COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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	No. C098505 Modoc County Superior Court No. CU-20-127

On Appeal from the Order of the
Modoc County Superior Court
the Honorable Wendy J. Dier.

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Party knows of no interested entities or persons that must be listed under California Rule of Court, Rule 8.208(e)(1) & (2).

Date: December 13, 2023

/s/ *Michael A. Robinson*

Michael A. Robinson

Attorney for Respondents, Bill G. Follis, Judy Cobb, Phill Follis, Jack Shadwick, Ramona Rosiere, the Modoc Nation, the City of Tulelake, California, and the City Council of the City of Tulelake.

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INTRODUCTION

Respondent Modoc Nation, a federally recognized Indian tribe, was forcibly removed from its aboriginal territory in the area surrounding Tule Lake along the California-Oregon border in 1864 by the United States. The removal occurred after officials acting on behalf of the federal government negotiated an 1864 treaty known as the "Valentine's Treaty," reserving the territory to the Modoc people.

The United States Senate failed to ratify the Valentine's Treaty, so it never went into effect. Instead, the Senate approved a treaty known as the Treaty of Council Grove. Under this treaty, the Modoc, Klamath, and the Yahooskin Band of Snake Indians ceded their lands in exchange for a single reservation in Klamath territory in Oregon. After the Senate approved the Council Grove Treaty, the Modoc were removed to the Klamath Reservation.

The Klamath and Modoc were historic enemies, and the Modoc's life on the Klamath Reservation was fraught with tension and conflict. Therefore, a group of Modoc people withdrew from the Klamath Reservation, returning to their ancestral lands encompassing Tule Lake and its surroundings. The United States intervened and attempted to

force the Modoc to return to the Klamath Reservation. The government's actions precipitated the Modoc War, during which the Modoc fought the United States military to remain on their ancestral lands. Ultimately, the United States' military might have overcame the Modoc. The majority of the Modoc leaders were either executed or imprisoned. Those who were not were placed in railroad cattle cars and shipped East. Eventually, the Modoc found their way to land the United States had set aside in Miami, Oklahoma. This is how the Modoc Nation, an Indian tribe from California, came to have its reservation in Oklahoma.

In 2018, the Modoc Nation began instituting efforts to reestablish ownership of its ancestral lands. First among the Tribe's property

transactions, in 2018, the Tribe purchased the Tulelake Municipal Airport from the City of Tulelake.[1]

The Tule Lake Committee opposes the Modoc Nation's ownership. Its opposition stems from the fact that the Airport sits on land that housed the Tule Lake Segregation Center, a World War II military installation in which the United States confined individuals of Japanese ancestry. The Tule Lake Committee's stated goal is to convert the Airport and the surrounding property into a living monument to the Tule Lake Segregation Center, similar to the Manzanar National Historic Site, even though a 1951 federal land patent, patenting the

[1] The Tule Lake Committee claims that the City "concocted a plan" to sell the Airport to the Tribe as means to "combat" litigation the Committee initiated seeking to "prevent the erection of planned" fences at the Airport through the invocation of the Tribe's sovereign immunity from suit. This claim, the Committee knows, is demonstrably false. First, the CEQA actions the Committee references, were only remotely related to safety fences that the *County of Modoc* and *Federal Aviation Administration* proposed to erect at the Airport. The direct issue in the Committee's CEQA actions, was the City's proposal to extend a lease under which the County of Modoc operates the Airport and serves as its sponsor for FAA funding purposes. Moreover, after purchasing the Airport, the Tribe neither formally joined the CEQA litigation, nor asserted sovereign immunity as a defense to the action. Instead, after the Modoc County Superior Court ordered the Committee to include the Tribe in settlement discussions between the Committee and the County of Modoc, the Committee voluntarily dismissed the CEQA actions.

property to the City of Tulelake mandates that the property be used exclusively for airport purposes.

Because the Committee opposes the Tribe's ownership, it initiated three separate lawsuits to void the Airport transfer and strip the Tribe of ownership. The first two cases the Committee commenced in federal court were dismissed, the first voluntarily, the second for lack of federal question jurisdiction. In response to the dismissal of its federal action, and while the Committee's appeal was pending in the Ninth Circuit, the Committee initiated the action below. The Complaint below asserts causes of action and alleges facts nearly identical to the Committee's second federal action.

The Tribe and the City respectively opposed the Committee's action below. The Tribe filed a motion to quash asserting sovereign immunity, and the City filed a demurrer. The Superior Court granted the Tribe's motion to quash, finding that there was no "immovable property" exception to the doctrine of tribal sovereign immunity and that the Tribe was a necessary and indispensable party because the Committee's action sought to strip the Tribe of ownership of the Airport.

After the Superior Court's ruling granting the Tribe's motion to quash, the Ninth Circuit ruled on the Committee's federal appeal. In an unpublished opinion, the Ninth Circuit ruled that the Committee lacked authority to bring an action to enforce the 1946 Federal Airport Act and the 1951 Patent, which are critical to the First Cause of Action in the Committee's complaint in the Superior Court.

STATEMENT OF FACTS

A. The Parties to this Appeal.

Respondent Modoc Nation ("Tribe") is a federally recognized Indian tribe. (88 Fed.Reg. 2112, 2113.) The Tribe's formal reservation is in Miami, Oklahoma (Motion to Augment Record, page 3, ¶ 10)[2]. However, the Tribe's ancestral lands are located in Northern California along the California-Oregon border and encompass the land on which the Tulelake Municipal Airport ("Airport") is located. (see, e.g., https://www.nps.gov/labe/learn/historyculture/index.htm.)

Respondents Bill G. Follis, Judy Cobb, Phil Follis, Jack Shadwick, and Ramona Rosiere were the members of the Tribe's Elected Council at

[2] Because the Motion to Augment, adds only the Complaint to the previously established record future references will be to the "Complaint" noting the page and paragraph of relevant information.

the time the Tribe purchased the Airport. (Complaint at 2-3, ¶¶ 5 -9.) Only one Respondent, Ramona Rosiere, remains on the Tribe's Elected Council. Phil Follis and Judy Cobb died in 2020, and Bill G. Follis died in 2022. Jack Shadwick is no longer on the Elected Council.

The Tule Lake Committee is a California non-profit public benefit corporation. Its purposes are providing education on the United States's wartime incarceration of people of Japanese ancestry, commemorating the history of the Tule Lake Segregation Center and the impact it had on the lives of those confined there, and preserving the history and experiences of the confinees. (Complaint at 2, ¶ 3.)

B. The Airport.

The Airport, which is the focus of the Committee's action below, is a municipal airport open to the public who use the property for aviation purposes. (Complaint at 4, ¶ 19; Exhibit A at 29, ¶ 3.) The United States patented the Airport in 1951 pursuant to the 1946 Federal Airport Act ("Airport Act".) (Complaint at 4, 13, ¶¶ 19, 70, and Exhibit A.) President Truman officially approved the 1951 Patent – patent number 1133552 –on December 21, 1951. (Complaint, Exhibit A at 30.)

The 1951 Patent conveyed the Airport "together with all rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging to the City of Tulelake, State of California, and to its successors in function forever[.]" (Complaint, Exhibit A at ¶ 28.) In exchange the City agreed that it would develop an airport on the property and that the airport the City developed would operate as a "public airport upon fair and reasonable terms and without unjust discrimination. (*Id.* at ¶¶ 2-3.) Further, the City agreed that "any subsequent transfer of the property interest conveyed" by the 1951 Patent would be "made subject to all the covenants, conditions, and limitations contained in" the 1951 Patent. (*Id.*, at 29, ¶ 4.)

The 1951 Patent contains a reversion clause providing that "[t]he property interest" conveyed "shall immediately revert to the United States" if "the lands in question are not developed, or cease to be used, for airport purposes[.]" (Complaint, Exhibit A at 29, ¶ 1.) To initiate the reversion, should it come about, the 1951 Patent provides that "upon the demand of the Administrator of Civil Aeronautics," the City or its successor in function…will take such action…as may be necessary to or

required to evidence transfer of title to the herein-conveyed lands to the United States of America." (Complaint, Exhibit A at 29-30, ¶ 6.)

The 1951 Patent contains no other enforcement provisions and does not reserve any rights to third parties concerning purported violations. (Complaint, Exhibit A.)

The City owned the Airport, but it did not operate it. (Complaint at 5, ¶ 21.) Instead, through a lease agreement with the City, the County of Modoc operate[d] as the Airport's "sponsor." (*Id.*; see also Complaint, Exhibit C at 36 and Exhibit D at 45-46, ¶¶ 14-14.4.)

C. The Airport Transfer.

In 2018, the City decided to sell the Airport pursuant to the terms of California Government Code sections 37440 through 37444 and began negotiations with the Tribe. (Complaint at 9, ¶ 43.) Between November 7, 2017, and July 31, 2018, the Committee alleged the City held seven (7) regular or special city council meetings at which it publicly discussed the Airport transfer. (*Id.*, at 15-17, ¶¶ 90, 94, 97, 100, 103, 105, and 107.) Despite its claimed interest in the Airport, the Committee appears to have only attended the July 31, 2018, City Council meeting. (*Id.*, at 9-13, ¶¶ 46-68.) While the Committee claims it

made a three-minute presentation, it does not allege that it ever challenged the Tribe's eligibility to purchase the Airport. (*Id.*, at 12, ¶ 60.)

