IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 09-2034, 09-2039

BOB BURRELL and SUSAN BURRELL,
Plaintiffs-Appellees/Cross-Appellants

vs.

LEONARD ARMIJO,
Defendant-Appellant,

and LAWRENCE MONTOYA,
Defendant-Cross-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
Honorable William P. Johnson, District Judge

OPENING BRIEF OF APPELLANT, LEONARD ARMIJO

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

RULES

STATEMENT OF RELATED CASES

This case was previously before this Court on an appeal from a dismissal of the Complaint. *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). There have been no other prior or related appeals.

STATEMENT OF JURISDICTION

A. The district court had jurisdiction of the Complaint herein pursuant to 28 U.S.C. §§ 1331 and 1343, in that the Complaint alleged claims arising under 42 U.S.C. §§ 1981, 1983 and 1985. Additionally, the Complaint alleged certain state law claims, as to which jurisdiction was proper under 28 U.S.C. § 1367. (The claim based on 42 U.S.C. § 1983 and the state law claims were dismissed by the district court, which dismissal was subsequently affirmed by this Court in *Burrell v. Armijo*, 456 F. 3d 1159 (10th Cir. 2006).)

B. Jurisdiction in this Court is proper under 28 U.S.C. § 1291, and Fed.R.App.P. Rule 4(a). Defendant-Appellant timely filed a motion in the district court under Fed.R.Civ.P. Rule 50(b). The district court's decision on the Rule 50(b) motion, and an amended judgment based on that ruling, were entered on the district court docket on January 15, 2009. The Notice of Appeal herein was filed on February 13, 2009.

C. The district court entered its order ruling on Defendant-Appellant's motion under Fed.R.Civ.P. Rule 50(b) on January 15, 2009. The Notice of Appeal was filed by Defendant-Appellant on February 13, 2009.

D. This appeal is from a final order and judgment that disposed of all claims in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in concluding that the action of Defendant Leonard Armijo, in directing Plaintiffs Bob and Susan Burrell not to conduct nighttime baling operations on their farmland leased from the Pueblo of Santa Ana, because of complaints about the noise from a Pueblo member, was not within the scope of the authority that the Pueblo of Santa Ana, a federally recognized Indian tribe, was capable of conferring upon Defendant Armijo in his capacity as Governor of the Pueblo, and that therefore Defendant Armijo's action was not protected by the Pueblo's sovereign immunity from unconsented suit?

This issue was raised in motions made during and at the conclusion of trial, and in Defendant Armijo's Rule 50 motion, Applt. App. at 71, 76-83.

2. Did the district court err in concluding that the evidence that Defendant Armijo issued his no-night-baling directive only to Plaintiffs, and not to any tribal member, was sufficient to support a jury verdict finding that Defendant Armijo had violated any rights of Plaintiffs under 42 U.S.C. § 1981?

This issue was raised in motions made during and at the conclusion of trial, and in Defendant Armijo's Rule 50 motion, Applt. App. at 71, 87-97.

3. Did the District Court err in concluding that the evidence that Defendant Armijo directed Plaintiffs not to conduct nighttime baling operations on their leased farmland, without any evidence of malicious intent, or willfulness, or

gross or reckless disregard for Plaintiffs' rights, was sufficient to support a jury verdict awarding punitive damages against Defendant Armijo?

This issue was raised in objections to jury instructions, and in Defendant Armijo's Rule 50 motion, Applt. App. at 72, 101-02.

4. Did the District Court err in concluding that the evidence that the Burrells made their own decision to move off their leased land, three years before the lease was to expire, and suffered no significant physical or mental loss or damage, was sufficient to support the jury's award of compensatory damages against Defendant Armijo?

This issue was raised in objections to jury instructions and in Defendant Armijo's Rule 50 motion, Applt. App. at 72, 102-06.

STATEMENT OF THE CASE

The Plaintiffs filed this action in 2002 against the Pueblo of Santa Ana and four individual defendants, including Leonard Armijo, a former Governor of the Pueblo, Lawrence Montoya, a former Lieutenant Governor, and Jerry Kinsman and Nathan Tsosie, two employees of the Pueblo, alleging that through a series of actions in 1997 the Pueblo and the individual Defendants had wrongfully forced the Plaintiffs off of their lease of Pueblo agricultural lands, which lease at that time had three years to run. At the time this action was filed, a nearly identical civil action was pending in Santa Ana Pueblo Tribal Court, against the same

Defendants. The Defendants had moved to dismiss that case, but the tribal court had failed to act on that motion for nearly four years. Defendants moved to dismiss the federal lawsuit on the ground that Plaintiffs had failed to exhaust their tribal remedies, and in response, the district court directed that if the tribal court did not rule on the tribal court case within six months, the federal court would proceed to entertain the case before it. The tribal court shortly thereafter entered its order dismissing the tribal case on the ground of tribal sovereign immunity. The district court subsequently ruled, on August 29, 2003, that the tribal court ruling was entitled to preclusive effect, and it therefore dismissed the federal complaint.

Plaintiffs appealed to this Court. On July 24, 2006, this Court vacated the decision below, concluding that various defects in the Santa Ana Tribal Court proceeding made it inappropriate to give that court's ruling preclusive effect. It nonetheless affirmed the dismissal of all claims against the Pueblo itself, and the dismissal of the claims based on 42 U.S.C. § 1983 and on the Plaintiffs' lease. It remanded the case to the district court for further consideration of the claims against the individual Defendants based on 42 U.S.C. §§ 1981 and 1985. *Burrell v. Armijo*, 456 F. 3d 1159 (10th Cir. 2006).

On remand, the district court on Defendants' motion struck a number of allegations of the Complaint that it found to be "immaterial, impertinent or

scandalous," under Rule 12(f), Fed.R.Civ.P. Applt. App. at 37-46. The remaining claims were tried to a jury in a five-day trial. In the course of the trial, the district court dismissed all claims against Defendants Nathan Tsosie and Jerry Kinsman, *see id*. at 729, 738. The jury returned a verdict against the two remaining Defendants, Leonard Armijo and Lawrence Montoya, finding that both had violated the rights of the Plaintiffs under 42 U.S.C. § 1981, and had conspired to violate those rights in violation of 42 U.S.C. § 1985(3), and awarding Plaintiffs compensatory damages in the amount of $347,000, and punitive damages against both Defendants in the amount of $1 million. Applt. App. at 150.

Defendants timely filed a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. Rule 50(b), arguing that: 1) the evidence showed that both Defendants' actions with respect to the Burrells were well within the scope of the authority that the Pueblo was capable of bestowing on them as Governor and Lieutenant Governor, respectively, and they were therefore fully protected by the Pueblo's sovereign immunity from unconsented suit; 2) there was no evidence sufficient to establish that either Defendant bore any racially discriminatory animus toward the Burrells, or that either Defendant had acted in a way so as to cause the Burrells to lose any contractual rights that they enjoyed, both of which were required elements of a claim under 42 U.S.C. § 1981; 3) there was no evidence of any conspiracy to deprive the Burrells of their rights; 4) there was no

evidence that would support an award of punitive damages against either Defendant; and 5) the evidence was completely inadequate to support the award of compensatory damages. Applt. App. at 71-107.

The court ruled on the motion by Memorandum Opinion and Order issued on January 15, 2009 (Doc.198) (hereinafter, "Rule 50 Opinion"), Applt. App. at 151-59. The court agreed that none of Defendant Montoya's actions regarding the Burrells were outside of his authority as Lieutenant Governor, and it further found that the evidence did not support any claim against him based on either 42 U.S.C. § 1981 or § 1985. *Id*. at 154-57. Thus, the court granted Defendant Montoya judgment as a matter of law on all claims. With respect to Defendant Armijo, however, although it concluded that he had not engaged in any action violative of 42 U.S.C. § 1985, the court denied the motion on all other grounds. It determined that Defendant Armijo had not acted "strictly in accordance with his authority as a Pueblo official," and thus was not protected by tribal sovereign immunity, and that there was sufficient evidence for the jury to have found that he violated the Burrells' rights under 42 U.S.C. § 1981. It further found that there was sufficient evidence to support the awards of both compensatory and punitive damages. Applt. App. at 153-54, 157-58. From that ruling, Defendant Armijo has taken this appeal. The Burrells have filed a cross appeal from the ruling granting judgment as a matter of law in favor of Defendant Montoya.

