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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF TEMECULA, a municipal corporation,

Plaintiff,

v.

PECHANGA BAND OF LUISEÑO INDIANS,

Defendant.

STATE OF CALIFORNIA, ARNOLD SCHWARZENEGGER, Governor of the State of California; EDMUND G. BROWN, JR., Attorney General of the State of California; CALIFORNIA GAMBLING CONTROL COMMISSION; and ROES 1-10, inclusive,

Real Parties in Interest.

Case No. CV 10-7378 DSF(VBKx)

PLAINITFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

DATE: March 14, 2011
TIME: 1:30 p.m.
ROOM: 840

The Honorable Dale S. Fischer, Judge Presiding

Complaint Filed: October 1, 2010

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I. INTRODUCTION

This case involves enforcement of a 1999 gaming compact between the State of California (the "State") and the Pechanga Band of Luiseño Indians (the "Tribe") as revised in 2006 through amendments ultimately approved in 2008 by the voters of California (collectively, the "Amended Compact")[1]. The City of Temecula (the "City") is expressly identified in the Amended Compact as an "Impacted City," and has clear rights under the Amended Compact. (*See* Exh. B to Macarro Decl., pp. 30-32 [Sections 10.8.8 through 10.8.9].) Through this lawsuit, the City seeks to compel the Tribe to fulfill its obligation to prepare a Tribal Environmental Impact Report ("TEIR") that studies the impacts of its expanded gaming operations on the City of Temecula and to mitigate those impacts as expressly intended by the Amended Compact for the benefit the City.

The 2006 Amended Compact was required under the federal Indian Gaming Regulatory Act (18 U.S.C. § 1166, *et seq.* and 25 U.S.C. § 2701, *et seq.*) ("IGRA") in order for the Tribe to conduct Class III gaming (Las Vegas-style slots). Indeed, without a compact the Tribe would have no authority to conduct Class III gaming at its casino. The Amended Compact allowed the Tribe to expand its casino by nearly quadrupling the number of Las Vegas-style slot machines that the Tribe operates *provided* that in return the Tribe study and mitigate through a TEIR the potential adverse impacts on non-Indian lands resulting from the addition of thousands of slot machines, and implement mitigation measures through intergovernmental agreements. Thus, the voters were promised in the February 2008 Official Voter Information Guide that:

> "Before the tribe builds or expands a casino, it would be required to prepare a draft report on these impacts and offer the public a chance to

[1] A copy of the Amended Compact is attached as Exhibit B to the Declaration of Pechanga Tribal Chairman Mark Macarro, which accompanies the Tribe's Motion to Dismiss.

> comment. The tribe then would prepare a final report on environmental impacts – including responses to public comments. Next, the tribe would have to begin negotiating enforceable agreements to address these impacts with (1) Riverside County and (2) *any city that includes or is adjacent to the proposed facility*. Under these agreements, *significant environmental impacts outside of the reservation must be reduced or avoided*, where feasible. The agreements also must provide for local governments to receive 'reasonable compensation' for increased public service costs due to the casino, such as costs of public safety and gambling addiction programs."

(*See* Exh. 1 to accompanying Request for Judicial Notice ("RJN") [Secretary of State's Official Voter Information Guide (Feb. 2008), p. 15; emphasis added].)

Although the Tribe has expanded the casino by vastly increasing the number of Las Vegas type slot machines it operates and has thereby significantly increased the adverse impacts on Temecula (Complaint, ¶ 1(E)), it has refused to prepare a TEIR or to mitigate those impacts as required by the Amended Compact. (Complaint, ¶¶ 29, 31.) Thus, the City was left with no choice but to bring this lawsuit in an effort to compel the Tribe to perform the analysis and mitigation that it promised the voters it would do.

The Tribe's motion to dismiss the City's lawsuit should be denied for four primary reasons.

