

STEVEN J. BLOXHAM
sbloxham@ndnlaw.com
JAMES QAQUNDAH
jqaqundah@ndnlaw.com
FREDERICKS PEEBLES & MORGAN LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Facsimile: (916) 441-2067

Attorneys for Intervenor-Plaintiff
ALTURAS INDIAN RANCHERIA
("ROSE FACTION")

**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,

Defendants.

Case No. 2:11-CV-02070-LKK-EFB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER OF
VOLUNTARY DISMISSAL PURSUANT
TO FED. CIV. P. 41(a)(2)**

Date: December 5, 2011
Time: 10:00 am
Courtroom: 4
Judge: Hon. Lawrence K. Karlton

I. Introduction

Intervenor-Plaintiff the Alturas Indian Rancheria ("Rose Faction") respectfully submits this memorandum of law in support of its motion for voluntary dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(2).

II. Factual Background

The Del Rosa Faction, purporting to act on behalf of the Tribe, commenced this action on August 1, 2010, in the Superior Court of California, County of Sacramento. The action seeks declaratory and injunctive relief to prevent the California Gambling Control Commission ("CGCC") from distributing funds out of the RSTF monies held for to the Alturas Indian

Rancheria ("Tribe") to the United States Internal Revenue Service ("IRS") for two Notices of Levy against the Tribe's RSTF funds filed by the IRS. The CGCC removed the action to the United States District Court on August 4, 2011, and the action was related to *Alturas Indian Rancheria v. Salazar*, No. 2:10-cv-01997-LKK-EFB (E.D. Cal. filed July 27, 2010) on August 9, 2011. On August 10, 2011, this Court granted the Del Rosa Faction's motion for a temporary restraining order. The Del Rosa Faction's motion for preliminary injunction remains pending.

On August 25, 2011, Defendant the California Gambling Control Commission ("CGCC") filed its answer (Doc. No. 18). On August 26, 2011, the Rose Faction moved to intervene as Intervenor-Plaintiff (Doc. No. 20). This Court granted the Rose Faction's intervention on September 20, 2011 (Doc. No. 28). On September 21, 2011, the United States moved to intervene as Intervenor-Defendant (Doc. No. 29). This Court granted the United States' intervention on October 27, 2011 (Doc. No. 43).

No other significant activity or discovery has occurred in this case.

III. DISCUSSION

A. Legal Standard for Granting Motion to Dismiss Pursuant to Fed. R. Civ. P. 41(a)(2).

Rule 41(a)(2) of the Federal Rule of Civil Procedure permits a party to dismiss its action upon Order of the Court. Fed. R. Civ. P. 41(a)(2); *see also Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997). The decision whether to grant a Rule 41(a)(2) motion for voluntary dismissal normally lies within the discretion of the court. *Navellier v. Sletten*, 262 F.3d 923, 928 (9th Cir. 2001). However, "absent 'legal prejudice' to the defendant, the district court normally should grant such a dismissal." *Brown v. Baeye*, 413 F.3d 1121, 1123 (10th Cir. 2005) (internal quotation marks and citation omitted).

In evaluating whether the Defendant would be prejudiced, courts may consider factors such as: (1) excessive delay and lack of diligence on the part of the plaintiff seeking dismissal; (2) the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; (3) the adequacy of plaintiff's explanation for the need to dismiss; and (4)

1 the duplicative expense of re-litigation. See *Brown*, 413 F.3d at 1124; *Zagano v. Fordham*
2 *University*, 900 F.2d 12, 14 (2d Cir.1990).

3 However, “when dismissal with prejudice is granted, it does not harm the defendant: The
4 defendant receives all that he would have received had the case been completed.” *Schwarz v.*
5 *Folloder*, 767 F.2d 125, 129 (5th Cir. 1985). Accordingly, in the interest of justice and
6 preserving judicial resources, “some courts have held that a dismissal with prejudice is not
7 discretionary, but instead must be granted if requested by the plaintiff.” *Id.* at 129 n.5 (5th Cir.
8 1985); see also *Smoot v. Fox*, 340 F.2d 301, 303 (5th Cir. 1964).

9 **B. Plaintiff should be permitted voluntary dismissal of this action pursuant to**
10 **Rule 41(a)(2) of the Federal Rules of Civil Procedure.**

11 It is not necessary to weigh the factors listed above because Intervenor-Plaintiff seeks
12 dismissal with prejudice and, therefore, the Defendants will not be prejudiced. Furthermore, the
13 Rose Faction notes that Intervenor-Defendant the United States has filed its own motion to
14 dismiss, further indicating that the Defendants will not be prejudiced by this voluntary dismissal.
15 However, the aforementioned factors also weigh in favor of dismissal.