STATEMENT OF FACTS

On the evening of June 1, 1997, Defendant Leonard Armijo, who was then serving his second one-year term as Governor of the Pueblo of Santa Ana, Applt. App. at 448, received a call at his home from Mr. Eliseo Raton, a tribal member and former Governor and War Chief. Mr. Raton complained that his daughter was being kept awake at night due to the noise coming from alfalfa baling operations being carried out by the Plaintiffs, Bob and Susan Burrell. *Id*. at 451-52. Gov. Armijo told Mr. Raton that he would have someone look into it, but Mr. Raton insisted that Mr. Armijo, as Governor, deal with the matter personally. He reminded Gov. Armijo that according to Santa Ana traditional belief, the night spirits protect the people, and they are not to be disturbed by loud nighttime activity. *Id*. at 452-53. Concerned that Mr. Raton might try to take some kind of action against the Burrells on his own if he did not act, Gov. Armijo therefore agreed that he would "take care of" the matter himself. *Id*. at 454. He thereupon drove the few miles up to the Burrells' north fields, and encountered Mr. and Mrs. Burrell in their tractors, baling their alfalfa. *Id*. at 455.

The Burrells had held a lease of approximately 170 acres of Santa Ana land for about 17 years, and had lived on and farmed that land continuously during that time. *Id*. at 265-66. About 116 acres were located at the south end of the Pueblo's lands, and another 54 acres, where the Burrells were baling that evening, were

just north of the tribal office, and across a road from the Burrells' residence. *Id*. at 266. By June 1, 1997, Mr. Burrell had already baled the first cut of the alfalfa on the south 116 acres. *Id*. at 283.

The night before their encounter with Gov. Armijo, the Burrells had found a tribal police officer at their home when they finished baling at 2:00 or 3:00 in the morning, who told them that "there had been a complaint about noise," but the officer took no action. *Id*. at 372. The next night, June 1, Gov. Armijo arrived at their field at about 9:00 p.m. He first spoke with Mrs. Burrell, and told her that they would have to stop baling, because they were making too much noise, and people were complaining. She testified that he said, "'Stop baling, or I will arrest you.'" *Id*. at 373. They walked over to where her husband sat on his tractor, and she told him what Mr. Armijo had said. The Burrells then simply "folded up the balers, took them home." *Id*. at 374. That was the end of the encounter with Gov. Armijo that night.

The Burrells felt that the directive that they halt nighttime baling would be extremely damaging to the financial well-being of their farming operation. *Id*. at 166, 296. Mr. Burrell believed that it was important to bale alfalfa at night, in order to assure that the alfalfa would have the proper moisture content. *Id*. at 170-71. He had followed that practice throughout his tenure at Santa Ana. *Id*. But that practice was not uniformly followed by Santa Ana farmers. Some baled at

night, but not all, and the tribal farm project, directed by Jerry Kinsman, which had about 60 acres in alfalfa, never baled alfalfa at night. *Id*. at 661. In any event, the next morning Mr. Burrell went to the tribal office, and asked Gov. Armijo to put his no-night-baling directive into writing. *Id*. at 293. Gov. Armijo had a letter prepared, and let Mr. Burrell read it to make sure it was what he wanted, and then he signed it and gave it to Mr. Burrell. *Id.* at 458; *and see* Defendants' Ex. B, Applt. App. at 739. Mr. Burrell took the letter to the Farmers' Home Administration, as a way of explaining that he might have difficulty making the next annual payment on his FHA loan. Applt. App. at 175-76.

Shortly thereafter, the Burrells went to see a lawyer, Nancy Kirkwood, and they asked her to send a letter to the Pueblo on their behalf concerning their situation. They spent "a couple of hours" with Ms. Kirkwood, discussing what the letter should say. *Id*. at 298-99; 429. Both Mr. and Mrs. Burrell agreed that the letter Ms. Kirkwood sent correctly stated their positions, except that they both had intended that it also say that they would like to have Gov. Armijo's no-night-baling directive lifted. *Id*. at 300-04; 429-31. But they took no action to correct that omission. *Id*. at 302-03.

The letter, Defendants' Ex. C, Applt. App. at 740-41, dated June 18, 1997, was addressed to the Tribal Council. The reference line of the letter read, "Bob Burrell: Request to enter in to [*sic*] Negotiations Regarding Mutual Termination of

Farming Lease of Santa Ana Pueblo Agricultural Lands." The text began, "Unfortunately and regretfully, after seventeen years of hard work and dedication, a situation has arisen in Mr. Burrell's current situation which will make it virtually impossible for Mr. Burrell to continue farming as a profession." It said that that situation "includes but is not limited to the incidents regarding the letter of Governor Leonard Armijo" (referring to Defendants' Ex. B, a copy of which was attached to the Kirkwood letter). The letter stated that Mr. Burrell would have to "liquidate" his farming equipment "in order to satisfy the lien of the Farm Home Administration."

Ms. Kirkwood went on to note that the Burrells' crops were "in various stages of growth and will be ready for harvesting and grazing in the near future." She said that "the crops will be lost if someone does not take over maintenance of the crops as soon as possible after Mr. Burrell vacates the farming operation." Finally, she stated, "Mr. Burrell hereby formally requests the Tribal Council to purchase his interest in the remaining term of the lease and compensate him for the capital improvements he has placed on the land . . . ." This letter was the Burrells' only written communication to the Pueblo, from the time Gov. Armijo told them to stop baling at night until late September of 1997. Applt. App. at 431.

Ms. Kirkwood's request for negotiations for a buy-out of the Burrell lease came up for discussion at the July 10 Santa Ana Tribal Council meeting. The

Council designated Lt. Gov. Lawrence Montoya, Jerry Kinsman (head of the tribal farm project), Nathan Tsosie (the tribe's business specialist) and tribal attorney Bill Haltom to negotiate with the Burrells, in an effort to reach a settlement with them. *Id*. at 462-63. Gov. Armijo thereafter had no further involvement in the Burrell matter. *Id.* at 464.

In late June or early July, Lt. Gov. Montoya had noticed that the Burrells' fields appeared not to have been irrigated for some time, especially the field on which Mr. Burrell was growing some blue corn that the Pueblo had agreed to purchase for its blue corn business. In light of Ms. Kirkwood's letter, he had Jerry Kinsman bring in crews to try to save the crops, and to harvest the alfalfa that was ready. *Id*. at 536-41.

In late August, the Burrells decided to move off of their leased land. They made the decision entirely on their own: no one ordered them to leave, or threatened them. *Id*. at 308. They moved their mobile home and all of their equipment, and took their livestock, and left Santa Ana.

Mr. Haltom , Lt. Gov. Montoya and Mr. Kinsman had two meetings with Mr. Burrell in an effort to reach a satisfactory settlement, and by the end of the second meeting, on September 23, 1997, they had come up with a package of terms that Mr. Burrell indicated would satisfy him. *Id*. at 310. Those terms were that in exchange for the relinquishment of the Burrells' lease, the Pueblo would

pay off the Burrells' FHA loan, which at that time had a principal balance in excess of $200,000, it would ask the Bureau of Indian Affairs to waive about $15,000 in water charges that were due under the terms of the lease; it would give Mr. Burrell a job with the tribal farm project as a consultant for up to three years; and it would assist the Burrells with the costs they had incurred in moving their mobile home off of tribal land. *Id*. The next night, September 24, the Tribal Council voted to approve those terms. Defendants' Ex. Q, Applt. App. at 745. But the next day, on September 25, 1997, the Pueblo received a hand-delivered letter from a new attorney representing the Burrells, claiming that the Pueblo had violated the Burrells' lease and "constitutional rights," and threatening to sue the Pueblo in federal court. Defendants' Ex. G, Applt. App. at 744. The Burrells had changed their minds about accepting the terms Mr. Burrell had worked out with Mr. Haltom and Lt. Gov. Montoya. Applt. App. at 311. This litigation eventually ensued.

