

**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

v.

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**

PRINCIPAL/RESPONSE BRIEF

OF APPELLEES BOB BURRELL AND SUSAN BURRELL

Submitted by:

**Chris Lucero Jr.
P.O. Box 7429
Albuquerque, NM 87194
(505) 843-6687
*Attorney for Plaintiff--Appellee***

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Oral Argument Requested

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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.

B. Jurisdiction in this Court is proper under 28 U.S.C. § 1291, and Fed.R.App.P. Rule 4(a). The district court's decision on Defendants' Rule 50(b) motion amended judgment on January 15, 2009, which upheld the jury verdict against Governor Leonard Armijo, but set aside the verdict as to Lt. Gov. Lawrence Montoya. Plaintiffs Burrell timely filed their Notice of Appeal regarding Lawrence Montoya on February 20, 2009. This appeal is from a final order and judgment that disposed of all claims in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. DID THE LOWER COURT ERR STRIKING PARAGRAPHS OF THE COMPLAINT
- II. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S VERDICT OF RACIALLY DISCRIMINATORY INTENT ON DEFENDANT ARMIJO'S PART, LISTED AS ISSUE 2 IN ARMIJO'S OPENING BRIEF
- III. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANTS, LISTED AS ISSUE 3 IN ARMIJO'S OPENING BRIEF
- IV. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S AWARD OF COMPENSATORY DAMAGES, LISTED AS ISSUE 4 IN ARMIJO'S OPENING BRIEF

V. THE LOWER COURT ERRED IN SETTING ASIDE JURY'S VERDICT AGAINST LT. GOVERNOR LAWRENCE MONTOYA AND FINDING OF CONSPIRACY IN VIOLATION OF 42 U.S.C § 1985, BY DEFENDANTS' CONTESTED RULE 50 MOTION

VI. THE DISTRICT COURT DID NOT ERR IN FINDING THAT DEFENDANTS' ACTIONS WERE NOT PROTECTED BY SOVEREIGN IMMUNITY, LISTED AS ISSUE 1 IN ARMIJO'S OPENING BRIEF

STATEMENT OF THE CASE

On April 14, 1998, the Burrells filed their first federal complaint in the U.S. District Court for New Mexico, *Burrell v. Leonard Armijo, et al*, CIV 98-0438 JC/WWD, which was dismissed on September 2, 1998, for failure to exhaust tribal remedies. The Burrells then immediately filed the identical complaint in the Santa Ana Tribal Court, *Burrell v. Leonard Armijo, et al.*, SA CV-123-98. After four years of no action by the tribal judge on pending motions or a requested jury trial, on May 14, 2002, Burrells re-filed their second federal complaint in instant *Burrell v. Armijo*, No. CIV 02-542 WJ/DJS (D.N.M), in part alleging that exhaustion of tribal court remedies was futile, given four years of tribal court inaction. District Judge William P. Johnson issued judgment granting defendants' motion to dismiss based on *res judicata* and sovereign immunity. This Court reversed as to the individual tribal defendants but upheld the dismissal of the Pueblo of Santa Ana on sovereign immunity grounds in *Burrell v. Armijo*, 456 F. 3d 1159 (10th Cir. 2006). The Burrells filed a Petition for Writ of Certiorari with

the United States Supreme Court, No. 06-721, asking it to reverse the dismissal of the Pueblo of Santa Ana by reversing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), and for the Court to imply a private right of action in the Indian Civil Rights Act of 1968, 25 U.S.C. Section §1301. The Petition was denied, and the 10th Circuit remanded the case to the lower court.

A jury trial was held over five days. The jury returned a verdict against Governor Leonard Armijo and Lt. Gov. 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, and send the Judge a note asking if they could award attorney's fees "from June 2, 1997 to the present." Verdict and note, Aplee App. 102-7. Defendants filed a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. Rule 50(b), seeking judgment in their favor notwithstanding the jury verdict, and the court ruled on January 15, 2009 (Doc.198) upholding the verdict against Governor Leonard Armijo and granting the motion and setting aside the verdict as to Lt. Governor Lawrence Montoya. With respect to Defendant Armijo, the Court concluded that he 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; and further found that there was sufficient evidence to support the awards of both compensatory and punitive damages. Appellant Leonard Armijo appealed, and the Burrell cross-appealed the lower court's setting aside the verdict against Lawrence Montoya.

STATEMENT OF FACTS

On May 20, 1980, Bob and Susan Burrell were given a ten year lease for 171.9 acres of Santa Ana Pueblo land by a signed "Lease" with the Southern Pueblos Indian Agency of the Bureau of Indian Affairs of the Department of the Interior, designated Farm Lease No. 3210018090, P's Exhibit 1 [Aplee App. 23-32]. The Burrells accepted this lease based on the promises tribal administrators were giving them that if they ran a successful farm operation like at nearby Sandia Pueblo, the lease would be renewed as long as the Burrells lived. *See* ¶1-4 of Affidavit of Bob Burrell [Aplee App. 88], .

Bob Burrell had been a successful construction contractor in Albuquerque, New Mexico, but gave that business up to enter into said lease. The Burrells liquidated all of their assets, including a home, business assets and personal property, generating over \$70,000 to use in the development of said farm. *Id* at ¶2. With their own funds, they bought a house trailer and moved on an old "feed lot" tract on the Pueblo of Santa Ana and installed a well, a septic tank, and power

and phone lines. The field across from the mobile home had large trees and rocks, and at one time was used as a dump by the Pueblo. The Burrells cleaned up the fields; cleared trees, rocks and refuse; plowed; built fences; dug ditches. They bought their first tractor, a 1967 International for \$6500 in 1981. All the while, they integrated into the ways of the Santa Ana Pueblo people. See Affidavit of Bob Burrell [Aplee App. 88-97].

The farm acreage was raw and undeveloped, and the Burrells had to remove 40-45 trees, level the property, install irrigation systems, and treat the soil with fertilizer for years in order to get the farm producing. They worked the farm for seventeen (17) years to get the farm into full production, living quietly and peacefully on the Pueblo and were gradually accepted by the people, making many friends and becoming a part of the Pueblo community. When they had trouble with cows infiltrating their field and causing damage, the Burrells were able to work it out peacefully. *Id.* On February 1, 1985, the Santa Ana Tribal Council extended the lease for another 10 years, based in part on the excellent work that the Burrells and their need for an FmHA loan and mortgage to buy equipment. See P's Ex. 2, Tribal Council Resolution Tribal Resolution 85-R-13 and correspondence to the Southern Pueblos Agency. [Aplee App. App. 33-34]. They were repeatedly told by the Tribal officials that they would be able to stay on the farm for their entire lives. See Affidavit of Bob Burrell [Aplee App.88-97].

The Burrells bought a long horn bull and some heifers to start a small cattle operation in 1983-4, and the herd was upgraded over the years with registered stock. Some of the fields with high alkali content could not be made productive until the late 1980's, after many failures. Over the years, the Burrells obtained farm loans from the Farmer's Home Administration to buy farm equipment and materials and supplies to create and run the farm, and at one time were in debt for \$240,000. They had to service the debt and generate enough income to live from the farm operations, and in the beginning years they suffered extreme hardship in order to survive. Susan Burrell survived cancer, and had to work part-time at a video store to make ends meet. *Id.*

They continuously improved the property, buying farm equipment, building storage buildings, installing water and sewer hook-ups, laser leveling much of the property, and working the soil. They paid their lease payments, water rights assessments, FHA mortgage payments, taxes, and complied with all regulations and requirements imposed on them from the Southern Pueblos Agency of the Bureau of Indian Affairs, the Santa Ana Pueblo and the Farmers Home Administration. *Id.* The strain of keeping the farm productive drove Bob Burrell into a heart attack on December 26, 1993, and he requested Santa Ana Pueblo to approve moving another mobile home on the property so that his daughter and her husband could help run the farm [P's Ex. 5, Aplee App. 35],

which request was approved by Santa Ana Tribal Council on February 1, 1994, as shown by letter from Tribal Administrator Roy Montoya. [P's Ex. 6, Aplee App. 36].

Tribal Officials continued to tell the Burrells that they had done a fantastic job with the farm and that they would have the farm for the rest of their lives. The Pueblo also approved another extension of the lease to the year 2003 in order for them to get further FmHA financing. See Affidavit of Bob Burrell [Aplee App. 88-97]. Defendant Leonard Armijo took the office of Governor in 1997, a year the Burrells felt was going to be an excellent crop year giving them expectations that their 17 years of hard work was going to be finally paying off. Leonard Armijo was already Acting Chief of Police when the Pueblo could not keep a professional chief of police to stay on the job due to all the political infighting and discrimination. He fired Roy Montoya as Tribal Administrator, who had held said position since the mid-1980's. The Burrells had a long a successful business relationship with Roy Montoya. *Id.* at ¶ 10.