Despite receiving a purchase offer from the Committee, on July 31, 2018, the City voted unanimously to sell the Airport to the Tribe.[3] (Complaint at 10, 13, ¶¶ 53, 55, 68.) Therefore, on July 31, 2018, the City and the Tribe executed a "Standard Offer and Agreement for Purchase of Real Estate (Non-Residential) ("Purchase Agreement".) (Complaint, Exhibit D at 39-48.) The Purchase Agreement contains several important, non-standard provisions. First, the Purchase Agreement required the Tribe to obtain the FAA's written approval of the transfer unless the City determined that the FAA's approval was unnecessary. (Complaint, Exhibit D at 43, ¶6.) Additionally, the Purchase Agreement required the Tribe to take possession subject to the terms and conditions of the County of Modoc's lease to operate the Airport as its FAA sponsor and to maintain that lease in full force and

[3] The Committee's allegations concerning the City's failure to respond to the Committee's purchase offer are truly ironic in that, under the Committee's theory in this case, there is no possible argument that the Committee could ever qualify as a "public agency" eligible to purchase the Airport.

effect after the parties consummated the sale. (*Id.*, at 46, ¶¶ 14.1-14.4.) Finally, the Purchase Agreement mandated the Tribe "continue the current use of the property in accordance with the" 1951 Patent.[4] (*Id.*, at 46, ¶ 14.4.)

Notably, at the time of the Airport transfer, federal law relating to the ownership and operations of airports under federal oversight expressly defined public agencies to include "an Indian tribe or pueblo." (49 U.S.C. § 47102(20).) Additionally, as the Committee's complaint confirms by its silence, the FAA did not object to the Tribe assuming ownership of the Airport.

D. The Committee Challenges the Airport Transfer.

On August 30, 2018, the Committee officially protested the Airport transfer by sending a letter to then-Mayor Hank Ebinger. (Complaint, Exhibit E.) The letter outlines the violations the Committee believed the City committed by approving the Airport transfer. (*Id.*) The Committee's letter never raises any issues concerning the Tribe's eligibility to purchase the Airport. (*Id.*) After the City did not respond to

[4] The Purchase Agreement erroneously identifies the 1951 Patent as being dated January 18, 1952.

the Committee's August 30, 2018, the Committee sued the City and the Tribe in federal court.

1. The First Federal Action.

In its first federal action, *Tule Lake Committee v. City of Tulelake, et al.,* (E.D. Cal.), no. 18-cv-02280-KJM-DMC, the Committee sued the City and the Tribe alleging violations of due process, equal protection, and petition rights under 42 U.S.C. § 1983. (see *Tule Lake Committee v. City of Tule Lake* (E.D. Cal. 2018) 2018 WL 4071894, *5.) The district court ordered the Committee to dismiss that action when it failed to satisfy the terms of an interim settlement agreement. (see *Tule Lake Committee v. City of Tule Lake* (E.D. Cal. 2020) 2020 WL 1169273.)

2. The Second Federal Action and Appeal.

Six months after being ordered to dismiss its first federal action, the Committee filed a second one. In the second action, *Tule Lake Committee v. Federal Aviation Administration et al.*, (E.D. Cal), 20-cv-00688-WBS-DMC, the Committee sued the FAA, alleging that the FAA violated federal law by failing to object to and prevent the transfer of the Airport to the Tribe. (see *Tule Lake Committee v. FAA* (E.D. Cal.)

2020 WL 5749839, *1-2.) In addition, as it did in the case below, the Committee alleged that by participating in the transfer, the City and the Tribe violated the 1951 Patent and 1946 Airport Act. (see *Id.*, at *2.)

The district court dismissed the Committee's claims against the FAA because the Committee failed to allege any final agency action on the part of the FAA. (see *Tule Lake Committee v. FAA*, *supra*, 2020 WL 5749838 at * 4-5.) The district court dismissed the Committee's claims against the City and the Tribe for lack of federal question jurisdiction. (see *Id.* at * 5-6.)

The Committee appealed the district court's dismissal of its claims against the City and the Tribe, asserting that because it claimed violations of the 1946 Airport Act and the 1951 Patent, which arose under federal law. (see *Tule Lake Committee v. FAA* (9th Cir. 2023) 2023 WL 3171564, * 1; Motion for Request for Judicial Notice "RJN," Exhibit 1 at 12-15.) The Tribe and the City responded to the Committee's appeal, asserting that the Committee lacked authority to enforce the 1946 Airport Act because the Act did not provide a private cause of action. (see *Tule Lake Committee v. FAA* (9th Cir. 2023) 2023 WL 3171564, * 1; RJN Exhibit 2 at 34-39, 45-50.) Additionally, the

Tribe and the City asserted that, under established federal precedent, the Committee could not enforce the terms of the 1951 Patent because it was neither a party to the Patent nor a third-party beneficiary. (see *Tule Lake Committee v. FAA* (9th Cir. 2023) 2023 WL 3171564, * 1; RJN Exhibit 2 at 45-50.) The issue of the Committee's authority to enforce the 1946 Airport Act and the 1951 Patent was fully briefed by the parties. (RJN, Exhibits 1-3.) On May 1, 2023, the Ninth Circuit ruled against the Committee adopting the Tribe's and City's arguments that the Committee lacked authority to enforce either the 1946 Airport Act or the 1951 Patent. (see *Tule Lake Committee v. FAA* (9th Cir. 2023) 2023 WL 3171564, * 1.)

3. This Litigation.

While the Committee's federal appeal was pending, the Committee filed the action below. In its Complaint, the Committee asserted claims nearly identical to those in its second federal action. The City demurred to the Complaint, and the Tribe filed a motion to quash, arguing that it was immune from suit and was a necessary and indispensable party. (CT at 15-19.) After full briefing and a hearing, the Superior Court granted the Tribe's motion to quash and dismissed the

case with prejudice without ruling on the City's demurrer. (CT at 69-72.)

STANDARD OF REVIEW

A court of appeal reviews a determination of sovereign immunity *de novo*. (*People ex rel. Owen v. Miami Nation Enterprise* (2016) 2 Cal.5th 222, 250.) It reviews a determination that a party is necessary and indispensable for abuse of discretion. (*Verizon California, Inc. v. Board of Equalization* (2014) 230 Cal.App.4th 666, 680.)

ARGUMENT

The Committee's principal argument on appeal is that this Court should recognize, for the first time, an "immovable property" exception to the Tribe's inherent sovereign immunity. (AOB 10-19). In making this argument, the Committee's Opening Brief takes an interesting approach – completely ignoring on-point majority opinions and instead focusing in detail on a dissent in *Upper Skagit Indian Tribe v. Lundgren* (2018) 138 S.Ct. 1649 ("*Upper Skagit*") and a minority concurring opinion in *Self v. Cher-Ae-Heights Indian Community of Trinidad Rancheria* (2021) 60 Cal.App.5th 209 ("*Self*".) (AOB at 10-19.)

Contrary to the Committee's suggestion, neither Justice Thomas's dissent in *Upper Skagit* nor Judge Reardon's concurring opinion in *Self* control the issue. They are minority opinions and diverge from the consensus of cases evaluating the exception's applicability to tribal sovereign immunity. (see *Cayuga Indian Nation by and through Cayuga Nation Council v. Parker* (N.D.N.Y 2023) 2023 WL 130852, *6 ("["immovable property" exception did not apply to overcome sovereign immunity to counterclaim arising from property dispute]; *Cayuga Nation v. Tanner* (N.D.N.Y. 2020) 448 F.Supp.3d 217, 244-245 ["immovable property" exception inapplicable in tribal context, and sovereign immunity precluded local government from bringing suit to enforce local ordinances on tribe's off-reservation fee land].) As explained below, these post-*Upper Skagit* decisions refusing to invoke the "immovable property" exception to overcome tribal sovereign immunity align with the nature of tribal sovereign immunity and the practical considerations necessary to the exception.

I. Tribal Sovereign Immunity is the Rule.

In all cases involving federally recognized Indian tribes, the rule is immunity. (*Self*, *supra*, 60 Cal.App.5th at 257.) Absent a tribe's

unequivocal waiver of immunity or Congress's unambiguous abrogation of immunity, there are no circumstances under which an Indian tribe is subject to suit. (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788 ("*Bay Mills*".) The rule of immunity as it pertains to Indian tribes is so firmly established that it is nearly sacrosanct (see *Bay Mills*, 572 U.S. at 788 ["Thus, we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver).][citing *Kiowa Tribe v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756].)

Following the Supreme Court's mandate, California state and federal courts recognize the fundamental aspects of tribal sovereign immunity and its mandatory nature. (*People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 242 ["The rule that Indian tribes are immune from suit is now firmly established as a matter of federal law …."][internal quotations and citations omitted]; *Self*, *supra*, 60 Cal.App.5th at 215 ["It is settled that an Indian tribe is immune to suit in the absence of a waiver or congressional abrogation of the tribe's immunity."]; *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81, 89

["An Indian tribe's sovereign status confers an absolute immunity from suit in federal or state court[.]"]; *People of the State of California v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1155 ["Sovereign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize."]). Because tribal sovereign immunity confers absolute immunity, it is not subject to diminution by the states. (*Self*, *supra*, 60 Cal.5th at 213 [quoting *Bay Mills*, *supra*, 572 U.S. at 789]; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering* (476 U.S. 877, 891 ["[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."].) Nor does a tribe's immunity fall in the face of an attempt to apply state law to an Indian tribe's off-reservation activities within a state. (*Bay Mills*, *supra*, 572 U.S. at 785 [A state's suit to enjoin off-reservation gaming barred by tribal sovereign immunity because Congress only abrogated immunity for on-reservation gaming].) Instead, as stated above, "tribal immunity is the rule, subject only to two exceptions: when a tribe has waived its immunity or Congress has authorized the suit. (*Bay Mills*, *supra*, 572 U.S. at 789-791.)

