UNITED STATES COURT OF APPEALS
NINTH CIRCUIT COURT OF APPEALS

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

APPELLANTS' OPENING BRIEF

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

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Appellant/Defendant Cesar Caballero herewith submits this Opening Brief.

I.
INTRODUCTION AND SUMMARY OF APPEAL

The case involves competing claims to a 240-acre parcel of land given by the United States Bureau of Indian Affairs [“BIA”] to the Miwok people, which was then hijacked by a group of impostor, non-Miwok people.

For some reason, the federal court has refused to allow the merits of Caballero’s claims that the current occupants of the land occupy it fraudulently and illegally. The Trial Court was only interested in giving the tribe the full benefit of the federal court system of justice while denying Caballero any benefit from it. As a result, the trial court issued an improper injunction, and granted summary judgment on the tribe’s obviously false claims of ownership of the lands and all of the intellectual property [trade names and the like]. This decision luckily was reversed on appeal [Docket No. 302]. after that the so-called

Appellee tribe decided to voluntarily dismiss its action [Excerpts of Record "ER" 6; docket entry 324].

Appellant requested the Trial Court to modify its previous orders denying Caballero's cross-claims [Docket No. 345], but the Trial Court once again refused to allow him access to the courts, and denied the motion on the grounds that Caballero was just arguing the same stuff he had argued before [ER 2, Docket No. 361].

One bit of new evidence that Appellant had for the court, which the trial court was unimpressed by, was that Appellant submitted this exact issue to the BIA for relief. The trial court had indicated this is a political question for the executive branch to deal with. Well, unfortunately, the Executive Branch [BIA] refuses to deal with it and instead has issued a letter saying it has no legal authority to deal with this issue. Thus, the claim of political question application did in fact involve new facts, at last. Even those new facts, that Caballero had nowhere else to go, did not impress the trial judge; she denied the motion for new trial and to vacate modify her previous decisions. This appeal followed.

The Ninth Circuit had previously found error by the Trial Court and reversed the trial court's decision to deny Cesar Caballero access to the federal court system of justice, and to only allow a tribe as a plaintiff to seek all remedies, injunctive, contempt, imprisonment and damages against Caballero but to one-sidedly not allow Caballero any remedies against the tribe. In the Ninth Circuit decision reversing the trial court, [Docket No. 302] it ruled:

> "This evidence fails to carry the Tribe's burden on summary judgment. There is insufficient evidence in the record to prove that Caballero offered "association services" within the meaning of the Lanham Act. Caballero's own vague and conclusory statements are insufficient to establish that Caballero or his tribe provided or offered any services. The only remaining factual support for the Tribe's allegations is a snapshot of Caballero's website depicting a contact email address for those with "Enrollment Questions," which, standing on its own, does not support the grant of summary judgment. Even if the "Enrollment Questions" heading on his website could be construed as constituting an offer of membership — what Caballero refers to as "association services" — solicitation

of members in and of itself is insufficient to constitute an offer of a service without evidence as to what those prospective members would be joining. As to the Red Hawk Casino Mark, the Tribe has failed to present any evidence that Caballero used the mark in connection with a good or service. On the present record, no reasonable jury could conclude that Caballero offered or provided any service in connection with his use of either the Tribal Marks or the Red Hawk Casino Mark.

4. The Tribe also is not entitled to summary judgment on the cybersquatting claims. To establish liability under the Anti-Cybersquatting Consumer Protection Act, the Tribe must show that, by registering, trafficking in, or using a domain name identical or confusingly similar to a protected mark, 15 U.S.C. § 1125(d)(1)(A)(ii), Caballero acted with "bad faith intent to profit from that mark," 15 U.S.C. § 1125(d)(1)(A)(i); see DSPT Int'l, Inc. v. Nahum, 624 F.3d 1213, 1218-19 (9th Cir. 2010). "The 'intent to profit' . . . means simply the intent to get money or other valuable consideration," id. at 1221, and may include using the domain name "to get leverage in a business dispute," id. at 1219. There is no evidence in the record — not even in

> Caballero's brief exchange with the Tribe's counsel at his deposition — that Caballero intended to profit by using the domain names involving the Tribal Marks or the domain names involving the Red Hawk Casino Mark, either in the traditional sense or as exerting pressure on the Tribe to gain an advantage in a business dispute. The Tribe therefore has failed to provide sufficient evidence on this statutory element of its claims for cybersquatting."

Caballero had also appealed to the Ninth Circuit the dismissal of his counterclaims, but the Ninth Circuit ruled the appeal was premature, stating in part: "A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable." [Docket No. 66].

II.
STATEMENT OF THE CASE

On December 23, 2008, Plaintiff/Appellee filed its complaint for trademark infringement and related intellectual property claims against Cesar Caballero, chief of the Miwok Nation. [accompanying Appellant's Excerpts of Record/ "ER" 16; see also Docket No. 1]. The

claim gets down to Appellee, whose current members of its Tribal Council [who are not Miwok blood and who do not have USA BIA-issued identification [the one and only proof of being a Miwok]] kicked out Appellant's group of true Miwoks, who have in fact have BIA-issued Miwok identifications. As a result, Appellant and his group do not have the right to use the Shingle Springs Band of Miwok Indians name and/or any kind of related name; they cannot have business permits in that name; and in a more general way, cannot exist at all. The Appellee/plaintiff in the trial court chose as a Native American tribe to come to United States federal District Court. It filed the complaint [ER 16], which elicited of course an answer and counterclaim by defendant appellant here Cesar Caballero.

Caballero's Answer and counterclaim were filed on February 17, 2009 [ER 15; docket entry 11]. The Answer stated in part [ER 15, page 19, paras 59-61]:

"59. The Indigenous Shingle Springs Miwoks are informed and believe and based thereon allege that the BIA was not listing a group of persons but rather the Rancheria property itself. This fact is supported by a document by BIA entitled "American Indians and

Their Federal Relationship," published in March 1972, which identifies "Shingle Springs Rancheria (Verona Tract) (3) (unoccupied)."

60. The Indigenous Shingle Springs Miwoks are informed and believe and based thereon allege that from 1916 until 1979 the Casino Indians did not have any sociological, political, economic existence on the Rancheria (Casino Land) or anywhere else that could have been recognized by the federal government as an Indian tribe.

61. The Indigenous Shingle Springs Miwoks are informed and believe and based thereon allege that the provisions of 25 C.F.R. Part 83 as they pertain to acknowledgment of recognition of the Casino Indians have, would have, do, did, and will preclude the Casino Indians from Federal recognition. Moreover, the Indigenous Shingle Springs Miwoks are informed and believe and based thereon allege that the provisions of 25 C.F.R. part 83 are the only way the Casino Indians could have gained recognition as a federally recognized tribe because no "course of dealings" or "pattern and practice" or other creative process could be used by the BIA to recognize a federal tribe."

The Plaintiff/Appellee filed an application for restraining order and injunctive relief [Docket entry 90]. For some reason, the trial court was of a view that what Plaintiff was doing was okay; they're fake Miwoks [they do not really dispute being fake Miwoks], but they can go ahead and annihilate the true Miwoks; they can go ahead and deprive the true Miwoks of their federally-granted lands [ER 13; Docket Entry 91: Temporary Restraining Order; see also ER 12; Docket 99: Preliminary Injunction].

