Supreme Court, U.S.
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In the

Supreme Court of the United States

WALTER ROSALES, MARIE TOGGERY,
and KAREN TOGGERY,

Petitioners,

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT
OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS,
and NATIONAL INDIAN GAMING COMMISSION,

Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a federally recognized Indian tribe is a necessary and indispensable party to an action by individual Indians to enforce their allotments of non-tribal land pursuant to 25 U.S.C. 345.

Whether individual Indians can be deprived of all rights and remedies provided by 25 U.S.C. 345, when a subsequently recognized Indian tribe falsely claims sovereignty over non-tribal land allotted to the individual Indians.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, filed August 11, 2003, is set forth in the Appendix ("App.") pp. 1a-5a. The opinion of the United States District Court for the Southern District of California, filed April 22, 2002, is set forth in the Appendix at pp. 5a-17a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit denied the Petitioners' Petition for Rehearing on September 19, 2003. App. p. 18a. This Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment, U.S. Const. amend. V, actions for allotments pursuant to 25 U.S.C. 345, and Rule 19 of the Federal Rules of Civil Procedure, the relevant portions of which are set forth verbatim at App. pp. 19a-22a.

STATEMENT OF THE CASE

Introduction

The United States has allowed a false claim of sovereignty by a recently created, non-historical, reorganized Indian tribe to deprive the individual

Indian Petitioners of all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit court of appeals decision in this case, erroneously found the Jamul Indian Village to be a necessary and indispensable party to this action, and thereby denied Petitioners' all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit's decision in this case conflicts with long standing precedent in the Eighth and Tenth Circuits, and denies individual Indian owners of millions of acres of allotted land in the nine western states the remedies to enforce their allotments provided in 25 U.S.C. 345. Here, the Ninth Circuit is alone among the circuit courts of appeals in erroneously holding that a federally recognized tribe is a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345, requiring dismissal of the individual Indians' claims due to the tribe's sovereign immunity. Such a disparity in outcome, based upon in which circuit the allotment was made, has not been, and cannot be, justified.

While the general practice of allotting reservation land to individual Indians ceased with the passage of the Indian Reorganization Act of 1934 ("I.R.A.") 25 U.S.C. 461, the United States concedes that more than 90 million acres of America have been "allotted" to Indians since passage of the General Allotment Act of 1887. Felix Cohen, <u>Handbook of Federal Indian Law</u> (DOI 1982) Ch. 11, Sec. B1, p.614. Moreover, the United States continues to accept

individual gifts of land from private citizens, as here, in trust for the benefit of designated individual Indian "allottees," pursuant to the Indian Reorganization Act. 25 U.S.C. 465. Felix Cohen, <u>Handbook of Federal Indian Law</u> (DOI 1982) Ch. 1, Sec. D4, p.41, n. 118. Some of the more well known allotments in Southern California that have been before this Court include those in and around Palm Springs, involving individual members of the Cabazon, Augustine, Torres-Martinez and Agua Caliente Bands of Mission Indians. Felix Cohen, <u>Handbook of Federal Indian Law</u> (DOI 1982) Ch. 11, Sec. B1, p.614, n. 20.

Certiorari should be granted in this case to eliminate the conflict among the circuit courts of appeals, and to decide important questions of federal Indian law that have not been, but should be, settled by this Court to prevent false claims of sovereignty from taking individual Indian allotments without just compensation. Without this Court's intervention, thousands of Native Americans with millions of acres of land in the nine western states of the Ninth Circuit will continue to be deprived of the remedies Congress provided in 25 U.S.C. 345.

Procedural History

Petitioner's Complaint was filed on May 30, 2001. Respondents moved to dismiss pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6), which motion was denied by the District Court for So. California on October 15, 2001. An Answer was filed on behalf of the Respondents on November 1, 2001.

Respondents again moved to dismiss, or in the alternative, for judgment on the pleadings and summary judgment on November 9, 2001, alleging that there was no ripe case or controversy, Petitioners lacked standing, and Petitioners had failed to exhaust administrative remedies.

On February 14, 2002, the District Court for So. California granted the Respondents' motion for summary judgment, and denied the Respondents' motions to dismiss and for judgment on the pleadings.

Petitioners moved for new trial, or in the alternative, relief from judgment on February 22, 2002. The District Court for So. California construed Petitioner's motion for a new trial as a motion for reconsideration, and then denied Petitioners' motion for reconsideration, on April 22, 2002. App. at pp.5a-17a.

