

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

BELVA ANN NAHNO-LOPEZ, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 08-CIV-01147 F
	)	
JEFF HOUSER, et al.	)	
	)	
Defendants	)	
_____	)	

**RESPONSE BRIEF OF PLAINTIFFS TO MOTION TO DISMISS/STRIKE**

**I. INTRODUCTION**

The Plaintiffs in this matter have filed an action for declaratory and injunctive relief based upon the willful actions of the each and every Defendant so named. This action is based upon the illegal acts of the Defendants in violation of numerous federal statutes and constitutes actions outside the scope of their authority. Such actions are ongoing and continuing and although the Plaintiffs have attempted for nearly a year to negotiate a settlement to this dispute; the Defendants have refused to even acknowledge their wrongdoing and continue to violate federal laws. Those federal laws have been promulgated to protect the Plaintiffs from infringement upon their individual property rights.

Factually in many ways this case is one of first impression, as no case has been discovered that reflects the uniqueness of the facts of this case and the continued controversy that now exists between the parties. Although Defendants desire to persuade this Court that sovereign immunity is at the heart of this matter; allegations of the Plaintiffs can easily be identified on the face of the complaint that shows otherwise.

**II. THE DEFENDANT'S HAVE ACTED OUTSIDE THE SCOPE OF THEIR AUTHORITY AND EX PARTE YOUNG DOCTRINE SHOULD APPLY.**

**A. Dismissal based upon Federal Rules of Civil Procedure Rule 12(f).**

The Plaintiffs now respond to the Defendant's Motion to Strike pursuant to Federal Rules of Civil Procedure 12(f), which provides that a court may strike from a pleading any redundant, immaterial, and impertinent, of a scandalous matter and where damages sought are not recoverable

The Plaintiffs hereby submit that they have requested damages, but also have requested declaratory and injunctive relief, including ejectment and recovery of lands that have been damaged by the willful actions of the Defendants. Complaint Prayer for Relief, ¶ 1, ¶2, ¶3, ¶4 ¶5.

The Plaintiffs submit that their Complaint does not fall within any of the categories of the FRCP 12(f) and consequently, none of the elements of FRCP 12(f) apply to the matter now before the Court. The latter request for damages may be recoverable from the individuals so named as party defendants, but obviously damages must legally be determined by the Court, should the Plaintiff's prevail on the merits of their causes of action. At no time have the Plaintiffs alleged or requested that the Ft. Sill Apache Tribe be responsible for the illegal acts of the Defendants.

**B. Dismissal based upon Federal Rules of Civil Procedure Rule 19.**

The Defendants also have filed a Motion to Dismiss based upon Rule 19, relating to the failure to name and join indispensable parties. The Plaintiffs believe the actions of the Defendants should not be taken lightly and dismissed based upon the defense of sovereign immunity, nor failure to name and join an indispensable party. In reiteration, the facts of this case speak clearly of first impression and a remedy based upon the facts of the matters presented

should prove that this case not be dismissed. Under the current precedent, the proper judicial review and inquiry with regard to a sovereign entity under Rule 19(b) examines the type and extent of potential prejudice to the sovereign, and does not, as Defendants have suggested, begin and end with the mere fact of its sovereignty.

Rule 19(b) sets forth specific, non-exclusive factors that a court should consider in the context of each case.<sup>1</sup> Contrary to the Defendant's assertions, no single factor, including an absent party's sovereign immunity, is ever determinative by itself under Rule (19) (b), but must be considered in the context of the particular case. *Pueblo of Sandia v. Babbit*, 47 F. Supp. 2d 49, 53 (D.D.C. 1999) (a per se rule requiring dismissal whenever an absent party has immunity from suit "would be inconsistent with the clear purpose of the current Rule 19, which was to abolish the prior system of labeling certain types of parties 'indispensible' in favor of a pragmatic case-by-case analysis") (citing, *inter alia*, *Provident Tradesmens Band v. Patterson*, 390 U.S. 102, 118-19 (1968)).

