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.	)	
	)	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT RULES 12(b)(1) AND 19 OF THE FEDERAL RULES

I. INTRODUCTION

Defendants are officials of the Fort Sill Apache Tribe of Oklahoma, the Manager of the Fort Sill Apache Casino (or "the Casino") in Lawton, Oklahoma, and the Casino itself. Complaint for Declaratory Judgment, Permanent Injunction, Ejectment and Damages (or "Complaint"), ¶¶ 4 - 9. Plaintiffs have brought suit against Tribal officials and the Casino Manager in their individual capacities, seeking relief including "treble damages, in an amount to be proven at trial, but believed to exceed $15,000,000 ..." for an alleged trespass on the part of the Tribe. Id., Prayer for Relief, ¶ 6.

Plaintiffs have brought the action despite well-established principles of sovereign immunity that extend to officials of the Tribe, Tribal enterprises and employees, and despite the fact the Ex parte Young doctrine[1] (the only possible basis for overcoming the defense of sovereign immunity asserted by Tribal officials) applies only where the relief sought is prospective and injunctive in character. See Verizon Md. Inc. v. Pub. Serv. Comm'n.,

[1]Ex parte Young, 209 U.S. 123, 28 S.Ct. 2224, 52 L.2d 714 (1908).

535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed. 2d 871 (2002). (whether Ex parte Young serves to overcome a claim of sovereign immunity[2] depends upon "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"). Moreover, Plaintiffs have failed to invoke a single statutory or other jurisdictional predicate applicable in the circumstances. They are also unable to join several parties "required" to be joined pursuant to Rule 19, namely, the Fort Sill Apache Tribe itself, together with the United States.

Thus for the reasons that follow we respectfully submit the Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, see generally Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995); and alternatively, for failure to join the Tribe and the United States as "required parties" pursuant to Rule 19 of the Federal Rules. See Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999) (noting "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity"); Imperial Granite Co. v. Pala Band of Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (United States an indispensable party in any suit to establish an interest in Indian trust lands).

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[2]Verizon Md. Inc. involved a claim of State sovereign immunity deriving from the Eleventh Amendment. Ex parte Young and its principles apply on the same basis where Tribal officials invoke the fundamental principle of sovereign immunity as a bar to suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 46, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984).

II. THE RELEVANT FACTUAL AND JURISDICTIONAL ALLEGATIONS

The essence of the alleged wrong at issue is that "Defendant(s) individually and in concert have acted outside the scope of their authority, in violation of federal statutes by trespassing, hindering access, encroaching, detaining and destroying the Kerchee and Pence Plaintiff(s) federal trust property." Complaint, ¶ 10.[3]

The jurisdictional predicates are alleged in the Complaint at ¶13 (28 U.S.C. §§1331 and 1353, and 25 U.S.C. §§177, 202, 345, 348, 415(a) "and common law principles of trespass"); ¶ 14 ("the American Indian Resource Management Act, §3713(a)(1)", and ¶ 15 (the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202).

We respectfully submit that none of the statutory references serve as an adequate jurisdictional basis for a lawsuit in trespass on the part of individuals asserting leasehold and ownership interest in an allotment against Tribal officials and employees in their individual capacities, just as "the common law principles of trespass" fail utterly as a predicate for federal question jurisdiction pursuant to 28 U.S.C. §1331.[4] It is also plain (1) that the doctrine of Ex

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[3]We note the existence of another matter on this Court's docket, deriving from claims that several of the named Plaintiffs here actually lack a valid interest of any kind in the allotment at issue, and are themselves in trespass. Deak v. Pence, et al., Case No. 08-CIV-01357 F. See, e.g., Rothman v. Gregor, 220 F.3d 81, 92 (2d Cir. 2000) (court may take judicial notice of public record pursuant to Rule 201(b) of the Federal Rules of Evidence).

[4]General federal question jurisdiction lies pursuant to §1331 "only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Federal Tax Bd. of Cal. v. Const. Laborers Vacation Trust for S.Cal., 463 U.S. 1, 27-28 (1983). It is equally well-established that the Declaratory Judgment Act furnishes no independent basis for jurisdiction. Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671-72, 70 S.Ct. 876, 94 L.Ed. 11(1950).

parte Young does not serve here to overcome the bar of sovereign immunity with respect to claims for relief including "treble damages" against Tribal officials "believed to exceed $15,000,000 ...," Complaint, Prayer for Relief, ¶ 6; and , alternatively, (2) that the action should be dismissed for failure to join the Tribe and the United States as "required parties' pursuant to Fed.R.Civ.P. 19.

