No. 09-6258

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

BELVA ANN NAHNO-LOPEZ, ET AL., APPELLANTS

V.

JEFF HOUSER, ET AL., APPELLEES

ON APPEAL OF ORDER GRANTING SUMMARY JUDGMENT
FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 08-cv-1147F)

OPENING BRIEF OF THE APPELLANT(S)

ORAL ARGUMENT REQUESTED

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I

DECISION BELOW

This is an appeal from the United States District Court for the Western District of Oklahoma entering Summary Judgment in favor of the Appellees on October 13, 2009.[1] (App. App. 11-26). The Appellant(s) believe that the trial court erred in its entry of Summary Judgment in favor of the Appellees as there exist material issues of fact in dispute and even assuming *arguendo* that no material issues of fact exist, interpretation of those material facts, pursuant to federal law, common law of trespass and tribal law; the Appellees' Motion for Summary Judgment should have failed and been denied.

II

STATEMENT OF PRIOR OR RELATED APPEALS

The Appellants are not aware of any prior or related appeals regarding the case and controversy involved in this appeal.

[1] Unless otherwise noted, all references to "App. App." are to the appellant appellant's appendix in No. 09-6258.

III

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the Western District of Oklahoma was entered on October 13, 2009, which disposed of all claims of the Appellants. Subject matter jurisdiction in the original complaint of the Appellants is based upon 28 U.S.C. §§ 1331, 1353 and 28 U.S.C. §§ 2201, 2202. A notice of appeal was filed with this Court on November 11, 2009, which complies with Fed. R. App. P. Rule 4 (a) (1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

IV

STANDARD OF REVIEW

This Court reviews a grant of summary judgment based upon sovereign and qualified immunity *de novo*, "considering all evidence in the light most favorable to the nonmoving parties under Rule 56(c), Federal Rules of Civil Procedure." Olsen v. Layton Hills Mall, 312 F.3d 1304, 1311 (10th Cir. 2002)(citation omitted).

V

STATEMENT OF ISSUES PRESENTED

A. Whether the trial court erred in granting summary judgment in favor of the Appellees when disputed issues of material fact existed in conjunction with leases of two (2) specific parcels of Indian trust lands?

B. Whether Appellee(s) violated federal law, common law of trespass and applicable tribal constitutional mandates and thus, may not utilize the doctrines of sovereign and qualified immunity as a defense to their actions outside the scope of their authority?

VI

STATEMENT OF THE CASE

A. Introduction

The Appellants in this matter filed an action for declaratory and injunctive relief, including damages based upon the willful actions of the each and every Appellee so named individually. At no time was the Ft. Sill Apache Tribe of Oklahoma sued, nor was it alleged that any potential payment of damages would be derived from the financial coffers of the Tribe or its gaming operation.

The facts of this case clearly are those of first impression, as no case has been discovered that has directly dealt with the unique factual situation that this case presents. A case and controversy has arisen between individual members of the Business Committee of the Ft. Sill Apache Tribe, its non-Indian gaming manager and individuals who are duly enrolled members of both the Kiowa and Comanche Tribes of Oklahoma who all claim an interest in Comanche Allotment No. 2329.

B. Appellants

This case involves two (2) sets of Appellant(s): the first set is referred to as the Pence Appellants consisting of Margaret Pence and Reachelle Garcia (hereinafter collectively referred to as “Pence Appellants”) who are duly enrolled

members of the Kiowa Tribe of Oklahoma. The Pence Appellants it is alleged own a possessory interest in a fifty (50) year lease for a Mutual Self-Help Home located on approximately 1.25 acres of allotted lands identified as Comanche Allotment No. 2329.

The home and the 1.25 acres were sub-leased by the Kiowa Housing Authority to Ethelene and Robert Chaat who paid in full the Mutual Self-Help Home and were then granted a twenty-five (25) year extension to the original twenty-five (25) year lease of the 1.25 acres upon which the home is located. The fifty (50) year lease has not expired and will not expire until August 22, 2022. (App. App. 171, date of original lease).

According to the Last Will and Testament of Ethelene Tartsah Chaat, the Pence Appellants inherited said home and lease. With full knowledge of this possessory interest in said real property the Appellees individually entered a lease with the future possessory interest owner of the land at issue, which lease was never approved by the Secretary of the Interior as is required by 25 U.S.C. § 348. (App. App. 232-234). The land at issue will revert to the future interest land owner on August 22, 2022, (App. App. 171) when the fifty (50) year lease terminates upon its own substantive terms. The Appellees it is alleged have acted outside the scope of their authority in violation of federal law and tribal law and have been

sued in their individual capacity for ejectment and damages based upon their intentional trespass, destruction of property, encumberment and encroachment upon the 1.25 acres of land leased by the Pence Appellants.

The second set of Appellants consist of Belva Ann Nahno-Lopez; Berdene Nahno-Lopez; Betty Jean Crocker; Lucinda Kerchee; Roberta C. Burgess-Kerchee; Gwendolyn Kay Kerchee; Melvin Kerchee, Jr., who are all duly enrolled members of the Comanche Tribe of Oklahoma (hereinafter collectively referred to as "Kerchee Appellants"). The Kerchee Appellants own in excess of fifty-one percent (51%) of Comanche Allotment 2329. According to the complaint filed in this matter the Appellants property has been and is presently being utilized by the Appellees illegally under federal statute as said lease was never approved by the Secretary of the Interior, pursuant to 25 U.S.C. § 348[2] and as well, in violation of the Ft. Sill Apache Constitution. As is required the Appellees have never received authority from the Tribe's General Council[3] to lease any of the lands in question (App. App. 216-225), nor did General Council of the Tribe ever approve the

[2] *See*, Palm Springs Paint Company v. Arenas, Cal.App. 4 Dist. 1966, 51 Cal.Rptr. 747, 242 Cal. App.2d 682; "A conveyance or lease of restricted Indian land without approval of Secretary of Interior, is absolutely void." *See*, also Mott v. U.S.,, U.S., Okla. 1921, 412 S.Ct. 204, 254 U.S. 570, 65 L.Ed. 410, Gobin v. Snohomish County, 304 F.3d 909 (2002) cert denied 123 S.Ct. 1488.

[3] According to the Ft. Sill Apache Constitution, Article(s) III, IV, the General Council of the Tribe, consisting of all duly enrolled members of voting age must approve any and all agreements, contracts including leases of lands entered into on behalf of the Tribe. No such approval exists, other than a generic resolution which it is alleged delegates such authority to the Appellee(s). *See*, also, Article VII, Section 1 (c).

execution of any leases with any entity regarding lands surrounding the Tribe's gaming facility. (App. App. 251-252). Pursuant to the Ft. Sill Apache Tribe's Constitution the sovereign authority for decision making is centralized in the General Council (membership) of the Tribe and not the Business Committee. The Appellees it is alleged have acted outside the scope of their authority in violation of federal law, common law trespass and tribal law and have been sued in their individual capacity for ejectment and damages to lands allotted to the Kerchee and Pence Appellants.

