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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALL MISSION INDIAN HOUSING AUTHORITY, Plaintiff, vs. BEN MAGANTE, JR., and CATHERINE JEWEL MAGANTE, Defendants.	Case No. 06cv1678-BTM (NLS) RESPONSE TO ORDER TO SHOW CAUSE Hearing: February 8, 2007 11:00 a.m. Honorable Barry Ted Moskowitz (No oral argument required)

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INTRODUCTION

In response to having identified the conflict between *All Mission Indian Housing Authority v. Silvas*, 680 F.Supp. 330 (C.D. Cal., 1987) on the one hand, and *Round Valley Indian Housing Authority v. Hunter*, 907 F.Supp. 1343 (N.D. Cal., 1995) and *Minnesota Chippewa Tribal Housing Corp. v. Reese*, 978 F.Supp. 1258 (D.Minn., 1997) on the other, the Court has ordered plaintiff the All Mission Indian Housing Authority (hereinafter, "AMIHA") to show cause why this action should not be dismissed for lack of subject matter jurisdiction. This response will not repeat the arguments accepted by Judge Tashima, formerly of the Central District and now of the U.S. Court of Appeals for the Ninth Circuit, in *Silvas*. Instead, this response will focus on why *Hunter* and *Reese*, which relies on *Hunter*, are simply wrong and, as between the two views, *Silvas* presents the better analysis.

Also, in *Silvas,* Judge Tashima had the benefit of briefing not only by AMIHA, but also a brief amicus curiae[1] filed by the Attorney General on behalf of the U.S. Department of Housing & Urban Development, the federal government agency that funds AMIHA and carries out federal housing policy toward Indian tribes. Because the Government's position has not changed, AMIHA has supplied as Exhibit A to this response to the Court's OSC a copy of the amicus brief of the United States considered by Judge Tashima in *Silvas*. AMIHA requests the Court to take judicial notice of, and to consider, the content of this brief amicus curiae.

It is not AMIHA's preference to invoke this Court's jurisdiction for this action. But AMIHA must do so because it has no other choice. As shown below, there is no jurisdiction in state court. No tribal courts exist for the mostly very small tribes that are members of and

[1] This amicus brief was actually filed in a companion case to *Silvas, AMIHA v. Castello,* U.S.D.C., C.D. Cal., Civil no. 87-997-LTL, but a copy was supplied to Judge Tashima in *Silvas* as an exhibit.

created AMIHA.[2] Therefore, *only* the federal courts might perform the essential function of hearing eviction actions in cases where AMIHA's tenants breach their subleases by non-payment of rent, or otherwise.

If the federal courts lack subject matter jurisdiction, then, as stated in the above amicus brief of the United States, the massive investment of federal tax dollars in housing on California Indian reservations is in grave jeopardy, as is the entire federal housing program[3] in states, such as California, which are subject to 28 U.S.C. §1360. If *no* court in states such as California is available to conduct evictions on federal Indian reservations, then tenants will have no incentive to pay rent or otherwise meet their obligations toward tribes or organizations such as AMIHA that must conduct occasional evictions in order to induce tenants to pay rent and meet their other duties as tenants. Without rent payments, no such tribal housing program can survive financially, and Congress' purpose in funding the federal Indian housing program founders.

While AMIHA does not claim that the lack of any alternate forum creates federal jurisdiction that does not otherwise exist, this is one factor of which the Court should be aware as it considers the substantive legal arguments as to why federal jurisdiction does exist. The primary such reason is that the claim that arises under federal law *is* a tribal right grounded in federal common and statutory law, contrary to *Hunter* and *Reese*. For this and the other reasons noted below, AMIHA submits that *Hunter* and *Reese* are simply wrong, and that *Silvas* presents the better analysis. Therefore, AMIHA urges the Court to conclude that federal court

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[2] "None of these tribes or bands, apparently for economic reasons, has established a tribal court to which eviction matters, such as this case, could be referred." *Silvas,* 680 F.Supp. at 330.

