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LOS COYOTES BAND OF CAHUILLA
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ERTC, LLC, a Nevada limited liability company Plaintiff, vs. LOS COYOTES BAND OF CAHUILLA AND CUPENO INDIANS Defendant.	Case No: 3:11-CV-02148-WQH-NLS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO JOIN AN INDISPENSIBLE PARTY Date: December 5, 2011 Dept: 4 Time: 11:00 a.m. Judge William Q. Hayes

I

INTRODUCTION

1. Defendant, the Los Coyotes Band of Cahuilla and Cupeño Indians (herein "Tribe") submits this memorandum in support of its motion to dismiss Plaintiff's Complaint for

Declaratory and Injunctive Relief and Unjust Enrichment. Plaintiff's federal action seeks to determine whether a land lease between the parties is valid and enforceable against Tribe. Defendant has not properly served the Tribe with its Complaint. Further, because the lease between the parties is *void ab initio* it is unenforceable in federal court, thereby depriving Court of federal question jurisdiction.

II

STATEMENT OF FACTS

2. The Tribe has a land base of approximately 25,049 acres, and its Reservation is in the remote and rural area of northwest San Diego County. Prior to 2010 the Tribe's only economic development was the operation of a modest camp ground on the reservation. Beginning in 2009 the Tribe was approached by an entity known as Blackwater Worldwide, which in the course of negotiations changed its name to Blackwater Lodge Training, then to U.S. Training Center, then to U.S. Training Center Inc., then Eagle Rock Training Center LLC (which later changed its name to "ERTC" LLC"). Within a span of two years the entity changed its name five or six times. The entity proposed to build a shooting range and training center on the Tribe's reservation.

3. The General Membership of the Tribe, also known as its General Council consists of all of its adult members. (See Declaration of Chairman Shane Chapparosa). From the General Council, a seven member Executive Council is elected to conduct the day to day operations of the Tribe. The General Council is the governing body of the Tribe and meets on a monthly basis to address tribal business and to vote on tribal matters. The Executive Council reports directly to the General Membership. The General Council has never delegated or authorized its Executive Committee or Spokesperson/Chairperson to enter into a tribal land lease or to unilaterally waive the Tribe's sovereign immunity. (Chapparosa Declaration). It is the custom and tradition of the Tribe that no land related actions can be taken without the General Membership approval and

that of the tribal member family whose traditional family area is involved. The ERTC is located in the family area used and traditionally occupied by the Siva family. The family was never approached and at no time gave their approval for the use of their family residential area to be leased for fifty years. Moreover, the premises as defined in the purported lease encompass 25,000 acres, or the entirety of the Tribe's Reservation and Trust land.

4. The Tribe's former Chairwoman entered into a number of agreements for the leasing of tribal land to ERTC. The first lease was entered into in March of 2010. The lease allowed Plaintiff to lease an unspecified number of acres of tribal land for six years and eleven months. (Plaintiff's Exhibit A to Compliant) The lease signed by the former Chairwoman and the Defendant was not formally approved by the General Council, the Executive Council, the Siva family, nor was it ever submitted to or approved by the Bureau of Indian Affairs ("BIA".) In November of 2010 the Plaintiff and the former Chairwoman executed an Addendum to the March lease which purported to extend the lease term to a period not to exceed twenty-five years, with the option to extend the term an additional twenty-five years at the expiration of the lease. (Plaintiff's Exhibit B to Compliant) The Addendum specifically references that the extension of the lease term was consistent with the "provisions of applicable federal law, specifically Code of Regulations section 25 C.F.R. 162," which implements the Long-Term Leasing Act (25 U.S.C. §415) and requires BIA approval for leases on Trust land. The November Addendum was not submitted or approved by the BIA, nor approved by the General Council, the Executive Council or the Siva family.

5. In December of 2010 the former Chairwoman and Defendant again revised the lease and made changes, including substituting a new leasing party. (Plaintiff's Exhibit C to Complaint) Again, this second revised lease was not submitted or approved by the BIA, by the General Council or the Siva family.

