IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

TULE LAKE COMMITTEE, Plaintiff and Appellant, v. BILL G. FOLLIS; JUDY COBB; PHIL FOLLIS; JACK SHADWICK; RAMONA ROSIERE; THE MODOC NATION; THE CITY OF TULELAKE, CALIFORNIA; and THE CITY COUNCIL OF THE CITY OF TULELAKE, Defendants and Respondents.	C098505 Modoc County Super. Ct. No. CU-20-127

Appeal from Order After Hearing Granting Motion to Quash/Dismiss
Modoc County Superior Court
The Honorable Wendy J. Dier, Superior Court Judge

PLAINTIFF-APPELLANT'S OPENING BRIEF

Yoshinori H. T. Himel (SBN 066194)
7227 Bayview Way
Sacramento, California 95831
Telephone: (916) 420-9865
Facsimile: (916) 229-9922
E-Mail: yhimel@lawronin.com

Mark E. Merin (SBN 043849)
Paul H. Masuhara (SBN 289805)
LAW OFFICE OF MARK E. MERIN
1010 F Street, Suite 300
Sacramento, California 95814
Telephone: (916) 443-6911
Facsimile: (916) 447-8336
E-Mail: mark@markmerin.com
paul@markmerin.com

Attorneys for Plaintiff-Appellant
TULE LAKE COMMITTEE

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C098505
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 43849 NAME: Mark E. Merin FIRM NAME: Law Office of Mark E. Merin STREET ADDRESS: 1010 F Street, Suite 300 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: (916) 443-6911 FAX NO.: (916) 447-8336 E-MAIL ADDRESS: mark@markmerin.com ATTORNEY FOR (*name*): Plaintiff - Appellant TULE LAKE COMMITTEE	SUPERIOR COURT CASE NUMBER: CU-20-127
APPELLANT/ PETITIONER: TULE LAKE COMMITTEE RESPONDENT/ REAL PARTY IN INTEREST: BILL G. FOLLIS, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	
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[ ] Continued on attachment 2.

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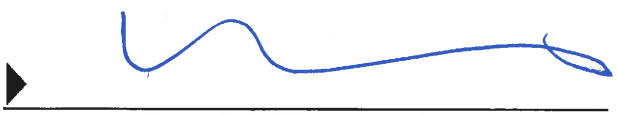
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I. INTRODUCTION

The Modoc Nation, an Indian Tribe with a reservation in Oklahoma (hereinafter "the Tribe") purchased the Tulelake Municipal Airport property from the City of Tulelake (the "City") in July 2018, occasioning this litigation. The City, in 1951, had obtained the property from the federal government, under a patent that transferred the property to it "and to its successors in function forever." The airport property occupies a large portion of the maximum-security WWII concentration camp used to punish Japanese Americans who spoke out against the unjust incarceration. The entire camp acreage was designated as a State Historic Landmark, and it is eligible for designation as a National Historic Landmark.

The City was embroiled in California Environmental Quality Act ("CEQA") litigation brought by the Tule Lake Committee (henceforth referred to as "the Committee"), a California non-profit public benefit corporation formed in 1981 to represent the survivors and descendants of those incarcerated at the camp. The Committee's litigation sought to prevent erection of planned fences. The City of Tulelake concocted a plan to transfer the airport to an Indian Tribe, which could then use its tribal sovereign immunity to combat the committee's litigation.

Since the Modoc Nation is not a "public entity" within the meaning of the patent nor a qualified "successor in function" to the City of Tulelake, the Committee initiated an action in state court to invalidate the sale of the airport

property to the Tribe. The Tribe moved to quash/dismiss the Committee's complaint on the ground of tribal sovereign immunity and the indispensability of the Tribe; and the court granted the Tribe's motion despite the Committee's argument that tribal sovereignty does not apply to property disputes relating to property purchased by a tribe but not on or adjacent to its trust lands. This appeal seeks reversal of the court's dismissal of the complaint with prejudice.

II. STATEMENT OF THE CASE

On November 4, 2020, the Committee filed its complaint against the Modoc Nation, the members of its tribal council (the "Tribal Defendants"), the City of Tulelake, California and the City Council of the City of Tulelake. (Plaintiff-Appellant's Motion to Augment Record, Complaint 1–53.)[1]

On February 2, 2023, the Tribal Defendants filed their motion to quash/dismiss the complaint. (Clerk's Transcript ["CT"] 4–21.)

On September 30, 2022, the Committee filed its opposition to the motion. (CT 22–37.)

