No. A158632

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JASON SELF AND THOMAS W. LINDQUIST,

Plaintiffs and Appellants,

v

CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA,

Defendant and Respondent.

Appeal from the Superior Court of the State of California
The Honorable Kelly C. Neel Case No. DR190353

# APPELLANTS' REPLY BRIEF

J. Bryce Kenny (CSB No. 208626)
P.O. Box 361
Trinidad, CA 95570
Telephone: (707) 677-2504
Email: jbrycekenny@gmail.com

Attorney for Appellants
Jason Self and Thomas W. Lindquist

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## I. INTRODUCTION

This is an appeal from a trial court order granting a hybrid motion to quash summons, or in the alternative, to demurrer, on the grounds of tribal sovereign immunity. The Respondent Tribe purchased land in fee simple located off of its reservation, operated the commercial businesses that were there when they purchased it, and sixteen years later, applied to have it placed into federal trust status by the federal government.

The Appellants/Beach Users filed suit to establish a public easement across a portion of the subject property to get by vehicle to the beach where, since at least 1967, anyone could launch a small boat into Trinidad Bay.

Apparently, the Respondent/Tribe does not disagree with the standard of review urged by the Beach Users, or the issues on appeal.

In a theme found many places in the Respondent's Brief ("RB"), the Tribe places far too much reliance on the fact that the Beach Users chose to include in their Complaint a statement as to their motive for filing the suit, namely, to avoid having the subject property go into federal trust status without an enforceable easement in place that ensures that future generations of the public will enjoy the same access to Trinidad Bay as they do. As explained fully below, the Beach Users statement of motive is mere surplusage, and cannot serve as the spring board to support the Tribe's arguments that other remedies exist, that their case interferes with the federal policy of placing land in trust for the benefit of Indian tribes, or that it is preempted by federal law.

Moreover, this is not a case where the court must defer to Congress because only it has the power to limit or expand common law tribal immunity under its plenary powers, it is a case where the *application* of

the common law, as it has always been understood, dictates that the Tribe is not immune.

## I. ARGUMENT

### A. The Tribe's Cited Authorities are not Apposite, Because This Case Presents an Issue of First Impression.

Section A of the RB fails to recognize that this case presents a new issue not yet decided by the courts. The numerous authorities cited are not apposite because they did not consider the immovable property exception to the rule of tribal sovereign immunity.

At page 23, the RB states: "It is a central tenet of the United States Supreme Court's tribal sovereign immunity jurisprudence that only Congress—not the states or the courts—may impose limitations on Indian tribes' inherent common law sovereign immunity." The statement misses the point that the Beach Users are not asking for "limits" to be imposed on tribes' "common law sovereign immunity, they are simply asking for the common law rule to apply to tribes. What the Tribes seeks is to have only those aspects of the common law that do not result in them being subjected to litigation--like any other government would be--applied to them. That is what Chief Justice John Roberts said cannot be the rule in his concurrence in Upper Skagit Indian Tribe v. Lundgren (2018) 138 S.Ct. 1649, 1655 ("The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.")

### B. Tribal Sovereign Immunity is not Compelled by the United States Constitution

At page 23, fn. 5 of the RB, the Tribe attempts to put tribal sovereign immunity on par with that of states when it declares:

> This relationship, like that of the states to the federal government, is consistent with the Supreme Court's understanding of the sovereign immunity of states: "the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt* (2019) 139 S. Ct. 1485, 1499.

In fact, tribal sovereign immunity is most definitely *not* rooted in the Constitution, but is a creature of federal common law. It was first mentioned in Turner v United States (1919) 248 U.S. 358, and later became a holding in United States v. U.S. Fidelity Co (1940) 309 U.S. 506. Kiowa Tribe of Okla. v. Manufacturing Technologies (1998) 523 U.S. 751, 757.

