UNITED STATES COURT OF APPEALS
NINTH CIRCUIT COURT OF APPEALS

SHINGLE SPRINGS BAND OF MIWOK INDIANS, Plaintiff/Appellee v. CESAR CABALLERO, Defendant/Appellant	Case No. 20-16785 USDC Eastern District of CA Case No.: 08-cv-03133-KJM-AC

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF DISMISSAL DATED JULY 8, 2019, BY HON. KIMBERLY J. MUELLER, JUDGE PRESIDING, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

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Appellant/Defendant Cesar Caballero herewith submits this Reply Brief.

I.
SUMMARY OF ARGUMENT

As far as the direct charge of being imposter fake Miwoks and having defrauded true Miwoks out of their rightful lands for decades, the only real defense that these land stealers have is sovereign immunity. It is all you really read about in anything they ever write. These are people who say things like "It doesn't matter what we did. You can't sue us for it." Appellant points out the following areas where they have lost their sovereign immunity right as pointed out below in argument B: a) you cannot claim a Miwok sovereign immunity and not be Miwok; b) you cannot claim sovereign immunity based on conduct which constitutes *ultra vires* activity; c) the Appellee obviously waived its sovereign immunity by filing its lawsuit which requested injunctive relief.

Appellant should point out that the Appellee's response brief doesn't even mention these issues. It is as though it just simply does not matter. But, there is a group of cases holding that if a tribe files a

lawsuit in federal court and seeks injunctive relief, it thereby waives sovereign immunity on related issues.

The Trial Court likewise ignored it and in doing so committed error. The Appellees likewise don't discuss much about the *ultra vires* claim we will set forth further details of that claim in this brief see below each of the other arguments asserted by the respondents are likewise without merit this case should be reversed and remanded to the trial court with instructions to permit the matter to go forward on the substantive merits all right when we say the matter you should say to permit the cross complaint by appellant to go forward on its substantive merits.

II.
ARGUMENT

A. The Trial Court Erred in Ignoring and Not Applying Case Law Stating that a Tribe that Files Suit in Federal Court and Seeks Injunctive Relief has Thereby Waived Its Sovereign Immunity as to Counterclaims Arising from the Same Facts as the Tribe's Claims

There is little doubt that there was solid published case law stating that where a native American tribe chooses to file a lawsuit in a US federal court and in that complaint asserts a claim for injunctive relief,

that in so doing, the tribe has waived its sovereign immunity for any counterclaims brought by defendants in that case that relate or rise out of the same nexus of facts as the claims brought by the tribe. See *Rosebud Sioux Tribe v. A&P Steel, Inc*. 874 F.2d 550, 552 (8th Cir 1989):

> "Furthermore, when a sovereign nation such as an Indian tribe commences a lawsuit, " 'it waives immunity as to claims of the defendant which assert matters in recoupment--arising out of the same transaction or occurrence which is the subject matter of the government's suit.' " United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co., 650 F.Supp. 278, 281 (D.Minn.1986) (quoting Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir.1982) (quoting Frederick v. United States, 386 F.2d 481, 488 (5th Cir.1967))). The counterclaims of the defendant must seek relief of a similar nature to that sought by the plaintiff and in an amount not in excess of the plaintiff's claim. Pan Am., 650 F.Supp. at 281. The Rosebud Sioux Tribe initiated this lawsuit. Because A & P Steel's counterclaim arises out of the same contractual transaction, seeks similar monetary relief, and is for an amount

> less than that sought and recovered by the Tribe, we conclude that the Tribe has specifically waived its immunity to the counterclaim."

See also *United States v. Oregon*, 657 F.2d 1109, 1014 (9th Cir. 1981):

> "Here, the Tribe intervened to establish and protect its treaty fishing rights; a basic assumption of that action was that there would be fish to protect. Had the original decree found the species to be in jeopardy, and enjoined all parties from future fishing in order to conserve the species, the Yakimas could not have then claimed immunity from such an action.[13] Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit."

