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

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

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INTRODUCTION

Plaintiffs' Answering Brief makes several assertions that are inaccurate and contrary to the record in this case.

1. The District Court Did Not Hold That The Arguments Raised In The Tribal Defendants' Reply Memorandum Were "Waived" Or That The Declarations Filed With Their Reply Memorandum Were Improper.

Plaintiffs repeatedly assert in their Answering Brief that the district court held that certain arguments made by the Tribal Defendants in their reply memorandum were "waived." Plaintiffs' Answering Brief ("Pl. Ans. Br.") at pages 9, 10. They also suggest that the lower court found the declarations filed concurrently with the reply memorandum to be improper or incompetent. Id.

In fact, the district court did no such thing. To the contrary, the court actually denied the Plaintiffs' motion to strike those arguments and those declarations. Tribal Defendants' Excerpts of Record ("ER") 5, lines 2-8. The court's ruling on these issues was conditional: "If we find these items to be improper, we will simply ignore them." But the court did not hold that the arguments were "waived" or the declarations were improper. (Emphasis added.)[1]

[1] The district court did ignore the supplemental declarations filed with the reply memorandum, just as it ignored the initial declarations filed with the motion. That, of course, is the basis for this appeal; the court should have reviewed and considered the extrinsic evidence presented to it in order to determine the scope of its jurisdiction to adjudicate the claims against the Tribal Defendants. See discussion below at pages 4-9.

On a more substantive level, the supplemental declarations of Hubert Nanty, the Executive Director of the Tribal Gaming Office (ER 9-26) and Carlos Garcia, the Tribal Police Chief (ER 27-29) were entirely proper. In their opposition to the motion to dismiss below, Plaintiffs had alleged, both in their memorandum of law and in the declarations they filed therewith, that the Tribal Defendants could not possibly have thought that the Plaintiffs were cheating, that there was no tribal investigation of the Plaintiffs' activities, and that the Tribal Defendants were acting under state law and authority when the Plaintiffs were taken off the Casino floor and questioned. See Plaintiffs' Response, pages 6-7 and n. 2; page 8, lines 15-17; page 13, lines 6-8 and 14-15. These pages are provided to the Court in the Tribal Defendants' Supplemental Excerpts of Record, filed concurrently herewith.

Given these arguments and unsupported allegations made by the Plaintiffs in their responsive memorandum below, it was entirely proper for the Tribal Defendants to submit additional evidence with their reply memorandum refuting these contentions. The Declaration of Hubert Nanty (ER 9-26) and the First Supplemental Declaration of Carlos Garcia (ER 27-29) conclusively demonstrated the falsity of the Plaintiffs' allegations by documenting the basis for the defendants' good faith beliefs that the Plaintiffs were engaged in unlawful conduct, the nature and scope of the tribal investigation conducted as a result, and to put

into evidence the Tonto Apache Tribal Gaming Ordinance, which expressly authorized that investigation.

As a result, the Plaintiffs' contention that this evidence was "waived" or "incompetent" is simply wrong. Rather, it was competent and relevant evidence that the district court should have weighed in determining its jurisdiction to adjudicate the claims against the Tribal Defendants.

2. This Is A Civil Tort Case And Does Not Involve Criminal Conduct On The Part Of The Tribal Defendants.

The Plaintiffs also repeatedly allege in their Answering Brief that the Tribal Defendants had engaged in criminal conduct with respect to the Plaintiffs. Pl. Ans. Br. at page 8 (referring to "felonious theft and criminal false imprisonment"); page 14 ("outright theft" and "[the defendants] were acting, in truth, criminally toward the plaintiffs"). The Plaintiffs then attempt to buttress these allegations with citations to Arizona criminal statutes, Pl. Ans. Br. at page 15, n. 5, and to cases involving criminal conduct. Id. at page 26.

While these allegations may provide some dramatic effect to Plaintiffs' arguments, they are inaccurate and irrelevant to this case. This is a civil tort case. Nowhere in the record is there any evidence or allegation that the Tribal Defendants have been charged with any crime, or even that the Plaintiffs sought to have them so charged (and we are unaware of any such effort).

Spurious allegations of criminal conduct on the part of the Tribal Defendants may add some sex appeal to the Plaintiffs' brief, but those contentions have no support in the record and should be ignored by the Court.