In overruling Nevada v Hall (1979) 440 U.S. 410, the Franchise Tax Bd. Court made it clear that common law sovereign immunity was based on comity, while state sovereign immunity is compelled by the history and structure of the Constitution. Franchise Tax Bd. of Cal. v. Hyatt (2019) 139 S. Ct. 1485, 1492. Because tribal sovereign immunity is not compelled by the Constitution, this court can and should decline to apply it as a matter of discretion as when faced with other questions of comity. In re Stephanie M. (1994) 7 Cal.4th 295, 314 ("The courts of this state may, but are not required to, execute the judgment of a foreign nation as a matter of comity.") Biosense Webster, Inc. v. Superior Court (2006) 135 Cal.App.4th 827, 836 (Whether to issue a TRO restraining a party from filing suit in a foreign court).

### C. Declining to Apply Sovereign Immunity Here Would not Constitute Diminution by the State

At page 24 of its RB, the Tribe again states that tribal sovereign immunity is a matter of federal law not subject to diminution by the states.

Michigan v. Bay Mills Indian Cmty. (2014) 572 U.S. 782, cited two cases at page 789 for that proposition. The first was where the State of North Dakota passed a statute to the effect that in order to be able to file suit in its courts, an Indian tribe was required to waive its immunity in those courts. That was going too far, said the Supreme Court in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P. C., 476 U.S. 877, 891-92 (1986). The second was Washington v. Confederated Tribes (1980) 447 U.S. 134, 154, where the Court stated in *dicta* "… even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." The Court was considering the state's power to impose cigarette taxes, not the doctrine of sovereign immunity.

If the cited phrase had any real power, it would have prevented the California Supreme Court from doing what it did in Agua Caliente Band of Cahuilla Indians v. Superior Court (2006) 40 Cal.4th 239, 254, to not recognize tribal sovereign immunity in an action by California to enforce its Political Reform Act.

By not applying sovereign immunity here, the court is not diminishing it, but merely stating that there is no tribal exception to the

immovable property exception. If Congress does not like that result, it is free to act.

### D. The Tribe did not Acquire the Subject Property in its Sovereign Capacity

At pages 26 and 27 of its RB, the Tribe argues that it holds title to the subject property not in its proprietary capacity, but as a sovereign. There is no citation to the record for that proposition, and the statements of counsel are not evidence. Knapp v Newport Beach (1960) 186 Cal.App.2d 669, 679.

The Beach Users have offered to amend their complaint to allege that the subject property is and has always been a commercial venture for the Tribe. They can even allege, in good faith, that before the Tribe purchased the subject property in 2000, Carol Ervin, the Tribal Chairperson at the time, promised the seller, Robert Hallmark, that they would never seek to have the property placed in trust.[1] This supports the notion that the property was purchased in the capacity of a proprietor, not as a sovereign, as now claimed. It also supports the analogy that the "prince" most certainly stepped down from the throne to acquire the property, as was explained in Schooner Exchange v. McFaddon (1812) 11 U.S. 116, 144, the seminal case on foreign sovereign immunity.

[1] Letter from Robert Hallmark dated February 28, 2019, which is part of the Correspondence file for the Coastal Commission meeting of Thursday March 7, 2019, and can be viewed at the Agenda Archives website at coastal.ca.gov.meetings/agenda/#/2019/3. The Tribe has submitted the staff report from this meeting for judicial notice. If notice is taken of their Exhibit C, notice of other parts of the same record should be taken under the rule of completeness. Evidence Code Sec. 356.

If the predicate facts upon which the defense of sovereign immunity turns are significantly expanded by judicial notice in this case, it may be appropriate to remand for discovery on those issues. See, Warburton/Buttner v. Superior Court 103 Cal.App.4th 1170, 1181; Great Western Casinos, Inc. v Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1418.

That tribes under the current state of the law enjoy sovereign immunity even for off-reservation commercial activity is not dispositive either, because here, the important factor is that the property is held in fee simple under California law, giving this court jurisdiction.

As the California Supreme Court has noted, "If it be true that a state has no power by statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication, -- if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents who will not voluntarily submit their claims to her courts for adjudication, -- great evil must result." Perkins v Wakeham (1890) 86 Cal. 580, 581.

