APPENDIX

APPENDIX A

Court of Appeal, First Appellate District,
Division Five - No. A158632

April 28, 2021

S267419

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JASON SELF, et al., Plaintiffs and Appellants,

v.

CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA,
Defendant and Respondent.

The petition for review is denied.

Cantil-Sakauye
Chief Justice

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JASON SELF et al., Plaintiffs and Appellants, v. CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA, Defendant and Respondent.	A158632 (Humboldt County Superior Court No. DR190353) Filed Jan. 26, 2021

The question in this case is whether sovereign immunity bars a quiet title action to establish a public easement for coastal access on property owned by an Indian tribe. We hold that the tribe's sovereign immunity bars the action. Congress has not abrogated tribal immunity for a suit to establish a public easement. 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. We affirm the trial court's dismissal of the suit.

BACKGROUND

A.

As "'separate sovereigns pre-existing the Constitution,'" Indian tribes possess the "'common-law immunity from suit traditionally enjoyed by sovereign powers.'" (*Michigan v. Bay Mills Indian Cmty*. (2014) 572 U.S. 782, 788 (*Bay Mills*).) Tribes are domestic dependent nations subject to Congress's plenary authority. (*Ibid*.) Tribal immunity is part and parcel of Indian sovereignty and self-governance. (Ibid.) It protects tribes from the financial burdens of defending against suits, encourages economic development and self-sufficiency, and furthers tribal self-governance. (*People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 235 (*Miami Nation*).)

Because it is a matter of federal law, tribal immunity is "not subject to diminution by the States." (*Bay Mills*, *supra*, 572 U.S. at p 789.) Tribes enjoy immunity from suit regardless of whether their activities are commercial in nature or whether their activities take place on a reservation. (*Id*. at p. 790; *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 758-760 (*Kiowa*).) The United States Supreme Court has "time and again . . . dismissed any suit against a tribe absent congressional authorization (or a waiver)." (*Bay Mills*, *supra*, 572 U.S. at p. 789.) In so doing, the court has deferred to Congress to determine the nature and limits of tribal immunity because it is Congress's job, not the courts', to weigh competing policies and create exceptions to tribal immunity. (*Id*. at pp. 800-801.)

In short, 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 pp. 789-791.)

B.

Defendant Cher-Ae Heights Indian Community of the Trinidad Rancheria ("Tribe") is a federally recognized Indian tribe. (See 84 Fed.Reg. 1200-01, 1201 (Feb. 1, 2019).) It purchased the coastal property at issue in fee simple absolute. The Tribe has applied to the federal Bureau of Indian Affairs ("Bureau") to take the property into trust for the benefit of the Tribe. (See 25 U.S.C. § 5108.) Some background on the administrative process is helpful to understanding the parties' arguments.[1]

As part of the trust acquisition process, federal law requires a review of the Tribe's title and sets forth a process for resolving title issues. (See 25 C.F.R. § 151.13.) If the federal government approves the Tribe's trust application, interested parties may appeal that decision. (See 25 C.F.R. § 151.12(d); see also, e.g., *Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director, Bureau of Indian Affairs* (IBIA

[1] We take judicial notice of facts related to the process appearing in three documents attached to the Tribe's request to the trial court for judicial notice: (1) A December 21, 2019, letter from the Acting Regional Director of the Bureau to the Coastal Commission indicating that the proposed trust acquisition is consistent with the California Coastal Act; (2) a March 11, 2019, letter from the Coastal Commission to the Regional Director of the Bureau concurring with the Bureau's consistency determination; and (3) the Coastal Commission's Adopted Staff Report concerning the Bureau's consistency determination. (See Evid. Code, § 452, subd. (c); see also *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1225, fn. 6 [taking judicial notice of Coastal Commission determination and staff report].)

2015) 61 IBIA 208, 214-215 [remanding decision to take tribal property into trust due to failure to address adjacent property owners' concerns regarding easement rights].) Federal law also includes a mechanism for obtaining a right of way over tribal trust lands, with the consent of the tribe. (25 U.S.C. §§ 323, 324; 25 C.F.R. § 169.101.)

Because the Tribe's proposed trust acquisition involves coastal property, the federal Coastal Zone Management Act imposes additional requirements. Each federal agency whose activity affects a coastal zone must certify that the activity is consistent to the maximum extent practicable with the state's coastal management policies. (See 16 U.S.C. § 1456(c); see also 15 C.F.R. § 930.36.) The state may concur or object to the federal consistency determination as part of a public process. (16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.35, 930.39, 930.41, 930.42, 930.43.)

Here, the Bureau determined the Tribe's proposal is consistent with state coastal policies, including public access requirements in the state Coastal Act. (See Pub. Resources Code, § 30210 ["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"]; see also, e.g., Pub. Resources Code, §§ 30211, 30212, 30214.)

Our Coastal Commission—the agency primarily responsible for implementing the Coastal Act (see Pub. Resources Code, § 30330)— concurred with the Bureau's determination. After securing commitments from the Tribe to protect coastal access and coordinate with the state on future development projects, the Commission concluded that the Tribe's proposal

"would not interfere with the public's right to access the sea" and would be consistent with public access policies.

In the future, if the Tribe violates the state's coastal access policies, the Coastal Commission may request that the Bureau take appropriate remedial action. (See 15 C.F.R. § 930.45(b)(1); see also 16 U.S.C. § 1456(c)(3)(A) [requiring new consistency review for future development projects that require federal permits].)

C.

According to the complaint, plaintiff Jason Self uses the Tribe's coastal property to access the beach for recreational purposes and for his kayaking business. Plaintiff Thomas Lindquist also uses the property to access the beach for recreation. They allege that the prior owner of the property dedicated a portion of it to public use, either expressly or impliedly, between 1967 and 1972. (See Civ. Code, § 1009, subd. (b) [limiting implied dedications of public easements to those established prior to March 4, 1972].) The complaint seeks to quiet title to a public easement for vehicle access and parking on the property.

Self and Lindquist do not allege that the Tribe has interfered with their coastal access or that it plans to do so. They worry that the Tribe *might* do so in the future, and they filed this case out of "an abundance of caution." Once the land is placed in trust, the federal government would hold title to it for the benefit of the Tribe. (See 25 U.S.C. § 5108.) The United States is immune to actions to quiet title to Indian trust land. (28 U.S.C. § 2409a(a).)

In the trial court, the Tribe entered a special appearance and, citing sovereign immunity, moved to quash service of process and to dismiss the complaint for lack of subject matter jurisdiction. The trial court granted the motion and dismissed the case with prejudice.[2]

DISCUSSION

A.

It is settled that an Indian tribe is immune to suit in the absence of waiver or congressional abrogation of the tribe's immunity. (*Bay Mills*, *supra*, 572 U.S. at pp. 788-790; *Kiowa*, *supra*, 523 U.S. at p. 754.) Self and Lindquist do not argue either exception applies here. Ordinarily, then, we must affirm the trial court's dismissal. (*Bay Mills*, *supra*, 572 U.S. at p. 791 ("Unless Congress has authorized Michigan's suit, our precedents demand that it be dismissed.")

Self and Lindquist argue that we should recognize an existing common law exception to sovereign immunity. They contend that, at common law, sovereigns such as states and foreign governments were not immune to property disputes, under the immovable property exception. The United States Supreme Court has never applied such an exception to a tribe and recently declined to decide the question

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[2] Self and Lindquist assert that the trial court abused its discretion in denying judicial notice of documents relating to gambling revenues of Indian tribes. We find no error in the court's conclusion that the materials are irrelevant. We deny as irrelevant Self and Lindquist's request that we take judicial notice of the same documents, as well as the Tribe's request for judicial notice of a Petition for Writ of Administrative Mandamus in Humboldt County Superior Court Case No. CV190327 and a 1997 report by the Advisory Council on California Indian Policy.

in *Upper Skagit Indian Tribe v. Lundgren* (2018) __ U.S. __, __ [138 S.Ct. 1649, 1652] (*Upper Skagit*).)

We review the immunity issue de novo. (*Miami Nation*, *supra*, 2 Cal.5th at p. 250.)

B.