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1333 (10th Cir. 1982) states:

> "The equitable nature of this suit is of paramount importance. "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-

> created equitable rights." Holmberg v. Armbrecht, 327 U.S. 392, 395, 66 S. Ct. 582, 584, 90 L. Ed. 743. If Congress had intended to make a drastic departure from the traditions of equity practice, an unequivocal statement of that purpose would have been made. An appeal to the equity jurisdiction of the federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754. We should not "lightly assume that Congress has intended to depart from established (equitable) principles." Weinberger v. Romero-Barcelo, --- U.S. ----, ----, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d 91."

And see *Rupp v. Oklahoma Indian Tribe*, 45 F.3d 1241 (9th Cir. 995).

See further *Tohono O'odham Nation v. Ducey*, 174 F.Supp.3d 1194, 1204 (D. Az. 2016):

> "Having placed a question before the court, a sovereign acknowledges the court's authority to resolve that question,

> whether in favor of the sovereign or in favor of a counter-claimant seeking the opposite resolution.
>
> ***
>
> In a later decision, the Ninth Circuit confirmed that '[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy.' *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). The Court of Appeals also explained, however, that "a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts."

See *Id.* at 1204-1205 states:

> "In *United States v. State of Oregon*, 657 F.2d 1009 (9th Cir.1981), the Court of Appeals held that the Yakima Tribe waived its sovereign immunity when it intervened in an action addressing salmon fishing rights on the Columbia River. As the court explained:

Here, the Tribe intervened to establish and protect its treaty fishing rights; a basic assumption of that action was that there would be fish to protect. Had the original decree found the species to be in jeopardy, and enjoined all parties from future fishing in order to conserve the species, the Yakimas could not have then claimed immunity from such an action. Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit. *Id.* at 1014. The Ninth Circuit further explained: "By intervening, the Tribe assumed the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse." *Id.* at 1015.

This waiver-by-litigation doctrine is narrow. In a later decision, the Ninth Circuit confirmed that "[i]nitiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). The Court of Appeals also explained, however, that "a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise

> from the same set of underlying facts." *Id.* This limitation in *McClendon* comports with the Supreme Court's decision in *Oklahoma Tax Commission*, which held that a tribe, by filing an action to enjoin the collection of taxes, was not subjecting itself to an action to collect the taxes even though that action arose out of the same facts. 498 U.S. at 509, 111 S.Ct. 905.[3]"
>
> On the basis of these authorities, the Court concludes that the Nation, by filing this action, has waived its sovereign immunity with respect to "the issues necessary to decide the action." *McClendon*, 885 F.2d at 630. It therefore is subject to counterclaims addressing those same issues. *Rupp*, 45 F.3d at 1244-45 (permitting counterclaims). To determine the scope of the Nation's waiver — the issues necessary to decide the action — the Court will examine the Nation's complaint.[4]"

This trend in the law allowing a tribe its right to choose to come to obtain the benefits of a U.S. District Court but at the cost of waiving sovereign immunity as to related counterclaims was stated in the recent United States Supreme Court in *Upper Skagit Tribe v. Lundgren*, 584 U.S. _ (2018) [Concurring opinion by J. Roberts]:

> "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."

Notice the Appellee here 100% ignores this issue in its opposition brief. Appellant supposes we just have to pretend that those cases don't exist, but the fact is they do exist. The trial court likewise oddly disregarded that solid case law completely, and doesn't mention it at all in its decision. See Trial Court's statement of decision from the motion to dismiss Cesar Caballero's cross complaint [ER-91-94]:

> "First, this Court lacks subject matter jurisdiction over the action because the Tribe possesses sovereign immunity to suit, and that immunity has not been waived. Fed R. Civ. Pro. 12(b)(1). Second, this Court lacks subject matter jurisdiction to adjudicate a challenge to the status of a tribe that appears on the United States' list of federally-recognized tribes, and Mr. Caballero, and the "Indigenous Miwoks" he purports to represent, cannot state a claim for relief as a matter of law. Fed. R. Civ. Pro. 12(b)(l), (6). Third, Mr. Caballero's challenge to the Tribe's