III. THE APPLICABLE LEGAL PRINCIPLES

A. FUNDAMENTAL JURISDICTIONAL DEFECTS

Each of the asserted jurisdictional predicates fail in this context, where Plaintiffs are individuals asserting ownership or leasehold interests in an allotment, and have allegedly been subject to activity on the part of the Tribe infringing on these interests.[5]

The first substantive basis for jurisdiction is the Indian Trade and Non-Intercourse Act ("Act"), 25 U.S.C. § 177, Complaint, ¶ 14, which provides in most relevant part that "No 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, it is beyond serious question that the Act applies "only to tribal land, which is land held in common for the benefit of all members of a tribe." San Xavier Development Authority v. Charles, 237 F.3d 1149 (9th Cir. 2001). Thus "[§177] does not apply to allotted land, which is land once held in common, but now owned by individual Indians, and held in trust by the federal government.

[5]It is axiomatic that parties seeking to establish jurisdiction have the burden of "showing by a preponderance of the evidence that subject matter jurisdiction exists." (citation omitted). APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003). Moreover, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." Ibid.

Compare Felix S. Cohen, Handbook of Federal Indian Law 253 (1082 (tribal land) with id. at 605-07 (allotted land)." Id., 237 F.3d. at 1151.

Indeed, "individual Indians do not even have standing to contest a transfer of tribal lands on the ground that the transfer violated [the Act]." United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989). See also Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979) (citations omitted) ("As the courts have stated repeatedly, claims on the part of individual Indians or their representatives are not cognizable in federal courts under the Indian Trade and Non-Intercourse Act").

25 U.S.C. §202 serves no better as a basis for jurisdiction. It is a **criminal statute** making it "unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land or any interest therein held by the United States in trust for such Indian, or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds." It provides no private right of action, and its significance in an action involving "common law principles of trespass," Complaint, ¶ 13, is not readily apparent. Thus §202 can give rise to no implied right of action in these Plaintiffs.[6]

25 U.S.C. §348 serves to restrict alienation of allotted trust lands, and §415 simply recognizes that Tribes may lease tribal lands to private entities subject to approval by the Secretary of Interior, who exercises that authority through the Bureau of Indian Affairs.

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[6]See Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), where the Supreme Court prescribed factors relevant in determining whether a private right of action may be implied, including in most relevant part "whether the plaintiff is a member of the class for whose special benefit the statute was enacted" and "whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy ...." Id., 422 U.S. at 78.

25 U.S.C. §415(a). Again, the relevance of these statutory provisions as a basis for jurisdiction here is not readily apparent.

Similarly, the American Indian Agricultural Resource Management Act, 25 U.S.C. §3713, invoked in the Complaint at ¶14, requires the Secretary of Interior "civil penalties for the commission of trespass on Indian agricultural lands", §3713(a), and provides for concurrent enforcement jurisdiction between Indian Tribes and the Government. §3713(c). Even assuming for purposes of this Motion that the allotment in question represented "agricultural lands" within the meaning of the statute, it vests no private right of action in individuals, nor would it be appropriate to imply a private right of action pursuant to the factors prescribed by Cort v. Ash.

25 U.S.C. §345[7] provides in relevant part as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) ....

In United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d (1986), the Supreme Court explained the statute's reach:

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[7]The corresponding jurisdictional statute is 28 U.S.C. §1353 ("The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty").

> Section 345 grants federal district courts jurisdiction over two types of cases: (I) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, ... and suits involving "`the interests and rights of the Indian in his allotment or patent after he has acquired it'" .... (citations omitted).

Id., 476 U.S. at 845.

This lawsuit is plainly the second "type of case" described by the Court, involving alleged "interests and rights ... in [a person of Indian descent's] allotment or patent after he has acquired it," which in terms applies, not to persons alleging a leasehold interest in an allotment[8], but to persons alleging an ownership interest. Certain of the Plaintiffs allege such an ownership interest, Complaint, ¶ 2, but are unable to invoke any authority for the proposition an action for infringement of such an interest lies against Tribal officials in their individual capacities pursuant to Ex parte Young.