6. In December 2010 the former Chairwoman, Kupsch was voted out of office effective January 1, 2011. The incoming Chairman, Shane Chapparosa began to question the

activities of ERTC which appeared to be moving forward with the training center. The newly elected Chairman also questioned the former Chairwoman with regard to what if any agreement had been reached with ERTC. At first the former Chairwoman claimed that Defendant was acting pursuant to a "permit." When the new Chairman demanded to see the "permit" and after some hesitation the former Chairwoman produced the Ground Lease from December 2010, in or about February 2011. The new Chairman also requested a copy of the lease from Sean Roach of ERTC which was at variance with the one produced by former Chairwoman Kupsch. This was the first time that the new Chairman had seen the leases and quickly presented them to the General Council. The General Council, which had not seen the document before or approved it, expressed anger and instructed the Executive Council to take all necessary steps to have Defendant removed from the Reservation.

7. After the Plaintiff was put on notice that the agreements entered into by the former Chairwoman were not valid and that the Tribe wanted ERTC to vacate its tribal lands, Plaintiff filed the current complaint and request for a temporary restraining order. Plaintiff served its pleadings on the Tribe's police officer at the law enforcement kiosk on or about September 16th, 2011, even though law enforcement is not the agent for service of process and even though the Tribe had not validly waived its sovereign immunity from suit, including service of process. When the officer, who is an employee of a party, transmitted the documents to the Chairman the Plaintiff claimed to have served the Tribe.

III

LEGAL ARGUMENT

1. The Lease(s) Entered Into by the Parties is Invalid and Unenforceable in Federal Court

"Tribal trust" land is land in which legal title is held in the name of the United States for the benefit of the tribe. Tribal trust lands are exempt for state taxation and regulation. The Tribe's reservation is comprised of tribal trust exclusively (there are no individual allotted lands or fee

lands within its boundaries.) Since the establishment of Indian reservations, the federal government has enacted numerous laws to protect tribal lands from being leased, sold, or encumbered without the approval of the Bureau of Indian Affairs ("BIA"), the federal agency that oversee tribal lands. While at times this need to protect tribal lands has been viewed as paternalistic, it is nonetheless an outgrowth of the federal government's trust responsibility owed to tribes and Indian people.

One of the earliest federal laws protecting tribal lands is the Nonintercourse Act of 1834 (25 U.S.C § 177) The law states that "No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." The purpose behind the Act was to prevent unfair, improvident or improper disposition, by Indians of lands owned or possessed by them, to other parties, except the United States, without the consent of Congress. *Tonkawa tribe of Oklahoma v. Richards*, 75 F. 3d 1039 (5th Cir. Ct. Appeals 1997).

In the ensuing years Congress enacted specific tribal land leasing statutes that were designed to give the BIA greater definition on when and under what circumstances a lease of tribal lands could be approved. In 1955 Congress enacted the Long-Term Leasing Act, 25 U.S.C. § 415 which allows the BIA to approve long term leases of tribal lands for "public, religious, educational, recreational, residential or business purposes …" Approved leases can be for twenty–five years with an option for an additional twenty-five years. The BIA promulgated leasing regulation at 25 C.F.R. § 162 and all such leases must be approved by the BIA in order to be valid. Federal Regulation §162.106 specifically and succinctly addresses the question: "What

will the BIA do if possession is taken without an approved lease or other proper authorization?" "(a) If a lease is required, and possession is taken without a lease by a party other that than an Indian owner of the tract, we will treat the unauthorized use as a trespass…we will take action to recover possession on behalf of the Indian landowners and pursue any additional remedies under applicable law."

A lease under 25 U.S.C. §415 is also subject to the National Environmental Policy Act ("NEPA") and cannot be approved with such compliance. *Sangre de Cristo Development Co., Inc v. United States*, 932 F. 2d 891 (10th Cir. Ct Appeals 1991) and *Davis v. Morton*, 469 F. 2d 593 (10th Cir. Ct. Appeals 1972).