Self and Lindquist are correct that states and foreign sovereigns are not immune to suits regarding real property located outside of their territorial boundaries. We are not persuaded, however, that a common law exception extends to tribes or that we should depart from the standard practice of deferring to Congress to determine limits on tribal immunity.

1.

In *State of Georgia v. City of Chattanooga* (1924) 264 U.S. 472, 479-480 (*Chattanooga*), the Supreme Court held that when a state purchases real property in another state, it is not immune to suit over rights to the property. Georgia had purchased land for a railroad yard in Chattanooga, Tennessee. (*Id.* at p. 478.) It sued to enjoin the city from condemning a right of way though the property, arguing that it had never consented to suit in Tennessee courts. (*Id*. at p. 479.) The Supreme Court held Georgia's foray into the Tennessee railroad business was a private undertaking, not a sovereign one: "Having acquired land in another State for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect to its expropriation." (*Id*. at pp. 479-480.) "Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership." (*Id*. at p. 480.)

Simply because this rule applies to states, however, does not mean it also applies to tribes. The

Supreme Court has "often noted . . . that the immunity possessed by Indian tribes is not coextensive with that of the States." (*Kiowa*, supra, 523 U.S. at p. 756.) Self and Lindquist acknowledge that, unlike tribal immunity, state sovereign immunity turns on the nature of the constitutional compact as informed by the Eleventh Amendment. (See *Franchise Tax Board of Cal. v. Hyatt* (2019) __ U.S. __, __ [139 S.Ct. 1485, 1497-1498].) Tribes, who were not parties to that compact, did not surrender any aspect of their sovereignty as part of the constitutional plan. (See *Bay Mills*, *supra*, 572 U.S. at pp. 789-790.) Tribes retain a "special brand of sovereignty," and both its nature and extent "rests in the hands of Congress." (*Id.*, at p. 800.)

Indeed, in contrast to *Chattanooga*, the Supreme Court has not limited tribal immunity to traditional sovereign activities, as opposed to private commercial ventures. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 510 (*Potawatomi*), the Supreme Court rejected an argument that a tribe's off-reservation cigarette sales were too removed from the tribe's sovereign interests to be covered by tribal immunity. Instead the court deferred to Congress to make those kinds of judgments, pointing to Congress's policy objectives of promoting tribal self-governance, self-sufficiency, and economic development. (*Ibid*.) Land acquisition, moreover, has a far stronger nexus to tribes' sovereign interests than cigarette sales. As we explain below, after Indian tribes lost millions of acres of reservation land due to calamitous federal policies enacted in the late 19th century, Congress made land acquisition a central feature of its tribal policy.

Upper Skagit does not help Self and Lindquist. In his concurring opinion, Chief Justice Roberts stated that the immovable property rule applies to states (citing *Chattanooga*) but reserved the question of whether it applies to tribes. (*Upper Skagit*, *supra*, __ U.S. at pp. __ [138 S.Ct. at pp. 1655-1656] (conc. opn. of Roberts, C.J.)). Justice Thomas would have applied it to tribes but only found support for that position from Justice Alito. (*Id*. at pp. __ [138 S.Ct. at pp. 1661-1663] (dis. opn. of Thomas, J.).) The majority opinion does not reach the question. (*Id*. at pp. 1653-1654.)

2.

Self and Lindquist fare no better with foreign sovereign immunity. They note that Chief Justice Marshall's opinion in *The Schooner Exchange v. McFaddon* (1812) 11 U.S. 116 (*Schooner Exchange*) articulated a common law immovable property exception for foreign sovereigns, albeit in dicta. (*Id*. at p. 145 ["A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual."].) They also point to a statute: the Foreign Sovereign Immunities Act includes an exception for immovable property (28 U.S.C. 1605(a)(4)), which was intended to codify "an exception to sovereign immunity recognized by international practice." (*Permanent Mission of India to the United Nations v. City of New York* (2007) 551 U.S. 193, 200.)

Neither the dicta in *Schooner Exchange* nor the Foreign Sovereign Immunities Act establishes that a common law exception applies to foreign sovereigns. *Schooner Exchange* concerned a French warship, not real property; the court held that United States courts

lack jurisdiction over the warship. (*Schooner Exchange*, *supra*, 11 U.S. at p. 147.) Thereafter, courts interpreted *Schooner Exchange* to establish "virtually absolute immunity" for foreign sovereigns. (*Verlinden B.V. v. Central Bank of Nigeria* (1983) 461 U.S. 480, 486 (*Verlinden B.V.*).) For the next 164 years, foreign sovereigns were generally immune to suit. (*Ibid.*) This was a matter of comity, rather than a constitutional restriction, and courts deferred to the executive branch (specifically, the State Department) when deciding whether to assert jurisdiction over a foreign sovereign. (*Id*. at pp. 486-487.) At least some of these cases involved real property owned by a foreign sovereign. (E.g., *Knocklong Corp. v. Kingdom of Afghanistan* (Nassau Cty. Ct. 1957) 167 N.Y.S.2d 285, 286-287 [granting motion to dismiss suit based on sovereign immunity of the Kingdom of Afghanistan, as "'suggest[ed]'" by amicus curiae State Department, in an action challenging title to real property].) When this case-by-case practice proved problematic, Congress passed the Foreign Sovereign Immunities Act in 1976. (*Verlinden B.V.*, *supra*, 461 U.S. at pp. 487 488.) In short, the common law does not seem to have driven foreign sovereign immunity. Rather, the courts deferred to the political branches—first the executive branch and then Congress after the Foreign Sovereign Immunities Act.

Even if there were a common law exception to foreign sovereign immunity, Self and Lindquist do not explain why we should extend it to tribes. Tribes are not foreign sovereigns; "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16; see also *id*. at p. 18 [noting that Article III, section 8 of the United States Constitution refers separately to "foreign

nations" and "the Indian tribes"].) The Supreme Court has rejected the notion that tribal sovereign immunity must be congruent with foreign sovereign immunity. (*Bay Mills*, *supra*, 572 U.S. at pp. 797-798.) Tribes enjoy immunity for commercial activities (*Kiowa*, *supra*, 523 U.S. at p. 758), notwithstanding the fact that Congress has denied it to foreign sovereigns. (28 U.S.C. § 1605(a)(2).) In fact, the Supreme Court has pointed to the Foreign Sovereign Immunities Act as an example of its deference to Congress on both foreign and tribal immunity: "In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." (*Kiowa*, *supra*, 523 U.S. at p. 759.)

3.

Even assuming a common law exception applies to states and foreign sovereigns, there are at least three additional reasons counselling us to defer to Congress to decide whether it should apply to tribes.

a.

Deferring to Congress on tribal immunity has been the Supreme Court's standard practice for decades. The court has acknowledged that it has the authority to limit tribal immunity, but it has pointedly refused to impose limits, despite its own skepticism about the doctrine's merits and somewhat hazy origins. (*Kiowa*, *supra*, 523 U.S. at pp. 756-757 [tribal immunity developed "almost by accident" and "with little analysis"]; *id.* at pp. 758-759.) Self and Lindquist recycle arguments that the Court has rejected in other cases: immunity could leave them with no effective judicial remedy (*Potawatomi*, *supra*, 498 U.S. at p. 514); tribal immunity should not be more broad than that of other sovereigns (see *Bay*

Mills, *supra*, 572 U.S. at p. 800); tribes should not enjoy immunity for commercial activities. (E.g., *Potawatomi*, *supra*, 498 U.S. at p. 510.) decades, the Supreme Court has set aside these and other concerns, treated tribal sovereign immunity as settled law, and deferred to Congress for the "simple reason[][that] it is fundamentally Congress's job, not ours, to determine whether or how to limit sovereign immunity." (*Bay Mills*, *supra*, 572 U.S. at p. 800.) We see no reason to depart from this practice.

b.

We should also defer to Congress because supporting tribal land acquisition is a key feature of modern federal tribal policy, which Congress adopted after its prior policy divested tribes of millions of acres of land. Deference is particularly appropriate when Congress has been active in the subject matter at issue. (See *Bay Mills*, *supra*, 572 U.S. at pp. 802-803; *Kiowa*, *supra*, 523 U.S. at pp. 758-759.)