16 **1. Intervenor-Plaintiff acted diligently in bringing this motion.**

17 The Rose Faction filed its motion within weeks of learning that the Del Rosa Faction had
18 filed the action, purportedly on behalf of the Tribe. When the Del Rosa Faction first filed the
19 action, the Rose Faction was unsure whether intervention was necessary because the Rose
20 Faction agrees that the State of California possesses “no discretion with respect to the use or
21 disbursement of the [RSTF] funds.” Tribal-State Compact Between the State of California and
22 the Alturas Indian Rancheria, § 4.3.2.1(b). However, when the Rose Faction discovered that
23 the Del Rosa Faction’s efforts to thwart the IRS collection may in fact cause further and
24 irretrievable debt to the Tribe, the Rose Faction realized it must intervene in order to protect the
25 Tribe’s RSTF funds from irreparable harm of unnecessary penalties.

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2. The suit is still in its early stages, and extensive preparation for trial by the Defendant has not been necessary at this stage.

This case is in the early stages of the proceedings. The only briefing has been pre-trial briefing in regard to a potential preliminary injunction, briefing on the Rose Faction's motion to intervene, and briefing on the United States' motion to intervene. Significantly, there have been no determinations or proceedings on the merits in this case.

3. Intervenor-Plaintiff has compelling reasons for its motion for dismissal.

i. The suit was filed without authority.

The Del Rosa Faction does not possess the authority to initiate a lawsuit on behalf of the Tribe. The Del Rosa Faction claims to be acting in the capacity of the Tribe's Business Committee, specifically the last undisputed composition of the Business Committee (the "2008 Business Committee").¹ However, the Business Committee does not possess the authority to bring a lawsuit.² The Business Committee only possesses those powers

¹ As this Court is aware, an internal conflict exists within the Tribe. The conflict centers on the composition of the Business Committee since 2009. In 2009, Phillip and Wendy Del Rosa were removed from the Business Committee by a majority vote of the General Council, upon an investigation into allegations of embezzlement and malfeasance of Tribal funds. Since then, the Del Rosas have contested their removal and subsequent loss of despot control over the Tribe's assets. In their effort to thwart their removal, the Del Rosas asserted that two nonmember individuals had been adopted as voting members of the General Council, purportedly increasing the amount of required votes for removal of a Business Committee member.

As the Rose Faction has noted elsewhere, the matter of the purported adoptions was litigated before the United States Postal Service, which determined as a matter of fact that the two were never adopted. The USPS ruling is binding on the Rose Faction and Del Rosa Faction, both of whom were parties to the litigation. *See, e.g.,* Plaintiff (Rose Faction)'s Memorandum in Support of Lifting Stay and Resolving Pending Motions (Doc. No. 108) in *Alturas Indian Rancheria v. Salazar*, No. 2:10-cv-01997-LKK-EFB (E.D. Cal. filed July 27, 2010).

² In addition, by operation of law, the terms of the members of the 2008 Business Committee have expired and those individuals are no longer in office. Pursuant to the Tribe's Constitution, each elected Business Committee member serves for a term of two years or until a successor is elected and installed. Although a reasonable reading of this sentence is that the term shall end at the first of either two (2) years or until a successor is elected and installed, it is irrelevant because successors have been elected and installed for each position on the Business Committee.

Both factions held elections to elect a new Business Committee for the 2010-2012 term in April 2012. One of those elections was necessarily valid, with the determination of which was valid being dependent on whether the purported adoptions ever occurred. Regardless of which election was valid, the successors of the 2008-2010 Business Committee were elected and installed, and the term of the previous 2008-2010 committee automatically expired pursuant to the express provisions of the Article V of the Tribe's Constitution. Accordingly, the 2008 Business Committee is not the current Business Committee.

Moreover, the Department cannot recognize the 2008 Business Committee because its term has expired and, therefore, those individuals have no authority by operation of law. The BIA is not free to choose

expressly delegated to it in the Constitution. Alturas Constitution, Art. VII, § 2.³ The power to initiate a lawsuit is not included in those powers. See Alturas Constitution, Art. VII, § 2.

The General Council, which concurrently exercises the powers delegated to the Business Committee, exclusively possesses all powers not expressly referred to in the Constitution, including the power to initiate a lawsuit. Alturas Constitution, Art. VII, § 1. Accordingly, pursuant to the plain language of the Constitution, the only Tribal body with such authority is the General Council. See Alturas Constitution, Art. VII. Because this lawsuit was not initiated by the General Council, its filing was invalid.

ii. The majority of adult Tribal members oppose the instant lawsuit.

