No. 12-17095

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAHNE PISTOR, et al.,
Plaintiffs-Appellees,

v.

CARLOS GARCIA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
For the District of Arizona
The Honorable Frederick J. Martone
CIV 12-0768-PHX-FJM

OPENING BRIEF OF TRIBAL DEFENDANTS CARLOS GARCIA, FARRELL HOOSAVA AND LISA KAISER

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JURISDICTIONAL STATEMENT

(A) The jurisdiction of the district court was based upon 28 U.S.C. §§ 1331 (Federal Question) and 1367 (Supplemental).

(B) The district court's Order of September 5, 2012 (Excerpts of Record ("ER") 3), denying the Appellants' motion to dismiss on the basis of tribal sovereign immunity, is immediately appealable to this Court under the collateral order doctrine. Burlington Northern & Santa Fe Railway v. Vaughn, 509 F.3d 1085, 1091 (9th Cir. 2007).

(C) The Order appealed from was entered on September 5, 2012. The Notice of Appeal was filed on September 18, 2012. (ER 1). The appeal is timely under Rule 4(a)(1)(A), Fed. R. App. P.

ISSUES PRESENTED FOR REVIEW

(1) Is a motion to dismiss contesting subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) the proper motion by which the Tribal Defendants could seek dismissal of the claims against them based upon an assertion of tribal sovereign immunity?

(2) When faced with a factual attack on its jurisdiction under a Rule 12(b)(1) motion, is the district court restricted to considering only the face of the complaint and is it required to accept those allegations as true?

(3) In deciding a Rule 12(b)(1) motion, are tribal officials and employees protected by tribal sovereign immunity when extrinsic evidence demonstrates that those defendants were acting in their official capacities, within the scope of their authority and solely under tribal law, despite the fact that the complaint purports to sue those tribal officials and employees in their individual capacities and alleges that they were acting under state, not tribal, law?

STANDARD OF REVIEW

Questions of subject matter jurisdiction are subject to de novo review in this Court. Robinson v. U.S., 586 F.3d 683, 685 (9th Cir. 2009). Questions of sovereign immunity are also subject to de novo review. Miller v. Wright, 699 F.3d 1120, 1124 (9th Cir. 2012).

STATEMENT OF THE CASE

Plaintiffs were patrons (and self-described "advantage gamblers") at the Mazatzal Casino, a tribal gaming facility owned and operated by the Tonto Apache Tribe (the "Tribe") and located on the Tonto Apache Indian Reservation near Payson, Arizona. Plaintiffs filed their Complaint in April, 2012. The Complaint seeks money damages from a number of officers and officials of the Tonto Apache Tribe, the Gila County [Arizona] Sheriff's Office and the Arizona Department of Gaming, alleging that the defendants had committed a variety of constitutional and state law based torts against the plaintiffs during an investigation of suspected

illegal conduct by the plaintiffs in the Casino. Plaintiffs seek relief under provisions of Arizona state law and under 42 U.S.C. § 1983.

In May, 2012, Defendants Carlos Garcia, Farrell Hoosava and Lisa Kaiser (the "Tribal Defendants") filed a motion to dismiss asserting tribal sovereign immunity. Each of the Tribal Defendants was an officer or employee of the Tribe or the Casino. That motion, filed under Fed. R. Civ. P. 12(b)(1) and 12(b)(2), presented a factual attack on the court's jurisdiction and asserted that the district court lacked jurisdiction to adjudicate the claims against the Tribal Defendants due to their sovereign immunity from suit.[1] In support of their motion to dismiss, the Tribal Defendants submitted declarations demonstrating that all of their actions that formed the basis for the Complaint had been taken in their official capacities, within the scope of their tribal authority, and solely under tribal law, thereby clothing the Tribal Defendants in the sovereign immunity of the Tribe and depriving the court of jurisdiction to adjudicate those claims.

The district court denied that motion, without a hearing, by Order dated September 5, 2012. (ER 3). In that Order, the court held that the assertion of sovereign immunity did not raise a jurisdictional issue and, therefore, a 12(b)(1) motion was not the appropriate vehicle by which the Tribal Defendants should have sought dismissal. Instead, the lower court sua sponte treated the motion as

[1] The Rule 12(b)(2) claim has been abandoned for purposes of this appeal.

one brought under Rule 12(b)(6). As such, the court failed to consider the factual materials presented to demonstrate the court's lack of jurisdiction and instead held that it was required to accept the jurisdictional allegations of the Complaint as true. (ER 7). On this basis, the court denied the motion to dismiss, finding that because the Complaint had named the Tribal Defendants in their individual capacities and because the Complaint alleged that the Tribal Defendants had been acting under state authority, they were not entitled to assert tribal sovereign immunity as a jurisdictional bar to the claims against them. (ER 7-8).