II. The Rule of Immunity is not Subject to Exceptions.

The Committee begins by attempting to undermine tribal sovereign immunity, echoing the assertion that "'Tribal [sovereign] immunity' is an entirely 'judge-invented doctrine[.]'" However, like tribal sovereign immunity, the immunity of the states, the federal government, and foreign nations derives from common law, making all sovereign immunity a judge-made law. (*Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri* (1973) 411 U.S. 279, 288 ["Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has … been carried forward in our jurisprudence."].)

Focusing on Justice Scalia's dissent, the Committee neglects the Supreme Court majority's view that immunity is "far from any old common law doctrine[.]" (*Bay Mills*, *supra*, 572 U.S. at 802 n. 12 [noting that tribal sovereign immunity "lies in Congress's hands [not courts'] to configure."]; see also *Upper Skagit*, *supra*, 138 S.Ct. at 1654 ["immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes].)

The Committee's attack on tribal sovereign immunity is not novel. Litigants have long sought to erode the doctrine and establish categorical exceptions by judicial command. In *Oklahoma Tax Commission v. Citizen Band, Potawatomi Tribe of Oklahoma* (1991) 498 U.S. 505, 510, the Supreme Court rejected a request to dispense with tribal immunity related to a tribe's business activities, reaffirming the doctrine and noting Congress's consistent "approval of the immunity doctrine." (*Oklahoma Tax Commission*, 498 U.S. at 510.)

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 758 ("*Kiowa*"), the Court addressed a plea to limit tribal sovereign immunity to a tribe's "on-reservation" conduct or non-commercial activities. Despite some frustration with the doctrine in the modern business world, the Court firmly upheld tribal sovereign immunity and again emphasized Congress's roll in weighing policy concerns arising from tribal immunity. (*Kiowa*, 523 U.S. at 759 - 60.)

In *Bay Mills*, *supra*, the Court faced another request to overrule its precedent and declare that tribal sovereign immunity does not extend to illegal commercial activity undertaken outside Indian territory. (*Bay Mills*, *supra*, 572 U.S. at 798.) Again, the Court stood

firm. In rejecting Michigan's bid to limit tribal sovereign immunity, the Court stressed that "*Kiowa* itself was no one-off: Rather, … our decision reaffirmed a long line of precedents, concluding that 'the doctrine of tribal immunity' – without exception for commercial or off-reservation conduct—" is settled law and controls this case." (*Ibid.* [internal citations omitted]). It continued, "Congress exercises primary authority in this area and "remains free to alter what we have done[.]" (*Ibid.* [citations omitted].)

Most recently, in *Upper Skagit*, *supra*, the Supreme Court entertained a request that the Court recognize an exception to tribal sovereign immunity in cases involving claims to ownership of immovable property. While a vocal minority argued for the "immovable property" exception, the Court refused to overstep Congress's authority, reiterating that Congress, not the courts, determines the scope of tribal sovereign immunity. (*Upper Skagit*, *supra*, 138 S.Ct. at 1654.)

a. Courts Have not Recognized an "Immovable Property" Exception to Tribal Immunity.

As discussed above, the Supreme Court consistently holds that unless Congress acts, tribal immunity remains at its peak. Nonetheless, the Committee stresses two points: first, that in *Upper Skagit*, *supra*,

the Supreme Court nearly addressed the "immovable property" exception, and second, that Congress abrogated foreign sovereign immunity with the Foreign Sovereign Immunity Act of 1976 ("FSIA"), 28 U.S.C. § 1602 et seq. (AOB at 11-17.) Neither argument aids the Committee.

i. *Upper Skagit* did not adopt the "immovable property" exception.

Despite heavily relying on *Upper Skagit*, *supra*, the Committee admits that the Supreme Court neither considered nor addressed whether the "immovable property" exception restricts tribal sovereign immunity. (AOB at 11.) While acknowledging this, the Committee focuses on Justice Thomas's dissent and Justice Robert's concurring opinion. (AOB at 13.) Then, without any basis whatsoever, the Committee speculates that "the entire concept of tribal sovereign immunity may be jettisoned when the issue is brought to the Court as its membership, swelled by the administration's appointments, is decidedly in the Thomas/Alito camp." (AOB at 14.)

However, a litigant's belief that the Supreme Court may depart from decades of *stare decisis* does not justify this Court overstepping clear boundaries the Supreme Court has set for reorganizing exceptions to

tribal sovereign immunity that Congress has not authorized. (*Bay Mills*, *supra*, 572 U.S. at 788-90.) Moreover, the Committee's prediction on the Supreme Court's view of the "immovable property" exception in the context of tribal sovereign immunity appears misguided. In *Self*, *supra*, California's First Appellate district directly addressed whether the "immovable property" exception constituted a restriction on the scope of tribal sovereign immunity. (*Self*, *supra*, 60 Cal.5th at 216.) In a detailed opinion, discussed below, the First Appellate District easily found no "immovable property" exception to tribal sovereign immunity. (*Id.* at 216-221.) After the California Supreme Court denied the plaintiffs' Petition for Review, they petitioned the Supreme Court for a writ of certiorari. On February 22, 2022, after the supposed swelling of the Supreme Court with appointments "decidedly in the Thomas/Alito camp[]," the Supreme Court denied cert. (*Self v. Cher-Ae-Heights Indian Community of the Trinidad Rancheria* (2022) 142 S.Ct. 1107.)

ii. *Self* Confirmed There are no "Common Law" Exceptions or Limitations on Tribal Immunity.

In an argument repeated throughout this litigation, the Committee suggests that no California court has ruled on the applicability of the "immovable property" exception to tribal sovereign

immunity. After discussing *Self*, *supra*, the Committee contends that "[a]lthough the court, by Judge Burns, did not consider whether the immovable property exception applied …, 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 property." (AOB at 14-15.) There are two problems with the Committee's claim, the first of which comes alarmingly close to lacking candor with the Court.

Contrary to the Committee's claim, *Self* addressed the "immovable property" exception in substantial detail. *Self* began by stating, "The question in this case is whether sovereign immunity bars a quiet title action to establish an easement for coastal access on property owned by an Indian tribe." (*Self*, *supra*, 60 Cal.App.5th at 215.) Two sentences later, it said, "The plaintiffs fail to persuade us that a common law exception to sovereign immunity for "immovable property" applies here. Consistent with decades of Supreme Court precedent, we defer to Congress to decide whether to impose such a limit, particularly given the importance of land acquisition to federal tribal policy." (*Id.* at 212.) From there, *Self* spent pages discussing one thing—the "immovable

property" exception. (*Id.* at 215-20.) The Committee's claim that *Self* "did not consider whether the immovable property exception applied" is wrong.

Not only did *Self* fully consider the application of the exception to Indian tribes, but its discussion of the exception and its ultimate conclusion on its applicability is devastating to the Committee.

Self presented a situation where the Cher-Ae-Heights Indian Community of Trinidad Rancheria purchased coastal property outside its federally recognized reservation in fee simple. (*Self, supra,* at 213.) The plaintiffs in *Self* claimed to use the property to access the beach, which they used for recreational purposes. (*Id.* at 215.) Additionally, they claimed that the property's prior owner dedicated a portion of the property to public use, either explicitly or implicitly. (*Ibid.*) Accordingly, although they did not allege that the tribe interfered with their ongoing coastal access, they brought an action *in rem* to quiet title to a public easement for vehicle access and parking on the property. (*Ibid.*)

Self observed that as coastal property, the property at issue was subject to certain conditions because the tribe had sought to have the land taken into trust. For example, it noted that under the federal

Coastal Zone Management Act, any agency taking activity affecting a coastal zone must certify that the action it proposes is consistent with state coastal management policies. (*Self*, *supra*, 60 Cal.App.5th at 214.) *Self* further noted that California's coastal management policies require that "maximum access … and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse." (*Ibid.*)

Self noted that these concerns had been met because, among other things, the tribe committed to protecting coastal access and coordinating with the state on future development projects. (*Self*, *supra*, 60 Cal.App.5th at 214). Additionally, *Self* emphasized that if the tribe violated California's coastal access policies, California could "request the Bureau [of Indian Affairs] to take appropriate remedial action." (*Id.* at 215.)

Responding to the quiet title action, Cher-Ae-Heights entered a special appearance and moved to quash the Complaint for lack of jurisdiction based on the tribe's immunity from suit. (*Self*, *supra*, 60 Cal.App.5th at 215.) The trial court granted the motion to quash, and

the plaintiffs appealed. (*Ibid.*) On appeal, the *Self* plaintiffs made the identical argument the Committee makes here. Specifically, as the Committee does, they argued that the court should recognize a common law exception to tribal sovereign immunity for claims involving immovable property. (*Self*, *supra*, 60 Cal.App.5th at 216; see AOB at 10-19.) In pushing their argument, the *Self* plaintiffs argued, as the Committee does here, that neither states nor foreign nations have immunity from suits concerning real property outside their territory. (*Ibid.*; see AOB at 10-19.) In particular, the *Self* plaintiffs, as does the Committee, focused on the argument that there was no common-law immunity for foreign nations as to property they held in the territory of another sovereign. (*Id.* at 218-19; see AOB at 10-19.) If there were a common law exception to foreign sovereign immunity, they asserted, there must be a corollary exception to tribal sovereign immunity. (*Ibid.*; see AOB at 10-19.)

