No. 11-35926

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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**SHAWN LAWRENCE DESAUTEL;**
**TAMARA DESAUTEL;**
**TONIA RENE DESAUTEL,**

Plaintiffs – Appellants,

v.

**ANITA B. DUPRIS, ET AL.,**

Defendants – Appellees.

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APPEAL FROM U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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THE HONORABLE EDWARD F. SHEA, Eastern District Court Judge

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# RESPONSE BRIEF OF APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

None of the appellees in this action are a corporate entity. The Colville Business Council is the governing body of the Confederated Tribes and Bands of the Colville Indian Reservation, a federally recognized Indian Tribe. All of the individual appellees are representatives of the Colville Tribe.

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# I. INTRODUCTION

Appellants are of Indian blood and sought to be enrolled as Colville Tribal members. They sought enrollment as infants and their enrollment was rejected. Many years later appellants pursued enrollment and were enrolled as Tribal members pursuant to the Colville Tribal Code on the basis of adoption. Appellant Shawn Lawrence Desautel, hereinafter referred to as Mr. Desautel, was dissatisfied with his Tribal enrollment, filed suit in the Colville Tribal Court challenging the Tribe's enrollment ruling. Mr. Desautel pursued all of his remedies through the Colville Tribal trial court and through appeal. At every juncture in the Colville Tribal court system Mr. Desautel lost. Mr. Desautel then proceeded to file a series of suits in Tribal court against Colville Business Council members, Tribal Court judges (trial court and appellate judges) and attorneys representing the Colville Tribe, hereinafter the Tribe.

Tamara Desautel Davis, hereinafter referred to as Ms. Davis, and Tonia Rene Desautel, hereinafter referred to as Ms. Desautel, did not pursue their appellate rights in respect to their enrollment date with the Tribe.

Mr. Desautel, Ms. Davis and Ms. Desautel filed suit in the United States District Court for the Eastern District of Washington naming six judges/justices of the Colville Tribal Court system, 11 Tribal Council

members, four attorneys who had represented the Colville Tribe in the Tribal court actions and lastly the Colville Business Council and the Colville Tribal Court.

Each of the Appellees entered a Notice of Appearance through Everett B. Coulter, Jr., and Evans, Craven & Lackie, P.S., the undersigned attorneys representing Appellees in this action. All of the Appellees accepted service of process and answered the Complaint.

Appellants moved the trial court to strike the Notice of Appearance and further moved for sanctions pursuant to Fed.R.Civ.P. 11.

Appellees moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for a lack of subject matter jurisdiction; Fed.R.Civ.P. 12(b)(6) for failure to state a cause of action and Fed.R.Civ.P. 8(a) for an excessive Complaint.

The trial court denied Appellants' Motion to Strike the Notice of Appearance as well as denying the Motion for Sanctions. The trial court granted the Motion to Dismiss for lack of subject matter jurisdiction while denying as moot the Motion to Dismiss for failure to state a cause of action. The trial court denied the Motion to Dismiss for an excessive brief.

## II. JURISDICTIONAL STATEMENT

### A. Jurisdiction of the District Court.

The District Court properly concluded it did not have subject matter jurisdiction and therefore dismissed the underlying action.

### B. Appellate Jurisdiction

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. The decision being appealed is a final decision from the Federal District Court for the Eastern District of Washington.

### C. Timeliness of the Appeal

The challenged order was entered October 21, 2011, and the Notice of Appeal was filed November 8, 2011. Appellants' appeal is timely.

## III. STATEMENT OF ISSUES FOR REVIEW

**A. Did the Trial Court Err in Dismissing Appellants' Suit for a Lack of Subject Matter Jurisdiction?**

**B. Did the Trial Court Err When it Denied Appellants' Motions to Strike the Notice of Appearance Filed by Appellants' Attorney and Refused to Grant Sanctions?**

## IV. STATEMENT OF THE CASE

### A. Nature of the Case

Appellants filed suit in District Court alleging that the Colville Tribe, Colville Business Council members, individual Tribal Court judges and

Appellate Court justices, along with attorneys representing the Tribe committed wrongful acts against the Appellants in the process of Appellants' Tribal enrollment proceedings. The Colville Tribe and all individual Appellees appeared, answered and moved to dismiss Appellants' suit based upon lack of subject matter jurisdiction.

**B. Course of Proceedings and Disposition in the Court Below**

Appellants moved to strike the Notice of Appearance of the attorney of record for the Appellees and further moved for sanctions. Appellees moved to dismiss based upon lack of subject matter jurisdiction in the Federal District Court, failure to state a cause of action upon which relief can be granted and for an excessively verbose Complaint.

The District Court decided the motions without oral argument denying Appellants' motions to strike and for sanctions while granting Appellees' Motion to Dismiss for lack of subject matter jurisdiction. The District Court denied the Motion to Dismiss for an excessively long Complaint and denied as being moot the Motion to Dismiss for failure to state a claim upon which relief can be granted.

