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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA, a federally recognized Indian Tribe, Plaintiff, v. CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; Defendant.	Civil No. 2:11-CV02070-LKK-EFB **UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** Date: Monday, December 5, 2011 Time: 10:00 a.m. Judge: Hon. Lawrence K. Karlton Place: Courtroom 4 Sacramento, California

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Introduction

The United States files this memorandum in support of its motion to dismiss this action under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a cause of action upon which relief can be granted.

The plaintiff–the Del Rosa Faction of the Alturas Indian Rancheria tribe–commenced this suit for injunctive and declaratory relief to prevent defendant California Gambling Control Commission ("CGCC") from honoring two Internal Revenue Service levies. The IRS issued those levies to collect, from funds CGCC owed to the Tribe, federal employment tax liabilities of approximately $73,400 the Tribe owed the IRS. The United States contends that this suit was jurisdictionally barred at the outset by the Anti-Injunction Act, 26 U.S.C. § 7421, and the Declaratory Judgment Act, 28 U.S.C. § 2201. Further, the Court lacked federal interpleader jurisdiction under 28 U.S.C. § 1335, and the United States has not waived sovereign immunity in any event. Assuming, however, that the Court somehow acquired jurisdiction by granting an oral motion to interplead the funds, the United States contends that the Court does not have the power to entertain an interpleader because CGCC was never exposed to the threat of adverse claims or double or multiple liability under Rule 22(a)(1). The only real claimant to the funds was the IRS. The levies put the IRS in the shoes of the taxpayer Tribe. And CGCC, by honoring the levies, would have been discharged from any liability to the Tribe or to either of its two warring factions.[1] Accordingly, this suit should be dismissed on any or all of these grounds.

Statement of Facts

For the purposes of this motion to dismiss, the facts alleged in the Complaint for Declaratory and Injunctive Relief and Damages, filed originally in Sacramento County Superior Court, are deemed correct. Docket 1. In relevant part, the complaint alleged that the Tribe is entitled to distributions from the Revenue Sharing Trust Fund ("RSTF") pursuant to "tribal-state compacts concerning class III Indian gaming with the State of California (¶ 2), that CGCC administers those funds as trustee (¶ 2), that CGCC held funds that were owing to the Tribe (¶¶ 7-8), that CGCC received two IRS levies to collect the

[1]The Del Rosa Faction and the Rose Faction are fighting over control of the Tribe in another case pending before the Court, Alturas Indian Rancheria v. Salazar, No. 2:10-cv-01997-LKK-EFB (E.D. Cal., filed July 27, 2010). See also the Rose Faction's motion to intervene and memorandum in support thereof, Documents 20 and 20-1, wherein the Rose Faction indicates that it intends to move to dismiss this action.

Tribe's unpaid tax liabilities from the funds (¶¶ 9-10), that the Del Rosa Faction, "suspecting [the levies] do not pertain to Tribal business enterprise," and desiring time to contact the IRS to discuss the matter, requested CGCC not to pay the IRS (¶ 11), that CGCC decided to honor the levies despite that request (¶ 13), that the Del Rosa Faction "desperately needed" the funds to "support the Tribe's government" (¶ 14), and that "[a] judicial determination is necessary and appropriate at this time and under the present circumstances to allow Plaintiff to ascertain its right to protect the RSTF monies being held for the benefit of the Tribe by the CGCC and whether the CGCC is acting outside the scope of its authority by facilitating such a disbursement to the Internal Revenue Service" (¶ 17) and "[s]uch a disbursement, particularly with no further investigation as to the origin of the purported tax liability, would cause irreparable harm to the Tribe's ability to govern itself, as well as irreparable harm to its government-to-government relationship with the United States and the State of California." (¶ 18). The Del Rosa Faction did not name the United States or the Rose Faction as defendants.

In the prayer clause of the complaint, the Del Rosa Faction sought an injunction to prevent CGCC from paying any of the Tribe's RSTF monies to the IRS, a declaratory judgment that the Del Rosa Faction is the sole beneficiary of RSTF monies held by CGCC for the benefit of the Tribe, a declaratory judgment that if CGCC honored the IRS levies, CGCC would be in breach of the tribal-state compact and its "implied covenant of good faith and fair dealing," and money damages, and costs and attorney's fees. Complaint, pages 5-6.

Along with the complaint, the Del Rosa Faction filed an Ex Parte Application for Order to Show Cause and Temporary Restraining Order to obtain a TRO and seek a preliminary injunction to stop CGCC from paying over monies to the IRS as demanded by the levies.[2] Docket 1-1, pages 3-11 of 52.