Petitioners timely filed a notice of appeal of the District Court's order granting summary judgment, and denying Petitioners' motion for new trial and relief from judgment, which had been construed as a motion for reconsideration, on May 10, 2002. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision in an unpublished Memorandum Decision on August 11, 2003. App. pp.1a-4a.

Petitioners timely filed a motion for rehearing, which was denied by the United States Court of Appeals for the Ninth Circuit on September 19, 2003. App. p.18a. This petition was timely filed on December 18, 2003.

Statement of Facts

Petitioners, Walter Rosales, Marie Toggery, and Karen Toggery, are Indians with half or more degree of California Indian blood, and are enrolled members of the Jamul Indian Village, a tribal governmental entity of Kumeyaay Indians, recognized by Congress in 1981, governed by a constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.[1]

On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded 2.21 acres of land in Jamul, California, to the Roman Catholic Bishop of Monterey and Los Angeles, "to be used for the purposes of an Indian graveyard and approach thereto." Petitioners and their families were, from their birth, occupants by sufferance, in possession of certain private property, contiguous to that Indian graveyard, which was owned by the non-Indian Daley family.

During the latter part of the 1970's the Petitioners and their families negotiated a gift of the property that they possessed. The Daleys agreed to convey title to the land to the United States in trust for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daleys used this form of conveyance to provide a place for the Petitioners and their families to live in perpetuity, protected by the United States, as a trustee, against all forms of

[1] Marie Toggery died during the pendency of this dispute. Her surviving claims are now being prosecuted by the representative of her estate, Karen Toggery.

alienation, trespass and infringement.

On December 27, 1978, the Daleys, recorded a grant deed of parcel 597-080-01, consisting of approximately 4.66 acres, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." However, upon the recording of the grant deed, the United States failed to issue trust patents to the individual beneficiaries of that deed, as provided for in 25 U.S.C. 348.

Instead, in the absence of specifically prescribed designation procedures, the Secretary of the Interior designated the Petitioners, among other half blood Jamul Indians, as beneficiaries of trust Parcel 597-080-01, by locating them on the property, acquiescing in their continued presence, possession and use of Parcel 597-080-01 for 25 years, building houses for them on the Parcel, and providing the Petitioners with services usually accorded Indians who have been designated beneficiaries of land acquired and held in trust for individual Indians under 25 U.S.C. 465.

Similar forms of grant deeds have long been accepted by the BIA and similar designations of individual Indians' trust allotments have long been made by the BIA, and enforced by the courts. See, *Coast Indian Community v. U.S. ("Coast")*, 550 F.2d 639, 651, n32 (Fed. Cl. 1977); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir.1976); and Memoranda of the Solicitor of the Interior, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479, involving for e.g., the

Mississippi Choctaws, the St. Croix Chippewas, the Nahma and Beaver Indians, and the Nooksack Indians.

The grant deed was recorded on December 27, 1978, three years before Congress recognized the creation of the tribe known as the Jamul Indian Village in 1981. This deed was accepted by the United States, pursuant to 25 U.S.C. 465, on behalf of the individual Jamul Indians of one-half or more Indian blood, who were then in possession of the parcel. The Petitioners thereby became entitled to this allotment of land under 25 U.S.C. 465, and 25 U.S.C. 345.

On May 9, 1981, Petitioner Watler Rosales certified that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution, pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. 476. The United States acknowledged the adoption of the constitution on July 7, 1981, and Congress recognized the Jamul Indian Village by publication in the Federal Register on November 24, 1982. When the Jamul Indian Village was created on May 9, 1981, it was a landless governmental entity.

The United States has confirmed that Parcel 597-080-01 was accepted into trust on behalf of individual Indians, including the Petitioners, and not on behalf of any then recognized, or any subsequently recognized, Indian tribe. The United States' August 3, 2000 response to Petitioners' Freedom of Information Act ("FOIA") request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians

of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

There is no subsequent record of any transfer of Parcel 597-080-01, from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary, to any tribe, including the Jamul Indian Village.

All individual designated allotment beneficiaries of land held in trust by the United States are cotenants. Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, B3, pp.615-16. As such, cotenants have equal rights to possession, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their interest in the trust parcel to any subsequently recognized tribe.