Whether the Ft. Sill Apache Tribe is an indispensable party is an issue that must be resolved by reviewing the facts specific to the allegations in the case now before the Court. The Defendants have the burden of demonstrating that the Ft. Sill Apache Tribe (1) has protectable interest in outcome of this case, and (2) that its "ability to protect that interest will be impaired or impeded if the suit proceeds in the [t]ribe's absence." *Davis v. United States*, 192 F.3d 1951, 962 (10<sup>th</sup> Cir. 1999). Defendants have not met that burden, in part because they have not made

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<sup>1</sup> The factors specifically set forth for consideration under Rule 19(b) are:

- (1) the extent to which a judgment rendered in a the [party's] absence might prejudice that person or existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
  - (A) protective provisions in the judgment;
  - (B) shaping the relief; or
  - (C) other measures;
- (3) whether a judgment rendered in the [party's] absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed fro nonjoinder.

any specific arguments regarding the Tribe's interests at stake, should the Defendants be found to have acted outside the scope of their authority and a permanent injunction issued by this Court. No tribal law or official action by the Ft. Sill Apache Tribe has been cited as excusing or legally justifying their actions. As a result, Defendants utterly fail to establish that the Ft Sill Apache Tribe actually risks prejudice to its interests if this case goes forward. Sovereign immunity is not, as Defendants seem to believe, a trump card. Although sovereignty "may be viewed as one of those interests compelling by themselves," *Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986), it is never dispositive by itself. *Davis*, at 960 (explaining that the above statement in *Wichita* should not be read "too categorically," especially given that the *Wichita* court specifically analyzed all the 19(b) factors). Where, as here, other factors substantially mitigate or eliminate altogether any potential prejudice to the absent sovereign, a court may determine that "in equity and good conscience" the case may move forward.

**C. Requiring dismissal under Rule 19(b) based upon tribal sovereign immunity would eviscerate the Ex parte Young doctrine.**

The facts presented by this case show there exist three parties that are members of three different federally recognized tribes and one Defendant that is a non-Indian. The Plaintiffs are Kiowa and of Comanche descent and are duly enrolled members of those tribes. The Defendants are duly enrolled members of the Ft. Sill Apache Tribe and Defendant Nott is a non-Indian. The gaming facility so named is a tribal enterprise, but due to recent federal decisions may in some instances be considered a private commercial enterprise. See, *San Manuel Indian Bingo and Casino and San Manuel Band of Serrano Mission Indians v. National Labor Relations Board*, 475 F.3d 1306 (D.C. Cir. 2007)(rehearing en banc denied (June 8, 2007)).

This case factually turns on the continued actions of the Defendants in trespass, encroachment and destruction of lands either owned through allotment or through a legally binding Bureau of Indian Affairs lease. The actions of the Defendants in violation of numerous federal statutes cannot be remedied by and through any tribal judicial forum and consequently, tribal exhaustion of remedies is not available to the Plaintiffs. *National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), *Iowa Mut. Ins. Co. v. LaPlante*, 430 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), and *State v. A-1 Contractors* 117 S.Ct. 1404 (1997).

The Plaintiffs do not deny that the Ft. Sill Apache Tribe of Oklahoma enjoys sovereign immunity from suit. Indian tribes have not relinquished their status as sovereign entities and courts of the United States have long recognized that tribes were and remain independent political societies. See, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-557; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831). Tribes retain the inherent powers of limited sovereignty which has never been extinguished. *FELIX S. COHEN'S HAND BOOK OF FEDERAL INDIAN LAW*, § 4.01 [1][a] at 206, (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). However, Congress may and has reduced the sovereign immunity from suit and consequently, that immunity is not an absolute. See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (noting that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess”); *Wheeler, supra*, 435 U.S. at 322 (noting that tribes are “subject to the ultimate federal control”); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (referring to tribes as “semi-independent”); *Cherokee Nation, supra*, 30 U.S. (5 Pet.) at 17 (referring to tribes as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian”).

Clearly, federally recognized Indian tribes enjoy the immunity from suits just as the federal government and states. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okl. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara, supra*, 436 U.S. at 58-59. However, the Ft. Sill Apache Tribe's sovereign immunity is not what is at issue before this Court, the issue is whether or not the Defendants, as officials or employees individually have acted outside the scope of their authority in violation of federal law.