On October 10, 2022, the Tribal Defendants filed their reply to the opposition to the motion. (CT 38–49.)

[1] The operative complaint was inadvertently omitted from the record designated on appeal. Accordingly, the Committee moves to augment the record, pursuant to Rule of Court 8.155(a)(1)(A). (*See*, *e.g.*, *Centex Homes v. Superior Court* (2013) 214 Cal. App. 4th 1090, 1097 n.7 [augmenting record on appeal with the complaint].) The Committee apologizes to the Court and the parties for any inconvenience caused by the omission.

On February 17, 2023, the Superior Court took the motion under submission. (CT 68.)

On March 13, 2023, the superior court granted the Tribal Defendants' motion, and dismissed the complaint, with prejudice. (CT 69–72.)

On April 27, 2023, the Committee filed its notice of appeal from the dismissal. (CT 73–74.)

III. STATEMENT OF APPEALABILITY

This matter is made appealable by Code of Civil Procedure section 904.1(a)(1) since the superior court on March 13, 2023, entered its order dismissing the complaint, with prejudice. (CT 69–72.)

IV. STATEMENT OF FACTS

A. THE PROPERTY IN SUIT

Among the ten "War Relocation Centers" or concentration camps that America created during World War II to incarcerate innocent citizens and immigrants because of their Japanese ancestry, Tule Lake is unique as the site where 12,000 American citizens were imprisoned for their American act of dissenting from governmental injustice. (Complaint 3.) In 1943, a misconceived and ineptly administered questionnaire caused thousands of the 120,000 incarcerated Japanese Americans to protest their false imprisonment by the federal government. (*Id.*) For their peaceful dissent, the government demonized them and punished them by segregating them from the other inmates. (*Id.*)

They were segregated into Tule Lake, which became a maximum-security prison camp and the largest of the ten concentration camps with over 18,000 souls. (*Id.*) The

government then maneuvered thousands of citizens into giving up their U.S. citizenship, and planned to deport them. (*Id.*) These events give Tule Lake unparalleled national and international significance. (*Id.*)

More than 331 persons died in the Tule Lake camp—some by suicide or murder, some from poor medical care, and some from depression and stress. Many who died were babies. Many who died were elderly and infirm. (*Id.* 4.)

In 1951 the federal government granted 359 acres of camp land to the City of Tulelake to use as an airport. (*Id.*) The grant was done by the Patent. (*Id.*; see also *id.* 25–32 [Patent attached].) As the Patent recites, its authority was the Federal Airport Act of 1946, Pub. L. No. 377, 60 Stat. 170 (May 13, 1946). (*Id.*) Under Section 16 of that Act the Administrator of Civil Aeronautics (whose current successor in function is the Administrator of the Federal Aviation Administration) was responsible for initiating the conveyance, which was then executed by the Department of the Interior. (*Id.*) The land patented to the city covered a large portion of the developed area of the camp, and two-thirds of the barracks area where people were forced to live. (*Id.* 4–5.)

The County of Modoc became the Tulelake Municipal Airport's sponsor. The Federal Airport Act of 1946, for example, defined "sponsor" as "any public agency which … submits to the Administrator, in accordance with this Act, an application for a grant of funds for airport development." (*Id.* 5.)

B. SIGNIFICANCE OF THE TULE LAKE SEGREGATION CENTER SITE

The challenges to the injustices of the incarceration resulted in the Civil Liberties Act of 1988. (Complaint 5.) In that Act, Congress found that the World War II

incarceration resulted not from genuine considerations of national security but from "racial prejudice, wartime hysteria, and a failure of political leadership." Pub. L. No. 100-383 (Aug. 10, 1988), 102 Stat. 903, § 2(a). (*Id.*) With the Civil Liberties Act came individual Presidential letters of apology, symbolic redress payments, and promises to educate the nation about the wrongful incarceration. (*Id.*)

The government's findings and apologies helped transform the Japanese American experience from shame and guilt at being imprisoned, to hope and healing. (*Id.*) Places of incarceration have now become hallowed ground, traditional cultural properties, and places for personal, national, and international remembrance. (*Id.*) Governmental efforts to preserve and interpret Japanese American incarceration sites manifest a genuine national remorse at having stripped an innocent but unpopular racial minority of the rights, freedoms, and dignity that Americans cherish. (*Id.*)

The National Park Service educates the public on the nation's natural and human history. (*Id.*) Tasking the National Park Service with preserving and interpreting Tule Lake reaffirms the nation's promises of public education about the incarceration's history. (*Id.* 6)

