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Torres Martinez Desert Cahuilla Indians
(Sued herein as Torres Martinez Desert Cahuilla Indian Tribe)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTHONY NORIEGA, an individual, Plaintiff, v. TORRES MARTINEZ DESERT CAHUILLA INDIAN TRIBE, AN INDIAN TRIBE, and DOES 1 through 10, inclusive, Defendants.	No. CV10-3776 FFM **TRIBE'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date: September 14, 2010 Time: 10:00 a.m. Dept: E - 9th Floor Hon. Frederick F. Mumm Magistrate Judge

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INTRODUCTION

There are two discrete questions presented by the Tribe's motion to dismiss this complaint. (1) Has the Torres-Martinez Tribe clearly and unequivocally consented to be sued by a former Tribal employee for claims arising out of his employment? (2) If the Tribe has consented to be sued, does the Fair Labor Standards Act apply to the Tribe's administration of a welfare program for financially needy Indian families?[1] The Plaintiff has blurred the distinctions between the two questions, and has failed to address the separate legal principles that apply to each. Consequently, the Tribe describes here the clear distinction between sovereign immunity and applicability of the Fair Labor Standards Act to its governmental operations. It then unravels the Plaintiff's arguments in demonstrating again, that the answer to each of the two questions is in the negative.

The Tribe has not consented to be sued here; it has not waived its sovereign immunity. This action must be dismissed for that reason alone. Though the court need not reach the second question, it is clear that the Fair Labor Standards Act does not apply to the internal functions of a Tribal government in providing for the general welfare of its poorest citizens.

[1] The Plaintiff has conceded what was a third question: whether California has any regulatory authority over the administration of this Tribe's welfare program. The State does not have such authority. *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945), *and see* cases cited in Tribe's Memorandum in Support of Motion to Dismiss at 9-10. Since the Plaintiff elected not to address this argument, he has consented to dismissal of that claim. Local Rule 7-12.

DISCUSSION

I. IMMUNITY FROM SUIT IS A QUESTION DISTINCT FROM WHETHER A FEDERAL STATUTE APPLIES TO A TRIBE'S GOVERNMENTAL CONDUCT.

The Plaintiff conflates two separate principles: a sovereign government's immunity from suit and the applicability of a federal statute to Indian Tribal governmental operations. (*See*, Opposition Memorandum at 1: " . . current law . . limit[s] the tribal immunity only to purely intramural matters that only directly affect the self-governance of the tribe.") The Plaintiff's proposition that sovereign immunity is limited as he suggests, is a misreading of settled law.

In decisions handed down over a period of nearly 180 years, the Supreme Court has recognized that Indian tribes "retain[ ] their original natural rights" which vested in them, as sovereign entities, long before the United States even existed. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 8 L.Ed. 483 (1832). Sovereign immunity reflects Congress's desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 94 L.Ed.2d 2144 (1987). The Supreme Court has refused to impose conditions upon that immunity. *Kiowa Tribe v. Manufacturing Technologies Inc.,* 523 U.S. 751, 755, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (the Court declines to "confine" immunity to governmental as opposed to commercial activities, or to on-reservation as opposed to off-reservation activities).

An Indian nation's immunity from suit is distinct and separate from those situations in which federal or state laws may be applicable to a tribe. The Indian

Civil Rights Act is certainly applicable to Indian tribes; but a Tribe's sovereign immunity prevents enforcement of the Act by the filing of a lawsuit for damages or injunctive relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57-58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The State of Oklahoma's tax on sales to non-Indians in a Tribal store may apply to an Indian Tribe, but the Tribe is immune from suit to collect unpaid state taxes. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The provision of the Americans with Disabilities Act that requires places of public accommodation be accessible to the disabled, may apply to an Indian Tribe; but the Tribe is not subject to suit by a private entity to enforce that Act. *Florida Paraplegic Association Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126, 1134-35 (11th Cir. 1999); *and see, Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (" . . . [T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it.").

Similarly, assuming, *arguendo*, that the Fair Labor Standards Act was found to apply to the operations of this Tribal government's welfare assistance program, the Tribe's immunity from suit by an individual remains unaffected. The denial of his claim in this court would still leave the Plaintiff with other remedies. The Tribe is not immune from suit by the United States. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456,1459-60 (9th Cir. 1994); *and see, Solis, Secretary of Labor, United States Department of Labor v. Matheson,* 563 F.3d 425 (9th Cir. 2009). Accordingly, if the U.S. Department of Labor concluded that somehow the Act applied to a Tribal government's welfare program, it could sue to enforce the Act. Additionally, the

Tribe itself provides remedies for those with employment-related grievances, remedies which the complaint reveals the Plaintiff elected not to pursue.