This appeal followed.

STATEMENT OF FACTS

The Tonto Apache Tribe (the "Tribe") is a federally recognized Indian tribe with a reservation located near Payson, Arizona. (ER 35, ¶ 4). The Tribe owns and operates the Mazatzal Hotel and Casino (the "Casino") which is located on the reservation (ER 35, ¶ 5). The Casino operates in accordance with federal and tribal law and under a Gaming Compact between the Tribe and the State of Arizona. (ER 35, ¶ 6). The Casino is operated by the Tribe and all Casino revenues go to support tribal programs and services. (ER 35, ¶ 7).

Casino operations are regulated by the Tonto Apache Tribal Gaming Office ("TGO"). The TGO consists of a five-member Tribal Gaming Commission and a regulatory staff of approximately 35 employees. The TGO has regulatory

oversight over all Casino operations, including the responsibility to investigate suspicious activities within the Casino and to protect tribal assets. (ER 9-10, ¶¶ 4-5).

The Tribe has adopted a Tribal Gaming Ordinance, which is implemented and enforced by the TGO. That tribal ordinance sets forth the regulatory framework for overseeing Casino operations. Section 108 of that tribal law grants the TGO the following enumerated powers:

> (9) Inspect, examine and monitor all gaming activities, and have immediate access to review, inspect, examine, photocopy and audit all records of the gaming establishment;
>
> (10) Ensure compliance with all Tribal, State and Federal laws, rules, and regulations regarding Indian gaming;
>
> (11) Investigate any suspicion of wrongdoing associated with any gaming activities;
>
> * * * *
>
> (17) Establish a list of persons not allowed to game in Tribal gaming facilities in order to maintain the integrity of the gaming;
>
> (18) Be empowered to detain persons who may be involved in illegal acts in or around the gaming facility for the purpose of notifying appropriate law enforcement authorities;
>
> (19) Provide referrals and information to the appropriate law enforcement officials when such information indicates a violation of Tribal, Federal, or State statutes, ordinances or resolutions;

(ER 10, ¶¶ 6-8) (The entire Tribal Gaming Ordinance can be found at ER 12-26).

Plaintiffs Pistor, Abel and Witherspoon were patrons of the Casino. (ER 40, ¶¶ 5-6). In the summer of 2011, the TGO initiated an investigation of the Plaintiffs' gaming activities. The investigation, conducted under the authority of the Tribal Gaming Ordinance, began because of the Plaintiffs' suspicious activities on the Casino floor. Specifically, the tribal regulators believed that the Plaintiffs were unlawfully manipulating slot machines through the use of electronic devices. (ER 11, ¶ 9).

In September, 2011, the TGO requested the assistance of the Tonto Apache Tribal Police Department in the investigation because of continued suspicions that the Plaintiffs were cheating the Casino through unlawful means. (ER 11, ¶ 10). As a result, Defendant Carlos Garcia, then the Acting Chief of the Tribal Police Department, became involved in the investigation. (ER 28, ¶¶ 5-6). Over the next several weeks, Chief Garcia observed the Plaintiffs' gambling activities in the Casino and reviewed surveillance video taken of the Plaintiffs at other times. As a result of these efforts, Chief Garcia observed what he regarded as continuing suspicious conduct by the Plaintiffs and also came to believe that the Plaintiffs were cheating the Casino through unlawful manipulation of the electronic gaming devices. (ER 28-29, ¶¶ 7-9).

On October 25, 2011, the tribal investigation of the Plaintiffs concluded. TGO and Tribal Police officers, with the limited assistance of several Gila County

and Arizona Department of Gaming officials, removed the Plaintiffs from the Casino floor, took them to non-public areas of the Casino where they were interviewed, confiscated cash, slot machine tickets and cell phones from the Plaintiffs as possible evidence of crimes, and served them with exclusion orders barring them from returning to the Casino (ER 4; ER 33, ¶¶ 5, 7).

In April, 2012, the Plaintiffs filed a lawsuit seeking money damages from a number of officers and officials of the Tribe, the Gila County Sheriff's Office and the Arizona Department of Gaming. The Complaint alleges that the Defendants committed a variety of constitutional and state law based torts against the Plaintiffs during the events of October 25, 2011. (ER 39).