First, the Tribe expressly and unequivocally waived its sovereign immunity from suit in the Amended Compact. The Amended Compact provides for a dispute resolution process relating to the Tribe's TEIR obligations and the City, as an Impacted City, may compel arbitration to resolve disputes concerning the mitigation of impacts. (*See* Exh. B to Macarro Decl., p. 32 [Section 10.8.9(b)].) Under the Amended Compact, the TEIR is the first stage of the arbitration process because that is the factual basis on which the arbitrator will base his or her decision. The

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Amended Compact states that the Tribe expressly waives it sovereign immunity for lawsuits brought "in connection with the arbitrator's jurisdiction" and to "enforce the parties' obligation to arbitrate." (*See* Exh. B to Macarro Decl., p. 32 [Section 10.8.9(b)].) The United States Supreme Court has held that arbitration provisions can constitute a clear waiver of a tribe's sovereign immunity. (*See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001).) Thus, the Tribe has waived its sovereign immunity and this lawsuit is proper.

Second, the City is an Impacted City with direct, enforceable rights under the Amended Compact. The City clearly has a right to litigate the amount and type of mitigation resulting from a TEIR (*see* Exh. B to Macarro Decl., p. 32 [Section 10.8.9(b)]), and it also has the right to enforce the Amended Compact to compel preparation of a TEIR and performance of the Intergovernmental Agreement in the first instance. Indeed, absent a right to enforce the Amended Compact, there would be no valid consideration for approval of the Amended Compact, nor would there be any mechanism by which to enforce IGRA's regulation of Indian gaming.

Third, the Court has already determined that it has subject matter jurisdiction over this action. As the City previously explained in its Response to the Court's OSC re Dismissal for Lack of Subject Matter Jurisdiction, the Ninth Circuit Court of Appeals has concluded that enforcement of tribal-state compacts arises under federal law and therefore the federal courts have jurisdiction pursuant to 28 U.S.C. section 1331. (*See, e.g., Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).) The Court subsequently issued an Order discharging the OSC. (Docket # 16, filed January 3, 2011.)

Finally, to the extent that the Tribe is attempting to bring a Federal Rules of Civil Procedure Rule 12(b)(6) motion for failure to state a claim upon which relief

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can be granted[2], that attempt must fail. The Court may not consider the portions of the Declaration of Pechanga Tribal Chairman Mark Macarro that go to disputed issues of material fact (*e.g.*, ¶¶ 8-9) because affidavits and other extrinsic evidence may not be considered on a motion for failure to state a claim. (*See*, *e.g.*, *Land v. Dollar*, 330 U.S. 731, 735, fn. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).) Furthermore, "a court may not take judicial notice of a fact that is subject to reasonable dispute." (*Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).) The statements made in Chairman Macarro's declaration that go to the merits of this action are disputed statements of material fact which render this lawsuit unfit for disposition on a motion for summary judgment, let alone a motion to dismiss. (*See* accompanying Declaration of Shawn Nelson, ¶¶ 6-7.)

For all of these reasons and as discussed more fully below, the Court should deny the Tribe's motion to dismiss the complaint.

II. THE TRIBE'S RELEVANT OBLIGATIONS UNDER THE AMENDED COMPACT AND THE INTERGOVERNMENTAL AGREEMENT

As stated in the Introduction, the 2006 Amended Compact was required under the federal Indian Gaming Regulatory Act (18 U.S.C. § 1166, *et seq.* and 25 U.S.C. § 2701, *et seq.*) ("IGRA") in order for the Tribe to conduct Class III gaming (Las Vegas-style slots). *See* 25 U.S.C. § 2710(d)(1)(C) ("Class III gaming activities [Las Vegas style gambling] shall be lawful on Indian lands *only if* such activities are … conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . .").

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[2] It is unclear to the City whether the Tribe is attempting to do this. The Tribe has described its motion as based on "jurisdictional grounds" (*see* Motion, p. 1, line 6), but the caption and notice of motion (see p. 2, line 9) states FRCP 12(b)(6) as an additional basis for the motion, and the Declaration of Pechanga Tribal Chairman Mark Macarro includes several purported facts beyond the issue of jurisdiction. Thus, in an abundance of caution, the City responds as though the Tribe is seeking to dismiss this action under FRCP 12(b)(6) as well as FRCP 12(b)(1) and 12(b)(2).