In a detailed opinion that delved deeply into the "immovable property" exception, *Self* rejected each of the plaintiffs' arguments. First, in addressing the analogy to state sovereign immunity, *Self* emphasized: "Simply because [the immovable property] rule applies to

states … does not mean it also applies to tribes." (*Self*, *supra*, 60 Cal.App.5th at 216.) It acknowledged that because Indian tribes were not parties to the Constitution, they "did not surrender any aspect of their sovereignty as part of the constitutional plan." (*Id.* at 217.) Therefore, *Self* acknowledged that tribal sovereign immunity is different. (*Ibid.*). With that background, it turned to the Supreme Court's longstanding precedents, which have "not limited tribal sovereign immunity to traditional sovereign activities." (*Ibid.*). It concluded by emphasizing that when it comes to tribes, courts have continuously deferred to Congress to determine the scope and nature of tribal immunity. (*Ibid.*)

After disposing of the state immunity analogy, *Self* addressed the same foreign immunity analogy the Committee raises here. As to that analogy, *Self* emphasized that "Self and Lindquist fare no better …" (*Self*, *supra*, 60 Cal.App.5th at 217). In addressing this issue, *Self* indirectly questioned Justice Thomas's dissent in *Upper Skagit*, *supra*. Specifically, *Self* cast doubt on Justice Thomas's assertion that *Schooner Exchange v. M'Faddon* (1812) 11 U.S. 116 recognized a common law immovable property exception for sovereigns. (*Id.* at 217-

18). After *Schooner Exchange*, *Self* noted, courts interpreted the case to have the contrary effect of establishing "'virtual absolute immunity' for foreign sovereigns." (*Ibid.* [quoting *Verlinden B.V. v. Central Bank of Nigeria* (1983) 461 U.S. 480, 486].) Thus, for the 164 years after *Schooner Exchange,* courts deferred to the executive branch on this issue of whether a particular foreign sovereign enjoyed immunity for their activities – including activities giving rise to property disputes – in the United States. (*Id.* at 218.) The ad hoc deferential approach ended in 1976 when Congress enacted the FSIA and formally waived the immunity of foreign sovereigns in specific circumstances. (*Ibid.*)

But, *Self* recognized that the FSIA is immaterial in the context of tribal sovereign immunity. If anything, *Self* suggested that Congress's decision to address foreign sovereign immunity rendered the claims that the exception existed under common law dubious. (*Self*, *supra*, 60 Cal.App.5th at 218.) Irrespective, *Self* noted the Supreme Court has utterly "rejected the notion that tribal sovereign immunity must be congruent with foreign sovereign immunity, listing important areas where the Supreme Court has recognized tribal sovereign immunity to be broader than foreign states". (*Ibid.*) *Self* concluded its discussion of

the analogy between foreign and tribal immunity with the observation that, if anything, the FSIA shows the Court's deference to Congress as to the applicability of the immovable property exception. (*Ibid.*)

Not only did *Self* examine whether there was an "immovable property" exception to tribal sovereign immunity, but it unequivocally rejected the exception and expressly found that it did not apply. Down to the arguments the Committee raised below and which it raises now, this case is virtually on all fours with *Self*. The main, and not insignificant, difference here is that, unlike *Self*, this is not a quiet title action. Moreover, unlike the plaintiffs in *Self*, the Committee has no colorable claim to title any portion of the Airport. Instead, here, the Committee has, at most, a historical and emotional attachment to portions of the Airport. But neither it nor its members can claim any legitimate or protected property right.

Here, as in *Self*, the Tribe purchased an off-reservation parcel of land in fee. Although the property is not near the Tribe's reservation, the land sits squarely in the middle of the Tribe's aboriginal territory. As in *Self*, the Modoc Nation purchased the property for economic development opportunities. Additionally, the Tribe purchased the

Airport as part of an effort to reestablish its ownership of its aboriginal land that the United States ingloriously stripped from the Tribe, and to reestablish its governmental authority over Modoc lands—A fact the *Self* Court recognized as being of primary importance to tribes as governments.

Not only are the legal arguments, in this case, identical to those *Self* rejected, but the fact that protections to which the Tribe agreed concerning the required use of the Airport are at least equal to those involved in *Self*. Here, the terms of the 1951 Patent require that the Airport must be used exclusively for airport purposes in perpetuity. (Complaint, Exhibit A.) Moreover, any airport operated on the property must be open to the public on fair terms and without undue discrimination. (Complaint, Exhibit A at ¶ 29.) If the property ever ceases to be used for airport purposes, the 1951 Patent mandates that the property will revert to the United States. (*Id.*)

Significantly, the purchase agreement between the City and the Nation mandates that the Tribe shall use the Airport in compliance with the 1951 Patent. (Complaint, Exhibit D at 46, ¶ 14.4.) The Committee does not allege that the Tribe violated these requirements.

To be sure, the Committee's Complaint is not that the Tribe is misusing the property. Its principal complaint is that continuing to use the Airport for its designated purpose is inconsistent with the Committee's dream of converting the property into a monument to the former Tule Lake Segregation Center. (Complaint at 3-8, ¶¶ 13 -41.) Put differently, the Committee's complaint is that the Airport even exists. (*Id.*)

iii. Tribal Immunity Applies Irrespective of Whether a Tribe has Submitted a Federal Fee-To-Trust Application for the Property at Issue.

The Committee unjustifiably suggests that *Self* concluded that tribes only enjoy sovereign immunity in property disputes when the property at issue is subject to a pending "fee-to-trust" application. (AOB at 15, 18.) However, *Self* did not condition the tribe's immunity from suit on a pending or active federal "fee-to-trust" application. The court in *Self* held that there was no recognized common law "immovable property" exception to tribal sovereign immunity—Period. (*Self*, *supra*, 60 Cal.App.5th at 216-222.)

Contrary to the Committee's argument, *Self's* majority opinion, not Judge Reardon's concurrence, holds precedential value. "No opinion has value as a precedent on points as to which there is no agreement of

a majority of the court." (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 [citations omitted].) Since Judge Reardon's lone concurrence lacked majority support, it has no controlling weight or precedential value. (*Byrd*, 89 Cal.App.4th at 1383.) Therefore, contrary to the Committee's suggestion, *Self* held that the "immovable property" exception *does not apply* in the context of claims of tribal sovereign immunity. (*Self*, *supra*, 60 Cal.5th at 216-222.) Put differently, the majority of the *Self* Court rejected Judge Reardon's view that the "immovable property" exception did apply, but federal law, policies, and prerogatives could preempt actions directed at immovable property that was already subject to a federal fee-to-trust application. (*Id.*)

III. The Parameters of Tribal Immunity are Subject Only to Congress's Exclusive Control.

Congress, not the courts, delineates the parameters—namely, the extent and application—of tribal sovereign immunity. (*Kiowa*, *supra*, 523 U.S. at760.) Despite debates about the constitutional basis for congressional authority over Indian tribes, the Supreme Court definitively established that Congress possesses absolute and exclusive authority over Indian tribes. (see *United States v. Lara* (2004) 193, 200 ["[T]he Constitution grants Congress broad general powers to legislate

in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"][citations omitted]; see also *Lone Wolf v. Hitchcock* (1903) 187 U.S. 553, 565 [recognizing Congress's "[p]lenary authority over the tribal relations of Indians, [which] has been exercised by Congress from the beginning.") Critically, the Supreme Court has emphasized that, like tribal sovereignty generally, tribal sovereign immunity is "in Congress's hands" and that "it is fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity." (*Bay Mills*, *supra*, 572 U.S. at 800 [citation omitted].)

Both individuals and courts – including the Supreme Court – have called upon Congress to curtail or abolish the doctrine of tribal sovereign immunity. (see *Bay Mills*, *supra*, 572 U.S. at 801-02.) In particular, as *Bay Mills* discussed after the *Kiowa* decision, "Congress considered several bills to substantially modify tribal immunity in the commercial context." (*Bay Mills*, *supra*, 572 U.S. at 801-02.) However, despite instances of Congress abrogating immunity when appropriate, it has never acted to limit tribal immunity concerning off-reservation or commercial conduct. Congress also has never recognized any restriction on tribal immunity concerning immovable property.

a. Courts to defer to Congress in the special area of tribal sovereignty and tribal sovereign immunity.

The Supreme Court and the Courts of California consistently express their deference to Congress's unique role in and exclusive authority over Indian affairs. (*Bay Mills*, *supra*, 572 U.S. at 788; *People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 241.) Recognizing Congress's sole authority, these courts unanimously emphasize that all levels of the judiciary must defer to Congress on the scope of tribal sovereignty, including tribal sovereign immunity from suit. (*Bay Mills*, *supra*, 572 U.S. at 790; *Self*, *supra*, 60 Cal.App.5th at 219.) The legal doctrine of deference is so deeply rooted that it applies in all aspects of Indian law, reflecting Congress's unique capacity "to weigh and accommodate competing policy concerns and reliance interests" involved in the limitation of immunity. (*Bay Mills,* 572 U.S. at 800.) Despite occasional expressions of frustration with tribal immunity by members of the Supreme Court, the principle remains steadfast: the Court refrains from altering the parameters of tribal immunity, emphasizing that Congress holds the exclusive authority to create exceptions. (*Id.* at 798-99.) The Court consistently underscores that unless and until

Congress acts, tribal immunity remains inviolable and exempt from any exceptions. (*Id.*)

In line with precedent, this Court should similarly defer to Congress. Given that Congress has not enacted legislation limiting tribal immunity in cases directly or indirectly related to immovable property, the "immovable property" exception has no application.

b. Constitutional and congressional limitations on other sovereign's immunity have no application to tribal immunity.