CGCC removed the suit to this Court on the ground that it presented a federal questions under 28

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[2]Copies of the levies are attached to the Declaration of Richard J. Armstrong in Support of Ex Parte Application. Docket 1-2, pages 49-50 of 55. One levy states that as of July 24, 2011, the Tribe owed $40,208.23 in Form 941 employment taxes with respect to the fourth quarter of 2009. The second levy states that as of August 4, 2011, the Tribe owed $33,190.29 for a civil penalty with respect to the period ending December 31, 2007. Each levy provides that payment is due 21 days after receipt by CGCC. The tax identification numbers are for the Tribe itself, not the casino operated by the Tribe or some other business. Dhillion Decl., ¶ 6, Document 15-2. Attached as Exhibits A and B to the Declaration of W. Carl Hankla filed herewith are copies of official IRS transcripts of account, Forms 4340, with respect to the tax liabilities on the two IRS levies at issue. These Forms, which are self-authenticating and enjoy a presumption of correctness, Huff v. United States, 10 F.3d 1440, 1445 (9th Cir. 1993), show the dates of notice and demand for payment, the dates of assessments, the payments and credits applied, and certain other account activity.

U.S.C. § 1331, and a claim by an Indian tribe under 28 U.S.C. § 1362.[3]

On August 10, 2011, the Court, without briefing or argument, issued an order granting a TRO and setting a hearing on the request for a preliminary injunction for August 29, 2011. Document 14. CGCC filed an opposition to a preliminary injunction on August 15, 2011. Document 15. The Court, after conducting a hearing on August 29, 2011, issued an order on September 2, 2011. Document 22. The September 2 Order provides as follows in its entirety:

> Plaintiff in this case is the Del Rosa faction of the Alturas Indian Rancheria, a federally recognized Indian Tribe. Plaintiff sought a preliminary injunction to prohibit defendant California Gambling Control Commission from releasing funds held in trust for the Tribe to the Internal Revenue Service. The IRS is attempting to collect the funds pursuant to two Notices of Levy it issued to the defendant on June 27, 2011 and July 8, 2011 respectively.
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> On August 1, 2011, Plaintiff, the Del Rosa Faction of the Alturas Indian Rancheria filed suit against the California Gambling Control Commission ("CGCC") in Sacramento County Superior Court. See Notice of Removal, ECF No. 1. The complaint, which seeks declaratory and injunctive relief, alleges that plaintiff is entitled to monetary distributions from California's Revenue Sharing Trust Fund ("RSTF"). Pursuant to state law, those funds are distributed quarterly to participating tribes through the CGCC, as trustee. According to plaintiff, "at the beginning of 2010, the CGCC determined that a leadership dispute within the Tribe required the Commission to withhold RSTF distributions pending resolution of the dispute." [footnote 1: That leadership dispute is also at the center of a related action filed in this court, Alturas v. Salazar, 10-1997.]
>
> On or about July 20, 2011, plaintiff became aware that the IRS had contacted the CGCC seeking levies against the Tribe's RSTF funds. [footnote 2: In a letter from the CGCC to the IRS, CGCC indicated that it believed that the levies were related to unpaid employment taxes. See July 19, 2011 Letter from Tina Littleton to Fara Mills, ECF No. 9-2 at 99.] At a meeting held on July 28, 2011, the CGCC voted to recognize the levies and to allow the IRS to execute the levies. Plaintiff claims that the Tribe has no knowledge of what the levies correspond to, and requested time from the CGCC tor the Tribe [to] investigate the matter directly with the IRS. Plaintiff alleges that the CGCC's conduct constitutes breach of a tribal-state compact, and breach of the covenant of good faith and fair dealing. Plaintiff filed a motion for a temporary restraining order ("TRO") and preliminary injunction. The court granted the TRO without hearing or briefing by the defendants. The court held a hearing on plaintiff's preliminary injunction motion on August 29, 2011. Defendants have indicated that payment on the levies has not been made to the IRS.
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> Shortly before the hearing, the other faction of the Alturas Indian Rancheria (the "Rose Faction") filed a Motion to Intervene as plaintiffs in this case. The motion is accompanied by a proposed motion for voluntary dismissal of the case. The motion to intervene is set for hearing on September 26, 2011.
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> At the hearing, defendant moved in open court to interplead the funds to the Clerk of Court, and the court granted the motion.

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[3]28 U.S.C. § 1362, "Indian tribes," provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Upon granting the defendant's motion to interplead the funds, the motion for a preliminary injunction is DENIED as MOOT. It also appears, upon granting the motion, that for all purposes, the CGCC should be dismissed as a defendant in this case. However, the court hereby STAYS dismissal of CGCC from the case until the court rules on the pending motion to intervene by the Rose Faction.

Accordingly, the court ORDERS as follows:

> [1] Defendant's motion, made in open court, for interpleader of the funds subject to the IRS levies issued on June 27, 2011 and July 8, 2011, is GRANTED. Defendant is hereby granted leave to deposit the funds with the Clerk of Court, pursuant to the procedures set forth in Local Rules 150. Upon making such deposit, CGCC, pursuant to 28 U.S.C. § 2361, shall be and is hereby discharged from any further liability to the United States with regard to the IRS levies.
>
> [2] Dismissal of defendant CGCC from the case is STAYED until further order of this court.
>
> [3] Plaintiff's Motion for a Preliminary Injunction, ECF No. 9, is DENIED as MOOT.