[3] See the Native American Housing Assistance and Self-Determination Act of October 26, 1996, P.L. 104-330, 110 Stat. 4017, 25 U.S.C. §4101, et seq., which reaffirms the federal commitment to supporting Indian housing programs and shifts the federal funding mechanism directly to block grants to tribes which may designate either themselves or other entities, such as AMIHA, as their "tribally-designated housing entity". See 25 U.S.C. §4103(21), 25 U.S.C. §4112(d), and 25 U.S.C. §4151. This statute will be referred to herein as "NAHASDA".

jurisdiction does exist over this action, especially in light of Congress's most recent pronouncement on the nature of its Indian housing program that requires AMIHA to conduct evictions in appropriate cases.

I.

THERE IS NO LONGER ANY DOUBT BUT THAT CALIFORNIA STATE COURTS LACK JURISDICTION OVER THIS CASE.

When Judge Tashima decided *Silvas,* he held that the prohibition of 28 U.S.C. §1360(b) prevented California state courts from having jurisdiction to entertain eviction actions on the trust lands of a federal Indian reservation:

> This statute is consistent with the Supreme Court's recognition that an action asserting a right to possession of Indian lands arises under federal law. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675, 682, 94 S.Ct. 772, 781, 784-85, 39 L.Ed.2d 73 (1974). Conversely, this Circuit has held: "Where a dispute involves [Indian] trust or restricted property, the state may not adjudicate the dispute nor may its law apply." *In re Humboldt Fir*, Inc., 426 F.Supp. 292, 296 (N.D.Cal.1977) (emphasis added; citations omitted), aff'd, 625 F.2d 330 (9th Cir.1980). See also *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir.1987) (rent control ordinance inapplicable to allotted Indian land); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir.1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977) (zoning ordinance inapplicable to Indian reservation).
>
> **Conclusion**
>
> Because the substantive state law cannot apply (and state courts cannot adjudicate this dispute) . . .
>
> *All Mission Indian Housing Authority v. Silvas*, 680 F.Supp. 330, 332 (C.D.Cal., 1987)

While this was certainly a correct interpretation of the federal statute by the federal court when made in 1987, there was then no definitive statement on the same subject from the California courts as a matter of state law. However, the California Supreme Court supplied that definitive state law holding in 1991:

> . . . in order for section 1360(b)'s jurisdictional preclusion to operate and its protective purpose to be fulfilled, the threshold question must be whether one possible outcome of the litigation is the determination that the disputed property is in fact Indian trust land. If that outcome is possible, then a state court is barred from assuming jurisdiction of the case. . . .
>
> Moreover, canons of construction aside, the broader construction seems more in harmony with the sweeping language of section 1360(b) itself: by excepting from state jurisdiction the right to adjudicate "ownership, or right to possession . . . *or any interest* in Indian property (italics added [by the Court]), the statute seems intent on comprehensively excluding from state courts the whole class of cases involving Indian property rights, including disputes in any form involving Indian trust land.
>
> Therefore, whenever a party claims that the state court has no jurisdiction under section 1360(b), it is incumbent on the state court, as in the case of areas of law completely preempted, to look beyond the face of the complaint in order to determine from the totality of the pleadings whether the case before it is a dispute over the "ownership or right to possession [of Indian land] or any interest therein." If it appears from the pleading that the case may be so characterized, and that one possible outcome of the case may be that the property in dispute is Indian trust land, the court must dismiss the case for want of subject matter jurisdiction.
>
> *Boisclair v. Superior Court,* 51 Cal.3d 1140, 1156 (1991)

Therefore, there is no longer any doubt but that, as a matter of both federal and state law, no state court has subject matter jurisdiction over an action, such as this, by which a party seeks the recovery of leased trust lands of a federal Indian reservation[4] in California.

[4] ¶5, line 22, p. 2 of the complaint alleges that the parcel of land whose possession AMIHA seeks to recover is "That portion of Tract number 139 of the LaJolla Indian Reservation. . ." ¶1, lines 22-23, p. 1 of the complaint alleges that each defendant "lives in a federally-subsidized home on a federal Indian reservation."

II.

HUNTER IGNORES THE TRIBAL NATURE OF THE RIGHT BEING ASSERTED.