SUMMARY OF ARGUMENT

A. The sole action Defendant Leonard Armijo took respecting the Burrells--to go to the Burrells' fields on the night of June 1, and direct them to cease baling hay at night because of complaints about noise--was well within the authority that the Pueblo of Santa Ana could confer on him as its Governor, and within the powers that the Pueblo could exercise over the Burrells. Defendant

Armijo is thus fully protected by the sovereign immunity of the Pueblo from unconsented suit. The district court, in its Rule 50 Opinion, thus erred in concluding that Defendant Armijo "was not acting strictly in accordance with his authority as a Pueblo official." All of the claims against him should be dismissed on the ground that they are barred by the sovereign immunity of the Pueblo.

B. To establish a claim under 42 U.S.C. § 1981 the Plaintiffs must show that Defendant Armijo acted with the intent to discriminate against Plaintiffs on the basis of race, and that the discrimination caused Plaintiffs to lose some contractual right. The evidence presented at trial fails to establish either element of the claim, and the district court's ruling on this issue in its Rule 50 Opinion failed to follow this Court's precedents under Section 1981, which require that in the absence of clear evidence of racially discriminatory intent in the complained-of action, there must be some showing of racial animus on the part of the defendant directed at plaintiffs that is tied to the specific action that forms the basis of the claim. No such evidence was presented. The district court's Rule 50 Opinion cited only the fact that Gov. Armijo's baling restriction was not imposed on any non-whites as the reason for the court's refusal to grant judgment as a matter of law on this ground. Applt. App. at 157.

Similarly, there is no evidence that Defendant Armijo's directive caused the Burrells to lose any benefits of a contractual relationship, although this issue was

not addressed at all in the Rule 50 Opinion. *Id*. The Burrells' lease gave them no particular rights with respect to the manner in which they conducted their farming operations, and the Pueblo was entitled to impose reasonable regulations on their conduct. Importantly, the Burrells' decision to abandon their lease was made solely by themselves, and was not the result of any directive or threat by Defendant Armijo or anyone else.

C. There is no evidence whatever that would support the award of punitive damages. This Court's precedents require a showing of malicious or willful conduct or gross disregard of a plaintiff's rights, over and above the proof of intentional discrimination, to support such an award, but there is no such evidence in this case. In its Rule 50 Opinion, the district court cited only the fact that Defendant Armijo imposed baling restrictions on the Plaintiffs, Applt. App. at 158, which is the same act (and the only act) purporting to establish the § 1981 violation. In the absence of any evidence of malicious or willful conduct or gross disregard of the Plaintiffs' rights on the part of Defendant Armijo, the award of punitive damages cannot stand.

D. Finally, there was no evidence upon which a reasonable jury could have determined that Plaintiffs had suffered compensatory damages in the amount of $347,000. The Burrells presented no evidence whatever of their damages from the cessation of their nighttime baling operation; rather, such evidence as they did

present, which was vague and sketchy, purported to show how they suffered from having to move off of their lease. But the evidence is very clear that their decision to leave the Pueblo was made by themselves, not because of anything Defendant Armijo said or did to them.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT ARMIJO'S NO-NIGHT-BALING DIRECTIVE WAS NOT OFFICIAL ACTION THAT WAS PROTECTED BY THE SOVEREIGN IMMUNITY OF THE PUEBLO OF SANTA ANA

Standard of Review: Whether a government official's actions are protected by sovereign immunity is a question of law, that the court of appeals reviews *de novo*. *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006).

There is no question but that the Pueblo of Santa Ana itself is fully protected by sovereign immunity from unconsented suit, and is subject to suit, even under federal civil rights statutes such as 42 U.S.C. § 1981, only where Congress has abrogated the tribe's immunity or the tribe has waived that immunity by some express act. *See, e.g. Burrell v. Armijo*, 456 F. 3d. 1159, 1173-74 (10th Cir. 2006); *Berrey*, 439 F.3d at 643; *Yashenko v. Harrah's N.C. Casino Co.,* 446 F. 3d 541, 551-53 (4th Cir. 2006); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). It is equally well established that that immunity protects tribal officials, employees and entities acting within the scope of their

official duties and exercising authority that the tribe is capable of bestowing. *See, e.g., E. F. W. v. St. Stephen's Indian High School*, 264 F. 3d. 1297, 1303 (10th Cir.2001); *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Hardin v. White Mountain Apache Tribe*, 779 F. 2d. 476, 479-480 (9th Cir. 1985); *Runs After v. United States*, 766 F.2d. 347, 354 (8th Cir. 1985); *Bottomly v. Passamaquoddy Tribe*, 599 F. 2d. 1061, 1067 (1st Cir. 1979). The question presented here is whether the action of Defendant Leonard Armijo, in directing the Burrells to cease baling alfalfa at night in response to a complaint from a tribal member about the noise, was within the scope of his authority as Governor of the Pueblo and was therefore protected by the Pueblo's sovereign immunity. The federal courts treat this issue as one of jurisdiction, *see E.F.W.*, 264 F.3d at 1302, and as the Supreme Court and this Court have made clear, it is the plaintiff's burden to establish facts showing that the court has jurisdiction to hear the matter when a challenge such as this is raised. *Renne v . Geary*, 501 U.S. 312, 316 (1991); *New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1499 (10th Cir. 1995). Plaintiffs have clearly failed to satisfy that burden here.

To pursue an action for damages against tribal officials individually, on the theory that their actions are not protected by tribal sovereign immunity, one must show that those officials acted "'manifestly or palpably beyond [their] authority.'" *Chayoon v.Sherlock*, 89 Conn. App. 821, 828, 877 A. 2d. 4, 9 (2005) (*quoting*

Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc., 221 F.Supp.2d 271, 280 (D.Conn. 2002)). "It is insufficient for the Plaintiffs merely to allege that the Defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority." *Chayoon*, 89 Conn.App. at 829, 877 A.2d. at 10; *and see Bassett*, 221 F.Supp.2d. at 280-81. As the Ninth Circuit has held, "A simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority. *Official action is still action of the sovereign, even if it is wrong, if it 'do(es) not conflict with the terms of (the officer's) valid statutory authority.*'" *Aminoil U.S.A., Inc., v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1234 (9th Cir. 1982), (*quoting Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949); emphasis added); *and see United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986) (BIA officials who constructed canal on Indian allotment, without owners' consent, not subject to suit, since "[s]cope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, [the action] was within the scope of his delegated power").

The relevant inquiry must be, thus, whether the official was acting at the time in a *bona fide* official capacity, not whether the action was wrongful as against the plaintiff. Thus, in *Thompson v. Crow Tribe of Indians*, 289 Mont.

358, 962 P.2d 577 (1998), the Montana Supreme Court dismissed a claim against tribal officials who, purporting to enforce a tribal tax levied against the plaintiff's business, had filed invalid tax liens against the non-member plaintiff's property, in an off-reservation county clerk's office. The court reasoned that even if the officials acted wrongfully, and contrary to Montana law, "there is nothing in the record that leads to a conclusion that the Tribal officials were acting outside their official capacities or . . . beyond the scope of their official duties and in excess of their powers." 289 Mont. at 366, 962 P.2d at 582. Similarly, in *Frazier v. Turning Stone Casino*, 254 F.Supp. 2d 295 (N.D.N.Y. 2003), in which plaintiff Joe Frazier sued Ray Halbritter, Chief of the Oneida Indian Nation, and Dwayne Stitzer, marketing manager of the tribe's Turning Stone Casino, claiming that they had unlawfully and without permission used Frazier's image in advertising a boxing match between Frazier's daughter and the daughter of Muhammed Ali, the suit was dismissed on the ground that both Halbritter and Stitzer were protected by the Oneida Nation's sovereign immunity. The court found that Halbritter and Stitzer were acting in their official capacities on behalf of the Oneida Indian Nation, not in furtherance of any personal interest, and were protected regardless whether they wrongfully misappropriated Frazier's image.