Taking cues from the *Upper Skagit*, *supra*, dissent, the Committee draws an analogy between tribal and foreign sovereign immunity. (AOB at 16-17.) It discusses Congress's explicit restriction of foreign nations' sovereign immunity in certain disputes involving immovable property within the United States, as manifested in the Foreign Sovereign Immunities Act ("FSIA"). (*Id.*; 28 U.S.C. § 1602 et seq.) However, the FSIA neither explicitly nor implicitly abrogates the immunity of Indian tribes and is entirely inapplicable to them. (*Self*, *supra*, 60 Cal.5th at 217-19.)

The FSIA's provisions, including its waiver of foreign sovereign immunity in specific actions, do not support the Committee's

contentions. Courts emphatically assert that they lack discretion to find a waiver of tribal sovereign immunity by implication. (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1419; *Bodi v. Shingle Springs Band of Miwok Indians* (9th Cir. 2016) 832 F.3d 1011, 1021.) While the FSIA abrogated foreign sovereign immunity concerning suits involving "immovable property and in suits based on commercial activity, the courts clearly state that Indian tribes continue to enjoy immunity for off-reservation commercial activities, and Congress has not acted to alter these decisions. (*Bay Mills*, *supra*, 572 U.S. at 799.)

The FSIA serves as a showcase where Congress has eliminated foreign sovereign immunity but has refused to similarly eliminate tribal immunity. Therefore, the lack of any corresponding limitation on tribal immunity in situations where Congress has curtailed foreign sovereign immunity reinforces the sanctity of tribal immunity in the eyes of Congress. Courts should refrain from intervening where Congress has not exercised its exclusive authority to limit tribal sovereign immunity.

IV. This Case is a Poor Vehicle for the First Recognition of an "Immovable Property" Exception to Tribal Immunity.

Despite the Committee's unfounded speculation about potential issues arising from the Tribe's mere ownership of the Airport, this case is ill-suited for expanding the "immovable property" exception to tribal immunity. First, the Committee lacks any legal interest in the Airport, and there is no precedent supporting the application of the exception when the plaintiff claims no interest in the property or seeks to enforce only general statutory provisions.

Not only does the Committee fail to identify a case where a party has succeeded on a claim that the "immovable property" exception applies to Indian tribes, but it also fails to identify any case where a court recognized the exception in a different context when the plaintiff claimed no interest in the property. Nor does the Committee explain how the exception would apply when the party invoking the exception seeks to vindicate the rights of the government as the Committee does here. Finally, the Committee does not identify any authority authorizing the application of the exception to a case where the party invoking the exception claims only a general interest in enforcing state and federal statutes.

Like the Committee, the Respondent could not locate any case like this, where a court allowed a party that could not claim any legal or legally protectable interest in property to invoke the "immovable property" exception. And indeed, doing so would create chaos for any sovereign. Recognizing the exception for the first time in a case like this would give courts limitless jurisdiction over any action where property was even tangentially involved. Put differently, failing to recognize the Tribe's immunity, in this case, on these facts, would essentially eviscerate the time-honored doctrine of tribal sovereign immunity—Something the Supreme Court has consistently instructed Court's to avoid.

Second, the Ninth Circuit has decided the claims the Committee wishes to assert in this action in *Tule Lake Committee v. FAA* (9th Cir. 2023) 2023 WL 3171564, and those issues are subject to the *res judicata*. Throughout its opening brief, the Committee claims that "there is no means, other than this litigation, for the Committee to challenge the Tribe's eligibility to acquire the Airport." (AOB, at 18.) The Committee argues that "if the 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."[5] (AOB, at 15, emphasis in the original.)

To the extent that the Committee's purpose in this action is to challenge the Tribe's eligibility to own the Airport, that challenge is precluded because (1) federal law governing airport development in effect at the time of the transaction recognizes explicitly Indian tribes as "public agencies" in connection with airport ownership, making it wholly eligible to own the Airport (49 U.S.C. § 47102(20);), and (2) the Committee has already litigated and lost on the issue of whether it has the authority to enforce both the 1946 Airport Act or the 1951 Patent, upon which the Committee's "ineligibility" argument hinge. (see *Tule*

[5] As to what services the City provided concerning the Airport Property, the Committee's opening brief is not clear. But in its Complaint , the Committee accurately acknowledges that the County of Modoc operates the Airport pursuant to a lease, which the Tribe is required to honor under the purchase agreement. (Complaint, Exhibit C, at 36, Exhibit D, at 46.)

Lake Committee v. Federal Aviation Administration (9th Cir. 2023) 2023 WL 3171564, *1 [finding that the Committee "does not have any interest to support its ability to challenge the City's transfer [in violation of the 195 Patent]" and that the 1946 Airport Act provides neither and express or implied right of action].)[6]

Third, this case is unsuitable for extending the "immovable property" exception because the Committee does not allege it has suffered any injury. According to the Committee, its "principal objective through this litigation is to prevent the further degradation of the Tule Lake concentration camp site." (AOB, at 25.) But the Committee did not, and cannot, point to any site degradation that arises from the Tribe's ownership. The Committee's Complaint did not allege any changes have occurred at the Airport since the Tribe assumed ownership.

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[6] Although *Tule Lake Committee v. Federal Aviation Administration*, *supra*, is an unpublished opinion, it is citable in this instance under California Rule of Court 8.1115(b)(1), which allows citation of an unpublished opinion "when it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel[.]" Here, as discussed in more fully in below, the unpublished opinion in *Tule Lake Committee v. Federal Aviation Administration*, *supra*, is directly relevant under the doctrine of *res judicata*.

The Committee's claim that there is even the potential for harm is purely speculative. The Committee's Complaint did not allege any harm arising from the sale of the Airport other than a generalized interest in enforcing what the Ninth Circuit ruled it could not – the 1951 Patent and the 1946 Airport Act. (see Complaint at 13-25.) What's more, even the concern they raise – that the Airport will be put to an inappropriate use that will degrade the Tule Lake concentration camp site is off-base and speculative.

Contrary to the Committee's wishes, the Airport was never intended to be part of a monument to the Tule Lake Segregation Center. On the contrary, the United States identified the property as a location for an airport and mandated that it be used as such. (Complaint, Exhibit A.) Moreover, there has been no actual or even proposed development anywhere within the Airport by the Tribe. The Committee's entire concern arises from a former spokesman for the Tribe, who merely stated, "The whole thing here, again, an airport, the FAA requires you to have aviation supportive businesses, so, that's indeed the type of enterprises that we look to help put into the Tulelake Municipal Airport down there." (Complaint at 12, ¶ 65.) That is the

totality of the threat. While the Tribe's statements may have caused concern for the Committee, they are not such that they give rise to any harm or injury. They are aspirational and speculative at best.

Fourth, this case is a poor vehicle for the extension of the "immovable property" exception because it does not involve the exercise of sovereign authority by the state, local, or federal government taking action against the Tribe. The state is not seeking to exercise sovereignty over the Airport. It has not challenged the Tribe's ownership. Nor have the City of Tulelake, the County of Modoc or the United States.

V. The Appellant Cannot Circumvent Tribal Immunity by Applying *Ex Parte Young*.

The action below aims to void the Airport transfer, nullify the Tribe's ownership, and prevent the Tribe from exercising control over the Airport. (Complaint, p 21.). Recognizing the limited potential of its "immovable property" argument being successful, the Committee attempted to circumvent the Tribe's immunity by naming tribal officers and invoking the doctrine of *Ex Parte Young*. (AOB at 20-22.) However, the Committee's efforts misunderstand the law.

While tribal sovereign immunity does not preclude claims for prospective injunctive relief against tribal officials, it does bar claim

against officials when "the sovereign entity is the real, substantial party in interest." (*Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718, 727 [quoting *Regents of the University of California v. Doe* (1997) 519 U.S. 425, 429; *see Lewis v. Clarke* (2017) – U.S. – , 137 S.Ct. 1285, 1290-91.) In determining if the sovereign entity is the substantial party in interests, courts "must determine whether the remedy sought is truly against the sovereign." (*Lewis*, 137 S.Ct. at 1290; see also *Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075 [stating that it is the "remedy sought" that determines whether a suit against tribal officers may proceed].)

Additionally, there are significant limits to the application of *Ex Parte Young*. For example, it only authorizes *prospective* relief directed at a particular officer's threatened or ongoing unlawful conduct. (*Jamul Action Committee v. Simermeyer* (9th Cir. 2020) 974 F.3d at 994); *White v. Agua Caliente Band of Cahuilla Indians v. Hardin* (9th Cir. 2000) 223 F.3d 1041, 1045.) Moreover, like any ordinary official capacity case, *Ex Parte Young* does not allow official capacity suits when the sovereign is the real party in interest and the actual target of the case. (*Idaho v. Coeur d'Alene Tribe of Idaho* (1997) 521 U.S. 261, 277

["*Young's* applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"].) Thus, the Supreme Court has rejected attempts to invoke *Ex Parte Young* when the remedy sought lies against the sovereign, or the action directly implicates sovereign interests. (*Coeur d"Alene Tribe*, 521 U.S. at 281-82 [disallowing an *Ex Parte Young* action purportedly seeking to enjoin state officials from trespassing because the case was the functional equivalent of a quiet title action against the sovereign]; *Endelman v. Jordan* (1974) 415 U.S. 651, 673-74 [disallowing an *Ex Parte Young* seeking to compel a governmental official to pay sovereign's past legal obligation].) When an action, in its true sense, is directed at the sovereign, and the sovereign suffers the remedy, *Ex Parte Young* is not a vehicle for avoiding immunity.

a. The Committee's Suit Falls Outside Those Allowed Under *Ex Parte Young*.