II. THE TRIBE HAS NOT CLEARLY AND UNEQUIVOCALLY CONSENTED TO BE SUED.

The Supreme Court has articulated the clear rule that an Indian tribe is immune from suit unless (1) the tribe has waived its immunity or (2) Congress has authorized the suit. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, *supra*, 523 U.S. at 754. Plaintiff argues that the Tribe has waived its sovereign immunity by accepting TANF grant funding from the federal government. However, the acceptance of federal funding, even when conditioned on a promise to comply with federal laws, does not alone constitute a waiver of tribal sovereign immunity. *See Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 584 (8th Cir. 1998) (tribal housing authority immune from discrimination suit even though it agreed to abide by federal nondiscrimination laws when it accepted federal housing grant), *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1289 (11th Cir. 2001) (Tribe's promise to abide by federal civil rights laws in contracts for federal financial assistance did not constitute express unequivocal waiver of sovereign immunity, and Tribe consequently maintained immunity from suit).

In addition, the federal laws and regulations with which the Tribe agreed to comply when accepting TANF funds do not mandate waiver of sovereign immunity by Indian tribes, nor do they make any reference whatsoever to immunity or consent to suit. Nowhere in the Personal Responsibility and Work Opportunity

Reconciliation Act of 1996, the implementing regulations under 45 C.F.R. § 281, or OMB Circular A-87, is there a requirement that a tribe waive its sovereign immunity in order to receive TANF funds. The Tribal TANF Plan, moreover, contains no express or implied waiver of immunity or consent to suit. In the absence of a mandated waiver, and in the absence of any other alleged facts showing that the Tribe voluntarily waived its immunity from suit, a waiver cannot be assumed.

Plaintiff also argues that even if the Tribe has not voluntarily waived its sovereign immunity, it is still subject to suit because Congress authorized lawsuits against the Tribe in enacting PWORA and the FLSA. However, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58, *quoting United States* v. *Testan*, 424 U.S. 392, 399 (1976) (internal quotation marks omitted). Furthermore, "courts should tread lightly in the absence of clear indications of legislative intent when determining whether a particular federal statute waives tribal sovereign immunity. As the Supreme Court has stated, such a waiver of sovereign immunity must be unequivocally expressed." *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206 (9th Cir. 1994) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)) (internal citation and quotation marks omitted).

It is instructive that in at least one case, the Ninth Circuit has held that a particular statute contains language sufficient to constitute a Congressional waiver of tribal sovereign immunity. In a case brought against the Shoshone-Bannock

Tribes under the Hazardous Materials Transportation Act (HMTA), the court quoted the language of the Act explicitly authorizing persons "directly affected by any requirement of . . . [an] Indian tribe" to "seek[] a determination of preemption in any court of competent jurisdiction." *Public Service Co.* at 1206. The court held that "by its terms [the Act] clearly contemplates that Indian tribes may be sued in court if they enact regulations that are alleged to be preempted by the HMTA." *Id.* at 1206-07. The two statutes at issue here and cited by Plaintiff contain no such language authorizing suit against Indian tribes. In fact, they contain no expression - implied, unequivocal, or otherwise - of Congress's intent to abrogate the sovereign immunity of tribes.

Because the Tribe has not waived its immunity from this lawsuit and Congress has not abrogated the Tribe's immunity by statute, this suit should be dismissed.

III. THE FAIR LABOR STANDARDS ACT DOES NOT APPLY TO TRIBAL GOVERNMENTAL EMPLOYEES IMPLEMENTING THE TRIBE'S WELFARE ASSISTANCE PROGRAM FOR NEEDY INDIAN FAMILIES.

The court need not address the issue of whether the Fair Labor Standards Act applies to the Tribe's welfare program because the Tribe has shown that it is immune from this lawsuit. Nevertheless, if the court does reach the issue, it should find that the FLSA does not apply.

The Plaintiff asserts that the Tribe's welfare program is a "commercial organization" that does not "directly affect the self-governance of the tribe."

Opposition Memorandum at 1. In consequence, he argues, the Fair Labor Standards Act should apply to employees of the Tribal government. The issue here is whether the Tribe's operation of a public assistance program for needy Indian families is more analogous to a Tribal law enforcement program to which the FLSA does not apply, or to a "smoke shop" retail business operated by an individual Indian Tribal member to which the FLSA does apply. *Compare, Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004) (FLSA does not apply to law enforcement officers employed by the Navajo Nation even though the officers necessarily work off-reservation), *with Solis v. Matheson, supra*, 563 F.3d 425 (FLSA does apply to "Baby Zack's Smoke Shop," a profit-making commercial business operated by an individual Tribal member). As the Tribe has already demonstrated, it has long been a function of governments in the United States to promote the general welfare "by meeting basic demands for subsistence" and operating programs "to help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Clearly, a governmental program to address poverty is a far cry from a profit-oriented "smoke shop" selling cigarettes.