The Pueblo had also started construction of concrete irrigation ditches to feed one part of the Pueblo's farming areas used by individual Pueblo members; however, construction delays prevented the completion of the concrete ditches, and these individual Pueblo members could not irrigate their fields and therefore their livestock was put in jeopardy. Testimony of Bob Burrell. Aplnt App. Vol.

I, 228-232 For 17 years the Burrells bailed hay at night when the moisture content is high which is standard farming practice. Id at 166-172. The different in value between hay bailed at night at exactly the right moisture and protean contain verses during the day can be several dollars per bale, or the difference between a farm surviving or not. Id at 166, 173, 203-204 During all those 17 years they loaned equipment to their neighbors, helped members of the Pueblo plow their fields and bail hay, and were consistent good neighbors to Pueblo friends. Id. at 231-232.

On June 1, 1997, Governor Leonard Armijo drove to one of Burrell's fields in his Chief of Police car and ordered the Bob Burrell to no longer bail hay at night, ordering him and Susan Burrell off their farm equipment. Testimony of Susan Burrell, Aplnt App. Vol. 2 p 372-374. Tribal members were allowed to bail at night. Testimony of Bob Burrell, Aplnt App. Vol. 1, p 181-3. The Burrells tried to get Governor Armijo and Lt Gov. Lawrence Montoya to meet and agree to some reasonable solution to the bailing problem, but they and all the other tribal officials the Burrells talked to, refused to do anything. Id at 174-181.

In early June 1997, Lt. Governor Lawrence Montoya went to the Burrell house, and Bob Burrell initially just wanted the bailing order rescinded, but Montoya asked what it would take for the Pueblo to buy out the Burrells. Id at 178, 184-5, 192-3 Bob offered \$500,000, and was told that nothing could be

done until after Feast Day on July 26, 1997. Id at 233-4. The Burrells testified that when a crop was cut was a crucial time, and each day that went by severely affected the quality of their crop. Bob Burrell testified that he tried to contact anyone he could think of to help get a meeting with Governor Armijo, Lt. Governor Montoya or the Tribal Council, and he got no response. Id at 174-181. The Burrells needed to make four crops harvests to make a profit, and as days passed in June 1997 with these Tribal officials refusing to try to resolve this no baling order, the Burrells got progressively more desperate. Id at 166, 173, 203-204. The Burrells went to see Nancy Kirkwood, an attorney, who wrote a letter to the Tribe on June 18, 1997, indicating the Burrells would be ruined by this no-bailing order. Id at 186, 206-206. However, that lawyer never followed up in trying to resolve the problems, and when the tribe's attorney Bill Halthom tried to contact her on July 10th, but she told him she no longer represented them.

Testimony of Bill Haltom, Aplnt App. Vol. III, 599

On the morning of July 10, 1997, the tribe began to actually take the Burrells' crop without their permission, hiring an outside contractor to bale the hay and stack it on Pueblo property, with the tribe's baling occurring during the hours of restriction imposed on the Burrells. Testimony of Bob Burrell, Aplnt App. Vol. I, 243-247 The Burrells introduced a video of the Pueblo farm crew taking their crop in the early morning of July 10 without their permission. Id at

244, Vol. II at 140; Plaintiff's Ex. 48. That night on July 10, 1997, the Defendant tribal officials presented at a Tribal Council meeting an agenda that included an item "Request to enter into negotiations about termination of Burrell lease," and a committee was formed of Lt. Governor Lawrence Montoya, Farm Administrator Jerry Kinsman, and tribal attorney Bill Haltom, to try to resolve the issues with the Burrells or to enter into negotiations about buying the BIA farming lease.

Testimony of Armijo, Aplnt App. Vol. II at 463-464. However, Lt. Governor Lawrence Montoya had already ordered Farm Administrator Jerry Kinsman to harvest the Burrell crop and distributed it to tribal members who could not farm due to the delays in the ditch lining project. See Tribal invoice to Bob Burrell, P's Ex. 42 Aplee App. At 67, which shows their first taking occurring on July 10, 1997, harvesting 1106 bales using an outside contractor. Defendant tribal officials made absolutely no effort towards a simple practical solution about the bailing restriction order. On July 20, 1997, Lt. Governor Lawrence Montoya called Burrell and told them to "sell their cows", which had grown to a herd of 50 mother cows, 50 calves and one bull. Plaintiffs Ex. 49 was the audio tape of the telephone voice message left by Lt. Gov. Montoya, played to the jury. Bill Haltom, the tribes attorney, after the July 10 tribal meeting "took a vacation" and was not available until August 5. Aplnt App Vol III at 596, 599. He acknowledged that the pueblo had "no authority to cancel the lease" which could

only be done by the BIA. Aplnt App Vol III at 603. The BIA was never involved in anything until Gov. Armijo wrote BIA Superintendent Florine Gutierrez, a letter on August 5, 1997, alleging the Burrells had abandoned the lease, and requesting that BIA to take steps to “terminate or enforce the lease.” P’s Ex 11, Aplee App. at 38. On August 27, 1997, Clyde Sandoval, BIA employee (the same who owned the company that was building the ditch lining project using BIA funds) and another BIA employee conducted an inspection of the Burrell farm lease and they reported to the BIA Superintendent Gutierrez, who on September 3, 1997, wrote to Gov. Armijo that the Burrells “were in full compliance with all terms of the agreement” and that “It is felt that the Pueblo of Santa Ana should consider the above information in deciding on a fair settlement of the situation.” P’s Ex. 12, Aplee App. at 39. Nothing in this letter indicates that the Burrells had abandoned their farm, instead mentions Mr. Burrell’s claim that his farm “lease is being cancelled” by the Pueblo .

On August 25, 1997, the Burrells testified that they started to fear for their safety, had endured their crops taken, had already lost several cuttings of the four they needed for the season to be profitable, and decided to removed their two mobile homes and all of their farm equipment.

On August 29, 1997, Lawrence Montoya, Leonard Armijo, Nathan Tsosie and Pueblo attorney Bill Haltom met with Bob Burrell and indicated they would

try to get the tribal council to approve an offer to buy the Burrell lease and all the Burrell farm equipment and mobile homes for \$218,000 for the FHA loan payoff; a 3 years health insurance for the Burrells; the Pueblo would buy a home lot off of the pueblo to set up their mobile home; and to hire Bob as “Farm Manager” for the Pueblo. Aplee App at 95. On September 24, 1997, the Tribal Council approved this offer, and issued Tribal Council Resolution No. 97-R-21, [Aplee App. 42] however the Burrells testified they were not given a copy of the tribal council resolution until after they filed their first federal lawsuit the following year, and prior to that lawsuit they had never received a formal offer to settle from anyone, despite the existence of Resolution No. 97-R-21 and Defendants’ claims to the contrary.

Santa Ana Pueblo sent the Burrells an Invoice on October 7, 1997, claiming they owed the Pueblo \$9,283.31 for “Personnel Costs” for cutting the Burrells alfalfa and baling it. Plaintiff’s Ex. 42, Aplee App at 67. The Pueblo farm crew and hired contractors continued to take the Burrell crop through October 2, 1997, and they removed a total of 4541 bales of hay, and distributed 560 to “tribal families.” Id. The Burrells repeatedly insisted they never gave the Pueblo permission to take their crop, that they never abandoned their farm, and that the BIA never gave anyone permission for the Pueblo to take over their farm prior to termination of the lease in 1999. Aplnt App Vol I at 245, Vol II at 389-90.

On January 27, 1998, the Tribal Council voted Resolution No. 98-R-05, Aplee App at 48, which withdrew the offer contained in No. 97-R-21, with the Burrells receiving neither resolution prior to discovery in the first federal lawsuit.

SUMMARY OF ARGUMENT

I. The Lower Court err striking paragraphs of the Complaint, which involved the type of government at the Pueblo of Santa Ana, the division of power between the Tribal Council and these Tribal officials, what authority these officials had under tribal law to take the described actions against the Burrells, described a system of entrenched sex discrimination against women as an item of evidence in the case, and other matters which showed the motives and intent of these Tribal officials concerning their take-over of the Burrell BIA farm lease without involvement of the Bureau of Indian Affairs.

II. The Burrells point to substantial evidence in the record which supports the jury's finding of racially discriminatory intent by Defendants, in response to Issue 2 in Appellant Armijo's Opening Brief.