ARGUMENT

I. The District Court Erred In Failing To Properly Address The Tribal Defendants' Rule 12(b)(1) Motion.

In holding that sovereign immunity is not jurisdictional, the district court relied primarily on Powelson v. United States, 150 F.3d 1103 (9th Cir. 1998). But Powelson does not support the court's conclusion.

Reduced to its essentials, Powelson held that the district court had the statutory jurisdiction to determine that it lacked subject matter jurisdiction over a particular claim against the United States because the United States enjoyed sovereign immunity from suit and had not waived that immunity. Id. at 1104.

The basic principle of Powelson, then, is that for a court to have jurisdiction over a sovereign entity, it must have both statutory jurisdiction and an effective waiver of that immunity because, as Powelson correctly noted, "while sovereign immunity can bar jurisdiction, a statute that purports to create jurisdiction alone does not necessarily eliminate sovereign immunity." 150 F.3d at 1104. And unless waived, "[s]overeign immunity is not merely a defense to an action against the

United States, but a jurisdictional bar." Id. (quoting 16 James Wm. Moore, et al., Moore's Federal Practice ¶ 105.21 (3d ed. 1998) (emphasis added).

Thus, Powelson is entirely consistent with the well-established principle that sovereign immunity bars jurisdiction unless effectively waived. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); United States v. United States Fidelity and Guaranty Co., 309 U.S. 506, 512 (1940) ("These Indian Nations are exempt from suit without Congressional authorization …. Absent that consent, the attempted exercise of judicial power is void"). Even more directly on point is this Court's analysis of the question in Pan American Company v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989):

> 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.

(Emphasis added).

In summary, then, the district court was incorrect in holding that tribal sovereign immunity is not a jurisdictional issue.

The lower court was equally incorrect in rejecting as 12(b)(1) motion as the proper vehicle to raise the sovereign immunity defense. (ER 6). In our Opening

Brief, at pages 12-13, we discussed three recent cases from this Circuit in which this Court had affirmed the dismissal for lack of jurisdiction under Rule 12(b)(1) of claims against a tribe (or the United States acting for a tribe) based on sovereign immunity. Although the Plaintiffs contend that these cases are not precedential, Pl. Ans. Br. at pages 19-21, we believe that these case stand for exactly what they say: that a Rule 12(b)(1) motion is the appropriate means to assert the defense of tribal sovereign immunity.

The district court's final procedural error was ignoring the Tribal Defendants' extrinsic evidence in support of their motion, and instead relying solely on the allegations of the Complaint, and unverified statements in a pleading, to determine its jurisdiction.[2]

As discussed in our Opening Brief, at pages 15-17, a 12(b)(1) motion is procedurally very different from a 12(b)(6) motion. While a court may be bound by the four corners of the complaint when deciding a 12(b)(6) motion, that is clearly not the case when the court is faced with a factual attack on its jurisdiction under Rule 12(b)(1). In that situation, the court can and should weigh the extrinsic evidence presented by the movant and need not presume the truthfulness of the plaintiff's allegations. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th

[2] The court acknowledged that the Complaint was ambiguous as to the capacity in which the Tribal Defendants were being sued, but relied on unverified statements in the Plaintiffs' responsive memorandum of law to "clarify" the issue. ER 7, lines 13-16.

Cir. 2004) (and cases cited there); 2 James Wm. Moore et al, Moore's Federal Practice, ¶ 12.30(4) (Matthew Bender 3d ed. 2012). See also, Breakthrough Management v. Chukchansi Gold Casino, 629 F.3d 1173, 1188 (10th Cir. 2010) (12(b)(1) motion is "a speaking motion" that allows the introduction of extrinsic evidence and "the district court ha[d] wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts under 12(b)(1)").

The district court's obligation to fully and finally determine its own jurisdiction on a 12(b)(1) motion is perhaps most important where, as here, the motion is based upon a claim of sovereign immunity.