C. **Summary Statement**

The original action is based upon the alleged illegal acts of Appellees in violation of numerous federal statutes, common law trespass, and tribal law; it is alleged such actions constitute actions outside the scope of the individual named Appellee's authority. The individual Appellees have illegally entered into a separate lease of certain real property that pursuant to the Mutual Self-Help Home Program was leased for a period of fifty (50) years to the Pence Appellants. The original lease between the Kiowa Housing Authority and Margaret Jean Kerchee-Walker, was assigned to Ethelene and Robert Chaat who paid for said home, which included the fifty (50) year lease. No notification of termination of said lease has

been forthcoming from the Kiowa Housing Authority to the sub-lessee's heirs, nor has any termination been requested by the Kiowa Housing Authority from the Secretary of the Interior.

The individual Appellees actions violate federal law relating to Indian allotments and access thereto and further, have violated federal laws that protect Indians from the negotiation of leases and land sales without the approval of the Secretary of the Interior. As well, the Appellees have violated the doctrine of common law trespass relating to their actions resulting in the encroachment, encumberment and trespass of the Appellants real property. Further, at no time were the individual Appellees authorized by the General Counsel of the Ft. Sill Apache Tribe to enter into any agreements or leases for the purpose occupying Comanche Allotted lands (App. App. 251-252), including a lease with the future interest holder of the 1.25 acres of land, Amber Deak. (App. App. 233-235).

Such actions by the Appellees are ongoing and continuing and although the Appellants have attempted for nearly a three (3) years now to negotiate a settlement to this dispute; Appellees have refused to even acknowledge their wrongdoing and continue to violate federal laws and principals of common law trespass and including their own constitutional mandates. The federal laws at issue have been promulgated to protect Appellants from infringement upon their

individual property rights. Such protection is the bedrock of modern federal Indian law and underscores the federal government's trust responsibilities to protect the property interests of Native American Indians.

The case factually turns on the continued actions of the Appellees in trespass, encroachment and destruction of lands either owned through allotment or through a legally binding lease with the Kiowa Housing Authority of the Kiowa Tribe of Oklahoma. The actions of the Appellees cannot be remedied through a tribal judicial forum and consequently, tribal exhaustion was not an issue before lower court. National Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), Iowa Mutual Ins. Co. v. LaPlante, 430 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), and Strate v. A-1 Contractors, 117 S.Ct. 1404 (1997).

In many ways as mentioned, this case is one of first impression, as no case has been discovered that reflects the uniqueness of the facts of this case and the continued controversy that exists between the parties. Although Appellees will attempt to persuade this Court as they did the lower court, that sovereign immunity is at the heart of this matter; allegations of the Appellants can easily be identified on the face of the complaint that prove otherwise. (App. App. 11-26).

VII

SUMMARY OF ARGUMENT

The trial court erred in granting the Appellees summary judgment when issues of material fact existed that were disputed and according to federal law, common law of trespass and tribal law the Appellees acted outside the scope of their authority as members of the Ft. Sill Apache Tribe's Business Committee.

A. Pence Appellants

The Pence Appellants have a valid and enforceable lease of lands comprising approximately 1.25 acres pursuant to a home built under the Mutual Self-Help Home Program upon which the home is located. The lease was originally for a term of twenty-five (25) years, which upon payment of the Mutual Self-Help Home in full was extended for an additional twenty-five (25) years. Thus, the term of the lease is for a total of fifty (50) years. The leasehold was inherited by the heirs of Ethelene Chaat who presently comprise the Pence Appellants. Ethelene Chaat and her husband Robert Chaat received an assignment of lease in on February 18, 1993, and paid the balance of the home loan in full on April 21, 1993. The lease will terminate until August 22, 2022, at which time the future possessory owner of the land will take possession of the 1.25 acres of land at issue. No termination of the lease has occurred and the Secretary of Interior by

and through an Acting Superintendent of the Anadarko Region of the Bureau of Indian Affairs has absolutely no authority to terminate said lease without the approval of the Kiowa Housing Authority who is the legal lessor of said property at issue. (App. App. 171-173). No notice of termination of the lease has been received by the Kiowa Housing Authority of the Kiowa Tribe of Oklahoma. Further, the Acting Superintendent is not an administrative probate judge with the legal education and authority to make such determinations. (App. App. 244-247). To controvert this alleged determination the Appellant(s) provided a letter dated May 28, 2008, from the Kiowa Housing Authority stating the Margaret Pence was the successor to the 1.25 acres and that she had legally inherited said property and home from Ethelene Chaat. (App. App. 173).

In summary, the Appellees have and are trespassing, encroaching and encumbering the Mutual Self-Help Home and leasehold of the Pence Appellants and according to the legal principals of common law trespass of the State of Oklahoma, should be held liable for any and all damages intentional and consequentially caused by said actions, including ejectment from the lands of the Pence Appellants.

Clear issues of material fact exist that is disputed relating to whether the lease of the Pence Appellants remains legal and binding upon the Kiowa Housing

Authority who is the original lessor of said 1.25 acres upon which the home of the Pence Appellants' is now located. Further, the legal question arises as to whether the Acting Superintendent has the authority to make such a legal decision without consulting with the lessor of the property in question, the Kiowa Housing Authority. No legal authority for such a legal opinion is cited by the Appellees, nor the lower court. Further, the question clearly is evident as to whether the lease entered into by the Appellees with the future possessory owner of the 1.25 acres is valid and legal based upon the fact that absolutely no approval of said lease was ever obtained by the Secretary of the Interior, pursuant to 25 U.S.C. § 348. (App. App. 232-234).

B. <u>Kerchee Appellants</u>

With full knowledge of federal requirements for approval of leases by the Secretary of Interior the Appellees entered an illegal lease with the Kerchee Appellants that was and is null and void. Any issue relating to the receipt of rental monies pursuant to a non-approved lease is null and void under federal law has no consequence and relevancy whatsoever.