For some reason, the trial judge decided that the series of federal laws that expressly provide these lands to the Miwoks, should just be entirely and 100% disregarded. Instead, the trial court upheld the plaintiff's right to those lands, fully knowing and understanding that the Plaintiffs are not Miwoks; they are imposters. The trial court felt so strongly about this that it doubled down on Caballero and granted the restraining orders [ER 13, docket no. 91; ER 12, docket No. 99].

The Court then held Cesar Caballero in contempt [ER 11; Docket Entry 140: Order Holding Defendant in Contempt, page 2]:

> "ORDERED AND ADJUDGED for the reasons stated by the Court at the hearing on July 20, 2011, and the reasons set forth in the Tribe's briefs regarding contempt, that Cesar Caballero is in contempt of this Court's preliminary injunction order ("Injunction Order") issued on September 15, 2010, directing that "Mr. Caballero may not use, or represent to third parties, including the United States government, that he is associated with or a representative of, the 'Shingle Springs Band of Miwok Indians,' the 'Shingle Springs Rancheria', the 'Shingle Springs Miwok Tribe, the 'Shingle Springs Miwok Indians,' or any confusingly similar variation thereof" and that "Mr. Caballero also may not represent that he is associated with, or lives on, the Shingle Springs Rancheria, the sovereign territory and land base that is held in trust by the United States for the Tribe"

The Court then sentenced him to Federal incarceration; all told, he did about 90 days in jail. See ER 10; docket no. 165, page 5. October 31, 2011 Order imprisoning Defendant:

> "ORDERED that, should Cesar Caballero fail to take the steps outlined herein to bring himself into compliance with the Injunction Order and Contempt Order before November 14, 2011, he shall report to this Court by 2:00pm on November 14, 2011 to be committed to the custody of the United States Marshal Services, and shall remain in custody for each day thereafter that Cesar Caballero remains in violation of the Injunction Order and Contempt Order;
>
> and it is further
>
> ORDERED that, should Cesar Caballero be committed to the United States Marshal Service for his failure to comply with the Injunction Order ad Contempt Order, a hearing shall be held before this Court on January 4, 2012 at 9:30am to address Cesar Caballero's continued contempt of this Court."

On January 5, 2012, Caballero was temporarily released from custody [ER 9, Docket No. 175].

On November 20, 2013, the Court issued a minute re-sentencing Caballero to imprisonment. See ER 7, docket No. 290, Minute Order:

> "As Defendant remains in non-compliance with the Courts injunction order; and as good cause has not been shown, the Court finds Defendant in contempt and orders that Defendant be imprisoned for 30 days, or until he can show that he is in compliance, whichever occurs first."

What's a little bit embarrassing perhaps for the trial court is that this Ninth Circuit reversed a summary judgment on that same restraining order claim. [Docket Entry 33]. By then, Caballero had already served the 60 and 30 days in jail, but it caused the Plaintiff/Appellee to abandon their case and walk away from it [See ER 12, order granting injunction; ER 11, order granting contempt; and ER 8, Order granting summary judgment]. Note: the summary judgment order has already been reversed; we put it in the record here by way of reference, but we have no appellate issues regarding the already undone summary judgment grant.

The trial court decided to dismiss Cesar Caballero's counterclaim on May 20, 2009 [ER 14; docket entry 33]. The concept was that the counterclaim was barred by sovereign immunity, because Caballero

was claiming he was the rightful tribe and not Plaintiff. Caballero pointed out that there should be no sovereign immunity here when a tribe has chosen to come into federal court to obtain the full benefits of federal law by litigating against Caballero's group. In that respect the tribe, obviously waived its sovereign immunity. Not so, according to the trial court, they can sue him, but he can't sue them.

So basically, we have a case where Appellant Caballero is chief of the rightful and true Miwoks, and trying to make that claim in federal court. A group of impostors is making the claim that they are the rightful owners of all of the land, and all of the related intellectual property, even though they are not Miwoks. A federal judge grants a restraining order and injunction, a summary judgment, a contempt citation, and jails Caballero.

The trial court also found that the complaint was barred by the non-justiciable political question doctrine, the concept being that if there was a real dispute over who should have that land that dispute should go to another branch of the USA the Constitution gives that power to the legislative branch article whatever section whatever but the

legislative branch has largely delegated that to US department of Interior, Bureau of Indian Affairs [“BIA”].

One of Caballero’s positions was the BIA has already said “I'm a Miwok and all my people are Miwoks”. The BIA has never said that about the Plaintiff/Appellee tribal council members herein. They are in fact not Miwoks. The BIA has letters and records of titles stating very clearly these are Miwok lands; there really is no question about it. In fact, the claim here is that the once the government has spoken it should be adhered to; if these lands are for Miwoks, so be it, they should be for Miwoks, and there should be no problem going into court to adjudicate that issue.

The Trial Court also granted the motion to dismiss on the basis that it was barred by the statute of limitations, but what the trial court didn't get apparently was that this was an ongoing fraud with an ongoing group of Miwok imposters, claiming a right to the exclude the true Miwoks. This statute of limitations re-runs every day.

Based on the doctrines of sovereign immunity, non-justiciable political question matter and statute of limitations, the trial court granted the motion to dismiss [ER 14; docket no. 33]. Caballero appealed that decision, but this Ninth Circuit ruled that it was premature and interlocutory in nature, and dismissed the appeal [Docket no. 66].

Appellant does not challenge the Ninth Circuit order in any way, shape, or form. He is now back to the Ninth Circuit on this issue post-judgment. Now, the Ninth Circuit can rule on the merits of Appellant's roughly-undisputed claims. The part that is undisputed is that the Plaintiff/Appellees are not Miwok. Cesar Caballero and his people that form the Miwok Nation are true Miwoks. The BIA has already said and answered the political question: these are the true Miwoks, and never said that about the plaintiff/Appellee. The Plaintiff Appellee's members could easily obtain identification cards if they so desired. The fact that they do not have them means they're not true Miwoks.

Following the November 19, 2015 reversal of the summary judgment order [Docket no. 302], the plaintiffs decided to walk away from their claim they filed a request for voluntary dismissal [ER 6; docket no. 324]. In the request for voluntary dismissal, they make the following statement [page 11-12 of the Memorandum of Points and Authorities]:

> "On the other hand, proceedings are already in place before the UPSTO's TTAB to resolve without a doubt the legitimacy and priority of the Tribe's and Mr. Caballero's claimed trademark rights and the right to federal registration of the Tribe's federally recognized name. (Barker Decl., Para 3) Dismissal with prejudice of trademark infringement claims before the Court would not preclude resolving Mr. Caballero's and the Tribe's respective rights before the USPTO."

On June 13, 2018, Caballero opposed the dismissal on the basis that it should be with prejudice [docket no. 338].

On June 21, 2019, the Trial Court granted the request for voluntary dismissal [ER 5; docket no. 339].

On July 8, 2019, the Trial Court entered an Order conclusively dismissing defendant's counter claim [per motion to dismiss, docket no. 226] [ER 4, docket no. 340].

The trial court then issued a judgment on July 8, 2019 [ER 3; docket no. 341].