**D. Ex parte Young doctrine applies and the Defendants have acted outside the scope of their authority in violation of federal law.**

It is not disputed that the Ft. Sill Apache Tribe of Oklahoma is immune from suit in federal court, unless and until Congress through its plenary authority over Indian tribes has acted in such a manner as to expressly and unequivocally waived said immunity. *See, Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

The issue however, is whether the Defendants are immune from suit; if it is determined they have acted outside the scope of their authority in violation of federal law. *Ex parte Young*, 209 U.S. 123 (1908; *See, Santa Clara Pueblo*, 436 U.S. at 59 (citing *Ex parte Young*); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10<sup>th</sup> Cir. 1984) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); cf. Recent case, 79 HARV. L. REV. 851, 852 (1966) (suggesting extension of *Ex parte Young* to tribal sovereign immunity context).

In *Ex parte Young*, a federal court was not barred by the eleventh amendment when a state officer acting unconstitutionally, either because the officer is acting in violation of the constitution or federal statute or regulation that is the supreme law of the land. *17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* § 4232 (3<sup>rd</sup> ed. 2007). Thus, the *Ex parte Young* exception to sovereign immunity relies upon the fiction that the suit is

against the officer and not the sovereign entity, thereby avoiding sovereign immunity. *See, Pennhurst State Sch. & Hosp. v. Haldreman*, 465 U.S. 89, 114 N.25 (1984) (noting fiction).

An officer cannot take refuge behind the sovereign immunity of a state government if he or she contravenes federal law and is “stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct.” *Ex parte Young*, 209 U.S. at 159-60. *See, also, Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002); *Vann et al. v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008). Albeit, the Plaintiffs have requested damages, however, they have as well requested prospective relief in the form of a declaration that the actions of the Defendants violate federal law and a permanent injunction from and any further acts in violation of federal law. Thus, this Court has the authority to find for the Plaintiffs prospectively and the Defendants liable for their continuing illegal actions.

In deciding whether the principle of *Ex parte Young* apply to the facts presently before the Court requires a careful review of the allegations contained in the Plaintiff’s complaint. Such a review should dictate the legal conclusion that tribal immunity should not bar the suit against the Defendants in this matter. *Santa Clara Pueblo*, which relied upon *Ex parte Young* held a tribal officer “not protected by the tribe’s immunity from suit,” *See*, 436 U.S. at 59. The Defendants are knowledgeable, as well as their legal counsel in the procedures set out in federal law to lease or purchase Indian allotted lands. *See*, 25 U.S.C. §§§§§ 177, 202, 345, 348, 415(a) and common law principles of trespass. However, the Defendants have not followed the precepts of federal law and when confronted with the facts of their illegal actions they have continued to ignore and blatantly proceed with actions that continue to violate the property rights of the Plaintiffs. The complete denial of individual rights of the Plaintiffs in this matter and continued bravado of the Defendants should not be allowed and sovereign immunity should not

be used to mask the illegal actions of its officials and employees. See, e.g. *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) (*Ex parte Young* has been extended to tribal officials in their official capacities ... to enjoin conduct that violates federal law”); *Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc.*, 221 F.Supp.2d 271, 278-79 (D.Conn.2002) (“[u]nder the doctrine of *Ex parte Young*, prospective injunctive and declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact”) (citing *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir.2001)); accord *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The general availability of *Ex parte Young* relief indicates that Rule 19 has not previously been construed to require dismissal in all cases involving the absent sovereign. Similarly, an absent state sovereign’s interests have not previously been found to require dismissal where a state officer has been joined under *Young*. See, e.g. *Gila River Indian Community v. Winkleman*, 2006 WL 1418079 (D.Ariz.) (where state officer present pursuant to *Young*, “resolution of this case does not require Arizona’s presence because Defendant Winkleman . . . can properly represent Arizona’s interests in the state lands.) Thus, Defendants sparse examination and interpretation of existing Rule 19 precedent simply cannot be correct, and adoption of their proposed rule would be an expansion of sovereign immunity doctrine that would result in the virtual elimination of *Ex parte Young* relief against tribal officers and employees, and perhaps against federal and state officers as well.