In Title & Document Restoration Co. v. Kerrigan (1906) 150 Cal.289, 310, the California Supreme Court had occasion to note that: "While it is true, as a general proposition, that an action to quiet title is an action in equity which acts upon the person, it is also true that the state has power to regulate the tenure of **immovable property within its limits**, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger." (Emphasis provided.), citing Perkins, supra, 86 Cal. 580. The Tribe has not responded to these authorities in its RB.

Nor has it responded to the case of Starkey v. La Pasto Band of Mission Indians (2004 S.D. Cal.) 03-CV-2549-IEG (JFS) , where tribal sovereign immunity was raised as a defense to a cause of action for quiet title. The court reasoned that "…although the quiet title claims allow courts to establish the rights of adverse claimants to property, the claim is properly characterized as an *in rem* action. 'Jurisdiction to render the judgment is based upon the court's power over the property within the state, despite the fact that there is no personal jurisdiction over the adverse claimants.'" P. 5, citing 2 Witkin Cal.Proc. Jurisd. Sec. 243; and Cal. Code of Civil Procedure Sec. 762.010. Thus, sovereign immunity did not defeat the quiet title action, because "…it is not necessary for the Court to exercise personal jurisdiction over the tribe." Ibid. This case should be particularly persuasive because it is not challenged by the Tribe. And, in the same case on administrative appeal, discussed below, the trust transfer was ultimately upheld.

...The California Supreme Court has opined that although both the lower appellate courts in California and the federal courts are split on whether sovereign immunity implicates true subject matter jurisdiction or personal jurisdiction, it is undisputed that it can be waived and courts have no duty to raise the defense *sua sponte*. It therefore concluded that it does not implicate a court's subject matter jurisdiction in any ordinary sense**.** People v Miami Nation Enterprises (2016) 2 Cal.5th 222, 243-244 (citations omitted)**.**

This observation supports the correctness of the approach taken by the federal district judge in Starkey, supra, that quiet title does not require personal jurisdiction over the landowner, so sovereign immunity is not a bar.

### E. This Case Does not Conflict With Congressional Policy or Federal law.

At pages 28-34 of the RB, the Tribe argues that "An exception to tribal sovereign immunity that allows private parties to use a state common law cause of action to require a tribe to litigate its interest in fee lands acquired and owned by the tribe in its governmental capacity, would thwart Congress's goal of facilitating tribal self-determination and economic development through the trust acquisition of off-reservation fee lands." A detailed description of the trust application process and its underlying rationale is laid out in the RB, but is of no help to this appeal. The premise is wrong mainly because, as explained in the Beach Users Opposition to RJN filed herewith, the existence of easements does not prohibit the land from being taken into trust status. See, Rodney Starkey *et al*. v. Pacific Regional Director, Bureau of Indian Affairs (2016) 63 IBIA 254, 260. Therefore, there is no conflict between state law quiet title actions and federal acquisition of lands for Indian tribes.

Moreover, while the Beach Users are private individuals, they filed their case on behalf of the general public. (1 Appellants' Appendix 7)

At page 32, the Tribe again improperly makes factual assertions with no citation to the record, referring to a "tribal cultural site" between the subject property and the Rancheria proper. The Beach Users offer to amend their complaint to allege that this property is actually claimed by a *different* tribe, the Yurok Tribe, which also claims the subject property as its aboriginal territory, and objected on that basis to the Coastal Commission's federal consistency determination,

the staff report for which is attached to the Tribe's RJN as Exhibit C.[2] Unlike the Rancheria, which was not established until at least 1906, the Yurok Tribe claims to have occupied the area roughly from Trinidad to the Klamath River, approximately 30 miles distant, since time immemorial.

The discussion about the pier being part of the Tribal Transportation System is not relevant because it has nothing to do with the beach where members of the public launch their small boats. The pier is separated from the boat launch beach by a large rock promontory known as the "Little Head," and is not traversed to get to the beach.

Nor is it of any consequence that the Beach Users do not allege that the Tribe has interfered with public access to the boat launching beach. They are not required to do that under the law of implied dedication. Bess v. County of Humboldt (1992) 3 Cal.App.3d 1544, 1550.