On July 19, 2019, Caballero filed a motion for new trial and to vacate and or modify the judgment [Docket no. 345] based on several arguments that, contrary to the Trial Court's decision, actually had not been dealt with before. One was that in the time span it took the Court to make a decision in, Caballero had managed to actually go to the BIA and have a friendly sit-down meeting; followed up with the submission of a detailed complaint and statement of issues regarding the two competing tribes; and received a very interesting letter from BIA Superintendent Troy Burdick that stated: "

> "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's complaint cite any authority under which we could take such

> action. As such, we are unable to act on your client's request for relief as described in the complaint."

[Docket entry 345, Declaration of Herman Franck exhibit D thereto, April 1, 2019 letter from Burdick to Franck] clearly stating that the BIA does not have any kind of legal authority to intervene in this dispute. See also Exhibit F thereto, May 6, 2019 letter from Burdick to Franck.

On August 14, 2020, the Trial Court denied the motion for new trial and or to modify vacate the verdict judgment [ER 2; docket entry 361]. What Appellant obviously wanted was for the Trial Court to accept the cross-complaint. Plaintiff can go ahead and dismiss its case, but Caballero does not have to dismiss his. He should have been allowed to go forward on his cross-complaint. The Trial Court denied that motion and stated that it raised no new facts. Well, the part about going to the BIA and being told by the BIA that it has no legal authority to intervene was new; the Trial Court just wouldn't accept the fact that that was a new fact, and instead decided that Caballero was just arguing the same arguments over and over again and denied the motion [ER 2].

On September 11, 2020, Appellant Cesar Caballero filed his notice of appeal of the judgment and the whole thereof to the United States Court of Appeals for the 9th circuit [ER 1].

III.
SUMMARY OF TRIAL COURT'S ORDER AND JUDGMENT

In dismissing Cesar Caballero's cross-complaint, the Trial Court ruled in part [ER 14; docket entry 33]:

> "First, this Court lacks subject matter jurisdiction over the action because the Tribe possesses sovereign immunity to suit, and that immunity has not been waived. Fed R. Civ. Pro. 12(b)(1). Second, this Court lacks subject matter jurisdiction to adjudicate a challenge to the status of a tribe that appears on the United States' list of federally-recognized tribes, and Mr. Caballero, and the "Indigenous Miwoks" he purports to represent, cannot state a claim for relief as a matter of law. Fed. R. Civ. Pro. 12(b)(l), (6). Third, Mr. Caballero's challenge to the Tribe's federal recognition is non-justiciable, as the Tribe's status in relation to the United States is a political question beyond the province of any court. Fed. R. Civ. Pro. 12(b)(l), (6). Fourth, to the extent Counter-Plaintiff claims he and the persons he purports to

represent were wrongfully denied membership in the Shingle Springs Band, this Court's also lacks subject matter jurisdiction to adjudicate it, because only the Tribe itself is empowered to grant membership, and no claim for federal relief can be stated. Fed. R. Civ. Pro. 12(b)(l), (6). Fifth, Mr. Caballero's challenge is time-barred, since, as a matter of law, he and other members of the Tribe have been aware of the Tribe's federal recognition for 30 years. Fed. R Civ. Pro. 12(b)(6). Seventh, Mr. Caballero's countersuit cannot state a claim upon which relief can be granted because, as a matter of law, a federally-recognized Indian tribe cannot be enjoined from using its own federally-recognized name, under the guise of trademark law or otherwise. *Id.* Finally, the United States is a necessary and indispensable party to Mr. Caballero's challenge of the United States' recognition of the Shingle Springs Band and his claim to their lands, but cannot be joined because of its immunity, requiring dismissal. Fed. R. Civ. Pro. 12(b)(7). Accordingly, pursuant to Federal Rules of Civil Procedure 12(b)(1), the Court hereby orders that Counter-Plaintiff's complaint is, in its entirety, DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction. In addition, the Court

> finds that dismissal also would be warranted if it had subject matter jurisdiction, because Counter-Plaintiff has failed to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6) andbecause the United States is an indispensable party that cannot be joined, requiring dismissal under Rule 12(b)(7)."

The Trial Court revisited these issues in its Order Denying Caballero's post-judgment motion for new trial and to Vacate or modify the Judgment [ER 2; docket 361], ruling as follows:

> "Regardless of the merits of defendant's argument, the motion must be denied because it is an attempt to use Rule 59 to "relitigate old matters [and] raise arguments [and] present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. Defendant claims to be challenging the court's 2019 dismissal order, but admits that, in truth, he is challenging the court's conclusion in the 2009 dismissal order, upon which the 2019 order is based. Plaintiff provides no explanation why the "evidence" on which

> he bases the motion could not have been obtained in 2009, when the issue was initially decided, nor why it was not presented to the court before it issued its most recent order. The court notes in particular the BIA correspondence is dated April 1, 2019, two months before the court issued its June 2019 order. *See* Franck Decl., Ex. D. Accordingly, the court finds defendant's Rule 59 motion seeks to "relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. It must therefore be DENIED."

The Judgement issued by the Court simply stated [ER 3]: "It is Ordered and adjudged That judgment shall be entered in accordance with the Court's Order filed on 7/8/2019."

IV.
STATEMENT OF APPEALABILITY

This is an appeal from a judgment of dismissal [ER 3], which is appealable as a matter of right pursuant to 28 USC Section 1291.

V.
STANDARD OF REVIEW

A dismissal for failure to state a claim [FRCP Rule 12(b)(6)] is *de novo*. See *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). A dismissal without leave to amend is reviewed *de novo*. See *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004) (noting underlying legal determinations require de novo review).

The district court's dismissal based on statute of limitations is reviewed *de novo*. See *Whidbee v. Pierce Cty.*, 857 F.3d 1019, 1022 (9th Cir. 2017) (considering how federal courts address service of process and statute of limitations defenses in state cases that have been removed to federal court); *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011).

A district court's decision concerning joinder is generally reviewed for an abuse of discretion. See *Rush v. Sport Chalet, Inc.*, 779 F.3d 973, 974 (9th Cir. 2015).

Leave to amend is reviewed for abuse of discretion. See *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017).

VI.
ISSUES ON APPEAL

Appellant Caballero raises the following issues on appeal:

1. Whether the Trial Court committed prejudicial error in granting the Motion to Dismiss the Cross-Claim on the basis of sovereign immunity because the Plaintiff/Appellee waived its Sovereign Immunity by filing a lawsuit against Defendant/Cross-Complainant/Appellant seeking equitable relief;
2. Whether the Trial Court committed prejudicial error in not enforcing the Plaintiff/Appellee Tribe's exception to sovereign immunity for *ultra vires* acts not part of the official affairs of the Tribe;
3. Whether the Trial Court committed prejudicial error in granting the Motion to Dismiss on the basis of Non-Justiciable Political Question, because the acts Complained of are ultra vires, and thus are actionable as being beyond the powers of the tribe;

4. Whether the Trial Court committed prejudicial error in dismissing the Cross-Complaint on the basis of Non-Justiciable Political Question because Plaintiff Tribe chose to file its Claims in Federal Court, and Caballero's Cross-Complaint claims were the counterpoint to those claims;
5. Whether the Trial Court committed prejudicial error in granting the Motion to Dismiss based on Statute of Limitations because of the continuing tort doctrine, which applies here because the imposter Miwoks are committing a new offense against the true Miwoks each new day;
6. Whether the Trial Court committed prejudicial error and/or abuse of discretion in granting the Motion to Dismiss based on failure to add the USA as a Necessary Party because Caballero has no claims against or involving the USA; and because Caballero requested leave to amend to add the USA as a Necessary Party;
7. Whether the Trial Court committed prejudicial error in granting the Motion to Dismiss the Cross-Complaint on the basis of failure to state a claim for relief under FRCP Rule 12(b)(6);

8. Whether the Court of Appeals should vacate the Orders finding Caballero in Contempt, in light of the Ninth Circuit's Reversal of the Order Granting the Injunction by Summary Judgment.