Here, there is no evidence of any consent by the Petitioners to such a transfer. Nor is there any wonder why the Petitioners have never consented to such a transfer of their individual interests to the subsequently created tribe. The Interior Board of Indian Appeals has found non-members illegally participating in the Jamul Indian Village tribal government since the tribe was first recognized. 32 IBIA 166.

The Solicitor of the Interior specifically advises the field personnel of the BIA that any transfer of individual Indians' designated trust allotments must

still be accomplished the old-fashioned way, by recording a grant deed. 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479. Where, as here, no subsequent grant deed was recorded, the Petitioners' designated allotments in the trust property cannot have been transferred to any subsequently recognized tribe.

On or about February 5, 2001, the United States published a notice calling for the "razing" of the Petitioners' homes on their allotments in parcel 597-080-01, and their "displacement" from their allotment in parcel 597-080-01. Publishing the February 5, 2001 notice has, both denied, and excluded, the Petitioners from the quiet enjoyment of their allotments as designated beneficiaries of the trust Parcel 597-080-01. The United States' denial of Petitioners' entitlement, and exclusion from their allotment of land, has caused the Petitioners severe property damage, consequential damages, physical and bodily injury, including severe emotional distress, subject to proof at trial.

Petitioners are entitled to enjoin the alienation of their allotments, and prohibit the razing of their homes on their allotments, because the United States has admitted that parcel 597-080-01 is not land over which an Indian tribe exercises governmental power, since it was deeded to the U.S. in trust for certain individual Indians, including the Petitioners, and was not deeded in trust for any recognized Indian tribe, then in existence, or subsequently recognized by Congress. By virtue of their allotments in, and designation as beneficiaries of, the trust parcel, the Petitioners possess fee simple property rights in parcel

597-080-01, as against all others, save the United States. These usufructuary rights entitle the Petitioners to exclude all others, including the subsequently created tribe and those that seek to trespass upon their designated allotments to raze their homes.

Petitioners therefore seek a declaration of their rights to their allotment in, and designation as trust beneficiaries of, parcel 597-080-01, pursuant to 25 U.S.C. 345. They also seek to enjoin the Respondents from denying, and otherwise excluding the Petitioners from, their allotment in, and designation as trust beneficiaries of, parcel 597-080-01.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit decision in this case is in conflict with the decisions of the Eighth and Tenth Circuit courts of appeals, which hold that a federally recognized tribe is not a necessary and indispensable party to an action to enforce an individual Indian's allotment under 25 U.S.C. 345. *Antoine v. United States ("Antoine")*, 637 F.2d 1177, 1181-82 (8th Cir. 1981), *reaffirmed after remand*, 710 F.2d 477, 478; *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier ("Potawatomi")*,17 F.3d 1292, 1294 (10th Cir. 1994), *reaffirmed after remand*, 142 F.3d 1325, 1329.

Here, the Ninth Circuit decision erroneously holds that the subsequently recognized tribe, known as the Jamul Indian Village, is a necessary and indispensable party to the individual Indian Petitioners' action to enforce their allotments in non-tribal land, which they acquired when the land was deeded to the United States in trust for their individual benefit, three years before the tribe was established under 25 U.S.C. 476. App. 1a-4a.

Here, the Jamul Indian Village is not a necessary or indispensable party to Petitioners' action, because there is no evidence in the record that it ever claimed a "legally protected interest" in Parcel 597-080-01. See for e.g., *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996); *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*,17 F.3d 1292, 1294 (10th Cir. 1994). As held by both the Ninth and Tenth Circuits, a "legally protected interest" excludes those "claimed" interests that are "patently frivolous." *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States* 192 F.3d 951, 958-59 (10th Cir. 1999).

Contrary to the Ninth Circuit's erroneous finding, App. 2a, the United States has already conceded that the Village has not "claimed jurisdiction over the parcel of land at issue in this action." The United States' response to Petitioners' FOIA request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of the BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66

acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

However, even if the Ninth Circuit's finding was not erroneous, it would still conflict with the Eighth and Tenth Circuit decisions in which a tribe's claim to individual Indians' allotments does not make the tribe a necessary or indispensable party to an action to enforce the individual Indians' allotments pursuant to 25 U.S.C. 345. *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994).

> This language [of 25 U.S.C. 345] is unequivocal. The United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment. In our view, determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States. Furthermore, if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties. *Antoine*, 637 F.2d 1177, 1181.