III. The Burrells point to substantial evidence in the record which supports the jury's award of punitive damages against Defendants, Listed as Issue 3 in Appellant Armijo's Opening Brief.

IV. The Burrells point to substantial evidence in the record which supports the jury's award of compensatory damages, in response to Issue 4 in Appellant

Armijo's Opening Brief

V. The Burrells argue that the lower court erred in setting aside the jury verdict against Lt. Governor Lawrence Montoya, since substantial evidence exists of his individual actions which support their findings he was guilty of violating the Burrell's constitutional rights and the award of damages against him individually and against him and Armijo based on 42 USC 1985

VI. The Burrells argue that the lower court did not err in finding that Defendant tribal officials actions were not protected by sovereign immunity since their actions against the Burrells were outside the scope of the legal authority.

ARGUMENT

I. DID THE LOWER COURT ERR STRIKING PARAGRAPHS OF THE COMPLAINT

Standard of Review: Motions under Rule 12(f) are not favored, *Salazar v. Furr's Inc.*, 629 F. Supp. 1403, 1411 (D.N.M. 1986), and that such motions are generally denied "unless the allegations have **no possible relation to the claims**," *Hill v. Cray Research*, 864 F. Supp. 1070, 1073 (D.N.M. 1991)(emphasis added).

This Circuit in *Burrell v. Armijo*, 456 F. 3d 1159 (10th Cir. 2006) ruled that "Accepting the allegations in the Burrells' complaint as true, we conclude that they have sufficiently pled that the individual tribal officials acted outside of their official authority, and thus, are not entitled to sovereign immunity." *See* Opinion dated July 24, 2006, at p. 27. The paragraphs stricken by the lower court involve

the issues presented to the jury. The Defendants motion to strike categorizes many factual allegations in Plaintiffs' complaint as "impertinent" or "immaterial" or "scandalous," yet these are not characterizations made by the 10th Circuit in its opinion, and in fact, ruled that Plaintiffs' factual allegations sufficiently stated a cause of action against these individual defendants under 42 USC 1981 and 1985. The Burrells argued that the defendants were trying to avoid discovery, and relevant evidence at trial.

The lower court struck the following paragraphs of the Complaint:

“49. Upon information and belief, the Pueblo of Santa Ana presently has a governmental system which was imposed on it by Spanish Conquistadors which involve a life appointment of a “Cacique.”

50. Upon information and belief, the historical and aboriginal governing organization of the Pueblo of Santa Ana, and its aboriginal religious traditions, did not revolve around the power of a Cacique who had an appointment for life.

53. The present Cacique is a member of the Baptist Church, and does not take a leadership role in the traditional Indian and Catholic religious practices which exist at the Pueblo of Santa Ana, therefore his power does not derive from traditional religious tradition.

56. Women are not allowed to be members of the Tribal Council, and are not even allowed to attend Tribal Council meetings.

58. Upon information and belief, the Pueblo of Santa Ana has made hundreds of millions of dollars from the profits it has received from its operation of its Casino over the last ten years, which a very high percentage derived during the time when the operation of the Casino was ruled by the New Mexico Supreme Court to have been illegal.

60. The small group of people around the Cacique who control the government of the Pueblo of Santa Ana have not used the profits made from the Casino and its other businesses for any direct benefit to the general membership of the Pueblo.

61. Upon information and belief, the Cacique was “hired” to build some walls for the kiva which took him less than two weeks and he was paid approximately \$100,000, with which he bought a double wide trailer, which all

amounted to a virtual payoff by his governmental appointments.

62. The individuals who are controlling the Cacique and his appointment of the government officials at the Pueblo of Santa Ana have themselves benefitted by an accumulation of interests on the Pueblo, employment for themselves and their family members, and control over many governmental functions at the Pueblo of Santa Ana.

63. Women are denied basic constitutional rights at the Pueblo of Santa Ana concerning the many restrictions imposed on them, including but not limited to, their inability to vote for government officials, their inability to have input about potential changes in government, their inability to attend Tribal Council meetings or vote in Tribal Council meetings, and their inability to have any input into the appointment of the Cacique, or his appointments of various governmental officials.

64. The general environment of sex discrimination which exists at the Pueblo of Santa Ana has been reflected in many bizarre orders of previous Governors. One instance the Governor ordered that any woman who was living with a man who was not married, was to immediately become married or they would have to move off the Pueblo. This order was rescinded by a subsequent governor who did not want his daughter marrying her live-in boyfriend.

65. The women are also denied their basis First Amendment rights to assemble and petition the tribal government about their grievances, and of the right of free speech, in that any attempt on their part to vocally express dissent about the governmental system and their place in it results in direct threats of banishment from the tribe, which would result in their losing what housing they have on the reservation, and being banished from their membership in the Pueblo of Santa Ana.

66. Any male member of the Pueblo of Santa Ana who voices dissent of the governmental systems and policies at the Pueblo of Santa Ana are also threatened with banishment, and there are at least four instances in recent years in which members have literally been driven from the Pueblo for voicing any kind of dissent against the power of the Cacique and his inner circle.

67. Said system of government amounts to a totalitarian state and has resulted in the political and financial oppression of the members of the Pueblo of Santa Ana by a corrupt system of government.

68. This corrupt system of government is the underlying cause of the violations of the constitutional rights of Bob and Susan Burrell in the underlying case."

These stricken paragraphs alleged sex, racial and religious discrimination as

partial sources of Defendants' racial animus towards the Burrells which lead to defendant tribal officials' confiscation of the Burrell crop and farm without due process of law, and the lower court prevented Plaintiffs from introducing evidence about these matters. The Pueblo of Santa Ana has no constitution, and no common law system, and no clearly written statutory or regulatory system governing its administrative officers and government of the Pueblo of Santa Ana. No tribal member has the right to vote in general elections of tribal officials. The Tribal Council of the Pueblo of Santa Ana includes all male members of the Pueblo at least the age of 18 years, who have served in some function for the tribe. The Tribal Council has little or no input into daily government, the casino or other businesses, and even the agenda of the Tribal Council is created by the Governor, who also schedules its meetings. The individuals who are controlling the Cacique and his appointment of government officials have themselves benefitted by an accumulation of interests on the Pueblo, employment for themselves and their family members, and control over many governmental functions at the Pueblo of Santa Ana.

What the division of power is in the Pueblo of Santa Ana between these defendant tribal officials and the Tribal Council, and the underlying history, are relevant evidence about these tribal officials authority, particularly when there is no constitution and no written body of law.

II. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S VERDICT OF RACIALLY DISCRIMINATORY INTENT ON DEFENDANT ARMIJO'S PART, LISTED AS ISSUE 2 IN ARMIJO'S OPENING BRIEF

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)). Because granting a motion for judgment may deprive the nonmoving party of a determination of the facts by a jury, such motions as a matter of law should be cautiously and sparingly granted. *Weese v. Schukman*, 98 F.3d 542, 547 (10th Cir. 1996) ("motion for a judgment as a matter of law is cautiously and sparingly granted, and then only when the court is certain the evidence ‘conclusively favors one party such that reasonable men could not arrive at a contrary verdict.’ citing *Western Plains Service Corp. v. Ponderosa Development Corp.*, 769 F.2d 654, 656 (10th Cir.1985)(The standard is particularly strict when such a ruling is made in favor of the party with the burden of proof.”) The jury's role as the factfinder decides whether witnesses were credible and therefore accept or reject their testimony. *See Neece v. IRS*, 41 F.3d 1396, 1399 (10th Cir.1994) (noting that “Any determination of the credibility of a witness necessarily includes the right of the factfinder to disbelieve the witness”).

Judgment as a matter of law is warranted “only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion.” *Harsco Corp. v. Renner*, 475 F.3d 1179, 1185 (10th Cir. 2007), (citing *Vining ex rel Vining v. Enter. Fin. Group, Inc.*, 148 F.3d 1206, 1213 (10th Cir. 1998)). “[T]he controlling question is whether the plaintiff has arguably proven a legally sufficient claim.” *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1241 (10th Cir. 2001). This Court must construe the evidence and inferences most favorably to the nonmoving party, and will refuse to weigh the evidence, pass on the credibility of the witnesses, or substitute his conclusions for those of the jury. *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir.1996); *Harsco Corp.*, at 1185.

