

No. 06-721

In The
Supreme Court of the United States

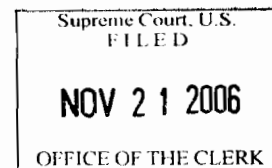
BOB BURRELL and SUSAN BURRELL,

Petitioners,

v.

LEONARD ARMIJO, Governor of Santa Ana Pueblo
and Acting Chief of Santa Ana Tribal Police; LAWRENCE
MONTROYA, Lt. Governor of Santa Ana Pueblo; NATHAN
TSOSIE, Tribal Administrator of Santa Ana Pueblo;
JERRY KINSMAN, Farm Administrator of Santa Ana
Pueblo; and the SANTA ANA PUEBLO,

Respondents.

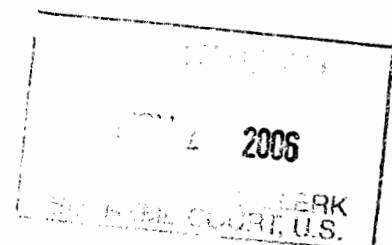


**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Tenth Circuit Court of Appeals properly dismiss the Pueblo of Santa Ana based on Tribal Sovereign Immunity?

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**CITATIONS OF THE OFFICIAL AND UNOFFICIAL
REPORTS OF THE OPINIONS AND ORDERS
ENTERED IN THE CASE BY COURTS**

Burrell v. Armijo, No. 98-0438 JC/WWD (Memorandum Opinion and Order by Judge John E. Conway granting Defendants' Motion to Dismiss for Failure to Exhaust Tribal Remedies September 02, 1998)

Letter Ruling from Superintendent of the Southern Pueblos Agency, BIA, United States Department of Interior, that Burrells' farm lease was cancelled, dated February 11, 1999.

Interior Board of Indian Appeals, United States Department of Interior, Ruling Upholding BIA Area Director's termination of Burrell lease, on May 17, 2000.

Burrell v. Armijo, No. CIV 02-542 WJ/DJS (D.N.M.) (Memorandum Opinion and Order by District Judge William P. Johnson granting in part Defendants' Motion to Dismiss and Staying Case until June 1, 2003 to Allow Tribal Court to Rule, entered on November 22, 2002)

Burrell v. Armijo, Santa Ana Tribal Court CV-123-98 (Order Granting Defendants' Motion to Dismiss on Grounds of Sovereign Immunity dated February 28, 2003)

Burrell v. Armijo, No. CIV 02-542 WJ/DJS (D.N.M.) (Memorandum Opinion and Judgment entered August 29, 2003)

Burrell v. Armijo, No. 03-2223 (10th Cir. 7/24/06)



STATEMENT OF THE BASIS FOR JURISDICTION

On July 24, 2006, the Tenth Circuit Court of Appeals issued its Opinion in *Burrell v. Armijo*, No. 03-2223 (10th Cir. 7/24/06).

On October 18, 2006, Supreme Court Justice Breyer granted an extension of time to and including November 22, 2006, to file a petition for a writ of certiorari.

Title 28 U.S.C. §1254 confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Tenth Circuit Court of Appeals.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case:

Indian Civil Rights Act of 1968, 25 U.S.C. §1302
25 U.S.C. §229
42 U.S.C. §§1981, 1983, 1985
(Full text included in Addendum)



STATEMENT OF THE CASE

On April 14, 1998, the Respondents (hereinafter referred to as the “Burrells”) filed their first federal complaint in the U.S. District Court for New Mexico, *Burrell v. Leonard Armijo, et al.*, CIV 98-0438 JC/WWD, which was dismissed on September 2, 1998, on the grounds of failure to exhaust tribal remedies. [App. 226,

citation is to the Appendix filed with the Tenth Circuit] The Burrells then immediately filed the same action in the Santa Ana Tribal Court, *Burrell v. Leonard Armijo, et al.*, SA CV-123-98, which included the same federal constitutional tort claims. [App. 254, pleadings from the Tribal Court case were reconstructed and filed in the record and are contained in the Appendix] After four years of no action by the tribal judge on pending motions or a requested jury trial, on May 14, 2002, Burrells re-filed their second federal complaint in *Burrell v. Armijo*, No. CIV 02-542 WJ/DJS (D.N.M.), relying on the district court's jurisdiction based on 28 U.S.C. §§1331 and 1343, and in part alleging that exhaustion of tribal court remedies was futile, given four years of tribal court inaction.

On November 22, 2002, District Judge William P. Johnson granting in part Defendants' motion to dismiss and stayed the case until June 1, 2003, to allow the Santa Ana tribal court to make a ruling. On February 28, 2003, a new Tribal Judge who had heard none of the hearings dismissed the Burrell's complaint based on sovereign immunity. District Judge William P. Johnson then issued judgment granting defendants' motion to dismiss based on res judicata and sovereign immunity.