Further, no causes of actions by the Plaintiffs enunciated in their complaint has requested remedies that revolve around the possible liability of the Ft. Sill Apache Tribe and no relief has been requested from the Tribe. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682

(1949) (contract dispute-no action outside the scope of officer's authority); *Ex parte Young*, 209 U.S. at 142, 149 (rejecting officer's "objection . . . that the suit is, in effect, one against the State of Minnesota"). In *Vann et al. v. Kempthorne*, 534 F.3d 741, 753 (D.C. Cir. 2008) the United States Court of Appeals for the District of Columbia, discussed at length the implications of the Supreme Court's decision in *Larson*, supra. The Court specifically denotes the relevancy of n. 11. *Larson*, 337 at 691:

Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being suited has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22 (1890)

In *Vann*, the Court of Appeals was faced with the issue of disenfranchisement of the Freedman of the Cherokee Nation of Oklahoma in violation of the Thirteenth Amendment to the United States Constitution and an 1866 Treaty. Although the Tribe argued that any injunction issued by the Court would fall within n. 11 of *Larson*, 337 at 691 as "affirmative action" the Court held that:

Given the obvious distinction between our own case and the one just described, the Cherokee Nation's reliance on *Larson* seems curious. Unlike the federal officer in *Larson*, who was lonely alleged to have breached a contract, the tribal officers in our case are said to have violated the Thirteenth Amendment and the 1866 Treaty. These allegations bring our case within the stripping in *Larson*, such that tribal sovereign immunity should not bar the Freedman's suit against the officers of the Cherokee Nation. *Vann*, at 756.

In the present matter assuming *arguendo*, that this court rules in favor of the Plaintiffs, the Defendants would only be required to remove their property from the Plaintiff's property and such a result would not fall within the gambit of n. 11 of *Larson*, 337 at 691. As the Court in *Vann*, stated: "Whatever the *Larson* Court meant with it referred to "affirmative action", we conclude that this dicta does not limit the force of *Ex parte Young* in the case at hand." *Vann*, at

758. Further, the *Vann* Court indicated that “. . . Cherokee Nations’ reliance on footnote 11 and similar pronouncements reflects wishful thinking. The tribe imagines a world where *Ex parte Young* suit cannot proceed if they will have any effect on the sovereign. But that is what *Ex parte Young* suits have always done.” *Vann, supra* at 755. In *Idaho v. Couer de’Alene Tribe*, 521 U.S. 261 (1997) the Supreme Court held that *Ex parte Young* did not allow the tribe to sue state officials as the requested relief was considered “implicates special sovereignty interests”. *Couer de’ Alene*, at 281. The *Vann* Court rejected the Cherokee argument that special interests in controlling governance and defining tribal membership call for a similar result. *Vann*, at 765. The Defendant’s cannot claim that any tribal interest is at stake in this matter when they have acted to take lands not belonging to the Tribe or a tribal member, but have seized lands outside tribal boundaries belonging to and leased by members of another tribe. Certainly, eminent domain powers of a tribe do not reach outside their lands or exterior boundaries.

In the present case, the Defendants have acted outside the scope of their authority in violation of federal laws. If allowed to continue their actions through the dismissal of this case, the results will create a “slippery slope” which would result in tribal officials, who have not acted pursuant to any legal authority of the tribe to take lands and property of others outside the exterior boundaries of their lands without limitation.

Although the Defendants argue that the Ft. Sill Apache Tribe is an indispensable party to this action, as the Defendants are officers or employees of the Tribe and the Tribe owns the gaming facility in question; such a conclusion begs the question, as no reference is made to the Ft. Sill Apache Tribe within the confines of the Plaintiff’s complaint. If it is concluded that the Defendants have acted *ultra vires* then the issue does not then require the joinder of the Tribe. *Larson*, 337 U.S. 689-90 (citing *Phila. Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing

*Ex parte Young*)). Defendants attempt to support their contention by citing a few cases that were dismissed due to the nonjoinder of a tribe or absent party, but they are unable to cite to even one case with even a similar fact pattern more than superficially to the case at bar.