A. Nature and structure of AMIHA and its housing projects

The plaintiff in this case is AMIHA, described by Judge Tashima as a consortium "organized by 17[5] California Mission Indian Tribes to provide low-income housing for Indian families on Indian reservations." *Silvas,* 680 F.Supp. at 331. As alleged in paragraphs 3 and 4 of the complaint, AMIHA

> is an Indian Housing Authority and a "public housing authority," as defined by 42 U.S.C. §1437a(6). . . . AMIHA is organized under the authority of the federally-recognized Indian tribes which are members of AMIHA, pursuant to 24 C.F.R. 950.126(a). Each such member tribe has a governing body duly recognized by the Secretary of the Interior and each such tribe has enacted an ordinance by which the tribe joins AMIHA and organizes AMIHA under its authority.

The text of the tribal ordinance by which a member tribe organizes AMIHA under its authority is prescribed by federal regulation, e.g., 24 C.F.R. §905.110, Appendix A (1988). This ordinance requires AMIHA to conduct evictions in appropriate cases. See Appendix A, Article V(3)(l).[6] This ordinance makes it clear that AMIHA is essentially the housing branch or department of each such member tribal government. AMIHA enters into master leases[7] with member tribes by which AMIHA leases suitable tracts of land on the reservations of such tribes, with the approval of the authorized representative of the Secretary of the Interior, as required by

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[5] The current number of member tribes is 10. The other 7 have withdrawn and, as described below, are their own Tribally-Designated Housing Entities, as used in NAHASDA. See discussion of NAHASDA below.

[6] "3. The Authority shall have the following powers . . .: (l) To terminate any lease or rental agreement . . . when the tenant or Homebuyer has violated the terms of such agreement . . . and to bring action for eviction against such tenant or Homebuyer."

[7] A copy of a typical master lease from a member tribe to AMIHA will be supplied on request, if desired.

25 U.S.C. §415 to protect the tribal interest in the land as master lessor. AMIHA then obtains funds from the U.S. Department of Housing & Urban Development to engage contractors to build housing projects on those tracts. Then, as alleged in paragraph 5 of the complaint, AMIHA subleases individual homesites with such a house on each homesite within each such master lease area to eligible Indian families under subleases[8] that require, among other things, the payment of rent. When a sublessee does not pay rent, as in the present case, AMIHA takes steps to terminate the sublease and to recover possession of the subleased land so that AMIHA may re-sub-lease that same parcel of land with the home on it to another eligible Indian family that will pay the federally-subsidized rent.

B. The function of AMIHA.

When AMIHA seeks to evict a tenant for non-payment of rent, such as in the present case, AMIHA acts as the housing department of the member tribal government that leased the homesite to AMIHA, asserting that member tribe's *tribal* right of possession of the *tribal* land in question. It is the *tribal* nature of the right of possession being asserted that escapes *Hunter,* which states that the "Coyote Valley Tribe is not a party to the action, nor does the complaint claim a tribal possessory right . . ." *Id.,* 907 F.Supp. at 1349.

Hunter is flawed in that it equates the plaintiff in that case, another Indian Housing Authority, with an individual asserting a right of possession. Then it affirms the flaw by stating that, if the plaintiff asserted a *tribal*, as opposed to an *individual*, right to possession, then federal jurisdiction would exist:

> An action involving an Indian *tribe's*—as opposed to an individual tribe member's—possessory rights of trust land would, unquestionably create a question of federal common law.
> *Hunter*, 907 F.Supp. at 1348

[8] A copy of a typical sublease will be provided on request, if desired.

But the plaintiff in *Hunter* **was** the *Round Valley Indian Housing Authority*, **not** an individual Indian. Such an Indian housing authority is, by statutory definition, *not* an individual, but rather a governmental entity:

> The term "public housing agency' means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing **The term includes any Indian housing authority**.
> 42 U.S.C. §1437a(6), bold emphasis added

Therefore, it is not necessary that only a tribe, as master lessor, assert the right of possession against the defaulting tenant for the right being asserted to be *tribal* in nature. As noted below, that right is equally *tribal* in nature if it is asserted by an organization, such as AMIHA, that is a branch of the tribal government itself that holds and administers the tribal right to possession, and is a public housing agency and an Indian Housing Authority, rather than, and as opposed to, any individual. The fundamental flaw of *Hunter* is that it does not recognize that an Indian Housing Authority, organized as above, *is* equivalent to the tribe that created it and necessarily asserts a *tribal* right of possession when it acts to evict a sublessee tenant.