Petitioners seeks a review of the opinion of the Tenth Circuit Court of Appeals in *Burrell v. Armijo*, No. 03-2223 (10th Cir. 7/24/06), in which the dismissal of the Santa Ana Pueblo was upheld. The Burrells do not appeal the 10th Circuit reversal of the dismissals of the individual defendant tribal officials, which allowed 42 U.S.C. §§1981 and 1985 actions to proceed against them in their individual capacities for any actions taken by them which exceeded their tribal authority.



FACTS OF THE CASE

The following factual story is based on the allegations of the Complaint, which must be accepted as true, since at issue is the Defendants' motion to dismiss based on Rule 12(b)(1). *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Part of these factual allegations are also based on materials attached to Burrells' response to the motion to dismiss.

On May 20, 1980, Bob and Susan Burrell were given a ten year lease for 171.9 acres of Santa Ana Pueblo land by a signed "Lease" with the Southern Pueblos Indian Agency of the Bureau of Indian Affairs of the Department of the Interior, designated Farm Lease No. 3210018090, a copy of said lease attached as Exhibit A to Plaintiffs' Response to Motion to Dismiss. [App. 123-132] They accepted this lease based on the promises tribal administrators were giving them that if they ran a successful farm operation like at nearby Sandia Pueblo, the lease would be renewed as long as the Burrells lived. *See* ¶1 of Affidavit of Bob Burrell [App. 113]

Bob Burrell had been a successful construction contractor in Albuquerque, New Mexico, but gave that business up to enter into said lease. The Burrells liquidated all of their assets, including a home, business assets and personal property, generating over \$70,000 to use in the development of said farm. *See* [App. 109-123 and Affidavit of Bob Burrell App. 113-114] With their own funds, they bought a house trailer and moved on an old "feed lot" tract on the Pueblo of Santa Ana and installed a well, a septic tank, and power and phone lines. The field across from the mobile home had large trees and rocks, and at one time was used as a dump by the Pueblo. The Burrells cleaned

up the fields; cleared trees, rocks and refuse; plowed; built fences; dug ditches. They bought their first tractor, a 1967 International for \$6500 in 1981. All the while, they integrated into the ways of the Santa Ana Pueblo people. [App. 109-123 and Affidavit of Bob Burrell App. 113-4]

The farm acreage was raw and undeveloped, and the Burrells had to remove 40-45 trees, level the property, install irrigation systems, and treat the soil with fertilizer for years in order to get the farm producing. They worked the farm for seventeen (17) years to get the farm into full production, living quietly and peacefully on the Pueblo and were gradually accepted by the people, making many friends and becoming a part of the Pueblo community. When they had trouble with cows infiltrating their field and causing damage, the Burrells were able to work it out peacefully. [App. 109-123]

On October 7, 1980, the Santa Ana Tribal Council renewed the original 10 year lease for another 10 years, based in part on the excellent work that the Burrells had done over the first 10 years of the lease. *See* ¶4 of Affidavit of Bob Burrell [App. 114], Tribal Resolution 85-R-13 [App. 129] and correspondence to the Southern Pueblos Agency [App. 130] They were repeatedly told by the Tribal officials that they would be able to stay on the farm for their entire lives. [App. 114] The Burrells bought a long horn bull and some heifers to start a small cattle operation in 1983-84, and the herd was upgraded over the years with registered stock. Some of the fields with high alkali content could not be made productive until the late 1980's, after many failures. Over the years, the Burrells obtained farm loans from the Farmers Home Administration to buy farm equipment and materials and supplies to create and run the farm, and at one time were in debt for \$240,000. They

had to service the debt and generate enough income to live from the farm operations, and in the beginning years they suffered extreme hardship in order to survive. Susan Burrell survived cancer, and had to work part-time at a video store to make ends meet. [App. 109-123 and Affidavit of Bob Burrell App. 114-5]

They continuously improved the property, buying farm equipment, building storage buildings, installing water and sewer hook-ups, laser leveling much of the property, and working the soil. They paid their lease payments, water rights assessments, FHA mortgage payments, taxes, and complied with all regulations and requirements imposed on them from the Southern Pueblos Agency of the Bureau of Indian Affairs, the Santa Ana Pueblo and the Farmers Home Administration. [App. 109-123 and Affidavit of Bob Burrell App. 115] One year a forest fire in the Jemez mountains let rain run wild seed down river and into irrigation ditches and eventually onto fields down river, including the Burrells' farm, causing a loss of crop. They and many farmers along the Rio Grande had to start all over, planting, spraying, fertilizing and hoping for the best. The strain of keeping the farm productive drove Bob Burrell into a heart attack on December 26, 1993, and he requested Santa Ana Pueblo to approve moving another mobile home on the property so that his daughter and her husband could help run the farm, which request was approved by Santa Ana Tribal Council on February 1, 1994. [App. 115 and correspondence from Tribal Administrator Roy Montoya App. 131]