In *Stump v. Sparkman*, 435 U.S. 349 (1978), a state court judge was sued under 42 U.S.C. § 1983, for having approved a mother's petition to have her 15-

year-old daughter sterilized, with no inquiry into the truth of the mother's factual allegations, no effort to enable the daughter to appear either personally or through a guardian ad litem, or any other measure to protect the daughter's rights, nor, indeed, any notice to the daughter of what was to be done to her. Regardless, the judge contended that the suit was barred by judicial immunity. While essentially conceding that Judge Stump had acted contrary to law, and *in excess* of his jurisdiction, the Supreme Court held that he had not acted "in the '*clear absence of all jurisdiction*,'" 435 U.S. at 357 (*quoting Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872); emphasis added), and the suit was thus barred. *And see Mireles v. Waco*, 502 U.S. 9 (1991) (judge who directed officers to locate public defender who was supposed to appear before judge, but was waiting to appear before another judge of the same court at the time, and to forcibly bring the attorney before him, held judicially immune from suit under 42 U.S.C. § 1983).

Especially in light of *Stump* and *Mireles*, the evidence shows that Defendant Armijo was at all times acting well within his authority as Governor of the Pueblo. The only action that he took with respect to the Burrells in this case, and the action on which the validity of the entire jury verdict must rest, was his direction to them to cease baling alfalfa at night.[1] Defendant Armijo explained in

[1]It should be noted that an assertion that was previously central to the Plaintiff's claims in this case, and that arguably might have alleged action by Gov.

his testimony, Applt. App. at 451-57, that he had gone to speak to the Burrells about their baling operation as a result of a call that he received from a tribal member, and former Governor, Eliseo Raton, whose daughter had recently moved into a mobile home located just across the road from the Burrells' north fields. Mr. Raton complained that his daughter was being kept awake by the noise from the Burrells' baling, and he insisted that Defendant Armijo, as Governor, handle the matter himself.[2] *Id.* at 452. Mr. Raton also reminded Mr. Armijo that in the

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Armijo beyond his authority as Governor, was completely abandoned by the Plaintiffs in the presentation of their case at trial. The Plaintiffs had originally contended that on July 24, 1997, the Santa Ana Tribal Council had voted to buy out the Burrells' lease for $500,000.00, by a vote of 47 to 2, but that Governor Armijo, Lt. Governor Montoya and the other two Defendants deliberately ignored that action and refused to carry it out. *See* Complaint at ¶¶ 27, 31, 88-90, Applt. App. at 22-23, 31-32. *Burrell*, 456 F.3d at 1162-63. This allegation was the basis alleged in the Complaint for the claimed violation of the Burrells' rights under 42 U.S.C. § 1981. Complaint at ¶¶ 88-90, Applt. App. at 31-32. During the trial the district court conducted an *in camera* hearing on this matter, Applt. App. at 190-202, after which the court determined that Plaintiffs had no admissible evidence of any such Tribal Council action. *Id.* at 201-02. Thereafter, no evidence of the claimed action was proffered by the Plaintiffs. The entirety of the claim as to the $500,000 buy-out vote simply vanished from this case. Gov. Armijo's no-night-baling directive is thus the only action on which his liability can be based, and then only if that action can be shown to be outside of the Governor's authority.

[2]The Burrells' testimony corroborated Defendant Armijo's explanation for why he went to see the Burrells that evening. Mrs. Burrell said she knew that the Burrells had a "new neighbor," a tribal member who had just moved in near them, but she did not know who it was. Applt. App. at 374. She also acknowledged that the noise from the baler was "loud," but "not so bad" from across the road that ran alongside their fields. Applt. App. at 375-76. And she noted that the previous evening, a tribal police officer had been at their home when they finished baling in

Pueblo's traditions one should not engage in activity that would disturb the night spirits, who protect the Pueblo. *Id.* at 453-54. On cross-examination, Mr. Armijo explained further that he was concerned that if he didn't handle Mr. Raton's complaint promptly, Mr. Raton might take matters into his own hands, and confront the Burrells himself, which he was afraid might "make things worse." *Id*. at 457, 487.

Mr. Armijo testified that as Governor, he had to deal with all manner of internal matters in the Pueblo. *Id.* at 449-50. ("Being a tribal governor, you're the commander in chief. You're also a dogcatcher. You're a marriage counselor. You just about hold any kind of position. . . . [You deal with] [e]verything from political to tribal to traditional duties.") Thus, dealing with complaints such as Mr. Raton's is a normal and expected part of the Governor's responsibilities.

The breadth of the Governor's responsibilities was confirmed by the testimony of the highest traditional Pueblo official, Juan Montoya. Mr. Montoya is the religious leader of the Pueblo, commonly known as the "cacique," a position to which he is appointed for life, and that he has held for nearly 30 years. *Id*. at 505. *See Burrell*, 456 F.3d at 1170 n.7. As religious leader, Mr. Montoya

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the middle of the night, and told them that there had been "a complaint about noise." Applt. App. at 372. Mr. Burrell testified that he knew that it was Eliseo Raton's daughter who had "complained about the noise." *Id.* at 267.

oversees "all tribal and religious matters, everything that is religious there in the tribe." Applt. App. at 505. More importantly for these purposes, he is the person who actually appoints the Governor, the Lieutenant Governor and other tribal officials each year. *Id.* at 505-06. Mr. Montoya explained that the Pueblo Governor handles all internal Pueblo disputes, and "would settle all disputes that happen." *Id.* at 506-07. He specifically acknowledged that the type of complaint that was made to Defendant Armijo by Eliseo Raton about the noise from the Burrells' baling activity was the kind of problem that the Governor was expected to handle. *Id.* And he stated that Governor Armijo's response to that complaint, in going to meet with the Burrells to tell them that they had to stop baling at night, was one that would be within the Governor's authority, whether it involved a non-Indian or a tribal member. *Id.*

The fact that Gov. Armijo was acting well within his authority was also acknowledged by Plaintiff Bob Burrell himself. Mr. Burrell testified that over the seventeen years that he and his wife lived at the Pueblo, he had become familiar with the role of the Governor of the Pueblo, and that he understood that the Governor had broad powers to deal with internal matters within Pueblo lands. *Id.* at 291. He acknowledged that Mr. Armijo's directive to him to stop baling was within his authority as Governor, or possibly as chief of police, which Mr. Burrell thought Mr. Armijo also was at the time (mistakenly, *see id.* at 449). *Id.* at 292-95.

As Mr. Burrell observed, "[a]s far as he was concerned, he did his job." *Id.* at 174.

In short, all of the evidence in the case was to the effect that Defendant Armijo was acting entirely within his authority as Governor of the Pueblo when he directed the Burrells to stop baling alfalfa at night. There was no evidence whatever to the contrary.[3] And it should be noted that an Indian tribe's regulatory authority over non-members who voluntarily enter tribal land and enter into consensual relations with the tribe or its members has long been established. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) (non-Indian on tribal land is subject to tribe's ultimate power to exclude, which power "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct"); *Montana v. United States*, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

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[3]One witness, Manuel Cristobal, a tribal member and member of the Tribal Council, testified that he felt that an "injustice" had been done to the Burrells. Applt. App. at 368. On cross-examination, however, Mr. Cristobal explained that what he considered to be the "injustice" was that "Mr. Burrell was told to leave. He was removed from Tribal lands." *Id*. at 369. But that was untrue, as Mr. Burrell himself had conceded. *See id*. at 308-09. Mr. Cristobal was simply mistaken as to what happened; he acknowledged that his belief that Gov. Armijo had told the Burrells they had to leave was simply based on "rumors." *Id*. at 369. Nothing in Mr. Cristobal's testimony supports the claim that the no-night-baling directive was outside Mr. Armijo's authority as Governor.