The Ninth Circuit's decision also fails to acknowledge and distinguish the Tenth Circuit's decision in *Potawatomi*, 17 F.3d 1292, 1294. There, the Tenth Circuit reversed the district court's finding that

a "tribe" was necessary or indispensable to an action over trust allotments, because the "tribe" had no "protected interest" in the individual Shawnee Indians' trust applications.

There, as here, the Tenth Circuit found that the BIA had the power to grant trust allotments of land to individual Absentee-Shawnee Indians within the Potawatomi reservation, under 25 U.S.C. 465 and a May 23,1872 Act of Congress, ch. 206, 17 Stat. 159 (1872). The Potawatomis sued the BIA to prevent the grant of such trust allotments to the individual Absentee-Shawnee Indians. The Tenth Circuit reversed dismissal for failure to join the Absentee-Shawnee "tribe," finding that the United States had failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the Absentee-Shawnee tribe had never been granted an "undivided trust or restricted interest" in the land.

There, as here, the Tenth Circuit found that the alleged "interest" of the Absentee-Shawnee tribe was merely an expectation, just as the alleged "interest" of the Jamul Indian Village is merely an expectation that has not yet come to pass, and such expectations do not constitute a legally protected interest for purposes of necessary party analysis under Fed. R. Civ. P. 19. *Potawatomi*, 17 F.3d at 1294.

In *Potawatomi*, the BIA never transferred any trust or protected interest to the Absentee-Shawnee tribe, just as in this case, the BIA never transferred any trust or protected interest in Parcel 597-080-01 to the Jamul Indian Village, after the Petitioners became designated beneficiaries of the trust parcel. Therefore

the Tenth Circuit found that the "tribe" had no conflict with the designated individual Indian trust applications, and was not a necessary or indispensable party to the action.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. 151.8. It merely grants the Secretary of Interior the power to allot land to individual Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a tribe. Moreover, as the Potawatomi tribe correctly points out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will evaluate their applications as they would Potawatomi applications. This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. ...
>
> In the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion under 12(b)(7). For this reason the district court abused its discretion in dismissing the action. *Potawatomi*, 17 F.3d 1292, 1294.

Here, there is a similar lack of evidence showing any protected interest of the Jamul Indian Village tribe

in Parcel 597-080-01. Just as the 1872 Act did not create any "undivided trust or restricted trust interest" in the Absentee-Shawnee tribe, the 1978 grant deed here did not, and could not, create any protected interest in a "tribe" that had yet to organize, had yet to adopt a constitution, had yet to be recognized, and had yet to exist in 1978. Moreover, there is no evidence that any protected interest in Parcel 597-080-01 was ever subsequently transferred to the Jamul Indian Village tribe. It therefore remains an abuse of discretion for the Ninth Circuit to have dismissed this action, where the BIA failed to make a Fed. R. Civ. P.12(b)(7) motion, let alone sustain its burden under Fed. R. Civ. P.19.

Similarly, here, until the BIA amends the grant deed to transfer the present designation of the individual Jamul Indian beneficiaries, to the subsequently recognized "tribe," the United States has failed to prove that the subsequently created "tribe" is either a necessary or indispensable party to this action.

The absence of any subsequently recorded transfer of the Petitioners' trust interest, also explains why the Ninth Circuit's reliance on its earlier decision in *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), is erroneous. In *Pit River*, unlike here, there was a formal designation of the subsequently recognized "tribe" as the beneficiary of the grant deed, after the tribe was recognized. 30 F.3d at 1093. Here, the United States concedes in silence that there has been no such recorded transfer, amended grant deed, nor any formal designation of the Jamul Indian Village "tribe" as the beneficiary of the 1978 Daley grant deed, after the Village was recognized in 1981.

Here, there are no competing interests between the subsequently recognized "tribe" and the Petitioners who were designated individual trust beneficiaries, because the United States has conceded that the "tribe" did not exist when the Petitioners' designated interest was originally recorded in the 1978 deed, and there has been no subsequent transfer of any interest in the parcel to the tribe.

As was found in *Kansas v. Norton*, 249 F.3d 1213, 1226-27 (10th Cir. 2001):

> Thus, the absence of the Miami Tribe does not prevent the State from obtaining its requested relief or an adequate judgment. Nor do we believe the absence of the Tribe is likely to subject the parties to this action to multiple or inconsistent obligations..."