Defendants cite *Davis v. United States*, 192 F.3d 951 (10<sup>th</sup> Cir. 1999), as a case that demonstrates that this matter should be dismissed. That opinion however involved a suit brought by the Seminole Freedmen against the Secretary of the Interior to compel allocation of a federally-created fund consistent with the Seminole Freedmen's rights guaranteed under the Seminole Treaty of 1866. However, the Defendants mistakenly imply that the *Davis* court held that the Seminole Tribe was an indispensable party under Rule 19(b).<sup>2</sup> But in the case cited by the Defendants, it was the District Court which had found that the tribe was indispensable; under review by the 10<sup>th</sup> Circuit, it was held that the district court had abused its discretion by according **too much significance** to the mere fact of the tribe's immunity, and remanded the case for proper analysis incorporating all four 19(b) factors. *Davis*, at 961, 962. [emphasis added]

The *Davis* court took pains to explain that "neither this court in *Enterprise Management* nor the D.C. Circuit in *Wichita & Affiliated Tribes* held that immunity is so compelling by itself as to eliminate the need to weigh the four 19(b) factors."<sup>3</sup> The comments to that effect [in those cases] were dicta because the Rule 19(b) factors were specifically analyzed in both opinions. *See, also Thomas v. United States*, 189 F3d 662, 667-668 (7<sup>th</sup> Cir. 1999) ("[w]e accept the fact that tribes have a strong interest in matters [...] that relate to membership, but the fact that a tribe has an interest in the litigation is not enough in itself to make it a necessary party in the sense of Rule

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<sup>2</sup> Defendants have most likely confused this opinion for a later Court of Appeals decision in the same case, which held that the "district court did not abuse its discretion in determining that Plaintiffs' judgment-fund claims could not, inequity and good conscience, proceed in the absence of the Tribe. *Davis v. United States*, 343 F3d 1282, 1294 (10<sup>th</sup> Cir. 2003). As discussed herein, although this later holding comes closer to supporting Defendant's argument, the facts are nonetheless readily distinguishable from this case.

<sup>3</sup> *Enterprise Magmt. Conslutants, Inc. v. United States*, 883 F.2d 890, 894 (10<sup>th</sup> Cir. 1989).

19”) (citations omitted). In the present case the Defendants have not even attempted to analyze the weight of the four 19(b) factors to support their arguments that the tribe is an indispensable party to this action.

Even if the Defendants have been correct about the holdings in *Davis*, the pertinent facts are not close to analogous here. *Davis* involved a dispute over the disposition of the proceeds from a fund, rather than an action for injunctive and declaratory relief involving a property right. More importantly, unlike the case at hand, in *Davis* no tribal officers were joined to the suit, and thus were not available to represent the interest of the tribe in question, which would most likely have mitigated the potential to the tribe.

**E. No potential prejudice exists to the Fort Sill Apache Tribe as the individual officers and employees so named as Defendants mitigates and eliminates such potential.**

Where a present party will adequately represent the interests of the absent tribe, cases have gone forward under Rule 19(b) even where the tribe has an acknowledged interest in the subject matter of the case, and where it might suffer potential prejudice as a result of the action. *See, e.g. Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes*, 78 F.Supp. 2d 589, 601 (E.D. Tex. 1999); *South Dakota v. Bourland*, 949 F.2d 984 (8<sup>th</sup> Cir. 1991) (tribe not indispensable party where tribal officials sued); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5<sup>th</sup> Cir. 1999) (tribe not indispensable where tribal officials under *Ex parte Young* is an effective remedy to the problem raised by the sovereignty interests of an absent tribe. *See, e.g. Nisqually Indian Tribe v. Gregoire*, 2008 WL 1999830 (W.D. Wash.) (joining tribal officer pursuant to *Ex parte Young* would cure indispensable party defect where tribe was held to be an indispensable party). Similarly, the Ft. Sill Apache Tribe’s interests in this case will be fully represented by the Defendants. Thus, any potential prejudice to the Tribe is effectively eliminated, and this case may go forward in its absence. *See Wichita*, 788, F.2d at 774-75 (“[i]n some cases the prejudice

created by the party's absence is mitigated, or even eliminated, by the presence of a party who will represent the absent party's interest.") (citing, *Heckman v. United States*, 224 U.S. 413 (1912). *Ramah Navajo School*, at 1351<sup>4</sup> ("[i]f the nonparties' interests are adequately represented by the party, the suit will not impeded or impair the nonparties' interest and therefore the nonparties will not be considered 'necessary.'") (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9<sup>th</sup> Cir. 1990).