There can be no dispute that a lease of tribal trust land that has not complied with NEPA or been approved by the BIA is void and unenforceable. *Brown v. U.S.*, 86 F.3d 1554 (C.A. Fed.1996), *Quantum Exploration, Inc. v. U.S.*, 780 F. 2d 1457 (9th Cir. Ct. Appeals 1986), *Yavapai-Prescott Indian Tribe v. U.S.*, 707 F. 2d 1072 (9th Cir. Ct. Appeals 1983), *U.S. v. Emmons*, 351 F.2d 603 (9th Cir. Ct. Appeals 1965), *Smith v. Acting Dir. of Billings Area Dir.*, 17 IBIA 231 (1989), *Bulletproofing, Inc. et.seq v. Acting Phoenix Area Office*, 20 IBIA 179 (1991) In the current case the ground leases entered into with the Defendant were never submitted or approved by the BIA, nor were they subject to NEPA review. As such the leases before the Court are null and void and unenforceable.

2. The Lease(s) Before the Court are not Subject to 25 U.S.C. §81

The Defendant in both the March and December 2010 leases provide that the term of the lease is for 6 years and 11 months. It appears that the Defendant was attempting to bring the lease(s) under 25 U.S.C. §81. For permits or licenses, Section 81(b) provides that contracts and

agreements that encumber Indian land for seven (7) or more years must be approved by the BIA. The converse being, if the contract or agreement encumbering the land is less than seven (7) years (6 years and 11 months) no BIA approval is needed. However, leases by their nature are distinguishable from permits, which can be revoked. Leases of Indian land, regardless of their terms, do not come with the purview of §81, but are instead controlled, as seen above, 25 U.S.C. §415 and 25 C.F.R. Part 162. Plaintiff's purported "Ground Lease" is replete with references to lease, and in fact is entitled as a "Lease Agreement." Leases on Indian lands, in order to be valid must be approved by the BIA.

As discussed above, since the establishment of Indian Reservations, Congress has enacted several statutes designed to protect tribes and Indian people from losing control or possession of their lands. One of these statutes is 25 U.S.C. § 81, which was enacted in 1872 to address contracts and agreements between tribes and third parties that were for "services for … Indians relative to Indian lands" and declared such agreements required Secretarial approval. Congress was concerned that Indians and tribes, were incapable of protecting themselves from fraud in the conduct of their economic affairs. Section 81 was in response to "claims agents and attorneys working on contingency fees who routinely swindled Indians out of their lands, accepting it as payment for prosecuting dubious claims against the United States." *GasPlus, LLC v. Department of the* Interior, 510 U.S. F. Supp 2d 18, 27 (D.D.C. 2007) In its original version §81 required that all attorney contracts with a tribe needed Secretarial approval.

When first enacted §81 was more easily applied since tribes were not engaged in substantial or complex economic development. Then in 1934, Congress passed the Indian Reorganization Act, 25 U.S.C § 461, which encouraged tribes to develop federally chartered

corporation to engage in tribal economic development and to allow tribes to take control over their own affairs and lands. As a result "Indian tribes, their corporate partners, courts and the BIA struggled for decades on how to apply §81 in an era that emphasized tribal self-determination, autonomy and reservation economic development." S. Report 106-150. As a result of this struggle Congress amended §81 in 2000 to address what contracts were and were not subject to §81 approval. Called the "Indian Economic Development and Contract Encouragement Act," Congress revamped the law and provided that "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of seven years or more shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary." 25 U.S.C. §81(b). The new amendments removed the restriction on BIA approval of attorney contracts.