In the late 19th century, the federal government abandoned its policy of supporting Indian self-governance and control of Indian lands and instead adopted a policy "to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." (*County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation* (1992) 502 U.S. 251, 253-254 (*County of Yakima*).) The Dawes Act of 1887 (24 Stat. 388) – "which empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved" (*County of Yakima*, *supra*, 502 U.S. at p. 254) and permitted the sale to non-Indians of surplus lands located on Indian reservations – devastated tribes, aggravated their poverty, and resulted in 90 million acres of tribal land

passing to non-Indians. (*Bay Mills*, *supra*, 572 U.S. at pp. 811-813 (conc. opn. of Sotomayor, J.).)

Congress abruptly ended this approach with the enactment of the Indian Reorganization Act (48 Stat. 984) in 1934 and returned to the policy of supporting tribal self-determination and self-governance. (*County of Yakima*, *supra*, 502 U.S. at p. 255.) Given the massive loss of tribal lands in the preceding decades, Congress authorized the federal government to restore surplus lands to tribes. (*Ibid.*) Congress also authorized the government to acquire land both within and outside existing reservations "for the purpose of providing land for Indians." (48 Stat. 985; see 25 U.S.C. § 5108; *County of Yakima*, *supra*, 502 U.S. at p. 255.) The same provision empowers the federal government to take land into trust for the benefit of a tribe, as the Tribe has requested here. (See 25 U.S.C. § 5108.) Federal regulations establish an administrative process for addressing title concerns when the Bureau takes land into trust (25 C.F.R. § 151.13) as well as for obtaining easements over trust lands (25 C.F.R. § 169.101; see also 25 U.S.C. §§ 323, 324).

The Indian Reorganization Act advances tribes' sovereign interests by helping them restore land they lost. And regardless of whether a particular tribe lost land, tribal land acquisition generally advances Congress's goals of tribal self-sufficiency and economic development. By authorizing the federal government to acquire land outside of existing reservations in trust for the benefit of a tribe, the federal scheme implicitly recognizes that tribes may acquire land for sovereign purposes beyond the borders of a reservation. (See 25 U.S.C. § 5108; 25 C.F.R. § 151.3(a).) This further distinguishes tribal

land acquisition from that of states and foreign sovereigns.

Decades after the enactment of the Indian Reorganization Act, Congress considered whether sovereign immunity should protect trust lands. In 1972, Congress waived the federal government's sovereign immunity in title disputes over real property under the Quiet Title Act. (28 U.S.C. § 2409a; see *Block v. North Dakota* (1983) 461 U.S. 273, 275 276.) But it retained immunity for property that the government holds in trust for Indian tribes. (28 U.S.C. § 2409a(a).) The Justice Department, which proposed the exception for Indian lands, observed that "Indians . . . have often surrendered claims to vast tracks of land" and proposed the exclusion because "[t]he Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government." (See H.R. Rep. No. 1539, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Admin. News, pp. 4547, 4556-67, written testimony from Mitchell Melich, Solicitor, U.S. Dept. of Interior.) Congress adopted the exclusion notwithstanding testimony that title disputes arise on Indian lands just like they do on federal lands covered by the bill's waiver of immunity. (Dispute of Titles on Public Lands, Hearings before Sen. Com. on Interior and Insular Affairs, Subcom. on Public Lands, on Sen. No. 216, Sen. No. 579, and Sen. No. 721, 92nd Cong., 1st. Sess., at pp. 58-60 (Sept. 30, 1971), testimony of Thomas E. McKnight.)

Congress has also addressed the sovereign immunity of Indian tribes themselves in connection with tribal land. Just eight months after the Supreme Court issued its decision in *Upper Skagit*, *supra*, __

U.S. __ [138 S.Ct. 1649], Congress reaffirmed its approval of tribal immunity in the context of a statute that, among other things, authorizes Indian tribes to grant rights of way over their land for energy resource development. (Pub.L. No.115-325, Title I, §§ 103(a), 105(d) (Dec. 18, 2018) 132 Stat. 4447, 4454, codified at 25 U.S.C. § 3504(i) ["Nothing in this section waives the sovereign immunity of an Indian tribe."])

Further, Congress has abrogated tribal immunity in targeted circumstances involving disputes over property. For example, the Indian Depredation Act authorizes suits against tribes that seized or destroyed property without just cause or provocation. (See Act of Mar. 3, 1891, ch. 538, 26 Stat. 851; see also *Hamilton v. United States* (1907) 42 Ct.Cl. 282, 287 [dismissing case for lack of jurisdiction because Indian Depredation Act did not authorize suit where tribe took claimant's real property pursuant to tribal law].) A 1958 statute waives tribal immunity and authorized the Hopi or Navajo Tribes to "commence or defend" a quiet title action against one another or any other tribe with an interest in specified tribal lands that had been the subject of a long-running dispute. (See Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; *Hamilton v. Nakai* (9th Cir. 1971) 453 F.2d 152, 158-159 [Indian tribes enjoyed sovereign immunity in quiet title suit absent waiver of immunity in Pub. L. No. 85-547]; see also Act of December 22, 1974, Pub. L. No. 93-531, § 8(a), 88 Stat. 1712, 1715 [either the Navajo or Hopi "tribe . . . is . . . hereby authorized to commence or defend . . . an action against the other tribe and any other tribe . . . for the purpose of . . . quieting title" to specified lands].)

This history weighs strongly in favor of deferring to Congress to weigh the relevant policy concerns of

an immovable property rule in light of the government's solemn obligations to tribes, the importance of tribal land acquisition in federal policy, and Congress's practice of selectively addressing tribal immunity issues in property disputes.

c.

Finally, the facts of this case make it a poor vehicle for extending the immovable property rule to tribes.

As far as property disputes go, this is something of a non-event. We do not discount the public's interest in coastal access. But when considering adopting a common law rule that would broadly abrogate tribal immunity in a wide variety of property disputes, it is worth noting that Self and Lindquist do not claim an ownership interest in the property. They allege no injury. They are attempting to establish a public easement for coastal access based on their concern that, sometime after the federal government takes the property into trust, the Tribe might interfere with access. The concern is speculative. And, as this case illustrates, Congress has created a detailed process for protecting public interests such as coastal access. (See, e.g., 16 U.S.C. § 1456(c).) California worked with the Bureau and the Tribe in that process. The state secured assurances from the Tribe to preserve coastal access. It determined that access is adequately protected, and it has remedies if there are problems in the future.

We have considered Self and Lindquist's remaining arguments and find them to be without merit.[3]

DISPOSITION

The judgment is affirmed.

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[3] We are not persuaded by the Tribe's argument, embraced by our colleague, that federal law preempts state quiet title actions. It is not enough that such actions could complicate the federal trust process. (See *Virginia Uranium, Inc. v. Warren* (2019) __ U.S. __, __, 139 S.Ct. 1894, 1901.) The Tribe points to no constitutional text or federal statute that displaces or conflicts with state law. (*Ibid.*)

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BURNS, J.

I concur:

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SIMONS, ACTING P.J.

A158632

Reardon, J., Concurring.

I concur in the judgment and write to outline a narrow, but important, distinction in my reasoning which reaches the same result as does the majority. In essence, the question undergirding this litigation is whether tribal sovereign immunity to litigation, as originally understood, includes an exception for the litigation of disputes over title to real (immovable) property or not. My view is that it does contain such an exception, which Congress may but has not eliminated. The majority reasons that it does not contain such an exception, though Congress could but has not added one.[1] Nonetheless, we agree on the importance of the tribal interests involved and the federal government's manifest policy to encourage the expansion of tribal property interests and, thereby, tribal self-sufficiency. Further, we agree that substantial deference is owed congressional action in this area.

However, I believe that, once a tribe petitions to bring land within federal trust, the nuanced scheme created by Congress for the consideration of such petitions preempts this litigation. By different routes, we reach the same result: plaintiffs' action was properly dismissed by the trial court.