The Kerchee Appellants stipulate that a lease was entered into (App. App. 257-258) however, that lease was not approved as per 25 U.S.C. § 348 as is mandated by said federal statute. Further, there exists a tribal legal issue as to

whether the individual Appellees were so authorized by the General Council of the Ft. Sill Apache Tribe to enter into lease with the Kerchee Appellants and whether assuming *arguendo* such a lease was authorized, whether it was approved in substantive form by the General Council of the Tribe who has supreme authority to approve any and all actions of the Appellees.[4]

Further, as alleged in the original complaint of the Appellants the trespass, encroachment and encumberment of the Kerchee Appellants' lands are on-going (App. App. 18-19) and obviously no mention of that allegation is made by the Appellees, or the lower court in its order granting summary judgment in favor of the Appellees. The Kerchee Appellants' non-approved lease terminated on October 9, 2008; obviously subsequent to that date no authority was granted to the Appellees to continue to utilize the lands of the Kerchee Appellants. The lower court does not even address this issue, but skirts any mention of a continued trespass by stating that the Appellees were granted permission to be on lands owned by the Kerchee Appellants. (App. App. 164, ¶ 1, 168 ¶ 2).

[4] The Ft. Sill Apache Tribe never approved the Indian Reorganization Act, Act of June 18, 1934, ch. 576, § 16, 48 Stat. 987 (codified at 25 U.S.C. § 476). *See* also 25 U.S.C. § 473a (Alaska provisions). Many provisions of the Indian Reorganization Act do not apply to Oklahoma. See 25 U.S.C. § 473. But similar provisions were extended to that state in 1936 with the passage of the Oklahoma Indian Welfare Act. Act of June 26, 2936, ch. 831, 49 Stat. 1967 (codified as amended at 25 U.S. C. §§ 501-509). The provision are applicable to "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 503.

Consequently, a material fact still remains disputed as to whether the trespass is ongoing; whether the lease was ever approved by the Secretary of the Interior and whether the Appellees have violated federal law, principles of common law trespass and their own tribe's constitutional mandates. In reiteration, mere affidavits of the Appellees without substantiating evidence does not disprove or relieve them of liability or show the facts alleged by the Appellees is uncontroverted.

It would seem evident that disputed material issues of fact still exist and that the entry of summary judgment in favor of the Appellees was clear err by the lower court. The lower court's scant substantive explanation and legal reasoning for dismissing the factually allegations of the Appellants was not explained and was legally unwarranted. Although mere allegations of the Appellants may not be used as a basis for demonstrating a genuine issue for trial, all reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. *See*, Olsen v. Layton Mills Mall, 312 F.3d 1304, 1311 (10th Cir. 2002), United States v. Agri. Services, Inc., 81 F.3d 1002, 1005 (10th Cir. 1995), Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

C. Sovereign Immunity

The Appellees have not been sued in their official capacity, nor has the Ft. Sill Apache Tribe been sued. No allegation contained within the Appellant's complaint (App. App. 11-26) alleges that the Ft. Sill Apache Tribe is a party defendant. Although the Indian tribes have long been recognized as possessing sovereign immunity from suit, this action is not against the sovereign, but against individual members of the Business Committee who believe their actions are immune from federal law and the law of the Tribe.

Appellants do not deny that the Ft. Sill Apache Tribe of Oklahoma enjoys sovereign immunity from suit. Indian tribes have not relinquished their status as sovereign entities and courts of the Untied States have long recognized that tribes were and remain independent political societies. *See*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-557; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). Tribes retain the inherent powers of limited sovereignty which has never been extinguished. *FELIX S. COHEN'S HAND BOOK OF FEDERAL INDIAN LAW*, § 4.01 [1][a] at 206, (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978). However, Congress may and has reduced the sovereign immunity from suit and consequently, that immunity is not an absolute. *See*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (noting that "Congress has plenary authority to

limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"); Wheeler, *supra*, 435 U.S. at 322 (noting that tribes are "subject to the ultimate federal control"); United States v. Kagama, 118 U.S. 375, 381 (1886) (referring to tribes as "semi-independent"); Cherokee Nation, *supra*, 30 U.S. (5 Pet.)) at 17 (referring to tribes as "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian").

In matters involving allegations of actions by individuals acting outside the scope of their authority certain legal precedent allows for such suits. *See*, Ex parte Young, 209 U.S. 123 (1908). Even in matters of allegations of violations of the Indian Civil Rights Act, 25 U.S.C. § 1302, the Supreme Court in Santa Clara, *supra*, at 436 U.S. 49, 56, 59 (1978) leaves open the issue of whether individual members of a tribal governing body may be sued for actions outside the scope of their authority. The Court stated that immunity is not absolute. *Id*. at 56.

D. Qualified Immunity

The Appellees should not be entitled to the defense of qualified immunity as their actions violated constitutional and federal statutory rights of the Appellants. In addition the Appellees were and are well aware of those clearly established laws at the time of their past conduct and ongoing conduct.

The court in Albright v. Rodriguez, 51 F.3d 1531 (10th Cir. 1995), set out a two part standard or test involved where a government official seeks summary judgment on qualified immunity grounds: "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.* at 1534-35

Qualified immunity certainly does not attach as a defense in this case factually, and it would seem absurd to argue otherwise. The lower court did not address the factual issue of whether the Appellees were in violation of constitutional and statutory rights and further, whether they were even aware of those legal mandates. It was err for the lower court to hold that the Appellees enjoyed qualified immunity was an affirmative defense to their illegal actions.

In this case the Appellants have satisfied both prongs of the qualified immunity test and thereby should have withstood a grant of qualified immunity to the Appellees. Because the Appellants presented evidence that the Appellees violated a clearly established statutory requirement, the burden then shifted to the Appellees to prove "no genuine issue of material fact' exist and defendant 'is entitled to judgment as a matter of law." *Id.* (internal citations omitted).

Accordingly, "the defendant still bears the normal summary judgment burden of showing that no material facts remain in dispute that would defeat the qualified immunity defense." *Id*. (citing *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002)) The Appellees did not and have not met this burden in this case, and "the record shows an unresolved dispute of historical fact relevant to this immunity analysis." *Id*. Therefore, the motion for summary judgment, based on the Appellees' request for qualified immunity, should have been denied by the lower court.

VI

ARGUMENT

A. Legal Standard of Summary Judgment

Pursuant to Rule 56(c), Fed. R. Civ. P., summary judgment shall be granted if there "exist no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, (1986). In determining whether a genuine issue of material fact exists the evidence presented

is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Further, all reasonable inferences are to be interpreted in favor of the non-moving party. United States v. Agri. Services, Inc. 81 F.3d 1002, 1005 (10th Cir. 1996), Olsen v. Layton Hills Mall, 312 F.3d 1304, 1311 (10th Cir. 2002). As stated in the Order Granting Summary Judgment, once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there exist no material issues for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

Appellants should have been afforded "all reasonable inferences [are] to be interpreted in favor of the non-moving party.", if such a standard would have been applied to the evidence before the lower court, Appellees motion for summary judgment ought to have been denied. Agri. Services, Inc. at 1005, Layton Hills Mall, at 1311. The Appellees artfully set out a list of undisputed facts based upon numerous affidavits that are not supported by real evidence. Any inference from these affidavits and interpretation of the other evidence should be viewed in the light most favorable to the non-moving party. Blackhawk-Cent. City Sanitation Dist. V. Am. Guar. & Liability Ins. Co., 214 F.3d 1183, 1188 (10th Cir. 2000).