IT IS SO ORDERED.

DATED: September 1, 2011.

On October 27, 2011, the Court granted United States' motion to intervene in this matter. Doc. 43.

Argument

This Case Should Be Dismissed for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Interpleader.

1. Subject matter jurisdiction was lacking when the Del Rosa Faction filed the complaint.

A. Legal standard under Rule 12(b)(1).

In Alturas Indian Rancheria v. Salazar, Case 2:10-cv-01997-LKK-EFB, Document 16, 2010 WL 4069455, this Court discussed the legal standards applicable to a motion to dismiss for lack of jurisdiction under Rule 12(b)(1):

> It is well established that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936); Assoc. of Medical Colleges v. United States, 217 F.3d 770, 778-779 (9th Cir. 2000). On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.
>
> When a party brings a facial attack to subject matter jurisdiction, that party contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994); Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir.

1990); see also 2-12 Moore's Federal Practice - Civil § 12.30 (2009). The factual allegations are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v. Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); Miranda v. Reno, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Nonetheless, district courts "may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment" when resolving a facial attack. Safe Air for Everyone, 373 F.3d at 1039.

Alternatively, when a party brings a factual attack, it "disputes the truth of allegations that, by themselves, would otherwise invoke federal jurisdiction." Id. Specifically, a party converts a motion to dismiss into a factual motion where it "present[s] affidavits or other evidence properly brought before the court" in support of its motion to dismiss. Id. Unlike in a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court need not assume the facts alleged in a complaint are true when resolving a factual attack. Id. (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). While the motion is not converted into a motion for summary judgment, "the party opposing the motion must [nonetheless] furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Id. When deciding a factual challenge to subject matter jurisdiction, the district courts may only rely on facts that are not intertwined with the merits of the action. Id.

Whether the Court has subject matter jurisdiction is an issue that must be determined "as of the time the action is commenced." Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988) (Indian tribe's complaint for interpleader to determine rights to funds owed to member of tribe, which funds were levied by state tax authority to collect cigarette taxes, lacked subject matter jurisdiction because claimants were not of diverse citizenship and complaint did not raise federal question). "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.'" Id., citing 15 Wright, Miller & Cooper, Federal Practice and Procedure, at § 3844 (1986).

B. The complaint was barred by two federal statutes prohibiting interference with IRS collection action.

The IRS had the right to seize the subject funds by levy under Internal Revenue Code (26 U.S.C.) Section 6331 without judicial interference.[4] Congress enacted two statutes to protect the administrative collection process from suits like this one by the Del Rosa Faction:

- The Anti-Injunction Act, Internal Revenue Code (26 U.S.C.) § 7421.
- The Declaratory Judgment Act, 28 U.S.C. § 2201.

Because of these statutes, the Court never had subject matter jurisdiction over this case.

(1) The Anti-Injunction Act barred this suit.

[4]The Supreme Court has confined tax litigation to the precise channels prescribed by Congress, such as suits for refund. Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974).

The Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code (26 U.S.C.), states, with statutory exceptions not applicable here:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The purpose of this Act, along with the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (discussed below), is to protect the government's need to collect taxes expeditiously without pre-enforcement judicial interference and "to require that the legal right to disputed sums be determined in a suit for refund." Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974). See also Enochs v. Williams Packing and Nav. Co., Inc., 370 U.S. 1, 17 (1962).

The scope of the Anti-Injunction Act is broad. The Ninth Circuit stated in Church of Scientology of California v. United States, 920 F.2d 1481, 1484 (9th Cir. 1980) that the Anti-Injunction Act generally prohibits any court from enjoining assessment or collection of taxes. In Blech v. United States, 595 F.2d 462, 466 (9th Cir. 1979), the Ninth Circuit held that the Anti-Injunction Act applies not only to bar suits filed for the purpose of restraining the assessment and collection of taxes but also to suits filed to restrain activities that relate to the assessment and collection of taxes. Thus, the Act applies even when the complaint does not expressly request an injunction against the IRS but would have the effect of such injunctive relief if granted. See Watson v. Chessman, 362 F.Supp.2d 1190, 1199-1200 (S.D. Cal. 2005) (even though plaintiff "did not look to" restrain the assessment or collection of tax, the suit was barred by the Anti-Injunction Act when it would have the effect of restraining the assessment or collection of tax). Similarly, this Court held in Uptergrove v. United States, 2009 WL 2244185, at *5 (E.D. Cal. 2009) that the Anti-Injunction Act prohibits collateral lawsuits that would have the effect of restraining IRS collection, affirming that "the Anti-Injunction Act bars entry of injunctive relief that would interfere with the collection of taxes."