Tribal Officials continued to tell the Burrells that they had done a fantastic job with the farm and that they would have the farm for the rest of their lives. The Pueblo also approved another extension of the lease to the year 2003

in order for them to get FHA financing. [App. 115] The Burrells had good neighbors and not so good neighbors, and sometimes they were treated more than fair by the Pueblo officials. Other times they were discriminated against in overt and open fashion, which became worse after the casino opened. [App. 115] Defendant Leonard Armijo took the office of Governor in 1997, a year the Burrells felt was going to be an excellent crop year giving them expectations that their years of hard work were going to be finally paying off. Leonard Armijo was already Acting Chief of Police when the Pueblo could not keep a professional chief of police to stay on the job due to all the political infighting and discrimination. He fired Roy Montoya as Tribal Administrator, who had held said position since the mid-1980's. The Burrells had a long successful business relationship with Roy Montoya. *See* ¶10 of Affidavit of Bob Burrell [App. 116]

Discrimination against the Burrells took various forms. They were not allowed to drive farm equipment down paved roads or through the village, when tribal members were allowed. They were refused their requests to not allow shooting in their direction when they rode their horses down the ditch. When moving cattle they could not have more than a couple of other horseback riders helping them. When they put in a gate without prior approval, they were told that the Pueblo could take over their fields at any time. When a drunk threatened their daughter, Melonie Feldkamp, with a gun at her own mobile home, nothing was done even though the incident was reported to Leonard Armijo, who was then Acting Chief of Police of the Pueblo. Their grandchildren were picked on the school bus. Their grandson could not play on the Little League team because he was white. Clyde

Sandoval of the BIA proposed to the Tribal Council to concrete the ditches on the south side fields, but the Council refused while agreeing to do so for members of the Pueblo. [App. 109-123]; and Affidavit of Bob Burrell. *See* ¶11 [App. 117]

The Burrells paid \$5000 per year to the Southern Pueblo Agency of the BIA for water rights when Pueblo's have never been required to pay water rights charges, since they purportedly had first rights to water under various treaties. *See* ¶12 of Affidavit of Bob Burrell [App. 117] Farm Administrator Jerry Kinsman told Bob Burrell that the Pueblo obtained grants from an "eastern university" to develop a blue corn business, which would include farming operations and facilities to grind blue corn meal. Though the Pueblo received these grants, they never started farming operations for the generation of blue corn in sufficient quantity to comply with their grant requirements and supply their grinding operations. The Pueblo would buy blue corn from outside sources for their business. *See* ¶13 of Affidavit of Bob Burrell [App. 117] The Burrells were not a part of said grant, or the Pueblo's blue corn business, however they decided to plant 15 acres of blue corn as part of their farming operation. Jerry Kinsman contacted the Plaintiffs and told them that they were going to be inspected under said grant, and that he had been telling the granting authorities that the Pueblo had blue corn farming operations. However, the Pueblo could not show the inspectors any blue corn fields, and he asked Bob Burrell to allow the Pueblo to show them the 15 acres he had planted, and allow the Pueblo to pretend that the fields were a part of the blue corn business. Bob Burrell believes that one of the reasons the Pueblo took his farm

was to cover the Pueblo's blue corn operation's commitments. *See* ¶14-16 of Affidavit of Bob Burrell [App. 117]

The Pueblo had also started construction of concrete irrigation ditches to feed one part of the Pueblo's farming areas used by individual Pueblo members; however, construction delays prevented the completion of the concrete ditches, and these individual Pueblo members could not irrigate their fields and therefore their livestock was put in jeopardy. *See* ¶17 of Affidavit of Bob Burrell [App. 117]

For 17 years the Burrells bailed hay at night when the moisture content is high which is standard farming practice. The difference in value between hay bailed at night verses during the day can be several dollars per bale, or the difference between a farm surviving or not. During all those 17 years they loaned equipment to their neighbors, helped members of the Pueblo plow their fields and bail hay, and were consistent good neighbors to Pueblo friends. *See* ¶18 of Affidavit of Bob Burrell [App. 117]

On June 1, 1997, Governor Leonard Armijo drove to one of Burrell's fields in his Chief of Police car and ordered Bob Burrell to no longer bail hay at night, ordering him off his tractor. Tribal members were allowed to bail at night. *See generally*, Complaint "Factual Allegations" [App. 109-123 and ¶19 of Affidavit of Bob Burrell App. 117]. *See* correspondence attached as Exhibit D [App. 133] The Burrells tried to get Lawrence Montoya as Lt. Governor to agree to some reasonable solution to the bailing problem. They had meetings with Lawrence Montoya, Lt. Governor of Santa Ana Pueblo; Nathan Tsosie, Tribal Administrator of Santa Ana Pueblo; Jerry Kinsman, Farm Administrator of Santa Ana Pueblo, and they all refused to intercede with

Armijo's orders. They were clearly working together to drive the Burrells off their farm. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶20 of Affidavit of Bob Burrell App. 117-8]