Through pilgrimages to the incarceration sites, survivors and descendants of the incarceration seek healing, human connection, and connection to the history. (*Id.*) Pilgrimages to Tule Lake began as solitary visits, with individuals seeking solace at the place that had caused them deep psychic wounds. (*Id.*) Pilgrimages to the site organized by the Tule Lake Committee now occur every two years, as four-day events that accommodate hundreds of pilgrims who come to honor the memory of those who were

imprisoned and those who died there. (*Id.*)

In 1975 the State of California designated the Tule Lake concentration camp site as a State Historic Landmark. (*Id.*) The trauma experienced at Tule Lake makes this historic site hallowed ground to Americans, to Japanese Americans, and to survivors and descendants of survivors of incarceration there. (*Id.*) Tule Lake's preservation is part of the healing that the government made possible when it acknowledged what President Reagan, in signing the Civil Liberties Act of 1988, described as "a great wrong." (*Id.*)

In 2006, a 37-acre portion of the camp's developed area was federally designated as the Tule Lake Segregation Center National Historic Landmark. (*Id.*) A National Historic Landmark or "NHL" must have national historic significance; must "possess exceptional value or quality in illustrating or interpreting the heritage of the United State"; must retain a high degree of historic integrity; must be recommended by the National Park System Advisory Board; and may be designated only by the Secretary of the Interior. 36 C.F.R. § 65.4. (*Id.*) Only about 2,500 sites have achieved this designation, including the 37-acre portion of the Tule Lake Segregation Center. (*Id.*) The National Park Service manages this portion. In December 2008, President Bush created the WWII Valor in the Pacific National Monument, including a Tule Lake Unit, including the 37-acre portion. (*Id.*)

In 2019 an Act of Congress elevated the Tule Lake Unit to the status of an independent National Monument, the Tule Lake National Monument. (*Id.* 8.) The Tule Lake concentration camp site is also eligible for listing in the National Register of Historic Places ("NRHP"). (*Id.* 6.)

C. THE SALE OF THE AIRPORT PROPERTY IN THE HISTORIC SITE TO THE TRIBE SOUGHT TO CUT OFF LITIGATION USING THE TRIBE'S SOVEREIGN IMMUNITY

Over a several year period the Committee had sought by CEQA actions to protect the historic site against planned and anticipated activities that would compromise its integrity as a historic site. (Complaint 8.) These CEQA actions opposed a fence around the airport which would restrict visitors to the Tule Lake Segregation Center and construction on the site which would adversely affect sensitive artifacts of the center's participants' activities. (*Id.*)

To avoid continued participation in litigation brought by the Committee and to end "this role of being the nominal owner of the piece of dirt under an airport that so far has gotten them sued a couple of times," the City Council of the City of Tulelake ("City Council") decided to transfer the City's fee interest in the historic property underlying the Tulelake Municipal Airport to the then Modoc Tribe of Oklahoma (now MN). (*Id*. 9.)

The decision to transfer the airport property to the Tribe for $17,500, was made despite the Committee's having offered to purchase the airport property for $40,000 cash, more than twice the offer solicited from the Tribe. (*Id.* 10; see also *id*. 36–27.) $17,500 for 359 acres amounts to less than $49 per acre. (*Id*. 10.) At the meeting of July 31, 2018, the City of Tulelake's City Council voted unanimously for the pre-drawn Ordinance naming the Tribe as purchaser of the historic property for $17,500. (*Id*. 10–13.)

After the sale of the airport property was finalized, the Committee filed the complaint to challenge the legality of the sale of the property to the Tribe. (Complaint 1–53.) The Tribe Defendants moved to quash/dismiss the complaint. (CT 4–21.) The

superior court granted the Tribe Defendants' motion. (CT 69–72.) This appeal was filed. (CT 73–74.)

V. ARGUMENT

A. INTRODUCTION

The City of Tulelake's decision to sell the airport property, which includes a large swath of the Tule Lake concentration camp, which the Japanese American Community has been attempting to preserve from development, raised several questions which the Committee attempted to address through its complaint in Modoc County Superior Court. (Complaint 1–53.) Since the superior court dismissed the complaint on tribal sovereign immunity grounds (CT 69–72), those issues have still to be resolved and will be addressed if this Court reverses the dismissal.