As the Supreme Court has made clear, "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." Mitchell v. Forsyth, 472 U.S. 511, 525 (1985). But sovereign immunity is more than a defense to liability; it is also "a limited entitlement not to stand trial or face the other burdens of litigation." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1946 (2009) (citing and quoting Mitchell, 477 U.S. at 526). And as this Court has correctly noted, sovereign immunity presents "an immunity from suit, rather than a mere defense to liability; and … [is] effectively lost if a case is erroneously permitted to go to trial." Burlington Northern & Santa Fe Railway v. Vaughan, 509 F.3d 1085, 1090 (9th Cir. 2007) (emphasis in original; quotation

marks omitted). Thus, where, as here, the 12(b)(1) motion asserts a sovereign immunity claim, the district court had not only the discretion, but the responsibility to consider the evidence presented to it in support of that motion and correctly determine its jurisdiction. That is precisely what the district court failed to do in this case by sua sponte treating the motion as having been based on Rule 12(b)(6).

The Plaintiffs' efforts to justify the lower court's error are unpersuasive. In essence, they argue that because the allegations of their Complaint say that the Tribal Defendants are not protected by sovereign immunity, the district court did not have to consider the extrinsic evidence submitted in support of the motion to dismiss. Pl. Ans. Br. at pages 22-23) ("… the Court did not ignore the defendants' outside evidence. Rather, the District Court necessarily impliedly found the assertions to be irrelevant in light of the unquestioned facts stated in the complaint….").

That may be the standard under a 12(b)(6) motion, but it is plainly not the appropriate procedure when the court is faced with a factual attack on its jurisdiction under Rule 12(b)(1). Under 12(b)(1):

> [w]hen 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); see also Safe Air for Everyone, 373 F.3d at 1039.

The Plaintiffs' reliance on Miller v. Wright, 699 F.3d 1120 (9th Cir. 2012) as amended ___ F.3d ___ (9th Cir. 2013) is also misplaced.[3] Pl. Ans. Br. at page 23, n. 11. Although the Plaintiffs have correctly quoted from the first footnote in the Miller opinion, they have omitted the citation for that quote. In fact, the Miller court cited AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636 (9th Cir. 2012) for the rule quoted and AE ex rel. Hernandez is a case based on a Rule 12(b)(6) motion. Id. at 635-36 ("Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(6)"). Thus, the quote from Miller v. Wright is inapposite to the issue presented here, and offers no defense of the district court's procedural error.

In summary, the district court's holding that tribal sovereign immunity does not raise a jurisdictional issue, its refusal to address the Tribal Defendants' 12(b)(1) motion, its sua sponte treatment of that motion as having been filed under Rule 12(b)(6) and its failure to consider the declarations and other evidence

[3] On January 13, 2013, the panel issued an amended opinion, which deleted footnote 4 from the original.

submitted in support of that motion were all erroneous and require reversal by this Court.

II. The Evidence Demonstrates That The Tribal Defendants Are Being Sued For Actions They Took In Their Official Capacities, Within The Scope of Their Authorities And Solely Under Tribal Law.

In our Opening Brief, at pages 4-9, we set forth, with record references, the specific evidence demonstrating that the Tribal Defendants are entitled to the protection of the Tonto Apache Tribe's sovereign immunity. 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 Tribal Gaming Office 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 any state or county law, but were acting solely in their capacities as tribal officials enforcing tribal law; specifically the Tonto Apache Tribal Gaming Ordinance.

Under these circumstances, and based upon this evidence (which directly contradicts many of the allegations of the Complaint), the Tribal Defendants were protected by the Tribe's sovereign immunity and their motion to dismiss for lack of jurisdiction should have been granted. 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") (emphasis `added); Cook v. Avi Casino Enterprises, 548 F.3d 718, 727 (9th Cir. 2008) ("Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority") (emphasis added).[4]

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[4] It is significant that both opinions use the word "acting." This makes it clear that the applicability of tribal sovereign immunity depends on what the tribal official was actually doing, not on what the plaintiff says the official was doing or the capacity in which the plaintiff sues the official. As this Court said in its unpublished decision in Murgia v. Reed, 338 Fed. Appx. 614, 2009 WL 2011913 (9th Cir. 2009):

> 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. 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.