The Appellees filed a Motion for Summary Judgment pursuant to F.R.C.P. 56 and LCvR 56.1(b), contending that as a matter of law they were entitled to summary judgment. (App. App. 108-109). The Appellees submitted fifty-seven (57) alleged undisputed facts within their brief in support of their motion for summary judgment. (App. App. 111-123). Accordingly, the Appellants filed a response alleging their own set of undisputed facts (App. App. 143-149) which completely disputed the numerous facts alleged by the Appellees as undisputed. Granted the Appellants did not list their individual facts that controvert the facts of the Appellees on the face of their response, but nonetheless numerous issues of material fact still existed for trial on the merits of the allegations of the Appellants.

B. Argument Issues Presented

1. Whether the trial court erred in granting summary judgment in favor of the Appellees when disputed issues of material fact existed in conjunction with leases of two (2) specific parcels of Indian trust lands?

In the present matter it would seem highly evident and questionable whether the moving party met its burden of proving to the lower court that no genuine issue of material fact existed for trial. Obviously, mere self-serving affidavits and non-authenticated documents do not meet this burden as the lower court has previously decided.

(1) Pence Appellants

The Pence Appellants set out four separate paragraphs (App. App. 147-148) that the lower court states:

> Despite Plaintiffs' own "Statement of Undisputed Facts," defendants' statement of facts remain uncontroverted in all ways that [are] material to the claims in this action. Of the fifty numbered paragraphs set out in plaintiffs' statement of facts, only four (¶ ¶ 35, 38, 39 and 43) cite any supporting evidence. This evidence does not fully support the contentions for which it is cited and these particular contentions do not, in and of themselves, controvert the material facts which entitle defendants to summary judgment. (App. App. 166 ¶ 1).

Contrary to the opinion of the lower court those paragraphs clearly point to facts that are alleged by the Appellants that dispute certain undisputed material facts presented by the Appellees within their motion for summary judgment. As well, the Appellees own statements of "Undisputed Facts" do not cite any supporting evidence that should be viewed in any different manner or degree of judicial scrutiny as the Appellants listing of "Undisputed Facts". This statement alone proves that for some unknown reasoning the lower court failed to evaluate and weigh the presented evidence equally.

Paragraph no. 35 of the Pence Appellants Response to the Defendants' motion for summary judgment states:

> The fifty year lease relating to the Pence property is under the authority of the Kiowa Housing Authority and not the Bureau of

> Indian Affairs and cannot be terminated unless or until a breach of said lease has occurred or until the Kiowa Housing Authority requests formal termination of said lease, which has never occurred. (*See*, attached Exhibit C). (App. App. 147)

This alleged undisputed material fact is supported by a Indian Programs document, which clearly controverts the evidence submitted by the Appellees in the form of a letter from the Acting Superintendent dated February 5, 2009, indicating that the lease is no longer binding. (App. App. 244-247).

Further, Appellants paragraph no. 38, states:

> Lease No. 29487 of the approximately 1.25 acres is still valid and binding and all documents relating to its validity indicate that Ms. Pence is the successor to said lease. (*See*, attached Exhibit(s) A, B). (App. App. 147).

Paragraph no. 38, is supported by document identified as Exhibit A, submitted by the Pence Appellants which indicates that an original lease was entered on August 22, 1972 involving the 1.25 acres of land the Pence Appellants allege to have a present leasehold interest. (App. App. 171-172). In addition a letter to Ms. Pence dated May 28, 2008, from the Kiowa Housing Authority, identified as Exhibit B, states that Ms. Pence is the successor to the lands at issue, upon which the home of her mother (Ethelene Chaat) is located and that the lease remains binding. (App. App. 173).

This evidence alone proffered by the Pence Appellants disputes the contentions of the Appellees and the alleged owner of the lands, Amber Deak. (App. App. 232-234). It as well disputes the alleged letter from Amber Deak that is not executed by Ms. Deak that she is the present interest owner of said lands. The letter allegedly executed by Ms. Deak, should not have been considered by the lower court as it was not executed by Ms. Deak. (App. App. 235). What weight the lower court gives this document is not expressed within the opinion of October 13, 2009, granting the Appellees summary judgment. (App. App. 163-169).

Finally, the lower court cites to paragraph no. 43 (App. App. 148) of the Appellants response to the request for summary judgment by the Appellees, as a contention by the Pence Appellants which rebuts the supporting document of the Appellees. The statement of paragraph no. 43, contests the undisputed facts proffered by the Appellees that the General Council of the Ft. Sill Apache Tribe authorized the individual Appellees actions. Paragraph 43 states:

> Whether or not the General Council of the Ft. Sill Apache Tribe authorized a purchase of the Kerchee lands and not an illegal lease. (See, Attachment No. 7, Defendant's Mot. Sum. Jdg. (App. App. 248-251))

The resolution allegedly authorizes "land acquisitions" relating to the Kerchee Appellants allotment, not leases of said described property of either

Kerchee or Pence. Further the legal description included in the General Council resolution (App. App. 250 ¶ 2) does not include the following legal description for the 1.25 acres of land description involved in the Pence Appellants situation:

> E1/2, NE1/4, SE ¼ NE ¼ NW ¼ Sec. 33, T. 2N. R. 11W., I.M., Oklahoma, containing 1.25 acres, together with an easement for ingress and egress purposes upon, over and across the following described parcel: Beginning at a point 200 feet west of he Northeast corner of the said NW ¼ Sec. 33-2N-11W; thence South 660 feet; thence East 35 feet; thence South 660 feet; thence West 20 feet; thence North 680 feet; thence East 20 feet to point of beginning, to be held and used in common by the grantors and other owners of the aligout part abutting the easement described herein, part of the original allotment no. 2329

Absolutely, no substantive land description described in the proffered resolution by the Appellees describes the Pence Appellants' 1.25 acres under the original lease (App. App. 171), within the described lands for land acquisition purposes contained in said resolution. (App. App. 250 ¶ 2). If the alleged lease of Amber Deak is to be authorized by General Council, it certainly is not so authorized within the substantive provisions of said resolution. Consequently, said lease purporting to allow for the trespass upon the leased lands of the Pence Appellants is null and void; lacking General Council approval and as well approval from the Secretary of the Interior.

The Appellees do not provided any additional proffered evidence that proves that the General Council approved the lease with Amber Deak (App. App. 232-

234), consequently, based upon the language of said General Council resolution, the Appellees were not authorized to enter a lease with Amber Deak, nor were they authorized to trespass, encumber, destroy property and encroach upon the 1.25 acres under lease to the Pence Appellants. Such actions were and are outside the scope of the individual Appellees.