Does the doctrine of tribal sovereign immunity act as a bar to a state court action to imply an easement over nonreservation real property owned by an Indian tribe? The plaintiffs, seeking to impose the easement

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[1] The majority cites to instances in which Congress has reinforced the notion of tribal sovereign immunity. (Maj. opn. *ante*, at pp. 12–16.) However, none of these pertain to nontrust land owned by a tribe within the territorial limits of another sovereign, as presented by these facts.

on behalf of the public in general, would have us answer this question in the negative. They argue that, whatever the provenance and scope of tribal sovereign immunity, it does not pertain to immovable property. Consequently, they contend the doctrine does not bar an in rem action to impose an easement on property within the state of California.

The "immovable property exception" to *state* sovereign immunity was, in essence, recognized by the United States Supreme Court in *Georgia v. Chattanooga* (1924) 264 U.S. 472, 480. (*Upper Skagit Indian Tribe v. Lundgren* (2018) __U.S.__ [138 S.Ct. 1649, 1660] (dis. opn. of Thomas, J., joined by Alito, J.) (*Upper Skagit)*.) The immovable property exception to foreign nation sovereign immunity has been codified by Congress in the Foreign Sovereign Immunities Act of 1976 (FSIA). (28 U.S.C. § 1605(a)(4); *Permanent Mission of India to the UN v. City of New York* (2007) 551 U.S. 193, 200 [FSIA codified the "'preexisting'" immovable property exception to sovereign immunity].) However, recently, the high court declined to decide whether such an exception exists as to *tribal* sovereign immunity, instead remanding to the state court of Washington for determination of that issue in the first instance. (*Upper Skagit,* at pp. __ [138 S.Ct. at pp. 1653–1654].)

Justice Thomas dissented from the majority's determination not to rule on the question. (*Upper Skagit, supra,* __U.S.__ at pp.__ [138 S.Ct. at pp. 1656–1657].) He then went on, at length, to explain why he believed the immovable property exception applied to tribal sovereign immunity, as it does to other types of immunity. (*Id.* at pp. __ [138 S.Ct. at

pp. 1657–1663].) His reasoning makes sense, and I adopt it here without full recitation.

Suffice to say, when one sovereign owns land of another sovereign, the second sovereign generally retains the authority to adjudicate disputes respecting that land, at least with regard to questions like the one before us over title. (*Upper Skagit, supra,* __U.S.__ at p. __ [138 S.Ct. at p. 1662] ["'the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated'"].) Thus, the second sovereign's authority over issues of title to land within its boundaries supersedes the first sovereign's privilege to preclude a judicial challenge to the fact and scope of its ownership of that land.[2] Quite obviously, the tribe's assertion of sovereign immunity to suit would operate to undermine the very foundation of the state's sovereignty. Congress could endorse such a result, but it has not, either explicitly or implicitly.

The federal Constitution does not speak to Indian tribal immunity. (See *Kiowa Tribe of Oklahoma v. Manufacturing Techs.* (1998) 523 U.S. 751, 759.) Thus, whether its inherent scope is derived from common law or natural law, it does not derive from the Constitution. Congress with its plenary authority over Indian affairs could modify its scope and could presumably extend tribal immunity to immovable property. (*Michigan v. Bay Mills Indian Community*

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[2] As noted by the majority, tribes are different from states and foreign nations, and the scope of their sovereign immunity is not necessarily the same. Whether this is a principle of limitation or aggrandizement is not clear. That is, is tribal sovereign immunity inherently greater or less than that afforded to states and foreign nations? The answer may well be neither, just different.

(2014) 572 U.S. 782, 788.) That decision would be a political one, necessarily accounting for the interests of the federal government, the tribes and the states. Congress has not done so. However, it has done something strikingly similar that, I believe, leads to the same result.

Pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. § 5108), "The Secretary of the Interior is . . . authorized . . . to acquire . . . any interest in lands . . . for the purpose of providing land for Indians. [¶] . . . [¶] Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." Such acquisitions are implemented according to 25 Code of Federal Regulations part 151.1 et seq. (2021), including a written request for approval of acquisition by the tribe (25 C.F.R. § 151.9 (2021)), and notification to the state and local governments affected of the request with an opportunity to respond (25 C.F.R. § 151.10 (2021)).

In evaluating requests, the Secretary of the Interior must consider, inter alia, the need of the tribe for additional land; the purposes for which the land will be used; if the land will be used for business purposes, the anticipated economic benefits; the location of the land relative to state boundaries and the tribe's reservation boundaries; the impact on state and local governments of the removal of the land from regulatory jurisdiction and tax rolls; and (importantly here) jurisdictional problems and potential conflicts of land use which may arise. (25 C.F.R. §§ 151.10–151.11 (2021).) The decision to grant or deny the request is subject to judicial and, in some instances,

administrative review. (25 C.F.R. § 151.12 (2021).) Also, before approval, the Secretary of the Interior shall notify the applicant of any liens, encumbrances, or infirmities in title and *may* require their elimination before approval, but *shall* require their removal if they render title to the land unmarketable. (25 C.F.R. § 151.13(b) (2021).)

As noted in the majority opinion, where, as here, coastal land is involved, the Federal Coastal Zone Management Act of 1972 provides an additional layer of state input and public participation. (16 U.S.C. § 1456, et seq.) I need not repeat that thorough explication. Suffice to say, the federal statutory construct is thorough and intricately balances various interests—federal, state, tribal and public. It would seem contrary to that construct, once a tribe petitions to bring land within the trust, to permit the tribe to be subjected to all manner of state lawsuits relative to the land, at least as to questions of title. Indeed, plaintiffs now seek to impose an encumbrance on the land—an encumbrance that could impede the granting of the tribe's petition.

As Justice O'Connor wrote: "Our cases reveal a "'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" [Citations.] Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read. [Citations.] Accordingly, we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the

congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'" (*Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering* (1986) 476 U.S. 877, 884; *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 248 [noting this trend].)

Here, the property in question was purchased by the tribe in 2000. However, the purported public access supporting the implication of an easement is alleged to have existed since at least 1967. Not until the tribe petitioned to have the land brought into trust did plaintiffs seek the declaration of an easement. I have noted the strong state interest in adjudicating issues of title to land within the state. Indeed, the state courts provide a forum for these plaintiffs, or anyone else, to bring an action to quiet title in an easement on the property.

However, once the tribe petitions to bring the land into trust, the tribe's interest in the acquisition of land—an interest shared by the federal government—comes to the fore. At that juncture, Congress has established a structure for the assertion and balancing of these various interests as it concerns questions of title. This seems to be a classic case of federal field preemption, precluding plaintiffs' suit.[3] Albeit, the field in question is a narrow one: where a tribe has petitioned to bring land within the federal trust. I recognize that Congress did not explicitly

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[3] Alternatively, the specific facts here raise the possibility of obstacle preemption. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936–940.)

preempt state court actions such as this. But, preemption need not be explicit, as long as congressional intent is clear. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra*, 41 Cal.4th at pp. 936–940.) Congress has provided an alternative forum for plaintiffs, such as these, to be heard. That is, even without a declared easement, the plaintiffs' interest in continued access will be considered. The statutory scheme for tribal petitions contemplates the possibility of existing encumbrances. However, to allow any number of potential parties to seek to impose encumbrances on the subject land once the petitioning process has begun is, to my mind, clearly against congressional intent. On that basis, I would affirm the ruling below.

_____

Reardon, J.[*]

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[*] Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Humboldt County Superior Court, Case No. DR190353

Trial Judge: The Honorable Kelly L. Neel

J. Bryce Kenny for Plaintiffs and Appellants

Hobbs, Straus, Dean & Walker, Timothy C. Seward, for Respondent.