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The Amended Compact is a contract. (*See Cachil Dehe Band of Wintun Indians v. State of California*, 618 F.3d 1066, 1074 (9th Cir. 2010) ("[g]eneral principles of federal contract law govern the Compacts, which were entered into pursuant to IGRA").) Accordingly, the Amended Compact required consideration in the form of "something of real value." (*Kremen v. Cohen*, 337 F.3d 1024, 1028 (9th Cir. 2003).) The Tribe promised to take certain steps, including preparing a TEIR and implementing an intergovernmental agreement for the mitigation of adverse impacts, as consideration in exchange for the voters of California granting the Tribe the right to increase its Las Vegas-style slot machines.

These commitments by the Tribe were important because, as the Legislative Analyst declared in its non-partisan analysis of 2008's Proposition 94 (the referendum to validate the Amended Compact), "[a]s casinos expand, surrounding local governments often experience higher costs to provide services, such as for public safety, traffic control, and gambling addiction programs." (*See* Exh. 1 to RJN [Secretary of State's Official Voter Information Guide (Feb. 2008), p. 17].) Moreover, the Tribe itself has recognized the potential of its gaming facilities to cause off-reservation impacts in the Intergovernmental Agreement between the City and the Tribe (with which the Tribe will not comply unless it first reaches an agreement with Riverside County). Thus, the Intergovernmental Agreement states:

> "the establishment of the Gaming Center may create off-reservation impacts, including but not limited to the generation of vehicle traffic and traffic-related events, law enforcement services, fire and emergency medical services, noise and light and related factors, and other effects."

(*See* Exh. 2 to RJN [Intergovernmental Agreement, § 3.1(b)].)

As a result of this unquestionable potential for off-reservation impacts, California's voters were promised:

> "Before the tribe builds or expands a casino, it would be required to prepare a draft report on these impacts and offer the public a chance to

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> comment. The tribe then would prepare a final report on environmental impacts – including responses to public comments. Next, the tribe would have to begin negotiating enforceable agreements to address these impacts with (1) Riverside County and (2) *any city that includes or is adjacent to the proposed facility*. Under these agreements, *significant environmental impacts outside of the reservation must be reduced or avoided*, where feasible. The agreements also must provide for local governments to receive 'reasonable compensation' for increased public service costs due to the casino, such as costs of public safety and gambling addiction programs."

(*See* Exh. 1 to RJN [Secretary of State's Official Voter Information Guide (Feb. 2008), p. 15; emphasis added].)

The Intergovernmental Agreement carries this promise further, committing that it would:

> "Assure the implementation of measures for mitigating the Off-Reservation impacts of the Gaming Center" and "Establish a mutually agreeable process to identify and mitigate potential Off-Reservation environmental impacts of future Gaming Center development, including a process that meets or exceeds the processes required under the Compact."

(*See* Exh. 2 to RJN [Intergovernmental Agreement, § 1.1(a) and (b)].)

In short, in exchange for the right to expand its gaming facilities considerably, the Tribe made several promises to the voters regarding the analysis and mitigation of off-reservation impacts. The Tribe's promise to the voters and its promise in the Amended Compact and the Intergovernmental Agreement to mitigate impacts on the City will be rendered meaningless unless the Tribe fulfills its obligations. If the Tribe fails to comply with the Amended Compact, it forfeits its authority under IGRA to conduct its gaming operations at the Casino.

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III. THE TRIBE HAS EXPRESSLY AND UNEQUIVOCALLY WAIVED ITS SOVEREIGN IMMUNITY

The City agrees with the Tribe that the basic tenets of the law concerning sovereign immunity are clear. First, a tribe's sovereign nation status confers upon it absolute immunity from suit in federal or state court absent an express waiver of that immunity or congressional authorization to sue. (*See*, *e.g.*, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).) Second, "to relinquish its immunity, a tribe's waiver must be 'clear.'" (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001).) Here, the Tribe expressly waived its sovereign immunity in the Amended Compact and therefore this lawsuit is proper.