In addition to Chief Garcia, the suit named Farrell Hoosava and Lisa Kaiser as additional defendants. On October 25, 2011, Mr. Hoosava was the General Manager of the Casino, with responsibility for managing Casino operations and protecting the integrity of gaming activities and Casino assets. (ER 35-36, ¶¶ 3, 8). On October 25, 2011, Ms. Kaiser was an Inspector with the TGO, responsible for investigating suspicious activities, protecting the integrity of gaming activities and Casino assets, and handling the exclusion of Casino patrons. (ER 32-33, ¶¶ 3,5). (Defendants Garcia, Hoosava and Kaiser are collectively referred to as the "Tribal Defendants").

All of the actions taken by the Tribal Defendants during the events of October 25, 2011 were taken by them in their official capacities as Tribal Police Chief, Casino Manager and TGO Inspector and were within the scope of their tribal authority. (ER 31, ¶ 7; ER 33-34, ¶ 8; ER 36, ¶ 10). Each of the Tribal Defendants was on duty at that time, was being paid by the Tribe or the Casino for their services, and was wearing his or her uniform and/or badge. (ER 31, ¶¶ 8-9; ER 34, ¶¶ 9-10; ER 37, ¶¶ 11-12). The tribal investigation of the Plaintiffs was undertaken in the good faith belief that the Plaintiffs were engaged in illegal gambling activities (ER 29, ¶ 10), and all of the activities of the Tribal Defendants were undertaken pursuant to their authorities under the Tribal Gaming Ordinance and other tribal law. Conversely, none of the actions of the Tribal Defendants were taken under any state or county authority, nor were the Tribal Defendants acting as state or county officials at any time. (ER 11, ¶ 12).

In May, 2012, the Tribal Defendants filed a motion to dismiss the claims against them. That motion was filed under Rule 12 (b)(1), Fed. R. Civ. P. and asserted that the district court lacked jurisdiction to adjudicate the claims against them because those claims were barred under the doctrine of tribal sovereign immunity. (ER 38). In support of that motion, the Tribal Defendants filed a total of five declarations setting forth all of the facts discussed above. (ER 9, 27, 30, 32 and 35).

On September 5, 2012, the district court denied the Tribal Defendants' motion to dismiss without a hearing and without considering any of the factual evidence filed in support of that motion. (ER 3-8).

SUMMARY OF ARGUMENT

In denying the Tribal Defendants' motion to dismiss on sovereign immunity grounds, the district court made several procedural errors. First, it failed to adjudicate that motion as a Rule 12(b)(1) motion, incorrectly holding that an assertion of tribal sovereign immunity did not raise a jurisdictional issue. In fact, sovereign immunity is a jurisdictional bar. District courts in this Circuit routinely grant Rule 12(b)(1) motions upon a finding of tribal sovereign immunity, and this Court routinely affirms those dismissals.

That error was compounded when the court below sua sponte treated the motion as having been filed under Rule 12(b)(6). As a 12(b)(6) motion, the court's jurisdictional analysis was limited to the face of the Complaint and it was required to accept the allegations of the Complaint as true. If correctly analyzed as a factual attack on the court's jurisdiction under Rule 12(b)(1), however, the court's analysis would not have been limited to the allegations of the Complaint and it could have and should have considered and weighed the declarations and other extrinsic evidence filed in support of the motion in order to determine its jurisdiction.

Had the district court done so, it would have found evidence that, contrary to the allegations in the Complaint, the Tribal Defendants were being sued for actions they had performed in their official capacities, within the scope of their authorities and solely under tribal law. Had the district court then applied the correct legal principles, it would have concluded that the Tribal Defendants were entitled to assert tribal sovereign immunity and it would have granted their motion to dismiss.

Its failure to do so should be corrected by this Court.

ARGUMENT

I. A 12(B)(1) Motion is the Proper Means by Which to Assert a Lack of Subject Matter Jurisdiction Based on Tribal Sovereign Immunity.

In Part II of its Order, the district court held that a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) was not the proper vehicle by which the Tribal Defendants should have asserted sovereign immunity. In effect, the court concluded that the Tribal Defendants' assertions of sovereign immunity did not call into question the Court's jurisdiction to adjudicate the plaintiffs' claims against them. As a result, the court held that "[e]ven if Hoosava, Kaiser and Garcia are entitled to tribal immunity from suit, it would be inappropriate for us to dismiss the claims against them for lack of jurisdiction," and denied the motion on that basis. (ER 5-6).