APPENDIX C

TIMOTHY C. SEWARD
Hobbs, Straus, Dean & Walker
1903 21st Street, 3rd Floor
Sacramento, CA 95811
Phone: (916) 442-9444
Fax: (916) 442-8344
SBN 179904

Attorney for Defendant
CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA

Aug. 2, 2019

SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF HUMBOLDT

JASON SELF, et al., Plaintiffs, vs. THE CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA, et al., Defendants.	Case No.: DR190353 ~~**[PROPOSED]**~~ **ORDER ON MOTION TO QUASH SERVICE OF PROCESS AND DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; OR, IN THE ALTERNATIVE DEMURRER TO COMPLAINT**

) Date: July 15, 2019
) Time: 10:30 a.m.
) Location: Courtroom 4
)
) Complaint Filed:
) April 29, 2019
)

Defendant's combined Motion to Quash Service of Process and Motion to Dismiss, or the alternative a Demurrer to Plaintiffs' Complaint, came to be heard on July 15, 2019, before the Honorable Kelly L. Neel of this Court. Parties appeared through their respective counsel. The Court, having considered a moving papers, opposition papers, reply papers, and the arguments of counsel, and good cause appearing:

IT IS HEREBY ORDERED that the Motion to Quash and Motion to Dismiss Plaintiffs Complaint, or in the alternative, a Demurrer to Plaintiffs' Complaint is GRANTED and this case Humboldt County Superior Court Case Number DR190353 is Dismissed with prejudice.

~~Or, in the alternative,~~

~~IT IS HEREBY ORDERED that the Demurer to Plaintiffs Complaint is GRANTED and this case, Humboldt County Superior Court Case Number DR190353 is Dismissed with prejudice.~~

DATED: 8/1/19

/s/ Kelly L. Neel
Honorable Kelly L. Neel,
Judge of the Superior
Court

APPENDIX D

J. Bryce Kenny CSB 208626
Attorney at Law
P.O. Box 361
Trinidad, CA 95570
Telephone: (707) 442-4431
Email: jbrycekenny@gmail.com

Attorney for Plaintiffs

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF HUMBOLDT

Jason Self, an Individual, Thomas W. Lindquist, an Individual, On behalf of the General Public, Plaintiffs, Vs The Cher-Ae Heights Indian Community Of the Trinidad Rancheria, a Federally Recognized Indian Tribe, and all Persons Unknown, Claiming any Legal Interest in The Property Described in the Complaint Adverse to Plaintiffs' Interest or the Interest Of the General Public, and	Case No. DR190353 OPPOSITION TO MOTION TO QUASH SERVICE OF PROCESS AND DISMISS COMPLAINT FOR LACK OF JURISDICTION; IN ALTERNATIVE, DEMURRER TO COMPLAINT Date: July 15, 2019 Time: 10:30 a.m. Courtroom 4

Does 1 Through 15,
Inclusive,

Defendants.

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TABLE OF AUTHORITIES

J. Bryce Kenny CSB 208626
Attorney at Law
P.O. Box 361
Trinidad, CA 95570
Telephone: (707) 442-4431
Email: jbrycekenny@gmail.com

Attorney for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF HUMBOLDT

Jason Self, an Individual, Thomas W. Lindquist, an Individual, On behalf of the General Public,

Plaintiffs,

Vs

The Cher-Ae Heights Indian Community Of the Trinidad Rancheria, a Federally Recognized Indian Tribe, and all Persons Unknown, Claiming any Legal Interest in The Property Described in the Complaint Adverse to Plaintiffs' Interest or the Interest Of the General Public, and Does 1 Through 15, Inclusive,

Defendants.

Case No. DR190353

OPPOSITION TO MOTION TO QUASH SERVICE OF PROCESS AND DISMISS COMPLAINT FOR LACK OF JURISDICTION IN ALTERNATIVE, DEMURRER TO COMPLAINT

Date: July 15, 2019
Time: 10:30 a.m.
Courtroom 4

I. INTRODUCTION

The plaintiffs have filed suit on behalf of the general public to establish a prescriptive public easement for access across the defendant's land for vehicle access to the shore of Trinidad Bay, and for parking adjacent to what is commonly referred to as "State Beach," on the west side of defendant's land. The Tribe owns the land generally knows as the "Trinidad Harbor property" in fee simple.[1] The property includes a seasonal marine railway boat launcher, a commercial pier and mooring facilities, a restaurant, and a vacation rental. An application is pending to have the subject property placed in the name of the federal government for the benefit of the Tribe, i.e.: federal trust status. If the land is accepted into federal trust, no suit to quiet title to an easement over the property would be allowed by virtue of federal law. 28 U.S.C. 2409a. To avoid that result, the plaintiffs have filed suit in this court based on a long history of public use of the land for access to Trinidad Bay for recreational and commercial purposes, and for parking for foot access to State Beach.

The Tribe has made a special appearance to quash service of process and dismiss for lack of jurisdiction, or in the alternative, to demurrer to the complaint. The straightforward question presented is whether, as a matter of law, the Tribe is entitled to immunity from this suit.

The moving party's Points and Authorities expend considerable effort in citing basic and unremarkable

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[1] The motion states that the subject property is less than half a mile from the Rancheria, but that is only as the crow, or in this case, the seagull flies across Trinidad Bay. By road it is more lime 1.2 miles.

propositions about federal Indian law, but which are not helpful in resolving this question of first impression in California courts.

As explained fully below, the Tribe asks the wrong question when it argues that only Congress can abrogate, or the Tribe or Congress can waive, the Tribe's sovereign immunity from suit. The real question is whether there should be an exception for tribes to the ancient "immovable property rule," whereby when a sovereign acquires property in a neighboring jurisdiction, it is not immune from suit in the neighboring jurisdiction's courts for *in rem* suits that concern the real property.

In the typical case, where a hybrid motion to quash/dismiss is filed, the plaintiff has the burden of proof to present evidence of sufficient facts to show that the court has subject matter jurisdiction. Great W. Casinos v Morongo Band of Mission Indians (1999) 74 Cal.App.4th 1407, 1418 (conflicting evidence of whether tribe waived its immunity); Brown v Garcia (2017) 17 Cal.App.5th 1198, 1203 (conflict over whether allegedly defamatory statements were made by tribal officials in individual or official capacity). Here, however, because plaintiffs' position is that the common law exception to tribal sovereign immunity applies, there is no factfinding necessary to determine whether the court has subject matter jurisdiction.

As explained fully below, the court should find that as a matter of law, there is no exception to the exception for tribes, and therefore the motion should be denied.

II. ARGUMENT

A. The Immunity From Suit That Tribes Enjoy is Derived From the Common Law

In Kiowa Tribe of Okla. v. Mfg. Techs. Inc. (1998) 523 U.S. 751, 759, the Court had occasion to review the origins of the sovereign immunity doctrine as it applies to Indian tribes. The majority opinion stated, "[a]s with tribal immunity, foreign sovereign immunity began as a judicial doctrine." It was noted that though in the tribal context, the doctrine arose almost by accident, it was nevertheless repeated in subsequent cases, and in that manner, became part of the federal common law. Id. at 757 (citations omitted). The Court further noted:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians.
>
> Id. at 758 (citations omitted).

Despite this criticism, the Court held that the doctrine did apply in the context of the case before it, where a tribe had defaulted on a promissory note and was sued by its holder in state court. It made no difference to the majority whether the tribe's business activity took place on or off the reservation, as its prior

decisions in that area did not distinguish between commercial or governmental activities, or where the activity took place. The Court reasoned that congress had always acted from time to time to limit or expand tribal sovereign immunity, and it was in a better position than the courts to examine all policy issues and conduct hearings and inquiries resulting in the best outcomes. The Court thus deferred to Congress to act if it did not agree with the outcome of the case. Id. at 760.

Justice Stevens authored a strong dissent, joined in by Justices Thomas and Ginsburg. It questioned why a tribe should enjoy sovereign immunity more expansive than that applicable to the federal, state, or a foreign government. Id. at 765. It observed that, given the lack of any federal statute or treaty defining a tribe's sovereign immunity, creating a "default" rule of immunity was tantamount to creating law, rather than interpreting the law. Ibid.

Lastly, in the dissent's opinion, the rule fashioned by the majority was simply unjust, especially to tort victims who have no opportunity to negotiate of waiver of immunity. Id. at 766.

Other Supreme Court cases cited by the Tribe are actually supportive of the plaintiffs, when they make statements like "[u]nless and 'until Congress acts, the tribes retain' their *historic* sovereign authority." Michigan v Bay Mills Indian Cmty. (2014) 572 U.S. 782, 788 (emphasis provided) citing United States v Wheeler (1978) 435 U.S. 313, 332. As argued below, all that the plaintiffs are asking is that the common law scope of sovereign immunity be applied to tribes the same way it is applied to any other sovereign.