What is clear from the history of §81 is it was never intend to cover tribal land leases or to supplant Section 162 regulations. This point was made as early as 1885 in an Attorney General Opinion that addressed whether or not the Secretary could rely on §81 as authority to approve grazing leases for three tribes. The Attorney General found that:

> "I submit that the power of the Department to authorize such lease to be made, or that of the President or Secretary to approve or to make the same, if it exists at all, must rest on upon some *law*, and therefore be derived from either a treaty or statutory provision. The Revised Statutes [§81] contain provisions regulating contracts and agreement with Indians and proscribes how they shall be executed and approved (see sec. 2103); *but those provisions do not include contracts of the character in section 2116 [Nonintercourse Act of 1834], hereinbeforehand mentioned.* 18 U.S. Op. Attorney General 235 (July 21, 1885) (*Emphasizes added)*

The BIA when promulgating 25 C.F.R. Part 84 to implement the new 2000 amendments made clear that Congress had instructed them to define what contracts and agreements were not covered by §81. In the Federal Register, the BIA commented on each regulator section and with

regard to §84.004 "Are There Types of Contracts and Agreements That Do Not Require Secretarial Approval Under this Part?" the BIA responded as follows:

> "—Contracts or agreements otherwise reviewed and approved by the Secretary under this title or other federal law or regulation. Congress did not repeal any other requirements for Secretarial approval of encumbrances, nor did it state that the Act imposed additional approval process, separate from existing statutory requirements. This exemption is also consistent with previous opinions of both the Department of Interior and the Department of Justice, judicial decisions, and the legislative history of the Indian Mineral Development Act, all of which consistently state that the requirements of Section 81 do not apply to *leases*, right-of-ways, and other documents that convey a present interest in tribal land." 66 FR 38918-01 at 38920 (July 26, 2001)

In other words, leases by definition fall within 25 CFR §162 and require Secretarial approval. There is no ambiguity that ERTC intended to have a lease, called it a lease, and claimed it complied with 25 CFR §162, even though it was never submitted or approved by the BIA.

The final regulation reads as follows:

> "… the following types of contracts or agreements do not need Secretarial approval under this part:
> (a) Contracts and agreements otherwise reviewable and approved by the Secretary under this title or other federal law. See example, 25 C.F.R. §152 (patents in fee, certificates of competency; *§162* (non-mineral leases, leasehold mortgages); …" 25 C.F.R. §84.004

As noted above Defendant has mistakenly read that §81 and implementing regulations to mean that if its lease with the Tribe is 6 years and 11 months it does not need BIA approval. This is clearly not the case as seen from the history §81 and the BIA interpretation of what agreement are not subject the §81. Tribal land leases are subject to approval by the BIA by virtue of 25 U.S.C. §415 and its implementing regulations at 25 C.F.R. §162. Without such approval the lease(s) at issue in this case are null and void.

3. Plaintiff's Complaint Must be Dismissed under Rule 19.

In order for Plaintiff to obtain a valid lease it would have to join the BIA otherwise it would have incomplete relief. Under Rule 12(b)(7) the court may dismiss a case for failure to join a necessary and indispensible party under rule 19. The BIA, or the United States is a required party under rule 19(a) in order for Plaintiff to have complete relief, and if the United States cannot be joined then Plaintiff's case must be dismissed on that basis as well.

A dismissal under Rule 12(b)(7) has three parts. *EEOC v. Peabody W. Coal Co.* (9th Cir. 2005) 400 F.3d 774, 779-80. First, guided by the provisions of Rule 19(a) [the court] must decide if its "desirable in the interests of just adjudication" to join the United State. *Id* at 779. Next, the court must determine whether a court could feasibly order the United States be joined. *Id* at 779. And third, if a court cannot do order, then guided by the provisions of Rule 19(b) must decide whether in "equity and good conscience" the case may proceed in the absence of the United States. *Id* at 779-80, *Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California v. City of Los Angeles* (9th Cir. 2011) 637 F.3d 993.