Bob and Susan Burrell had successfully farmed on this lease for 17 years, and had always baled at night, which they testified was a standard farming practice, Testimony of Bob Burrell. Aplnt App. Vol. I, at 166-172. Bob Burrell testified that the baling restriction “meant my farm was shut down. All the preparation goes to that one particular time when you either bale it right or you bale it wrong.” *Id* at 166. He went on to describe that proper baling practices were required to get four cuts a year on a proper timetable, when the alfafa was at the proper height, stage of growth and had the proper moisture and protein content. *Id* at 166-171. Mr. Burrell testified that the baling restriction would cut

in half the price he could sell the alfafa. *Id.* at. 203-5. For 17 years, the Burrells had no problem with baling at night, and testified that their farm fields were large and far enough away from any houses so that you “could hear [the equipment] running but it sure wasn’t loud.” *Id.* at Vol. II, p. 174. For 17 years they had never received a complaint from anyone. *Id.*

On May 31, 1997, on a Saturday evening the Burrells after daily inspections of the growing alfafa to determine the right time to bale, started baling at night but dew came in a little too heavy, so they quit at about 2 to 3 am. An unidentified Santa Ana police officer was parked on their property when they got home, and he indicated there had been a complaint about noise. The officer told them he could hear the balers running, but did not think anything of it, and left. Testimony of Susan Burrell, *Aplnt App. Vol. II*, at 372. On Sunday June 1, 1997, they were again baling at night when Gov. Lawrence Armijo drove up to their fields in a Santa Ana police car, in full police uniform with a badge that said Police Chief, and told Susan Burrell to “Stop baling, or I’ll arrest you.” *Id.* at 373. Governor Armijo was the Governor of the Pueblo of Santa Ana and was also the acting Chief of Police, though Defendants contested that he was chief of police, or that he was in a uniform or drove a police car when he approached the Burrell that Sunday evening on their fields. Susan Burrell flat denied that their balers could have caused enough noise to disturb anyone since they were so far away from any

houses. Id at 392-3. Since Mr. Burrell had a Farm and Home mortgage on his farming equipment and crop, he demanded that Governor Armijo put his baling restriction in writing, which he did on June 2, 1997, signing it as Governor. P's Ex. 7, Aplee App. 37.

The Defendants did not really contest that this baling restriction only applied to the Burrells, who were the only White, non-Indian farmers on the reservation. Obviously, the June 2, 1997, letter from Gov. Armijo to Bob Burrell does not indicate that the baling restriction applies to anyone other than the Burrells. Bob Burrell testified that he had personal knowledge that tribal members baled at night. Aplnt App. Vol I at 181-2. The tribe then began to actually take the Burrells' crop without their permission, hiring an outside contractor to bale the hay and stack it on Pueblo property, with the tribe's baling occurring part of the time between 9:00 pm and 7:00 am, the hours of restriction imposed on the Burrells. Aplnt App. Vol I at 245-247Tr. Vol. I, 112-118. The Burrells in fact introduced a video of the Pueblo farm crew taking their crop without their permission. Id at 244, Vol. II at 140; Plaintiff's Ex. 48.

Bob Burrell testified that he had knowledge about the Pueblo's ditch lining project in Tribal Council Meeting Agenda for July 10, 1997, item 4:

"4 Ditch Lining Project.
Clyde Sandoval
Restitution for loss of farming."
[P's Ex. 37 Aplee App. At 55]

Mr. Burrell testified that Clyde Sandoval, the BIA inspector who conducted inspections of his farm, was also in a private company with a partner named Dominic Lente, and their company had been hired to concrete line the Pueblo's irrigation ditches. Their work at the Pueblo got "hung up" and was "over a year behind." Aplnt App. Vol I at 229. The concrete lining project delays prevented Pueblo farmers from irrigating their land in 1997, and caused a "livestock feed problem." Id. at 230. In May 1997, Mr. Burrell agreed to help these Pueblo members by allowing them to take 300-500 bales of his hay for their livestock, just "enough to tide them over for a few days." Id at 232-2. He did not ask for compensation and he was never paid for this by anyone, doing it to help his neighbors. As P's Ex. 37 shows, the Pueblo officials at the Tribal Council meeting of July 10, 1997, were discussing "restitution for farming losses" concerning the ditch lining delays. Aplee App. 55.

Manuel Christobal, a tribal member and in the Tribal Council testified:

"Q. Okay. Are you a member of the Santa Ana Tribal Council?

A. Yes, I

Q. And can you tell us who makes laws on the Santa Ana Pueblo?

A. The governing body of the tribe is the Tribal Council. The governor may have issues with his authority, but the Tribal Council makes the final decision on any agreements or transactions that come through the tribal office.

Q: Okay. And presently today, the institution that makes laws on the Pueblo of Santa Ana is the Tribal Council?

A. Yes, it is.

Q. Does the Governor have the right to make law?

A. No, he doesn't. He would have to appeal his issue to the Tribal Council, and therefore, the Tribal Council will make a decision through – through a vote,

whether it is with the decision or not.

Q. Okay. Now, what is the standard farming practice regarding baling of Santa Ana?

A. As far as I know, we never had any restrictions to any type of baling.

Q. No law?

A. No law, no.

Q. Now, there — the Burrells had baled a certain way for 17 years. Do you know if there had been a problem with that?

A. No. When the Burrell lease came upon the Santa Ana reservation, there was no, how would I say, no opposition. No one complained of the noise. No one actually had saw it as a problem.” Aplnt App. Vol I at 348-350.

Mr. Burrell testified that after he was ordered to never bale at night, he repeatedly attempted to resolve the problem, making numerous attempts to speak with Governor Armijo, other tribal officials and tried to get before the Tribal Council, all without success. Id at 174-181; Vol. III at 718-721. The agenda for the June 4, 1997, Tribal Council meeting, Plaintiff’s Ex. 36, does not list anything about the Burrell farm, or Mr. Burrells’ efforts to get the baling restrictions before the council. The tribal council agenda for the July 10, 1997, meeting created by Governor Armijo’s office listed the Burrell farm as item 3, indicating “Bob Burrell-Request to enter into negotiations regarding termination of lease.” Gov. Armijo testified that the council appointed a task force of Lt. Gov. Lawrence Montoya, Jerry Kingsman, Nate Tsosie and attorney Reid Halthom. Aplnt App. Vol. II at 463. Gov. Armijo admitted the task force was directed “to do whatever has to be done to contact the Burrells to see how far or what needs to be done or” “Q: Just to resolve their – their concerns? A: Right.” Id. at 464,.

The Burrells did have discussions with Lt. Gov. Montoya in early June 1997, that unless the baling restriction was lifted, they could not economically survive, and offered to sell the farm to the Pueblo. Santa Ana Pueblo sent the Burrells an Invoice on October 7, 1997, claiming they owed the Pueblo \$9,283.31 for “Personnel Costs” for cutting the Burrells alfalfa and baling it. Aplee App at 67, P’s Ex. 42. That invoice showed that the Pueblo’s farm crew and outside contractor started taking the Burrell crop the morning of July 10, 1997, while the Tribal Council meeting was later in the evening of July 10. The Pueblo farm crew and hired contractors continued to take the Burrell crop through October 2, 1997, and they removed a total of 4541 bales of hay, distributing 560 to “tribal families.”

The Burrells repeatedly insisted they never gave the Pueblo permission to take their crop, that they never abandoned their farm, and that the BIA never gave anyone permission for the Pueblo to take over their farm prior to termination of the lease in 1999. Aplnt App. Vol. I at 245, Vol. II at 389-390. The BIA was never involved in anything until Gov. Armijo wrote BIA Superintendent Florine Gutierrez, a letter on August 5, 1997, that the Burrells had abandoned the lease, requesting that BIA to take steps to “terminate or enforce the lease.” Aplee App. at 38; P’s Exhibit 11. Gov. Armijo testified that he did not write this letter, that the Task Force wrote it, probably Lt. Gov. Lawrence Armijo and Nathan Tsosie, and Gov. Armijo just signed the letter. Aplnt App. Vol. II at 464-5, 474-5,

490-496. (Reid Haltom, the tribes lawyer, admitted writing the letter for Armijo to sign. Aplnt App at Vol III at 638) He claimed not to be involved in any way with the Burrell farm after the Task Force appointment by the Tribal Council on July 10, 1997. Aplnt App. Vol. II at 464-5, 474-5, 490-496.