The Del Rosa Faction did not name the federal government as a defendant, instead seeking relief only against CGCC. But that does not avoid the jurisdictional issue. The Anti-Injunction Act can block a suit even when the United States is not named as a party. For example, on the basis of the Anti-Injunction Act, the Ninth Circuit has rejected attempts by taxpayers to restrain their employers from withholding taxes from wages. Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986);

Maxfield v. U.S. Postal Service, 752 F.2d 433, 434 (9th Cir. 1984) (same).

The Fourth Circuit is in agreement. In International Lotto Fund v. Virginia State Lottery, 20 F.3d 589, 591 (4th Cir. 1994), the plaintiff, like the Del Rosa Faction here, filed suit against a state gaming agency seeking to enjoin it from deducting taxes from funds it was owed and paying the deducted monies over to the IRS. The plaintiff was an Australian organization claiming that it was not liable for U.S. income tax. The district court agreed with the plaintiff and granted the relief sought. The Fourth Circuit reversed on the basis of the Anti-Injunction Act, holding that the suit was barred. See also Chirik v. TD BankNorth, N.A., 2008 WL 186213 (E.D. Pa. 2008) (plaintiff's claim for declaratory relief–to convert his savings account to the tax-advantaged Individual Retirement Account he claimed he had intended to open–was barred by the Anti-Injunction Act because it would have the effect of restraining the assessment or collection of tax due with respect to interest earned on the savings account; United States not named as party to suit).

For the reasons above, the Anti-Injunction Act barred this action. The complaint sought injunctive relief to prevent CGCC from obeying the IRS levies it received. Viewed as of the commencement of the case, the complaint therefore came within the scope of the Anti-Injunction Act. Subject matter jurisdiction was lacking from the beginning.

(2) No judicial exception to the Anti-Injunction Act authorized this suit.

There are two judicial exceptions to the Anti-Injunction Act. These are found in Williams Packing, 370 U.S. 1, and South Carolina v. Regan, 465 U.S. 367 (1984). Neither exception can apply here, so subject matter jurisdiction could not have been based on either.

(a) The Williams Packing exception could not have applied.

(i) The first Williams Packing test.

Courts have implied a narrow exception to the Anti-Injunction Act under Williams Packing if the injunction-seeking taxpayer can show two things: (1) that "under no circumstances" can the United States ultimately prevail on the merits of the case and (2) that equity jurisdiction otherwise exists–that the taxpayer is threatened with irreparable harm and that no adequate legal remedy is available. Williams Packing, 370 U.S. at 6-8; Elias v. Connett, 908 F.2d 521, 525 (9th Cir. 1990). "Promoting the purpose behind the Act requires a strict construction of any possible exceptions." In re American Bicycle Ass'n,

895 F.2d 1277, 1281 (9th Cir. 1990).

The Del Rosa Faction could not have satisfied the first test under Williams Packing because it could not have alleged facts to show that "under no circumstances" the United States can prevail on the merits. "Under no circumstances" means that "under the most liberal view of the law and the facts . . . the United States cannot establish its claim." United States v. American Friends Serv. Comm., 419 U.S. 7, 10 (1974). To rebut a Williams Packing argument, the United States need show only that it has a good faith basis for its position, not that it would necessarily prevail. Elias, 908 F.2d at 525.

The Del Rosa Faction argued that collection should be frozen because of its suspicion that the tax liabilities in question are the Rose Faction's responsibility rather than the Tribe's. Specifically, the Del Rosa Faction declared that it had "serious doubts as to the nature and origin of the tax liability" the IRS sought to collect through the two levies. Document 9-2, page 11. But the Forms 4340 filed herewith, showing assessments against the Tribe, are presumptively correct. Huff, 10 F.3d at 1445. It would be the Del Rosa Faction's burden to come forward with admissible evidence to show otherwise. Id. The Del Rosa Faction has alleged no facts that would call the Forms 4340 into doubt.

(ii) The second Williams Packing test.

The Del Rosa Faction could not have met the second test under Williams Packing because it could not have alleged facts sufficient to show that it would suffer irreparable harm in the absence of injunctive relief. Paying the tax might be a hardship, but it is well-settled that financial hardship alone does not constitute irreparable harm for purposes of the Anti-Injunction Act. Hughes v. United States, 953 F.2d 531, 536 (9th Cir. 1992); Elias, 908 F.2d at 526. The only harm the Tribe faces is economic, which under the circumstances does not threaten the right of self-government. See Fort Mojave Tribe v. San Bernardino, 543 F.2d 1253, 1258 (9th Cir. 1976) ("The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the governing ability of the tribe.").

