No. ___

IN THE

Supreme Court of the United States

ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS; MORRIS R. BULLOCK, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; PERRY D. WILLIAMS, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; MELINDA L. SYLESTINE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; KEVIN P. BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; MCCLAMROCH BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; SIDNEY PONCHO, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; EDWIN D. BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas,

Petitioners,

v.

COMSTOCK OIL & GAS INC., successor by merger to Black Stone Oil Company; and KERR-MCGEE CORPORATION, as successor in interest to Oryx Energy Company and as General Partner of Sun Operating Limited Partnership 1,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. SYDOW
SYDOW, KORMANICK, CARRIGAN & ECKERSON, L.L.P.
1111 Bagby Suite 4650
Houston, Texas 77002
(713) 654-8100

* Counsel of Record

NORMAN GORDON *
DIAMOND, RASH, GORDON & JACKSON, P.C.
300 East Main, 7th Floor
El Paso, Texas 79901
(915) 533-2277

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Does a tribe's sovereign immunity from suit extend to actions for prospective equitable relief?

2. Do tribal officials acting within the lawful authority of their office share a tribe's immunity from suit in actions for prospective equitable relief except as provided by the *Ex parte Young* doctrine?

3. Does a suit against tribal officials to declare in full effect oil and gas leases subject to the Indian Mineral Development Act, 25 U.S.C. § 396a *et seq.*, or the Indian Mineral Leasing Act, 25 U.S.C. § 2101 *et seq.*, meet the requirements of the *Ex parte Young* doctrine?

LIST OF PARTIES

Secretary of the United States Department of the Interior

Alabama and Coushatta Indian Tribes of Texas

Tribal Council members:

Morris R. Bullock,
Perry D. Williams
Melinda L. Sylestine
Kevin P. Battise
McClamroch Battise
Sidney Poncho
Edwin D. Battise

Comstock Oil & Gas Inc., successor by merger to Black Stone Oil Company

Kerr-McGee Corporation, as successor in interest to Oryx Energy Company and as General Partner of Sun Operating Limited Partnership 1

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. ___

ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS; MORRIS R. BULLOCK, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; PERRY D. WILLIAMS, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; MELINDA L. SYLESTINE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; KEVIN P. BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; MCCLAMROCH BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; SIDNEY PONCHO, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; EDWIN D. BATTISE, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas,

Petitioners,

v.

COMSTOCK OIL & GAS INC., successor by merger to Black Stone Oil Company; and KERR-MCGEE CORPORATION, as successor in interest to Oryx Energy Company and as General Partner of Sun Operating Limited Partnership 1,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Comes now Alabama and Coushatta Indian Tribes of Texas; Morris R. Bullock, Individually and as Member of the

Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; Perry D. Williams, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; Melinda L. Sylestine, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; Kevin P. Battise, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; McClamroch Battise, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; Sidney Poncho, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas; Edwin D. Battise, Individually and as Member of the Tribal Council of the Alabama and Coushatta Indian Tribes of Texas, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on August 27, 2001, Appendix at 1a. The motions for rehearing and rehearing en banc were denied on October 26, 2001, Appendix at 41a. Although this is an interlocutory appeal, the jurisdiction of this Court is invoked pursuant to the *Cohen* [1] doctrine under 28 U.S.C. § 1254(1) because it involves the denial of the immunity from suit claims of an Indian tribe and its officials.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 267 F.3d 567, and the District Court's opinion is reported at 78 F. Supp. 2d 589.

[1] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

STATUTORY PROVISIONS

Pertinent Provisions of the Tribe's Restoration Act

25 U.S.C. § 733(a)

> The Federal recognition of the [Alabama and Coushatta Indian Tribes of Texas] and of the trust relationship between the United States and the tribe is hereby restored. Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

25 U.S.C. § 734(b)

> Subject to the provisions of section 733(a) of this title, the constitution and bylaws of the tribe on file with the Committee on Natural Resources of the House of Representatives is hereby declared to be approved for the purposes of section 476 of this title except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

25 U.S.C. § 736(a)

> The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title is held in trust by the Secretary.

Pertinent Provisions of the Indian Mineral Development Act

25 U.S.C. § 396a

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the

approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

25 U.S.C. § 396b

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale . . . ; Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

Pertinent Provisions of the Indian Mineral Leasing Act

25 U.S.C. § 2102(a)

Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

25 U.S.C. § 2105

Nothing in this chapter shall affect, nor shall any Minerals Agreement approved pursuant to this chapter be subject to or limited by, sections 396a to 396g of this

title, or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe.