C. AMIHA is equivalent to each of its member tribes.

As noted above, Indian housing authorities are formed by tribes under their sovereign authority, essentially as the housing departments of the tribal governments. The form of the ordinances that create Indian housing authorities are prescribed by federal regulation, but the ordinances themselves are exercises of *tribal* authority. An Indian housing authority is the functional equivalent of a tribe in the context of housing matters. The cases uniformly so hold:

> The defendant Housing Authority is an agency formed by the Tribe for purpose of pursuing functions intimately related to tribal self-government. The challenged activities of the Housing

> Authority were quasi-governmental activities on land entirely situated within the reservation's borders.
>
> *U.S. ex rel. Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273, 1276 (8th Cir., 1987)

> Defendant Washoe Housing Authority . . . is a non-profit agency and a political subdivision of the Washoe Tribe created by the Tribal Council to provide low income housing on Washoe Tribal lands.
>
> *Brown v. Washoe Housing Authority,* 625 F.Supp. 595, 596 (D. Utah, 1985)

> The attributes of tribal sovereignty generally extend to a housing authority, established by a tribal council pursuant to its powers of self-government.
>
> *Snowbird Construction Co. v. U.S.,* 666 F.Supp. 1437, 1441 (D. Idaho, 1987)

> As an arm of the tribal government, all of TOHA's property is considered public property of the Nation.
>
> *Tohono O'odham Nation v. Schwartz,* 837 F.Supp. 1024, 1026 ((D. Arizona, 1993)

One of the most important tribal governmental attributes of such an Indian housing authority is that it shares the sovereign immunity from unconsented suit and other immunities enjoyed by the tribe(s) that created it[9]:

> As an arm of tribal government, a tribal housing authority possesses attributes of tribal sovereignty, *id.,* and suits against an agency like the Housing Authority are bared absent a waiver of sovereign immunity.
>
> *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 670-671 (8th Cir., 1986)

> The Rosebud Housing Authority was established by the Rosebud Sioux Tribal Council in the exercise of its powers of self-government. The Rosebud Housing Authority operates in connection with the United States Department of Housing and

[9] The Ninth Circuit has held that, although such Indian housing authorities possess the sovereign immunity of the tribes that create them by ordinance, the language of those ordinances contains a waiver of that immunity. See *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir., 2006) For a contrary view, see *Ninigret Development Corp. v,. Narragansett Indian Housing Authority,* 207 F.3d 21, 30 (1st Cir., 2000).

> Urban Development in the development and operation of housing projects on the Rosebud Reservation. But this Court must reject the Plaintiffs' claim that the RHA does not possess attributes of tribal sovereignty and is sufficiently linked to HUD that it may be considered an agency of the federal government, rather than of the tribe. Instead, this Court is compelled to conclude that the RHA is a tribal agency, to which the limitations of the United States Constitution do not apply. Thus, the constitutional claims asserted by the Plaintiffs under the first, fifth, or fourteenth amendments, fail to state a claim against RHA and RHA Defendants in both their official and individual capacities.
>
> *Dubray v. Rosebud Housing Authority,* 565 F.Supp. 462, 465-466 (D. S.D., 1983)

> The claims asserted by plaintiff against defendants Turtle Mountain Band and Turtle Mountain Housing Authority under the Indian Civil Rights Act are barred by . . . sovereign immunity.
>
> *Wilson v. Turtle Mountain Band of Chippewa Indians,* 459 F.Supp. 366, 369 (D. N.D., 1978)

Even more significantly, the various Courts of Appeals regard a consortium of tribes, such as AMIHA, as equivalent to the tribes that created it for purposes of federal jurisdiction under 28 U.S.C. §1362, one of the very statutes under which AMIHA now invokes this Court's jurisdiction. Examples of such treatment follow.