This issue may be difficult to distinguish by a novice who is not aware of the subtly differences that exist between an IRA form of tribal government and a more traditional form in which the General Council (membership) of a tribe retains all authority and powers to approve the actions of their elected officials. In this situation however, it is an important element in proving whether or not the actions of the Appellees were and are sanctioned legally by the General Council of the Tribe.

Just another example of a disputed fact that goes to the veracity and the alleged good faith actions of the Appellees, in relationship to whether their actions are within the scope of their alleged authority, pursuant to tribal law and federal law.

Finally, paragraph(s) nos. 47, 48 (App. App. 148) clearly indicate that the Pence Appellants claims include support of the proffered exhibit(s) A, B, (App.

App. 171-173) that the 1.25 acres is under a legal and binding lease agreement and that Amber Deak does not have a possessory interest in said lands. This obviously, controverts the statement of Amber Deak (App. App. 135) that she is the present interest holder of the 1.25 aces.

Pence Appellants believe that it was err for the lower court to grant summary judgment in favor of the Appellees regarding the 1.25 acres of land at issue, based upon the substantive arguments contained herein. Disputed issues of material fact exist and should have been resolved at trial in this matter.

(2) Kerchee Appellants

The Kerchee Appellants have consistently argued that the Ft. Sill Apache Tribe's resolution of the General Council of the Tribe, dated: June 12, 1999, did not authorize the lease of the Kerchee property. (App. App. 248-251).

Any acts allegedly committed by the individual Appellees cannot be relieved by mere denials that they were not personally involved in actions relating to either Kerchee or Pence Appellants. (App. App. 120 , ¶ 39). Obviously, acting as alleged officials of the Tribe with absolutely no General Council delegation of authority does not relieve the Appellees for actions taken outside the scope of their authority. (App. App. 117, ¶ 28). Nothing within the substantive provisions of the

resolution cited by the Affiant, Houser, indicates that the General Council of the Ft. Sill Apache Tribe delegated to the Appellees or authorized the Appellees to enter into an illegal lease with the Kerchee Appellants, in violation of 25 U.S.C. § 348. Again the lower court accepts mere statements contained in an affidavit as true and without question, replete of any proffer of substantiating evidence other than a 1999 resolution by the General Council that does not specifically authorize the lease of any lands. (App. App. 251-252). Clearly, the Appellants dispute this authority pursuant to paragraph no. 43. (App. App. 148). A delegation of authority to purchase does not equate to the authorization or delegation by the General Council of the Tribe to lease, either the Kerchee or Pence properties.

Further, the Kerchee Plaintiffs alleged undisputed facts that the trespass was on-going and that the land had been destroyed. (App. App. 143 ¶ ¶ 5, 6). The Appellees contend that the lands were reclaimed and no land was destroyed. (App. App. 123 ¶ 56 (Nott Affidavit 226-231, ¶ 10, 11)). This fact has been disputed by the Appellants and a material issue of fact still exists as to whether the land have been irreparably harmed by the Appellees intentional actions.

In addition, as mentioned the lower court completely refuses to address the federal statutory requirement of 25 U.S.C. § 348, which is an important element in the protection of allottees from incursions upon their lands by unethical and

scurrilous individuals who are attempting to take advantage of the "helpless and defenseless" Indians. The conclusion by the lower court granting summary judgment, flies in the face of the policies of federal Indian law for the protection of Indians based upon illegal actions that have over the last two (2) centuries resulted in the loss of nearly two-thirds (2/3) or more of lands allotted to individual Indians, pursuant to the General Allotment Act of 1887.[5]

Violation of 25 U.S.C. § 348, should have alone protected the Kerchee Appellants from a finding of summary judgment in favor of the Appellees, and clearly proves that the individual Appellees were and are in violation of this federal statute which was well established at the time of the taking.

The lower court ingenuously points to the fact that the Kerchee Appellants had granted permission to the Appellees to trespass upon their lands as are **correctly** described: (emphasis added)

> E ½ SE ¼ NW ¼, E ½ E ½ W ½ SE ¼ NW ¼, E ½ E ½ SW ¼ NE ¼ NW ¼, E ½ SE ¼ NW ¼ SE ¼, W ½ SE ½ SE ¼ NE ¼ NW ¼ of Section 33, Township 2 North, Range 11 West of the Indian Meridian and a parcel of land described as beginning at the Northeast Corner of the NW ¼ of Section 33, Township 2 North, Range 11 West of the Indian Meridian, thence South 330 feet; thence West 200 feet to the point of beginning, thence West 130 feet, thence South 330 feet; thence East 130 feet, thence North 330 feet to the point of beginning,

[5] W. Washburn, Red Man's Land, supra Note 69, at 145; Office Indian Aff., U.S. Dep't of Interior, 10 Rep. On Land Planning 6 (Washington: Government Printing Office, 1935). Tribes generally received remuneration at the rate of $1.25 per acre.

> containing 0.985 acre, more or less, for a combined total of 37.235 acres; and the E ½ NE ¼ NW ¼ NE ½ NW ¼ of Section 33, Township 2 North, Range 11 West of the Indian Meridian, thence West 130 feet, thence South 330 feet, thence East 130 feet; thence North 330 feet, containing 0.985 acre, more or less, for a combined total of 2.235 acres, more or less. Total combined acreage for the above two tracts is 39.27 acres, more or less, part of the original allotment of Charlie Kerchee, Comanche 2329.

This legal description it is alleged is incorporated within the General Council resolution of June 12, 1999, but is not titled correctly and may be incorrectly identified as "Nahno Allotment". (App. App. 250 ¶ 2). Whether or not this is the correct allotment for land acquisition purposes of the General Council of the Tribe is a matter for trial, and this inconsistency was completely ignored by the lower court.

In addition, the Appellees point the lower court to the fact that the Kerchee Appellants alleged acceptance of lease payments from the Appellees, somehow absolves the Appellees from liability for entering into an illegal lease under federal statutory law, as well as criminal penalties pursuant to federal law is nonsense. *See*, 25 U.S.C. §§ 348, 202. (App. App. 35, Appellees Brief S.J.) No legal precedent or other federal statute is cited either by the lower court or the Appellees to allow for the circumvention of federal laws relating to the required lease approval of allotted lands by the Secretary of the Interior. It is irrelevant that the

Kerchee Appellants received payments, when the basis of the payments was null and void, pursuant to federal law. Certainly the Appellees are and were aware of such a requirement and failed to abide by well established federal statutory law.