In moving to quash/dismiss the complaint challenging the legality of the Tribe's purchase of the Tulelake Municipal airport, the Tribe asserts its sovereign immunity from suit to prevent this Court even from considering the legality of the City of Tulelake's sale of the historic camp property to the Tribe. (CT 4–21.) But, as shown below, the principle of tribal sovereign immunity has **never** been applied to prevent a court from considering the merits of a dispute relating to real property (immovable property) owned by an Indian Tribe remote from the tribe's reservation and not subject to an application by the tribe to the federal government to take the land into trust for the tribe's benefit.

Because the principle of tribal sovereign immunity does not apply to the off-reservation purchase of the airport property in Modoc County, which is not the subject of a trust application by the Tribe, whose reservation is in Oklahoma, the superior court,

below, erred in finding that tribal sovereign immunity precluded the adjudication of the Committee's challenge to the eligibility of the Tribe to purchase, own, and operate the airport as a public airport, and the decision below should be reversed.

If the principle of tribal sovereign immunity could insulate the transfer in question from all court review, then any Indian tribe anywhere could defy all regulation of property, even that remote from its reservation and not subject to a trust application, and cause untold mischief, simply by purchasing it. There is no support for such an expansive application of the judicially-created principle of tribal sovereign immunity.

Even if this Court were to conclude that tribal sovereign immunity applies to the sale in question, it should then conclude that the Tribe is neither a necessary nor indispensable party to this action seeking equitable relief on a question of paramount public interest.

B. TRIBAL SOVEREIGN IMMUNITY DOES NOT APPLY TO DISPUTES RELATED TO IMMOVABLE PROPERTY REMOTE FROM THE TRIBE'S RESERVATION AND NOT SUBJECT TO AN APPLICATION TO THE FEDERAL GOVERNMENT TO TAKE THE PROPERTY INTO TRUST FOR THE TRIBE'S BENEFIT

"Tribal [sovereign] immunity" is an entirely "judge-invented doctrine" (*Michigan v. Bay Mills Indian Cmty.* (2014) 572 U.S. 782, 814 [Scalia, J., dissenting]) which has been applied in many instances to protect sovereign Indian tribes from threats to their sovereignty, such as making the tribes immune from taxes imposed on their activities, even commercial activities off their reservations. But it has never been stretched so far that it would prevent a local court from determining the merits of a dispute relating to

property, purchased by an Indian Tribe remote from its reservation, and not the subject of an application to the United States to take the property into trust for the tribe's benefit.

In *Upper Skagit Indian Tribe v. Lundgren* (2018) 138 S. Ct. 1649, the Supreme Court came close to addressing a case similar to that before this Court, with one significant exception discussed in more depth below, the trust status of the land in question. In *Upper Skagit*, the Indian Tribe purchased 40 acres **adjacent** to its reservation in the State of Washington with the stated intent to request the federal government to take the land into trust for the benefit of the tribe. Before so requesting, the tribe commissioned a survey of the property and discovered a portion of the property was fenced by neighbors, the Lundgrens, who claimed the fenced portion of the 40 acres as their own. Upon being informed of the tribe's claim, the Lundgrens initiated a quiet title action, alleging adverse possession and mutual acquiescence of the previously accepted boundaries. The tribe asserted sovereign immunity from suit relying on decisions recognizing "the sovereign authority of Native American tribes and their right to 'the common law immunity from suit traditionally enjoyed by sovereign powers.'" (*Id.* at 1652.)

The Washington Supreme Court rejected the tribe's claim of immunity and ruled for the Lundgrens, holding that sovereign immunity does not apply to cases where a judge "exercises in rem jurisdiction" to quiet title in a parcel of land owned by a tribe, but only to cases where a judge seeks to exercise *in personam* jurisdiction over the Tribe itself. (*Lundgren v. Upper Skagit Indian Tribe* (Wash. 2017) 187 Wash. 2d 857, 867.)

The tribe petitioned for a writ of certiorari to the Supreme Court which held that *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* (1992) 502 U.S. 251, on which the Washington Supreme Court relied in citing the *in personam* vs. *in rem* distinction as conclusive, did **not** address sovereign immunity at all but only dealt with a "more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887." (*Upper Skagit*, *supra*, 138 S. Ct. at 1652.) The Lundgrens argued for the first time before the Supreme Court that "[a]t common law . . . sovereigns enjoyed no immunity from actions involving **immovable property** located in the territory of another sovereign" and so "the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the 'character of a private individual.'" (*Id*. at 1653–54 [emphasis added].) But the Supreme Court declined to address the immovable property exception and, instead, remanded the case to the "Washington Supreme Court to address these arguments in the first instance." (*Id*. at 1654.)