The Tribe did not discuss the Federal Quiet Title Act, cited in the AOB. It simply cannot be disputed that if the land were taken into trust status before this suit and accompanying *lis pendens* were filed, no court, state or federal, would have jurisdiction to entertain this suit. That is because 28 U.S.C. Sec. 2409a provides in relevant part: "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands,…." In filing this case, the Beach Users were simply

[2] If the court takes judicial notice of Exhibit C, it should also take judicial notice of the letter from the Yurok Tribe dated March 1, 2019, available at the web site identified in the previous footnote, and for the same reason.

engaging in an abundance of caution, in case the subject property really did go into trust status. They were required to record a *lis pendens* by Civ. Code Sec. 761.010, and C.C.P. Sec. 405.25 operates to make any public rights obtained retroactive to the recording of the *lis pendens*.

The plaintiffs in Upper Skagit Indian Tribe v. Lundgren had a quiet title claim based on adverse possession, not implied dedication, as here. Therefore, it may have been necessary under Washington law for them to allege interference by the defendant tribe with their land rights.

Sec. F(1) of the RB lacks merit because it conflates the process for federal trust acquisition of land to be held for tribal beneficiaries with what is being sought here—a public easement to the shoreline of the Pacific Ocean. This is not the case for the application of all the principals discussed there. HARP may eventually participate in an administrative appeal of the federal decision to accept the subject property into trust status, or it may not have to. The IBIA has held that the existence of easements do not prevent land from being taking into trust for an Indian tribe.

Further, the fact that no final judgment has been entered in the HARP v. Coastal Commission case makes discussion of it superfluous. It may eventually find its way to this court, and if it does, the issues will be totally different, namely whether the Commission abused its discretion in finding the proposed trust transfer to be consistent with the California Coastal Act.

The Beach Users can best reply to pages 34-38 of the RB, the lack of any decided cases applying the immovable property exception, by pointing out that that is the nature of open legal questions. Someone has to be first, and it should be this court, based on the persuasive

authority provided and the recognition that the Beach Users are saying there is no tribal exception to the immovable property exception. It is for Congress to declare an exception for tribes. In the meantime, courts should be able to apply the rule as it was known at common law, since that is the undisputed source of tribal sovereign immunity.

It is of no consequence that Oneida Indian Nation v. Phillips (N.D.N.Y. 2018) 360 F. Supp. 3d 122 and Cayuga Nation v. Tanner (N.D.N.Y. Mar. 24, 2020), No. 5:14-CV-13172020 WL 1434157--both of which came out after Upper Skagitt—and neither of them applied the immovable property exception. They could not. They were bound by the controlling authority in their Second Circuit published before Upper Skagitt. In contrast, lower federal court decisions are not binding on this court. "Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law." Fair v. BNSF Railway Co. (2015), 238 Cal.App.4th 269, 287 (citations omitted). This "independent determination" gives this court great freedom, a rare thing.

**F. Public Access to the Coastal Waters of California is as Important as Eminent Domain.**

At pages 39 to 41, the Tribe tries to distinguish Georgia v. City of Chattanooga (1924) 264 U.S. 472, on the grounds that it was an eminent domain case, while the instant one is quiet title to an easement for public access to the waters of the Pacific Ocean. It is true that Chattanooga involved eminent domain. But implied dedication is a close cousin of eminent domain. Both involve private property being encroached on for a public use. The difference is a matter of degree, and in the case of implied dedication, there is no requirement to pay the

landowner, because of voluntary concurrence in the public use. Friends of Hastain Trail v. Coldwater Development LLC (2016) 1 Cal.App.5th 1013, 1027.

By its nature, implied dedication assumes that the owner was aware of the public use of her property, and did not object to it. Chattanooga observed that eminent domain was "deemed to be essential to the life of the state." Id. at 480. It must be remembered that California has jurisdiction to quiet title to lands within its borders, and it has been stated that "… if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents who will not voluntarily submit their claims to her courts for adjudication, -- great evil must result." Perkins v Wakeham (1890) 86 Cal. 580, 581. So, certainly, the power to quiet title is not a trivial matter in the life of the state, and the right of public access to the beach is enshrined in the California Constitution at Art. X Sec. 4

It has been pointed out that Chattanooga did not mention the immovable property exception, or the case associated with it, Schooner Exchange, even though the latter preceded it by 12 years. The reason is likely that Schooner dealt with the immunity of foreign sovereigns, while Chattanooga dealt with a state of the Union. But regardless of whether an Indian tribe is more analogous to one or the other, the result is the same. In Schooner, the prince steps down from his throne by acquiring land in the territory of another sovereign, and in Chattanooga, the state abandons its sovereignty by acquiring land in a neighboring sovereign for a commercial purpose.