B. THE DOCTRINE OF EX PARTE YOUNG DOES NOT APPLY TO PERMIT THE PLAINTIFFS' CLAIMS

It is axiomatic that "[a]n Indian tribe is subject to suit only where Congress has authorized the suit or Congress or the tribe has waived immunity." Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc., 523 U.S. 751, 754 (1998). Neither Congressional abrogation of Tribal immunity nor a Tribe's waiver of immunity may be implied, but instead must be unequivocally expressed. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

[8]See Complaint, ¶ 3 ("MARGARET PENCE ... and REACHELE DARBY-GARCIA ... are the rightful owners of a fifty (50) year leasehold ...." (capitalization in original)).

The sovereign immunity of the Tribe also extends to Tribal officials "acting in their representative capacity and within the scope of their authority, " Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (10th Cir. 1985), Tribal enterprises[9], Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982) (enterprise "clothed with the sovereign immunity of the Tribe"), and employees of those Tribal enterprises. Bassett v. Mashantucket Pequot Museum and Research Ctr., Inc., 221 F.Supp. 2d 271, 281 (D.Conn. 2002); Frazier v. Turning Stone Casino, 254 F.Supp. 295, 307 (N.D.N.Y. 2003).

Though it is clear officers are protected by tribal sovereign immunity when acting in their official capacities and within the scope of their authority, tribal officials may nonetheless "subject to suit under the doctrine of Ex Parte Young when they act beyond the scope of their authority." Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 177 F.3d 1212, 1225 (11th Cir. 1999).

In Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court held Eleventh Amendment immunity no bar to suits for prospective injunctive relief against state officials acting pursuant to a state statute violating the U.S. Constitution. The underlying logic was as follows: "The act to be enforced is alleged to be unconstitutional ; and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an act upon the part of a state official in attempting, by the

[9]Here Plaintiffs have described Defendant Fort Sill Apache Casino only as "a privately owned gaming facility conducting business in the private sector," Complaint, ¶ 9, and "established by the Fort Sill Apache Tribe ... as an economic development project." Id., ¶ 19. These representations themselves make clear the Casino is "clothed with the sovereign immunity of the Tribe", Ramey Constr. Co., Inc., supra, 673 F.2d at 320, that established, owns and runs it.

use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." Id., 209 U.S at 159.

Thus the Court in Ex Parte Young created a legal fiction to the effect that suits for prospective relief against unconstitutional action on the part of state officials acting in their official capacity are not actions against the state. See Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). However, sovereign immunity continues to "bar[] a suit against state officials when the state is the real, substantial party in interest. Thus, ... relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter...." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-02 , 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (footnote, citations and internal quotation mark omitted). "[S]uit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Id., 465 U.S. at 101, n. 11.

The Court in ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1193 (10th Cir. 1998), cert. denied, 525 U.S. 1122 (1999), set forth the following framework for determining whether to permit individual capacity suits to go forward under the doctrine of Ex parte Young: Courts "[f]irst ... determine whether the action is against state officials or the state itself. Second, we look at whether the alleged conduct of the state officials constitutes a violation of federal law. Third, we assess whether the relief sought is permissible prospective relief or analogous to a retroactive award of damages impacting the state treasury. Finally, we analyze whether the suit rises to the level of implicating "special sovereignty interests." (quoting Idaho v. Coeur d'Alene

Tribes, supra, 521 U.S. at 281).

The Supreme Court in Idaho v. Coeur d'Alene Tribe made clear that an official capacity suit for prospective relief (there a declaratory judgment against the State of Idaho to establish title in the tribe to banks and submerged lands of Lake Couer d'Alene and its associated rivers and streams) is nonetheless barred if the remedy sought is the functional equivalent of relief otherwise barred by the State sovereign immunity and "special sovereignty interests" are implicated. Id. 521 U.S. at 281. The Court went on to hold that the Couer d'Alene Tribe's suit against state officials to be the "functional equivalent of a quiet title action," implicating such "special sovereign interests":

> [T]he declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority ... would be to ignore the realities of the relief the Tribe demands.

Id. at 281-82.

We submit the non-monetary relief sought here would give no less offense to the "sovereign authority" of the Fort Still Apache Tribe and its ability to "exercis[e] their governmental powers and authority over the disputed lands ...," ibid., and in all likelihood would "expend itself on the [Tribal] treasury or domain, ... interfere with ... [Tribal] administration, [and] ... compel [the Tribe] to act." Halderman, supra at 101-02.