VII.
ARGUMENT

A. The Court Committed Prejudicial Error in Granting the Motion to Dismiss the Cross Claim on the Basis of Sovereign Immunity Because the Plaintiff/Appellee Waived its Sovereign Immunity by Filing a Lawsuit Against Defendant/Cross-Complainant Appellant Seeking Equitable Relief

In his Opposition to Plaintiff's motion to dismiss his counterclaim, Cesar Caballero cited a series of cases stating that a tribe that chooses to file a lawsuit in United States District Court has thereby waived its sovereign immunity as to counterclaims that relate to the same nexus of facts. See Caballero Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Dismiss Cross-Complaint [Docket 22, at page 14-15].

The Trial Court's decision [ER 14; Docket Number 33], does not mention these cases or how they are somehow not applicable.

The cases are the following:

Rosebud Sioux Tribe v. A&P Steel, Inc. 874 F.2d 550, 552 (8th Cir 1989):

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

> that the Tribe has specifically waived its immunity to the counterclaim."

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

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

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

> "The equitable nature of this suit is of paramount importance. "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." Holmberg v. Armbrecht, 327 U.S.

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

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

Since the motion was litigated (2009), there are a further series of cases holding roughly the same way. See *Tohono O'odham Nation v. Ducey*, 174 F.Supp.3d 1194, 1204 (D. Az. 2016):

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

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

See Id. at 1204-1205 states:

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

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

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

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

There is just no rhyme nor reason in the trial court's decision as to why this obviously applicable precedent isn't applicable to this case involving a tribe who is suing Cesar Caballero, and seeking injunctive relief (and putting him in jail for that).

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

> "The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right."

B. The Trial Court Committed Prejudicial Error in Not Enforcing the Plaintiff/Appellee Tribe Exception to Sovereign Immunity for *Ultra Vires* Acts Not Part of the Official Affairs of the Tribe

Another basis to avoid the bar of sovereign immunity was stated in the Appellant's post-judgment motion for new trial and/or modify/vacate the Judgement [Docket Entry #345]. The motion stated at page 16:

> "Moving party makes the following request regarding the application of sovereign immunity over the counterclaim: Counter-claimant Cesar Caballero requests leave to amend as counter-defendants the true culprits of the fake Miwok imposter fraud scheme to the counterclaim. The counterclaimant would

> add the current members of the governing council of the Shingle Springs Band of Miwok Indians: Regina Cueller [Chairwoman], Pat Cueller, Allan Campbell [Vice Chair], Brian Fonseca, Nicholas H. Fonseca, Annie Jones, Jessica Godsey Olvera, and Jacky Calanchini.
>
> The sovereign immunity applies to individuals for official acts only. The acts complained of are not official, are ultra vires, and involve individual members of the tribe who are not Miwok, and are imposters governing the tribe."

1. Ultra Vires Exception to Sovereign Immunity Claims

The trial court committed prejudicial error in determining that the exception to sovereign immunity allowed in *Lewis v. Clarke* 581 U.S. ___ (2017) did not apply to the present action. *Lewis v. Clarke* stated:

> "The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. *Graham,* 473 U. S., at 167. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. *Van de Kamp* v. *Goldstein*, 555 U. S. 335 –344

> (2009). But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability." *Hafer*, 502 U. S., at 30–31 (internal quotation marks omitted); see *Alden* v. *Maine*, 527 U. S. 706, 757 (1996)."

Lewis v. Clarke also states:

> "In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities. An indemnification statute such as the one at issue here does not alter the analysis. Clarke may not avail himself of a sovereign immunity defense."

Further support of Appellant's claim of a reasonable expectancy in the Shingle Springs Rancheria is found in the recent US Supreme Court case of *McGirt v. Oklahoma*, 591 U. S. ____ (2020): "Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."

These lands are properly stated to be for the Miwok people of Shingle Springs. Appellant does not seek to change or challenge title to the land, because title is already in the Miwok name.

The answer to this case in this appeal is that the exception to sovereign immunity did apply, and the Trial Court committed error in finding that there was no exception and quashing the complaint.

The reason the Trial Court should have reached the legal conclusion that the sovereign immunity exception of *Lewis v. Clark* did apply is because the complaint alleged facts which, if proven at trial, would show that the conduct of the individually-named tribal council members sued as defendants in this action was all *ultra vires*, and outside the scope of any legitimate official business of the tribe. Instead, it was conduct against true Miwok tribe citizens using fraud, imposters, and subterfuge as some kind of excuse to keep true Miwoks off of lands that were undisputedly earmarked for them. The Counterclaim states as follows [ER 15; docket entry 11, paragraphs 89-92]:

"89. The indigenous Shingle springs Miwoks had and have a prospective economic relationship with the federal government in that through their beneficial interest in the 240 acres Shingle Springs Tract, they likely would have control of the federal recognition of the "Shingle Springs Band of Miwok Indians and eventually confirmed as the true and natural benefactor of such recognition as a federally recognized tribe, and the resulting probability of economic benefit of federal programs and benefits which are only available to members of federally recognized tribes in addition to the gaming rights coming as a direct result of that recognition.

90. In addition, Casino Indians intentionally disrupted the relationship between the Indigenous Shingle Springs Miwoks and the United States government by eliminating the Indigenous Shingle Springs Miwoks from the PLAN FOR THE DISTRIBUTION OF THE ASSETS OF THE SHINGLE SPRINGS RANCHERIA ACCORDING TO THE PRVOSIONS OF P.L. 85-671, AS AMENDED BY P.L. 88-419.

> 91. Casino Indians thereafter began and continued to fraudulently intentionally assume historic references to Shingle Springs Band of Miwoks or similar name, despite having no ancestral claim to the Miwok identity or aboriginal or indigenous claim to the Shingle Springs area.
>
> 92. Casino Indians fraudulently assumed and took control of the federal recognition of the "Shingle Springs Band of Miwok Indians."
>
> 93. Casino Indians continued to assume their tribal identity and heritage through intentional and unjustified acts."

See also Cross-Complaint, ER 15, paragraphs 25-69 "General Allegations."

The cross-complaint supplemented in the opposition to the motion to dismiss by the Declaration of Cesar Caballero, which included Exhibits A-J showing his undeniable ancestry to the true Miwoks of Shingle Springs. See Docket Number 22-1, Decl. of Cesar Caballero, Exhibits A-J, and see page 4 thereto, Para. 17-21, which states:

"17. I studied the Sacramento Verona Group of Indians and found that they are made of Maidu and Hawaiians who came over to California in the gold rush. It is my understanding that tribal lands must be occupied within two (2) years and yet the Verona band shows up sixty (60) years later and then wants our identity.