federal recognition is non-justiciable, as the Tribe's status in relation to the United States is a political question beyond the province of any court. Fed. R. Civ. Pro. 12(b)(l), (6). Fourth, to the extent Counter-Plaintiff claims he and the persons he purports to represent were wrongfully denied membership in the Shingle Springs Band, this Court's also lacks subject matter jurisdiction to adjudicate it, because only the Tribe itself is empowered to grant membership, and no claim for federal relief can be stated. Fed. R. Civ. Pro. 12(b)(l), (6). Fifth, Mr. Caballero's challenge is time-barred, since, as a matter of law, he and other members of the Tribe have been aware of the Tribe's federal recognition for 30 years. Fed. R Civ. Pro. 12(b)(6). Seventh, Mr. Caballero's countersuit cannot state a claim upon which relief can be granted because, as a matter of law, a federally-recognized Indian tribe cannot be enjoined from using its own federally-recognized name, under the guise of trademark law or otherwise. *Id.* Finally, the United States is a necessary and indispensable party to Mr. Caballero's challenge of the United States' recognition of the Shingle Springs Band and his claim to their lands, but cannot be joined because of its immunity, requiring dismissal. Fed. R. Civ. Pro. 12(b)(7).

> Accordingly, pursuant to Federal Rules of Civil Procedure 12(b)(1), the Court hereby orders that Counter-Plaintiff's complaint is, in its entirety, DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction. In addition, the Court finds that dismissal also would be warranted if it had subject matter jurisdiction, because Counter-Plaintiff has failed to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6) andbecause the United States is an indispensable party that cannot be joined, requiring dismissal under Rule 12(b)(7).”

Nowhere in the Trial Court's decision does the court give a reason as to why/how all those cases don't apply. Instead, the trial judge and Appellee have just completely ignored that line of cases, and have completely ignored the simple reality that the tribe did in fact file a lawsuit in federal court that does in fact seek injunctive relief; that they obtained injunctive relief [which this Court later reversed]; that

Appellee also had Cesar Caballero prosecuted for contempt which resulted in him spending significant jail time. Appellee just ignores all

that Caballero cited in his Opening Brief exactly where the record reflects this; see Appellee/Plaintiff's complaint, ER 144, paragraph 28; ER 145, paragraph 34; and ER 146-147, prayer for relief A – H [requests for injunctive relief]; see ER 56, order granting motion for preliminary injunction on summary judgment; see ER 78 [Order Holding Defendant in Contempt]; ER 70 [October 31, 2011 Order imprisoning Defendant]; ER 54 [Minute Order finding Caballero in Contempt and Imprisoning him for 30 days dated November 20, 2013].

The record is quite clear that the Appellee really went to town on Appellant Caballero in fighting him in a battle where Caballero's hands were tied behind his back, with a claim of a false, imposter Miwoks masquerading as though they were true Miwoks asserting a Miwok sovereign immunity when they are not Miwok at all. Instead, Appellee keep the true Miwoks out. Appellee claims that the US government has somehow deemed them true Miwoks; this is not true they have deemed Cesar Caballero's people Miwoks by issuing them USA Bureau of Indian Affairs ["BIA"] ID that specifically says they are Miwok. The Appellee's Tribal Council governing board don't have

those BIA identifications. Nobody has ever said that they are Miwoks; they aren't Miwoks.

In these days of new sports such as Mixed Marial Arts [“MMA”] fighting, we can easily make an analogy that what the Appellee tribe did in this case is akin to accepting an MMA fight whereby their opponent had both hands tied behind his back. They can fight but the opponent can't. This type of one-sided litigation has already been said to be improper in the above line of cases.

Accordingly, the judgment and post-judgment orders should be reversed, and this matter should be remanded with instructions to permit Cesar Caballero’s cross-claims to proceed on their substantive merits.

B. Non-Miwok Persons Cannot Assert Miwok Sovereign Immunity

When we speak of national sovereignty, it is necessarily connected to an actual nation. We don't just say sovereign immunity, for example, we say tribal sovereign immunity of a specific tribe, just like we would say the national sovereignty of Mexico. You would not get

sovereignty if you were not a nation. It is an oxymoron to speak of sovereignty that does not apply to an actual nation. The Appellee does not have an actual nation at all; its tribal council have hoodwinked the US Bureau of Indian Affairs [“BIA”] into thinking that they are Miwok people. The BIA looks upon them as being Native American, and won't get into the issue of whether they are Miwok or not, but this Court in applying sovereign immunity must ask this question: Sovereign immunity based on which nation? What is your nation?”. This is what the Appellee does not really have a good answer to; they can only say Miwok Nation, but one cannot claim Miwok Nation sovereign immunity unless one is Miwok.

