtaining judgments against officials who are entitled to indemnification by the tribe or state. Protecting the financial integrity of the sovereign is a fundamental purpose of sovereign immunity. Allowing suits such as this to proceed is directly contrary to this Circuit's holding in *Cook*—that plaintiffs should not be permitted to "circumvent tribal immunity by the simple expedient of naming

an officer of the Tribe as a defendant, rather than the sovereign entity." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (quoting *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983)).

As the complaint bears out, recovery under the 2012 note with the Tribe is the real purpose of JW Gaming's suit. The fraud and RICO claims are ancillary. The presence of the contract claim distinguishes this case from *Lewis*, *Maxwell* and *Pistor* and counsels in favor of concluding that the party who is obligated under the contract—the Tribe—is the real party in interest here.

C. The request for appointment of a receiver also shows the Tribe is the real party in interest.

Nor does JW Gaming cite any case which suggests courts have discretion to ignore a request for equitable relief when engaging in the real party in interest analysis. However, that is in effect what JW Gaming asks this Court to do by claiming the issue is a "red herring" because the receivership request relates to the breach of contract claim only, not the tort or RICO claims.

There is reason to be skeptical of JW Gaming's claim. The complaint does not identify the claim for relief to which the receivership request pertains. (ER 154). And the law is clear that a receiver typically will not be

appointed to protect a simple contract creditor's right to property or money. *See* 12 Charles Alan Wright *et al*., Federal Practice and Procedure § 2983 (3d ed. 2018). It defies credulity to believe plaintiff wants a receiver appointed in connection with a simple contract claim, as opposed to the widespread fraud and racketeering among tribal officials it claims has been ongoing for decades. Given the serious allegations in the complaint, JW Gaming and its counsel clearly hope this Court will order a receiver to take control of the Tribe, a remedy that would be unprecedented in the history of tribal litigation.

This request must be considered when undertaking the real party in interest analysis. Ignoring it would defy the Supreme Court's command to determine the nature of a case on the record as a whole rather than considering claims in isolation. And because imposition of a receiver would unquestionably interfere with governance of the Tribe, it confirms the Tribe is the real party in interest in this suit.

III. The District Court's Interpretation of *Lewis v. Clarke* Undermines Tribal Self-Government and Autonomy.

In its attempt to support the district court's ruling, JW Gaming asks this Court to ignore the contractual origins of this suit and set aside tribal sovereign immunity so that it can pursue claims against the entire tribal

council and numerous employees (even those who had no hand in negotiating the contracts with JW Gaming or deploying the proceeds of its loan), for decisions made in the course of governing and administering the Tribe's business. This Court should decline this unprecedented request. If the district court's ruling is adopted as law, it would give plaintiffs license to transform straightforward breach of contract claims into tort cases with the potential for substantial personal liability for tribal officials. This would, in turn, undermine the fundamental purposes of sovereign immunity, which are to promote stable and effective governments and preserve the scarce resources of the sovereign. These purposes are no less valid in the tribal context and, arguably, are even more so.

A. The court's ruling encourages suits challenging acts of self-governance by tribal officials.

The district court's construction of *Lewis* will have several foreseeable and wide-spread negative effects if affirmed by this Court. It will permit plaintiffs to avoid sovereign immunity's bar simply by alleging claims that seek damages against tribal officials in their personal capacities, as the court considered dispositive the fact that "[i]n the event of an adverse judgment, the individual defendants—not the Tribe—will be bound." (ER 5-6). However, it

is always the case that the party sued on a claim will be bound if an adverse judgment is rendered. If this were the rule, it would give plaintiffs virtually complete control over whether tribal officials can be hauled into court for acts tied to their official duties. They would face the burdens associated with such litigation even if they are ultimately successful in defending against the claims, and governance will suffer as a result. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982))). Prudence counsels against adopting a rule that leaves tribal officials exposed to such suits.

B. An increase in individual capacity suits threatens tribes' fiscal health.

Affirming the district court's ruling will also embolden the plaintiff's bar and increase the number of personal capacity suits filed against tribal officials and employees. This will permit plaintiffs to expose tribal officials to court-sanctioned discovery and ultimately trial based solely on a plaintiff's choice to seek money damages from the officials themselves. *See Grand Canyon Skywalk Dev. LLC v. Cieslak*, Nos. 2:15-CV-01189-JAD, 2:13-CV-00596-JAD, 2015 WL

4773585, at *7 (D. Nev. Aug. 13, 2015) (citing *Maxwell* and opining that tribal sovereign immunity does not bar subpoenas served on tribal officers and employees), *aff'd*, 2016 WL 890921 (D. Nev. Mar. 7, 2016). This will infringe upon the officials' or employees' ability to fully perform their duties and, in the end, result in less effective government. Documents relating to a tribal employee's official duties will be held by the tribe, thus requiring the tribe to respond, or help its employee respond, to discovery demands in a case, with all the expense and disruption that entails. *See Mitchell*, 472 U.S. at 526.

Tribal treasuries will also bear the burden of individual capacity suits. Tribes, like the states and federal government, often indemnify their employees against judgments in cases arising out of their official duties. An expansion in personal capacity suits will increase the need to indemnify tribal employees and, as a consequence, increase the burden on tribal financial resources. This, in turn, stands to undermine both the federally-codified obligation of the United States government to guard and preserve the sovereignty of Indian tribes and the goal of promoting Indian self-determination and economic self-sufficiency. *See* 25 U.S.C. § 4301(a)(6) (2019).

CONCLUSION

It is fundamentally the job of Congress, not the federal courts, to determine whether or how to limit tribal sovereign immunity. The district court's ruling encroaches upon that function. The Tribal Defendants request that this Court reverse the district court's order denying their motion to dismiss based on sovereign immunity and remand the case with instructions to dismiss causes of action two through six of the complaint.

Respectfully submitted this 15th day of May, 2019.

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STATEMENT OF RELATED CASES

Appellants are unaware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 4,994 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type and size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

s/ *Rudy E. Verner*

Rudy E. Verner

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2019, a true and correct copy of the foregoing **REPLY BRIEF** was served electronically via CM/ECF addressed to the following:

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