In determining whether the United States is a required party under Rule 19(a) there is a two part analysis. *Yellowstone County v. Pease* (9th Cir. 1996) 96 F.3d 1169, 1172. First, the court examines whether it could award complete relief to the parties without joining the non-party. *Id* at 779-780. Alternatively, the court asks whether the non-party has a "legally protected interest" in the case that would be "impaired or impeded" by adjudicating the case without it. *Id* at 1172-73. If the answer to either of those questions is in the affirmative then the United States is a "required party" under Rule 19(a). *Yellowstone County* at p. 1172; see also *Paiute-Shoshone*

Indians of the Bishop Community of the Bishop Colony, California v. City of Los Angeles (9th Cir. 2011) 637 F.3d 993.

Because the United States has sovereign immunity, no one, including Indian tribes, may sue the United States without first obtaining permission from Congress. *Sisseton-Wahpeton Sioux Tribe v. United States* (9th Cir. 1990) 895 F.2d 588, 592. Under Rule 12(b)(7) the court may dismiss a case for failure to join a necessary and indispensible party under Rule 12(b)(7). *Begay v. Public Service Company of New Mexico* (2010) 710 F.Supp.2d 1161, D.N.M.

As discussed above the tribal trust lands is defined as lands in which the United States holds title in trust for the tribe. The Supreme Court has held that the United States is an indispensable party defendant in any proceeding against property in which the United States has an interest. *State of Minnesota v. U.S.*, 305 U.S. 382 (1939). The Untied State must be a party to any action where the relief sought would impair the United States function to protect the trust land from being alienated to a third party, if the United States does consent to such a suit, the case must be dismissed. *Town of Okemah, Okl. v. U.S.* , 140 F. 2d 963 (10th Cir. 1944)

Plaintiff action against the Tribe seeks to validate a 50 year lease of tribal trust property. Because the United States hold the title to the lands the Plaintiff seeks to occupy, the United States must be joined as a party. The United States has not consented to be joined to Plaintiff's suit and the Plaintiff's case must be dismissed under Rule 19 of the federal rules of civil procedure. Without the joinder of the United States, any judgment issued by the court will have no legal or binding effect on the United States and the United States may seek a dismissal of the court's judgment. *State of Minnesota v. U.S.*, 305 U.S. at 387 fn.1.

4. The Former Tribal Chairwoman had no Authority to Unilaterally Waive the Tribe's Sovereign Immunity

As a general proposition Indian tribes are immune from suit in state or federal court. *United States v. Oregon* (9th Cir. 1981) 657 F.2d 1012; see also *Kiowa Tribe v. Mfg. Tech., Inc.* (1998) 523 U.S. 751. To relinquish its immunity a tribe's waiver must be clear. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma* 498 U.S. 505, 509. A waiver is ineffective if the person purportedly waiving immunity lacks authority to do so. See *Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1188. Waivers are strictly construed *Ramey Const. v. Apache Tribe of Mescalero Reservation* (10th Cir. 1982) 673 F.2d 315 320) and there is a strong presumption against them. *Demontiney v. U.S. ex re. Dept. of Interior* (9th Cir. 2001) 255 F.3d 801, 811.

As shown above the waiver of immunity at issue is contained in a lease document that was not submitted or approved by the Bureau of Indian Affairs and is consequently invalid. Since the lease was not formally approved by the Tribe or by the BIA the waiver of immunity contained therein is correspondingly invalid.

Nonetheless, even if the lease had been approved by the BIA, the waiver would still be invalid because the Tribe's former Chairperson did not have unilateral authority to waive the Tribe's immunity. As demonstrated in the attached Declaration of Shane Chapparose, the current Tribal Chairman and a veteran on the Tribe's Executive Council for over ten years, it is the Tribe's custom and tradition that the Chairperson (or "Spokesman") cannot execute any contracts or agreements with regard to the Tribe's land and containing a waiver immunity without the consent and approval of the General Council and the Executive Council. It defies common sense and logic that the Chairwoman would have been granted authority to sign a 50

land lease containing a waiver of immunity without the lease being submitted to the General Council and Executive Council for review and approval.