Finally, the Tribe has a remedy at law. That remedy is a refund suit.[5] The Del Rosa Faction

[5]The Rose Faction recognizes this in its motion to intervene. Consistent with the government's position here, the Rose Faction, seeks to dismiss this action so that the Tribe can pay its liabilities and seek a refund if the Tribe determines that the assessments do not represent rightful liabilities of the Tribe.

therefore cannot use this suit to seek to enjoin collection. Injunctions suits like this one have been prohibited for over 120 years. See, e.g., Snyder v. Marks, 109 U.S. 189 (1883) (tobacco manufacturer's suit in equity to restrain collection was dismissed because it had a legal remedy at law through a refund suit after payment of the tax). See also Alexander v. "Americans United," Inc., 416 U.S. 752, 762 n.13 (1974) ("A taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it."). The Anti-Injunction Act applies here.

(b) The Regan exception could not have applied.

A second judicial exception to the Act was established by South Carolina v. Regan, 465 U.S. 367 (1984). The Regan exception, like the Williams Packing exception, must be strictly construed. "Because of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique facts in Regan, courts have construed the Regan exception very narrowly." Judicial Watch v. Rossotti, 317 F.3d 401, 408 n.3 (4th Cir. 2003). The Regan exception cannot apply here.

In Regan, South Carolina sought an injunction against the assessment of income tax on the interest earned by holders of its bonds. The tax would have had the effect of requiring the state to pay a higher rate of interest on its bonds. The state believed that this violated the Tenth Amendment. 465 U.S. at 371. Since the state was the issuer of the bonds, not a taxpayer, it could not follow the usual refund procedures to raise its Constitutional challenge. Opposing the suit, the United States argued that the state could encourage a bond-holder to litigate its interests in a refund suit. The Court disagreed, holding that under the circumstances the state could represent its own interests under an equitable exception to the Anti-Injunction Act. Id. at 381.

The Del Rosa Faction cannot rely on Regan. The Tribe has an alternative legal remedy that South Carolina did not–a refund suit. The Del Rosa Faction does not want to pay first and then seek a refund, but that is the avenue Congress provided. The law does not allow another route. See Bennett v. United States, 361 F.Supp.2d 510, 517 (W.D. Va. 2005) (noting that the judicial exception to the Anti-Injunction Act does not apply "where a plaintiff has any access to judicial review, even if the plaintiff did not have access to a legal remedy for the precise harm allegedly suffered or did not like the available remedy").

Taxpayers are required to pay their employment tax liabilities first and litigate only after filing an

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Document 20-1, page 3.

administrative refund claim with the IRS that is either denied or not acted upon within six months.[6] No statute or regulation or case law excuses an Indian tribe from following the refund procedures.[7]

Moreover, converting this action into an interpleader–an idea that was raised by oral motion during the hearing on August 29, 2011–does not cure the jurisdictional problem posed by the Anti-Injunction Act. The proceeding still has the effect of restraining the collection of federal tax.

(3) The Declaratory Judgment Act barred this suit.

In the complaint, the Del Rosa Faction sought declaratory as well as injunctive relief. The Declaratory Judgment Act's ban on tax cases is co-extensive with the scope of Anti-Injunction Act. Bob Jones Univ. v. Simon, 416 U.S. 725, 732 n.7 (1974); Ecclesiastical Order of the ISM of AM, Inc. v. IRS, 725 F.2d 398, 402 (6th Cir. 1984). Thus, for the same reasons as discussed in subsection (1) above, the complaint was barred *ab initio* by the Declaratory Judgment Act as well as the Anti-Injunction Act.

The Declaratory Judgment Act provides in relevant part: "(a) In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* [with three exceptions not applicable here], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (italics added). The Declaratory Judgment Act was adopted by Congress to enlarge the range of remedies available in federal court but it does not extend subject-matter jurisdiction to cases in which the court has no independent basis for jurisdiction. Amalgamated Sugar Co. v. Bergland, 664 F.2d 818 (10th Cir. 1981).

Converting the original complaint to an interpleader would not get around the Declaratory Judgment Act. The Seventh Circuit reached this conclusion in Commercial National Bank of Chicago v. Demos, 18 F.3d 485, 490 (7th Cir. 1994). There, the court held that, absent a substantial question of

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[6]For a district court to have jurisdiction over a suit for the refund of taxes, the taxpayer first must have paid the assessment, or a divisible portion thereof, for which relief is sought. See 26 U.S.C. §§7422(a), 6532(a); Thomas v. United States, 755 F.2d 728, 729 (9th Cir. 1985); see also Flora v. United States, 362 U.S. 145 (1960) (full payment of the tax or a divisible portion thereof required). Then the taxpayer must have filed an administrative refund claim that has been rejected or not acted on within six months. Thomas, 755 F.2d at 729. These steps ensure that the taxpayer pays the tax in full and gives the administrative process a chance to work before taking his dispute to court.