338 Fed. Appx. at 616 (citation omitted) (emphasis added).

The Plaintiffs contend that if the Complaint alleges the tribal officials were acting contrary to law, they cannot have been acting within the scope of their authority and therefore cannot be protected by sovereign immunity. Pl. Ans. Br. at 25-26. But that is not the law. Sovereign immunity is a policy doctrine that protects sovereign actors from liability for acts that would clearly be actionable if undertaken by other actors. Stated more simply, sovereign immunity only applies in cases where it is alleged that the defendant acted unlawfully. If the mere allegation of unlawful conduct negated the doctrine, or if the commission of an unlawful act could not have been done within the scope of a government actor's lawful authority, then sovereign immunity would be a meaningless concept.

In fact, the Plaintiffs' contention was expressly rejected by the Supreme Court more than sixty years ago in Larsen v. Domestic & Foreign Commerce Corp, 337 U.S. 682 (1949). In that case, the Court dismissed a conversion claim against a government official for failing to deliver coal that the plaintiff alleged it had contracted to purchase. The Court held that it lacked jurisdiction to adjudicate the claim because of the immunity of the official.

In so holding, the Court characterized the plaintiff's position concerning the alleged conversion as follows:

> [s]ince these actions were tortious they were "illegal" in the respondent's sense and hence were contended to be individual actions, not properly taken on behalf of the

> United States, which could be enjoined without making the United States a party.

337 U.S. at 692. The Court expressly rejected that view:

> [w]e believe the theory to be erroneous. It confuses the doctrine of sovereign immunity with the requirements that a plaintiff state a cause of action. It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is "illegal" in the sense that the respondent suggests. If he does not, he has not stated a cause of action.

Id. at 692-93. But, as the Court continued:

> [t]here is, therefore, nothing in the law of agency which lend support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. Nor, we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies.
>
> * * *
>
> It is argued that an officer given the power to make decisions is only given the power to make correct decisions. If his decisions are not correct, then his action based on those decisions is beyond his authority and not the action of the sovereign. There is no warrant for such a contention in cases in which the decision made by the officer does not relate to the terms of his statutory authority. Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong. And we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.
>
> * * *

> We therefore reject the contention here. We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principle under the normal rules of agency.

Id. at 695 (citation omitted).

The principle that a government official can commit a tort and still be acting within the scope of his authority is now well established. In Lineen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002), this Court affirmed the sovereign immunity dismissal of claims against a tribal official stemming from his "alleged misconduct during his official duties as a tribal ranger on the Community's land." 276 F.3d at 492. Thus, the Court found no inconsistency between claims of tortious conduct and the fact that the tribal ranger was acting within the scope of his governmental authority.

So too with the Tribal Defendants in this case. While it is alleged that they committed torts against the plaintiffs, it is beyond doubt that in taking the actions they did, they were acting within the broad scope of their authority under the Tonto Apache Tribal Gaming Ordinance, which authorized and required them to protect tribal assets from potentially unlawful conduct; to investigate possible cheating or other illegal activities in the Casino; to detain persons who may be involved in illegal conduct and turn possible lawbreakers over to other governmental

authorities with prosecutorial powers; and to exclude unwanted patrons from their facility. ER 10, ¶8, ER 13, ¶¶17-18.

Moreover, the evidence is equally clear that the Tribal Defendants were acting in their official capacities when they took these actions. Each of them was on duty and appropriately uniformed or badged during the incidents in question. ER 31, ¶¶7-9; ER 33-34, ¶¶8-10; ER 36, ¶10; ER 37, ¶¶11-12. In order to be acting within the scope of one's official duties, "[i]t is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official." Little v. City of Seattle, 863 F.2d 681, 683 (9th Cir. 1989). Under this standard, it is evident that all of the Plaintiffs' claims relate to actions that the Tribal Defendants took in their official capacities and within the scope of their tribal authority. As a result, the Tribal Defendants are protected by the Tonto Apache Tribe's sovereign immunity.

III. Neither Evan v. McKay Nor Maxwell v. County Of San Diego Support The District Court's Decision.

In our opening brief, at pages 20-28, we carefully explained why neither Evans v. McKay, 869 F.3d 1341 (9th Cir. 1989) nor Maxwell v. County of San Diego, 697 F.3d 941 (9th Cir. 2012) support the district court's order below. The Plaintiffs' arguments in their Answering Brief fail to address these analyses.