Several tribes in Nevada have formed a non-profit corporation called the Inter-Tribal Council of Nevada, Inc. The Ninth Circuit did not question its status as equivalent to the tribes that formed it in entertaining a suit by that organization under 28 U.S.C. §1362, the special federal court jurisdictional statute reserved for suits by *tribes* presenting federal questions. See *Inter-Tribal Council of Nevada, Inc. v. Hodel,* 856 F.2d 1344, 1345 (9th Cir., 1988), squarely holding that "The District Court had jurisdiction under . . . 28 U.S.C. §1362 . . . ." This section applies only to such suits by "any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior", as is alleged in paragraph 4 of the present complaint. Even though the Inter-Tribal Council of Nevada, Inc., a corporation, certainly did not fit this

definition of a "tribe", the tribes which formed it did, and the Ninth Circuit therefore treated the organization as a tribe, entitled to proceed to assert its claims under a statute reserved for tribes.

Similarly, many tribes have formed another inter-tribal organization called the Council of Energy Resource Tribes. When this organization was named as a defendant in a federal Title VII action, the Tenth Circuit held that, because Title VII expressly does not apply to tribes,[10] Title VII did not apply to CERT:

> CERT is itself a group of Indian tribes. As we have discussed, we do not believe that Congress intended to protect individual Indian tribes [from claims under Title VII] but not collective efforts by Indian tribes.
>
> *Dille v. Council of Energy Resource Tribes,* 801 F.2d 373, 376 (10th Cir., 1986).

In *Taylor v. Alabama Inter-Tribal Council* 261 F.3d 1032, 1036 (11th Cir., 2001) the Eleventh Circuit regarded such an inter-tribal consortium as equivalent to a tribe. Even more instructive is *EEOC v. Karuk Tribe Indian Housing Authority*, 260 F.3d 1071, 1080 (9th Cir., 2001), in which the Ninth Circuit regarded another Indian housing authority "as an arm of the tribal government and in a governmental role." In *Ninigret Development Corp. v. Narragansett Indian Housing Authority*, 207 F.3d 21, 30 (1st Cir., 2000), the First Circuit held that an Indian housing authority shared the sovereign immunity of the tribe that created it. Lastly, in *Dillon v. Yankton Sioux Tribal Indian Housing Authority,* 144 F.3d 581, 583 (8th Cir., 1998), the Eighth Circuit held that "we must treat the Authority as a tribal agency rather than a separate corporate entity created by the tribe."

So too here. While AMIHA itself is not a tribe, it alleges that it is composed of and organized by tribes, each of which has a governing body duly recognized by the Secretary of the Interior, as required by 28 U.S.C. §1362. As in *Inter-Tribal Council of Nevada, Inc. v. Hodel,*

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[10] The definition of "employer" specifically excludes "an Indian tribe." 42 U.S.C. §2000e(b).

supra, AMIHA invokes federal jurisdiction under 28 U.S.C. §1362, a statute providing federal court jurisdiction over federal questions exclusively for *tribes.* Thus, federal jurisdiction is equally available to AMIHA under 28 U.S.C. §1362 in this case. If the consortium, as a corporation, qualified as a tribe under 28 U.S.C. §1362, then *a fortiori* so does AMIHA, which is not a separate corporation, but rather the housing branch of the tribal governments themselves. If Congress thus wished to provide access to federal court for *tribes* to assert tribal rights of possession over reservation lands, can it be said that Congress wished to deny access to federal court to collective efforts by the same tribes to assert the same possessory rights? If Indian housing authorities, such as those above, share the tribal sovereign immunity of the tribes that created them, then can it be said that they do not act for and assert the rights of the tribes that created them specifically for federal housing purposes?

Therefore, *Hunter* goes far astray in treating an IHA as not equivalent to a tribe. For purposes of federal question jurisdiction, an Indian housing authority such as AMIHA *is* equivalent to a tribe, as every case except *Hunter* and *Reese,* which relied on *Hunter*, hold. *Hunter* did not even consider this essential aspect of the Round Valley Indian Housing Authority's status. Even by its own standards, *Hunter* would have had a different result if it had recognized the fundamental nature of an Indian housing authority as effectively part of the tribe(s) that created it:

> An action involving an Indian *tribe's*—as opposed to an individual tribe member's—possessory rights of trust land would, unquestionably, create a question of federal common law. 28 U.S.C. Section 1360(b). *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974) . . . The present case differs from *Oneida* in that the Coyote Valley Tribe is not a party to the action, nor does the complaint claim a tribal possessory right . . .
>
> *Hunter, supra,* 907 F.Supp. at 1348-1349

Therefore, if one removes the error of *Hunter* in equating an Indian housing authority to *individual* Indians, rather than to the *tribes* that created it, then even *Hunter* supports the existence of federal jurisdiction for this action. This so because, as the even the *Hunter* court acknowledges (907 F.Supp. at 1348), a *tribe's* claim to possession of land[11] as a *tribe* necessarily arises under federal law. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974).