[7]Since the liabilities at issue are employment taxes rather than income taxes, the Tribe does not have an alternate forum in the United States Tax Court to challenge the assessments before paying them.

federal law, an interpleader action to determine the rights of several claimants to a bank account, including the IRS, required dismissal for lack of subject matter jurisdiction. But the court stated that it would have reached the same result even if jurisdiction were present, because the Declaratory Judgment Act prohibits suits to obtain declaratory relief with respect to most federal tax issues:

> Even if we had found the existence of a federal question in a defendant's cross-claim based on the Internal Revenue Code in this case, we would find it remarkably anomalous to permit the bank to bring this action through the interpleader procedural device where Congress has specifically barred a similar action based on the declaratory judgment procedural device.

Id. at 490. In other words, the Seventh Circuit opined that a plaintiff could not use an interpleader to force the United States to litigate a tax-based claim to the funds since the plaintiff could not have maintained a declaratory judgment action to determine the government's right to the fund. See also Massillon Industrial Credit Union v. Ehmer, 2004 WL 2944156, 94 A.F.T.R.2d 2004-6875 (N.D. Ohio 2004) (dismissing on the basis that "[i]nterpleader thwarts the statute" (i.e., I.R.C. § 6332)).

In opposing the Del Rosa Faction's request for preliminary injunction relief, CGCC made some of the jurisdictional arguments above. The Court did not make a ruling on jurisdiction. Instead, it entertained a motion to interplead the levied-on funds and determined that granting this motion would moot the Del Rosa Faction's injunction request (and CGCC's arguments against injunctive relief). The United States respectfully disagrees. Jurisdiction cannot be assumed. As discussed above, this action was barred by the Declaratory Judgment Act as well as the Anti-Injunctive Act when it was commenced, and converting it to an interpleader did not solve those jurisdictional problems. Jurisdiction is lacking for other reasons as well, as discussed below.

C. Interpleader jurisdiction could not be based on 28 U.S.C. § 1335.

In granting the motion for interpleader on August 29, 2011, the Court may have thought that it had jurisdiction under the interpleader statute, 28 U.S.C. § 1335. Yet section 1335 does not apply.

In order for a district court to have interpleader jurisdiction under section 1335, there must be "[t]wo or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 ["Diversity of citizenship; amount in controversy; costs"] of this title [28]." Here, the potential claimants to the RSTF funds are not of diverse citizenship. CGCC does not have citizenship for diversity purposes. Department of Fair Employment and Housing v. Lucent Technologies, Inc, 642 F.3d 728, 737

(9th Cir. 2011). Nor does the Tribe. See American Vantage v. Table Mountain Rancheria, 292 F.3d 1091, 1095 (9th Cir. 2002) (adopting majority rule that unincorporated Indian tribe is not a citizen of a state for diversity purposes). Nor does the United States, by the plain terms of 28 U.S.C. § 1332(a). Therefore, the Court has no jurisdiction under section 1335.[8]

D. Interpleader jurisdiction could not be based on Rule 22.

Rule 22 of the Federal Rules of Civil Procedure provides in relevant part: "Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead." Rule 22 is a procedural device, though, not a source of jurisdiction. Gelfgren v. Republic Nat'l Life Ins. Co., 680 F.2d 79, 81 (9th Cir. 1982).

E. Interpleader jurisdiction could not be based on any ground absent a waiver of sovereign immunity.

Even if jurisdiction could be grounded on the federal question statute, 28 U.S.C. 1331,[9] or another statue, to oblige the United States to respond to an interpleader action would require a waiver of sovereign immunity under 28 U.S.C. § 2410(a)(5). The United States may not be required to interplead when it has not waived sovereign immunity. United States v. Dry Dock Savings Inst., 149 F.2d 917 (2d Cir. 1945). Without such a waiver, subject matter jurisdiction is absent in an action against the United States.[10]

The sovereign immunity waiver under section 2410(a)(5) does not permit challenges to the merits

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[8]It would follow that 28 U.S.C. § 2361, the sole section of Chapter 159, "Interpleader," does not come into play, because section 2361 applies by its terms "[i]n any civil action of interpleader or in the nature of interpleader *under section 1335* of this title." (Italics added.) Assuming this is true, then the Court's reliance on section 2361 to give CGCC a discharge under its Order of September 2, 2011 would be misplaced.

[9]See Stockton Christian Life Center v. United States, 172 F.Supp.2d 1292, 1297 (E.D. Cal. 2001) ("If the IRS were actively litigating its tax lien against Neth [an adverse lien claimant against the subject property] or pursuing its claim to the interpleaded funds, then federal question jurisdiction would lie.").