In so holding, the court erred. In fact, the assertion of tribal sovereign immunity does raise a jurisdictional issue, and a 12(b)(1) motion is therefore the proper means to challenge the court's jurisdiction.[2]

More than twenty years ago, this Court expressly held that the assertion of tribal sovereign immunity raises a jurisdictional issue. In Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989), the Court carefully analyzed the doctrine and concluded that

> Absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants. [Citations omitted]. Thus the issue of tribal sovereign immunity is jurisdictional in nature.

884 F.2d at 418 (emphasis added). In support of this basic principle, the Court cited more than a dozen other authorities, including U.S. v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940) ("consent alone give jurisdiction to adjudicate against a sovereign. Absent that consent, the attempted exercise of judicial power is void") and California v. Quechan Tribe of Indians, 595 F.2d 1153, 1154 (9th Cir. 1979) ("Since the Tribe's claim of sovereign immunity goes to the jurisdiction of this court to hear the case, that question must be addressed

[2] Respected commentators support this view. According to Wright & Miller, "the Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction also may be appropriate . . . when a plaintiff's claim is barred by one of the various aspects of the doctrine of sovereign immunity . . ." Wright & Miller, Federal Practice and Procedure, Civil 3d § 1350, pages 70-79 (footnote and citations omitted).

first"). More recently, this Court has noted that "[s]overeign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. [Citation omitted]. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1005-16 (9th Cir. 2007).

Precisely because sovereign immunity is jurisdictional, this Court has repeatedly affirmed the use of 12(b)(1) motions by tribes (or the United States on behalf of tribes), asserting sovereign immunity as the proper basis for a motion to dismiss. For example, in Lewis v. Norton, 424 F.3d 959 (9th Cir. 2005), the plaintiffs brought an action seeking to overturn a tribe's decision rejecting their applications for membership in the tribe. The United States moved to dismiss under Rule 12(b)(1) on the basis of sovereign immunity. The district court dismissed the case under Rule 12(b)(1) for lack of subject matter jurisdiction , 424 F.3d at 961, and this Court affirmed the dismissal on that basis. Id. at 959.

In Robinson v. U.S., 586 F.3d 683 (9th Cir. 2009), plaintiffs sued the United States as trustee for an Indian tribe. The suit alleged that construction activity by the tribe had encroached upon, and damaged, the plaintiffs' easement. The United States moved to dismiss under Rule 12(b)(1), asserting sovereign immunity under the federal Quiet Title Act. This Court ultimately held that the suit did not arise under the Quiet Title Act, but nevertheless held that the 12(b)(1) motion was the

proper means for the government to contest the court's jurisdiction on the basis of sovereign immunity. 586 F.3d at 685.

Finally, just two months ago in Miller v. Wright, 699 F.3d 1120 (9th Cir. 2012), the tribal defendants filed a 12(b)(1) motion seeking to dismiss the claims against them for lack of jurisdiction on the basis of tribal sovereign immunity. After correctly noting that under Rule 12(b)(1), "the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction," WL 4712245*2 (W.D. Wash. Oct. 6, 2011), the district court found that the defendants were protected by tribal sovereign immunity and granted their motion to dismiss for lack of jurisdiction. Id. at *1. On appeal, this Court noted that "[t]he district court dismissed the action for lack of subject matter jurisdiction in light of the tribe's sovereign immunity," and affirmed that result. 699 F.3d at 1122-23.

As these cases demonstrate, this Court has repeatedly held that tribal sovereign immunity is jurisdictional, and that the dismissal of an action against a sovereign entity for lack of subject matter jurisdiction under Rule 12(b)(1) is proper. The district court's contrary conclusion in this case is therefore erroneous.

Finally, we would note that even the cases that the lower court relied upon for its ruling do not support its conclusion. The lower court primarily relied upon Powelson v. United States, 150 F.3d 1103 (9th Cir. 1998) and Wisconsin Dep't. of

Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047 (1998). But Powelson itself correctly noted that:

> Moore's Federal Practice states that [s]overeign immunity is not merely a defense to an action against the United States, but a jurisdictional bar. 16 James Wm. Moore et al., *Moore's Federal Practice* ¶ 105.21 (3rd ed. 1998).

150 Fed. 3d at 1104, and also described Justice Kennedy's concurrence in Wisconsin Dept. of Corrections as noting that Eleventh Amendment immunity has sometimes been treated "more like personal jurisdiction and other times more like subject matter jurisdiction." Id. at 1104, n. 1. Thus, even the cases relied upon by the district court do not support its holding that a motion to dismiss on the basis of tribal sovereign immunity cannot be brought under Rule 12(b)(1).