A "tribe" that did not exist in 1978 simply cannot be found to have acquired a "legally protected interest" in Parcel 597-080-01 when the grant deed was recorded in 1978, and any claim by the United States to the contrary is patently frivolous. *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

The United States has simply submitted no evidence that any amendment to the grant deed was ever recorded, transferring the individual Indian beneficiaries' designation to the subsequently created "tribe," after its recognition in 1981. Therefore, just as was found in *Potawatomi*:"In the absence of evidence showing the nature of the Absentee-Shawnee tribe's

interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion..." under Rule 19 here. Id., at 1294.

The Ninth Circuit's decision also conflicts with the Eighth and Tenth Circuits decisions by denying the Petitioners all rights and remedies pursuant to 25 U.S.C. 345, without any attempt to shape the equitable relief requested to avoid this prejudice. App. 3a. For example, the Eighth Circuit noted that a damages remedy could be shaped to avoid any potential infringement if any other non-party were found to be in possession of the allotment: "if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties." *Antoine*, 637 F.2d 1177, 1181.

"[T]he absence of an alternative forum [sh]ould weigh heavily, if not conclusively against dismissal." *Sac and Fox v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001), citing, *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996). Even the Ninth Circuit has, on a prior occasion, conceded that courts should be "extra cautious" before dismissing an action pursuant to Rule 19, where "there does not appear to be any alternative forum in which plaintiffs' claims can be heard." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

Here, there was certainly no need to throw the baby out with the bath water and dismiss the Petitioners' entire action to protect any interest the United States perceives the tribe has in Parcel 597-080-01. Even if there had been a subsequent transfer of the

Petitioners' interest in the trust parcel to the tribe, as the Eighth Circuit held in *Antoine*, the Petitioners would remain equitably entitled to damages from the United States for the wrongful withholding of a patent for their original allotment in 1978, since such damages would not impair any subsequent interest the tribe allegedly acquired.

Ultimately in the remand of *Antoine*, the District Court awarded damages to prevent violation of the 5th Amendment's prohibition against the taking of private property without just compensation. The Eighth Circuit then affirmed the award of damages for the value of the allotment taken, plus an amount sufficient "to produce the present full equivalent of that value paid contemporaneously with the taking." *Antoine v. United States (II)*, 710 F.2d 477, 479-80 (8th Cir. 1983), citing this Court's opinion in *United States v. Creek Nation*, 295 U.S. 103, 111 (1935), and citing *Confederated Salish and Kootenai Tribes v. United States*, 401 F.2d 785 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969), and *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938).

Individual Indians in the Ninth Circuit, including the Petitioners, should not be denied just compensation or any of the remedies provided by 25 U.S.C. 345 in the other circuits, just because their tribe was subsequently recognized after the United States acquired land in trust for their individual benefit in California, instead of the Dakotas.

II. CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the Eighth and Tenth Circuit courts of appeals. As the Eighth and Tenth Circuits have held, a federally recognized Indian tribe is not, and should not be, a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345.

More importantly, a false claim of sovereignty by a subsequently created I.R.A. tribe, should not be allowed to deprive individual Indians of all remedies provided by 25 U.S.C. 345.

As Felix Cohen, IBIA Chairman under President Roosevelt, and the primary draftsman of the Indian Reorganization Act, warned in 1953:

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..." Cohen, Handbook of Federal Indian Law (DOI 1982) p. v.

Particularly in these times of great challenge to our distinctly American freedoms, the United States should not allow false claims of tribal sovereignty to take individual Indians' allotments without just compensation, lest our democratic faith fail these indigenous Americans.

For all of the foregoing reasons, since the "threshold requirements of Rule 19(a) have not been satisfied," as this Court decided in its *per curiam* opinion, *Temple v. Synthes Corporation, Ltd.*, 498 U.S. 5, 8 (1990), the writ of certiorari should be granted, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the Petitioners' action should be remanded for trial.

Respectfully submitted

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(Any footnotes trail end of each document)

No. 02-55800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; et al.,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; et al.,
Defendants - Appellees.

July 8, 2003, Argued and Submitted,
Pasadena, California
August 11, 2003, Filed

COUNSEL: For WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, Plaintiffs - Appellants: Patrick D. Webb, Esq., WEBB & CAREY, San Diego, CA.

For UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIONAL INDIAN GAMING COMMISSION, Defendants - Appellees: M. Alice Thurston, Esq., Mark R. Haag, Esq., Katherine J. Barton, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For UNITED STATES OF AMERICA, Defendant - Appellee: Appellate Section, U.S. DEPARTMENT OF JUSTICE, Washington, DC.