In critical respects, this case bears significant similarities to *Coeur d'Alene Tribe*, *supra.* There, an Indian tribe initiated a trespass action attempting to establish a boundary between its reservation and state-owned land. (*Coeur d'Alene Tribe*, *supra*, 521 U.S at 264.) The

action sought an injunction against named state officers "from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the … lands." (*Id.*, at 265.)

Here, the Committee directs its complaint squarely at the Tribe. For example, the Committee acknowledges that it was the Tribe, in its sovereign status, that purchased the Airport. (Complaint at 9-10, 12-13.) It complains of the Tribe's sovereign status, expressing dissatisfaction that the Tribe has legitimately asserted sovereign immunity from suit in appropriate actions. (Complaint at 12-13.) Moreover, the Committee's entire argument that the Tribe is not an "eligible purchaser" for the Airport solely pertains to the Tribe. It has no relation to the individually named tribal officials. (Complaint at 3-14.) Finally, the only relief the Committee's complaint seeks is relief *against the Tribe.* (Complaint at 21 [requesting judicial review of the tribe's actions and seeking an order that the Tribe may not exercise dominion and control over the Airport].)

Nowhere does the complaint allege that the individually named tribal officers have threatened to violate federal or state law. Nor does

the complaint allege that any of the individually named officers are currently engaged in activity that would constitute an ongoing violation of state or federal law. Indeed, after being identified as parties, the Committee never discusses the individual tribal officials in any way other than to allege that they "participat[ed] in the purported transfer" and that they are "exercising dominion and control over the property after the purported transfer." (Complaint at 14.)

As indicated, the Committee's claims mirror those asserted in *Coeur d'Alene Tribe*, *supra*. There, the Supreme Court found that because the claim sought to divest the state of title to property, the State and not its officers was the real party in interest[.]." (*Coeur d'Alene Tribe*, *supra*, 521 U.S. at 281-82.) Consequently, the Supreme Court held that *Ex Parte Young* did not apply, and the case was barred by sovereign immunity. (*Id.*)

Here, the same is true—the Committee seeks to divest the Tribe of ownership of the Airport, but because the Tribe is immune, it seeks to effectuate its goal by substituting tribal officials for the Tribe. In the end, however, there is no legitimate dispute that the remedy the Committee seeks will be imposed directly on the Tribe, not the

individual tribal officials. It is the Tribe that would be determined to be ineligible to own the Airport. It is the Tribe that would be stripped of ownership. Therefore, because the Tribe is the real party in interest to the Committee's action, *Ex Parte Young* is inapplicable. (*Coeur d'Alene Tribe*, *supra*, 521 U.S. at 281-82; see also *Lewis*, *supra*, 137 S.Ct. at 1290; *Maxwell*, *supra*, 708 F.3d at 1089.)

b. The Committee Does not Allege an Ongoing Violation of Federal or State law.

Even if the Committee's complaint could be construed as a request for a remedy related to the individual official's actions, it would still be inappropriate under *Ex Parte Young*. "Simply asking for injunctive relief and not damages *does not* clear a path for suit." (*Ulaleo v. Paty* (9th Cir. 1990) 902 F.2d 1395, 1399 [emphasis in original].) For *Ex Parte Young* to apply, the Committee must establish an ongoing violation of federal law. (*Coeur d'Alene*, *supra*, 521 U.S. at 281; *Center for Biological Diversity v. U.S. Forest Service* (9th Cir. 2023) 80 F.4th 943, 956.) An ongoing violation of federal law is an illegal act that is repeated and likely to continue without judicial intervention.(*Coeur d'Alene*, *supra*, 521 U.S. at 266.)

Although the Committee's Complaint is not entirely clear, it seems that the Committee claims that the sale of the Airport to the Tribe was illegal based on the Committee's belief that the Tribe is not a "public agency" and that the violation continues so long as the Tribe continues to claim an ownership interest. (Complaint at ¶ 14.)

There are two problems with the Committee's argument. First, the Committee's Complaint does not allege any violation of the Federal Airport Act, nor could it. The Committee's contention that the Tribe is "ineligible" to own the Airport comes from the 1951 Patent, not the 1946 Federal Airport Act. As the Committee's Complaint acknowledges, it is the 1951 Patent that "conveyed the Airport the City and "its successors in function forever." (Complaint at 14, ¶ 76.) It is the 1951 Patent that the Committee claims bound the City and its successors in function "to all the covenants, conditions, and limitations, contained in [the 1951 Patent].) (Complaint at 14 ¶ 78.) Although the Committee does not address it directly, the 1951 Patent provides that the Airport "will be operated as a public airport upon fair and reasonable terms and without unjust discrimination[]," which is the essence of the Committee's claim. (Complaint, Exhibit A at 29.)

It is worth emphasizing that the Committee's Complaint does not point to any provision of the 1946 Federal Airport Act that addresses the subsequent sale of an airport developed under the Act or imposes any limitations on such sales. Instead, as the Committee's Complaint obliquely acknowledges, the 1946 Federal Airport Act supplies nothing more than definitions that the Committee claims provides context for the Committee's "ineligibility" argument. (see Complaint at 13, ¶ 74.) However, nothing in the 1946 Federal Airport Act addresses subsequent sales of airports developed under the Act, nor does anything in the Act impose any conditions, restrictions, or limitations on the sale of any

airport developed under the Act.[7] Because the Committee cannot allege an actual violation of the 1946 Federal Airport Act, there cannot be any past, current, or ongoing violation. Consequently, the 1946 Federal Airport Act cannot provide a basis for relief under the doctrine of *Ex Parte Young*.

The second problem the Committee faces is that the Ninth Circuit has foreclosed the Committee's ability to bring any claim based on either the 1946 Federal Airport Act or the 1951 Patent. In *Tule Lake Committee v. FAA*, 2:20-cv-00688-WBS-DMC (E.D. Cal.), referenced in

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[7] Although, the 1946 Federal Airport Act does not address the sale of the Airport Property, provisions of California law do. Specifically, California Government Code Sections 37440 through 37444 govern the sale and lease of municipal airports. The provisions apply to any "municipal airport or property owned by a city for [a municipal airport], which property is restricted, under the terms of the instrument conveying the property to the city, to use for airport purposes." (Ca. Gov't Code § 37441.) Under Section 37442, the City was authorized to sell the Airport Property "in such a manner and upon such terms and conditions as the [City] may specify." The only limitation, California law imposes is that the sale must be "subject to the requirement that the purchaser use the property, or allow the use of such property, as a public airport for not less than 10 years from the date of the sale, unless an earlier discontinuance of such use is permitted by the Administrator of the Civil Aeronautics Administration of the United States Department of Commerce." (Ca. Gov't Code § 37433.) The sale of the Airport Property fully complied with this provision, and the Committee does not claim otherwise.

the Committee's Complaint (Complaint at 12-13, ¶ 67), the Committee sued the Federal Aviation Administration, the City, and the Nation to overturn the sale of the Airport. (RJN, Exhibit 1 at 8-9.) The Committee's federal claims against the City and the Tribe were nearly identical to those the Committee asserted in the Superior Court. (RJN, Exhibits 1, 3.) Specifically, the Committee alleged that the sale to the Tribe violated the 1946 Federal Airport Act and the 1951 Patent because the Tribe was not eligible to own the Airport under the conditions imposed by the 1951 Patent. (RJN, Exhibit 1 at 11-18.) The district court dismissed the Committee's claims against the Tribe and the City for lack of federal question jurisdiction. (see *Tule Lake Committee v. FAA* (E.D. Cal. 2020) 2020 WL 5749839, *5-6.)

On appeal, the Committee claimed that its allegations that the sale of the Airport violated the 1941 Federal Airport Act and the 1951 Patent supplied the district court with federal question jurisdiction. The Ninth Circuit disagreed, stating: "None of these arguments has merit." (*Tule Lake Committee v. Federal Aviation Administration* (9th Cir. 2023) 2023 WL 3171564, *1.)

As to the 1946 Federal Airport Act, the Ninth Circuit stated: "Assuming the complaint properly alleged a violation of the Airport Act, the Committee cannot show that the Airport Act provides either an express or implied right of action." Continuing, the Court opined that: "Even if properly before us, based on the lack of support in the text of the statute or the record, we are doubtful that the Airport Act was created for the benefit of any particular class of individuals; rather it appears to be intended to benefit the public generally through the development of airports." (*Tule Lake Committee*, *supra*, 2023 WL3171564, *1.) Furthermore, the Court emphasized: "it seems unlikely that Congress intended to create an implied right of action to protect the ability of certain groups to sue public entities in California who received a land patent under the Act, especially considering the Airport Act outlined a different process for public participation through public hearings on project approvals." (*Ibid.*) Put differently, the Ninth Circuit conclusively held that the Committee has no authority to bring a suit to enforce an alleged violation of the 1946 Airport Act, even if it could legitimately allege such a violation.

The Ninth Circuit held similarly concerning the Committee's ability to enforce the 1951 Patent. On this issue, the Ninth Circuit held: "The 1951 Patent cannot provide a basis for jurisdiction as the Committee is a stranger to the patent and does not have any interest to support its ability to challenge the City's transfer." (*Tule Lake Committee*, *supra*, 2023 WL 3171564, at *1 [citing *Raypath, Inc. v. City of Anchorage*, (9th Cir. 1976) 544 F.2d 1019, 1021].) In other words, the Ninth Circuit effectively concluded, as have other federal courts, that because the Committee is not a party to the 1951 Patent, it has no authority to enforce its terms even if this were a situation where there were open and obvious violations. (*Raypath, Inc.*, 544 F.2d at 1021 [finding that strangers to a federal land patent or deed "are in no position to complain" of alleged violations because "they are strangers to the title and are not persons in whose favor any of the covenants, conditions, or restrictions in the deed were intended to run."].)

c. The Ninth Circuit's Ruling in *Tule Lake Committee v. F.A.A.* is *Res Judicata*.