Requiring a non-Indian lessee to cease nighttime activity that, because of its noise, was amounting to a nuisance, is thus well within the powers that Indian tribes, acting through their authorized officials, may legitimately exercise.

The district court's Rule 50 Opinion concluded that "Defendant Armijo was not acting strictly in accordance with his authority as a Pueblo official, nor was he within the authority that the Pueblo could lawfully confer upon him," Applt. App. at 154, but it did not explain how it reached that conclusion. It noted that the baling restriction was "not included as part of any Tribal Council agenda," but acknowledged that the Council was aware of the action, and simply appointed a task force to negotiate with the Burrells for termination of their lease. *Id.*

Appellant submits that the district court erred in failing to credit the undisputed testimony, including that of Plaintiff Bob Burrell himself, that Mr. Armijo's directive was within his authority as Governor, and in failing to recognize that Mr. Armijo was not advancing any personal interest of his own, but rather was performing a prototypically traditional function of a Pueblo Governor–trying to resolve a concern raised by a tribal member. Importantly, in that case it was a former Governor of the Pueblo who had raised the concern, and he was someone who, Gov. Armijo feared, were his concerns not addressed, might aggravate the situation by confronting the Burrells himself. In taking the action he took, that dealt strictly with an internal Pueblo matter, in a manner that he thought

would best preserve the peace, Defendant Armijo was plainly acting well within the scope of authority of his position, as even the Plaintiffs knew. He was thus fully protected by the sovereign immunity of the Pueblo, and the verdict against him must be set aside.

II. THERE WAS NO EVIDENCE ON THE BASIS OF WHICH A JURY COULD REASONABLY HAVE FOUND ANY RACIALLY DISCRIMINATORY INTENT ON DEFENDANT'S PART, OR ANY LOSS OF PLAINTIFFS' CONTRACT RIGHTS, SUFFICIENT TO MAKE OUT A VIOLATION OF THE BURRELLS' RIGHTS UNDER 42 U.S.C. § 1981.

Standard of Review: This Court reviews district court decisions under Rule 50, Fed.R.Civ.P., *de novo*, "'reviewing all of the evidence in the record,' . . . in the light most favorable to the non-moving party." *Herrera v. Lufkin Industries, Inc.*, 474 F.3d 675, 685 (10th Cir.2007) (*quoting Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1288 (10th Cir.2000)). Rule 50 provides for the granting of judgment as a matter of law where "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed.R.Civ.P. 50(a)(1). In reviewing a ruling on a Rule 50 motion, "the question is . . . whether there is evidence on which a jury could properly find for [the non-moving] party." *Herrera,* 474 F.3d at 685 (*citing Century 21 Real Estate Corp. v. Meraj Int'l Inv.*

Corp., 315 F.3d 1271, 1278 (10th Cir. 2003)). "'The district court's refusal to grant JMOL will only be reversed if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion.'" *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1112 (10th Cir. 2004) (*quoting Minshall v. McGraw Hill Broad. Co.*, 323 F.3d 1273, 1279 (10th Cir. 2003)).

A. Introduction.

To prevail on a claim under 42 U.S.C. § 1981,[4] a plaintiff must show that he or she is a member of a protected class,[5] that the defendant had the intent to discriminate against the plaintiff on the basis of race, and that the discrimination interfered with an activity protected by § 1981. *Hampton v. Dillard Dept. Stores, Inc.*, 247 F. 3d 1091, 1101-02 (10th Cir. 2001); *Delaunay v. Collins*, 97 Fed.Appx. 229, 233, 2004 WL 377665, p.6 (10th Cir. Mar. 2, 2004) (unpublished). In this case, the Plaintiffs' claim consists solely of the assertion that Defendant Armijo's directive to the Burrells to stop baling at night was motivated by racial animus,

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[4]Section 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." It is well established that white persons are afforded the same protection from racial discrimination by this statute as are non-whites. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976).

[5]See *supra* n.5.

and wrongfully caused a loss of the Burrells' contractual rights. As will be shown, there was no evidence presented that supports, or would permit any reasonable inference that supports, either element of that claim.

B. There was no direct or indirect evidence of any racially discriminatory intent on Defendant Armijo's part.

An essential element of any claim under § 1981 is intentional racial discrimination by the defendant against the plaintiff. *Guides, Ltd. v. Yarmouth Group*, 295 F.3d 1065, 1073 (10th Cir. 2002). That element may be established by either direct or indirect evidence. *Id.*; *Hampton,* 247 F.3d at 1107.

Admittedly, "the issue of intent is one that is not often susceptible to direct proof," *Hampton*, 247 F.3d at 1107, but in the instant case, it is glaringly apparent that there was no evidence at all, direct or indirect, supporting any inference that Defendant Armijo had any racially discriminatory intent in directing the Burrells to stop their nighttime baling operations. It is instructive to compare the record in this case in that regard with other cases in which racially discriminatory intent was at issue.

For example, in *Hampton*, there was evidence that Dillard's had a policy of applying special surveillance scrutiny to black shoppers, of utilizing special codes that highlighted blacks as suspicious, and of singling out black shoppers for special attention in surveillance reports, as well as the fact that the report prepared

by the officer who accosted Ms. Hampton mentioned her race twelve times in the space of less than two pages. 247 F.3d at 1109. In *Guides, Ltd.*, this Court agreed that the jury could draw the inference that defendant's refusal to grant plaintiff (a black-owned business selling African art) a long-term lease was motivated by racial animus, from evidence that the mall manager told other tenants that the plaintiff did not "fit the image" of the mall, and was not "glamorous" enough and did not "mix well," that the manager gave obviously pretextual and even false reasons for refusing to extend plaintiff's lease, and that the manager occasionally suggested that plaintiff should change the name of its store from "Africa House." 295 F.3d at 1073-74.

A closer case was presented in *Hardeman* on the issue of racially discriminatory intent in Mayor Baca's refusal to grant the plaintiff a post-termination contract. This Court determined, however, that several facts collectively established the necessary basis for the jury's determination that racial discrimination was present. Those facts were that Baca had dealt differently with problems with non-black department heads than he did in dealing with the plaintiff; that he failed to investigate the charge that his auditing department was baselessly targeting contracts with black businesses and entities; that he wrongly assumed that the plaintiff was responsible for the criticism directed at him by Albuquerque's black community after he fired her, just because she was black; and

that he took various adverse actions against other black employees in plaintiff's department after she had been terminated. 377 F.3d at 1117. And in *Delaunay*, in which the plaintiffs (a Frenchman and his wife, a member of the Arapaho tribe) claimed that Arapaho tribal officials wrongfully attempted to prevent them from utilizing their adjudicated water rights on their ranch (which included land they owned in fee and leased tribal land) within the boundaries of the Wind River Reservation in Wyoming, there was substantial evidence of racially discriminatory intent toward Mr. Delaunay. The defendants, including the tribal official responsible for administering water rights on the reservation, made private and public remarks to Mr. Delaunay to the effect that he was merely a visitor with no rights on the reservation, they physically attempted to prevent the Delaunays from diverting water onto their land, and when the Delaunays went to the tribal water board to get assistance, the defendant told them to leave the ditch alone, and that they had no right to be on tribal land, while handling complaints brought to the board by tribal members in a conciliatory and cooperative manner. There was also evidence that the same defendant had had similar conflicts with another non-Indian who had previously had land on the reservation. 97 Fed.Appx. at 231-32, 233; 2004 WL 377665 at 4-5, 6-7. This Court viewed that evidence as sufficient to support the jury's verdict for the Delaunays, and affirmed the district court's refusal to grant the defendants judgment as a matter of law. 97 Fed.Appx. at 234;

2004 WL 377665 at 7.

In *Stewart v. Adolph Coors Co.*, 217 F.3d 1285 (10th Cir.2000) on the other hand, the plaintiff's evidence of racially discriminatory intent consisted solely of racially disparaging or otherwise inappropriate remarks made by various Coors employees at various times, most of them years before or after the complained-of employment action. *Id*. at 1289. This Court affirmed the district court's grant to the defendant of judgment as a matter of law, noting that anecdotal evidence of prior acts of discrimination could only be relied on to show racially discriminatory intent if they can "'somehow be tied to the . . . actions disputed in the case at hand.'" *Id*. (*quoting Heno v. Sprint/United Management Co.*, 208 F.3d 847, 856 (10th Cir. 2000)) (citations omitted by the Court).