That brings up again the issue of whether the Tribe acquired the subject property for commercial purposes, or for some other. The Beach

Users have offered to amend their complaint to allege acquisition for a commercial purpose, on the theory that a motion to quash where the facts are not in dispute is the functional equivalent of a demurrer. The Tribe has not disputed that in its RB at Sec. G. Instead, it feigns lack of understanding of how an allegation of commercial use of the subject property relates to sovereign immunity. The Beach Users explained clearly in their AOB that footnote 8 from the Bay Mills case leaves open possible rejection of sovereign immunity where a plaintiff has no other remedy for a claim related to "…off-reservation commercial conduct." Michigan v. Bay Mills Indian Cmty. (2014) 134 S. Ct. 2024, 2035 n. 8.

And, the distinction can also be very useful in deciding whether Chattanooga is deemed persuasive to this court. If the Tribe, like the State of Georgia, acquired the subject property for a commercial purpose, the case becomes more on point. Importantly, by offering for judicial notice a Coastal Commission staff report which clearly establishes that the subject property is used for commercial purposes, the Tribe admits as much[3]. See Page 000024 of Exhibit C to Tribe's RJN.

Because it cannot be disputed that the Tribe acquired the property in fee simple and runs the commercial operations located there, the reasoning of the Chattanooga case applies that "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of eminent domain of the State wherein the land is situated." Georgia v. Chattanooga, 264 U.S. at 480. By the same token, the power of the State of California to quiet

title to land within its territory is not restricted or modified by the fact that the Tribe still has some attributes of a sovereign.

Even Bay Mills recognized that tribes possess only those aspects of sovereignty that are not inconsistent with their dependent status. 134 S.Ct. at 240 (Sotomayor, J., concurring), citing United States v. Wheeler (1978) 435 U.S. 313, 322-323. To allow a tribe to resist state jurisdiction to quiet title to fee owned lands within its territory is inconsistent with the dependent status of tribes. If the Tribe accepts state grant funds to build its pier, it should submit to the jurisdiction of the state courts.

**G. Cass County is Persuasive Authority Because it Relied in Part on Chattanooga.**

At RB 41, the Tribe attempts to discount Cass County Joint Water Resource District v 1.43 Acres of Land in Highland Township (2002) 643 N.W.2d 685, because it relied in part on the now overruled County of Yakima v. Confederated Tribes and Bands of Yakima Nation (1992) 502 U.S. 251. But, as pointed out in the AOB, it also relied upon Chattanooga, and that reliance is solid. Especially now that it is plain that the Tribe acquired the subject property for commercial purposes.

Further, it is highly questionable whether the subject property is within the Tribe's "aboriginal lands," as claimed at RB 41. The Rancheria could not have been created before 1906, because that was when the federal Rancheria Act was passed. Duncan v Andrus (N.D. Cal. 1977) 517 F.Supp.2d 1, 2. Moreover, as pointed out above, the Yurok Tribe claims the land as part of its aboriginal territory since time immemorial.

Nor, should the Tribe be able to invoke the doctrine of *stare decisis* here, for it is plain that no court has yet decided whether the immovable

property exception to sovereign immunity applies to Indian tribes. The Upper Skagitt majority sent it back down specifically so that courts like this one could weigh in. 138 S.Ct. at 1654.