Res Judicata, now known as "issue preclusion," prohibits relitigating issues that were earlier decided. (*People v. Strong* (2022) 13 Cal.5th 698, 716.) Issue preclusion applies when: 1) the issue sought to

be precluded is identical to that decided in a former proceeding, 2) the issue was actually litigated in the former proceeding, 3) the issue was necessarily decided in the former proceeding, 4) the decision in the former proceeding was final and on the merits, and 5) the party against whom preclusion is sought must be the same, or in privity with, the party to the former proceeding. (*Strong*, 13 Cal.5th at 716.) Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. (*DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

There can be little dispute here that the Ninth Circuit's ruling in *the Tule Lake Committee, supra,* precludes the Committee's claims based on alleged violations of the 1946 Airport Act and the 1951 Patent.

First, the Committee's agreement in this action is identical to the issue the Ninth Circuit addressed. In the Ninth Circuit proceeding the Committee's claimed that the Airport transfer violated the 1946 Airport Act and the 1951 Patent. This is the same issue the Committee sought to litigate in the First Cause of Action in the complaint filed in the Superior Court. (see Complaint at 13-14, ¶¶ 69-83.) There is no legitimate claim that the claims in these two actions are not identical.

Second, the issue litigated in the *Tule Lake Committee*, *supra*, was whether the Committee had the authority to enforce either the 1946 Airport Act or the 1951 Patent. (*Tule Lake Committee*, *supra*, 2023 WL 3171564, *1.) That issue was not only litigated but was also the primary issue litigated before the Ninth Circuit. (*Ibid.*) Indeed, the Committee's entire claim for federal jurisdiction hinged on its ability to bring a private right of action to enforce the 1946 Airport Act and the 1951 Patent. Moreover, because those issues were pure issues of law, the Ninth Circuit conducted its review *de novo*, meaning that the parties necessarily had to litigate the issues in that forum.

Third, the question of whether the Committee had the authority to enforce the 1946 Airport Act and the 1951 Patent were both necessarily decided. "Courts have understood the 'necessarily decided' prong to 'require' [] only that the issue not have been 'entirely unnecessary' to the judgment in the initial proceeding." (*Samara v. Matar* (2018) 5 Cal.5th 322, 327.) There is no question that the Ninth Circuit's decision that the Committee does not have the authority to enforce either the 1946 Airport Act or the 1951 Patent was necessary to its ruling. That issue permeated the appeal and was why the Ninth Circuit upheld the

district court's dismissal for lack of federal question jurisdiction. (*Tule Lake Committee*, *supra*, 2023 WL 3171564, *1.)

The last consideration, whether the Ninth Circuit's ruling in *Tule Lake Committee*, *supra*, was final and on the merits, is also easily resolved in favor of considering the issue foreclosed. Notably, "there need not be a judgment on the merits of the complaint in order to apply direct estoppel in a second action." (*South Sutter, LLC v. LJ Sutter Partners, LP* (2011) 193 Cal.App.4th 634, 665.) Instead, "only the issue being argued in the second action had to be fully litigated in the first action." (*South Sutter, LLC*, 193 Cal.App.4th at 665.) A judgment "is on the merits if the substance of the claim is tried and determined." (*Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035, 1049.) The adjudication of an issue in another action is firm when it is not tentative, the parties have been fully heard, and a reasoned decision supports the decision. (*South Sutter, LLC*, *supra*, 193 Cal.App.4th at 663.) In contrast, an appellate court's denial of an application for a writ without an opinion is not res judicata of the legal issues presented by the application and is generally not a decision on the merits. (*Oak*

Grove School District of Santa Clara County v. City Title Ins., Co. (217 Cal.App.2d 678, 694 [citations omitted].)

Here, as discussed, the central issue before the Ninth Circuit was whether the Committee had the authority to sue to enforce purported violations of the 1946 Airport Act and the 1951 Patent. In a reasoned opinion, following a comprehensive briefing by the parties, the Ninth Circuit unequivocally ruled against the Committee on these issues. Consequently, the Ninth Circuit necessarily determined the issues presented on the merits.

Despite the Ninth Circuit closing the door on the Committee's ability to enforce the 1946 Airport Act and the 1951 Patent before the Committee submitted its brief in this appeal, the Committee still contends that it has the right to enforce them in this action, either directly against the Tribe or indirectly through an *Ex Parte Young* action. The Committee's position is misguided. The Ninth Circuit has already ruled against the Committee. Consequently, it cannot be a basis for any action against the Tribe or the individually named tribal officials.

d. *Van v. U.S. Department of Interior* and *Salt River Project Agricultural Improvement & Power District v. Lee* do not apply to this case.

In its attempt to justify the pursuit of tribal officials as a means to circumvent the Tribe's immunity in this case, the Committee cites *Van v. U.S. Department of Interior* (D.C. Cir. 2012) 701 F.3d 927 and *Salt River Project Agricultural Improvement & Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176. (AOB at 21-22.) However, these cases are irrelevant to the nature of the action the Committee brings here. Both *Van* and *Salt River* involve typical *Ex Parte Young* cases where the plaintiffs sought solely to prevent the ongoing violations of a federal treaty and tribal law, respectively. (*Van*, 701 F.3d at 173-174 [suit to enforce terms 1866 Treaty]; *Salt River*, 672 F.3d at 1177-78 [suit to enjoying tribe from enforcing tribal employment preference act].) They did not involve an action where a plaintiff sought to void a tribe's property purchase and divest the tribe of ownership.

Tribal officials are primarily tasked with upholding the tribe's laws and acting on behalf of the tribe under appropriate circumstances. The officials do not claim any individual ownership interest in a tribe's property. Consequently, courts consistently hold that a plaintiff cannot

employ *Ex Parte Young* to quiet title to a sovereign's land. (*Jamul, supra,* 974 F.3d 984, 994-95 ["The Supreme Court has disallowed attempts to use the doctrine discussed in *Ex Parte Young* to quiet title to a sovereign's property[.]"].) Here, the Committee's claims seeking to divest the Tribe of title to the Airport are akin to a quiet title action. Consequently, the fiction of *Ex Parte Young* cannot apply.

VI. The Tribe is a necessary and indispensable party.

1. The Tribe is a necessary party.

Code of Civil Procedure section 389 governs whether a person is a necessary party that must be joined to an action. Section 389 requires a person to be joined in an action if their absence would prevent complete relief among the parties or if they claim an interest in the subject of the action and their absence could as a practical matter hinder their ability to protect that interest or create a risk of inconsistent obligations for the existing parties. (Code.Civ.Proc. § 389(a).) Section 389(a) first identifies who should be joined, if possible. Section 389(b) then establishes factors for the court to consider if a person who ought to be joined cannot be made a party to determine whether the case should proceed in the person's absence or be dismissed.

A trial court has expansive discretion in applying the factors under 389(b) in determining which factor to weigh and how much weight-specific considerations should be given, and no one factor is necessarily more important than any other. (see *Save Our Bay v. San Diego Unified Port District* (1996) 42 Cal.App.4th 686, 692.) A trial court's findings of fact and weighing of interests will only be overturned upon a finding that the trial court abused its discretion. (*Pinto Lake MHP LLC v. County of Santa Cruz* (2020) 56 Cal.App.5th 1006, 1019-20 [quoting *San Joaquin v. State Water Resources Control Board* (1997) 54 Cal.App.4th 1144, 1154]; see also *Karczorowski v. Mendocino County Board of Supervisors* (2001) 88 Cal.App.4th 564, 565 [trial court's determination of whether a party is indispensable "will be reversed only if it amounts to an abuse of discretion"].) Under the abuse of discretion standard, a trial court cannot be reversed "if there exists a reasonable or fairly debatable justification under the law for the trial court's decision, or alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957 [citation omitted].)

A. The Tribe has an undeniable interest in the subject matter of the Committee's Action.

The inquiry as to whether a person claims an interest in the subject of an action, the protection of which may be impaired or impeded in the person's absence, "is whether the person is one whose rights must necessarily be affected by the judgment in the proceeding." (*Pinto Lake*, *supra*, 56 Cal.App.5th at 1013.)

After considering the parties' arguments, the trial court found it clear "that the Modoc Nation is an indispensable party." The trial made this finding based on the fact that "The Modoc Nation is the owner of the airport, their ownership interest will potentially be affected by this lawsuit." (CT at 70-71.) There is no reasonable argument that the trial court abused its discretion in reaching the determination it did.

As the trial court determined, the Tribe owns the Airport. (CT at 70.) The Tribe and the City executed the Purchase Agreement on July 31, 2018 (Complaint, Exhibit D.) Ordinance Number 2018-16-01 approved the sale on July 31, 2018, and became effective on August 30, 2018. (Complaint, Exhibit C.) And, as the trial court determined, the Committee's action, which seeks to void the Airport transfer, could potentially affect the Tribe's ownership interest. Under these

uncontroverted facts there is no claim that the Tribe does not have an interest in the subject matter of the Committee's action.[8] (see *Lee v. Rich* (2016) 6 Cal.App.5th 270, 277 [purchaser of property is indispensable to an action to void his title].)

B. The Tribe is necessary because the City cannot adequately represent its interests, and the Tribal Council members are not proper parties.