The record of the instant case contains nothing comparable to the evidence that established the basis for the findings of discriminatory intent in *Hampton*, *Guides*, *Ltd.*, *Hardeman* or *Delaunay*. There was no showing that Defendant Armijo established any policies or practices that targeted whites, or the Burrells in particular, on the basis of their race, that he treated white people in a discriminatory manner or that he made any disparaging or derogatory statements to or about other whites or the Burrells, race-based or otherwise. There is not even any evidence such as that in *Stewart*, of any prior racially disparaging statements by Defendant Armijo. The only thing Defendant Armijo did, according to the

Plaintiffs' own evidence, was to order them to stop baling alfalfa at night, which action he took because of a complaint about the noise of the operation. Plaintiffs contend that the essential racial motivation for that action is shown, indirectly, of course, by the fact that no tribal member was ordered not to bale at night.

That fact alone–and that is literally all that Plaintiffs can argue based on the trial record that is in any way related to race–does not satisfy Plaintiffs' burden to show racially discriminatory intent here. First, Mr. Burrell himself testified that only some Pueblo farmers conducted baling operations at night. Applt. App. at 171. More importantly, however, Defendant Armijo explained in detail why he ordered the Burrells to stop nighttime baling: because of a complaint about the noise by Eliseo Raton, a tribal member who was a former governor of the Pueblo and who, Mr. Armijo feared, might confront the Burrells directly, and "make things worse," if Defendant Armijo did not deal with the situation. Applt. App. at 487; *and see id.* at 451-57, 485-86. Mr. Armijo had never had any similar complaint about nighttime noise directed at a tribal member. *Id*. at 470. He explained that his first response to Mr. Raton was to tell him, "'Okay, I'll send one of my officers over there;'" but Mr. Raton insisted that Mr. Armijo deal with it personally. "'Well, you're the *tahpo* [Keres for "Governor"],'" he said. "'You take care of it.'" *Id.* at 452. Mr. Armijo testified that he had never before had any problems or adverse encounters with the Burrells, *id.* at 451, 468, but confronted

with Mr. Raton's insistent complaint on behalf of his daughter, he decided that he had to take action. As Mr. Burrell commented, "As far as [Gov. Armijo] was concerned, he did his job." *Id.* at 174.

Plaintiffs made no effort to refute this showing of a nondiscriminatory basis for Gov. Armijo's action, or to show that it was pretextual. Indeed, they corroborated it with their own testimony. Mrs. Burrell said she knew that the Burrells had a "new neighbor," a tribal member who had just moved in near them, but she did not know who it was. Applt. App. at 374. And she noted that the evening before they were visited by Gov. Armijo, a tribal police officer had been at their home when they finished baling in the middle of the night, and told them that there had been "a complaint about noise." *Id*. at 372. Mr. Burrell testified that he knew that it was Eliseo Raton's daughter who had "complained about the noise." *Id.* at 267.

Not only was there no evidence supportive of any inference of racially discriminatory intent behind Gov. Armijo's action, the evidence was that Mr. Armijo and Mr. Burrell had been on friendly terms previously. Mr. Armijo testified that he occasionally borrowed equipment from Mr. Burrell, and visited with the Burrells from time to time, *id.* at 450-51, 469, and Mr. Burrell added that he had baled Mr. Armijo's alfalfa in the past. *Id*. at 214. Mr. Armijo further noted that numerous other non-Indians worked for the Pueblo, and that he never

experienced any difficulties between him and any of them in any of his three terms as Governor. *Id*. at 466-67. Moreover, the claim that Mr. Armijo issued the no-night-baling directive to the Burrells because of racial animus makes no sense: the Burrells had been operating like this on tribal land for 17 years, and Leonard Armijo had been Governor the year before this dispute arose, yet there had never been any previous restriction imposed on their baling operations. And even at the time of Gov. Armijo's no-night-baling directive, the Burrells had already baled the alfalfa on the 116 acres they leased near the south end of Santa Ana's lands, *id*. at 283, with no limit on when those operations were conducted. The contention that Gov. Armijo issued his directive because he was prejudiced against the Burrells on account of their race, thus, lacks any rationality: the directive only makes sense in light of the clear, race-neutral explanation that Mr. Armijo gave for it, and that explanation entirely refutes any claim of racially discriminatory intent.

The Plaintiffs had the burden to prove racially discriminatory intent behind Defendant Armijo's directive to the Burrells to cease baling at night, by substantial evidence. They offered no such proof. Their bare claim, that the fact that no tribal member was ordered not to bale at night suffices to show racial discrimination, fails in the face of Defendant Armijo's racially neutral explanation for his action: that there were never any complaints against tribal members' baling operations, but that there was a complaint against the Burrells, that as Governor he

felt compelled to address. That explanation, importantly, was corroborated by the Burrells' own testimony, and was not disputed or contradicted in any respect. In light of that, the suggestion that an inference of racial discrimination can be drawn from the bare fact that no tribal member was given such a directive, which was the sole justification given by the district court in refusing to grant Defendant Armijo judgment as a matter of law on this issue, Applt. App. at 157, must be rejected, and beyond that there was no evidence at all, much less any "legally sufficient" evidence, to support the verdict. The district court's failure to grant Defendant Armijo judgment as a matter of law on the issue of racially discriminatory intent, thus, was clear error.

C. There was no evidence that Gov. Armijo's directive caused the loss of any valid contractual rights enjoyed by the Burrells.

The other crucial element of a claim under 42 U.S.C. § 1981 is interference with the making or enforcing of a contract. *Hampton*, 247 F.3d at 1101 (plaintiff must show "actual loss of a contract interest"); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir. 1989) (same). Plaintiffs contended in their Response to Defendant's Motion for Judgment as a Matter of Law, at 18, Applt. App. at 125, that Defendant Armijo's baling restriction impaired their rights under their lease. The district court's Rule 50 Opinion was silent on this issue: the court simply concluded that there was sufficient evidence on which the jury could have

found that Defendant Armijo engaged in racial discrimination, but it did not identify any contract right with which any such discrimination interfered, much less one that was lost completely, as this Court's precedents require. *Id*. at 157.

It should be recalled that this is not the § 1981 claim that was pled by Plaintiffs. In their Complaint, the contract that they alleged was interfered with was the alleged decision of the Santa Ana Tribal Council to buy out their lease for $500,000, an action that they claimed Defendant Armijo refused to implement. Complaint at ¶¶ 27, 31, 88-90; Applt. App. at 22-23, 31-32; *see supra* n. 1. The no-night-baling directive was not even mentioned in that claim. The Plaintiffs' current contention, that the no-night-baling directive somehow caused them to lose their contract rights, arose only when it became clear at trial that the Plaintiffs had no admissible evidence that would support the $500,000 buy-out claim. Applt. App. at 201-02. But this last-minute substitute theory does not work: there is no evidence whatever that supports the argument that the baling directive prevented the Burrells from making or enforcing any contract, or that they lost any contract rights as a result of it.

The Burrell lease, Plaintiffs' Exhibit 1, Applt. App. at 749-59, contains several detailed provisions concerning the conduct of farming operations on the leased land, but it says nothing whatever about how or when the Burrells could undertake baling operations, nor is there any general language in the lease

authorizing the Burrells to conduct their operations free of tribal regulation. As the Supreme Court has observed in a very similar context, "[c]ontractual arrangements [with Indian tribes] remain subject to subsequent legislation by the presiding sovereign." *Merrion*, 455 U.S. at 147. The Burrells' conduct under their lease thus was subject to reasonable regulation by the Pueblo, through its authorized officials.