**H. Protecting the Treasury is one of the Underpinnings of the Doctrine of Sovereign Immunity.**

At Sec. F(2) of the RB, the Tribe somewhat remarkably refuses to concede that the protection of the public fisc is one of the underpinnings of the sovereign immunity doctrine. This raises a contradiction within the RB at 32-33, where the Tribe states "[s]overeign immunity does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury. *Seminole Tribe*, 517 U.S. at 58 (citing *Hess v. Port Auth. Trans-Hudson Corp.* (1994) 513 U.S. 30, 48." That is an implicit admission that it exists at least *partly* for that purpose. And, if you scratch the surface and look at the Hess case, it shows through a long recital of authorities that "…the state treasury factor is the most important factor to be considered . . . and, in practice [circuit courts] have generally accorded this factor dispositive weight" as an underpinning for the sovereign immunity doctrine of the Eleventh Amendment. 513 U.S. at 48-49.

Since it is established that tribal sovereign immunity derives from the common law, it makes sense that in tribal immunity cases, a court would ask what the financial impact to a tribe would be if it were not immune from suit?

In Santa Clara Pueblo v Martinez, the Court considered both sovereign immunity and whether Congress intended to create a cause of action in federal court for declaratory and injunctive relief to address a violation of the Indian Civil Rights Act. It's observations and footnote

19 should be read as applicable to both issues. "Not only would it undermine the authority of tribal forums, see *supra*, at 59-60, but it would also impose serious financial burdens on already 'financially disadvantaged' tribes. [citation]." Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 64-65.

"The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. [citation] And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits. [citation]." Ibid. fn. 19.

People v Miami Nations Enterprises (2016) 2 Cal.5th at 235, cited Santa Clara for that proposition also. ("Permitting suits against tribes and, in some contexts, their officials would "impose serious financial burdens on already 'financially disadvantaged' tribes.")

American Property Management Corp. v. Superior Court (2012) 206 Cal.App.4th 491, 507, a tribal sovereign immunity case, also confirms the point, citing Allen v Gold Country Casino (9th Cir. 2006) 464 Fed.3d 1044. Allen, in turn, cited Alden v Maine (1999) 572 U.S. 706, which noted "[i]t is indisputable that at the time of the founding, many of the states could have been forced into insolvency but for their immunity from private suits for money damages." Id. at 750. That simply leaves no room for doubt that one of the reasons that sovereign immunity was considered important, was and is to protect the finances of the sovereign.

But rather than concede this simple point, the Tribe sends the reader back to Sec. B of its RB, which purportedly explains the true

reasons for sovereign immunity. But there we find only general statements that "[t]ribal sovereign immunity arises out of federal common law and reflects the Constitution's treatment of Indian tribes as governments in the Indian Commerce Clause, their special status as 'domestic dependent nations,' Congress's plenary power, and the unique relationship between the United States and Indian tribes. Those observations would be better labeled as reasons why Congress has chosen to *retain* the doctrine, not why courts recognized it initially. The Supreme Court has taken the position that the doctrine of tribal sovereign immunity is not a creature of Congressional action, and that it found its way into its case law "almost by accident." Kiowa Tribe of Okla. v. Manufacturing Technologies (1998) 523 U.S. 751, 756.

There is no doubt that the materials that the Beach Users have submitted for judicial notice show that a large part of the original reasons behind sovereign immunity as applied to tribes are no longer present with respect to modern California gaming tribes.

The claim that the materials are not relevant because they show gross gambling revenue "without defining the regions, identifying the parties that submitted information, or the information submitted," is not well taken. The region is defined as "Sacramento" and includes California and Northern Nevada, the parties submitting the information are obviously the tribes themselves, or their subsidiary entities, and the information submitted is the gross revenue generated by casino gambling. Exhibits 1 and 5 to Appellants' RJN. Because Exhibit 5 indicates there are only two Indian gaming operations in all of Nevada, the inescapable inference is that the vast majority of the 9.2 billion

dollars generated in 2018 goes to California tribes, including the instant Tribe.

### I. The Tribe Urges a Scope of Tribal Sovereign Immunity that Would Exceed That of any Other Sovereign.

In his dissenting opinion in Upper Skagitt, Justice Thomas pointed out that "[j]ust last Term, this Court refused to 'exten[d]' tribal immunity 'beyond what common-law sovereign immunity principles would recognize." 138 S. Ct. at 1661, (Thomas, J., dissenting) citing Lewis v Clarke (2017)137 S.Ct. 1285, 1289. He points out that tribes no longer possess the full attributes of sovereignty, [citation], and for that reason the Lewis Court declined the invitation to make tribal immunity 'broader than the protection offered by state or federal sovereign immunity…..Accordingly, because States and foreign countries are subject to the immovable property exception, Indian tribes are too."