On August 27, 1997, Clyde Sandoval and another BIA employee conducted an inspection of the Burrell farm lease and they reported to the BIA Superintendent Gutierrez, who on September 3, 1997, wrote to Gov. Armijo that the Burrells “were in full compliance with all terms of the agreement” and that “It is felt that the Pueblo of Santa Ana should consider the above information in deciding on a fair settlement of the situation.” Aplee App at 39, P’s Ex. 12. Nothing in this letter indicates that the Burrells had abandoned their farm, and only indicates that Mr. Burrell said “his lease is being cancelled,” not by BIA but by the Pueblo of Santa Ana. Gov. Armijo testified that the Task Force wrote his August 5, 1997, letter which states the Burrell farm was abandoned and they were entitled to nothing, and that he just followed their fact findings and recommendations and signed the letter that they wrote. Aplnt App. Vol. II at 491. He testified he did not know the Burrell crop had been cut, baled and distributed to Pueblo members, which matters were under the Task Force’s authority. Id at 492, 494-5. He testified that he and the Tribal Council did not receive the Task Force report written by Reid Haltom until the Tribal Council meeting held on September 24,

1997 (see Aplee App at 40, P's Ex. 13), which report indicates that "Mr. Burrell wants to relinquish the lease and not continue farming at the Pueblo. Basically, he does not have the working capital to continue. He cannot make the lease payment (\$5,278.20) or his loan payments. ... the Farmers Home Administration (FmHA) has given Notice of Foreclosure and foreclosed on this equipment." Haltom then claims to have talked to a FmHA official who gave him financial details about what was owed on the loan (an impossibility as it violates the Burrell's right of privacy). Id.

The Burrells repeatedly denied that they abandoned the farm, denied that they were in financial trouble, and denied that they ever received a notice of foreclosure from FmHA. Aplnt App Vol III at 720-1. In fact, in early September 1997, their FmHA loan had been paid through 1998, since the FmHA was only an annual payment. Id at 650; Aplee App at 50, P's Ex 35. The Burrells testified that they were current with all their bills and were not in financial distress between June and September 1997. Aplnt App Vol II 389-390; Vol III at 720-1. The FmHA loan was never foreclosed, and the Burrells are still paying this loan off today, though they could have filed for bankruptcy to discharge this indebtedness based on the confiscation of their farm and its crops . Their lease payment was made in early October 1997 to the BIA, so all of these allegations made by the Task Force through attorney Reid Halthom were false.

Despite the fallacies in his report, part of his and the Task Force's recommendations included paying the Burrells a cash settlement between \$120,000 - \$160,000. Aplee App at 40, P's Ex 13, p. 2. On September 24, 1997, the Tribal Council passed a resolution 97-R-21 to offer to "pay off the Farmers Home Administration loan from Mr. Bob Burrell, for the tribe to request that the BIA waive the water charges currently due to the Bureau of Indian Affairs, to hire Mr. Bob Burrell for the farm project for three years and to pay for Mr. Burrell's mobile home moving expenses." Aplee App at 42, P's Ex 15. Susan Burrell testified that this settlement offer, and this Tribal Council resolution, were never communicated to them by anyone. Aplnt App Vol. II at 400.

The Plaintiffs submitted evidence of racial discrimination that the Defendants: 1) Imposed a restriction on baling hay on the Burrells, who are White, but not imposed on members of the Pueblo; 2) Entered on the land covered by the Burrells' lease, harvested their crops and distributed some of the crops to tribal members without the Burrells' permission, without payment to the Burrells, without due process of law, and without the involvement or permission of the tribal council or the BIA; 3) Took possession of the Burrell farm and attempted to terminate their lease, despite the actions taken by the Tribal Council on July 10, 1997. *See Court's Jury Instructions, Doc. 142.*

The Burrells also introduced evidence that Gov. Armijo placed other

restrictions on their farm equipment that did not apply to tribal members.

Testimony of Bob Burrell, Aplnt App. Vol. I, 239-242. Armijo refused to prosecute a tribal member who was drunk and assaulted the Burrell's daughter Melanie Feldman at the Burrell home with a rifle in his hand, "threatening to shoot a hole through the roof of the porch, told me that he could rape me and nothing would be done to him, while my children were inside, my husband was at work, and my parents were in the fields." Aplnt App. Vol. II, 343-347. When she tried to testify that "As a woman" she "had no rights whatsoever," and when asked whether "women were allowed to vote or attend..." the lower court upon objection simply stated "That's not relevant." Id at 344. She did testify that Governor Armijo drove to her home in his police car after assault by the drunken tribal member but did nothing about the crime, and in fact the same individual continued to go on her property and threaten her. Id. at 343-347. Someone had shot at Susan Burrell while horseback riding on the ditch, and Armijo also did nothing. Id at 386. Another tribal member accosted her on the street and threatened that "he could do to me whatever he wanted..." Id at 386. When the Burrells had a birthday party for one of their grandchildren, Armijo drove up in his police car and ordered them to stop having large groups of people at their home, which restriction was never placed on tribal members. Id at Vol I, at 241. All this constitutes evidence of racial and sexual discrimination, and is substantial

evidence of racially discriminatory intent. The Burrells were the only white farmers under lease at the Pueblo and Armijo's baling restrictions only applied to them and not to the tribal members, the Santa Ana Farm crew or the contractors hired by the Defendants to harvest the Burrell crop. There is no evidence that Defendants directed the crops of other tribal member to be taken and disbursed to needy tribal members.

The jury obviously did not believe Gov. Armijo's testimony he acted neutrally towards the Burrells. This Court must construe the evidence and inferences most favorably to the nonmoving party, and will refuse to weigh the evidence, pass on the credibility of the witnesses, or substitute his conclusions for those of the jury. The evidence showed the noise complaint to be a minor problem on only one of the four Burrell parcels. Even Armijo showing up in a police car late Sunday night in full uniform with the Chief of Police badge threatening to arrest the Burrells if they did not stop baling seems obviously staged.

The Burrells testified they did not want to leave the pueblo. They had integrated into the Pueblo way of life and had many friends on the pueblo. Baling at night is a standard farming practice in this area of the country, and failure to following that would have had a drastic impact on the Burrell's income. The Burrells made every effort they could think of to get this restriction lifted. The Burrells testified their crops were taken without their permission and

distributed to Pueblo members, and they were never paid anything. When Jerry Kinsman was asked if he would be surprised if Gov. Leonard Armijo ended up in possession of one of the large Burrell tracts, Mr. Kinsman responded “I wouldn’t be surprised at all, because I don’t know.” *Id.* at Vol. III at 698 Gov. Armijo admitted in post-judgment deposition in aid of collecting the judgment that he and his relatives ended up with part of the Burrell tracts. The Defendants presented no evidence to refute this allegation at trial. Reid Haltom’s testimony about these tribal officials legal authority was not believed by the jury, since he backtracked from his testimony about FmHA foreclosure when confronted with written evidence that the Burrells were ahead of schedule on the FmHA loan in late 1997, and his report that he confirmed the exact money owed on the FmHA mortgage FmHA was specifically refuted by a letter from FmHA, which stated that they had never given such information to Bill Haltom or anyone else from the Pueblo. *Aplnt App. Vol. III, p. 649-651 and Plaintiff’s Exhibit 35, Aplee App. 50.* After the Burrell’s lease payment in early October 1997, the Pueblo of Santa Ana took the following year to have the BIA make a formal finding of abandonment by the Burrells, which seems an admission that there could be no determination of legal abandonment without BIA involvement.

Defendants really do not discuss the actual evidence of the case and instead discuss evidence in *Hampton v. Dillard Dept. Stores, Inc.*, 247 F. 3d 1091, 1101-

02 (10th Cir. 2001); *Guides, Ltd. v. Yarmouth Group*, 295 F.3d 1065, 1073 (10th Cir. 2002); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1112 (10th Cir. 2004); *Delaunay v. Collins*, 97 Fed.Appx. 229, 233, 2004 WL 377665, p.6 (10th Cir. Mar. 2, 2004); and *Stewart v. Adolph Coors Co.*, 217 F.3d 1285 (10th Cir.2000). The Defendants argue that Plaintiffs presented “no evidence whatever of any racially derogatory statements or actions by either Defendant.” Why did the no bailing order apply only to the only White people on the reservation, while tribal members and the tribes farm crews continued to bail during times forbidden to Burrells? Armijo’s only reply is he never heard complaints from anyone else about anyone else. Susan Burrell testified that she was shot at with guns while riding a horse on the ditch bank, without the tribal police taking any action. Aplnt App Vol II at 386. She had been stopped on the road by tribal members and accosted. Id. at 387. Bob Burrell testified that they imposed restrictions on him to not drive farm equipment on the roads, which also did not apply to tribal members. Id at Vol I at 240. Armijo also ordered the Burrells to not have too many visitors during their grandchild’s birthday party, which restrictions were not imposed on tribal members. Id at 241 Why did Acting Chief of Police Armijo do nothing about the assault with a deadly weapon against Melanie Feldman? If the ditch lining project caused some tribal families to lose farming and crops for their livestock, why did Lt. Gov. Montoya only order the taking of the Burrell