The Plaintiffs' discussion of Evans, Pl. Ans. Br. at pages 24-25, simply fails to recognize the very different procedural positions of that case as between the

1989 decision cited by the district court and the later 1992 decision of this Court, as discussed in our Opening Brief, at pages 21-23. The 1989 decision was made in the face of a 12(b)(6) motion, where all the Court could review were the bare allegations of the complaint. On that limited basis, the Court found that allegations that the plaintiffs were being sued in their individual capacities as state actors were sufficient to require denial of the 12(b)(6) motion to dismiss. By 1992, however, the Court had before it a fuller evidentiary record (which the district court in the present case would have had if it had reviewed the extensive evidence available to it under the Tribal Defendants' 12(b)(1) motion). Evans v. City of Browning, Mont., 953 F.2d 1386 (9th Cir. 1992); 1992 WL 8208 (C.A. 9 Mont.) With that evidence before it, and without being required to accept the allegations of the complaint as true, this Court was able to set forth a simple test to determine whether the tribal officials would be held liable under 42 U.S.C. § 1983:

> [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 828 *1-2. Significantly, the issue was not whether state or local officials were involved in the alleged activities, which they clearly were. The relevant

inquiry, according to the Court, was "under what authority were the tribal officials acting?"

Using that test, the record before this Court clearly demonstrates that the Tribal Defendants cannot be sued under § 1983. The Tribal Defendants were acting solely under the authority of tribal law. According to the Declaration of Hubert Nanty, the Executive Director of the Tonto Apache Tribal Gaming Office and the official who initiated the investigation of the Plaintiffs, the Tribal Defendants were acting solely under the Tonto Apache Tribal Gaming Ordinance and "[n]one of the actions of defendants Garcia, Hoosava or Kaiser were taken under any state or county authority, nor were they acting as state or county officials at any time." ER 11, ¶12. This testimony is entirely consistent with the record here; although state and county officers were assisting in the tribal investigation at the request of the Tribe, the Plaintiffs have failed to identify any state or county law under which the Tribal Defendants were allegedly acting. As a result, "they were not acting under color of state law and cannot be sued under § 1983." Evans v. City of Browning, Mont., 1992 WL 8208 *2.

The Plaintiffs' discussion of Maxwell is similarly deficient. As discussed in our Opening Brief at pages 26-28, Maxwell itself recognized that the rule it applied to the two tribal paramedics in connection with their off-reservation ambulance service was not a universal, black letter method of analysis. "While individual

capacity suit against low ranking officers typically will not operate against the sovereign," the Court said, "we cannot say this will always be the case." Maxwell, 697 F.3d at 953 (emphasis added). Rather, "in any suit against tribal officials, we must be sensitive to whether 'the judgment sought would … interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting ….'" Id. (citation omitted).

It was this type of analysis that the Court employed in Miller v. Wright, 699 F.3d 1120 (9th Cir. 2012) as amended ___ F.3d ___ (9th Cir. 2013). There, the Court refused to treat the suit against the Tribal Chairman and the Tribal Tax Administrator as an individual capacity suit, because it found that the defendants were unquestionably engaged in important sovereign tribal activities.

So too here. Although the Plaintiffs argue to the contrary, Pl. Ans. Br. at pages 29-30, it is clear that the on-reservation activities of the Tribal Defendants in managing and regulating a tribal casino under the authority of federal and tribal law are more closely aligned with the actions of the tribal officials in Miller v. Wright than with the off-reservation, non-tribally related actions of the paramedics in Maxwell. While one might conclude that the paramedics were not advancing specific tribal interests in their activities, one could not reach that conclusion with respect to the activities of the Tribal Defendants in this case. Because the alleged liability of the Tribal Defendants would plainly "interfere with the public

administration or … restrain the [sovereign] from acting" as it deems necessary to protect the operation of its Tribal Casino, a proper respect and sensitivity for tribal sovereignty and self-government dictate that even under Maxwell, the Tribal Defendants are entitled to the protection of the Tonto Apache Tribe's sovereign immunity.

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 25th day of February, 2013.

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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 4,532.

/s Glenn M. Feldman
Glenn M. Feldman

CERTIFICATE OF SERVICE

I certify that on February 25, 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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