The present named Defendants adequately represent the interests of the Ft. Sill Apache Tribe as an absent party, as here "(1) the present party will undoubtedly make all of the absent party's arguments, (2) the present party is capable and willing to make the absent party's arguments, and (3) the absent party would not offer any necessary elements that the present parties would neglect." *Crosby Lodge, Inc. v. National Indian Gaming Assoc.*, 2007 U.S. Dist. LEXIS 59495, at \*506 (d.Nev.) (citing *Shermoen v. United States*, 982 F.2d 1312, 1318 (9<sup>th</sup> Cir. 1992)). By this standard there can be little doubt that the named Defendants will adequately represent the Ft. Sill Apache Tribe's interest in this case.

Although the United States may or may not be a party defendant in this matter for failure to act, the issue is still whether the Defendants are acting outside the scope of their authority in violation of federal law. Thus, the United States is not an indispensable party to this case, although, albeit, their trust responsibility should have been exercised and said party may be named in the Amended Complaint of the Plaintiffs.

#### **F. The Fort Sill Apache Tribal Casino**

A recent decision from the Court of Appeals, District of Columbia has indicated that in certain circumstances "...activities of a tribal government fall somewhere between a purely intramural act of reservation governance and an off-reservation commercial enterprise." See, *San*

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<sup>4</sup> See, also *Ramah Navajo School Board v. Babbit*, 87 F.3d 1338 (10<sup>th</sup> Cir. 1996)

*Manuel Indian Bingo and Casino and San Manuel Band of Serrano Mission Indians v. National Labor Relations Board*, 475 F.3d 1306-1318 (D.C. Cir. 2007) (rehearing en banc denied (June 8, 2007)). In that case the court was deciding whether a ruling from the NLRB should apply to the San Manuel Indian Bingo and Casino. The court indicated that an “inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of . . . tribal sovereignty, but has called for particularized inquiry into the nature of the state, federal and tribal interest at stake.” Citing, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136-145 (1980). The Court stated that determinative consideration appears to be the extent to which application of the general law will constrain the tribal activity and governmental functions. If such a restraint will occur, the tribe’s sovereignty is at risk and a clear expression of congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities of non-Indians, then the application of the law may not impinge upon the tribe’s sovereignty. Citing, *Reich v. Mashantucket Sand & Gravel*, 95 F3d 174, 180-81 (2d Cir. 1996) (“[E]mployment of non-Indians weighs heavily against [a] claim that . . . activities affect rights of self-governance in purely intramural matters.”).

In finding that the NLRB decision applied to the Tribe’s gaming operations, the Court indicated that:

. . . Certainly, its enactment of a tribal labor ordinance to govern relations with its employees was a governmental act, as was its act of negotiating and executing a gaming compact with the State of California, as required by IGRA, See 25 U.S.C. § 2710(d)(3). Moreover, application of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities. Nevertheless, impairment of tribal sovereignty is negligible in this context, as the Tribe’s activity was primarily commercial and its enactment of labor legislation its execution of a gaming compact were ancillary to that commercial activity. The total impact on tribal sovereignty at issue here amounts some unpredictable, but probably modest effect on tribal revenue and the displacement of legislative an

executive authority that is secondary to a commercial undertaking. We do not think that limited impact sufficient to demand a restrictive construction of NLRA. 475 F.3d 1306-1321.

In the case at bar, a holding in favor of the Plaintiffs will not negatively affect the tribal sovereignty of the Ft. Sill Apache Tribe, nor their gaming facility, and if so, such an effect will only be negligible. The only action that will be required is either the Defendant's remove their fixtures and other property belonging to the gaming facility from the lands of the Plaintiffs or enter some form of settlement agreement for their continued trespass, encroachment and destruction of the Plaintiff's property. However, a ruling in favor of the Defendants based upon their motions to dismiss will have dire consequences throughout Indian Country.