18. I also had the pleasure of finding many historical articles in our local newspaper about the culture of our tribe.

19. My tribe has struggled to maintain its existence based upon the attempts by the government people to assimilate the Indians into their culture. We have maintained by focusing on the cultural and spiritual aspects of tribal life. My mother as well as tribal elders tell stories of tribal meetings and dances, which we still hold today. My Great-Aunt Alberta Blackwell is 94 years old.

20. In 2008, I took out a business license as the historian of our tribe under the name "Shingle Springs Band of Miwoks" because that is who we are. I referenced the first date of use as 1914 because Senate Resolution 115 (published by the Senate of the State of California) clearly states

Appellant notes that he does not ask for their ejectment from the land itself; what his asks for instead is a remedy that allows the true Miwoks to occupy and enjoy the lands that the US BIA has earmarked for them or to have damages money damages on for their loss in being deprived of the use of those lands.

Case law supporting this *ultra vires* exception to sovereign immunity is found in *Al Shimari v. CACI Premier Technology*, Inc., 840 F.3d 147, 157 (4th Cir. 2016). The Trial Court would not apply immunity under a similar concept of sovereign immunity, the non-justiciable political question immunity. In *Al Shimari*, the court noted that private contractors in Iraq were engaging in conduct that, if true, would constitute war crimes and thus was *ultra vires* and not subject to the political question immunity:

> "In examining the issue of direct control, when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a "de facto military decision [ ]" shielded from judicial review under the political question doctrine. Taylor, 658 F.3d at 410. However, the military cannot lawfully exercise its authority by

> directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine. The district court failed to draw this important distinction. Accordingly, we conclude that a contractor's acts may be shielded from judicial review under the first prong of Taylor only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful."

The same rule was applied in the case of *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005).

> "In the landscape before us, this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank. No ongoing government negotiations, agreements, or settlements are on the horizon. The outside chance that the Executive Branch will issue a statement in the future that has the "potentiality of embarrassment" when viewed against our decision today does not justify foreclosing

> the Holocaust Survivors' claims, especially when "[t]he age and health of many of the class members also presses for a prompt resolution." In re Holocaust Victim Assets Litig., 105 F.Supp.2d at 148.
>
> In sum, none of the Baker formulations is "inextricable" from the Property Claims. See Baker, 369 U.S. at 217, 82 S.Ct. 691. The Holocaust Survivors have presented a justiciable controversy.[16]"

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

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

The concept applies here as well. See also the BIA Letter from C.K. Haukes dated January 12, 1919, CT 687, quoted above, which

expressly reserves this land for the Shingle Springs landless Indians. Plaintiff and his Miwok Nation tribe members are those people.

2. The Ultra Vires Exception to Sovereign Immunity Claims Applies to This Case

Section I of this brief cites the various pieces of evidence showing that without a doubt the Shingle Springs Rancheria lands were expressly given to the Shingle Springs Miwoks. All of those facts and evidentiary items add up to a showing that the defendants are guilty, and are not shielded by sovereign immunity because their conduct was *ultra vires*.

The conduct is *ultra vires* because it unlawfully excludes US BIA identification-possessing Miwok persons from lands expressly given to them in trust by the US government.

These are *ultra vires* acts that the Tribal council members have taken on themselves personally and individually. Appellant is not attempting to eject these members from the land. Appellant is seeking to oust them as council people, and as being basically the entire

source of the reason that there are more than 200 true Miwoks without a proper home.

The trial Court found Appellant Cesar Caballero in contempt and sentenced him to jail [ER 11, docket 140, quoted above]. See also ER 10, Docket no. 165 [order imprisoning Caballero] [quoted above], and ER 7, docket 290 [Order imprisoning Caballero for thirty days [quoted above]. These contempts arose from Plaintiff's/Appellee's success in obtaining a Preliminary Injunction, and can be seen as the ultimate in a request for equitable relief and enforcement of equitable relief via quasi criminal contempt proceedings.

This court could reverse and instruct the Trial Court to apply that rule of *Lewis v. Clark*, 581 U.S. ___ (2017) to this case; it was generally not applied. In the alternative, this Court has *de novo* independent jurisdiction to review and reverse this pure issue of law.

One option is to remand this matter back to the trial court to apply the *ultra vires* rules to the facts of this case, and to hold that *ultra vires* acts are outside the parameters of sovereign immunity.

Accordingly, plaintiff/appellant requests that this Court reverse the judgment of dismissal and to find that the exception to sovereign immunity stated in *Lewis v. Clark*, 581 U.S. ___ (2017) applies here, where the underlying conduct being sued upon is *ultra vires* unofficial conduct for which there is no sovereign immunity.

C. The Trial Court Committed Prejudicial Error in Granting the Motion to Dismiss on the Basis of Non-Justiciable Political Question, because the Acts Complained of Are Ultra Vires and Thus Actionable as Being Beyond the Powers of the Tribe

The cases cited above about *ultra vires,* [*Lewis v. Clarke* 581 U.S. ___ (2017); *McGirt v. Oklahoma*, 591 U. S. ____ (2020); *Al Shimari v. CACI Premier Technology*, Inc., 840 F.3d 147, 157 (4th Cir. 2016); *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005)] also apply to the similar doctrine of non-justiciable political question. The underlying acts of acting as a fake imposter Miwoks, taking over the Miwok designated lands, are all ultra vires behaviors for which the non- justiciable political question has no application.

The *ultra vires* nature of the acts can be borne out by looking at the actual title documents kept by the United States BIA, which we have

since obtained in another separate *in rem* action. See Request for Judicial Notice and Request for leave to submit further evidence on appeal, submitting a declaration of BIA official filed by the US attorney in the *in rem* action also currently on appeal. See Caballero et al. v. United States, Ninth Circuit Case No. 20-17356. The title documents are all properly placing the Miwoks of Shingle Springs as the beneficial title holders. The title is held by the USA government in trust for the benefit of the Shingle Springs Band of Miwok Indians. That is Mr. Caballero, a true-blood BIA-identification card carrying Miwok; along with the many other members of his Miwok Nation tribe. They claim that the title deeds show this land is for their benefit, and yet a group of non-Miwoks have taken it over by fraud and by fraudulently claiming to be Miwoks when they aren't; by fraudulently acting as imposters Miwoks; and by fraudulently claiming that they have a right to regularly exclude true-blood BIA card carrying Miwoks. They simply do not have the power to do that because this land by federal government decision was granted to the Shingle Springs Band of Miwok Indians. See also the following Federal statutes that put together the funding for this land:

a. Act of Congress 06/30/13 (28 stat. 86), stating in part: "For support and civilization of Indians in California, including pay of employees and for the purchase of small tracts of land situated adjacent to lands heretofore purchased, and for improvements on lands for the use and occupancy of Indians in California, $57,000."
b. Act of Congress 5/25/18 (40 stat. 570), stating in part: ""For the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians, $20,000, said funds to be expended under such regulations and conditions as the Secretary of the Interior may prescribe."

Based on the foregoing, the political question immunity does not apply to any kind of act which itself is *ultra vires*. The *ultra vires* issue was raised and discussed in the post-judgment motion. See post judgment motion [Docket No. 345] See in particular MPA at page 16:

> "The sovereign immunity applies to individuals for official acts only. The acts complained of are not official, are ultra vires, and

> involve individual members of the tribe who are not Miwok, and are imposters governing the tribe."