Justices Thomas and Alito, who dissented from the court's remand decision, wrote that the Supreme Court could "easily" have affirmed the Washington Supreme Court's decision by addressing respondents' alternative ground for affirmance "based on the 'immovable property' exception to sovereign immunity. That exception is settled, longstanding, and obviously applies to tribal immunity.…" (*Id*. at 1656.)

Two Justices concurred with the Court to defer decision but, concerning the merits, said, "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." (*Id*. at 1655 [Roberts, C.J., concurring].) "In other words, once the Court makes clear that the Lundgrens ultimately have no recourse, the parties can begin working toward a sensible settlement. That, in my mind at least, is not a meaningful remedy." (*Id.*) "The consequences of the Court's decision today thus seem intolerable, unless there is another means of resolving property disputes of this sort. Such a possibility was discussed in the Solicitor General's brief, the Lundgrens' brief, and the Tribe's reply brief, and extensively explored at oral argument—the exception to sovereign immunity for actions to determine rights in immovable property." (*Id.*) Thus, two Justices were inclined, on policy grounds, to accept the immovable property exception.

Upper Skagit does not reject the "immovable property exception to sovereign immunity." Rather, the applicability of the exception was deferred to another day. But if the reasoning of Justices Thomas and Alito is followed, not only would the principle of sovereign immunity have no application to a dispute related to a tribe's purchase of off-reservation property, but the entire concept of tribal sovereign immunity may be jettisoned when the issue is brought to the Court as its membership, swelled by the past administration's appointments, is decidedly in the Thomas/Alito camp.

Unlike the superior court itself, both the Tribe Defendants and the Committee cited and discussed *Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria* (2021) 60 Cal. App. 5th 209. In *Self*, the plaintiffs allegedly feared that the Cher-Ae Heights Indian Community's purchase of coastal property adjacent to its reservation might interfere with their traditional use of the beach for recreational use and for a kayaking

business, and so sought to quiet title to a public easement for vehicle access and parking. In refusing to provide relief to the plaintiffs for what they described as a "speculative" concern that the Tribe might interfere with access, the court noted that the Tribe had requested that the property it purchased be taken into trust by the federal government, that Congress had created a detailed process for protecting public interests such as coastal access, that California had worked with the Bureau of Indian Affairs and the Tribe and secured assurances that coastal access would be protected, and that if that access were not adequately protected, the plaintiffs had remedies to address those problems in the future. (*Self*, *supra*, 60 Cal. App. 5th at 222.) In other words, it was the extensive protections of coastal access that were already in place that led the court to conclude that the case before it was "a poor vehicle for extending the immovable property rule to tribes." (*Id*. at 221–22.)

The extensive processes available to interested parties to protect their coastal access has no parallel in the present dispute. Here, if this Court does not reverse the lower court's dismissal of the complaint on tribal sovereign immunity grounds and provide a forum to address the legality of the Tribe's purchase of the airport property, there are **no other means available** to resolve the TLC's contention that the Tribe is not an eligible "public agency" equipped to provide the "successor in function" services previously provided by the City of Tulelake.

Although the court, by Judge Burns, did not consider whether the immovable property exception applied in *Cher-Ae Heights*, Judge Reardon, in his concurrence, stated his view that "tribal sovereign immunity to litigation, as originally understood, includes

an exception for the litigation of disputes over title to real (immovable) property…" (*Id.* at 222.)

C. THE DEVELOPMENT AND APPLICATION OF PRINCIPLES OF SOVEREIGN IMMUNITY SHOW THAT IT NEVER APPLIED TO IMMOVABLE PROPERTY OWNED BY ONE SOVEREIGN IN THE TERRITORY OF ANOTHER SOVEREIGN

The immovable property exception to sovereign immunity arises when one sovereign acquires property in the territory of another sovereign. The territorial sovereign has law in place governing issues of the land's ownership and transfer, and a forum in which to adjudicate those issues. If a party challenges the acquiring sovereign's ownership by an action in the territorial sovereign's forum, the acquiring sovereign's claims of sovereign immunity from the action under the general sovereign immunity principle will fail because the parcel is "immovable property," making the acquiring sovereign nonetheless amenable to action in the territorial sovereign's forum.

The federal courts have recognized and defined the immovable property rule between the States. (See *Georgia v. Chattanooga* (1924) 264 U.S. 472, 479–80 ["The power of Tennessee, or of Chattanooga, as its grantee, to take land for a street is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation."].)