"An absent party with an interest in the action is not a necessary party under Rule 19(a) if the absent party is adequately represented in the suit." (*Salt River Project Agr. Imp. & Power Dist. v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1180.)[9] Although discussed in relation to whether a judgment in the Tribe's absence would be adequate, the Committee argues that the Tribe will not be prejudiced because either the City or

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[8] One area where the Tribe acknowledges that the trial court's order goes too far is extending the dismissal to the Committee's Second Cause of Action. Through that cause of action, the Committee seeks prospective relief to prevent the City from discussing matters in "closed session" meetings that go beyond the scope of discussion topics authorized by Government Code section 54956.8. The Tribe takes no position on those claims but acknowledges that the relief sought relates only to the City and does not implicate any interests of the Tribe.

[9] California's joinder statute mirrors Rule 19 of the Federal Rules of Civil Procedure. (see Law Rev. Comm'n Comments on Civ. Proc. § 389, 1971 Amendments.)

the individually named tribal officials can adequately represent the Tribe's interests. Again, the Committee's arguments miss the mark.

a. The City cannot adequately represent the Tribe's interests.

Without analysis, the Committee declares that because the Tribe and the City share counsel, the City must adequately represent the Tribe's interests. However, this assertion ignores an attorney's duty to his client(s). Counsel representing two parties must notify the parties of potential conflicts, obtain the parties' consent for dual representation, and, if a conflict arises, withdraw from representing both parties. Although the City's and the Tribe's interests may align at present, nothing in the fact that they share counsel raises an inference that the parties will never have a conflict of interest or that the City's counsel must zealously advocate for the Tribe's interests to the City's detriment. (*Weiss v. Perez* (N.D. Cal. 2022) 602 F.Supp.3d 1279, 1293 ["A present alignment of interests is insufficient to find adequate representation… The different motivations of the two parties could lead to a later divergence of interests."] [citing *White v. Univ. of Cal.* (9th Cir. 2014) 765 F.3d 1010, 1027].)

Indeed, the City has multiple interests that it must represent, which do not necessarily align with the Tribe's interests. The City's duty is to all its constituents—i.e., the voters and residents within its jurisdiction. The City cannot represent one constituent to the detriment of all others. (see, *e.g.*, *Forest Conserv. Council v. U.S. Forest Svc.* (9th Cir. 1995) 66 F.3d 1489, 1499 ["The government must represent the broad public interest, not just the economic concerns of the timber industry… Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public."].)

For example, it is possible that the City would enter into settlement discussions with the Committee to preserve taxpayer resources or that a change in the City's political leadership might be adverse to the Tribe's ownership. (see *Simpson Redwood Co. v. State* (1987) 196 Cal.App.3d 1192, 1203 [the government might protect its pecuniary interests by settlement].) Further, the "ultimate objective" of the City and the Tribe are not identical. (*Southwest Cntr. for Bio. Diversity v. Berg* (9th Cir. 2001) 268 F.3d 810, 823 [discussing intervention].) The City's ultimate objective is to defend its

governmental decision, whereas the Tribe's is to protect its property rights. While these objectives may have a similar result, the City could (for example) act to rescind and re-authorize the parties' contract, a decision which the Tribe would likely oppose. Thus, the City's interests do not completely align with the Tribe's, and it cannot adequately represent the Tribe in this litigation.

Although not argued by the Committee, the contractual indemnification agreement between the City and the Tribe for causes arising from the property transaction also does not completely align the City's interests with the Tribe's. (see *Simonelli v. City of Carmel-by-the-Sea* (2015) 240 Cal.App.4th 480, 484-485 [an indemnity provision "does not ensure that the City will protect [the absent party's] interests."].) Therefore, the indemnity agreement also cannot establish that the City adequately represents the Tribe's interests through shared counsel.

b. The tribal officials cannot represent the Tribe's interests.

Like the Tribe itself, the Tribe's governmental officials enjoy immunity. Absent a valid application of *Ex Parte Young*, which is not present in this case, the tribal officials cannot be made parties to this action and, therefore, cannot adequately represent the Tribe's interests.

C. The Tribe is indispensable to the Committee's First and Third Causes of Action.

As addressed above, to determine whether a party is indispensable under Section 389(b), a court considers four factors, including whether, in the Tribe's absence, it will potentially be prejudiced by a decision in the action, whether the prejudice can be mitigated through protective provisions, whether a judgment rendered in the Tribe's absence will be adequate, and whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. (Code Civ. Proc. § 389; *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297.) Again, the trial court has broad discretion in considering the four factors and determining which carries the most weight under the circumstances. (see *Save Our Bay*, *supra* 42 Cal.App.4th 692.). However, the equitable factors "almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." (*Jamul Action Com., supra* 974 F.3d at 997 ["There is a wall of circuit authority in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—virtually all the cases to consider the question appear to dismiss… regardless of whether an alternate remedy is available…."].)

1. The Tribe will be prejudiced by any judgment determining its ownership of the Airport to be void.

"Legal prejudice means prejudice to some legal interest, some legal claim, some legal argument." (*Smith v. Lenches* (9th Cir. 2001) 263 F.3d 972.) A judgment rendered in the Tribe's absence that lays a legal foundation for subsequent action to divest the Tribe of its property or that purports to control what the Tribe can do with its property would be prejudicial to its interests. (Civ. Proc. § 389(b)(i).)

The Committee suggests that the Tribe lacks an interest in the subject matter of this lawsuit because it claims the Airport transfer was void *ab initio.* (AOB at 24.) Under the Committee's theory, "if the sale was 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 cannot be prejudiced by such a judgment." (*Id.*) This argument, for which the Committee cites no authority, ignores at least two important considerations.

First, the Committee's argument acknowledges, as it must, that it seeks a judgment *against the Tribe*. Having acknowledged this, the Committee cannot rationally argue that the Tribe would not be

prejudiced by being absent from a case seeking a judgment against the Tribe.

Second, the Committee's argument fails to appreciate that its action specifically seeks to divest the Tribe of its current ownership of property, which it has held as a bonafide purchaser for five years. Regardless of whether the Committee claims the Airport transfer was void *ab initio* or after the fact, there is no claim that such a determination does not affect the Tribe's current title to the property and that interest would be prejudiced in the Tribe's absence.

Although it oddly discusses it in relation to whether any judgment will be adequate, the Committee also claims that the Tribe will not be prejudiced in its absence because either the City or the individually named tribal officials can adequately represent the Tribe's interests. Again, the Committee's arguments miss the mark and fails to discuss the actual standards.

2. There is no way for a Court to mitigate the prejudice the Tribe would experience through protective provisions.

Aside from avoiding the questions altogether, the court cannot mitigate the impacts on the Tribe's interests from a decision that either voids the property sale or enjoins the Tribe from exercising dominion

and control over the property. As described in the Tribe's briefs, "any protective provision the Court might fashion would limit how the Modoc Nation could use and develop its property without the Modoc nation's participation in the lawsuit, and without the Modoc Nation's input on the type of development it plans for the property or the impact of restrictions." (CT at 47.) The trial court considered the Tribe's argument and determined that it is an indispensable party. (CT. at 70-71.) The court's determination was not an abuse of discretion.

3. A judgment in the Tribe's absence will not be adequate.

As the trial court noted, the Committee requested "judgment declaring the airport transfer is void… and that the Modoc Nation may not exercise control over the airport." (CT at 69-70.) In the Tribe's absence, the court cannot divest it of its current property rights, and the effect on the parties' rights and obligations if the contract for sale were voided is indiscernible. Nor can the court impose any binding restrictions on the Tribe's property rights in its absence. Therefore, the court could not have fashioned an adequate judgment for the Committee on its First and Third Causes of Action.

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4. The Committee has a forum available in which to fulfill its objective to prevent undue degradation to the Airport.

Although a wall of federal authority establishes that a lack of alternative forum because of tribal sovereign immunity does not provide a reason for the court to proceed in the Tribe's absence, the Committee does have an alternative forum to press its complaints. First, to the extent that the Committee believes the Federal Airport Act and/or the Land Patent prohibit the Tribe from owning the property, the Land Patent provides the remedy. The Committee may appeal to the Federal Aviation Administration, which maintains a reversionary interest in the property, should the terms of the patent (or federal law) be violated. Second, to the extent that the Committee is concerned about undue degradation of the property, numerous federal and state laws protect that interest, including laws governing airports, the National Environmental Policy Act (NEPA), and the California Environmental Quality Act (CEQA). Further, any concern about future effects is purely speculative and not subject to judicial intervention.

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CONCLUSION

For the foregoing reasons, Respondents ask that the superior court's order dismissing the Tule Lake Committee's first and third causes of action be affirmed.

Dated: December 13, 2023.

PEEBLES KIDDER BERGIN & ROBINSON LLP

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Michael A. Robinson
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CERTIFICATION OF WORD COUNT

Respondents' counsel, pursuant to Rule of Court 8.204(c)(1), hereby certifies that, according to Microsoft Word and excluding the portions of the brief specified in Rule 8.204(c)(3), this brief contains 13, 805 words.

/s/ Michael A. Robinson
Michael A. Robinson

PROOF OF SERVICE

I declare that I am employed with the law firm of Peebles Kidder Bergin & Robinson LLP, whose address is 2020 L Street, Suite 250 Sacramento, California 95811. I am employed in Sacramento County, California. I am over the age of 18 and am not a party to this case. On **December 13, 2023,** I caused the following document(s) to be served described as: **RESPONDENTS' BRIEF** on the interested party(ies) in this action as addressed as follows:

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XX By electronic transmission via the court's Electronic Filing System operated by ImageSoft TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **December 13, 2023,** at Sacramento, California.

Sally Eredia