Here is a super simple way of looking at this case: the Appellee is a group of non-Miwok people that are invoking Miwok sovereign immunity. It would be a little bit like Appellant's counsel, a white man with blue eyes born in California, somehow asserting the national sovereignty of Mexico as giving immunity to suit; of course, that's a ridiculous example, but it is exactly what the Appellee is doing here. They are not Miwok, but are asserting Miwok sovereignty. This type of conduct is quite obviously *ultra vires*; this type of conduct is in the

category of a giant lie. The Trial Court was very well aware that the people were not Miwoks, and that the non-Miwoks were keeping the true Miwoks out of the Shingle Springs lands. The Trial Court fully accepted that and said basically it doesn't matter; tribal sovereignty applies. To that we say no it doesn't; if you're not a Miwok, you cannot assert Miwok tribal sovereignty.

Accordingly, the judgment of dismissal should be reversed, and this case should be remanded with instructions to hear Appellant Caballero's cross-complaint on its substantive merit.

C. Appellee and the Trial Court Fail to Mention or Grapple with the *Ultra Vires* Exception to Sovereign Immunity and/or Political Question Immunity from All of Appellant's Claims

Conspicuously missing from Appellee's Answering Brief is any mention or grappling with the core issue of this appeal, that the Appellee's tribal council members' individual conduct is actionable here as an exception to any claim of tribal sovereign immunity, because their conduct is *ultra vires* in all respects.

The *ultra vires* exception to tribal sovereign immunity was raised in the trial court proceedings in Appellant's post-judgment motion for new trial and to vacate or modify judgment [Docket Entry #345]. The motion stated at page 16:

> "Moving party makes the following request regarding the application of sovereign immunity over the counterclaim: Counter-claimant Cesar Caballero requests leave to amend as counter-defendants the true culprits of the fake Miwok imposter fraud scheme to the counterclaim. The counterclaimant would add the current members of the governing council of the Shingle Springs Band of Miwok Indians: Regina Cueller [Chairwoman], Pat Cueller, Allan Campbell [Vice Chair], Brian Fonseca, Nicholas H. Fonseca, Annie Jones, Jessica Godsey Olvera, and Jacky Calanchini.
>
> The sovereign immunity applies to individuals for official acts only. The acts complained of are not official, are ultra vires, and involve individual members of the tribe who are not Miwok, and are imposters governing the tribe."

Appellant points out though that this is the current state of the law that immunities such as the political question immunity [similar to sovereign immunity] does not apply where the conduct of the offending parties is *ultra vires*. See *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147, 157 (4th Cir. 2016), cited in Appellant's Opening Brief and not mentioned at all by Appellees:

> "In examining the issue of direct control, when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a "de facto military decision [ ]" shielded from judicial review under the political question doctrine. Taylor, 658 F.3d at 410. However, the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine. The district court failed to draw this important distinction. Accordingly, we conclude that a contractor's acts may be shielded from judicial review under the first prong of Taylor only to the extent that those acts (1) were

committed under actual control of the military; and (2) were not unlawful."

A recent example of the use of the *ultra vires* doctrine to strike down an otherwise a political question matter, can be seen in *Alabama Association of Realtors et al. v. United States Department of Health and Human Service*, 20-cv-03377-DLF (DC Dist. 2021), pages 19-20:

> ""It is the role of the political branches, and not the courts, to assess the merits of policy measures designed to combat the spread of disease, even during a global pandemic. The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide eviction moratorium? It does not. Because the plain language of the Public Health Service Act, 42 U.S.C. § 264(a), unambiguously forecloses the nationwide eviction moratorium, the Court must set aside the CDC Order, consistent with the Administrative Procedure Act, see 5 U.S.C. § 706(2)(C), and D.C. Circuit precedent, see National Mining Ass'n, 145 F.3d at 1409."

"*Ultra vires*" is defined as follows [see https://www.law.cornell.edu/wex/ultra_vires:

> "Latin, meaning "beyond the powers." Describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters. When referring to the acts of government bodies (e.g., legislatures), a constitution is most often the measuring stick of the proper scope of power."