Likewise, the courts (and the political branches) have recognized, defined, and applied, between nations, the rule that sovereign immunity does not apply to immovable property. (See *Schooner Exchange v. McFaddon* (1812) 11 U.S. (7 Cranch) 116, 145 ["A

prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual…"]; *see also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, § 1605(a)(4) ["A foreign state shall not be immune from the jurisdiction of courts of the United States ... in any case ... in which ... rights in immovable property situated in the United States are in issue"].) The statute was meant "to codify … the pre-existing real property exception to sovereign immunity recognized by international practice." (*Permanent Mission of India to the U.N. v. City of N.Y.* (2007) 551 U.S. 193, 200 [quoting *Asociacion de Reclamantes* v. *United Mexican States* (D.C. Cir. 1984) 735 F.2d 1517, 1521 [Scalia, J.]].) And, "[i]n 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation." (*Kiowa Tribe v. Mfg. Techs.* (1998) 523 U.S. 751, 759.) Clearly, acquisitions of property are "commercial in nature" and would not trigger sovereign immunity as contrasted to acts pursuant to a government's sovereignty or *acta jure imperii*. (See Tate Letter for complete discussion, which is included as "Appendix 2" in *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) 425 U.S. 682, 711–15.)

D. SINCE THE TRIBE HAS NOT INITIATED A TRUST APPLICATION, THERE IS NO OCCASION TO CONSIDER WHETHER PROCESSES INCIDENT TO THE TRUST APPLICATION PROCEDURE WOULD PREEMPT THIS COURT FROM ADDRESSING THE MERITS OF THE DISPUTE RELATED TO IMMOVABLE PROPERTY

Although Congress has authorized the Secretary of the Interior to acquire interests in lands "for the purpose of providing land for Indians" (Indian Reorganization Act of

1934, 25 U.S.C. § 5108), the Tribe has not requested the Department of Interior to take the airport property in Modoc County into trust for the Tribe's benefit. If it did, there would be an opportunity for the Committee to object and to raise its concerns about the Tribe's eligibility to fulfill the "successor in function" role that the patent deeding the property to the City of Tulelake requires.

Indeed, because no trust application has been filed, unlike in *Self*, *supra*, 60 Cal. App. 5th at 221–22, there is no means, other than this litigation, for the Committee to challenge the Tribe's eligibility to acquire the airport property. The immovable property exception makes the tribal sovereign immunity argument inapplicable.

E. THE UNAVAILABILITY OF SOVEREIGN IMMUNITY IN IMMOVABLE PROPERTY CASES APPLIES TO INDIAN TRIBES AS IT DOES TO ALL OTHER SOVEREIGNS

The Supreme Court has noted that Indian Tribes possess only the common-law immunity from suit traditionally enjoyed by sovereign powers, not a different, broader immunity. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.) It has declined to extend sovereign immunity of Indian Tribes "beyond what common-law sovereign immunity principles would recognize." (*Lewis v. Clarke* (2017) 137 S. Ct. 1285, 1292.)

The Supreme Court stated in *United States v. Fox* (1877) 94 U.S. 315 that it is "everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." (*Id*. at 320.) "The power of the State in this respect follows from her sovereignty within her limits…" (*Id*.)

Expanding tribal sovereign immunity to bar actions involving immovable property would undermine the sovereign interests of the States. If Indian tribal sovereign immunity could bar this action, similarly an Indian Tribe, merely by acquiring property off its reservation, could prevent a state from enjoining a nuisance on the property, could frustrate the state's strong interests in quieting title to property to assure the marketability of property within its borders, and could frustrate a state's interests in providing procedures where disputes about the possession of property could be resolved peacefully.

If the Tribe's sovereign immunity could bar resolution of this lawsuit, there would be no meaningful way to resolve the weighty questions the sale of this airport to the Tribe has engendered. Such a result would not be just.

F. EVEN IF TRIBAL SOVEREIGN IMMUNITY DID APPLY TO THIS CASE, THE LITIGATION COULD STILL PROCEED WITH THE TRIBAL COUNCIL MEMBERS NAMED IN THEIR "OFFICIAL CAPACITIES" AS ADEQUATE REPRESENTATIVES OF THE TRIBE UNDER *EX PARTE YOUNG* PRINCIPLES

In its decision finding tribal sovereign immunity barred the action, the court below also held that the action could not proceed against the tribal council members under *Ex Parte Young* principles. The Committee, in addition to the Tribe, also named as defendants Bill G. Follis, Judy Cobb, Phil Follis, Jack Shadwick, and Ramona Rosiere, who were all been sued in their "official capacities." (Complaint 2–3.) Unquestionably, the Tribe's governing body is responsible for the acts of the Tribe, itself, and the Court has the power to declare and enjoin illegal acts of the individuals on that ruling body. In *Ex parte Young* (1908) 209 U.S. 123, the Supreme Court held it was not a violation of the state's sovereign immunity for the Court to enjoin Minnesota's attorney general from

enforcing unconstitutional railroad acts. In explaining why the state's sovereign immunity did not preclude the Court from exercising jurisdiction in the case, the Court explained:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

(*Id*. at 159–60 [internal citation omitted].)