## V. STATEMENT OF FACTS

All three of the appellants are of Indian blood and were denied enrollment as infants. They subsequently were enrolled by the Colville

Tribal Council on the Tribe's enrollment procedure as adopted members based upon a blood correction. Mr. Desautel filed suit in the Colville Tribal Court challenging the Colville Tribal Council's enrollment decision. The Tribal Court rejected Mr. Desautel's argument and Mr. Desautel appealed to the Colville appellate court. The Colville appellate court rejected Mr. Desautel's enrollment challenge. Mr. Desautel then proceeded to file a series of suits in the Colville Tribal Court system against Tribal Council members, appellate judges, trial court judges and attorneys representing the Tribe, all of which were dismissed.

Ms. Davis and Ms. Desautel did not pursue their appeal rights in respect to their adoption enrollment date; rather, they joined with Mr. Desautel in this action seeking to challenge the Colville Tribe's intramural enrollment decision.

Appellants then filed this *pro se* lawsuit in the United States District Court for the Eastern District of Washington containing a 92-page Complaint and 439 pages of exhibits alleging a United States Constitutional rights violation in respect to enrollment status as Colville Tribal members. The gravamen of the Complaint requested the District Court to set aside the Colville Business Council and Colville Tribal Court's decisions and orders in respect to Tribal membership enrollment.

## VI. STANDARD OF REVIEW

Appellants' appeal is an appeal of the Order of Dismissal for lack of subject matter jurisdiction. Subject matter jurisdiction is reviewed *de novo* upon appeal. *See, Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008).

Whether a party is entitled to sovereign immunity is a question of law and is reviewed on appeal *de novo*. *See, Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

## VII. SUMMARY OF ARGUMENT

The District Court properly granted the Motion to Dismiss for lack of subject matter jurisdiction. Indian Tribal sovereign immunity is a limit on federal subject matter jurisdiction and there is no basis to assert federal subject matter jurisdiction. As such, the District Court did not commit reversible error.

District Court exercised its discretion denying a Motion to Strike the Notice of Appearance and denying sanctions.

## VIII. ARGUMENT

### A. Federal Subject Matter Jurisdiction

Appellants failed to establish federal subject matter jurisdiction. Federal District Court is a court of limited jurisdiction and jurisdiction only

arises when there is diversity of citizen jurisdiction pursuant to 28 U.S.C. §1332 or cases involving a federal question jurisdiction under 28 U.S.C. §1332. The trial court found that diversity jurisdiction did not exist and there was no federal question jurisdiction.

The burden of proof in a Rule 12(b)(1) motion is on the party asserting federal jurisdiction. *See, Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000).

**B. Sovereign Immunity**

Indian Tribal sovereign immunity is a limit on federal subject matter jurisdiction when an action is brought in federal court against a sovereign Indian Tribe. *See, Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). Even more importantly, intramural decisions of Indian Tribes are not subject to review by the federal court. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The present case is similar to the facts in *Santa Clara Pueblo, supra*, in that appellants herein challenge the enrollment decisions of the Colville Tribe. In the *Santa Clara Pueblo* decision, Martinez filed suit in federal court against the Santa Clara Pueblo Tribe for alleged enrollment discrimination. The United States Supreme Court held that the Tribe's immunity defeated federal

subject matter jurisdiction and secondly ruled that the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* (hereinafter ICRA) did not create a private cause of action against the Tribe.

More recently, this Court decided *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005). *Lewis v. Norton* involved plaintiff suing the United States seeking to enforce Tribal enrollment rights. The trial court dismissed for lack of subject matter jurisdiction and the Court of Appeals affirmed. The Court of Appeals held that Tribal sovereign immunity could not be avoided by suing the United States Department of Interior. The Court recognized the importance of *Santa Clara Pueblo v. Martinez, supra*, as establishing the rule that Indian tribes as sovereign Indian nations were to be left to their own political decisions as it related to purely intramural tribal enrollment issues. Thus there was no subject matter jurisdiction.

In *Alvarado v. Table Mountain Rancherias*, 509 F.3d 1008 (9th Cir. 2007), plaintiffs were unsuccessful in their tribal enrollment process and brought suit in federal court challenging the enrollment process. The Ninth Circuit Court of Appeals clearly and succinctly ruled that tribal sovereign immunity prohibited federal subject matter jurisdiction on actions relating to tribal government and tribal enrollment.

**C. United States Constitutional Claims**

To the extent that appellants' Complaint alleged a United States Constitutional claim as a basis for federal subject matter jurisdiction, federal Constitutional claims do not exist in Indian country. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self government." *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 55, *citing*, *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832). The *Santa Clara Pueblo* court held that because Indian nations predated the United States Constitution, the Indian tribes are unconstrained by the United States constitutional provisions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 56.