25 U.S.C. § 2108

Nothing in this chapter shall impair any right of an Indian tribe organized under section 16 or 17 of the Act of June 18, 1934 (48 Stat. 987), as amended [25 U.S.C.A. §§ 476, 477], to develop their mineral resources as may be provided in any constitution or charter adopted by such tribe pursuant to that Act.

STATEMENT OF THE CASE

This is an Indian sovereignty case. The decision of the Fifth Circuit strips tribes and tribal officials of their immunity from suit as long as no money damages are sought, regardless of the impact on the Tribe.

The Tribe is federally recognized under the Alabama and Coushatta Indian Tribes of Texas Restoration Act. *See* 25 U.S.C. §§ 731-737. As such, it controls lands set aside and held in trust for it as a reservation. 25 U.S.C. §§ 733(a), 736(a). Between 1979 and 1993, the Tribe signed nine oil and gas exploration leases with the oil companies granting the right to explore and produce hydrocarbons, seven leases being executed before the effective date of the Alabama and Coushatta Indian Tribes of Texas Restoration Act.

On October 26, 1998, the Tribe and seven tribal council members filed suit in the United States District Court for the Eastern District of Texas, Lufkin Division, against the oil companies. Alleging that certain oil and gas leases were void because the Secretary of the Interior had not approved them, the Tribe and the tribal council members sought to cancel the leases. In addition, they claimed that the leases were void for deficiencies in production and that the oil companies had misappropriated natural gas liquids extracted from tribal lands. Plaintiffs dismissed the federal action on December 18, 1998.

On that same date, the Tribe filed suit in its tribal court (created subsequent to the filing of the federal action) against the oil companies seeking a declaration that the oil and gas leases were null and void for lack of the requisite approval of the Secretary of Interior under 25 U.S.C. § 81; that the oil and gas leases had terminated for lack of requisite production; and, that the oil and gas leases were canceled because (1) of misappropriation of natural gas liquids by the oil companies and (2) for their failure to pay royalties or pay the appropriate royalties for the hydrocarbons produced from the leased lands.

On February 9, 1999, naming the Tribe, tribal council members, and the Secretary for the United States Department of the Interior as defendants, the oil companies filed a complaint for a declaratory judgment that (1) the tribal court is nonexistent and (2) that the disputed leases are in full effect. In response, the Tribe and its officials moved to dismiss on the ground that tribal sovereign immunity deprived the court of jurisdiction over the Tribe and the tribal council members acting in their official capacities.[2] Defendants filed a supplemental motion to dismiss on the grounds that the statutes underlying the oil companies' declaratory action that the leases are in full effect do not create or imply any private right of action.

The district court found that neither the Tribe nor Congress waived the Tribe's sovereign immunity. Thus, with respect to the Tribe, the court dismissed the oil companies' motion for declaratory judgment for lack of jurisdiction. Relying on *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), the court failed to extend the Tribe's sovereign immunity to the individual tribal council members and accordingly denied their motion to dismiss. The court found that it had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 2001, and 1362. The tribal council members appealed the

[2] The Secretary of the Interior also filed a motion to dismiss on jurisdictional grounds, on which the district court has not yet ruled.

finding and the oil companies cross-appealed the district court's conclusion that their action against the Tribe was barred by sovereign immunity.

On appeal, the Tribe asserted that it enjoyed sovereign immunity from suit regardless of the type of relief requested, unless such immunity has been explicitly waived by the Tribe or abrogated by Congress. The tribal officials asserted that absent satisfaction of the *Ex parte Young* doctrine, they too were entitled to immunity. The officials contended that the oil companies could not make the requisite showing because, among other things, they lacked a private cause of action to have the leases declared in full effect.

In its decision of 27 August 2001, the Fifth Circuit held *TTEA* to be "binding authority on this dispute." *Comstock Oil & Gas, Inc. v. Alabama Coushatta Indian Tribes of Texas*, 267 F.3d 567, 570 (5th Cir 2001). The Court did not address whether the Tribe had waived its immunity or whether Congress had implicitly abrogated such immunity, but held that the Tribe as well as its officials lacked sovereign immunity from suit in this case because tribal sovereign immunity extends only to an award of damages. *Id.* at 571, citing *TTEA* at 680. The cited portion of *TTEA* reads as follows:

> The Supreme Court recently held that, absent congressional abrogation, tribal sovereign immunity extends even to actions on contracts between the Tribe and others. *See Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Though recognizing "reasons to doubt the wisdom of perpetuating the doctrine," *id.* at 1704, a six-Justice majority concluded that narrowing of tribal sovereign immunity should be left to Congress, *see id.* at 1705.
>
> *Kiowa*, however, was an action for damages, not a suit for declaratory or injunctive relief. This difference matters. In *Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165, 171, 97 S.Ct.