Ex parte Young principles have been applied in actions involving Indian Tribes with similar result. In *Vann v. U.S. Dep't of Int.* (D.C. Cir. 2012) 701 F.3d 927, for instance, the court permitted an action to proceed against the Principal Chief of the Cherokee Nation by plaintiff Freedmen (descendants of slaves owned by Cherokee Nation members) who sued claiming that defendant Cherokee Nation had violated an 1866 Treaty which gave the Freedmen rights to tribal membership. Specifically to avoid the sovereign immunity bar, the Freedmen plaintiffs sued not only the Cherokee Nation

itself but also the relevant executive official, the Principal Chief, in his official capacity. Rejecting the tribe's claim that it was entitled to sovereign immunity and that the case could not go forward in its absence, the Court of Appeals applied the precedents that permit suits against government officials in their official capacities, and allowed the suit to proceed against the Principal Chief in his official capacity, without the Cherokee Nation itself as a party. Finding no reason to distinguish the *Vann* case from any other "run-of-the-mill *Ex parte Young* action" because of the involvement of an Indian Tribe, the court cited Ninth and Tenth Circuit cases where the courts concluded that an Indian Tribe is not a required party under Rule 19 of the Federal Rules of Civil Procedure in suits naming a tribal official in his or her official capacity. (*Id.* at 930.)

In *Salt River Project Agric. Improvement & Power Dist. v. Lee* (9th Cir. 2012) 672 F.3d 1176, the Ninth Circuit ruled that Navajo officials responsible for enforcing a challenged tribal law "adequately represent the Navajo Nation's interests" and are amenable to suit even without the tribe's involvement in the litigation. (*Id.* at 1180.)

Here, it was the members of the Tribe's governing council who acted to acquire the subject airport in derogation of the laws which this action claimed were violated and as to which the Committee sought appropriate relief. They are proper defendants, in their official capacity, even if the Tribe, itself, is found to have sovereign immunity barring this action against it.

G. THE TRIBE IS NOT A NECESSARY PARTY

While not expressly stating so, the court below impliedly found that the Tribe was a necessary party as well as being an indispensable party. But the Committee contends

that the Tribe is not a necessary party because all of the claims in the complaint relate to actions or inactions of defendant City of Tulelake and not the Tribe itself. Furthermore, the City is represented by the Tribe's lawyers pursuant to an indemnification agreement and presumably the City can adequately represent the Tribe's interests.

H. THE TRIBE IS NOT AN INDISPENSABLE PARTY

Code of Civil Procedure section 389 requires parties whose joinder will not deprive the court of subject-matter jurisdiction to be joined as parties if, in that party's absence, the court cannot accord complete relief among the existing parties, or the party claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may, as a practical matter impair or impede the person's ability to protect interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If a necessary party cannot be joined, § 389 requires the court to determine whether, "in equity and good conscience," the action should proceed among the existing parties or should be dismissed. (See *Serrano v. Priest* (1976) 18 Cal. 3d 728, 753 ["we should be careful to avoid converting a discretionary power or a rule of fairness … into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." [citation & alteration omitted]].) There, "able and willing advocates" served the argued absent interests. (*Id.*) Here, equity and good conscience dictate that this case should proceed in the absence of the Tribe, if it is found to be necessary but beyond joinder. The Tule Lake concentration camp is of great cultural and historic significance

which is threatened by commercial development on the 359-acre airstrip which was purportedly sold by defendant City to the Tribe. The important public issues raised by the complaint include whether the sale violated the terms of the Land Patent by which the City of Tulelake acquired the airstrip; whether the purported sale of the airstrip to the Tribe violated public policy, in many respects; and whether the City of Tulelake violated the open-meeting provisions of the Brown Act which were designed to make transparent the proceedings of elected government. These would all go unaddressed and unresolved were this Court to let stand the superior court's dismissal of the action on the ground that the Tribe's presence is necessary and indispensable.

"The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code Civ. Proc. § 389(b).)