Lt. Governor Lawrence Montoya approached Bob Burrell in early July 1997 about what it would take for the Pueblo to buy out the Burrells. Bob offered \$500,000, and was told that nothing could be done until after Feast Day on July 26, 1997. On July 20, 1997, Lt. Governor Lawrence Montoya called Burrell and told them to "sell their cows", which had grown to a herd of 50 mother cows, 50 calves and one bull. On or about July 24, 1997, the Santa Ana Tribal Council met and voted to buy out the Burrell lease for \$500,000. The Burrells were even told by a tribal member that the vote was 47-2, and he described what went on in the meeting. The Burrells have kept the names of the tribal members who were talking to them hidden for fear of retaliation against them. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶21-23 of Affidavit of Bob Burrell App. 118]

Tribal Administrators in council meetings and in person have vehemently ordered tribal members not to talk to the Burrells, and specifically ordered them to not discuss anything about the council meeting held in July which these tribal administrators now deny ever occurred. These tribal administrators are acting in conspiracy to cover up the first tribal council resolution to buy the Burrell farm, using threats against their own people. One tribal member that these tribal administrators thought was talking to the Burrells has even been jailed. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶24-25 of Affidavit of Bob Burrell App. 118]

Farm Administrator Jerry Kinsman ordered the tribal farm crews to take over the Burrell farm completely in mid-July 1997. On August 15, 1997, the individual defendants acting in concert hired someone in Bernalillo to take bailers to the Burrells' fields and harvest the crop. These tribal officials then distributed part of said crop to various members of the Pueblo who had not been able to grow any hay on their fields because of construction delays in finishing the construction of concrete irrigation ditches to the tribal members' fields. The Burrells crop was taken without their permission or authority, and amounts to felony larceny against them by the Governor and Acting Chief of Police of Santa Ana Pueblo, and his Lt. Governor, Farm Administrator and Tribal Administrator. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶26-27 of Affidavit of Bob Burrell App. 118-9]

The farm crew did part of the bailing of the Burrell fields prior to 7 a.m. in violation of the Governor's own bailing restrictions. *See* ¶28 of Affidavit of Bob Burrell. *See generally*, Complaint "Factual Allegations," [App. 109-123 and ¶¶26-27 of Affidavit of Bob Burrell App. 119] Lawrence Armijo, Governor and Acting Chief of Police of Santa Ana Pueblo; Lawrence Montoya, Lt. Governor; Jerry Kinsman, Farm Administrator; and Nathan Tsosie, Tribal Administrator, acting individually and in concert, refused to comply with the Tribal Council resolution to buy the Burrell farm for \$500,000, and proceeded to "negotiate" with the Burrells to accept less money. These tribal officials had no authority to refuse to put into effect a resolution of the Tribal Council, as under their tribal traditions, the tribal council is superior in authority to the Governor, the Chief of Police, the Tribal Administrator or the Tribal Farm Administrator. *See generally*, Complaint "Factual

Allegations,” [App. 109-123 and ¶¶29-30 of Affidavit of Bob Burrell App. 119]

On August 25, 1997, the Burrells removed their two mobile homes and removed all of their farm equipment. Nathan Tsosie and Lawrence Montoya arranged to have Clyde Sandoval and Randy Buller of the BIA inspect the farms to determine if the Burrells had violated any provisions of the lease, and regulations of the BIA or accepted farming practices. The BIA officials stated that there were no violations, and fully supported the Burrells. As late as early December 1997, BIA officials were still being contacted by tribal officials to get support for allegations that the Burrells violated some law or regulation, and the Burrells were refused assistance from said governmental employees. *See generally*, Complaint “Factual Allegations,” [App. 109-123 and ¶¶31-32 of Affidavit of Bob Burrell App. 119-120]

On August 29, 1997, Lawrence Montoya, Leonard Armijo, Nathan Tsosie and Pueblo attorney Bill Haltom met with Bob Burrell and offered: \$218,000 for the FHA loan payoff; a 3 year health insurance for the Burrells; the Pueblo would buy a home lot off of the pueblo to set up their mobile home; and to hire Bob as “Farm Manager” for the Pueblo. That offer was taken away by these tribal officials on September 23, 1997. *See generally*, Complaint “Factual Allegations,” [App. 109-123 and ¶33 of Affidavit of Bob Burrell App. 120]

On September 25, 1997, the Tribal Council voted to reinstate the withdrawn offer. *See attached Exhibit E* [App. 134-5] On October 2, 1997, the Burrells demanded “copies of any recording and/or transcript of any Tribal Council meeting” dealing with the matter, to include any

“Tribal Council resolutions or documents created pursuant to Tribal Council Action, material filed as exhibits, written communications to the Council, and other evidence for the record.” The information was sought to “see if there is any possibility of avoiding litigation.” *See generally*, Complaint “Factual Allegations,” [App. 109-123 and ¶¶34-35 of Affidavit of Bob Burrell App. 120] Exhibit F [App. 136-7] Mr. Bill Haltom, Esq., replied in writing that no record is kept of Tribal Council meetings, no minutes are kept, no written resolution generated, and no evidence existed. He also demanded that a thorough investigation be conducted before filing a lawsuit, otherwise he would seek Rule 11 sanctions against Burrell’s attorney. *See* Exhibit G [App. 138-9] The Burrells hired a retired FBI agent experienced with criminal investigations on Indian reservations to conduct an investigation, and he reported that no tribal official would talk to him per the orders of Mr. Bill Haltom. *See* ¶¶36-37 of Affidavit of Bob Burrell [App. 120]. After the Burrells hired an attorney, who alleged that the Tribal officials committed felony larceny, some of the bales of hay that had been removed were replaced presumably under the orders of these defendant tribal officials. *See* ¶38 of Affidavit of Bob Burrell [App. 120-1]