Negligence on behalf of the Bureau of Indian Affairs in receiving monies to be deposited in a trust account (IIM) does not somehow by acquiescence prove an approved lease with the Kerchee Appellants existed. In an attempt to correct the matter the Bureau of Indian Affairs sent out a notice of trespass (App. App. 121, § 45). The Appellees responded by filing a federal lawsuit against the United States which was never served, but utilized in the Appellant's opinion only to serve as a stall tactic for the Appelles' ulterior motives in their attempt to enter into another alternative lease with the State of Oklahoma for other property upon which to park their customer vehicles. A frivolous lawsuit filed only in attempt to buy the Appellees time to shop for other lands. To substantiate this motive, the lawsuit was never even served and was dismissed subsequent to the Appellants filing a motion to intervene.

Whether the Appellants complied with the local rules regarding labeling their undisputed facts as disputed facts should not warrant the penalty of summary judgment being entered against the Appellants. (App. App. 143-149). Clearly,

nearly each labeled undisputed fact of the Appellants at issue are material to the factual conclusions of this case and controvert the alleged undisputed facts of the Appellees. Beginning with paragraph no. 10, of the Appellants' undisputed facts (App. App. 144) material issues of fact are alleged that controvert the undisputed facts of the Appellees. The disputed fact exists whether the lease of allotted lands owned by Kerchee Appellants was ever approved by the Secretary of Interior. Further, the whole line of paragraphs relating to the alleged actions of the Appellees within the scope of their authority does not mention the fact that said lease was never approved pursuant to 25 U.S.C. § 348. The Appellees and their legal counsel clearly had knowledge that said approval was necessary when leasing allotted Indian lands. The Appellees state that as "members of the Tribe's Business Committee, acting in their official capacity and within the scope of their authority, and in the reasonable belief good faith belief the Tribe had a lawful leasehold interest . . ." which factually is absurd to say the least. (App. App. 119 ¶ ¶ 36, 37). All Appellees knew that any lease of allotted lands must be approved by the Secretary of Interior or said lease is null and void. Clearly those statements alone raise material issues of fact that are disputed by the Appellants.

The lower court indicted all the undisputed material facts of the Appellees [defendants] remained undisputed even after the Appellants filed their response. (App. App. 163). In reiteration of the lower courts' previous Order Granting Summary Judgment (App. App. 132-133), the court states in general terms that:

> The uncontroverted motion and briefing establishes that the defendants are entitled to summary judgment in their favor, on the remaining claims, for each of the following reasons. First, there are no genuine issues of mater fact for trial. Second, the defendants are entitled to sovereign immunity. Third, defendants are entitled to qualified immunity. Fourth, uncontroverted facts show that defendants are entitled to summary judgment on the Kerchee Plaintiffs' common law claim because it is undisputed the Kerchee Plaintiffs gave consent to the Tribe to make use of the property in question. (App. App. 164, quote ¶ 1).

The lower court indicates that the "plaintiffs have [not] made any purely legal arguments that would make summary judgment inappropriate at this stage. They have not." (App. App 166, Pg 4 ¶ 4 Order October 13th, 2009). This obviously is not the case as the Appellants have pointed to numerous federal statutes that have been violated by the Appellees. The most important federal statute relating to the Kerchee Plaintiffs relates to 25 U.S.C. § 348, which requires any and all leases of allotted Indian lands to be approved by the Bureau of Indian Affairs who have trust responsibility to oversee and protect Indians from incursions upon their lands by others.

In reiteration, no evidence was ever proffered by the Appellees that showed that the alleged lease with the Kerchee Plaintiffs was approved pursuant to 25 U.S.C. § 348. (App. App. 256-258). Furthermore, the use by Appellees of the lands at issue were for commercial purposes in particular parking for a gaming facility. As such 25 U.S.C. § 415 requires approval by the Secretary of the Interior for a commercial lease and absolutely no such approval has ever been obtained by the Appellees for either the Kerchee or Pence properties. Further, the Secretary of Interior has the fiduciary duty to exercise oversight and approval of leases related to Indian allotted lands, not only for general welfare purposes of individual Indians, but further for protection of allottees' financial interest. *See*, Brown v. U.S., D.A. Fed. 1996, 86 F.3d 1554, on remand 42 Fed.Cl. 538.

(3) Sovereign Immunity

Assuming, *arguendo*, that there exist material issues of fact that are disputed, the issue arises as to whether the individual Appellees who have violated federal law, common law trespass and applicable tribal constitutional mandates are immune from suit based upon the doctrine of sovereign immunity when it is alleged they have acted outside the scope of their individual authority?

It would appear that the lower court's decision granting summary judgment in favor of the Appellees, is based primarily upon the affidavits of the Appellees

(App. App. 175-214). However, it seems apparent that human nature would dictate the contents of the Appellees affidavits and that denial of any wrongdoing would be tantamount in their minds and stating that they "acting in good faith and pursuant to the law" would be the natural result.

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

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

In Ex parte Young, a federal court was not barred by the eleventh amendment when a state officer acting unconstitutionally, either because the

officer is acting in violation of the constitution or federal statute or regulation that is the supreme law of the land. *17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE* § 4232 (3rd ed. 2007). Thus, the Ex parte Young exception to sovereign immunity relies upon the fiction that the suit is against the officer and not the sovereign entity, thereby avoiding sovereign immunity. *See,* Pennhurst State Sch. & Hosp. v. Haldreman, 465 U.S. 89, 114 N.25 (1984) (noting fiction).

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

In deciding whether the principle of Ex parte Young apply to the facts presently before the lower court a careful review of the allegations contained in the Appellants complaint should have occurred. Such a review should have dictated the legal conclusion that tribal immunity should not bar the suit against the Appellees in this matter. Santa Clara Pueblo, which relied upon Ex parte Young held a tribal officer "not protected by the tribe's immunity from suit," *See*, 436 U.S. at 59. As mentioned the Appellees are knowledgeable, as well as their legal counsel in the procedures set out in federal law to lease or purchase Indian allotted lands. *See*, 25 U.S.C. §§§ 345, 348, 415(a) and common law principles of trespass, including their own constitutional mandates. However, the Appellees did not follow the precepts of federal law and when confronted with the facts of their illegal actions they have continued to ignore and blatantly proceed with actions that continue to violate the property rights of the Appellants. The complete denial of individual rights of the Appellants in this matter and continued bravado of the Appellees should not have been allowed by the lower court and sovereign immunity should not have been allowed to be utilized to mask the illegal actions of the Appellees and their employee. *See*, *e.g.* Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) (*Ex parte Young* has been extended to tribal officials in their official capacities … to enjoin conduct that violates federal law");