crops, why not tribal members' crops? Why did Armijo and Montoya completely disappear while Bob Burrell ran pleading to their offices during the month of June 1997 to lift the no baling order, or make some sort of accommodation? These tribal officials knew that order would financial destroy the Burrells, why would it be so difficult to meet with them or come up with a simple solution, since the complaint only involved one part of one of the Burrell fields? The Defendants never addressed the repeated claims made by the Burrells that these Pueblo officials never attempted to involve the BIA Southern Pueblos Agency in the problems which began May 31, 1997. They did not try to work out any problems using BIA; why no notice to BIA of crop taking and distribution; why no documentation, except the belatedly constructed invoice dated October 7, 1997, charging the Burrells for the cost of taking their crop starting July 10!!? The Appellant argues that Armijo's no-baling order alone is not evidence of racial discriminatory intent, but ignore the above described evidence of discriminatory intent concerning their treatment of the Burrells. The tribe claimed abandonment by the Burrells in June through October 1997, while it had possession of the Burrell fields and use of their crops without their permission and without BIA involvement. However, after the Burrells made their farm lease payment October 1997, these same Defendants took years in BIA processes and appeals to uphold a legal finding of abandonment, which seems an admission they had to do those

same procedures before ordering the taking of the Burrell crop **before even** the first meeting of the Tribal Council to address the Burrells issue on July 10, 1997. The lies that Governor Armijo made in his letter to the BIA on August 5, 1997, about abandonment were refuted by the BIA inspection report. The lies that attorney Halthom made to the Tribal Council in his September 24, 1997, Report to Tribal Council on Burrell Lease, about the Burrells' alleged financial inability and that their FHA mortgage was in foreclosure, was revealed to the jury when he changed his testimony on the stand in front of the jury. The Burrells submit that misrepresentations of fact to the BIA and the Tribal Council by these defendants and their attorneys amounts to substantial evidence of racial animus, during a time when the first thing that should have occurred was involvement of the BIA. When the BIA was finally involved, their report in September 3, 1997, was that the Burrells were in full compliance with their lease and there was no abandonment.

III. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANTS, LISTED AS ISSUE 3 IN ARMIJO'S OPENING BRIEF

Standard of Review: The same as in Issue II, as described on page 19-20, in that this is an issue concerning substantial evidence. 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.”" *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1120-1 (10th Cir. 2004)(quoting *Youren v.*

Tintic Sch. Dist., 343 F.3d 1296, 1308 (10th Cir. 2003)). In *Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1503 (10th Cir. 1991) the Tenth Circuit Court held that a "motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict."

The Defendants did not specifically list the claim for punitive damages in their motion for directed verdict at the close of the Plaintiff's case [Aplee App. at 108-141], nor at Defendants' motion for directed verdict at the close of the all the evidence [[Aplee App. at 141-190]. The only reference to damages were made by Defendants' counsel when arguing jury instructions. Plaintiffs object that this is an issue that can not be considered by the Court. In *Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486(10th Cir.1990) it held that "Only questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding, the verdict." As a threshold matter, this Court must determine if the Rule 50(b) motions made at the close of the Plaintiff's case and at the close of the evidence included arguments that Plaintiffs had failed to prove punitive damages. No new matter not raised in the pre-verdict motions can be allowed for post-verdict motions. This interpretation of Rule 50(b) has constitutional underpinnings, since some courts have held that can constitute an impermissible re-examination of jury verdicts in violation of the Seventh Amendment. See *Fed. Sav, and Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 137-138

(4th Cir. 1987) (application of rule protects Seventh Amendment right to trial by jury); *Miller v. Premier Corp.*, 608 F.2d 973, 980 n.3 (4th Cir. 1979) ("The requirement of a proper directed verdict motion as foundation for a motion for judgment n.o.v. under Fed. R. Civ. P. 50(b) is not a mere technicality; it serves vitally important interests in the fair conduct of litigation"); *Morante v. American Gen. Fin. Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998), *citing Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 n.17 (5th Cir. 1975) ("It would be a constitutionally impermissible reexamination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict"); *Benson v. Allphin*, 786 F.2d 268, 273, 172 L.R.R.M. (BNA) 2177 (7th Cir. 1986) (application of rule protects Seventh Amendment right to trial by jury); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (application of rule preserves sufficiency of evidence and allows district court to review its initial denial as matter of law instead of forcing it to "engage in an impermissible reexamination of facts found by the jury").

The Burrells have a duty to object to a post-verdict motion when it includes issues not raised in pre-verdict motions for directed verdict at the close of Plaintiffs' case, and at the close of the evidence. *Elliot v. Turner Constr. Co.*, 381 F.3d 995, 1006 (10th Cir. 2004) (when a party fails to object to Rule 50(b) motion specifically on the ground that the issue was not made in the motions for direct

verdict at the close of Plaintiff's case or at the close of all the evidence, the nonmoving party's right to object on that basis is itself waived).

If the Court still wants to consider the punitive damage issue, the Burrells would refer to all the testimony above described and circumstantial evidence which supported the jury's conclusion that the Defendants intentionally interfered with the Burrell farm based on discrimination against their race. The jury was given a proper instruction on punitive damages and the Defendants do not argue that the instruction on punitive damages was deficient. The jury received a proper instruction on punitive damages, considered the evidence and determined that the Burrell's were entitled to \$1 million dollars in punitive damages against these two defendants. The Burrells maintained during the five day trial, and in closing argument, that these Defendants intentionally took over the Burrell farm and its crops to drive the only White people on the reservation off their BIA farm lease. Substantial evidence exists that Defendants were motivated by evil motive and intent, and that they were reckless or callously indifferent to the federally protected rights of the Burrells.

IV. SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE JURY'S AWARD OF COMPENSATORY DAMAGES, LISTED AS ISSUE 4 IN ARMIJO'S OPENING BRIEF

Standard of Review: The same as in Issue II, as described on page 19-20, in that this is an issue concerning the existence of substantial evidence.

The Burrells had a legal right to continue the lease until its termination approximately three years later. They lost their home, the company of their daughter, her husband, and their grandchildren. Testimony of Susan Burrell, Aplnt App Vol II at 372-420. They had to liquidate their cattle and farm equipment under unfavorable and unplanned circumstances, and they lost their social relationships with tribal members they had enjoyed for 17 years. The Burrells introduce without objection their Burrell Farm Family Record Books, which gave detailed financial and accounting information about the Burrell farm operations during the entire 17 years of existence. The Defendants denigrate these damages by contending that their damages did not amount to more than \$25,000 of lost farm income.

The Burrells lost their entire life's work, everything they had accumulated and liquidated before going onto the pueblo was poured into this farm lease. It was not just the seventeen years of hard work on this BIA farm lease, but everything they had before they stepped foot on the pueblo. They did not try to bail out of the FmHA mortgage, but sold all the farming equipment and cattle and gave the money to FmHA, and then for the last twelve years have continued to pay off a FmHA mortgage balance. These are God's good people, and as Defendants' own counsel admitted in his closing argument, the Burrells are "salt of the earth."

Their entire lives were slaughtered by these tribal officials, who the jury

found to have committed these violations of the Burrells' rights with intent to discriminate against them on the basis of their race [Ct. Instructions Doc 142, at p. 8]. The jury weighed the court instruction on burden of proof which the Burrells' had, that "prove by a preponderance of the evidence that Defendants did so because of invidiously discriminatory animus against Plaintiffs on the basis of Plaintiffs' race," Id at p. 17, and that damage instruction specifically charges the jury to not use sympathy, only damages caused by defendants wrongful conduct, with common sense as a guide. Id at 32. This compensatory damage instruction is complete, detailed and not objected to by the Defendants.

There is substantial evidence in the record to support the jury's award of \$347,000 in compensatory damages.

V. THE LOWER COURT ERRED IN SETTING ASIDE JURY'S VERDICT AGAINST LT. GOVERNOR LAWRENCE MONTOYA AND FINDING OF CONSPIRACY IN VIOLATION OF 42 U.S.C § 1985, BY DEFENDANTS' CONTESTED RULE 50 MOTION

Standard of Review: The same as in Issue II, as described on page 19-20.