Since taking the Burrell farm, Defendant tribal officials or their agents have communicated with the BIA and its employees giving false information, including but not limited to:

- a) that the Burrells were abandoning their farm;
- b) that the Burrells were bankrupted and could not make their lease payments;

- c) that the Burrells were in default under the FHA mortgage;
- d) that the Burrells had not paid their water rights assessments;
- e) that the Burrells violated their lease, violated some BIA farming regulations, or violated some provision of the FHA mortgage. *See* ¶39 of Affidavit of Bob Burrell [App. 121]

Bob Burrell absolutely denied that he ever told any tribal official that he was in foreclosure with his FHA mortgage, or that he was abandoning his lease. Bob Burrell states that they were doing well with the farm, and expecting to have their best year, since all of the fields were finally in full production, and they were having a very successful breeding program with their cattle operation. *See* ¶40 of Affidavit of Bob Burrell [App. 121] During the weekend of April 4, 1998, tribal member Otis Leon took approximately 1500 bales of Burrell's hay, which is another felony crime committed against the Burrells by tribal members. *See* ¶41 of Affidavit of Bob Burrell [App. 121]

Burrell has been told that he and his family should not even step a foot on the Pueblo, given the emotional atmosphere. His wife and he have fear that something could happen that would harm them if they ever attempted to continue to work this farm, though the Pueblo defendants posture as if the Burrells can return at any time. *See* ¶¶42-43 of Affidavit of Bob Burrell [App. 121-2]

Bob Burrell testifies that at no time did he want to abandon this farm. His family and he were systematically

driven off this farm by these tribal administrators. *See* ¶44 of Affidavit of Bob Burrell [App. 122]

These defendant tribal officials were clothed under tribal authority at all times, and they intentionally and maliciously ran the Burrells off their farm, stole their crop and terminated their lease, which actions were based on discrimination against the Burrells because of their race. [App. 122] These tribal officials had duties under their titles of Acting Chief of Police, Governor, Lt. Governor, Farm Administrator and Tribal Administrator to protect the Burrells' property, and to protect them from criminal activities against their home and property. These officials intentionally refused said protections because the Burrells are white and non-Indian. [App. 122]

The Pueblo of Santa Ana has no constitution, and no common law system, and no clearly written statutory or regulatory system governing its administrative officers and government of the Pueblo of Santa Ana. The Pueblo of Santa Ana presently has a governmental system which was imposed on it by Spanish Conquistadors which involve a life appointment of a "Cacique." The historical and aboriginal governing organization of the Pueblo of Santa Ana, and its aboriginal religious traditions, did not revolve around the power of a Cacique who had an appointment for life. The present Cacique system at the Pueblo of Santa Ana involves the appointment for life of a member of the Pueblo who has his powers until voluntary retirement, or by his appointment of his own successor. The present Cacique Juan Montoya, was appointed by the previous cacique, his uncle, when he was only 16 years old. [*See* ¶¶48-52 of the Complaint, App. 109-123]

The Pueblo of Santa Ana does not elect its Governor, Lt. Governor, Chief of Police or other government officials, which are all appointed by the Cacique on an annual basis. No tribal member has the right to vote in general elections of tribal officials. The Tribal Council of the Pueblo of Santa Ana includes all male members of the Pueblo at least the age of 18 years, who have served in some function for the tribe. Women are not allowed to be members of the Tribal Council, and are not even allowed to attend Tribal Council meetings. The present Cacique is a part of a small group of people who have taken governmental control of the Pueblo of Santa Ana, and total control of all of the operations of the Santa Ana Casino, and other businesses, including the profits derived therefrom. The Pueblo of Santa Ana has made hundreds of millions of dollars from the profits it has received from its operation of its Casino over the last ten years, which a very high percentage derived during the time when the operation of the casino was ruled by the New Mexico Supreme Court to have been illegal. [See ¶¶54-58 of the Complaint, App. 109-123]

The Tribal Council has little input into daily government, the casino or other businesses, and the agenda of the Tribal Council is created by the Governor, who also schedules its meetings. The individuals who are controlling the Cacique and his appointment of government officials have themselves benefitted by an accumulation of interests on the Pueblo, employment for themselves and their family members, and control over many governmental functions at the Pueblo of Santa Ana. Women are denied basic constitutional rights at the Pueblo of Santa Ana concerning the many restrictions imposed on them, including but not limited to, their inability to vote for

government officials, their inability to have input about potential changes in government, their inability to attend Tribal Council meetings or vote in Tribal Council meetings, and their inability to have any input into the appointment of the Cacique, or his appointments of various governmental officials. [See ¶¶59-63 of the Complaint, App. 109-123]