III.

THERE IS FEDERAL COMMON LAW TO APPLY IN THIS CASE.

Hunter is correct in noting that there is no general federal common law on the subject of landlord-tenant relations as such. But *Hunter* is wrong in assuming that there is no federal common law to apply. Again, *Hunter* ignores one of the key aspects of this case: the land in question here is part of a federal Indian reservation, title to which is held in trust for the LaJolla Band of Mission Indians by the United States. Therefore, any conveyance of any interest in such land *must* be accompanied by federal approval; otherwise, any such conveyance is "null and void", as required by 25 U.S.C. §177. Such approval is specifically required for such master leases as AMIHA receives from its member tribes by 25 U.S.C. §415. As this statute requires, the authorized representative of the Secretary of the Interior does approve all of AMIHA's master leases, and his approval is noted thereon.

[11] In addition to the master lease to AMIHA, the claim of the LaJolla Band, acting through AMIHA, is based on the federal patent for the LaJolla Indian Reservation, issued under the authority of Section 3 of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712. This is a far cry, indeed, from *Shulthis v. McDougal*, 225 U.S. 561 (1912), in which an individual claimed federal court jurisdiction based on a distant federal link in his chain of title.

While there may be no pre-1996 federal common law on the subject of landlord-tenant disputes, there certainly is extensive federal common law regarding the federal law of the leasing of trust lands. See, e.g., 25 U.S.C. §§393-415, and the multitude of federal cases construing these leasing statutes. Indeed, the Ninth Circuit has held that the federal scheme for the leasing of trust land under 25 U.S.C. §415, the statute under which AMIHA's master leases are all approved, is so comprehensive as completely to preempt the application of any state or local law to such leases. See *Segundo v. City of Rancho Mirage,* 813 F.2d 1387 (9th Cir., 1987).

Therefore, regarding the leases and sub-leases under this statute of Indian trust land, there could not be anything but federal common law, because application of state or local landlord-tenant law is completely preempted by federal law. The Ninth Circuit had previously so held in *In re Humboldt Fir,* 426 F.Supp. 292, 296 (N.D. Cal., 1977), *aff'd.* 625 F.2d 330 (9th Cir., 1980, emphasis added): "Where a dispute involves trust or restricted property, the state may not adjudicate the dispute *nor may its law apply.*" More recently, the Ninth Circuit has repeated this holding that state law simply does not apply within Indian country:

> "state law has no force and effect, except as granted by federal law, within the territory of an Indian tribe. . ."
> *American Vantage Co., Inc. v. Table Mountain Rancheria,* 292 F.3d 1091, 1096 (9th Cir., 2002)

Similarly, in contrast to *Hunter*, the Interior Board of Indian Appeals has held that the construction of a lease of Indian trust land, approved by the Secretary of the Interior under 25 U.S.C. §415, presents a question of federal law. *Kearney Real Estate Corp. v. Sacramento Area Director,* 23 ILR7027 (1995). Federal common law often exists on subjects ordinarily thought of as the province of state law, when Indian tribes are involved, especially when there is a national policy to effectuate through uniform application of federal law.