2616, 53 L.Ed.2d 667 (1977), the Court reaffirmed that "whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." Though the defendants in *Puyallup* were not tribal officials, the Court cited it the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Years later, Justice Stevens suggested that tribal sovereign immunity might not extend "to claims for prospective equitable relief against a tribe." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Stevens, J., concurring).

The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in *Kiowa* undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In any event, *Santa Clara Pueblo* controls. Thus, while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief.

181 F.3d at 680-81. Justice Stevens' concurrence in *Potawatomi* is now the law in the Fifth Circuit: neither tribes nor tribal officials possess immunity from suit for prospective equitable relief.

ARGUMENT

I. THE HOLDING OF THE FIFTH CIRCUIT THAT INDIAN TRIBES LACK SOVEREIGN IMMUNITY FROM SUIT FOR PROSPECTIVE EQUITABLE RELIEF CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

This Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), misconstrued by *TTEA*, 181 F.3d at 680, held that Indian tribes possess sovereign immunity from suits for injunctive or declaratory relief. In *Santa Clara*, a female member of the Pueblo sued the Pueblo and its governor in federal court seeking injunctive or declaratory relief against enforcement of a tribal ordinance denying membership in the Pueblo to children of female members who married outside the Pueblo while extending membership to children of male members who married outside the Pueblo. *Santa Clara* at 51. Plaintiff claimed that the ordinance violated the equal protection provision of the Indian Civil Rights Act. *See* 25 U.S.C. §§ 1301-1303. The Court concluded that suits against tribes under ICRA are barred by tribal sovereign immunity because nothing on the face of the statute purported to subject tribes to the jurisdiction of the federal courts "in civil actions for injunctive or declaratory relief." *Id.* at 58-59 (emphasis added).

Nothing in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), relied upon by *TTEA* for its unique "equitable relief/no immunity" proposition, diminishes the authority of *Santa Clara*. To the contrary, *Kiowa Tribe* provides that "[a]s 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." 523 U.S. at 753 (citations omitted). Nowhere in *Kiowa Tribe* does the Court distinguish between money damages and injunctive or declaratory relief as being a factor in determining whether a tribe enjoys immunity from suit.

The cogent and well-reasoned decision of the Court of Appeals for the Eleventh Circuit in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999) accurately portrays the decision in *Kiowa Tribe* as an unequivocal endorsement of the Supreme Court's holding in *Santa Clara* that a tribe enjoys immunity from suits seeking equitable relief. *See* 181 F.3d at 1244-1245 (11th Cir. 1999).[3]

The holding of the Fifth Circuit directly contradicts this Court's ruling in *Santa Clara* and is in conflict with that of a sister court. This Court should grant the writ of certiorari, reverse the holding of the Fifth Circuit, and hold that Tribes are immune from suit absent explicit tribal waiver or Congressional abrogation.

II. THE HOLDING OF THE FIFTH CIRCUIT THAT TRIBAL OFFICIALS *PER SE* LACK SOVEREIGN IMMUNITY FROM SUIT FOR PROSPECTIVE EQUITABLE RELIEF CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

In *Santa Clara*, this Court cited *Ex parte Young*, 209 U.S. 123 (1908), for the proposition that the tribal governor, as an officer of the Pueblo, was not protected by the tribe's immunity from suit. *Santa Clara*, 436 U.S. at 59. By citing *Ex parte Young*, this Court recognized that tribal officials acting as such are cloaked with the tribe's immunity except for those limited circumstances when *Ex parte Young*-type relief is available. See *David v. Coyhis*, 869 F. Supp. 1401, 1409 n.12 (E.D. Wis. 1994) ("Though perhaps ambiguous in its brevity . . . the sentence . . . is best understood as an extension of the *Ex parte Young* doctrine to tribal officials.").

[3] The decision in also criticizes Judge Stevens' concurrence in *Potawatomi*. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1244-1245 (11th Cir. 1999).

Subsequent to this Court's decision in *Santa Clara*, several Court of Appeals have recognized that "when tribal officials act in their official capacity and within the scope of their authority, they are immune." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1371 (9th Cir. 1991) (declining to issue injunction that would require tribe to allow plaintiff use of road); *see also Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) ("tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority"); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981) (same); *see also Baker Electrical Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994) (if acting within authority of tribe, tribal officers are clothed with the tribe's sovereign immunity); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462 (10th Cir. 1989); *State of Wisconsin v. Baker*, 698 F.2d 1323, 1333 (7th Cir. 1983).