The general environment of sex discrimination which exists at the Pueblo of Santa Ana has been reflected in many bizarre orders of previous Governors. One instance the Governor ordered that any woman who was living with a man who was not named, was to immediately become named or they would have to move off the Pueblo. This order was rescinded by a subsequent governor who did not want his daughter marrying her live-in boyfriend. The women are also denied their basic First Amendment rights to assemble and petition the tribal government about their grievances, and of the right of free speech, in that any attempt on their part to vocally express dissent about the governmental system and their place in it results in direct threats of banishment from the tribe, which would result in their losing what housing they have on the reservation, and being banished from their membership in the Pueblo of Santa Ana. [See ¶¶64-65 of the Complaint, App. 109-123]

Any male member of the Pueblo of Santa Ana who voices dissent of the governmental systems and policies at the Pueblo of Santa Ana are also threatened with banishment, and there are at least four instances in recent years in which members have literally been driven from the Pueblo for voicing any kind of dissent against the power of the Cacique and his inner circle. Said system of government amounts to a totalitarian state and has resulted in

the political and financial oppression of the members of the Pueblo of Santa Ana by a corrupt system of government. This corrupt system of government is the underlying cause of the violations of the constitutional rights of Bob and Susan Burrell in the underlying case. [See ¶¶67-8 of the Complaint, App. 109-123]

The tribal officials have ordered all pueblo members to have no communication with the Burrells, and threatened them not to provide evidence as witnesses on behalf of the Burrells. [See ¶69 of the Complaint, App. 109-123]

On April 14, 1998, the Burrells filed an action in the United States District Court for the District of New Mexico, styled *Burrell v. Leonard Armijo, et al.*, CIV 98-0438 JC/WWD. After consideration of various motions to dismiss filed by the Defendants, on September 2, 1998, Judge John E. Conway dismissed the complaint without prejudice for failure to exhaust tribal court remedies.

On October 29, 1998, the Burrells filed a Complaint for Damages in the Tribal Court of Santa Ana. [App. 254] The tribal court judge did not allow discovery, as interrogatories and requests to produce were served on each defendant, including the Pueblo of Santa Ana. *See generally*, one set of Interrogatories [App. 274] and Requests to Produce [App. 301] served on one defendant, though each of the individual defendants received similar sets when served with the summons and complaint. The Burrells also filed several motions for injunctive relief [App. 310] and for protective orders [App. 354], alleging that defendants in their official capacities were threatening and harassing potential witnesses, some of whom had expressed willingness to testify about the tribal council resolution ordering a settlement with the Burrells which

tribal officials were ignoring. The Burrells finally got a hearing on the pending motions, but the tribal judge gave them only four days notice, which prompted a motion for continuance. [App. 354] On February 29 and March 21, 2000, Judge Kezele held evidentiary hearings on Defendants' Motion to Dismiss on grounds of tribal sovereign immunity and failure to state a claim. [App. 359] Both parties asked for copies of the tapes and records of several hearings, but no response came back from the Tribal Court. [App. 359] No ruling had ever been received by Judge Kezele, and it is obvious that he was never going to make a ruling and simply allow the case and pending motions to lie unresolved. [See ¶¶74-85 of the Complaint, App. 109-123]

The long delay and obvious intentional failure to act on the case, prompted the Burrells to re-file in the U.S. District Court alleging in their new complaint that they had exhausted tribal court remedies. Defendants filed a motion to stay discovery which was granted by the lower court. [App. 83] Defendants filed another motion to dismiss [App. 29], and the lower court granted it in part, staying the federal case and remanding to the tribal court to have the newly appointed Tribal Judge Angela Lujan make rulings in the tribal case. [App. 158] Burrells immediately filed motions to amend their complaint, for an order requiring discovery (particularly concerning the issue of a tribal council resolution requiring a settlement with the Burrells that was being ignored by tribal officials, exposing clear separation of tribal powers issues), for arbitration and/or for a jury trial setting. [App. 361] These motions were ignored by the tribal judge who issued her order dismissing the case. [App. 168]

After notice of the tribal court decision, the Plaintiffs' filed a "Motion to Exercise Jurisdiction Over This Case;

For an Order That the Tribal Court’s Ruling Based on Sovereign Immunity is Null and Void and for the Court to Order a Jury Trial” and a motion to consolidate the records of the first federal Burrell lawsuit and the tribal court records with the instant case for purposes of having a complete record. [App. 169, 188] The lower court denied the motion to consolidate the records [App. 193] and an order denying the motion to exercise jurisdiction over the case, wherein he ordered “status briefs” from the parties. The Burrells included as exhibits to their “Status Brief” parts of the record proper from both the first Burrell federal case, and the tribal court case. [App. 226-396]

The lower court issued an “Order Lifting Stay, Denying Plaintiffs’ Motion and Notice of Pending Motions” and on August 29, 2003, granted the defendants’ motion to dismiss and issuing Judgment in favor of defendants.