### **III PLAINTIFFS HAVE ADEQUATELY STATED CLAIMS UNDER THE CITED FEDERAL STATUTES**

#### **A. Jurisdictional analysis.**

The federal statutes and laws cited as federal question jurisdiction must be evaluated based upon their intent, and the intent is clear; to protect Indians with allotted lands and individual Indians from unscrupulous individuals who may take advantage of individual Indians, through negotiation of leases and sales of their lands without proper bargaining power.

The Defendant's legal conclusion that none of the named jurisdictional basis grant this Court jurisdiction over the Plaintiff's allegations is unfounded. The land in question are not lands owned or allotted within the jurisdiction the Ft. Sill Apache Tribe, but lands that lie outside their boundaries upon which official status is in essence no status whatsoever, other than a common citizen of the State of Oklahoma and the United States.

The Indian Trade and Non-Intercourse Act (hereinafter referred to as "Act"), 25 U.S.C. § 177, provides as the Defendants have stated; however, Plaintiffs are not attempting to prove that the individual Plaintiffs are representative of their respective tribes. Plaintiffs only assert that

any purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. However, even though the Plaintiffs are individual Indians they should be allowed to utilize the Act to protect their individual allotments and leases of Indian lands from illegal actions by the Defendants. Again this case is one of first impression and does not involve lands legal condemned by a governmental entity or lands legally extinguished by some other means. This is purely and simply a matter of trespass and damage to allotted and leased lands, that the Act was legislative intended to hinder.

25 U.S.C. § 202 is not a criminal statute, but is purely a penalty statute that holds individuals liable for attempting to unlawfully:

[i]nduce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey land or any interest therein held by the United States in trust for such Indian, or to offer such contract, deed, mortgage, or other instrument for record in the office of any recorder of deed. Any person violating this provision shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed \$500 for the first offense, and if convicted for a second offense may be punished by a fine not exceeding \$500 or imprisonment not exceeding one year or both such fine and imprisonment, in the discretion of the court. This section shall not apply to any lease or contract authorized by law to be made.

Plaintiffs assert that the Defendants have violated this federal law by negotiating and leasing lands based upon an agreement not approved pursuant to 25 U.S.C. § 348. Defendants have as well, induced Plaintiffs (Kerchee) into a lease not approved, which clearly is illegal and void. Pursuant to the non-approved lease the Defendants have been allowed to trespass, encroach, and damage property, under the guise of some factious lease. Nothing within the confines of the substantive language of 25 U.S.C. § 202, prohibits a private individual from utilizing this statute to enforce legal property rights that have been violated. The court in *Cort v.*

*Ash*, 422 U.S. 66 (1975) at 78, discusses the requirements of whether a private cause of action applies to a statutory framework. In determining whether a private cause of action is implicit in a statute not expressly providing for one, several factors are relevant. First, is the plaintiff “one of the class for whose especial benefit the statute was enacted,” (citing, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) – that does the statute create a federal right in favor of the plaintiff?” In the present situation the prohibitions against inducing Indians to execute any contract, deed, mortgage or other instrument purporting to convey land, clearly was promulgated to protect the Plaintiffs who are individual members of a class, which constitutes “Indians”. Secondly, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (Amtrak). In the present situation the statute in question does not imply or explicitly express a legislative intent. Thirdly, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g. *Amtrak, supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey* 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See, *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); cf. *J.I. Case Con. B. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal narcotics Agents*, 403 U.S. 388, 394 -395 (1971); *id.*, at 400 (Harlan, J. concurring in the judgment). In regards to the last two elements, it would appear obvious that the legislation had the underlying purpose of protecting individuals as are now named as Plaintiffs in this matter. And lastly, there exist no state law or underlying reason why the application of said law would be inappropriate and is not one traditionally relegated to any state.