In stating that "[t]here is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state-sovereign immunity[,]" the panel in *TTEA* cited *Ex parte Young* for the proposition that "State sovereign immunity does not preclude declaratory or injunctive relief against state officials."[4] *TTEA* at 680. Neither *Santa Clara* nor *Ex parte Young* stand for the proposition that tribal officials never enjoy immunity from suit for equitable relief, but only that such suits must meet the parameters of *Ex parte Young*. The panel erred in not applying the limitations of the *Ex parte Young* doctrine to the oil companies' separate claims for relief against the tribal officials.

[4] The effect of *TTEA's* misconstruction of the *Ex parte Young* doctrine in suits involving Indian tribes is to make tribal sovereign immunity from suit less extensive than state sovereign immunity.

The decision of the Fifth Circuit turns tribal officials into targets and permits relief against tribes via their officials in any kind of suit where the relief does not include money damages—there is no need to allege a violation of law or lack of authority. Every tribal decision can now be second guessed in federal litigation. This Court should grant the writ of certiorari, reverse the holding of the Fifth Circuit, and hold that tribal officials acting within the lawful authority of their office share the tribe's sovereign immunity from suit regardless of the relief sought.

III. THE FIFTH CIRCUIT ERRED BY FAILING TO APPLY THE LIMITATIONS OF THE *EX PARTE YOUNG* DOCTRINE TO THE OIL COMPANIES' SEPARATE CLAIMS FOR RELIEF AGAINST THE TRIBAL OFFICIALS.

As recently stated by Justice O'Connor, the application of the *Ex parte Young* doctrine is "a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Couer d'Alene Tribe v. Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring). *Ex parte Young* does not create a cause of action where none exists, it simply removes the sovereign's shield from suit on a pre-existing cause of action. In *Santa Clara*, this Court found the requisites of the *Ex parte Young* doctrine had been met: Plaintiff alleged an ongoing violation of federal law by a tribal official and sought prospective equitable relief; nonetheless, the Supreme Court dismissed the action for lack of subject matter jurisdiction because the law violated did not provide for a private remedy. *Santa Clara*, 436 U.S. at 72.

A. *Ex parte Young* requires that there be an allegation that a federal law is being violated for each claim of relief.

The oil companies' request for a declaration that the leases are in full effect must fail under *Ex parte Young* because the oil companies have not pointed to a single instance where the Tribe has violated any federal law pertaining to the leases. There are no allegations of any taking or wasting of the property of the oil companies or that the Tribe has hindered their performance under the leases. *Accord Imperial Granite,* 940 F.2d at 1271 ("[T]he only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit as anything other than a suit against the Band."). In the case at bar, the only action taken by the Council members with respect to the oil and gas leases was to authorize suit. Therefore, the *Ex parte Young* criteria does not attain.

While the oil companies make much of their allegation that the Tribe may have filed its suit in the wrong (or non-existent) forum, they cannot point to any federal law which divests the Tribe of authority to file suit. Indeed, the district court specifically found that the council members were acting within their authority by seeking judicial recourse for the cancellation of lease agreements. *Comstock Oil & Gas, Inc. v. Alabama Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 593 (E.D. Tex. 2000).

Ex parte Young relief is to be granted only where the official lacks authority (either because the sovereign did or could not grant the authority) or the official acts outside the scope of his authority, but not where the official is mistaken about the exercise of the authority. *See Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 689, (1949). While the Fifth Circuit affirmed the district court's finding that the Tribal Council lacked authority to create a tribal

court, it did not disturb the court's finding that the Tribal Council possessed authority to seek judicial recourse to determine of the validity of the leases. The oil companies' request for equitable relief to declare the leases in full effect must fail under *Ex parte Young*.

B. *Ex parte Young* requires that the relief must be properly characterized as prospective, i.e. that it not operate against the sovereign.

In *Coeur d'Alene Tribe of Idaho v. Idaho*, 521 U.S. 261 (1996), this Court held that *Ex parte Young* does not sanction every equitable suit against an official of the sovereign. The Coeur d'Alene Tribe alleged legal and aboriginal title in the submerged lands and bed of Lake Coeur d'Alene and of various navigable rivers and streams within the original boundaries of its reservation. The tribe sought the following equitable relief against the various state officials under *Ex parte Young*: (1) a declaratory judgment establishing the tribe's entitlement to exclusive use and occupancy and the right to quiet enjoyment of the submerged lands; (2) a declaration of the invalidity of all Idaho law which purports to affect the submerged lands in any way; and (3) an injunction prohibiting Defendants taking any action adverse to the tribe's declared rights.