ARGUMENT

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978), the U.S. Supreme Court, with a majority opinion written by Justice Marshall, ruled that the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et seq., does not provide a private right of action. Petitioners pray that this Court overrule this finding, and hold that the Indian Civil Rights Act provides an implied private right of action giving anyone who has had their constitutional rights violated by an Indian tribe on their reservations the right to sue for damages and injunctive relief, in addition to the right of habeas corpus provided in 25 U.S.C. §1303.

The relevant portions of the Indian Civil Rights Act to the Burrell claims are:

“No Indian tribe in exercising powers of self-government shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

....

(5) take any private property for a public use without just compensation;

....

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . .”

On the face of the statute, the Burrells are entitled to the protections of these prohibitions, in addition to the same provisions of the U.S. Constitution:

“Amendment I. Religion and Expression

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V. Rights of Persons

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Amendment VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Tenth Circuit opinion in this case allowed 42 U.S.C. §1981 and 1985 counts to proceed against these individual Tribal officials, but upheld the dismissal of the Pueblo of Santa Ana relying on tribal sovereign immunity. The Burrells ask this Court to consider whether such tribal sovereign immunity should be set aside.

The general rule of stare decisis is not an absolute rule, and this Court recognizes the need on occasion to correct what are perceived as erroneous decisions or to adapt to changed circumstances. Stare decisis is not a constitutional command; as Justice Frankfurter wrote,

“stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.” *See Helvering v. Hallock*, 309 U.S. 109, 119 (1940). In some instances it becomes important to the Court to correct an earlier interpretation that it views as erroneous or no longer viable.

This Court is less reluctant to overrule a decision that involves constitutional interpretation rather than interpretation of a statute.

“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-7 (1932) (Justice Brandeis dissenting).

Stare decisis “has only a limited application in the field of constitutional law.” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1938) (Justices Stone and Cardozo concurring). “Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996). When considering to overrule a constitutional precedent, the Court usually looks for something in addition to its belief that a case was wrongly decided. “Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The

Burrells submit to this Court that “special justification” exists to overrule *Santa Clara Pueblo v. Martinez* and its grant of sovereign immunity to the Pueblo of Santa Ana and its finding that the Indian Civil Rights Act of 1968 does not have an implied right of action.

The *Martinez* court held that the act did not have a remedial provision, other than a writ of habeas corpus, and since there was no explicit waiver of sovereign immunity, the tribe still enjoyed immunity from suit against it based on the Indian Civil Rights Act. However, *Martinez* specifically held that individual officers of the Pueblo were not protected by the tribe’s immunity from suit. *Id.* at 115-6. *See also, Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, at 171, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Tribal sovereign immunity does not bar suit for prospective relief against tribal officers acting in violation of federal law. *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991). When tribal officials act beyond their authority, they lose their entitlement to immunity from suit. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269 (9th Cir. 1991).

Federal contracts and lease regulations typically require no discrimination on the basis of race, religion, color or sex. A contractual relationship between a tribe and state actors, can create the color of state law requirement of 42 U.S.C. §1983. In *Evan v. McKay*, 869 F.2d 1341, at 1347-9 (C.A.9,1989), the Ninth Circuit found state action on the part of Blackfeet Tribal police officers because they had a contract with the City of Browning. In the instant case, the Burrells tried to get discovery about the duties of

the Santa Ana Tribal Police (Governor Armijo was governor and acting Chief of Police), and there could have been grants of money from the state towards the tribe's police force, which could have made Armijo acting under color of state law, however discovery was never permitted in either the two federal cases, or in the tribal court case.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court recently held that tribal courts had no jurisdiction over the §1983 claims, since they are not courts of "general jurisdiction." The historical and constitutional assumption of concurrent state-court jurisdiction over cases involving federal statutes is missing with respect to tribal courts, and their inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Congress has not purported to grant tribal courts jurisdiction over §1983 claims, and such jurisdiction would create serious anomalies under 28 U.S.C. §1441. Obviously, tribal courts would also not have jurisdiction over 42 U.S.C. §1981 and §1985 claims.

Part of the underlying justification for the *Martinez* court not allowing 42 U.S.C. §1981, §1983 and §1985 claims, or implied rights of action under the Indian Civil Rights Act of 1968, is that the Indian tribes could resolve their own disputes, presumably thinking that constitutional violations could be heard in their own tribal courts. Also, the *Martinez* court pointed to the tribal courts as available forums for litigating violations of the Indian Civil Rights Act. *See Martinez* at 436 U.S. at 64. Now the *Hicks* case shows that tribal courts have no jurisdiction over federal constitutional tort claims. Anyone familiar with practice before tribal courts will attest that they routinely rely on sovereign immunity to avoid claims of violations of the Indian Civil Rights Act, as was done in

the instant case. As the *Hicks* case recognized, tribal courts do not have jurisdiction over federal claims, since they are not courts of general jurisdiction. The practical realities are that tribal courts not only do not have jurisdiction over constitutional tort violations, or over violations of federal statutes like the Indian Civil Rights Act, but they are inadequate forums to address violations of constitutional rights, given the realities of tribal political powers and their relations to tribal court systems.