This is a case that should be remanded for the simple reason that this *ultra vires* issue was not dealt with by either the Appellee, or the Trial Court. The fact is the law allows an action to go through sovereign immunity if one can show that the conduct complained of is *ultra vires*.

The Court is thus referred to the following series of evidentiary items and legal authorities showing a solid case that the Appellee is indeed engaged in *ultra vires* conduct [against or outside legal authority]:

1. Act of Congress 06/30/13 (28 stat. 86), stating in part: "For support and civilization of Indians in California, including pay

of employees and for the purchase of small tracts of land situated adjacent to lands heretofore purchased, and for improvements on lands for the use and occupancy of Indians in California, $57,000.";

2. Act of Congress 5/25/18 (40 stat. 570), stating in part: ""For the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians, $20,000, said funds to be expended under such regulations and conditions as the Secretary of the Interior may prescribe.";
3. Series of land title documents from the US Bureau of Indian Affairs ["US BIA"/"BIA"] given to Appellant by Philip Scarborough. See Request for Judicial Notice, Item 1, exhibits 4-6 thereto [unopposed and should be granted] in which the Land title documents include the following unambiguous grantee language: "Shingle Springs Band of Miwok Indians, Shingle Spring Rancheria (Verona Tract), California.";
4. Plaintiff's Counsel Compilation of Data from Excerpts of the BIA title documents [RJN Document 1 above], showing title in

the name of Miwok people of Shingle Springs. [RJN Attachment 2 thereto];

5. Letter by CK Haukes dated January 12, 1919 [RJN, Attachment 3 hereto];
6. US Bureau of Indian Affairs Index to Indian Land Records [Appellee's RJN, Exhibit A thereto, Complaint in El Dorado Case No. PC20190492, Exhibit A thereto [which states: "Grantor: U.S.; Grantee: MeWuk Tribe; Remarks: "Shingle Springs Rancheria"];
7. April 1, 2019 letter from BIA regional superintendent Troy Burdick [Docket No. 345, Declaration of Herman Franck, exhibit D]:

   "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's complaint cite any authority under which we could take such action. As such, we are unable to act on your client's request for relief as described in the complaint.";
8. Declaration of Cesar Caballero in support of Opposition to Motion to Dismiss [Docket #338-1], Exhibit E, Cesar

Caballeros USA BIA identification showing that he is a member of the Miwok tribe;

9. The following federal law: 25 USC section 1322 [anti-alienation statute] and 18 USC section 1162 [making it a federal crime to alienate a Native American from their own lands].

To remind the Court what Appellant said in his opening brief, here is the reason these are *ultra vires* [outside of authority granted by law]: First, Appellant says again for the record that this case in no way request a change of the underlying title holders of the land. The title is in the Shingle Springs Band of Miwok Indian's name. This is exactly how it should be.

Appellant is and represents those true Miwok people. Appellee's members simply are not Miwoks, and are imposters. This imposter status goes against the express law that created the land: Act of Congress 06/30/13 (28 stat. 86) and Act of Congress 5/25/18 (40 stat. 570).

When Appellant filed this action, he did not have in his possession the series of title documents now given by Assistant US attorney Philip Scarborough, Esq. in connection with an *in rem* action filed in the US District Court for the Eastern District of California. Appellant points out that the current action does not seek any kind of title alteration or change, and indeed the way the title is spelled out in the US Bureau of Indian Affair ["BIA"] official records is quite perfect: "Shingle Springs Band of Miwok Indians, Shingle Spring Rancheria (Verona Tract), California." See Request for Judicial Notice filed in this court, Item 1, Exhibits 4, 5, and 6 thereto [Exhibit 4: TAAMS Title Status Report for the Verona Tract; Exhibit 5: TAAMS Title Status Report for Tract 546 T 5595; and Exhibit 6: TAAMS Title Status Report for Tract 546 T 5474].

Appellant/Defendant is and represents the very Miwok people that are described in the title document.

The problem here isn't the way title is described; the problem here is that the Respondents are controlling these lands and the Respondents are not Miwoks. The problem is that the Respondents are regularly

excluding the true Miwok people. Respondent's decision to somehow take over these lands and exclude true Miwoks is quite simply *ultra vires*. It is against the law; it's against the legal authority; it's against the title documents; it's against all of these Federal rules and positions taken by the BIA [that this land belongs to Miwok people].