The Trial Court in its order denying the motion for new trial [ER 2] does not mention the ultra vires issue and treats all of the conduct of the tribe no matter how awful as being somehow immune from any kind of civil prosecution this ruling is at odds with the public case law.

Accordingly, the judgment of dismissal should be reversed

D. The Trial Court Committed Prejudicial Error in Dismissing the Counterclaim on the Basis of Non-Justiciable Political Question Because Plaintiff Tribe Chose to File its Claims in Federal Court, and Caballero's Counterclaims were the Counterpoint to Those Claims

The Trial Court committed prejudicial error in dismissing the Cross-Complaint on the basis of Non-Justiciable Political Question because Plaintiff Tribe chose to file its claims in Federal Court, and Caballero's Cross-Claims was the Counterpoint to Those Claims Caballero stated in his opposition to the motion to dismiss his cross-complaint that the political question doctrine did not bar this action because of caselaw stating the political question doctrine doesn't apply

when the Tribe chose to file a lawsuit in US District Court. See Caballero MPA in Opposition to Motion to Dismiss Cross Complaint, Docket Entry 22, page 17-18, citing *Miami Nation of Indians of Indiana, Inc. v. U.S.*, 255 F.3d 342, 345 (7th Cir. 2001); and *Price v. State of Hawaii*, 764 F.3d 623, 626-628 (9th Cir. 1985).

Miami Nation of Indians of Indiana, Inc. v. U.S., 255 F.3d 342, 345 (7th Cir. 2001) states:

> "A group of Indians that is seeking recognition as a tribe entitled to federal largesse (the regulation calls recognition "acknowledgment" and the terminology may be significant, as we'll see later) has to satisfy seven criteria: (a) the group has been identified from historical times to the present, on a substantially continuous basis, as Indian; (b) "a substantial portion of the ... group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and ... its members are descendants of an Indian tribe which historically inhabited a specific area"; (c) the group "has maintained tribal political influence or other authority over its members as an autonomous entity throughout

> history until the present"; (d) the group has a governing document; (e) the group has lists of members demonstrating their descent from a tribe that existed historically; (f) most of the members are not members of any other Indian tribe; (g) the group's status as a tribe is not precluded by congressional legislation. 25 C.F.R. § 83.7. In 1980, the Miami Nation of Indians of Indiana petitioned Interior for recognition that it was an Indian tribe. (Obviously the fact that it calls itself a "nation" is not dispositive.)"

Id. at 348 states:

> "By promulgating such regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act. *Cf. Morton v. Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1261 (9th Cir.2000). And the Act has been interpreted (1) to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations (whether formal, as here, or doctrines of a common

law character) until the regulations are altered by proper procedures, *Webster v. Doe*, 486 U.S. 592, 602 n. 7, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *Service v. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *Head Start Family Education Program, Inc. v. Cooperative Educational Service Agency 11*, 46 F.3d 629, 633 (7th Cir.1995); *Cherokee Nation of Oklahoma v. Babbitt, supra*, 117 F.3d at 1499; *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C.Cir.1992); Canby, *supra*, at 5, and (2) to make compliance with the regulations judicially reviewable, provided there is law to apply to determine compliance, 5 U.S.C. § 701(a)(2); *Webster v. Doe*, *supra*, 486 U.S. at 599-600, 108 S.Ct. 2047; *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); *Sprague v. King*, 23 F.3d 185, 188 (7th Cir.1994) — as there is if despite the lack of *statutory* criteria, the agency's regulation establishes criteria that are "legal" in the sense not just of being obligatory but of being the kind of criteria that courts are capable of applying. *Ellison v. Connor*, 153 F.3d 247, 251-52 (5th Cir.1998); *McAlpine v. United States*, 112 F.3d 1429, 1433-34 (10th Cir.1997).

> As we explained in *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663-64 (7th Cir.1990), with reference to the Labor Board — but the point is equally applicable to the Department of the Interior — "no one questions the validity of the doctrine [i.e., the NLRB's rule that an organization is exempt from the National Labor Relations Act if it is incapable of engaging in meaningful collective bargaining] in this proceeding."

See also *Price v. State of Hawaii*, 764 F.3d 623, 626-628 (9th Cir. 1985):

> "Although no statute or regulation governs recognition of the Hou for purposes of establishing Sec. 1362 jurisdiction, we conclude that the same factors which govern eligibility for federal benefits and "immunities and privileges," see 25 C.F.R. Sec. 83.7, also provide some guidance for the jurisdictional inquiry. These factors, however, do not demonstrate that the Hou or their "governing body" have been "duly recognized" for Sec. 1362 purposes.
>
> 1. Historical continuity.
>
> We first examine whether the group petitioning for recognition "has been identified from historical times until the present on a

substantially continuous basis, as 'American Indian,' or 'aboriginal.' " 25 C.F.R. Sec. 83.7(a). The importance of a tribe's longstanding existence is underscored by the regulations' exclusion of "associations, organizations, corporations or groups of any character, formed in recent times," 25 C.F.R. Sec. 83.3(c), from eligibility for Bureau of Indian Affairs benefits.

Although native Hawaiians in general may be able to assert a longstanding aboriginal history, the issue before us is whether the particular subgroup seeking recognition--the Hou Hawaiians--can establish that they are a longstanding aboriginal sovereign rather than a recently formed association. To allow any group of persons to "bootstrap" themselves into formal "tribal" status--thereby obtaining the federal economic and legal benefits attendant upon tribal status--simply because they are all members of a larger aboriginal ethnic body would be to ignore the concept of "tribe" as a distinct sovereignty set apart by historical and ethnological boundaries. Cf. F. Cohen, Handbook of Federal Indian Law 5 & n. 17, 229 (1982). Because the Hou ohana was founded in 1974, it does not satisfy the historical requirement for tribal status implicit in Sec. 83.7(a).

2. Longstanding tribal political authority.

The BIA regulations also consider whether "the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present." 25 C.F.R. Sec. 83.7(c). The Hou have alleged no facts indicating longstanding actual political authority over its members. To contrary effect, the Hou have submitted "Minutes of a General Meeting of the Elder Council" that indicate that their Chief and Elder Council were first elected on January 27, 1985. This recent election was apparently prompted by the Department of Health and Human Services' request that the Hou formalize their political trappings in order for them to obtain Health and Human Services' benefits.

3. Other factors considered in BIA regulations.

The Hou have not alleged that "a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area...." 25 C.F.R. Sec. 83.7(b). Nor have they alleged that their members obey certain formal "procedures through which the group

currently governs its affairs and its members," 25 C.F.R. Sec. 83.7(d).”

This is very similar to the above arguments regarding sovereign immunity: if the tribe chooses to file in Federal Court, it has waived sovereign immunity as to counterclaims/cross-claims that arise out of the same nexus of facts as the claims of the Tribe's complaint.
The Trial Court's decision doesn't mention a word about these cases, their holdings, or how this case is somehow not subject to these precedents. On appeal, this issue may be reviewed de novo. This Court can apply these federal cases to this case, and on that basis can rule that the non-justiciable political question doctrine of *Baker v. Carr*, 369 U.S. 186 (1962) does not apply here because of the Tribe's decision to sue and seek equitable relief (Injunction, Contempt and Jailtime) against Cesar Caballero.