As to the first factor, the most favorable judgment for the TLC would be a voiding of the sale of the airstrip by the City to the Tribe. If the sale was void *ab initio*, the Tribe would never have obtained legal possession, and it will lose nothing by a judgment against it since it never had legal possession in the first place. Thus, it could not be prejudiced by such a judgment.

As to the second factor, the Court's equitable power could assist all parties in accomplishing their different goals. For example, protective provisions could be ordered to maintain the status quo, avoiding damage to the historic property, during the litigation.

As to the third factor, the Tribe is not a necessary party because its interests are adequately represented by the City and, in fact, the City is represented in this case by the Tribe's counsel. (See, e.g., *Union Carbide Corp. v. Superior Court* (1984) 36 Cal. 3d 15 [risk of multiple liability must be more than a theoretical possibility]; *Van Atta v. Scott* (1980) 27 Cal. 3d 424 [prejudice must be concrete].) "[T]here is no indication that the tribe would offer any necessary element to the action that the [City of Tulelake] would neglect." (*Salt River Project*, *supra*, 672 F.3d at 1180–81; *Kansas v. United States* (10th Cir. 2001) 249 F.3d 1213, 1227 ["[M]ost importantly, the potential for prejudice to the [tribe] is largely nonexistent due to the presence in this suit of . . . the tribal officials . . . . These Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests in [the action]."].)

As to the fourth factor, the TLC's principal objective through this litigation is to prevent the further degradation of the Tule Lake concentration camp site. If this Court does not reverse and remand the action to the lower court to decide this case on the merits, there is no other forum in which the weighty questions raised in this suit may be addressed. The airstrip would remain under the Tribe's control and subject to business development inconsistent with the spirit, significance, and appropriate future for the site. The public at large would lose a part of its heritage.

Courts have recognized the "public rights exception," requiring that the public's interest be weighed in the balance. For the exception to apply, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right. Further, although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties." (*Kescoli v. Babbitt* (9th Cir. 1996) 101 F.3d 1304, 1311 [internal quotation marks & citations omitted].) Because the present litigation satisfies both criteria, § 389 does not bar it. This is especially true as the Committee seeks only equitable remedies—declaratory and injunctive relief—and not economic damages.

VI. CONCLUSION

For all of the reasons stated and argued above, the decision of the superior court below to dismiss the Committee's complaint on the grounds of tribal sovereignty immunity should be reversed and the case remanded for further proceedings.

Dated: November 13, 2023

Respectfully Submitted,

By:_____

Mark E. Merin
Paul H. Masuhara
LAW OFFICE OF MARK E. MERIN
1010 F Street, Suite 300
Sacramento, California 95814
Telephone: (916) 443-6911
Facsimile: (916) 447-8336
E-Mail: mark@markmerin.com
paul@markmerin.com

Yoshinori H. T. Himel
7227 Bayview Way
Sacramento, California 95831
Telephone: (916) 420-9865
Facsimile: (916) 229-9922
E-Mail: yhimel@lawronin.com

Attorneys for Plaintiff-Appellant
TULE LAKE COMMITTEE

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule of Court 8.204(c)(1), the enclosed brief of Plaintiff-Appellant TULE LAKE COMMITTEE is produced using 13-point Times New Roman type including footnotes and contains approximately 6,394 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 13, 2023

Respectfully Submitted,

By:_____

Mark E. Merin
Paul H. Masuhara
LAW OFFICE OF MARK E. MERIN
1010 F Street, Suite 300
Sacramento, California 95814
Telephone: (916) 443-6911
Facsimile: (916) 447-8336
E-Mail: mark@markmerin.com
paul@markmerin.com

Yoshinori H. T. Himel
7227 Bayview Way
Sacramento, California 95831
Telephone: (916) 420-9865
Facsimile: (916) 229-9922
E-Mail: yhimel@lawronin.com

Attorneys for Plaintiff-Appellant
TULE LAKE COMMITTEE

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[x] The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 11/13/2023

Paul H. Masuhara
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APP-009E, Item 4

On November 13, 2023, I electronically served the documents listed in 3. as follows:

Name of Person Served:	Electronic Service Address:	On Behalf of:
Michael A. Robinson	MRobinson@ndnlaw.com	*Bill G. Follis; Judy Cobb; Phil Follis; Jack Shadwick; Ramona Rosiere; the Modoc Nation; the City of Tulelake, California; and the City Council of the City of Tulelake*
Clerk of the Court	Clerk@modoc.courts.ca.gov	*Modoc County Superior Court*