B. An Action to Quiet Title is Purely *in rem*

As a general proposition the Restatement (Second) of Judgments, Sec. 6 (1982) explains that *in rem* actions include proceedings in which land is forfeited to government, such as condemnation or eminent domain actions, **proceedings to quiet title to land,** and probate proceedings that resolve competing claims to property (emphasis provided).

California law is in accord. An action to quiet title to real property is an action *in rem*. Stanley v Westover (1928) 93 Cal.App. 97, 101 (context was deed lost by county recorder).

It must be noted that the instant case, unlike almost every case cited by the moving party, concerns jurisdiction that attaches because of ownership of property in California, not because of any specific activity of the Tribe or its officers or employees, on or off a reservation.

The most informative case on this issue is the fairly recent Supreme Court case of Upper Skagit Indian Tribe v Lundgren (2018) 138 S.Ct. 1649. It bears remarkable similarity to the instant matter. In Upper Skagit a tribe purchased land outside its reservation boundaries and then got into a boundary dispute with the adjoining landowner, who filed suit in state court to quiet title. The tribe raised the defense of sovereign immunity, but the trial court denied the motion to dismiss. The intermediate appellate court and the Washington Supreme Court both agreed with the lower court. When it reached the United States Supreme Court, however, it was reversed. Id. at 1653. The Court reversed because the Washington courts had relied upon what it considered to be an incorrect interpretation of an earlier Supreme

Court case, County of Yakima v Confederated Tribes of and Bands of Yakima Nation (1992) 502 U.S. 251. The Court clarified that Yakima was primarily an interpretation of a federal statute called the General Allotment Act, which reflected federal policy prior to the 1934 Indian Reorganization Act, and it said nothing about sovereign immunity.

The Court was urged to affirm the Washington courts' judgment on the alternative grounds of the "immovable property doctrine," the same theory being offered here. But the majority declined to address it because the issue only came up very late in the proceedings, and there was precedent to remand so the lower courts could have the first crack at the issue in those circumstances. Upper Skagit, supra, 138 S.Ct. at 1654.

The majority opinion does acknowledge that the immovable property doctrine goes back in its jurisprudence to at least 1812. "As our cases have put it, "[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual." Id. at 1653, citing Schooner Exchange v McFaddon, (1812) 11 U.S. 116, 7 Cranch 116, 145, 3 L.Ed 287.

The majority opinion mentions the two arguments urged by the tribe and the government there, as to why the immovable property doctrine should not apply to tribes. First, citing Kiowa, supra, it is stated that immunity doctrines lifted from other contexts—namely, states' immunity--do not always neatly apply to Indian tribes. Ibid. This is an often-stated proposition that has at its core the fact that at the Constitutional Convention, the states all waived their immunity for the sake of creating one Nation. The

tribes, on the other hand, were not even present at the convention, so could not have waived their immunity. That is a true statement, but of little force here, because as pointed out by the dissent in Upper Skagit, the immovable property rule predates the constitutional convention by a significant margin. Id. at 1658-1659.

Justice Thomas wrote "[t]he principle of *lex rei sitae* was so well established by the 19th century that Chancellor James Kent deemed it "too clear for discussion." 2 Commentaries on American Law 429, n. a (4th ed. 1840). The medieval jurist Bartolus of Sassoferatto had recognized the principle 500 years earlier in his commentary on conflicts of law under the Justinian Code." Id. at 1658, citing Bartolus, Conflict of Laws 29 (J. Beale transl. 1914). If tribal immunity derives from the common law, then it must include the common law exception of the immovable property rule.

The majority opinion also pointed out that "...the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country." Upper Skagit, supra, 138 S.Ct at 1654, citing Verlinden B.V. v Central Bank of Nigeria, (1983) 461 U.S. 480, 486; Ex Parte Peru (1943) 318 U.S. 578, 588. That state of affairs is understandable, given that it is the executive branch's duty to set foreign policy, not the judicial branch. First National City Bank v Banco Nacional De Cuba (1972) 406 U.S. 759, 765. As stated above, the Tribe's immunity, on the other hand, is a creature of U.S. Supreme Court decisions. It is appropriate for courts to decide whether the immovable property rule applies to tribes or not, because doing so is not an abrogation of tribal

immunity, but only a recognition that at common law, there existed an exception that applies to tribes as well as other sovereigns. There is no Supreme Court precedent that prohibits that.

In a concurring opinion in Upper Skagit, Chief Justice John Roberts, joined by Justice Kennedy, forcefully stated:

> But that [majority] opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. 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.

He suggested that if the lower courts were not willing to recognize the immovable property rule in the tribal context, "...the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case. See Michigan v Bay Mills Indian Community, 572 U.S. _____, _____ n.8, 134 S.Ct. 2024, 188 L.Ed. 2d 1071 (2014) (reserving the question whether sovereign immunity would apply if a 'plaintiff who has not chosen to deal with a tribe[ ] has no alternative way to obtain relief for off-reservation commercial conduct')." Upper Skagit, supra, 138 S.Ct. at 1656.

Accordingly, the moving party's insistence that only Congress can abrogate a tribe's immunity is

misplaced, because here, the issue is whether an exception to the immovable property rule should exist for tribes as well as other sovereigns.

The Upper Skagit Court noted a split of authority at that time over whether suits *in rem* were exempt from sovereign immunity. 138 S.Ct. at 1651. One case cited was Cayuga Indian Nation of N.Y. v Seneca County (2014 2nd Cir.) 761 F.3d 221, which held that the tribe was immune from a foreclosure suit brought by the county to collect unpaid property taxes. It is distinguishable from the instant matter, which seeks only clarification of rights in land, and does not in any way implicate the financial health of the Tribe. Further, even Cayuga recognized that the Supreme Court has instructed that unless Congress has abrogated a tribe's immunity from suit, *common law immunity* must be recognized. 761 F3d. at 222. As stated above, the common law rule in this case creates an exception that should be applicable to tribes in the context of *in rem* suits to quiet title to land they own in fee simple.

Hamaatsa, Inc. v Pueblo of San Felipe (2016) 388 P.3d 977, 985, from the New Mexico Supreme Court, is more similar to the instant matter because it involved a public road crossing fee owned Indian land. That court elected to follow Cayuga and give tribal sovereign immunity its absolute maximum scope and grant a motion to dismiss brought on those grounds. But neither Cayuga nor Hamaatsa had the benefit of the Court's observations in Upper Skagit, because they preceded it. Upper Skagit marks an unmistakable shift away from the expansive application of tribal sovereign immunity, at least in quiet title actions such as this one.

The moving party also cites Save the Valley, LLC v Santa Ynez Band of Chumash Indians, 2015 WL 12552060, but it is readily distinguishable. There a citizen group filed suit challenging the status of land upon which a casino expansion was being constructed, alleging that it was not federal trust land. The district judge, in granting a motion to dismiss on sovereign immunity grounds, stated in footnote 3 that he declined to follow the state cases cited to him, because they all, like the instant matter, involved *in rem* actions in which the plaintiffs were claiming an interest in the land, either through eminent domain, or to quiet title. The plaintiffs there had no standing to assert a quiet title action, because they could claim no interest in the land, they only asserted that it was not federal trust land. The case also did not consider the question which arose in Upper Skagit as to whether the ancient immovable property rule provides jurisdiction in a case such as this one.

To the extent that Upper Skagit's holding has undercut the validity of the prior state cases that had denied sovereign immunity, that should not be true for Cass County Joint Water Resource District v 1.43 Acres of Land in Highland Township (2002) 2002 ND 83, 643 N.W.2d 685 from the North Dakota Supreme Court. That is because although it did discuss the Yakima case, the applicability of which was clarified in Upper Skagit, it also seemed to rely upon the immovable property rule as well to find that it had subject matter jurisdiction.

The facts were that a water district brought a condemnation action for land which had recently been conveyed in fee simple to an Indian tribe. The trial court granted a motion to dismiss on the grounds of sovereign immunity, finding that the court would

need both *in rem* jurisdiction over the land, and *in personam* jurisdiction over the Tribe. The Supreme Court of North Dakota reversed, and in doing so, discussed County of Yakima v Confederated Tribes, supra. It noted that in Yakima the power to levy property taxes on fee owned reservation property was approved, and that such jurisdiction was permissible if it was *in rem* rather than *in personam*. Cass, supra, 643 N.W.2d at 691.