[10]The United States may not be sued without its consent. United States v. Dalm, 494 U.S. 596, 608 (1980). A plaintiff against the government bears the burden of establishing that jurisdiction exists. Sopcak v. Northern Mountain Helicopter Service, 52 F.3d 817, 818 (9th Cir. 1995). When the United States has not consented to suit, the suit must be dismissed for lack of subject matter jurisdiction. Allied/Royal Parking, L.P. v. United States, 166 F.3d 1000, 1003 (9th Cir. 1999); Elias v. Connett, 908 F.2d 521, 527 (9th Cir. 1990); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (citing United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction.")). For example, section 7422(a) of the Internal Revenue Code contains a waiver of sovereign immunity to challenge federal taxes alleged to be illegally or erroneously assessed and collected.

of the underlying tax assessments, only to the procedural validity of the tax liens.[11] Arford v. United States, 934 F.2d 229, 232 (9th Cir. 1991). Here, the validity of the statutory federal tax lien on the RSTF funds has not been questioned. Only the propriety of the levies is at issue. Liens and levies are not synonymous. A challenge to the propriety of a lien is not the same thing as a challenge to the propriety of a levy. See Commonwealth of Ky. v. Laurel County, 805 F.2d 628, 636 (6th Cir. 1986) (no waiver of sovereign immunity for interpleader against United States when levy, not lien, was at issue). It follows that jurisdiction is missing for a challenge to the levies at issue because, among other reasons, the United States has not waived sovereign immunity.

2. A cause of action for interpleader could not be stated even if the Court had jurisdiction.

Jurisdiction for a Rule 22 interpleader may be based on a federal question. Gelfgren, 680 F.2d at 81. Even if such jurisdiction is assumed here, the essential elements of an action for interpleader are not evident. The stakeholder, CGCC, did not face double or multiple liability, and the only claimants to the funds–the Tribe and the United States–are not adverse because the IRS stepped into the shoes of the Tribe when it served the levies on CGCC. CGCC thus was never faced with a "real and reasonable fear of double liability or vexatious, conflicting claims to justify interpleader." Indianapolis Colts v. Baltimore, 741 F.2d 954, 957 (7th Cir. 1984). Accordingly, although the Court arguably may have subject matter jurisdiction over this case, it lacks the power to grant interpleader relief, and dismissal is proper under

[11] In this regard, the Del Rosa Faction might argue that no federal tax lien arose against the Tribe's RSTF funds because, before making assessments, the IRS purportedly failed to follow mandated government-to-government protocol as provided by executive order or IRS guidelines. See Executive Order 13175, Nov. 9, 2000, "Consultation and Coordination With Indian Tribal Governments"; President Obama's Memorandum for the Heads of Executive Departments and Agencies, Subject: Tribal Consultation, dated Nov. 5, 2009; Internal Revenue Manual 22.41.1.2, "Protocol for Contacting Tribes." Government-to-government procedures are necessary and appropriate as between the United States and any federally recognized Indian tribe. But private parties may not sue to enforce executive orders that expressly prohibit such private rights of action. City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1166 (9th Cir. 1997). The Executive Order and the Presidential Memorandum cited above contain express disclaimers. Similarly, no taxpayer can obtain relief from a tax liability by alleging that an officer or employee of the IRS failed to follow the Internal Revenue Manual. See, e.g., First Federal Savings & Loan Ass'n v. Goldman, 644 F.Supp. 101, 103 (W.D. Pa. 1986) (Internal revenue manual was not promulgated pursuant to any mandate or delegation of authority by Congress so that procedures set forth in manual did not have effect of rule of law and therefore were not binding on Internal Revenue Service so that manual conveyed no rights to taxpayers and taxpayers could not allege noncompliance with those procedures to invalidate tax levies).

Rule 12(b)(6).[12]

A. Legal standard under Rule 12(b)(6).

Dismissal is proper under Rule 12(b)(6) of the Federal Rules of Civil Procedure when the complaint does not make out a cognizable legal theory. Cervantes v. Countrywide Home Loans, Inc., __ F.3d __, 2011 WL 3911031 (9th Cir., Sept. 7, 2011).

B. No cognizable legal theory for interpleader could be made out because CGCC did not face double or multiple liability.

The IRS served CGCC with two levies to seize property or rights to property of the Tribe, namely RSTF funds in CGCC's possession. CGCC, by honoring those levies and paying the IRS, would have received a discharge of liability to the Tribe or any third party. So interpleader was not appropriate under the circumstances: CGCC did not face double or multiple liability.

To ensure that third parties such as CGCC will honor such levies, Code section 6332(e) provides the following protection:

> Any person in possession of (or obligated with respect to) property or rights to property upon which a levy has been made who, upon demand by the Secretary [of the Treasury, i.e., the IRS], surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) *shall be discharged from any obligation or liability to the delinquent taxpayer and any other person* with respect to such property or rights to property arising from such surrender or payment.