So the present state of affairs is that Indians and non-Indians have no defensible constitutional rights while they are on Indian reservations, as tribal and federal courts are unavailable to them, except when tribal officials go beyond their tribal authorities, which in the instant case forces scrutiny into a tribe's constitution, if it has one, and its historical and cultural history. The latter seems inappropriate as a determining factor in constitutional torts. The *Martinez* case involved tribal membership, which the *Martinez* court regarded as inherently a matter for the tribes to resolve, despite the obvious sex discrimination involved in the Santa Clara Pueblo's membership restrictions. In the instant case, Santa Ana Pueblo through its non-elected officials, stole private property, violated the equal protection and due process rights of the Burrells, and took their real property rights using police powers, instead of some legitimate use of their powers of eminent domain.

Accepting the complaint's allegations as true, these tribal officials then ignored resolutions of the Tribal Council of the Pueblo of Santa Ana to settle with the Burrells. This brings to focus that the Pueblo of Santa Ana has no elected officials. Tribal members have no right to vote, which is a seemingly preposterous situation in the modern United States, who is willing to spend billions of

dollars in Iraq to establish democracy by trying to establish the right to vote in totalitarian Muslim countries. Yet right here in America, U.S. citizens/tribal members of the Pueblo of Santa Ana, and other tribes, have no right to vote. Are our first Americans less than human, or so different culturally, that they can be denied basic constitutional rights contained in the Bill of Rights?

Tribal sovereign immunity against constitutional torts has created totalitarian and corrupt governments on Indian reservations within our own country. American Indians have left a history of honorable service and dedication in Armed Services, and have spilled their blood to defend this country, yet it can be argued that they have no constitutional rights within their own reservations. American Indians and non-Indians who live and work on Indian reservations should not have their defensible constitutional rights stripped from them. To blindly say that this is a matter for Congress to enact specific waivers of sovereign immunity, like attaching a private right of action to the Indian Civil Rights Act, is ignoring political reality – that will never occur, as shown by efforts over the past 20 years to address this horrible situation.

This Court has expressed reluctance to expose poor Indian tribes to lawsuits. However, this Indian tribe is far from poor, as it has made gigantic amounts of money with its casino, and has extensive commercial enterprises. The Burrells propose that a lifting of sovereign immunity against this particular tribe could still leave open the possibility that other Indian tribes, who are not rich, could still have sovereign immunity issues addressed on a case by case basis.

The American Indian is still struggling with assimilation into the general American society. Substance abuse and poverty and a host of other societal ills inflict them

and create an environment which robs them of individual empowerment. The fact that they have no judicial forums to address violations of their most basic rights is a very big factor in keeping them down. Can their own tribal government deny them the right to vote? How about the right to an independent judiciary imposing an orderly rule of law? How about the right to a trial by jury? How about the rights of women to have a voice in their Tribal Council, or even the right to attend meetings? How about the right to have a constitution, or to have the traditional powers of the tribal council to be paramount over tribal officials?

Can the legal system outside the reservation stand by while such outrageous insults against core values of the American way of life occur? The Burrells humbly submit that is what has occurred during the last 40 years of history after enactment of the Indian Civil Rights Act of 1968. The *Martinez* case resulted in a sexist and racist decision that can rank with *Plessy v. Ferguson*, 163 U.S. 537 (1896), which approved de jure racial segregation in public facilities, and ruled that states could prohibit the use of public facilities by African Americans.

The American Indian and non-Indians on reservations are still U.S. citizens first and foremost, and no set of circumstances can justify them being robbed of their individual constitutional rights. If the Indian people are going to rise above poverty, lack of self-determination and the plethora of societal ills on the reservations, it will ultimately have to come from the people themselves, not their tribal governments. Such efforts on the part of a people must start with them having the ability to determine who shall represent them in tribal government, and a legal system that can hold tribal government and its officials accountable for violations of fundamental constitutional rights. Their lack of enforceable individual constitutional rights has made a

direct contribution to all the ills on Indian reservations. Indian sovereign immunity from constitutional torts has stripped the individual Indian of the basic dignity which is an inherent right of all American citizens.

◆

CONCLUSION

The Burrells ask this Court to grant a writ of certiorari, and seeks to overturn the following rulings of the 10th Circuit Court:

1) The dismissal of the Pueblo of Santa Ana as a party defendant.

2) Avoiding the *Martinez* case, which the Burrells request to be specifically overturned regarding the Pueblo's sovereign immunity and its holding that no private right of action exists in the Indian Civil Rights Act of 1968.

3) Reinstating the Burrells' 42 U.S.C. §1983 action until discovery can be completed to determine if the Pueblo had ever received state or federal funds for its police force which would make the defendant Acting Chief of Police and Governor Leonard Armijo a state actor.

4) Allowing the same claims under 42 U.S.C. §§1981 and 1985 that the Tenth Circuit Court has allowed against the individual tribal officials to be available against the Pueblo of Santa Ana itself.

Respectfully submitted,

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