Bassett v. Mashantucket Pequot Museum and Research Ctr. Inc., 221 F.Supp.2d 271, 278-79 (D.Conn.2002) ("[u]nder the doctrine of *Ex parte Young*, prospective injunctive and declaratory relief is available against tribal officials when a plaintiff claims an ongoing violation of federal law or claims that a tribal law or ordinance was beyond the authority of the Tribe to enact") (citing *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir.2001)); accord Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

The general availability of Ex parte Young relief indicates that summary judgment should not have been afforded the Appellees, in a case not involving the sovereign. Similarly, an absent state sovereign's interests have not previously been found to require dismissal where a state officer has been joined under Young. *See, e.g.* Gila River Indian Community v. Winkleman, 2006 WL 1418079 (D.Ariz.) (where state officer present pursuant to young, "resolution of this case does not require Arizona's presence because Defendant Winkleman . . . can properly represent Arizona's interests in the state lands.) Thus, Appellees and the lower courts sparse examination simply cannot be correct, and acceptance of dismissal based upon the doctrine of sovereign immunity based upon mere affidavits would result in the virtual elimination of Ex parte Young relief against tribal officers and employees, and perhaps against federal and state officers as well.

Further, no causes of actions by the Appellants enunciated in their original complaint requested remedies that revolve around the possibility of liability of the Ft. Sill Apache Tribe and no relief has been requested from the Tribe. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (contract dispute-no action outside the scope of officer's authority); Ex parte Young, 209 U.S. at 142, 149 (rejecting officer's "objection . . . that the suit is, in effect, one against the State of Minnesota"). In Vann et al. v. Kempthorne, 534 F.3d 741, 753 (D.C. Cir. 2008) the United States Court of Appeals for the District of Columbia, discussed at length the implications of the Supreme Court's decision in Larson, *supra*. The Court specifically denotes the relevancy of n. 11. Larson, 337 at 691:

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

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

that:

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

In the present matter assuming *arguendo*, that the lower court ruling is overturned the Appellees would only be required to remove their property from the Appellants property and such a result would not fall within the gambit of n. 11 of Larson, 337 at 691. As the Court in Vann, stated: "Whatever the Larson Court meant with it referred to "affirmative action", we conclude that this dicta does not limit the force of Ex parte Young in the case at hand." at 758. Further, the Vann Court indicated that ". . .Cherokee Nations' reliance on footnote 11 and similar pronouncements reflects wishful thinking. The tribe imagines a world where *Ex parte Young* suit cannot proceed if they will have any effect on the sovereign. But that is what *Ex parte Young* suits have always done." Vann, *supra* at 755. In Idaho v. Couer de'Alene Tribe, 521 U.S. 261 (1997) the Supreme Court held that Ex parte Young did not allow the tribe to sue state officials as the requested relief was considered "implicates special sovereignty interests". Couer de' Alene, at

281. The Vann Court rejected the Cherokee argument that special interests in controlling governance and defining tribal membership call for a similar result. Vann, at 765. The Appellees cannot claim that any tribal interest is at stake in this matter when they have acted to take lands not belonging to the Tribe or a tribal member, but have seized lands outside tribal boundaries belonging to and leased by members of another tribe. Certainly, eminent domain powers of a tribe do not reach outside their lands or exterior boundaries.

In the present case, the Appellants have acted outside the scope of their authority in violation of federal law, common law trespass and their own constitutional mandates. If allowed to continue their actions through the upholding of the lower court's grant of summary judgment, the results will create a "slippery slope" which would result in tribal officials, who have not acted pursuant to any legal authority of the tribe to take lands and property of others outside the exterior boundaries of their lands without limitation. Certainly, a dire consequence within Indian country to say the least.

Although the Appellees previously argued that the Ft. Sill Apache Tribe is an indispensible party to this action, as the Appelless are officers or employees of the Tribe and the Tribe owns the gaming facility in question; such a conclusion begs the question, as no reference is made to the Ft. Sill Apache Tribe within the

confines of the Appellant's complaint. The lower court concluded that if it is concluded that the Appellees have acted *ultra vires* then the issue does not then require the joinder of the Tribe. Larson, 337 U.S. 689-90 (citing *Phila. Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing *Ex parte Young*)). Appellees attempted to support their contention by citing a few cases that were dismissed due to the nonjoinder of a tribe or absent party, but they are unable to cite to even one case with even a similar fact pattern more than superficially to the case at bar.

The lower court correctly analyzed the issue of sovereign immunity in its previous order relating to a motion to dismiss and strike filed by the Appellees based upon sovereign immunity. (App. App. 16). The lower court stated:

> The Tenth Circuit gave guidance to district courts considering these difficult issue so of tribal immunity in Native American Distributing v. Seneca-Cayuga Tobacco Company, 545 F.3d 1288 (10th Cir. 2008). In that action, a tobacco distributor sued a tobacco manufacturer. The district court determined that the tobacco manufacturer was a tribal enterprise entitled to tribal immunity. Plaintiff sued individuals including the tribe's former chief and managers of the tobacco manufacturer. The Tenth Circuit upheld the district court's finding that the tobacco manufacturer was a sub-division of the tribe and entitled to sovereign immunity. The Tenth Circuit, however, reversed the district court's determination that the individual defendants were immune from suit. This court is guided by the framework set forth in Native American Distributing. (App. App. 16).

Here the relief sought by the Appellants is from the individual Appellees for money damages and not from the sovereign.

The lower court held that:

> On the other hand, Native American Distributing makes clear that claims for money damages from each of these individual defendants, sued in their individual capacities, are not barred so long as it is clear plaintiffs seek money damages from the individual defendants personally and not from the Tribe. Native American Distributing, 546 F.3d at 1297. (App. App. 99).

Based upon the issues of material fact that are disputed the lower court erred in holding that the individual Appellees should be afforded sovereign immunity and summary judgment should not have been entered.

(4) Qualified Immunity

The Appellees also allege that they are immune from suit based upon the doctrine of qualified immunity, however, this would appear to be the least persuasive argument. Although the burden had shifted to the Appellants when the Appellees raised the defense of qualified immunity in the context of summary judgment, the Appellants produced evidence that proved that the federal laws in question were clearly established at the time of the actions of the Appellees and the Appellees should have been aware of those federal statutory laws.

In Albright v. Rodriquez, 51 Fd.3d 1531 (10th Cir. 1995), the Court reiterated the two-part standard where a Government official seeks summary judgment on qualified immunity grounds. "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right. Second, the

plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." Id. at 1534-35. Clearly the facts show even reviewing the Appellee's Brief in Support of Summary Judgment that no approval for the lease agreement with the Kerchee Appellants was ever secured by the Secretary of the Interior, pursuant to 25 U.S.C. § 348. Consequently, the lease agreement with the Kerchee Plaintiffs executed on October 9, 2003, was void pursuant to federal statutory law. (App. App. 256-258).