Lawrence Montoya was Lt. Governor and it was clear from all the testimony that he was a key player in everything that occurred from June 1, 1997, to September 24, 1997. He was the first one to communicate with the Burrells after the June 1, 1997, baling restrictions order from Armijo. Bob Burrell testified that he tried repeatedly to communicate with Gov. Leonard

Armijo, who avoided him. He talked to Jerry Kingsman, Farm Administrator, between June 18-24, 1997, according to Kingsman's own report, Aplee App at 44, P's Ex. 22, wherein Kingsman admitted he relayed to Lt. Gov. Montoya that the Burrells were very upset about the baling restrictions. Aplnt App Vol. III at 691-2. Kingsman testified that he was not invited to the July 10th Tribal Council meeting, that he was actually not very involved in the Burrell problem from June 18th to September. Id at 693. Kingsman testified that he did not make the decision to cut the Burrell crop, bale it and distributed it to tribal members, and store the rest on tribal land, Id at 693-694, all of which orders came from Lt. Gov. Lawrence Montoya. Kingsman had the farm crew and outside contractors cutting and baling the Burrell crop the morning of July 10, before the tribal council meeting held later that night. Kingsman testified "I think I've already said I don't do anything on that land without somebody telling me to do it." Id at 701. Lawrence Montoya was Kingsman's boss, "He tells me what to do, and I do it." Id. Kingsman would never have taken any actions without direct orders from Lawrence Montoya. Id at 702-3. Governor Armijo specifically denied having any involvement in anything concerning the Burrell farm after June 1, 1997, and he gave no orders concerning irrigating the Burrell farm, cutting its crops, baling the hay or distributing it to tribal members, which were in the hands of the Task Force. Aplnt App Vol II at 473-4, 482-3, 491-6. Reid Haltom was the lawyer on the

Task Force, and though he testified the Tribal Council on July 10th directed him to “handle the matter,” he was to work with Lt. Gov. Montoya, Nathan Tsosie, and Jerry Kingsman. Aplnt App Vol III at 596-7. After July 10th, Halthom testified that he tried to contact Nancy Kirkwood, who had written a letter for the Burrells, but she told him she no longer represented them. He then left on a vacation and did not return until August, when he wrote the August 5, 1997 letter from Armijo to BIA Superintendent Gutierrez. He assumes he contacted Bob Burrell in early August prior to the August 5th letter. Aplnt App Vol III at 630, 8. He did give his legal opinion on the stand that the Pueblo of Santa Ana had no legal authority to cancel the Burrell lease, which could only be done by the Bureau of Indian Affairs. Id. at 603.

Summarizing their testimony, Gov. Armijo did absolutely nothing but write the baling restriction letter dated June 1, 1997, and never issued any orders or talked to the other tribal officials about the Burrells, particularly after July 10, when the Tribal Council created the Task Force, instructing them to investigate and “enter into negotiations with the Burrells to terminate the lease.” P’s exhibit 37, Tribal Council Agenda for July 10, 1997, Aplee App at 55. Jerry Kingsman did absolutely nothing without direct orders from his boss, Lt. Gov. Montoya. Reid Haltom immediately went on vacation, and did not return until early August. The Burrells testified they were frantically trying to get the baling restriction lifted

from June 1 to the end of July, in order to save their crop, with no one talking to them, except the one time Lt. Gov. Lawrence Montoya went to their house. Any witnesses attending and testifying about the tribal council meeting on July 10, 1997, denied any reports that the Burrells were trying to get the baling restriction order lifted. So the only person who made any decisions about cutting the Burrell crop, baling it and distributing it to tribal members was Lt. Gov. Montoya, and he did not tell the Tribal Council about accommodating a solution to the baling restrictions, despite his promises to the Burrells. So the defendants own testimony, and that of Kingsman and Haltom, leads to the conclusion that Lt. Gov. Montoya made the decisions to take over the Burrell farm, assume the duties of irrigation, take the Burrell crop and distribute it to tribal members, and not report to the Tribal Council on July 10 1997, that the Burrells would stay on their farm if the baling restrictions were lifted. No one ever really obeyed the Tribal Council's directive to negotiate with the Burrells during July and August.

Lt. Gov. Montoya was never told to take the Burrell crops and distributed them to tribal members by Gov. Armijo or the Tribal Council. He told the Burrells there was nothing he could do about the baling restrictions. These tribal officials testified the issue of lifting this restriction was never raised at the tribal council meetings of June 4 and July 10th. Instead Lt. Gov. Montoya and Gov. Armijo place item 3 on the July 10th agenda about negotiating a settlement.

Taking the evidence in light most favorable to the Burrells, these tribal officials never presented alternatives to the baling restrictions to the Tribal Council and never considered any practical solutions to it themselves, because prior to preparing the July 10th Tribal Council agenda, Lt. Gov Montoya and Jerry Kingsman had already arranged outside contractors to begin taking the Burrell crop beginning the morning of July 10. To get that equipment out there and started before dawn, these outside contractors and the farm crew would have to have been organized prior to July 10.

The decision to do this prior to consultation with the Tribal Council on July 10th also means it was done prior to consultation with the tribes lawyers, Reid Haltom from the Nordhaus law firm and Richard Hughes from the Rothstein law firm, both of whom attended that July 10th Tribal Council meeting. The evidence supports Montoya's responsibility for this taking of crops without due process of law, and that he was in a conspiracy with Gov. Armijo.

Defendants argue that baling at night was not a contract right. However, the Burrells did have a specific contract right in their written lease that any disputes between the parties concerning the lease had to be submitted to the BIA. The Pueblo could not take any action to cancel the lease as admitted by Reid Haltom. Burrells testified the baling restriction was a direct attempt by Defendants to shut their farm down, and that Defendants confiscated their crops without due process

of law, which are contract violations. The Defendants object that the record concerning Lt. Gov. Montoya is completely lacking of a wrongful interference with the Burrells' contract rights. However, the evidence shows Lt. Gov. Montoya directed the farm crew on the Burrell farm without orders from Gov. Armijo, the Tribal Council or the BIA. He ordered the crops taken and distributed to tribal members by Kingsman. In other words, if the testimony of Gov. Armijo, Jerry Kingsman and Reid Haltom are to be believed, Lt. Gov. Montoya took these steps on his own, days before the July 10th Tribal Council meeting. Lt. Gov. Montoya gave conflicting testimony about whether the Burrells asked him in early June 1997 to rescind the baling restrictions:

“Q: Mr. Montoya, at any time during this conversation, to your best recollection, did Mr. Burrell ask you to do anything to get this no-night baling directive lifted?
A: He did ask me, but because I didn't know what happened prior to the two days before, as I was sitting there, I would have to have gone back to my subordinate, was the governor, and find out basic details; but there was no conversation about rescinding whatever, basically where, “we're not going to farm anymore, This is what we want.” And so I left it at that, and I guess, again, we talked about other items besides that conversation.

Q: So he did not ask you to help get the -- the order rescinded?

A: No. The only thing I promised him was I would get him on the council. I didn't say what date. I said I would try to get on the council.” Id at 501.

In *Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1503 (10th Cir. 1991) the Tenth Circuit Court held that a "motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict." In *Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir.1990) it held that

"Only questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict."

As a threshold matter, this Court must determine if the Rule 50(b) motions made at the close of the Plaintiff's case and at the close of the evidence included arguments that Plaintiffs had failed to prove the elements of conspiracy in violation of 42 U.S.C. §1985. In their motion for directed verdict at the close of the Plaintiff's case, Defendants did not specifically make an argument that Plaintiffs failed to prove conspiracy. The arguments made by Defendants counsel addressed whether these tribal officials exceeded their tribal authority. [Aplee App at 108- 141] Lack of proof of a conspiracy was not mentioned as a grounds for the motion for directed verdict at the close of the all the evidence. [Aplee App at 141- 190].

There is substantial evidence that Gov. Armijo and Lt. Gov. Montoya conspired to take the Burrell farm and its crops without due process of law. Lt. Gov. Montoya testified that they did not even receive the Kirkwood letter until days after June 18th. Gov. Armijo testified that he had nothing to do with anything after June 1, but Montoya testified that he was "pretty sure there was a discussion" with the Armijo about the Kirkwood letter and the baling restriction after June 19. And he then described that when he and Armijo were appointed in the beginning of the year, they were considered "brothers for the year.

So for instance, if you get ill or something, we – we have to dialogue. I mean we’re sort of like, I guess you could say, connected at the hips even though we have our own minds.” He denied Burrells repeated claims that they tried everything possible to get him, or Gov. Armijo, to lift the baling restrictions. He admitted:

“The point is, is that the decision was made. I was trying to resolve it. There were some parameters that I couldn’t go that were beyond my capabilities.”

Q: Because he was governor and you’re lieutenant governor?

A: No. Yeah, that, and like I told you, the thing about the calendar. I mean, if they were looking for a resolution at that moment in time, I would still figure out where we were going to go with this. So basically, my best comment or my best offer to them was, ‘Well, let me take you back to the council and see what happens.’” [Aplnt App at Vol III at 557.