Furthermore, to the extent that the Court may wish to learn the intent of Congress regarding the substantive law to be applied, independent federal common law on general landlord-tenant relations need not exist. Instead, Congress has specified by statute, in §207 of the Native American Housing Assistance and Self-Determination Act of October 26, 1996, P.L. 104-330 ("NAHASDA"), 110 Stat. 4034, 25 U.S.C. §4137, which is described in much more detail later in this brief, the essential features of the uniform national law that Congress wishes to be applied in all federally-funded Indian housing:

> Except to the extent otherwise provided by or inconsistent with tribal law, in renting dwelling units in affordable housing assisted with grant amounts provided under this chapter, the owner or manager of the housing shall utilize leases that—
>
> (1) do not contain unreasonable terms and conditions;
>
> (2) require the owner or manager to maintain the housing in compliance with applicable housing codes and quality standards;
>
> (3) require the owner or manager to give adequate written notice of termination of the lease, which shall be the period of time required under State, tribal, or local law;
>
> (4) specify that, with respect to any notice of eviction or termination, notwithstanding any State, tribal, or local law, a resident shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents, records or regulations directly related to the eviction or termination;
>
> (5) require that the owner or manager may not terminate the tenancy, during the term of the lease, except for serious or repeated violation of the terms or conditions of the lease, violation of applicable Federal, State, tribal, or local law, or for other good cause; and
>
> (6) provide that the owner or manager may terminate the tenancy of a resident for any activity, engaged in by the resident, any member of the household of the resident, or any guest or other person under the control of the

resident, that—

(A) threatens the health or safety of, of right to peaceful enjoyment of the premises by, other residents or employees of the owner or manager of the housing;

(B) threatens the health or safety of, or right to peaceful enjoyment of their premises by, persons residing in the immediate vicinity of the premises, or

(C) is criminal activity (including drug-related criminal activity) on or off the premises.

25 U.S.C. §4137(a)

Thus, *Hunter* is wrong, or at least obsolete[12], in decrying the lack of federal common law regarding landlord-tenant relations in the context of such tribal subleases. On the contrary, Congress has already developed the skeleton of the necessary landlord-tenant law by statute. The federal common law necessary is that which interprets and applies these statutory requirements on a nationwide basis on federal Indian reservations.

Silvas recognized the exclusion of state or local landlord-tenant law from the field of leases and sub-leases under 25 U.S.C. §415 by noting the above holdings in *Segundo* and *Humboldt Fir,* concluding that, therefore, "the dispute is one arising under the federal common law, which may, if necessary, look to state law for its ascertainment." *Silvas,* 680 F.Supp. at 332. On the other hand, *Hunter* did not even consider these points.[13]

For these additional reasons, *Hunter* does not apply, and the above federal common law, based on the above language of NAHASDA, does apply.

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[12] *Hunter* was decided in 1995. NAHASDA was enacted in 1996.

[13] *Reese* conducts no independent analysis, and instead cites and relies on the analysis of *Hunter. Reese* is also incorrect for the same reasons as is *Hunter.*

IV.

CONGRESS HAS RECENTLY EMPHASIZED THE TRIBAL NATURE OF THE RIGHTS BEING ASSERTED IN THIS CASE.

Prior to 1988, the U.S. Department of Housing and Urban Development funded and otherwise regulated AMIHA's housing efforts for its member tribes through the Housing Act of 1937, 42 U.S.C. §1437, et seq. In 1988, Congress shifted significant aspects of its Indian housing program from that department to Indian housing authorities in the Indian Housing Act of June 28, 1988, P.L. 100-358, 102 Stat. 676, 42 U.S.C. §1437aa, et seq. Then, by its enactment of the Native American Housing Assistance and Self-Determination Act of October 26, 1996, P.L. 104-330, 25 U.S.C. §4101, et seq. Congress shifted major responsibility for the administration and design of the federal Indian housing program from the U.S. Department of Housing and Urban Development to the tribes themselves. Under NAHASDA, tribes are no longer required to act through Indian housing authorities. Now, while they can still chose to do so, they also have the option of designating themselves as the applicant for, administrator of, and recipient of federal funding. No longer must a tribe's housing requests fit into a categorical federal program; instead, tribes may devise their own programs, within broad limits, and receive funding for them under approved plans. In its findings, Congress declared that

> Federal [financial] assistance should be provided in a manner which recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or **tribally designated entities under authorities similar to those accorded Indian tribes** . . .
>
> 25 U.S.C. §4101(7), bold emphasis added

To obtain funding under this new statute, each participating tribe must designate to the U.S. Department of Housing and Urban Development who its "tribally-designated housing entity"

("TDHE") will be. That TDHE can be either an existing Indian housing authority ("IHA"), or the tribe itself, or even another entity, at each tribe's option:

> The terms "tribally designated housing entity" and "housing entity" have the following meaning:
>
> **(A) Existing IHA's**
>
> With respect to any Indian tribe that has not taken action under subparagraph (b) [i.e., to designate a TDHE], and for which an Indian housing authority . . . (ii) is acting upon October 26, 1996 as the Indian housing authority for the tribe . . . the terms mean such Indian housing authority.
>
> 25 U.S.C. §4103(21)

The LaJolla Band of Mission Indians, which is a member tribe of AMIHA and the tribe which entered into the master lease with AMIHA for the homesite in question, has not designated itself, or any other entity, as its TDHE. Therefore, under the above statute, AMIHA is the LaJolla Band's TDHE, as well as the TDHE for all other member tribes which have not designated either themselves or another entity to be and to act as the tribe's TDHE.

Very significantly, Congress contemplated that a consortium such as AMIHA might be a TDHE because it specifically provided to this instance in the statute. In doing so, it made clear that, when an existing IHA acts for a tribe as its TDHE, that IHA is "acting on behalf of each such tribe", thus emphasizing the tribal nature of all claims being asserted by such a TDHE on behalf of that tribe:

> A tribally designated housing entity may be authorized or established by one or more Indian tribes to act on behalf of each such tribe authorizing or establishing the housing entity.
>
> 25 U.S.C. §4103(21)(C)

Elsewhere in the statute Congress repeats the role of such TDHA's acting for, or equivalent to, tribes in various contexts:

> The term "recipient" means an Indian tribe or the entity for one or more Indian tribes that is authorized to receive grant amounts under this chapter on behalf of the tribe or tribes.
>
> 25 U.S.C. §4103 (18)

> The term "Indian area" means the area within which an Indian tribe or a tribally designated housing entity, as authorized by 1 or more Indian tribes, provides assistance under this Act for affordable housing.
>
> 25 U.S.C. §4103(10)

> Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.] and title VIII of the Civil Rights Act of 1968 [42 U.S.C.A. §3601 et seq.] shall not apply to actions by federally recognized tribes and tribally designated housing entities of those tribes under this chapter.
>
> 25 U.S.C. §4131(5)

In its most recent enactment regarding its Indian housing program, Congress has thus resoundingly declared the equivalence of tribes and their TDHE's, and the manner in which a TDHE acts for a tribe in all respects regarding the program. The LaJolla Band of Mission Indians has designated AMIHA, pursuant to 25 U.S.C. §4103(21), to be and to act as its THDE.

Therefore, under the current 1996 statute, Congress has reaffirmed the *tribal* nature of the actions taken by this TDHE on behalf of this authorizing tribe. When AMIHA enters into a master lease with a tribe for a housing project on that tribe's reservation, obtains federal funds under the above statute, contracts with a contractor to build a number of homes on the leased land, subleases those homes on individual parcels to eligible Indian families, and conducts evictions from those subleased parcels in necessary cases, it does so on behalf of the affected tribe, as is specifically authorized by NAHASDA. In conducting an eviction, AMIHA thus acts on behalf of the affected member tribe to assert a *tribal* right to recover the land under the master lease and the sublease so that it may re-sublease the same land to another eligible Indian family.

CONCLUSION

Hunter is simply wrong in failing to regard an Indian housing authority, such as AMIHA as equivalent to the tribes which created it and for which it serves as the housing department of the respective tribal governments. Both share the same status and immunities, as the cases cited above show. *Hunter* in 1995 cannot be faulted for not having anticipated that in 1996 Congress would enact the Native American Housing Assistance and Self-Determination Act of October 26, 1996 which supplied the basis for any federal common law of landlord-tenant relations that might be needed, and for emphasizing the tribal nature of actions taken by tribally-designated housing entities on behalf of the tribes for which they act.

Under both *Silvas* and *Hunter,* assertion of such a *tribal* right to possession of trust real property presents a federal question under both 28 U.S.C. §1331 and 28 U.S.C. §1362. Therefore, federal jurisdiction exists under both these sections for the present action by which AMIHA seeks to recover possession of the land subleased by AMIHA, on behalf of the LaJolla Band to the defendants.

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Respectfully submitted,

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