Further proof that the Respondents' conduct is ultra vires is found in the initial US BIA Index to Indian Land Records document [Appellee's RJN, Exhibit A thereto, Complaint in El Dorado Case No. PC20190492, Exhibit A thereto [which states: "Grantor: U.S.; Grantee: MeWuk Tribe; Remarks: "Shingle Springs Rancheria"].

All pieces of evidence have unmistakable language in them that shows that the Miwok people are absolutely an officially recognized tribe. Appellant points this out because Respondents take the position that Appellant somehow should go out and get recognized. The reality is these reports make it clear Appellant and his tribe was a recognized Native American tribe. The reports also show that the land in Shingle Springs was purchased by the USA with the expressly-stated intent to

give it over to the new people and that they actually did that they got the money they bought the land and transferred it to them.

Further evidence that the Appellee's conduct is *ultra vires* is found in their argument that the BIA has somehow sanctified or certified them. The only thing the BIA certified was their vote. The BIA has never certified that these people are Miwoks. The fact is that the BIA has certified Appellant Caballero as a Miwok by giving him a Miwok ID [Docket No. 338-1, Declaration of Cesar Caballero, Exhibit E.]

In fact, the BIA has made it clear to us that it has no legal authority to investigate the claims that they are fake, imposter Miwoks who have illegally described themselves as Miwok. In fact, they are not Miwok, and are regularly excluding Miwoks from these lands. Appellant attempted to get the USA BIA to get involved in this dispute and received a letter from the regional superintendent Mr. Troy Burdick, [Docket No. 345, Declaration of Herman Franck, Exhibit D], which states:

> "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's

> complaint cite any authority under which we could take any such actions. As such, we are unable to act on your client's request for relief as described in the complaint."

It is actually the Appellee's members who are the people in the house that don't have a US BIA Miwok ID. The reason they don't have them is that they are not Miwok. That's the point of this case: non-Miwoks have taken over these lands, and are excluding true Miwoks. This is against the law. See 25 USC section 1322(b) and see 18 USC section 1162(b), two federal laws that prohibit the alienation of a Native American from Native American lands. One cannot do that, and yet these Respondents are. Their conduct in violating these two Federal statues is further evidence of the *ultra vires* nature of their conduct.

The foregoing makes it clear that Appellant has shown a credible and solid case for *ultra vires* acts by the Appellee's tribal council as individuals which would constitute or no which does constitute an exception to sovereign immunity and qualified or and political question immunity accordingly the court should reverse the trial courts dismissal of this action with remand instructions to allow these

ultra vires claims as an exception to sovereign immunity and political question matter immunity, to proceed forward on these on their substantive merits.

Accordingly, the Court should reverse the Judgment of the Trial Court and remand this case with instructions to consider and apply the exception to sovereign immunity for *ultra vires* acts, or such other remand instructions as the Court deems just and appropriate.

D. Appellee's Argument that The Trial Court's Dismissal is Separately Supported by Appellant's Inability to Join the United States as a Necessary and Indispensable Party is Without Merit

Appellee argues briefly that the Trial Court's dismissal is supported by Appellant's inability to join the United States, which is a necessary and indispensable and possessing sovereign immunity.

This argument is without merit for the following reasons:

The reason Appellee is so keen on joining the United States as an indispensable party is that so far, the United States' sovereign immunity has been a further cloak on the tribal immunity. The

concept is you have to bring the USA into this dispute, even though Appellant has zero dispute with the USA. Appellant also points out by the letter from Troy Burdick of the BIA, that they have no interest or legal authority in getting involved in this dispute.

The reason the Appellee likes the United States listed as a necessary party is that once the United States is in the case, they will move to dismiss. This happened in one related case which resulted in a hearing in which it was dismissed and is currently on appeal to the US Ninth Circuit Court of Appeals.

In the First Amendment of the United States Constitution, we all share a right and all that imposes an obligation on the government to allow everybody to petition the government for redress of grievances. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972):

> "Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment."

See also corollary provisions of the California State Constitution Article 1, Section 3:

> "(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
>
> (b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.
>
> (3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it

protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in

> furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses."