Moreover, although it is apparent that baling alfalfa at night was the Burrells' preferred practice, it plainly was not the only viable approach to harvesting alfalfa. Mrs. Burrell (who kept the records for the Burrell farming operation) testified that in 1996 the Burrells baled slightly less than 5000 bales of alfalfa from their 168 acres of leased land (not all of which, to be sure, was in alfalfa). Applt. App. at 432. By comparison, the Santa Ana tribal farm project, which for economic reasons, *see* Applt. App. at 661-62, *never* baled at night, in 2007 harvested 7100 bales of alfalfa from its 60 acres. *Id*. at 660. Jerry Kinsman, the general manager of the tribal division that includes the tribal farm, testified that with intelligent management of the baling operation, it was entirely possible to obtain good quality and quantity harvests of alfalfa without nighttime baling. *Id*. at 663-64.

There is thus no basis for the contention that precluding the Burrells from nighttime baling on their northerly fields (they completed their baling operations

on their south fields, without restriction; *id*. at 283), alone, prevented them from enforcing, or otherwise interfered with, their lease of tribal lands, much less caused an "actual loss" of any contract interest. The Burrells were not prevented from harvesting their alfalfa, or otherwise enjoying the benefits of their lease. They were merely prohibited from engaging in conduct on their lease that created a nuisance to tribal members. The situation is thus comparable to that in *Phelps*, in which this Court affirmed the dismissal of the plaintiff's § 1981 claim, because the claim was merely of a possible loss of future contract opportunities. In no way, this Court observed, had the defendants' allegedly wrongful conduct denied plaintiff "the basic *right* to contract." 886 F.2d at 1267.[6]

Plaintiffs also argued that the no-night-baling directive actually caused the Burrells to lose their lease altogether, but this outlandish claim is thoroughly refuted by the Burrells' own testimony. The letter from the Burrells' first lawyer, Nancy Kirkwood, Defendants' Ex. C, Applt. App. at 740-41, had informed the Pueblo in June that the Burrells intended to give up their farm, and Mr. Burrell

[6]In 1991, Congress amended § 1981 to add paragraphs (b) and (c). Paragraph (b) defined the term "make and enforce contracts" broadly, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." In *Hampton*, this Court clarified that the 1991 amendments did not change the requirement set forth in *Phelps*, of "an actual loss of a contract interest." 247 F.3d at 1101 n.1.

acknowledged that he and his wife made their decision to move off of their lease in late August or early September, 1997, about three months after the evening encounter with Gov. Armijo in their fields. And he freely admitted that neither Gov. Armijo nor anyone else had told them to leave, or had threatened them if they did not leave, or had in any way forced them out. Applt. App. at 308-09. They made their own decision to pick up and go. *Id*.

It is moreover significant that the Burrell lease was eventually cancelled by the Bureau of Indian Affairs, based on findings of multiple breaches of the lease terms by the Burrells, and that decision was affirmed on appeal by the Interior Board of Indian Appeals. The Burrells never sought review of that decision in federal court. *Burrell*, 456 F.3d at 1163-64. This Court previously held that that fact precluded the Burrells from asserting any breach of lease claims against the Pueblo or the individual defendants in this case. *Id.* at 1174. For the same reason, they should be precluded from asserting a § 1981 claim based on loss of their lease rights. But regardless, they failed to present any evidence tying Defendant's action to any such loss, and the district court clearly erred in failing to grant Defendant Armijo judgment as a matter of law on this ground.

III. THERE WAS NO EVIDENCE ON WHICH A JURY COULD REASONABLY HAVE BASED ANY AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANT ARMIJO

Standard of Review: Whether there was sufficient evidence to support an award of punitive damages "'is a question of law reviewed de novo.'" *Guides, Ltd.*, 295 F.3d at 1077 (*quoting Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995)).

In *Guides, Ltd.*, this Court held that in an action based on § 1981, punitive damages could not be awarded based on no more than a showing of intentional discrimination. "Otherwise, every jury verdict in a successful § 1981 or § 1982 claim would include an award of punitive damages. Instead, we believe that a plaintiff must prove that the defendant acted with malicious, willful or gross disregard of a plaintiff's rights over and above intentional discrimination." 295 F.3d at 1077;[7] *and see Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243, 1245 (10th Cir. 2003). In *Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1308-

[7]In the paragraph just before the one in which the quoted language appears, the Court said that the standard for punitive damages in a civil rights action "requires that the discrimination must have been malicious, willful *and* in gross disregard of the rights of the plaintiff." 295 F.3d at 1077 (emphasis added). In *Hardeman*, however, this Court corrected itself, explaining that a defendant's conduct does not have to be knowing or willful to support an award of punitive damages, and that it is only necessary that the defendant's conduct be shown to be "'motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" 377 F.3d at 1120-21 (*quoting Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1308 (10th Cir. 2003)).

09 (10th Cir. 2003), this Court explained that in considering whether punitive damages may be warranted by the evidence in a particular case, the "focus must be on whether the defendant's actions call for deterrence and punishment over and above that provided by compensatory awards." (Internal quotation marks omitted.) *And see Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("substantial damages should be awarded only . . . in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.")

In refusing to overturn the award of punitive damages in its Rule 50 Opinion, the district court cited only the point that Defendant Armijo "intentionally imposed restrictions on Plaintiffs that could be characterized as dealing a fatal blow to the viability of their farm business, and that similar restrictions were never imposed on non-whites." Applt. App. at 158. In other words, the court justified the award on the basis of evidence that it characterized as showing intentional discrimination, exactly the showing that this Court, in *Guides, Ltd.* and *Juarez* said could *not* support a punitive damages award.

But there is no other evidence in this record that *can* support such an award. There is no evidence of malice or "evil motive" on Defendant Armijo's part, or of deliberate intention to cause harm to the Burrells, or of reckless disregard of their rights. Nor can Mr. Armijo's behavior be characterized in any respect as being of the sort that should be deterred and punished, like the efforts by the defendants in

Youren to cover up sexual molestation of children by school staff. It is worth recalling Mr. Burrell's own comment, that in directing the Burrells to stop baling at night, Mr. Armijo just "did his job." Applt. App. at 174.

The district court's refusal to set aside the punitive damages verdict, thus, directly contradicted controlling precedent of this Court. The evidence presented at trial established no basis whatever for any award of punitive damages, and should this Court conclude that Defendant Armijo is not protected by the Pueblo of Santa Ana's sovereign immunity, and that he violated the Plaintiffs' rights under § 1981, the award of punitive damages, at least, must be rejected.

IV. THE EVIDENCE WAS UTTERLY INSUFFICIENT TO SUPPORT THE JURY'S AWARD OF COMPENSATORY DAMAGES

Standard of Review: On an appeal from a denial of a motion for judgment as a matter of law on the issue of whether there was sufficient evidence to support an award of compensatory damages, the court of appeals will review the record as a whole to determine "whether the damage award is supported by substantial evidence." *Hampton*, 247 F.3d at 1114.

The jury awarded the Burrells $347,000 in compensatory damages, but there was no evidentiary support for any such award. Even if Defendant Armijo could be found liable to the Burrells under § 1981, under no circumstances can the

damages award be sustained, and the district court committed clear error in failing to set that award aside.