The Tribe consists of five adult members. Upon realizing that the Tribe could suffer greater economic harm by preventing the CGCC from complying with the IRS levies, particularly in the form of excessive penalties, the majority of those five members have taken the position that this lawsuit is not in the best interests of the Tribe. It was for this reason—that the instant lawsuit is counter to the Tribe’s interest in protecting the Tribe from incurring additional penalties from the IRS—that the majority of General Council (the Rose Faction) sought to intervene and dismiss the lawsuit.

to deal with persons who are no longer in office as a matter of Tribal law, and the “last undisputed” rule does not authorize the BIA to deal with Tribal representatives whose terms have expired. See *Kennedy v. Pacific Regional Director*, Decision by Assistant Secretary Larry Echo Hawk, at 9 (March 1, 2011) (“For the Department to attempt to recognize those long-past-term officers would not provide the Tribe with a useful resolution to its dispute.”) This is especially true if there is a viable alternative, as there is in this case with the 2008 General Council, which consists of an undisputed composition of individuals who do not have terms that will ever expire.

³ The powers expressly delegated to the Business Committee, which are concurrently shared with the General Council, are:

- (a) To promulgate all ordinances, resolutions, or other enactments of the Alturas Indian Rancheria;
- (b) To represent the Alturas Indian Rancheria in all negotiations between the tribe and local, state, and federal governments, and other tribes;
- (c) To waive the immunity of the Alturas Indian Rancheria from suit;
- (d) To employ legal counsel;
- (e) To administer all lands and assets and manage all economic affairs and enterprises of the Alturas Indian Rancheria;
- (f) To acquire property and accept gifts, and to request land to be taken into trust by the Secretary of the Interior for the benefit of the Alturas Indian Rancheria; and
- (g) To establish rules of procedure for the conduct of its affairs.

Alturas Constitution, Art. VII, § 2.

1 **iii. The Rose Faction and the majority of adult Tribal members are**
2 **satisfied to seek a refund from the IRS once it is confirmed that**
3 **the IRS Levies are the result of the personal liabilities of Phillip**
 and Wendy Del Rosa, or any other individual members.

4 When the CGCC contacted the Rose Faction requesting information regarding the
5 IRS Levies,⁴ the Rose Faction investigated the matter of the underlying tax liability. The
6 Rose Faction provided true and correct information to the CGCC to the best of its ability.

7 However, although the Rose Faction is aware that the underlying tax liability might be
8 the responsibility of one or more members, it is satisfied to seek a refund from the IRS once
9 it is confirmed that the liability does not rest with the Tribe. As a practical matter, this
10 position is the most sensible for the Tribe. If it is determined that the underlying tax liability
11 belongs to one or more individual members, the Tribe can and will recover reimbursement
12 from the IRS, and will therefore not be harmed. On the other hand, if the additional penalties
13 are imposed on the Tribe for nonpayment, it is possible that the Tribe will be liable for the
14 penalties regardless of whether the underlying tax liability belonged to the Tribe.

15 Moreover, the Rose Faction seeks the distribution of the Tribe's RSTF monies so that
16 they can be put to use for Tribal governmental purposes, including satisfying past and
17 overdue obligations of the Tribe. Because the payment of an IRS Levy against Tribal assets
18 is a Tribal purpose, particularly if the tax liabilities turn out to be Tribal liabilities, the Rose
19 Faction, acting as the General Council, agrees that the levy should be paid.

20 Finally, the Rose Faction has managed the day-to-day operation of the Tribal
21 government, in the absence of the Tribe's RSTF monies, since approximately February, 2010.
22 The administration of the Tribal government has proven difficult in the absence of these funds,
23 and the Tribe has only been able to operate on a severely reduced scale and has not been able
24 to pay off all of the Tribe's debts. While the Rose Faction seeks distribution of those monies—
25 the amount of which currently stands at \$1.65 million—so that they can be used for Tribal
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28 ⁴ It is the Rose Faction's understanding that the CGCC also attempted to contact the Del Rosa Faction for their
 version of the IRS Levies.

1 purposes, the Rose Faction is confident that the remaining approximately \$1.58 million will be
2 sufficient for those Tribal purposes.

3 **4. Because the Rose Faction seeks dismissal with prejudice, there will**
4 **be no duplicative cost of relitigation.**

5 The Rose Faction seeks dismissal with prejudice. For this reason, the Defendant will not
6 suffer prejudice from any duplicative cost of relitigation, and will have “receive[d] all that he
7 would have received had the case been completed” in the Defendant’s favor. *Schwarz*, 767
8 F.2d at 129.

9 **IV. Conclusion**

10 For the foregoing reasons, Intervenor-Plaintiff respectfully requests this Court to order
11 dismissal of the Complaint with prejudice under Fed. R. Civ. P. 41(a)(2).

12 Dated: November 2, 2011

Respectfully submitted,

13 FREDERICKS PEEBLES & MORGAN LLP
14 2020 L Street, Suite 250
15 Sacramento, California 95811
(916) 441-2700

16 By: /s/ Steven J. Bloxham
17 Steven J. Bloxham
18 Attorneys for Intervenor-Plaintiff
19 Alturas Indian Rancheria
20 (“Rose Faction”)
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