In Imperial Granite Co. v. Pala Band of Indians, 940 F.2d 1269 (9th Cir. 1991) a mining company brought trespass and related claims against an Indian Tribe and its officials when the Tribe denied access to a road through the Tribe's lands as to which the company claimed an easement. Id. at 1270. As in this instance, the complaint in Imperial Granite "alleg[ed] no individual actions by any of the tribal officials named as defendants.... [T]he only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes that caused Imperial's alleged injury." Id. at 1271.

The same is true here: Any alleged infringement upon the interests asserted in the Complaint was not the product of "individual actions by any of the tribal officials named as defendants ...." It was the product of action taken collectively by Tribal officials on behalf of the Tribe itself. An action against the officials named here is not "anything other than a suit against the [Tribe]", ibid., which is immune from suit.

Thus we submit the doctrine of Ex parte Young should not apply in this context, and in any case does not apply to claims for relief other than "prospective" and injunctive in nature. Verizon Md. Inc. v. Pub. Serv. Comm'n, supra, 535 U.S. at 645.

C. DISMISSAL IS ALSO REQUIRED BECAUSE THE TRIBE AND THE UNITED STATES ARE REQUIRED PARTIES NOT SUBJECT TO JOINDER PURSUANT TO RULE 19

A party is "required" pursuant to Rule 19 of the Federal Rules of Civil Procedure[10] if it has an interest in the subject matter of the action, and its absence will impair or impede its ability to protect that interest. Fed.R.Civ.P. 19(a)(1)(B)(ii). If "required" within the meaning of the Rule, the party must be joined. Fed.R.Civ.P. 19(a)(2).

However, if joinder is impossible, a Court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed.R.Civ.P. 19(b). The determination depends upon factors including: (1) the extent to which a judgment rendered in the party's absence might prejudice that party or existing parties; (2) the extent to which any such prejudice could be lessened or avoided by "protective provisions", "shaping relief", or "other measures"; (3) the adequacy of any judgment rendered in the person's absence; and (4) whether an adequate remedy for the plaintiff would be possible in the event of dismissal on grounds a required party cannot be joined. Fed.R.Civ. 19(b)(1)-(4).

We note that "Rule 19, by its plain language, does not require the absent party to actually possess an interest; it only requires the movant to show that the absent party claims an interest relating to the subject of the action." (emphasis added). Davis v. United States, 192 F.3d 951, 958 (10th Cir. 1999). Thus Rule 19 excludes only "those claimed interests that are 'patently frivolous.'" Id. at 959 (citing Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992))

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[10]Rule 19 was amended in 2007 "as part of the general restyling of the civil rules to make them more easily understood .... These changes [were] intended to be stylistic only." Notes of the Advisory Committee on 2007 Amendments. See also, Republic of Phillippines v. Pimentel, - U.S. - , 128 S.Ct. 2180, 2184, 171 L.Ed. 2d 131 (2008) (noting modification of Rule 19 replacing "necessary" with "required" party, and deleting "indispensable").

(emphasis in original).

Moreover, if the required party enjoys sovereign immunity from suit, immunity may be "one of those interests 'compelling by themselves,'" militating strongly in favor of dismissal. Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986) (quoting 3A James A. Moore et al., Moore's Federal Practice, ¶19.15(1984)); see also Enterprise Mgmt. Consultants, Inc. v. United States, 883 F.2d 890, 894 (10th Cir. 1989). And indeed, the Court of Appeals for the Tenth Circuit recognizes the "strong policy favoring dismissal when a court cannot join a tribe [whose joinder is mandated by Rule 19] because of sovereign immunity." Davis v. United States, supra at 960. Thus the "required" status of the Tribe, and the sovereign immunity that makes its joinder impossible, is yet another basis for dismissal.

Moreover, the United States has been held an indispensable party (pursuant to Rule 19 as framed prior to the modification described at 11, n.8) to any suit to establish an interest in Indian trust lands, Imperial Granite Co. v. Pala Band of Indians, supra, 940 F.2d 1269, 1272 n.4, citing Minnesota v. United States, 305 U.S. 382, 386 (1935). An inability to join the United States as a party pursuant to Fed.R.Civ. P. 19 should also result in dismissal. Ibid. (citing Carlson v. Tulalip Tribes, 510 F.2d 1337, 1339 (9th Cir. 1975).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant dismissal of the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure; and alternatively, that it grant dismissal for inability to join the Fort Sill Apache Tribe and the United States as required parties pursuant to Rule 19 of the Federal Rules. We submit a proposed Order via email pursuant to Local Rule.

Respectfully submitted this 4th day of February, 2009.

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