This Court held that the Eleventh Amendment barred the tribe's prosecution of its case in its entirety, noting that the tribe's "suit is the functional equivalent of a quiet title action which implicates special sovereignty issues." *Id.* at 282. In the case at bar, the oil companies in effect contend that the Tribe has clouded the oil companies' title in the oil and gas leases. Their request for a declaration that the leases are in full effect is the equivalent of a quit title action and must fail under *Ex parte Young*.

C. *Ex parte Young* requires that the oil companies' request for a declaration that the leases are in full effect must exist as a federal private cause of action.

The Fifth Circuit erred in finding that a cause of action exists under the federal regulatory scheme for declaratory relief that the leases are in full effect. The Tribe sought a declaration that the oil and gas leases were null and void under 25 U.S.C. § 81 for lack of requisite approval of the Secretary of the Interior. The Fifth Circuit in *TTEA* subsequently held that since Indian tribes lack a private cause of action to challenge the validity of a contract for failure to comply with section 81, the other contracting party likewise lacked a cause of action for declaratory relief that the suspect contract was in full effect. *TTEA* at 682. The oil companies' request for a declaration that the oil and gas leases meet the requirements of section fail to satisfy *Ex parte Young'* requirements.

The Tribe also sought a declaration that the leases terminated for lack of production in their primary term and, alternatively, that the leases had been canceled because the oil and gas companies (1) misappropriated natural gas liquids and/or (2) failed to pay the appropriate royalty. The cases relied upon by Fifth Circuit do not support the oil companies' attempt to make a federal case out of the Tribe's run-of-the-mill oil and gas contract case. While a district court in Montana opined in *Rainbow Resources, Inc. v. Calf Looking*, 521 F. Supp. 682, 684 (D. Mont. 1981) that a cause of action implicitly exists for declaratory and injunctive relief relating to enforcement of the regulation prescribed under 25 U.S.C. §§ 396a-396d, the oil companies' request for a declaration that the oil and gas leases are in full effect is not such a suit. In *Rainbow*, the injunction issued by the tribal court contravened the lessees's federally mandated obligation per federal regulation to remove its property from a well site.

In this case, the Tribe seeks a declaration that the oil companies failed to properly perform their duties under the leases, i.e., lack of requisite production, theft of product, and underpayment of royalty per the terms of the lease—a regular contract dispute. Furthermore, the district court below found that the federal regulations permitted the Tribe to seek judicial recourse to protect its rights under the lease. *Comstock* at 593.

Reliance by the Fifth Circuit on *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984) and *Superior Oil Co. v. United States*, 798 F.2d 1324 (10th Cir. 1986) is also unavailing. In *Tenneco* the issue was not the validity of the oil and gas leases but the tribal ordinances which imposed new licensing, organizational, and taxation requirements on the 50-year old leases. 725 F.2d at 574. The court did not find that the oil company had a cause of action for a declaration that the oil and gas lease was in full effect, but rather to determine whether the Tribe could impose the new burdens. In *Superior* the oil company argued that the bad faith refusal by the Tribal Council to issue permits for seismic operations deprived the company of its property interests in its oil and gas leases. 798 F.2d at 1325. No such allegation has been made in this case. The Tribe in the case at bar is not relying on any tribal law or action in urging its entitlement to relief. *Rainbow*, *Tenneco*, and *Superior* do not suggest that an oil company has a cause of action for a declaration that its leases are in full effect, but only that relief may be granted where a tribe interferes with the leasee's rights and duties under the lease. No such allegations exist in this case.

This Court should grant its writ of certiorari and hold that a suit against tribal officials to declare in full effect oil and gas leases subject to the Indian Mineral Development Act, 25 U.S.C. § 396a *et seq.*, or the Indian Mineral Leasing Act, 25 U.S.C. § 2101 *et seq.*, fails to meet the requirements of the *Ex parte Young* doctrine.

CONCLUSION

The Petitioners respectfully request that this Court grant their petition for writ of certiorari.

Respectfully submitted,

MICHAEL D. SYDOW
SYDOW, KORMANICK, CARRIGAN & ECKERSON, L.L.P.
1111 Bagby Suite 4650
Houston, Texas 77002
(713) 654-8100

* Counsel of Record

NORMAN GORDON *
DIAMOND, RASH, GORDON & JACKSON, P.C.
300 East Main, 7th Floor
El Paso, Texas 79901
(915) 533-2277

Attorneys for Petitioners