As discussed above, this Court has repeatedly found that tribal sovereign immunity bars a court's jurisdiction to adjudicate claims against the sovereign entity and that a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is the proper means to raise that issue. The district's contrary ruling on this question should therefore be reversed.

II. In Deciding A 12(b)(1) Motion, The District Court Is Not Bound By The Four Corners Of The Complaint And Should Review And Weigh Additional Evidence To Determine Its Jurisdiction.

The district court compounded its error by sua sponte treating the Tribal Defendants' motion as a Rule 12(b)(6) motion and then holding that its jurisdictional analysis was limited to the face of the Complaint. (ER 7).

In fact, the lower court's role in deciding a 12(b)(1) motion as opposed to a 12(b)(6) motion is dramatically different. It is true that under Rule 12(b)(6), the court is required to accept the allegations of the complaint as true. Not so however when the movant presents a factual attack on the court's jurisdiction under Rule 12(b)(1), as was done here. According to a leading treatise:

> When the attack is factual, however, the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56. Because a factual Rule 12(b)(1) motion involves the court's very power to hear the case, the court may weigh the evidence to confirm its jurisdiction. No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.30(4) (Matthew Bender 3d Ed. 2012) (internal quotations and footnotes omitted).

A factual attack on jurisdiction under Rule 12(b)(1) is, by definition, based upon evidence beyond the face of the complaint. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing and quoting from Morrison v. Amway

Corp., 323 F.3d 920, 924 n. 5 (11th Circ. 2003). As a result, when presented with a factual attack on its jurisdiction, the district court can and should accept and weigh extrinsic evidence in order to determine its own jurisdiction. As this Court has further noted:

> In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegation. Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

Safe Air for Everyone, 373 F.3d at 1039 (citations and internal quotations omitted).[3]

In this case, the district court plainly failed to follow these procedural requirements. Instead of accepting and deciding the Tribal Defendants' Rule 12(b)(1) motion, the lower court sua sponte converted it to a Rule 12(b)(6) motion. Then, instead of weighing and analyzing the factual evidence presented by the movants in support of their motion, the court incorrectly held that its jurisdictional analysis was limited to the face of the Complaint, and that it was required to accept

[3] This latter point is of critical importance here, because federal courts are presumed to lack subject matter jurisdiction, and the party asserting jurisdiction has the burden of proving its existence. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S.Ct. 1673, 1675 (1994).

those allegations as true. By depriving the Tribal Defendants of their opportunity to present evidence in support of their sovereign immunity claims, the district court further erred.

III. Had The District Court Weighed The Evidence Presented By The Tribal Defendants, It Would Have Found That Those Defendants Were Protected By Tribal Sovereign Immunity And That The Court Therefore Lacked Subject Matter Jurisdiction To Adjudicate The Claims Against Them.

The district court held that the Tribal Defendants were not protected by tribal sovereign immunity because they were being sued under 42 U.S.C. § 1983 in their individual capacities for actions allegedly taken under state law. (ER 7). In support of this holding, the court relied upon Evans v. McKay, 859 F.2d 1341 (9th Cir. 1989). As discussed below, however, the district court used the wrong legal analysis and ignored the factual evidence presented to it to reach an erroneous conclusion.

A. The Sovereign Immunity Standard for Tribal Officers and Employees.

Three immutable principles underlie this Circuit's sovereign immunity jurisprudence as applied to tribal officers and employees.

First, tribal officers and employees are protected by the tribe's sovereign immunity when they are acting in their official capacities and within the scope of their tribal authority. Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985) ("tribal immunity extends to individual tribal officers acting in their

representative capacity and within the scope of their authority"); Imperial Granite Company v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribal officials who allegedly violated plaintiff's rights under the United States Constitution, the Indian Civil Rights Act and state law regarding trespass and nuisance held immune from suit because they were acting within the scope of their authority).

Earlier cases, such as the two cited above, dealt primarily with the status of tribal officers or officials. The question of whether tribal employees were similarly shielded by sovereign immunity was definitively resolved by this Circuit in Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008). In Cook, two tribal casino employees unlawfully served alcohol to an intoxicated colleague who later got into her car and hit Cook's motorcycle, causing him grievous injuries. Cook sued the Casino and the employees under various theories of liability. The district court granted defendants' motion to dismiss and Cook appealed.

This Court affirmed the dismissal:

> The principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal officials—apply just as much to tribal employees when they are sued in their official capacity.
>
> * * *

> Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority.