The Amended Compact requires the Tribe to prepare a TEIR and to mitigate impacts of gaming operations on the county in which a gaming facility is located and the cities impacted by the gaming operations, and further provides that these entities may compel arbitration to resolve disputes concerning the mitigation of impacts. (*See* Exh. B to Macarro Decl., pp. 24-32 [Sections 10.8 through 10.8.9].) The Amended Compact also specifically provides that an "Impacted City" (defined in Section 10.8.8 as a city "adjacent" to a Gaming Facility) may demand arbitration "with respect to disputes over mitigation or compensation on which the parties cannot reach agreement." (*See* Exh. B to Macarro Decl., p. 31 [Section 10.8.9(a)].) It is undisputed that Temecula is an adjacent city.

The Tribe specifically waived its right to assert sovereign immunity "in connection with the arbitrator's jurisdiction" and "and in any action brought in the United States District Court where the Tribe's Gaming Facility is located . . . to (1) enforce the parties' obligation to arbitrate," among other items. (*See* Exh. B to Macarro Decl., p. 32 [Section 10.8.9(b)].) Under the Amended Compact, the TEIR is the first stage of the arbitration process because that is factual basis on which the

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arbitrator will base his or her decision. Therefore, the Tribe has waived its sovereign immunity for the City's lawsuit to enforce the Tribe's obligation to prepare a TEIR and to arbitrate any dispute between the City and the Tribe over the scope of mitigation and compensation.

The United States Supreme Court has held that arbitration provisions constitute a clear waiver of a tribe's sovereign immunity. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma ("C & L")*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), the United States Supreme Court considered the question of whether the inclusion of an arbitration clause providing for judicial enforcement of the resulting award in a construction contract entered into by a tribe necessarily constituted a waiver of the tribe's sovereign immunity, despite the absence of any express waiver of sovereign immunity. The Court answered the question in the affirmative, holding that a contrary interpretation would render the arbitration clause meaningless:

> "The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See *Eyak*, 658 P.2d, at 760 ("[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity....The arbitration clause...would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed."); *Val/Del*, 145 Ariz., at 565, 703 P.2d, at 509 (because the Tribe has "agree[d] that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign

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immunity");...."

(*C & L, supra*, 532 U.S. at 422; *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal.App.4th 1, 6 (2002) (holding that by agreeing to an arbitration clause and enforcement provision in contract, tribe had waived sovereign immunity).)

Similarly, here the Amended Compact memorializes the Tribe's commitment to adhere to a dispute resolution regime and waive sovereign immunity "in connection with the arbitrator's jurisdiction" and "and in any action brought in the United States District Court where the Tribe's Gaming Facility is located . . . to (1) enforce the parties' obligation to arbitrate." (*See* Exh. B to Macarro Decl., p. 32 [Section 10.8.9(b)].) The dispute resolution provisions of the Amended Compact require a TEIR as the first stage of the arbitration process because the TEIR is the factual basis on which the arbitrator will base his or her decision. These dispute resolution provisions thus likewise have a real world objective. Absent a practical consequence or means of enforcing this requirement it would be meaningless, because the Tribe could simply refuse to prepare a TEIR and therefore never subject itself to arbitration or its substantive obligations under the Amended Compact. If one were to accept the Tribe's argument here that its waiver of sovereign immunity must be limited to when there has been arbitration, and it evades arbitration by failing to do a TEIR, there would be no remedy for the Tribe's failure to undertake any analysis or mitigation of off-reservation impacts. In that case, there would be no consideration for the Compact's and the voters' consent to the Tribe's significant increase in the number of its Las Vegas-style gaming machines. This interpretation of the Tribe's clear waiver of sovereign immunity cannot be correct (and is not correct) because it would render the entire Amended Compact null and void, and there would be no mechanism by which to enforce IGRA's regulation of Indian gaming.