The reasoning there is very compelling. Why should tribes be given more protection than other sovereigns, when more and more are using it to go into areas historically occupied by organized crime? See AOB at pp. 33-34 and discussion of "moral hazard," which was not commented upon by the Tribe in the RB.

The Tribe's attempt at RB 43 to distinguish Wilkes v. PCI Gaming Authority (Ala. Sept. 29, 2017) no. 1151312, 2017, WL 4385738, because it was a tort case, is unavailing. It was cited to illustrate that state courts are starting to use footnote 8 of Bay Mills to deny sovereign immunity where tort victims or others who never chose to deal with a tribe, are otherwise left without a remedy.

### J. Preemption Does not Provide an Alternative Basis to Uphold the Trial Court.

In Sec. H of the RB, the Tribe argues that an alternate basis for upholding the trial court is that the Beach User's Quiet Title case is preempted by federal law. The burden is on the party asserting preemption to demonstrate that it applies. Quesada v Herb Thyme Farms, Inc. (2015) 62 Cal.4th 307-308. The Tribe does not meet its burden.

First and foremost, the Tribe is mistaken, because, as noted above, the existence of easements of record does not prevent property from being taken into trust status.

In Rodney Starkey *et al.* v. Pacific Regional Director, Bureau of Indian Affairs (2016) 63 IBIA 254,[4] the La Posta Band of Mission Indians applied to take land adjacent to their reservation into trust. Neighbors Rodney and Almeda Starkey had a recorded easement over the parcel proposed for trust acquisition to access their property. It developed that their actual road was not entirely on the easement described of record. The Band offered to work with them to correct the legal description, and stated many times its intent not to interfere with their access rights, and that the trust acquisition would be "subject to" existing easements. But the Starkeys filed suit in federal district court to "…bar the Department from approving the Band's fee to trust application and taking the land in trust, and to restrain the Band from interfering with the easement rights of the Starkeys." 63 IBIA at 260.

The Starkeys and the Band negotiated a compromise, which became the stipulated judgment in the federal case. Ibid. The Appeals

[4] The Interior Board of Indian Appeals hears appeals from final administrative decisions on, among other things, taking land into federal trust status for the benefit of American Indian tribes. Its decisions are available on its web site.

Board concluded that the BIA had properly considered all of the Starkey's claims, and that the existence of the original recorded easement and the one that resulted from the litigation did not prevent the decision to uphold the trust transfer. 63 IBIA at 267.

Thus, even if the instant Beach Users are successful in obtaining a public easement, the Tribe can still transfer the subject property into trust status. That puts to rest the preemption argument at Section H.

A state cause of action to establish a public easement cannot possibly support an implied preemption on any of the three grounds that the Tribe cites, "…conflict, obstacle, or field preemption." (RB at 50, citing People ex rel. Harris v. Pac Anchor Transp., Inc. (2014) 59 Cal.4th 772, 778.

In considering the question of preemption, a threshold question is whether a presumption exists *against* preemption of state law. Buckman C. v. Plaintiffs' Legal Comm. (2001) 531 U.S. 341, 347. ("Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' [citation], such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.")

Here, there is no doubt that quieting title to land within its jurisdiction is a field that states have traditionally occupied. Perkins v Wakeham (1890) 86 Cal. 580. The Tribe fails to demonstrate how either the Coastal Zone Management Act (CZMA) or the Indian Reorganization Act (IRA) is inconsistent with such state power. Therefore, no presumption of federal preemption exists to assist the Tribe.