Id. at 727.

Thus, the law in this Circuit is now clearly established that tribal officials and tribal casino employees enjoy immunity from suit for actions taken in their official capacity and within the scope of their authority.

The second principle is closely related to the first: a claimant cannot avoid the sovereign immunity bar by simply suing an individual tribal officer or employee instead of the tribe. In Hardin, the tribal defendants had been sued as individuals, but were held to be immune from suit because they had been acting within the scope of their tribal authority. This Court reached the same conclusion in Cook.

> In these cases the sovereign entity is the "real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Regents of the University of California v. Doe,* 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Applying this principle to tribal rather than state immunity, we have held that a plaintiff cannot circumvent tribal immunity "by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1322 (9th Cir. 1983).

Cook, 548 F.3d at 727. And this Court restated the same principle just two months ago in Miller v. Wright, 699 F.3d 1120, 1129 (9th Cir. 2012), citing and quoting

from Cook. Thus, in this Circuit the law is clear that a litigant cannot avoid sovereign immunity by merely suing a tribal officer or employee in his individual capacity for actions taken by that officer or employee in his official capacity.

Finally, the third operative principle relevant here is that a § 1983 claim does not lie against a tribal officer or employee for actions taken under tribal law. R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1983). Because § 1983 provides a cause of action for constitutional violations committed under color of state law, and because Indian tribes are not states, §1983 provides no relief with respect to deprivations of constitutional rights made under tribal authority.

B. Evans v. McKay Does Not Support the District Court's Decision.

Although the district court acknowledged these principles in its Order, it did not apply them. Instead, in reliance on Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989), it held that the Tribal Defendants were not entitled to the protection of tribal sovereign immunity because the Complaint named the defendants as individuals and alleged that the Tribal Defendants had been acting under state, not tribal, law. The district court found these bare allegations a sufficient basis for denying the Tribal Defendants' motion to dismiss.

In effect, the district court held that this Court's 1989 decision in Evans stated a rule of law that was different from, and contrary to, the basic principles of

sovereign immunity jurisprudence discussed above. But that is not the case. In fact, the court's reliance on Evans was a further error caused by its failure to properly adjudicate the Tribal Defendants' Rule 12(b)(1) motion and to treat it as a 12(b)(6) motion instead.

In the 1989 Evans opinion, upon which the lower court relied, the Court was faced with a Rule 12(b)(6) motion for failure to state a claim. In that posture, the Court correctly recognized that it could not look at evidence outside of the pleadings and was bound by the requirement that "all material allegations of the complaint are to be taken as true and construed in the light most favorable to the non-moving party." Evans v. McKay, 869 F.2d at 1344. Under those constraints, and because the complaint alleged that the tribal defendants were acting in their individual capacities and as agents of the state, the Court found that a 12(b)(6) dismissal of the tribal defendants, upon that barren record, was inappropriate at that stage of the proceedings. Id. at 1348.

As discussed above, that was not the procedural posture that the lower court should have found itself in when considering the Tribal Defendants' Rule 12(b)(1) motion in this case. In that situation, the district court could have and should have considered the declarations and other extrinsic evidence filed in support of the motion, and the court clearly was not required to accept the truthfulness of the Complaint's allegations as they related to the court's jurisdiction.

Subsequent proceedings in Evans v. McKay (not considered by the district court) demonstrate this procedural distinction. After further proceedings in the district court on remand, Evans came back to the Ninth Circuit sub nom. Evans v. City of Browning, Mont., 953 F.2d 1386 (9th Cir. 1992); 1992 WL 8208 (C.A. 9 (Mont)).[4] There, upon a fuller evidentiary record than the Court had considered three years earlier, the Court of Appeals addressed the issue of whether certain tribal defendants were acting "under color of state law" for purposes of 42 U.S.C. § 1983 when they allegedly arrested the non-Indian plaintiffs without a warrant. Although the facts in Evans were "extremely complicated," 1992 WL 8208 *1, because of the overlapping federal, state and tribal authorities exercised by some of the defendants, the rule announced by the Court was really quite simple:

> [i]f the appellees were acting as tribal police executing a tribal order, they were not acting under color of state law and cannot be sued under § 1983.
>
> * * * *
>
> If the trier of fact determines that the officers were acting as tribal police, Roy [the Tribal attorney who, like all of the tribal defendants, had been sued in his individual capacity] would be immune from suit under § 1983.