(italics added); see Cauchi v. Brown, 51 F.Supp.2d 1014, 1018 (E.D. Cal. 1999) (section 6332(e) holds levied party harmless against claims to levied-on property). CGCC approved payment of the levies at a regular meeting of the commissioners. Del Rosa Faction's Ex Parte Application for TRO, Document 9, page 4. A check was issued to the IRS. CGCC's Memorandum, Document 15, page 4. CGCC thus honored the levies and would have become entitled to the statutory discharge under section 6332(e) but for the subsequent TRO and the steps CGCC took to stop payment on the check to the IRS.[13]

The Del Rosa Faction contended that CGCC should be stopped from honoring the levies because CGCC allegedly had no discretion or power to do anything but pay the RSTF funds to the Tribe. This

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[12]The Del Rosa Faction could not seek or maintain an interpleader because it is not the stakeholder. See Commonwealth of Ky. v. Laurel County, 805 F.2d 628, 636 (6th Cir. 1986).

[13]Because the Court issued its TRO, CGCC stopped payment on the check. CGCC Memorandum, Document 15, page 4.

contention ignored federal levy law. If the Del Rosa Faction were correct, CGCC could have defended against the levies by telling the IRS it was powerless to do anything but pay the funds over to the Tribe.[14] But under well-settled law, there are only two defenses to an IRS levy. One is "I don't have anything belonging to the taxpayer to give you." The other is "I have something belonging to the taxpayer, but it is subject to a prior judicial attachment or execution." See I.R.C. § 6332(a); National Bank of Commerce, 472 U.S. 713 (1985). The fact that other parties may assert a claim in competition with the IRS's (that is, the Del Rosa Faction) is irrelevant to the enforceability of an IRS levy. See Determan v. Jenkins, 111 F. Supp. 604, 605 (N.D. Ga. 1953) (police officer who found cash in crashed plane could turn it over to the IRS pursuant to levy without fear of liability to owner of plane; owner argued that officer had no authority to turn over the cash because the officer had no interest in it).

Because of I.R.C. § 6332(a), CGCC was not subject to double or multiple liability under Rule 22 if it had honored the levies. Under similar circumstances, district courts have held that interpleader is inappropriate and have granted motions to dismiss by the United States or have done so *sua sponte*. See Public School Retirement System of Mo. v. United States, 227 F.R.D. 502 (W.D. Mo. 2005) (interpleader dismissed where under I.R.C. § 6332 stakeholder would obtain immunity from liability if it honored IRS levy); Ameripride Services, Inc. v. Leidel, 2004 WL 2011457 (D. Kan. 2004) (same); State Farm Mutual Automobile Ins. Co. v Internal Revenue Service, 2003 WL 2249275 (N.D. Ohio 2003) (same); Allegheny Child Care Academy v. Klein, 2003 WL 23112776 (W.D. Pa. 2003) (same); Rosenheck & Co. v. United States, 1997 WL 460259 (N.D. Okla. 1997) (same); Johnson v. United States, 566 F.Supp. 1012 (M.D. Fla. 1983) (same); Queen City Savings & Loan Assoc. v. Sanders, 1980 WL 1642, 46 A.F.T.R.2d 80-5715, 80-2 USTC ¶ 9657 (W.D. Wash. 1980) (same).

C. No cognizable legal theory for interpleader could be made out because there were no adverse claimants.

Courts have held in circumstances similar to these that interpleader cannot be maintained because of a lack of adverse claimants, which is a fundamental and requisite element of the cause of action for interpleader. Here, the only real claimant is the United States. CGCC has no claim, and the Rose Faction is content to allow the funds to go to the IRS.

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[14]Further, if the Del Rosa Faction's argument were correct, then it would mean that private parties could contract between themselves to disregard the IRS collection system.

The United States and the Tribe do not have adverse claims. The IRS levies represented a claim through the taxpayer, the Tribe. In a levy proceeding, the IRS "steps into the taxpayer's shoes." United States v. National Bank of Commerce, 472 U.S. 713, 725 (1984) (internal quotations omitted). The Del Rosa Faction opposes the United States' claim, but the Del Rosa Faction's claim is through the Tribe. No adverse claims exist under this analysis. See Public School Retirement System of Mo., 227 F.R.D. at 504 (IRS and taxpayer were not "adverse" for purposes of Rule 22, so interpleader was not proper). Without adverse claimants, an interpleader cannot proceed.

Conclusion

Based on the foregoing, the United States requests the Court to dismiss this action with prejudice for lack of subject matter jurisdiction. It is barred by the Anti-Injunction Act and the Declaratory Judgment Act, it lacks support under the federal interpleader statute, and it fails to invoke a waiver of sovereign immunity. Alternatively, the Court should dismiss this action for failure to state a cause of action upon with relief can be granted, because the essential requirements of an action for interpleader or in the nature of interpleader are lacking. After the case is dismissed, the subject funds should be returned to CGCC or otherwise made available for levy by the IRS. The Tribe can then, if it so decides, file a refund claim on the ground that those taxes were wrongfully or illegally assessed and collected.

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Date: October 31, 2011

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