Courts have declined in other instances to read out of existence a tribe's express waiver of sovereign immunity. For example, in *Campo Band of Mission*

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Indians v. Superior Court, 137 Cal.App.4th 175 (2006), the California Court of Appeal held that a tribe unambiguously waived its sovereign immunity relating to patron claims for negligent acts in its compact with the State of California. In *Campo Band*, the tribe and the State entered into a compact relating to the tribe's operation of gambling facilities. (*Id.* at 177.) Pursuant to this compact, the tribe agreed, *inter alia*, to adopt a tort liability ordinance relating to personal injury claims by patrons and the procedures for processing those claims. (*Id.*) Furthermore, through the compact, the Tribe "unambiguously waived its immunity relating to patron claims for negligent acts to the extent of the insurance coverage it contractually obligated itself to obtain for such claims." (*Id.* at 184.) The Tribe proceeded to adopt a regulation that required injured patrons to comply with certain claims procedures and, subject to such compliance, provided for arbitration of patrons' claims. (*Id.* at 178.) When a patron who had been injured at the tribe's casino sought arbitration of her claim, the tribe refused to participate in arbitration and asserted its sovereign immunity. (*Id.*) The tribe argued that the language in the compact requiring it to establish a tort liability ordinance "setting forth the terms and conditions, if any, under which it waives immunity to suit" meant that the issue of waiver was left solely to the tribe's discretion when it established the ordinance. (*Id.* at 184.) The California Court of Appeal disagreed, holding that such an interpretation would read out of existence the sovereign immunity waiver to which the tribe had agreed in the compact:

> "More importantly, the Tribe's assertion that it can, in imposing such terms and conditions, essentially revoke (or render totally ineffective) the waiver of tribal sovereign immunity set forth in the Compact is contrary to its express agreement therein limiting its waiver only relating to specified types of claims and the extent of the required insurance coverage. [¶] Having consented to waive its tribal sovereign immunity in the Compact, the Tribe cannot, in drafting [its tort liability

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> ordinance], render its obligations totally illusory by retaining the sole and unfettered discretion to determine whether a claimant has complied with the procedural requirements set forth in its regulation."

(*Id.* at 184-185.)

The Tribe here cannot render its waiver of sovereign immunity in the Amended Compact to participate in arbitration illusory by refusing to prepare the TEIR, which explicitly triggers the Amended Compact's arbitration provisions. The Tribe struck a deal with the voters of California and, as part of that deal, agreed to waive its sovereign immunity with respect to efforts to enforce its obligations to mitigate off-reservation impacts. The Tribe should be held to that commitment. The Court should find that the Tribe expressly and unambiguously waived its sovereign immunity, and should deny the Tribe's motion to dismiss.

IV. THE CITY IS AN "IMPACTED CITY" WITH DIRECT, ENFORCEABLE RIGHTS UNDER THE AMENDED COMPACT

In addition to reflecting the Tribe's waiver of sovereign immunity, the Amended Compact also establishes that the City has the direct right to enforce the provisions of the Amended Compact relating to the Tribe's analysis and mitigation of off-reservation impacts. As discussed above, the City falls within the Amended Compact's definition of an "Impacted City," which is defined as a city "adjacent" to a Gaming Facility. (*See* Exh. B to Macarro Decl., p. 30 [Section 10.8.8].) As an Impacted City, the City may comment on TEIRs and may demand binding arbitration "with respect to disputes over mitigation or compensation on which the parties cannot reach agreement." (*See* Exh. B to Macarro Decl., p. 31 [Section 10.8.9(a)].) As the City clearly has a right to litigate the amount and type of mitigation resulting from a TEIR, it also has the right to enforce the Amended Compact to compel preparation of a TEIR and performance of the Intergovernmental Agreement in the first instance. Therefore, the Amended Compact provisions preclude characterizing the City as a third party beneficiary as the Tribe suggests, and instead recognize the

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City's very definite and explicit rights under the Amended Compact, including its entitlement to arbitrate disputes concerning those rights. Accordingly, the Court should deny the Tribe's motion to dismiss the City's complaint.

V. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS MATTER

The Tribe's contention that the Court lacks subject matter jurisdiction is meritless in light of the fact that the Court already has concluded that it does indeed have subject matter jurisdiction over this action. As the City previously explained in its Response to the Court's OSC re Dismissal for Lack of Subject Matter Jurisdiction, the Ninth Circuit Court of Appeals has concluded that enforcement of tribal-state compacts arises under federal law and therefore the federal courts have jurisdiction pursuant to 28 U.S.C. section 1331. (*See, e.g., Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).) As the Ninth Circuit held in *Cabazon Band of Mission Indians*, in which it analyzed a claim that the State of California had repudiated a tribal-state compact, the lack of federal court jurisdiction "would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous." (*Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).) IGRA is not so vacuous, and thus the Ninth Circuit concluded that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." (*Id.*)

In response to the City's arguments, the Court subsequently issued an Order discharging the OSC. (Docket # 16, filed January 3, 2011.) This matter is therefore settled: the Court has subject matter jurisdiction over this lawsuit to enforce the Amended Compact entered into pursuant to IGRA.

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VI. IF THE TRIBE'S MOTION IS INTENDED TO BE A RULE 12(B)(6) MOTION IT FAILS BECAUSE THE FACTUAL ALLEGATONS OF THE COMPLIANT MUST BE TAKEN AS TRUE AND THE DISPUTED FACTUAL ALLEGATIONS IN THE DECLARATION OFFERED BY THE TRIBE ARE NOT JUDICIALLY NOTICEABLE

As noted in the Introduction (fn. 1), the City is unclear as to whether the Tribe intended its motion to be an FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted as well as a motion to dismiss for lack of jurisdiction. To the extent the motion seeks to dismiss for failure to state a claim, it necessarily fails.

The arguments advanced in the Tribe's motion all appear to go to jurisdictional issues. The Declaration of Pechanga Tribal Chairman Mark Macarro submitted by the Tribe goes well beyond the jurisdictional issues raised in the Tribe's FRCP 12(b)(1) and 12(b)(2) motion, however, and attempts to put before the Court extrinsic "evidence" going to the merits of the City's claims. While declarations are permissible on a 12(b)(1) and 12(b)(2) motion involving jurisdictional issues and questions of sovereign immunity, it is hornbook law that the allegations of the complaint are to be taken as true on a 12(b)(6) motion to dismiss a complaint, and affidavits and other extrinsic evidence may not be considered on a motion for failure to state a claim. (*See, e.g., Land v. Dollar*, 330 U.S. 731, 735, fn. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (2009) (in evaluating a 12(b)(6) motion, "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party") (internal quotations omitted).) Indeed, while courts can take judicial notice of some matters of public record in connection with a 12(b)(6) motion, "a court may not take judicial notice of a fact that is subject to reasonable dispute." (*Lee v. City of Los Angeles*, 250 F.3d 668, 689 (2001) (internal quotations omitted.)

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In this case, the declaration of Chairman Macarro submitted by the Tribe asserts extrinsic "evidence" consisting of "facts" that are disputed and go to the merits of the City's claims. Since that is improper on a motion to dismiss for failure to state a claim, the City has filed concurrently herewith objections to those portions of Chairman Macarro's declaration.

In an abundance of caution, the City also has submitted concurrently herewith the declaration of City Manager Shawn Nelson, which demonstrates that the extrinsic "facts" set forth in the Macarro declaration are disputed. In the event that the Court decides to consider the portions of the Macarro declaration that that City submits are improper on a 12(b)(6) motion to dismiss, the Nelson declaration provides a more complete picture of the disputed issues for Court. (*See* Nelson Decl., ¶¶ 6-7.) Accordingly, this lawsuit could not be resolved on a motion for summary judgment, let alone a motion to dismiss.

VII. CONCLUSION

For all of the foregoing reasons, the City respectfully requests that the Court deny the Tribe's motion to dismiss this lawsuit.

DATED: February 22, 2011

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