1992 WL 8208 *1-2. Thus, in its 1992 decision, this Court focused not on the

[4] The 1992 opinion is unpublished. Under Ninth Circuit Rule 36-3(c)(i), it may be cited here in order to demonstrate the law of the case in that complex litigation.

interaction between the tribal defendants and the state defendants, but rather on the simple question of whether the tribal defendants were exercising tribal authority.[5]

This more recent analysis and holding in the Evans litigation is directly applicable to the present appeal. Here, the evidence in the record (discussed below) demonstrates that the Tribal Defendants were acting in their official capacities as tribal officials and employees, and were acting solely under tribal authority. As a result, according to the Ninth Circuit's most recent holding in Evans, "they were not acting under color of state law and cannot be sued under § 1983." Id. at *1.

Thus, when properly analyzed in its entirety, Evans v. McKay not only does not support the district court's holding, but in fact supports the Tribal Defendants' motion to dismiss.

C. Maxwell v. County of San Diego Does Not Control This Case.

In proceedings subsequent to its September 5, 2012 Order, the lower court orally expressed the view that its ruling is supported by this Court's decision in Maxwell v. County of San Diego, 697 F.3d 941 (9th Cir. 2012). In Maxwell, a tribe and two tribally-employed paramedics were sued for providing allegedly negligent care to a shooting victim. The Court upheld the dismissal of the tribe,

[5] This holding is entirely consistent with the Court's earlier decision in R.J. Williams Co., 719 F.2d at 982 ("... actions taken under color of tribal law are beyond the reach of § 1983 ....").

but held that the paramedics were not entitled to claim tribal sovereign immunity because they had been sued in their individual capacities and were not acting for and on behalf of the tribe. Id. at 952. In support of this result, the panel announced a new "remedy-focused" analysis for tribal sovereign immunity, Id., which analysis appears to overturn Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) sub silentio and which characterized the discussion of Hardin in Evan v. McKay, 869 F.3d at 1348, n. 9, as "mistaken." Maxwell, 697 F.3d at 955. In effect, the decision is Maxwell calls into question the continuing validity of this Court's tribal sovereign immunity precedents.

Although Maxwell may have muddied the waters of this Circuit's sovereign immunity jurisprudence, there are two reasons why that decision should not be viewed as relevant to this appeal.[6]

First, Maxwell, if extended beyond its specific facts, is contrary to this Court's well-established law in this area. Maxwell appears to say that tribal officials and employees cannot assert a sovereign immunity defense if they are sued in their individual capacities, even if they were actually acting in their official

[6] We would also note that a motion for rehearing or rehearing en banc in Maxwell is currently pending before the Court, and that on December 21, 2012, the panel granted the motions of a number of Indian tribes and tribal organizations for leave to file two amicus briefs supporting those rehearing requests.

capacities. But that rule and reasoning were expressly rejected by this Court in Murgia v. Reed, 338 Fed. Appx. 614, 2009 WL 2011913 (9th Cir. 2009).[7]

In Murgia, a Bivens action brought against tribal police officers, this Court—in a per curiam opinion—rejected the claim that sovereign immunity did not apply because the officers were sued in their individual capacities. The Court said:

> The district court erred in concluding that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities. In our circuit, the fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. See, e.g., Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985) (despite defendants' being named in their individual capacities, tribal sovereign immunity applied because they were "acting within the scope of their delegated authority"). If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words "individual capacity" appear on the complaint. Id. Accordingly, we vacate that portion of the district court's order that denied the Defendants' claim of sovereign immunity, and we remand for further proceedings on that question.

338 Fed. Appx. at 616 (emphasis added). Thus, the precise rule seemingly

[7] This 2009 unpublished opinion may be cited under Circuit rule 36-3(b). Although not binding precedent, it accurately states the law in this area and its rule and reasoning should be adopted by the Court in this case.

announced by the Maxwell panel was previously rejected in Murgia as inconsistent with prior Ninth Circuit authority.[8]

Maxwell is also inconsistent with this Court's more recent decision in Miller v. Wright, 699 F.3d 1120 (9th Cir. 2012). Maxwell appears to say that the availability of a sovereign immunity defense depends solely on how the tribal officials are named in the complaint, not on what actions they were actually undertaking that gave rise to the complaint. But Miller v. Wright makes clear that it is the reality of the officials' actions, and not the capacity in which they are sued, that is determinative in the sovereign immunity analysis.