There were only two types of losses testified to by the Plaintiffs in this case. One was the loss of income from the Plaintiffs' farm at Santa Ana, which was based on data compiled by Mrs. Burrell, and the other was the emotional distress they claimed to have suffered as a result of the move. But Mr. Burrell testified very clearly that their decision to move off of Santa Ana land was their own decision, that they made voluntarily. Defendant Armijo did nothing to make them leave. Applt. App. at 308-09. That was, in fact, a decision they had arrived at early on, and that was communicated to the Pueblo by Nancy Kirkwood's letter. Defendants' Ex. C, Applt. App. at 740-41. And subsequently, as was noted *supra* at 37-38, the Burrells' lease was terminated by the BIA for multiple breaches. There is thus no actual basis for *any* claimed damages arising from the Burrells' voluntary decision to leave Santa Ana. Nor did the Burrells present any evidence of the loss they claimed to have suffered directly due to the no-night-baling directive. The situation is thus quite similar to that warned against by the Supreme Court in *Carey,* 435 U.S. at 263-64, where it noted that "although mental and emotional distress caused by [violation of one's rights] itself is compensable under § 1983, . . . neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such

injury *actually was caused*." (Emphasis added.) The jury's entire compensatory damages award should thus be set aside.

Even if Defendant Armijo could be charged with responsibility for the Burrells' decision to leave their farm, a proposition that, as is noted *supra* at 37, has no basis in the record, moreover, the damages awarded by the jury have virtually no evidentiary support. It is important to recall that the Burrells' lease would have expired in September, 2000, and thus at the very most, they could only claim lost farm income for a period of four years, including 1997 (in which they actually did receive substantial income from the farm, but not as much as they expected, due to their termination of their farming activities in June). Although the numbers are uncertain, Mrs. Burrell claimed that the Burrells had earned net income of between $6321 and $7130 in 1996. Applt. App. at 433. Interpreting that evidence generously in favor of the Burrells, at the most, the jury could have reasonably concluded that the Burrells' lost farm income would have been about $25,000.00 through the end of their lease.

Otherwise, the only loss the Burrells could describe was the "emotional distress" of having to move off the farm. Again, assuming that Defendant Armijo could be held liable for the Burrells' voluntary decision to abandon their lease and move off of Santa Ana land, the evidence of their emotional distress is so vague, sketchy, and conclusory that it cannot under any circumstance be viewed as

meeting the "substantial evidence" standard this Court applies to a jury's award of compensatory damages. *Hampton*, 247 F. 3d at 1114.

Mr. Burrell's testimony as to the emotional distress he suffered, and his financial losses, consisted in its entirety of the following exchange:

> Q. Okay. Now you testified a little about the effects this had on you. I want to get into that a little bit. What kind of effects did this, the loss of this farm, have on you personally?
>
> A. I don't know.
>
> Q. Well, did it cause you any kind of financial problems?
>
> A. Definitely.
>
> Q. Okay, and did it have an emotional effect on you?
>
> A. Very much.
>
> Q. Okay. Worry?
>
> A. Definitely.
>
> . . .
>
> Q. What effect did it have on your relationships with people in the tribe?
>
> A. The tribe as a whole, it didn't have much. I had a bunch of friends in the village, a bunch, it made me mad at the tribal officials. That's all.
>
> Q. Okay. Were you able to go back onto the pueblo?
>
> A. After I moved, no.
>
> Q. Why, did you feel that you couldn't go back on the tribal land?

A. No need to go back.

Q. Okay. How about sleeplessness? Did it cause you to lose sleep?

A. Yeah. Uh-huh.

Q. Did you ever feel sadness?

. . . .

A. Yes.

Q. Any other kind of emotions that you want to relate to the Court or the jury?

A. No.

Applt. App. at 289-91.

At the most, all one can conclude from that testimony is that the Burrells' decision to leave their farm at Santa Ana caused Mr. Burrell some kind of financial concern, caused some worry, and caused him to lose some sleep. Otherwise, his testimony makes the Burrells' departure from Santa Ana appear to be little more than an inconvenience. It certainly does not come across as a particularly stressful or trying experience, and by no means could it warrant a jury award of $347,000.00.

Mrs. Burrell's testimony was hardly more detailed. For the most part, she described her unhappiness that she had to move away from the Pueblo to a different location, but that would have been true when the lease terminated

regardless. There is no effort by her to quantify whatever portion of that unpleasantness could be ascribed to leaving three years earlier than they would have otherwise done. She stated that she was "basically depressed," and that she missed her friends at the Pueblo, although she did continue to have contact with some of them, but otherwise she revealed herself as someone who took the change in stride and adjusted to her new situation. *See* Applt. App. at 415-20. In light of the Supreme Court's injunction that "an award of damages must be supported by competent evidence concerning the injury," *Carey*, 435 U.S. at 264 n.20, it is apparent that the award in this case must be set aside. There is certainly nothing in this record like the "'eloquent and emotionally moving testimony'" given by the plaintiff in *Hampton*, of how disgraced and humiliated she felt when she was accused of theft by the store security guard, in front of her friend, her children and others. 247 F.3d at 1115 (quoting district court opinion, *Hampton v. Dillard Dept. Stores, Inc.*, 18 F.Supp. 2d 1256, 1275-76 (D.Kan.1998)). Rather, the Plaintiffs' testimony here is very much like the evidence in *Cousin v. Trans Union Corp.*, 246 F.3d 359, 370-71 (5th Cir. 2001), that the Fifth Circuit found to be "legally insufficient" to support an award of $50,000 in compensatory damages. As two other courts of appeals have observed,

> although a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation, "the testimony must establish that the plaintiff suffered

> *demonstrable emotional distress, which must be sufficiently articulated*; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award for compensatory damages."

Akouri v. Florida Dept. of Transportation, 408 F.3d 1338, 1345 (11th Cir. 2005) (*quoting Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir.1996)) (emphasis added). In *Price*, the Fourth Circuit analyzed opinions from various federal circuits and set forth a set of nine factors that could be used as a guide in considering whether sufficient evidence had been presented to support an award of emotional distress damages. 93 F.3d at 1254. None of those factors supports the award in this case.

Finally, there is the fact that the Burrells failed to mitigate whatever damages they might claim, by accepting the Pueblo's settlement offer. That offer amounted to well over $200,000.00 in direct financial benefits to the Burrells, primarily by paying off their outstanding FHA loan (which they were still paying off at the time of the trial), by offering Mr. Burrell continued income from work with the tribal farm project, and in other ways. *See* Defendants' Exs. F and Q, Applt. App. at 742-43, 745-46. Although directed to do so, there is no indication that the jury took this substantial foregone benefit into account in calculating the Burrells' damages.

In short, Defendant Armijo submits that the compensatory damages award

can in no way be supported by the evidence presented at trial, and the district court erred in failing to set that award aside in its Rule 50 Opinion.

CONCLUSION

For all of the foregoing reasons, Defendant Armijo urges that the district court's rulings as to him in its Rule 50 Opinion must be reversed, and that the claims against him should be dismissed in their entirety on the ground that his actions with respect to the Burrells were fully protected by the sovereign immunity of the Pueblo of Santa Ana; or, in the alternative, he should be granted judgment as a matter of law on the ground that the evidence failed to establish the necessary elements of a claim under 42 U.S.C. § 1981; or, in the alternative, the award of punitive damages should be set aside in its entirety, and the compensatory damages award should likewise be set aside, or alternatively, reduced to an amount actually justified by the competent evidence in the record.

Request for Oral Argument: Defendant-Appellant Armijo requests that the Court grant oral argument on this appeal, and as grounds therefor states that Appellant believes that oral argument would be beneficial to the Court, given the complexity of the sovereign immunity issue and the issues relative to the sufficiency of the evidence for purposes of the § 1981 claim. Appellant would note that this Court set this case for oral argument *sua sponte* on the first occasion

the case was appealed to this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,139 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as measured by the WordPerfect X3 software by which it was created.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 software, in 14 point Times New Roman font.

_s/ Richard W. Hughes_____
Richard W. Hughes
Attorney for Defendant-Appellant Leonard Armijo

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellant's Opening Brief as submitted in digital form is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Anti-Virus program, version 10.1.0.394, Virus Definitions File Dated 4/30/2009, rev. 18, and, according to the program, is free of viruses.

_s/ Lynne E. Stroud_____
Legal Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2009, I caused a true copy of the foregoing Appellant's Opening Brief to be sent by United States Mail to the following:

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Additionally, on the same date a copy of the digital submission in electronic form was emailed to: clucerojr@aol.com.

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