Montoya did admit that the majority of the Burrell farm was on the southern end of the Pueblo, where there are really no homes, so the baling restriction did not seem to apply to those parcels since “there’s only animals and it’s away from the residence.” Id at 557-8.

VI. THE DISTRICT COURT DID NOT ERR IN FINDING THAT DEFENDANTS’ ACTIONS WERE NOT PROTECTED BY SOVEREIGN IMMUNITY, LISTED AS ISSUE 1 IN ARMIJO’S OPENING BRIEF

Standard of Review: An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. v. Sac &*

Fox Tribe of Indians, 725 F.2d 572, 576, n.1(10th Cir. 1984). See also, *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006).

This argument that the tribe's sovereign immunity extends to tribal officials has been the subject of multiple motions to dismiss, and was considered in the first appeal to the 10th Circuit Court in *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). As this Court stated in *Burrell*:

"[w]hen a complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Id.* at 1168.

The 10th Circuit Court's decision was based on a review of the allegations of the complaint pursuant to a Rule 12(b)(6) motion. After remand from the 10th Circuit, Defendants filed another Motion to Dismiss attaching affidavits alleging that all their acts were within the scope of their tribal authority. The motion was considered by the lower court to be actually more like a motion for summary judgment, and after careful consideration denied their motion based not only on the allegations of the complaint, but also on the basis of the affidavits and other evidence submitted by the parties and evidence that was already contained in the record. This lower court rejecting these sovereign immunity arguments by Defendants by its order entered on April 2, 2008, amounted to review of the evidence to see if the Burrells had carried their burden of proof concerning a motion for summary judgment, and determined that "Given the circumstances

surrounding the broken negotiations and the factual disputes concerning the motivations behind Defendants' various actions, a fact finder could infer that Defendants were not acting within the official scope of their authority." *See* Order dated 4/2/2008 at pg. 12.

The Court's made the same rulings about these arguments concerning sovereign immunity concerning the Defendants' motion for directed verdict at the at the close of Plaintiff's case and at the close of the evidence, which rulings would all have necessitated this Court determining that evidence existed that these tribal defendants exceeded their tribal authority requiring these factual issues be submitted to the jury.

Instead Defendants in their latest motion cite a state court Connecticut case, *Chayoan v. Sherlock*, 89 Conn. App. 821, 877 A.2d 4 (2005), in an effort trying to create an additional special burden of proof for the issue "exceeding tribal authority," namely that "one must show that those tribal officials acted "manifestly or palpably beyond [their] authority." This new language which Defendants try now to get this Court to use was not used by the 10th Circuit Court in the *Burrell* opinion, or any other 10th Circuit case. This is an attempt to create a heavier burden of proof, which presumably the Defendants will intend to propose as a new rule that the 10th Circuit should adopt, when this Court already has the legal guidelines to be used when addressing a post-verdict Rule 50(b) motion for

judgment as a matter of law.

The Appellant seems to ignore that this Court already considered all the other cases cited by Defendants, when it wrote its decision in *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006). These cases were considered by the lower court in the Rule 50 motion, and it determined that sovereign immunity did not apply to the facts before the jury. Because granting a motion for judgment may deprive the nonmoving party of a determination of the facts by a jury, such motions as a matter of law should be cautiously and sparingly granted. Plaintiff's exhibit number 1 was the Burrell lease, which is a Department of Interior, Bureau of Indian Affairs lease listing the "Southern Pueblos Indian Agency" as the agency administering the lease. The leased premises are for lands that are held in "trust" or restrictive status by the United States government, and the lease spells out in ¶ 11 that any violations of the lease "shall be acted upon in accordance with the regulations in 25 CFR 131." The BIA Southern Pueblos Agency had a body of federal regulations which covers its administration of this lease. For example, 25 CFR 162.108 states "What are BIA's responsibilities in administering and enforcing leases?:"

"(a) We will ensure that tenants meet their payment obligations to Indian landowners, through the collection of rent on behalf of the landowners and the prompt initiation of appropriate collection and enforcement actions. We will also assist landowners in the enforcement of payment obligations that run directly to them, and in the exercise of any negotiated remedies that apply in addition to specific remedies made available to us under these or

other regulations.

(b) We will ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.”

25 CFR 162.203 provides for procedures when tribes can supersede or modify federal regulations covering Indian land leases by tribal laws and leasing policies. BIA sent inspectors at least annually to determine if the Burrells were in compliance with the multitude of federal regulations concerning, types of crops, fencing, surveys, crop rotation, irrigation, and other farming practices. *See* Clyde Sandoval, *Aplnt App at Vol II at 438-9*. Mr. Sandoval had been doing these annual inspections on the Burrell farm since 1985, so it was apparent to the jury that these tribal officials knew him very well, and he testified that he was never contacted about problems at the Burrell lease prior to his inspection on August 27, 1997. *Id at 440-444*. Since Governor Armijo issued his “no baling hay before 7:00 am” order June 2, 1997 [Plaintiff’s Ex. 7], he took steps to interfere with standard farming practices unilaterally, without involvement of the BIA Southern Pueblos Agency, who he knew administered the lease and were charged by federal regulation to inspect, take enforcement actions, “respond to concerns” of the tribe (25 CFR 162.108), and resolve conflicts.

The testimony of Manuel Christobal, a tribal member and on the Santa Ana

Tribal Council testified that these Tribal officials could not take any action on the Burrell lease without the authority of the Tribal Council. In support of this position, the Burrells would point the Court's attention to Exhibit 2, Santa Ana Tribal Council Resolution No. 85-R- 13, Feb. 21, 1985, which shows the Tribal Council's authority to create the Burrell farm lease. Plaintiff's Exhibit 4, a March 22, 1985, letter to Bob Burrell from Sam Montoya, Superintendent of BIA Southern Pueblo's Agency informing him of the BIA lease creation by Tribal Council Resolution No. 85-R-13. Plaintiff's Exhibit 6, a February 3, 1994, letter to Burrell from Gov. Roy Montoya authorizing the Burrells to place an additional mobile home for his son-in-law and daughter to help him after his heart attack.

These exhibits all reference the Tribal Council creating the Burrell BIA farm lease, extending its term by Tribal Council resolution, and authorizing an additional mobile home on the farm by Tribal Council resolution. Now look at the June 5, 1997, order by Governor Leonard Armijo. Obviously it does not reference any action by the tribal council, or by the BIA; the order was based on his authority alone, not authorized by the Tribal Council, or by the BIA, and therefore was beyond the scope of his authority since it involved standard farming practices in use for 17 years and not applicable to anyone except the only White people on the reservation. That he and Lt. Governor Lawrence Montoya did not have the authority to take the Burrell crops and take possession of his fields was clearly

beyond any of their legal authority, and therefore, the jury's verdict that they violated 42 U.S.C. §§ 1981 and 1985 should be upheld.

CONCLUSION

The Burrells request that this Court affirm the jury's verdict against Governor Leonard Armijo, and reverse the lower court's dismissal of the verdict against Lawrence Montoya, and for such further relief the Court deems appropriate.

Respectfully submitted:
s/ Chris Lucero Jr.
Chris Lucero Jr.
P.O. Box 7429
Albuquerque, NM 87194
(505) 843-6687

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 12,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as measured by the WordPerfect 12 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 12 software, in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on the 23nd day of June 2009, I caused a true copy of the foregoing Appellant's Opening Brief to be sent by United States Mail to the following:

Richard Hughes
Post Office Box 8180
1215 Paseo de Peralta
Santa Fe, New Mexico 87504-8180

Additionally, on the same date, this pleading was filed electronically with CM/ECF, which caused opposing counsel Richard Hughes to be served electronically as shown by the Notice of Electronic Filing.

s/ Chris Lucero Jr.
Chris Lucero Jr.

**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

v.

LEONARD ARMIJO,

Defendant-Appellant,

and LAWRENCE MONTTOYA,

Defendant-Cross-Appellee.

ERRATA SHEET

Request for Oral Argument

Appellees-Cross-Appellants Bob and Susan Burrell request that the Court grant oral argument on this appeal, and state 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. Appellees 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:

s/ Chris Lucero Jr.
Chris Lucero Jr.
P.O. Box 7429
Albuquerque, NM 87194
(505) 843-6687

CERTIFICATE OF SERVICE

I hereby certify that on the 6nd day of July 2009, I caused a true copy of the foregoing Errata Sheet to be sent to:

Richard Hughes
Post Office Box 8180
1215 Paseo de Peralta
Santa Fe, New Mexico 87504-8180

when this pleading was filed electronically with CM/ECF, which caused opposing counsel Richard Hughes to be served electronically as shown by the Notice of Electronic Filing.

s/ Chris Lucero Jr.
Chris Lucero Jr.