In Miller, the Court affirmed the dismissal of claims against a tribal tax administrator and the tribal chairman on the basis of sovereign immunity. The Court held that the officials were immune from suit precisely because they were being sued for actions taken in their official capacities in administering a tribal tax program; an activity that the Court described as "a fundamental attribute of sovereignty." 699 F.3d at 1129. As a result, the way in which the officials were named in the complaint was immaterial and the Court "reject[ed] [the plaintiff's] attempt to circumvent tribal immunity by naming tribal officials as defendants." Id.

[8] The Murgia panel included Judge Canby, who literally wrote the book on federal Indian law. William C. Canby, American Indian Law In A Nutshell (5th ed. 2009).

To the extent, then, that the Maxwell "remedy-focused analysis" is inconsistent with Murgia, Miller and other Ninth Circuit cases, it should be confined to its own specific facts and not applied in this case.

The second reason why Maxwell is inapposite here is even more fundamental: the decision itself acknowledged that it was not setting forth a rule that applied in all cases. As the Court noted:

> While individual capacity suits against low-ranking officers typically will not operate against the sovereign, we cannot say this will always be the case. In any suit against tribal officers, we must be sensitive to whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act."

Maxwell, 697 F.3d at 953 (emphasis added, citation omitted).

This appeal presents exactly the different circumstances that the Maxwell court recognized could lead to different results. Unlike low-level paramedics providing non-tribally related medical services off-reservation, in this case the Tribal Defendants were high level officials (including the Casino General Manager and the Tribal Chief of Police) who were enforcing the Tonto Apache Tribal Gaming Ordinance at the Tribe's Casino on the reservation in conformity with the Indian Gaming Regulatory Act and in furtherance of express tribal gaming policies

and procedures.[9] In that situation, unlike Maxwell, a suit against these officials will plainly interfere with tribal administration of its laws and restrain the tribe from regulating its tribal gaming activities as it deems necessary. Under these circumstances, even the Maxwell court recognized that different results would be warranted, and that is the case presented here. As a result, Maxwell provides no support for the district court's erroneous denial of the Tribal Defendants' motion to dismiss in this case.

D. The Evidence Filed in Support of the Tribal Defendants' Motion to Dismiss Demonstrates That They are Entitled to Assert Tribal Sovereign Immunity

As discussed above, the law in the Circuit is that (at least high level) tribal officials and employees who are, in fact, acting for the tribe in their official capacities and within the scope of their tribal authority are immune from suit arising from those activities, regardless of the capacity in which they are sued, and that § 1983 claims do not lie against tribal officials when acting under tribal law.

In this case, the factual evidence submitted by the Tribal Defendants in support of their motion to dismiss, but ignored by the district court, amply demonstrated that the Tribal Defendants fell within both of these safe harbors. That evidence, with record references, is set forth in the Statement of Facts above,

[9] Under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 and 2702, the operation and regulation of tribal gaming facilities implements important tribal and federal policies, including promoting tribal economic development and strengthening tribal governments.

at pages 4-9 and for the sake of brevity will not be repeated here. In summary, however, that evidence shows that the Tribal Defendants were all high level tribal officials and employees whose actions on October 25, 2011 were taken in their official capacities as Tribal Police Chief, Casino General Manager and TGO Inspector. Those activities were part of a formal tribal investigation of the Plaintiffs, who were suspected of engaging in illegal gambling activities; an investigation undertaken by tribal officials and employees whose scope of authority under the Tonto Apache Tribal Gaming Ordinance required them to investigate suspicious activities and to protect the integrity of the Casino's gaming activities and its assets from unlawful activities. Finally, the Tribal Defendants were not operating as state or county actors or under the color of state or county law, but were acting solely in their capacities as tribal officials enforcing tribal law.

Had the district court considered this evidence and correctly analyzed the law, it would have concluded that the Tribal Defendants were entitled to the protection of the Tonto Apache Tribe's sovereign immunity and would have granted their Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The lower court erred in failing to do so.

CONCLUSION

For all of the foregoing reasons, the Order of the District Court should be reversed and the case remanded with instructions that the Tribal Defendants' motion to dismiss be granted.

RESPECTFULLY SUBMITTED this 10th day of January, 2013.

DICKINSON WRIGHT/MARISCAL WEEKS

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STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, the Tribal Defendants state that they are not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Counsel for the Tribal Defendants certifies that this brief has been double-spaced, that the typeface used (Times New Roman 14) is proportionately spaced, and that the number of words is 7,777.

/s Glenn M. Feldman
Glenn M. Feldman

CERTIFICATE OF SERVICE

I certify that on January 10, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Glenn M. Feldman

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