25 U.S.C. §§ 348 and 415 have been utilized by the Plaintiffs to show that the Defendants have violated federal law in their actions which have negatively affected and damaged the property rights of the Plaintiffs. Leasing lands without approval of the Bureau of Indian Affairs causes those negotiated leases or sales of allotted lands to be held null and void. Under 25 U.S.C. § 348, any conveyance of Indian trust land, "or any contract made touching the same," is absolutely null and void. In *Haymond v. Scheer*, 543 P.2d 541 (1975) the court allowed damages be awarded where "Evidence was sufficient to support trial court finding that heirs of Pawnee allottee who had received land under this chapter [25 U.S.C. §348] had legal title to such land and were entitled to damages from those occupying such land." See, also *Appleton v. Kennedy*, 268 F.Supp. 22 (N.D.Okla. 1967). Pursuant to 25 U.S.C. §415 the lease of any lands for commercial use must be approved as well by the Secretary of the Interior and in this case no such approved lease has been documented by the Defendants. See, *Brown v. U.S.*, 86 F.3d 1554 (C.A.Fed. 1996) on remand 42 Fed.Cl. 538; *Sangre de Cristo Development Co., Inc. v. U.S.*, 932 F.ed. 891 (1991), *cert denied*, 112 S.Ct. 1760.

The American Indian Agricultural Resource Management Act, 25 U.S.C. §3713, allows for civil penalties for commission of trespass on Indian agricultural lands", §3713(c). However, this Act does not prohibit an individual and private right of action. The Defendant's reliance on *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d (1986), is misconceived as the Defendants characterize this lawsuit as plainly the second type of case as set out by the court in *Mottaz*, involving alleged "interests and rights ...in [a person of Indian descent's] allotment or patent after he has acquired it,". The Kerchee Plaintiffs own allotment no. 2329 and obviously, have a beneficial interest in said allotment. See, *e.g Arenas v. United States*, 322 U.S. 419

(1944); *Scholder v. United States*, 428 F.2d 1123, 1129 (CA9), *cert denied*, 400 U.s. 942 (1970), quoting *United States v. Pierce*, 235 f.2d 885, 889 (CA9 1956).

In *Mottaz* the court stated:

The structure of §345 strongly suggests, however, that §345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original allotment. In those suits, §345 provides that "the parties thereto *shall* be the claimant as plaintiff and the United States as party defendant" (emphasis added), while, as to the latter class of cases, no mention is made of the United States; participation is made. Reference n. 9:

n.9

In fact, §345 has been used by Indians to sue parties other than the United States to quiet title to land originally given under various allotment schemes. See, e.g., *Begay v. Albers*, 721 F.2d 1274 (CA10 1983; *Vicenti v. United States*, 470 f.2d 845 (CA101972), *cert. dismiss'd*, 414 U.S. 1057 (1973) (plaintiffs sought recovery of title from private parties; suit against the United States for damages held barred by sovereign immunity).

According to the court in *Mottaz*, federal courts have general subject-matter jurisdiction over claims to quiet title to allotments brought by Indians. *Mottaz*, at 846.

In the present situation, the Defendants did and do not have an executed and approved BIA lease, nor have they attempted to lease any property pursuant to the processes and procedures set out by federal law.

#### **IV CONCLUSION**

Based upon the foregoing the Plaintiffs request this action not be dismissed, as the reprehensible and callous acts of the Defendants will not be remedied. The Plaintiffs have no other forum in which to argue their case and justice and will not prevail. Here where the Defendants have merely mounted a facial challenge to subject matter jurisdiction, "the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in light most favorable to the non-moving party." *Short v. Chertoff*, Civ. A. Not 05-

1034 (RMU), 2007 U.S. Dist. LEXIS 86208, at \*5 (D.D.C. Nov. 26, 2007). The court may look “beyond the allegations contained in the complaint to decide a facial challenge, ‘as long as it still accepts the factual allegations in the complaint are true.’” Id. at \*6 (quoting *Jerome Stevens Pharm., Inc. V. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005)).

DATED this 28<sup>th</sup> day of February, 2009.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2009, I caused the foregoing *Response Brief of Plaintiffs to Defendant's Motion to Dismiss/Strike* to be electronically transmitted to the Clerk of Court using the ECF system for filing and there serving documents on:

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