In reversing and remanding Upper Skagit to the Washington Supreme Court, the Court stated that it was error for the Washington Supreme Court to have "...read Yakima as distinguishing *in rem* from *in personam* lawsuits and 'establishing the principle that...courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted.'" 138 S.Ct. at 1652. That admonition does not necessarily undermine the validity of Cass, because in addition to citing Yakima, it cited and discussed a case which, though it did not use the name, applied a version of the "immovable property rule."

The case it cited was State of Georgia v City of Chattanooga (1924) 264 U.S. 472, and it involved the State of Georgia owning fee simple land in Tennessee used for a railroad yard. The city sued to condemn part of the land for a street. Georgia responded by asserting it was immune from suit in Tennessee courts. The Court held that the defense was inapplicable, reasoning that "[l]and acquired by one state in another state is held subject to the laws of the latter, and to the incidents of private ownership." Georgia, supra, 264 U.S. 479. That is essentially a restatement of the immovable property rule. Tellingly, the Court did not mention that all states

had waived their immunity as part of the Constitutional Convention, at which tribes did not attend. Thus, it was clear that it was referring to a common law rule rather than a waiver of immunity by Georgia. Therefore, the Georgia Court's reasoning should be applicable in the tribal context as well.

Based on the reasoning of Cass and other state cases, and the majority, concurring, and dissent opinions in Upper Skagit, this court should hold that the immovable property rule is applicable to tribes, just as it is to every other sovereign going far back into the common law. It must be remembered that the Upper Skagit Court did not disapprove of the immovable property rule, it only decided to let it percolate up through the lower courts first because of the late stage at which it emerged in the case.

D. Policy Reasons do not Support a Tribal Exemption From the Immovable Property Rule

One of the underpinnings of tribal sovereign immunity was to guard the capital of tribes, most of whom have traditionally had scarce financial resources. Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 65 n.19 (recognizing that "many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of" "[t]he cost of civil litigation").

However, tribal gambling has completely changed the picture on that score, especially in California. The National Indian Gaming Commission, in its most recent publication, states that as of the 2017 fiscal year, California and Northern Nevada Indian gaming has generated revenue of $8,996,042,000. (Request for Judicial Notice filed herewith.) Clearly, as a general proposition, the rationale that tribes do not

have the resources to go to court no longer applies so as to support tribal sovereign immunity. It is a maxim of jurisprudence that "[w]hen the reason of a rule ceases, so should the rule itself." Civil Code Sec. 3510.

The Cass County case, which was an eminent domain case, cogently observed that if sovereign immunity were applied, "...Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project." 643 N.W.2d at 694. That fear was echoed by Chief Justice John Roberts in Upper Skagit when he said "[t]he 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." Upper Skagit, supra, 138 S.Ct. at 1655.

The instant plaintiffs are trying to establish an easement for access to the sea for the general public, not just for themselves. The right of the public to access the shoreline is enshrined in the California Constitution. Art. X, Sec. 4 states:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state

> shall be always attainable for the people thereof.

Protecting coastal access is a very strong aspect of the sovereignty of the State of California. If this court has no jurisdiction to carry out the dictates of the California Constitution, then something has gone very much awry with the doctrine of tribal sovereign immunity.

Since Kiowa was issued in 1998, and strongly criticized the doctrine of tribal sovereign immunity, Congress has chosen to do nothing to either expand the doctrine, or contract it, except in minor ways not applicable here. But this court need not wait—seemingly interminably—for Congress to act. The immovable property rule is part of the common law of sovereign immunity. Because tribal sovereign immunity is rooted in the common law, and so is the immovable property exception, it necessarily follows that it applies to tribes, unless and until Congress says that it does not.

When courts decide Indian cases in a way which Congress believes to be undesirable, it can and has changed the underlying law to prevent a replication of the result. One such case was Duro v Reina (1990) 495 U.S. 676, which held that an Indian reservation had no criminal jurisdiction over Indians who were not members of that tribe. Congress amended the underlying statute to reverse that result, and it was upheld as constitutional in United States v Lara (2004) 541 U.S. 193, 199. If Congress disagrees with a ruling that tribal immunity does not apply here, it is free to pass a statute directing how and when it is to be applied.

III. CONCLUSION

Tribal sovereign immunity is a creature of the common law. The common law has always contained an exception to the rule of sovereign immunity, i.e.: the "immovable property rule." A party taking the benefit of the doctrine of sovereign immunity must also take the small burden that a recognized exception brings.

For the above-stated reasons, the pending motion should be denied and the demurrer overruled.

Dated: 6-27-2019 Respectfully Submitted,

/s/ J. Bryce Kenny
J. Bryce Kenny
Attorney for Plaintiffs

PROOF OF SERVICE

I am over the age of eighteen years, a U.S. Citizen, and am not a party to the pending action. My business address is P.O. Box 361, Trinidad, CA 95570.

On this date I served the following: OPPOSITION TO MOTION TO QUASH SERVICE/ DISMISS/ DEMURRER; PROPOSED ORDER

___x___ by electronic service pursuant to the stipulation of counsel, to tseward@hobbsstraus.com:

_____ By personal service to the person named below:

_____ BY OVERNIGHT PARCEL DELIVERY SERVICE

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

Dated: 6-28-19 /s/ J. Bryce Kenny
Bryce Kenny

APPENDIX E

TIMOTHY C. SEWARD
Hobbs, Straus, Dean & Walker
1903 20 Street, 3rd Floor
Sacramento, CA 95811
Phone: (916) 442-9444
Fax: (916) 442-8344
SBN 179904

Attorney for Defendant
CHER-AE HEIGHTS INDIAN COMMUNITY
OF THE TRINIDAD RANCHERIA

SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF HUMBOLDT

JASON SELF, et al. Plaintiffs, vs. THE CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA, et al., Defendants.	**Case No.: DR190353** **NOTICE OF MOTION AND MOTION TO QUASH SERVICE OF PROCESS AND DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; OR, IN THE ALTERNATIVE DEMURRER TO COMPLAINT** Date: July 15, 2019 Time: 10:30 a.m Location: Courtroom 4 Complaint Filed: April 29, 2019

PLEASE TAKE NOTICE that on July 15, 2019, at 10:30 a.m, or as soon thereafter as the matter may be heard, in Courtroom 4 of the Humboldt County Superior Court located at 421 I Street in Eureka, California, 95501, Defendant Cher-Ae Heights Indian Community of the Trinidad Rancheria, a federally recognized Indian tribe ("Trinidad Rancheria") specially appears and hereby does move this Court for an Order granting Defendant's combined Motion to Quash Service of Process and Motion to Dismiss Plaintiffs' Complaint, or in the alternative, a Demurrer to Plaintiffs' Complaint, on the grounds that this Court lacks subject matter jurisdiction because Defendant, as a federally recognized Indian tribe, is immune from suit.

Because a party may raise subject matter jurisdiction at any time, no specific procedural method is required to bring the matter to the court's attention. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1418 (1999). California courts have recognized "the hybrid motion to quash/dismiss as a proper means of challenging the court's authority without making a general appearance" based on the rule that subject matter jurisdiction can be challenged at any time. *Brown v. Garcia*, 17 Cal. App. 4th 1198, 1204 (2017); *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1144 fn. 1 (1990). In the alternative, the Trinidad Rancheria requests that its motion be deemed a demurrer. To the extent that the Trinidad Rancheria's motion is treated as a demurrer, the Trinidad Rancheria, through its attorney, contacted the Plaintiffs' attorney to meet and confer about the Trinidad Rancheria's motion in accordance with CCP § 430.41(a), and the parties were not able to reach an agreement on the demurrer. (See

the Declaration of Timothy C. Seward, filed concurrently.)

The Motion is made pursuant to California Code of Civil Procedure (CCP) § 418.10, and in the alternative pursuant to CCP § 430.10(a), and is based on this Notice of Motion, the Memorandum of Points and Authorities, the Declaration of Timothy C. Seward, all the files and records of this action, and on any additional material that may be elicited at the hearing of the Motion.