Nor does further legal analysis change the result. In People v Dillard (2018) 21 Cal.App.5th 1205, 1217, a case cited by the Tribe, Buckman is cited for the proposition that where the state law predates the federal enactments that are claimed to preempt it, the preemption argument must fail. The Buckman Court did find preemption, but when the controlling rule is applied here, the opposite conclusion is required. That a state may quiet title to real property within its bounds is an ancient aspect of the common law. The CZMA and the Indian Reorganization Act (IRA) are not nearly so old. And nothing in their legislative history or purpose demonstrates how state courts quieting title conflicts with the purpose or goals of those laws. That explains why the Tribe has cited none, and only makes conclusory and general statements.

Indeed, the CZMA process is still playing out while the Humboldt County Superior Court considers whether the Coastal Commission was correct in finding that the trust acquisition was consistent with the state Coastal Act. This case is not interfering with that process.

The Tribe seems to be trying to advance a species of the "issue preclusion" branch of *res judicata*. But it is well settled that to be applicable, the prior decision must be final. Cal Sierra Development, Inc. v. George Reed, Inc. (2017) 14 Cal.App.5th 663, 671.

The Tribe, without citation to the record, again proclaims that it acquired the Harbor Property to facilitate its self-determination and economic development. That the Tribe waited sixteen years to apply for the trust transfer shows that the trust transfer is not necessary to further self-determination and economic development. How can

recognition of an easement interfere with goals that were accomplished twenty years ago when the property was acquired?

The Tribe briefly suggests that preemption based on a conflict with "the right of reservation Indians to make their own laws and be ruled by them" is also appropriate here. But it does not develop that argument, and it is plain that it does not apply here.

In People ex rel. Becerra v. Huber (2019) 32 Cal.App.4th 524, 547, a case cited by the Tribe, Division Four of this court declined to apply preemption to an enforcement action aimed at illegal sales of cigarettes both off and on the reservation. Here, there is not even a colorable claim that this case implicates conduct *on* the reservation. The court's *in rem* jurisdiction is not predicated on conduct by anyone, and it is undisputed that the subject property is not reservation land.

One can only speculate as to why the BIA has not completed the trust transfer process of the subject land. But even if it is waiting for this case to become final before it acts, it cannot be said that a mere slowing down of a federal process creates a situation where preemption is appropriate. This is especially true where it is apparent that the existence of an easement does not stop the property from going into trust status.

The Tribe has not met its burden in showing why preemption should apply to this case. The argument that preemption is an alternate basis for upholding the trial court is completely vacuous.

K. CONCLUSION

This court is free to make an independent analysis of the federal tribal sovereign immunity doctrine. The Beach Users ask only that an exception to the ordinary rule not be carved out for tribes that gives

them greater immunity than any other sovereign. It makes no sense to do that in an era when the gaming tribes in California have improved their economic standing beyond their wildest dreams, and some are moving aggressively into questionable ventures that are illegal for anyone else.

The immovable property exception, footnote 8 of the Bay Mills case, and the reasoning in the Starkey federal district court case cited above each give the court an adequate basis to support a ruling that protects the public's access to California's coastal waters in perpetuity by rejecting sovereign immunity in this case.

Chief Justice John Roberts was right when he said "[t]he correct answer cannot be that the tribe wins every time no matter what." 138 S.Ct. 1649, 1655

The case should be reversed and remanded for further proceedings, including, if the court deems it appropriate, an opportunity for the Beach Users to amend their complaint as they have requested here, for discovery on jurisdictional facts, or both.

Dated: Respectfully Submitted,

_____/s/_____
J. Bryce Kenny
Attorney for Appellants

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court and in reliance on the computer program used to prepare this brief, counsel certifies that this brief was produced using at least 13-point type and contains 6,693 words.

Dated: July 27, 2020 _____/s/_____
J. Bryce Kenny

## PROOF OF SERVICE

I am over the age of 18 years, a U.S Citizen, and am not a party to this action. On July 28, 2020, I served the Appellants' Reply Brief on the Respondent by email to its counsel of record, Timothy C. Seward at tseward@hobbsstraus.com through the court's TrueFiling Electronic Filing System, and by mailing a copy to the Humboldt County Superior Court, 825 Fifth Street, Eureka, CA, first class postage prepaid, on July 28, 2020. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____/s/_____
J. Bryce Kenny