The Supreme Cou*rt* in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 272 (2001) required the two step sequence above-indicated in resolving qualified immunity claims. However, the court in Pearson v. Callahan, 129 S.Ct. 808, 815, 172 L.Ed. 565 (2009) stated that:

> While the sequence set forth there is often appropriate, it should no longer be required as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. Id. at 818.

Irrelevant of which prong of the sequence for qualified immunity is applied, the Appellees in this case are not entitled to qualified immunity, as the Appellants have established a statutory right to access their allotment or leased property without hindrance from the Appellees. Such actions by the Appellees violate 25 U.S.C. §§ 345, 348 and common law principles of trespass. Both 25 U.S.C. §§

345, 348 and common law principles of trespass were clearly established laws at the time of their conduct and continue to be well established principles of law. The Appellees and their legal counsel's knowledge of the law makes it crystal clear that such actions were and are in violation of clearly established principles of law and thus, qualified immunity should not apply to the present

Obviously, operating pursuant to a lease agreement in both situations, relating to the Kerchee lease and Amber Deak lease that are in violation of federal law, shows the demeanor and intention of the Appellees. If they desire to utilize lands surrounding their gaming facility, their past behavior dictates they will do whatever is necessary, including skirting federal laws and regulations relating to leasing Indian allotted lands to obtain lands they require. The affidavits of the Appellees should not be considered persuasive as to issues surrounding sovereign immunity, nor qualified immunity as all are self-serving and the Appellants have not had the opportunity to question the Appellees on direct or cross examination before the court to determine the veracity of their statements contained within the substantive provisions of their affidavits. Further, a single generic resolution does not prove that the General Council of the Tribe authorized any of the actions of the Appellees, even by a preponderance of the evidence. Such submissions to the

lower court did not prove the Appellees were authorized enter leases without the approval of the Secretary of the Interior.

For purposes of this appeal, if the Appellants only look to the designated paragraphs of their Response to the Appellees motion for summary judgment and the alleged uncontroverted facts contained in said brief, a reasonable person could surmise that the exhibit(s) (attachements) submitted by the Appellants controvert the evidence submitted by the Appellees to disprove their alleged uncontroverted facts.

Finally the lower court's reliance upon Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 (9th Cir. 1991) is misguided. Clearly, the facts of Imperial Granite are completely distinguishable from the present facts before the lower court. The Ninth Circuit indicated that where there exist no allegations that the tribal officials acted outside the scope of their lawful authority dismissal was appropriate. In the present matter the Appellants throughout the present litigation have alleged actions outside the scope of the Appellees legal authority. Also the lands at issue in Imperial Granite involved fee lands and a non-Indian. In the present matter the lands at issue are allotted trust lands and the Plaintiffs are all duly enrolled members of other tribes.

The lower court's statement that "Similarly here, where there is no evidence that any of the defendants actions beyond the scope of their authority for the tribe, defendants are entitled to share the tribe's sovereign immunity." (App. App. 167 ¶ 1). It is evident that the leases with the Kerchee Appellants, including Amber Deak were not and have not been approved by the Secretary of Interior or the General Council of the Tribe.

Such analysis of Imperial Granite is incorrect and summary judgment should not have been entered in favor of the Appellees.

VII

CONCLUSION

The lower court's decision in this matter has far reaching consequences within Indian country and federal Indian law today. Such a decision will allow for the wholesale trespass, encumberance and encroachment upon Indian allotted lands without restraint. Any individual or entity will be allowed to lease Indian allotted lands without following clearly established laws protecting allottees from such incursions without protection from the Secretary of the Interior's review of lease agreements. Lease agreements that take unwarranted and egregious advantage of allottees to receive fair and equitable results in situations that involve

parties with less than equal bargaining powers will be common occurrence.

Illegal confiscation of individual Indian property rights whether by the federal government, state government, non-Indians or in this case individual members of another federally recognized Indian tribe should not be allowed and cannot be allowed. If allowed to stand, this decision will permit violations of the Fifth Amendment to the United States Constitution, as well as illegal taking of Indian property pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302 (5) (8).

The sovereign immunity of tribal governments and its legal foundation and rationale have been established by numerous Supreme Court decisions over nearly two centuries. However, the blatant misuse of sovereign immunity is not justified and in the present case at bar where Appellees are misusing and abusing this well established legal doctrine that protects tribes from frivolous lawsuits. Frivolous lawsuits that attempt to pierce the self-governing principles of sovereigns that pre-date the constitution of this country should not be tolerated. In this case, however, the abusive methods of the Appellees should not be allowed to stand behind sovereign and qualified immunity. The belittling attitude that "we as tribal governments can and will do anything we want and then hide behind sovereign immunity" should be restricted. Should this case be allowed to stand then potentially the flood gates of allotted lands being taken illegal could become a

frequent occurrence within Indian country. Actions that violate the personal property interests of Indians must not be legally accepted. In addition, thousands of homes built pursuant to the Mutual Self-Help Home Program could potentially be taken out of the hands of Indians, who inherited homes, which were paid for by their parents or other close relatives without restriction by any future interest holder in the leased land upon which the homes were built.

Federal Indian policies in regards to Indians are well established and federal laws that protect the leasing and purchasing of Indian lands without the approval of the Secretary of the Interior should not be arbitrarily and capriciously applied by federal courts based upon the abuse of legal doctrines such as sovereign and qualified immunity.

The decision of the lower court in this matter must be reversed and remanded for further proceedings to develop at a minimum a factual record that substantiates that the actions of the individual Appellees within the standards as set out under federal statutory requirements, state common trespass laws and tribal law. Mere affidavits of the individual Appellees is not a sufficient evidentiary basis to overcome allegations that federal law has and is being violated and whether such actions were and are within the scope of said individual's authority.

The Appellants respectfully request that this Honorable Court vacate the Order Granting Summary Judgment in favor of the Appellees and remand the case for further proceedings. In addition, due to the serious consequences of the possible outcome of this case within Indian country, the Appellants respectfully request oral arguments.

RESPECTFULLY SUBMITTED,

DATED this 15th day of April, 2010.

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CERTIFICATE OF COMPLIANCE

Section 1 Word Count

I hereby certify that pursuant to the requirements of Fed. R. App. P. 32(a)(7)(C), this brief is proportionally spaced and contains 11,989 words.

I relied upon my word processor to obtain the count and it is a 2007 Micro soft Vista Program, HP Computer.

I certify the information on this page is true and correct to the best of my knowledge.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that I scanned the Appellants Opening Brief for any virus by use of AVG software program.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010, I caused the foregoing *Appellants Opening Brief* to be electronically transmitted to the Clerk of Court for the Tenth Circuit Court of Appeals using the ECF system for filing and there serving documents on:

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