This means that you cannot just flat out bar a person from gaining access to court. To do so would require a violation of this First Amendment Right, and the current case where there is zero dispute that they have no legal authority in to do anything about this dispute.

To eliminate Plaintiff/Appellant's First Amendment right to petition the court for redress of grievances, is itself a constitutional violation, and should not be allowed. The state court rules defining necessary party must give way to the supremacy of the US Constitution's right of access to courts, a right secured in the right to petition the government for redress of grievances.

Accordingly, the judgment of dismissal should be reversed in this case should be remanded with instructions to the trial court to consider the *ultra vires* nature of Appellee's conduct, on the merit, or such other

remand instructions as this Court deems appropriate.

E. Appellant Never Waived His Cross-Complaint

Appellee oddly claims that appellant somehow waived his cross-claim. "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (Roesch v. De Mota (1944) 24 Cal.2d 563, 572.). Following the dismissal of his cross claim, Appellant did in fact file an appeal [Docket #40, Notice of Appeal by Caballero from Trial Court's order granting motion to dismiss his cross-claims. The appeal was dismissed on the basis that it was premature, as interlocutory orders are generally not appealable. [Docket # 66, 10/22/2009 Dismissal of Appeal], which stated in part:

> "A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See* Fed. R. Civ. P. 54(b); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgment is entered in compliance with rule). Consequently, this appeal is dismissed for lack of jurisdiction."

Appellant had to await a final disposition of the case before doing an appeal. There was no waiver, only waiting.

Accordingly, the Judgment of dismissal and the post judgment orders should be reversed.

F. The Trial Court Committed Prejudicial Error by Ignoring Appellant's Claim in his Motion for New Trial that The Statute of Limitations is not a Bar to Appellant's Cross - Claim Due to the Continuing Violation Doctrine

The Trial Court committed prejudicial error by ignoring Appellant's claim in his Motion for New Trial that the Statute of Limitations is not a bar to Appellant's Cross-Claim due to the continuing tort doctrine. This argument was raised by Appellant in his post-judgment Motion for new trial. See motion for new trial, docket no. 353, Reply brief, page 8:

> "This issue re statute of limitations is likewise easily salvageable with leave to amend because this is an ongoing fake Indian problem. The action is mainly in the category of a fraudulent business practices claim under Business & Professions Code section 17200, and would seek injunctive relief requiring that the rancheria be government by actual Miwok Indians and not the current set of imposters."

The problem Appellant seeks to adjudicate on the merits has nothing to do with BIA recognition long ago of the Miwok people. The problem is the Miwok tribe on the Shingle Springs lands ISN'T MIWOK. They committed the tort of continuing theft of Miwok lands continuously, and continuously, wrongfully exclude true Miwoks from the lands. This is the problem being sued over, not federal recognition. Appellee thinks it has been recognized as Miwok, but it simply isn't true. Recognition of Miwok status happens plainly and clearly when a person is granted a BIA Identification card, such as Appellant’s, that states the tribe as Miwok. Appellee's Tribal councilmembers don't have BIA IDs, and simply are not Miwok. They continue to wrongfully steal and keep the lands from true Miwoks. The violations committed on a continuing basis include the torts of negligent and/or intentional interference with prospective economic advantage. The conduct also constitutes a wrongful alienation of a Native American from his/her USA given lands, in violation of 25 USC section 1322(b) [prohibiting the alienation of a Native American from USA-given Native American lands), and 18 USC section 1162(b) [making it a federal crime to alienate a Native American from their own lands].

This Court should apply the continuing violation doctrine to this case, as set forth in *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192 [(California Supreme Court describes the continuing violation doctrine as avoiding the time bar of a statute of limitations defense)], and should reverse the Trial Court's decision to dismiss the cross-complaint.

III.
CONCLUSION

Based on the foregoing, the Court should reverse the judgment of dismissal, and should remand this case with instructions to permit the cross-complaint to proceed on its substantive merits, or such other remand instructions as the Court deems appropriate.

Respectfully submitted,

_//s// Herman Franck, Esq.____ Date: June 4, 2021
HERMAN FRANCK, ESQ.
Attorney for Appellant
Cesar Caballero

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32, I hereby certify that this brief contains 6,320 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

__//s// Herman Franck, Esq._____ Date: June 4, 2021

HERMAN FRANCK ESQ.