A further reason that the Trial Court’s decision is in error is that the cross-complaint does not in any way challenge and/or go against any kind of a decision made by the United States government instead, we note that the USA has granted title in these lands in trust for the

benefit of the Miwok people of Shingle Springs, that is Cesar Caballero and his fellow members of Miwok Nation. Appellant does not seek to undo any kind of behavior of the USA. In this case, the USA has given the land to the Miwok people, so Appellant does not have an issue with the USA.

Instead, Appellant has an issue with the tribe that took over the Miwok land. These people are not Miwok, and should not be there; their being there has nothing to do with any decision, on any issue, by the United States government or its legislative branch. Rather, their being there is a result of their own hijacking of land done through fraudulent means in which they have faked being Miwoks, and in fact they aren't. They have also falsely stated that they have a right to exclude Miwoks, when obviously from the title documents, they simply don't. These lands belong to the Miwok people by decision of the USA, a decision that Cesar Caballero’s cross-complaint does not in any way challenge or oppose.

This is a case where the USA has decided to give land to the Miwok people, and another tribe has stolen it. Appellant's action is against that other tribe for theft of land. Appellant has no beef with the USA.

A further basis to deny the motion to dismiss based on non-justiciable political question was brought up in the post-judgment motion [Docket entry 345]. Herman Franck, counsel for Cesar Caballero submitted a declaration in which he described his efforts where Caballero and Mr. Franck met with Troy Burdick, regional Superintendent of the United States BIA, and submitted a request and complaint to the BIA to basically get involved in this big issue to see if it could help Caballero solve it or do something about it. In response, the BIA noted it was without legal authority to do anything. See post-judgment motion for new trial vacate modified judgment of dismissal etc., [Docket No. 345, Declaration of Herman Franck, exhibit D, letter from Mr. Troy Burdick, regional Superintendent of the BIA]:

> "There is no statute or authority that we know of that would authorize such actions on our part, nor did your client's complaint cite any authority under which we could take such

> action. As such, we are unable to act on your client's request for relief as described in the complaint."

Mr. Franck also pointed out to the court that he had made similar request to the United States Senate Committee on Native American affairs and these similar committee with the House of Representatives, and basically nobody wants to do anything about this. A case on point is the case of *Alperin v. Vatican Bank*, 410 F.3d 532, 546 (9th Cir. 2005), in which the court noted that there could be jurisdiction over cases where there's literally nowhere else to go.

The Trial Court snubbed this issue by claiming the post judgment motion was simply a repeat of the previous opposition to the motion to dismiss the cross complaint. The trial court noted [ER 2, page 4]:

> "Regardless of the merits of defendant's argument, the motion must be denied because it is an attempt to use Rule 59 to "relitigate old matters [and] raise arguments [and] present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co.*, 554 U.S. at 485 n.5. Defendant claims to be challenging the court's 2019 dismissal order, but

> admits that, in truth, he is challenging the court's conclusion in the 2009 dismissal order, upon which the 2019 order is based."

The fact is, it wasn't the same stuff as before; Appellant had a whole new group of facts that the Trial Court just utterly and completely disregarded and ignored. The concept is actually that there is no other place to go for any kind of fixing of this big problem, the only place to go is a US District Court.

Appellant's challenge isn't to anything the USA has done. His challenge is to what this other band of fake impostor Miwoks has done. The Trial Court's denial of the post-trial motion on these points was likewise in error, and should be reversed on appeal.

Accordingly, the Trial Court's grant of the motion to dismiss based on non-justiciable political question should be denied.

E. The Trial Court Committed Prejudicial Error in Granting the Motion to Dismiss Based on Statute of Limitations Because of the Continuing Tort Doctrine, which Applies Here Because the Imposter Miwoks are Committing a New Offense Against the True Miwoks each New Day

The trial court also dismissed Caballero's cross-complaint based on a statute of limitations grounds. The simple answer to this point is that this is in the nature of a continuing tort, that keeps on going each and every day that Appellee tribe fakes being Miwoks, and hold themselves out to the world as Miwoks, when in fact they aren't; and continues to fraudulently state that they have some kind of right to exclude true Miwoks, when obviously the title documents to the lands are clearly stated to be for the Miwok people.

Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185, 1192 explains the doctrine:

> "The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 811-818 [111 Cal.Rptr.2d 87, 29 P.3d 175]; see *National Railroad Passenger*

> *Corporation v. Morgan* (2002) 536 U.S. 101, 118 [153 L.E.2d 106, 122 S.Ct. 2061].)
>
> Finally, under the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. (*Howard Jarvis Taxpayers Assn. v. City of La Habra, supra,* 25 Cal.4th at pp. 818-822.)"

The trial court committed error in not applying the continuing violation and/or continuing accrual doctrine to this case. See motion for new trial, docket no. 353, Reply brief, page 8:

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

Appellant notes the following quote from a letter by C.K. Haukes dated January 12, 1919 [Request for Judicial Notice Document 3]:

> "It should be noted that the purchase should be made for the "landless Indians of California" and not for "Hawaiian Indians" who may have intermarried with the California Indians. If any of this class of intermarried Indians desire to join the bands for whom the land is purchased, the Office will consider such particular case on its merits."

This quotation from this early 20th century letter shows a clear intent of the federal government to give this land for the benefit of the Miwoks. The series of title documents produced by the US BIA in a related *in rem* action [currently also on appeal before the Ninth Circuit, appeal number 20-17356], show that the US BIA did in fact give title just how they were supposed to, in trust for the benefit of the Miwok people of Shingle Springs; it says so right in the BIA documents. For the current tribe of non-Miwoks to be occupying these premises, and to be regularly rejecting over 200 true-blood Miwoks, who as a result remain without Native American lands or homes. They are mostly destitute people that were supposed to be taken care of by

these lands, and instead another group hijacked the land, and nobody wants to do anything about it. The only place to go in a case like this is a federal court.

The tort keeps on happening each day the plaintiff does these acts. The continuing tort doctrine is a complete answer to the statute of limitations problems. It means, for example, that damages made be cut off after 3 years, but that's fine. Appellant will just take damages in the last 3 years before the filing of the complaint up until now [that is about a 15-year period], which will be plenty.

The Trial Court's dismissal of the cross-complaint based on statute of limitations ground was in error, and should accordingly be reversed.

F. The Trial Court Committed Prejudicial Error and/or Abuse of Discretion in Granting the Motion to Dismiss Based on Failure to Add the USA as a Necessary Party Because Caballero Has No Claims Against or Involving the USA; and Because Caballero Requested Leave to Amend to Add the USA as a Necessary Party

The Trial Court committed prejudicial error in determining that the USA was a necessary party for one basic reason: Appellant/Defendant has no beef with the USA; his issues are with this fake, impostor Miwok tribe. He has no claims of any sort against the USA.

Also, the Court must have known that requiring Caballero to add the United States in as a party faced the insurmountable hurdle of the fact that the United States, as a sovereign nation, also enjoys sovereign immunity, which would have absolutely been asserted, and would have thereby made adding the USA as a necessary party futile. It is a denial of justice to require a party to do something which the party is without the power to do. Cesar Caballero has no way to convince the United States of America to waive its sovereign immunity and has no way to add them as a defendant.