The Torres-Martinez Tribe, like most other Indian Reservations, is plagued with extraordinarily high unemployment (60% according to U.S. Housing and Urban Development information in 2010), poor housing, inadequate water supplies, and few job opportunities. *See,* U.S. Dept. Housing and Urban Development, Homes and Communities, *Case Study: Farmworker Housing,*

Torres-Martinez Desert Cahuilla Indians, available at: http://www.hud.gov/local/shared/working/groups/frmwrkcoln/casestudies/torres.cfm?state=nm (last viewed August 26, 2010); *and see,* U.S. Dept. Health and Human Services, Assistant Secretary for Planning and Development, *Characteristics of American Indians and Alaska Natives Participating in Temporary Assistance for Needy Families Programs* (April 2009) (fifty percent of Indian land areas had an unemployment rate of 50% in the year 2008), available at: http://aspe.hhs.gov/hsp/09/AI-NA-TANF/rb.shtml (last viewed August 26, 2010). This Tribal government's response to prolonged disastrous economic conditions is to avail itself of federal funding to provide cash assistance and job training to Tribal members.

Promoting the general welfare of Tribal members by providing the financial means to subsist and job training for the future, are precisely the types of internal governmental affairs which the courts have held are not subject to external controls.

> "The tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." [citation omitted]. Although these are not the only matters which could be covered by this exception, exemptions have been allowed "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the

> tribe and where self-government is clearly implicated." *Snyder,* 382 F.3d at 895.

Solis v. Matheson, supra, 563 F.3d at 430. The Tribal TANF program "functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance." *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1079-80 (9th Cir. 2001) (Age Discrimination in Employment Act does not apply to employee of Indian Tribal housing authority). The Tribal TANF program provides assistance only to Indians and only to those who are members of the five tribes which established the program, or who are residents in the County. *See,* Tribe's Request for Judicial Notice at 4.

The Plaintiff suggests that because he is non-Indian and worked outside of the Reservation, his employment in a Tribal self-governance program is of no import. That is not the law. The Tribal employees in *Snyder* worked off-Reservation "because of a crime that occurred on the reservation or directly affected the interests of the tribal community." *Snyder* at 896. Thus, according to the court, "services performed off-reservation nevertheless relate primarily to tribal self-government and remain part of exempt intramural activities." *Id.* Similarly, the *Snyder* court declined to alter its view because some of the employees of the Tribal law enforcement agency were non-Indian. It was deemed more important by the Court that all of the employees worked to "serve the interests of the tribe and reservation governance." *Id.* Job opportunities are extraordinarily limited on this, and many other Reservations, and Tribal members have moved off-Reservation to

seek employment. The operation of an efficient and effective welfare assistance program requires employees with skills such as those the Plaintiff claimed to possess, and not all persons with those skills are Indian. The fundamental fact remains, that the Tribal TANF program is intended to address persistent poverty and lack of job opportunities for Tribal members, a fact central to the "interests of the Tribe and reservation governance."[2]

The Tribal TANF program goes to the heart of good government; it is the embodiment of the governmental obligation "to promote the general welfare"; it represents the Torres-Martinez Tribal government's decision to secure resources to address overwhelming Tribal poverty. Self-government "is clearly implicated," and the FLSA does not apply. *Id.*

[2] The Plaintiff mentions the fact that the Torres-Martinez Tribal TANF program serves not only its own members, but by agreement, the members of four other federally-recognized tribes. The fact that these five tribes for the sake of efficiency and economy do together, what each could do alone, does not change the nature of this self-governance program. *See, Pink v. Modoc Indian Health Project Inc.,* 157 F.3d 1185, 1188 (9th Cir. 1998) (consortium of two sovereign Indian Tribes established to provide health care to members of both tribes, is considered a "tribe" for purposes of applicable federal law).

CONCLUSION

The Tribe has demonstrated that the questions of sovereign immunity from unconsented suit and the applicability to an Indian tribe of a particular federal statute, are separate and quite distinct. It has shown that it has not waived its sovereign immunity and has not consented to the filing of this lawsuit, and therefore that the motion should be granted.

The court need not reach the remaining question, whether the Fair Labor Standards Act applies to the Tribe's governmental welfare program. If, somehow, the court does find it necessary to address that issue, the Tribe has demonstrated that its welfare assistance program is "quintessentially related to self-governance" (*Karuk Tribe Housing Authority, supra*), and is therefore not subject to the Act. If the action is not barred by the Tribe's immunity, it is barred because the complaint fails to state a claim for relief.

DATED: August 30, 2010

Respectfully submitted,

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/s/ Scott W. Williams

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