In determining whether an official or tribal employee had the authority to waive the tribe's immunity the courts look to federal and tribal law. *Kiowa Tribe v. Mfg.Techs., Inc,* 523 U.S. 751, 756 (1998), *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.LC*, 2011 WL 4001088 (W.D. Wash.) In *Pilchuck*, a case very similar to the current case, the defendant had engaged in prolong discussion the tribe and its tribal economic corporation, Stillaguamish Tribal Enterprise Corporation ("STECO"), on a variety of economic development projects. The defendant dealt most frequently with the tribe's chairman, Mr. Goodridge Sr. In 2006 a "Working Agreement" was drafted memorializing plans for defendant to purchase a piece of fee land, the land would be taken into trust, the tribe would then lease the land back to defendant to develop a RV Park. The tribe was also given an option to repurchase the land from the defendant should the project fail. The Working Agreement included an arbitration provision and a waiver of immunity. At the time the Agreement was drafted, Mr. Goodridge Sr.was no longer the tribe's chairman, but was the CEO and chair of STECO's board.

A meeting was held on October 16, 2006 and present were four out of six tribal board members, including the tribal chairman and vice-chairman, along with Mr. Goodridge Sr. and defendant representatives. The RV park was discussed, but the Working Agreement was neither presented or discussed. Further there was no discussion at the meeting of who would negotiate an agreement with the defendant or who would be authorized to act on behalf of the tribe. Nonetheless, Mr. Goodridge Sr. later signed the Working Agreement. The tribe decided not to continue with the RV project in the fall of 2007, even though the chairman had entered into

"option agreements" to repurchase the land and made periodic payments to defendant. The defendant attempted to invoke arbitration and the tribe refused.

The court found as a matter of law that the tribe had not waived its immunity. Although the tribe's constitution was silent with regard to who may waive the tribe's immunity, the court looked at the fact that the Working Agreement, drafted by the defendant two months prior to the October 2006 meeting, was never presented to the tribal officials at the October or even discussed. There was no discussion at the October meeting that Mr. Goodridge was being authorized to act on behalf of the tribe and to enter into any agreement waiving the tribe's immunity. (*Also see*, *Danka Funding Company, LLC. v. Sky City CasinoI,* 329 N.J. Super. 357, 747 A. 2d 837 (1999) comptroller of the Sky City Casino found not authorized to sign leasing agreement and could not waiver immunity per tribal law; *World Touch Gaming v. Massena Management LLC*, 117 F. Supp. 2d 271 (N.D.N.Y 2000) senior vice-president of tribal casino management company could not waive tribal immunity, only the tribal council authorized to waive immunity; *Sanderlin v. Seminole Tribe of Florida,* 243 F. 3d 1282 (11th Cir. 2001) tribal chief found to lack authority to waive the tribe's immunity when he signed for and accepting federal grants that contained provisions that the tribe would comply with federal discrimination laws; *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App.4th 1, 9 (1st Dist. 2002) the tribal council, with full knowledge of the terms of the contract, approved and issued a tribal resolution approving contract stratified the purpose of the tribal sovereign immunity waiver ordinance, which was "to ensure that no waiver of sovereign immunity is made by a single tribal officer and that instead such waivers be made only by formal action of its governing body, the tribal council")

As stated in the Declaration of Shane Chapparosa, who was on the Executive Council during the relevant time in question, the lease(s) signed by the former Chairwoman were never presented to the Executive Council nor to the General Council. Nor was there ever a motion, vote or resolution granting the Chairwoman authority to sign any lease with the Defendant. As the court found in *Pilchuck*, without such showing and knowledge of the terms of the agreement and lacking tribal authorization to sign such agreement, the Chairwoman could not and did not waive the Tribe's sovereign immunity. Defendant's case must be dismissed for lack of subject matter jurisdiction.

IV

Conclusion

For the foregoing reasons Plaintiff's case should be dismissed for lack of subject matter jurisdiction and failure to join an indispensible party.

Respectfully submitted.

October 28, 2011

s/ Mark A. Radoff
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