DATED: June 7, 2019 Respectfully Submitted,

HOBBS, STRAUS, DEAN & WALKER, LLP

/s/ Timothy C. Seward
By: Timothy C. Seward
(SBN 179904)
1903 21st St., 3rd Floor
Sacramento, CA 95811
Phone: (916) 442-9444
Email:
tseward@hobbsstraus.com

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT CASE NUMBER: DR190353
CASE: *SELF v. CHER-AE HEIGHTS INDIAN COMMUNITY, et al.*

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of Sacramento, California. I am over the age of eighteen years and my business address is 1903 21St Street, Third Floor, Sacramento, California 95811. On June 7, 2019, I served the attached **NOTICE OF MOTION AND MOTION TO QUASH SERVICE OF PROCESS AND DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; OR, IN THE ALTERNATIVE DEMURRER TO COMPLAINT** on the parties in said case by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully paid, in the United States mail addressed as follows.

Attorneys for Plaintiffs:
J. Bryce Kenny, Esq.
PO Box 361
Trinidad, CA 95570

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on the 7th of June 2019, at Sacramento, California.

/s/ Kris Daly
KRIS DALY

APPENDIX F

J. Bryce Kenny CSB 208626
Attorney at Law
P.O. Box 361
Trinidad, CA 95570
Telephone: (707) 442-4431
Email: jbrycekenny@gmail.com

Attorney for Plaintiffs

Apr. 29, 2019

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF HUMBOLDT

Jason Self, an Individual, Thomas W. Lindquist, an Individual, on Behalf of the General Public, Plaintiffs, vs The Cher-Ae Heights Indian Community Of the Trinidad Rancheria, a Federally Recognized Indian Tribe, and all Persons, Unknown, Claiming any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Real Property Described in the Complaint Adverse to Plaintiffs' Interest or the Interest Of the General Public, and Does 1 Through 15, Inclusive, Defendants.	Case No. DR190353 IN REM COMPLAINT TO QUIET TITLE TO PUBLIC EASEMENT

On behalf of the general public, plaintiffs allege:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. The beaches with which this lawsuit is concerned are located adjacent to Trinidad Harbor, in the City of Trinidad, California. One will be referred to as "boat launch beach," and is situated next to the commercial marine railway which seasonally serves Trinidad Bay. The other will be referred to as "Trinidad State Beach," which is located on the Pacific Ocean just to the north of Trinidad Head. Access to both beaches requires crossing private property now owned in fee simple by the Cher-Ae Heights Indian Community of the Trinidad Rancheria.

2. Plaintiff Jason Self is a resident of Humboldt County who depends on public access to boat launch beach for year-round operation of his business "Kayak Trinidad" and also uses the boat launch beach and Trinidad State Beach and its parking area for his own recreational purposes.

3. Plaintiff Thomas W. Lindquist is a resident of Humboldt County who has a history, since at least 1981, of using the subject property for access to both the boat launch beach and the parking area for access to Trinidad State Beach.

4. Defendant Cher-Ae Heights Indian Community of the Trinidad Rancheria ("Rancheria") is a federally recognized Indian tribe.

5. Plaintiffs do not know the true names of defendants DOES 1 through 15, inclusive, and therefore sues them by those fictitious names. Plaintiffs are informed and believe, and on that basis alleges that each of the DOE defendants' claims, or may claim, some interest in the real property

described in this complaint. The names, capacities and relationships of Does 1 through 15 will be alleged by amendment to this complaint when the same are known.

6. Plaintiffs are informed and believe, and on that basis allege that at all times mentioned in this complaint, defendants were the agents and employees of their codefendants, and in doing the things alleged in this complaint were acting within the course and scope of that agency and employment.

7. The property which is the subject of this lawsuit (hereinafter the "subject property") is commonly known as the Trinidad Harbor parking area, and is legally described in Exhibit A hereto. There is currently pending an application to the federal Department of the Interior Bureau of Indian Affairs to place all of the subject property into "trust status" where title would be held by the United States of America for the benefit of the Rancheria. Plaintiffs are informed and believe, and on that basis allege that if a decree quieting title to certain public easements over the subject property is not granted and recorded, the rights of the public to use the subject property may be lost forever.

FIRST CAUSE OF ACTION TO QUIET TITLE TO EASEMENT OVER REAL PROPERTY BY EXPRESS OR IMPLIED DEDICATION

8. In or around January of 2000 the Rancheria acquired title to the subject property in fee simple absolute.

9. On information and belief, since at least January 1, 1967, the prior owners of the subject property either expressly or impliedly offered to make a common law dedication of a portion of it to the public

use of small boat launching from boat launch beach, for parking for vehicles used for beach boat launching, and for parking for vehicles whose owners were utilizing Trinidad State Beach for recreational purposes.

10. On information and belief, the general public accepted the offer of dedication by using the subject property for the above-described purposes, free of charge, with the belief that it was public property.

11. Within five years of the filing of this action, plaintiffs and the general public were seised of the rights they claim in the subject property.

12. The basis of the plaintiffs' title is the public's acceptance of the express or implied offer to dedicate by the continuous use of the property for recreational beach access.

13. The claim of plaintiffs is adverse to that of the Rancheria.

14. The plaintiffs seek to quiet title as of the date of this complaint.

SECOND CAUSE OF ACTION FOR QUIET TITLE TO EASEMENT OVER REAL PROPERTY BASED ON OPERATION OF ARTICLE X, SECTION 4 OF THE CALIFORNIA CONSTITUTION

15. Plaintiffs incorporate paragraphs 1 through 13 above as if fully set forth here.

16. As an alternative basis for quiet title, plaintiffs allege on information and belief that defendant's title does not trace back to a Mexican land grant which resulted in a federal patent obtained prior to the admission of California to the United States so as to limit the State of California's rights which attached to the land prior to its transfer to

subsequent deed holders, which rights exist by virtue of Article X, Section 4 of the California Constitution, the common law trust doctrine, or both.

THIRD CAUSE OF ACTION FOR INJUNCTIVE RELIEF

17. Plaintiffs incorporate paragraphs 1 through 13, inclusive, as if fully set forth here.

18. Because of the pending application to place the subject property into federal trust status, there exists legal uncertainty as to whether such an occurrence would oust this court of jurisdiction to issue a final decree quieting title to a public easement. Accordingly, the plaintiffs and the general public may suffer irreparable injury as a result of the Rancheria closing off the subject property to public access on reliance of its misunderstanding of the legal rule against concurrent *in rem* jurisdiction.

19. Because plaintiffs would in that case have no adequate remedy at law, they reserve the right to seek a temporary restraining order and preliminary injunction protecting the public's right of access to the subject property during the pendency of this case. An award of money damages would not be adequate because the Tribe is immune from suits for money damages.

FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF

20. Plaintiffs incorporate paragraphs 1 through 16, inclusive as if fully set forth here.

21. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiffs contend that they and the public at large have an

easement or easements over the subject property, whereas defendant disputes these contentions and contends that the only easements that burden its property are those of record.

22. Plaintiffs desires a judicial determination of their rights and duties, and a declaration as to whether a public easement exists across the subject property.

23. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiffs may ascertain their rights in the subject property and relief from the burden being caused to them by the unsettled state of affairs.

WHEREFORE, plaintiffs pray for judgment as follows:

1. On the First and Second Causes of Action for a judgment quieting title to a public easement or easements over the subject property;

2. On the Third Cause of Action, for a preliminary and permanent injunction barring defendant from interfering with the public easement over its property;

3. On the Fourth Cause of Action for a declaration that a public easement or easements exist over the subject property;

4. For costs of suit and attorney's fees as provided by law;

5. For such other and further relief as the court deems just and proper.

Dated:
4/29/19

/s/ J. Bryce Kenny
J. Bryce Kenny
Attorney for Plaintiffs

VERIFICATION

I, Jason Self, have read the foregoing complaint and know the content thereof. The same is true based on my personal knowledge, except for such matters as are alleged on information and belief, and as to those, I believe them to be true.

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

Dated: 4/29/19 /s/ Jason Self
Jason Self