Additionally, Cesar Caballero asked for leave to amend to add the USA as a party to see if he could serve them; the Trial Court denied that request for leave to amend without discussion. This denial constitutes an abuse of discretion, and a further basis in which to reverse the Trial Court's judgment of dismissal. See *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017).

Accordingly, the judgment of dismissal should be reversed

G. The Trial Court Committed Prejudicial Error in Granting the Motion to Dismiss the Cross Complaint on the basis of Failure to State a Claim for Relief Under F.R.C.P. Rule 12(b)(6)

The Trial Court, in its order granting the Plaintiff's motion to dismiss Cesar Caballero's cross-complaint, further found that even if sovereign immunity and/or non-justiciable political question matter were not a bar to the action, the Trial Court was of a view that the complaint failed to state a claim for relief under F.R.C.P. Rule 12(b)(6). See Trial Court's decision, ER 14, docket item 33, page blank:

> "In addition, the Court finds that dismissal also would be warranted if it had subject matter jurisdiction, because Counter-Plaintiff has failed to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6) andbecause the United States is an indispensable party that cannot be joined, requiring dismissal under Rule 12(b)(7)."

On appeal, such a ruling if on a real Rule 12(b)(6) Motion to Dismiss would be reviewed under the *de novo* or independent standard. On appeal, Appellant points out the following facts which if accepted as

true gives Cesar Caballero full remedies as requested in the cross complaint, and specifically the remedies of the fifth claim for relief for intentional interference with prospective economic advantage and related sixth claim for relief for negligent interference with prospective economic advantage: the economic expectancy is that plaintiff and his fellow tribe members are actual true Miwok people with US BIA identification cards so stating, whereas the Plaintiff/Appellee tribe in this matter is not Miwok, and it basically hijacked the Shingle Springs lands for their own use and benefit, and have excluded the true Miwoks. The true Miwoks, Appellant Caballero and other members of his tribe, have a reasonable expectancy of an economic advantage in terms of benefiting from the Shingle Springs lands, including benefiting from the gaming license thereon. See cross-complaint, ER 15, Docket no. 11, paragraphs 89 - 103.

The cross-complaint further alleges illegal, unlawful interference in a sense that the plaintiff's tribal council in the action are fraudulent imposters, falsely purporting to a) be Miwok people [when they actually are not at all]; and b) claiming to have some right to exclude

true Miwoks, which is, as pointed out above, an *ultra vires* act in violation of the deeds on the title documents showing that these lands are most certainly for the Miwok people.

Appellant/defendant has this alleged intentional interference by Plaintiff of his reasonable expectancy of an economic advantage in terms of the use and use of fruit of the 240 acres in Shingle Springs; as such, a claim was stated. See California CACI No. 2202 [stating the elements of the tort of intentional interference with prospective economic advantage].

The other claims for relief under the Landham Act [third claim for relief] were roughly the converse of Plaintiff's claims that they were the true owners of the trademark and other intellectual property rights. Cesar Caballero had a converse claim that his Miwok Nation were the true owners of the trademark and rights to do business under the name of the Shingle Springs Band of Miwoks.

We further note the above-cited case law showing that if the tribe brings an action into federal court, that counterclaims on the same basic issues are generally allowable.

Accordingly, the Trial Court's finding without any real notice to Caballero [on a *sua sponte* FRCP Rule 12(b)(6) motion] was granted in error, and should be reversed.

H. The Court of Appeals should Vacate the Orders finding Caballero in Contempt, in light of the Ninth Circuit Reversal of the Order Granting the Injunction by Summary Judgment

The Court should reverse the contempt convictions levied against Caesar Caballero for one basic reason: this court previously reversed the grant of the preliminary injunction through a summary judgment, and after that reversal, the Plaintiff chose to abandon the case and submit a voluntary dismissal. See docket entry 302, [Ninth Circuit reversal of summary judgment]; docket number 324 [Plaintiff's request for voluntary dismissal]; docket number 340 [trial courts Grant of plaintiff's request for voluntary dismissal.

Under these unique circumstances, the Court can do justice by undoing the improper injunction, and the doubly improper contempt citations. See contempt convictions [docket number 165; contempt conviction dated October 21, 2011, sentencing Cesar Caballero to 60 days jail [ER 10, docket no. 165]; and contempt conviction dated November 20, 2013, [ER 7, docket no. 290] sentencing Cesar Caballero to 30 days in jail.

VIII.
CONCLUSION

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

Respectfully submitted,

_//s// Herman Franck, Esq.____ Date: March 15, 2021
HERMAN FRANCK, ESQ.
Attorney for Appellant
Cesar Caballero

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32, I hereby certify that this brief contains 12,145 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

__//s// Herman Franck, Esq._____ Date: March 15, 2021

HERMAN FRANCK ESQ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 20-16785

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

See attached List of Cases

Appellant is of the view that this appeal, and the pending in rem appeal, should be consolidated. See FRAP, Rule 3(b)(2).

Signature /s Herman Franck, Esq. **Date** 3/15/2021

(use "s/[typed name]" to sign electronically-filed documents)

Attachment to Notice of Related Cases

Cesar Caballero herewith gives notice of the following related cases:

1. Cesar Caballero v. Land Situated in El Dorado County, California etc., United States District Court for the Eastern District of California, Case Number 20-CV-00866-KJM-AC, United States Court of Appeals Case Number 20-17356.

   Current Status: Case was dismissed on a sovereign immunity grounds; Judgment of Dismissal was issued; Appeal was filed; AOB due April 12, 2021.

2. *Cesar Caballero, on behalf of himself and as Representative of all other authentic members of the Miwok Nation v. Regina Cueller; Allan Campbell; Pat Cueller; Brian Fonseca; Nicholas H. Fonseca; Annie Jones; Jessica Godsey Olvera; Jacky Calanchini; Does 1-20 inclusive*, El Dorado Superior Court Action No. PC-20190492.

   Status: On Appeal to the California Third District Court of Appeal following Judgment of Dismissal, Case No. C091774. The Appellant's Opening Brief was filed on March 3, 2021.

   This state court action was brought against individual Tribal Council Members, and not the Shingle Springs Band of Miwok Indians. See *Lewis v. Clarke*, 581 U.S. ___ (2017):

   > "The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. *Graham*, 473 U. S., at 167. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. *Van de Kamp* v. *Goldstein*, 555 U. S. 335 –344 (2009). But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability." *Hafer*, 502 U. S., at 30–31 (internal quotation marks omitted); see *Alden* v. *Maine*, 527 U. S. 706, 757 (1996)."

   The Superior Court dismissed the action, and issued a dismissal based on sovereign immunity grounds. Plaintiff's action claimed that sovereign immunity did not apply where the acts of the council members were unlawful, fraudulent, and *ultra vires*. See *Al Shimari v. CACI Premier Technology*, Inc., 840 F.3d 147, 157 (4th Cir. 2016):

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

> Taylor only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful."

This state court action involves similar facts as the present case. Many of the witnesses and evidence are the same. The difference is that this case is an *in rem* action, for which there is no defense of sovereign immunity. See *Upper Skagit Tribe v. Lundgren*, 584 U.S. ___ (2018), discussed above.

The merits of Caballero's and Miwok Nations' claims of ownership of the 240-acres in Shingle Springs, CA have not been decided. In this *in rem* case, the substantive merits would be tested for the first time.