**D. Federal Civil Rights**

Appellants' Complaint alleged a federal civil rights claim under 42 U.S.C. §1983, et seq. seemingly as a basis for federal subject matter jurisdiction. As a matter of law, there is no subject matter jurisdiction for a federal civil rights claim against an Indian tribe arising out of conduct in Indian country. In *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), suit was filed in Federal District Court for Montana against individuals of the Blackfeet Tribe. Plaintiff alleged a federal civil rights claim under 42 U.S.C. §1983. The Ninth Circuit Court of Appeals held that there was no subject

matter jurisdiction and that civil rights claims arise only under color of state law and tribes are not states. *Accord, R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

**E. Individual Immunity**

Appellants named numerous individuals in the action below. Appellants' Complaint alleged the individuals were acting in their official while at the same time individual capacity. All of these individuals are cloaked with the same sovereign immunity as the Colville Tribe. A tribe's sovereign immunity extends to individual tribal officials who are acting in their representative capacity and within the scope of their authority. *See*, *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). Tribal employees, officials, officers, judges and attorneys all acting in behalf of the Colville Tribe are immune.

*Santa Clara Pueblo v. Martinez*, 436 U.S. 58-59 held, "it is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Citing*, *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976).

Appellants have expressly acknowledged the precedential authority of *Santa Clara Pueblo v. Martinez*, *supra*, and have failed to allege a claimed waiver of individual sovereign immunity. No such waiver exists.

Colville Appellate Court Justices Dupris, Nelson and Bonga, appellees herein, were clearly acting in their representative capacity. *See*, ECF #1-4 at pages 280-291.

Justice Gary F. Bass was acting in his judicial and official representative capacity. *See*, ECF #1-7 at pages 416-424 of Appellants' exhibits below.

Tribal Trial Court Judges Trudy Flamand and Steven D. Aycock were acting in their judicial and official representative capacity when they made tribal trial court decisions adverse to Mr. Desautel. *See*, ECF #1-3 at pages 206-215; ECF #1-3 at pages 259-260; ECF #1-6 at page 375.

Colville Business Council members Adolph, Bessette, Finley, Hutchinson, Jerred, Joseph, Joseph, Moomaw, Nissen, Seymour and Seymour were all Colville Business Council members and sued in their official capacity both in the Colville Tribal Court system and the court below. *See*, ECF #1-6 at pages 341-358.

The remaining individuals named in this action are attorneys Svaren, Repp, Christie and Woolsey. All four of these attorneys were representing

the Colville Tribe and acting in their representative capacity as attorneys for the Tribe. *See*, ECF #1-3, pages 188-192, page 199, 220, 259, 328, 329, 362, 363.

All of the named individuals share the same protection of the Tribe's sovereign immunity and none of these individuals or their actions are subject to any waiver of sovereign immunity.

**F. Motion to Strike and Sanctions**

Appellants moved district court to strike the Notice of Appearance filed in behalf of defendants at the trial court. In addition, Appellants moved for sanctions pursuant to Fed.R.Civ.P. 11. District court denied the Motion to Strike as well as the Motion for Sanctions. It is unclear in reading the Appellants' brief whether or not Appellants have appealed the district court's ruling.

The district court denied Appellants' Motion to Strike the defense attorneys' Notice of Appearance. Local Rule 83.2(d)(1) specifically allows attorneys to enter a notice of appearance. As noted by the district court, the Federal Rules of Civil Procedure and the local rules do not prohibit filing a notice of appearance. The district court relied on *KIRO v. Moore*, 229 F.R.D. 228 (D.N.M. 2005).

The district court is entitled to broad deference in respect to interpretation and enforcement of local rules. *See*, *Vias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007). As such, the district court did not abuse its discretion in denying the Motion to Strike the Notice of Appearance of behalf of the Colville Tribe and its representatives.

Appellants' second motion was for sanctions pursuant to Fed.R.Civ.P. 11. The gist of the motion for sanctions was that the Tribe and its representatives used a different form to accept service of process of the Summons and Complaint. District court noted that the Tribe and its representatives cooperated by executing the waiver of services of the Summons and Complaint in a timely fashion and there was no inappropriate conduct.

District court has broad discretion in respect to granting or denying motions for sanctions. District court abuses its discretion in imposing or denying sanctions when it utilizes an erroneous view of the law or a clearly erroneous assessment of the issue before it. *See*, *Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005).

District court did not abuse its discretion in denying Appellants' Motions to Strike and the Motion for Sanctions.

## IX. CONCLUSION

The District Court did not commit error in dismissing the Complaint for lack of subject matter jurisdiction. Appellants' Complaint was fundamentally a collateral attack on the Colville Tribe's sovereign immunity relating to a strictly intramural affair of the Appellants' enrollment status. Appellants impermissibly sought to collaterally attack the Tribe's sovereign decisions in respect to enrollment.

Federal subject matter jurisdiction is lacking in this case based upon prior Supreme Court and Ninth Circuit precedent.

## X. STATEMENT OF RELATED CASES PER RULE 28-2.6

The undersigned attorney for Appellees represents to the Court there are no directly related cases before the Court of Appeals. There is one case pending before the Court of Appeals that may be raising related issues in respect to subject matter jurisdiction and sovereign immunity. The case is Tonasket v. Sargent case number CV 11-073-LRS. The case involves the Confederated Tribes and Bands of the Colville Indian Reservation and was originally filed in the United States District Court, Eastern District of Washington.

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RESPECTFULLY submitted this 16th day of February, 2012.

EVANS, CRAVEN & LACKIE, P.S.

By s/ Everett B. Coulter, Jr.

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