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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE ET AL. Plaintiffs, **v.** TRACIE STEVENS, ET AL. Defendants.	Case No. 2:13-cv-01920-KJM-KJN **PLAINTIFFS' OPPOSITION TO DEFENDANT RAYMOND HUNTER'S MOTION TO DISMISS** Date: May 23, 2014 Time: 10:00 a.m. Place: Courtroom No. 3 Judge: Honorable Kimberly J. Mueller

INTRODUCTION

Plaintiffs, Jamul Action Committee, Jamul Community Church, Darla Kasmedo, Paul Scripps, Glen Revell, and William Hendrix respectfully submit this opposition to the Motion to Dismiss filed by Jamul Indian Village (JIV) Chairman Raymond Hunter on April 25, 2014 (Electronic Court File (ECF) No. 23.) Mr. Hunter moved to dismiss Plaintiffs' First Amended Complaint (FAC) against him on the basis of Federal Rule of Civil Procedure Rule 12(b)(1) (subject matter jurisdiction; facial challenge) and Rule 12(b)(6) (failure to state a claim).

Mr. Hunter claims that, as Chairman of the JIV, he is entitled to sovereign immunity protection and therefore is not a proper Defendant in this case. Furthermore, Defendant Hunter claims that the *Ex Parte Young* doctrine, which allows litigation against tribal officials as representatives of the tribe, does not apply to him. Finally, Defendant Hunter claims that the allegations in the FAC against all Defendants are not clearly stated against him.

Defendant Hunter is not insulated from this litigation. Although Defendant Hunter is not asserting that the JIV is a necessary party to this litigation, the Federal Defendants are. (ECF No. 21 at 28-29.)[1] And both the Federal Defendants and Defendant Hunter argue that the JIV is entitled to tribal sovereign immunity from being named as a party to this lawsuit. If the JIV is entitled to tribal sovereign immunity then, the according to the Ninth Circuit, Mr. Hunter as Chairman of the JIV is an appropriate defendant under the *Ex Parte Young* doctrine to represent the JIV's interests in this case. *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1172 (9TH Cir. 2012).

STATEMENT OF THE CASE

Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief in this case on February 27, 2014. (ECF No. 15.) Plaintiffs include a community group, a local church, and four individuals living in the rural community of Jamul and who will be adversely affected by the proposed casino. The Defendants include the National India Gaming Commission (NIGC) and its officers and employees, the Department of Interior (DOI) and its officers and employees, and Raymond Hunter – current Chairman of the JIV.

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[1] The Federal Defendants have also filed a separate motion to dismiss. (ECF No. 21.) The Federal Defendants' motion is, in part, based on Federal Rule of Civil Procedure, Rule 12(b)(7) (failure to join a necessary party.) Defendant Hunter has not based his motion on Rule 12(b)(7).

The primary focus of Plaintiffs' lawsuit is a determination, first revealed by the NIGC, on April 10, 2013, that the JIV has "Indian land" that qualifies for use for gaming under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2703. The NIGC, by regulation, is required to make an Indian lands determination before approving a site-specific gaming management contract between a tribe and private casino manager. 25 C.F.R §522.2 and §559.1-2. *See also North County Community Alliance v. Salazar* 573 F.2d 738 (9th Cir. 2009).

The Plaintiffs allege that the NIGC's Indian lands determination is a final agency action subject to judicial review under the Administrative Procedures Act (APA). 5 U.S.C. §§ 701-706. (See ECF No. 15 at 1-7.) Plaintiffs also allege that the NIGC's Indian lands determination is arbitrary, capricious and a contrary to law including the Indian Reorganization Act of 1934 (IRA), the Indian Gaming and Regulatory Act (IGRA), and the National Environmental Policy Act (NEPA). Plaintiffs also allege that the Indian lands determination – which purports to remove private fee owned land from State regulation – violates the principles of federalism outlined by the Supreme Court in *Hawaii v. Office of Hawaiian Affairs* 129 S.Ct. 1436 (2009).

In addition to pursuing judicial review under the APA, Plaintiffs sought declaratory and injunctive relief against all of the Defendants, including Defendant Hunter, with respect each of their four claims for relief. (ECF No. 15 at 36-37, 39, 40, and 44.) Also, in the FAC, the Plaintiffs added allegations, which especially pertain to Defendant Hunter, regarding the illegal initiation of construction of casino on the site. (See ECF No. 15 at 4.)

On April 25, 2014 Defendant Hunter filed his motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 23). Defendant Hunter also joined the JIV's proposed amicus brief filed by JIV on April 25, 2014 without prior permission from the Court. (ECF No. 23 at 7, l. 20.) (Defendant Hunter and the JIV have the same counsel.) Specifically, on April 25, 2014, the JIV filed a Motion for Leave to File an Amicus Curiae Brief

(ECF No. 22), a Proposed Amicus Curiae Brief (ECF No. 22-1) and a Request for Judicial Notice (ECF No. 22-2) of 24 separate documents totaling 237 pages (ECF 22-3, 22-4, 22-5, 22-6 and 22-7.) These additional extrinsic documents and briefs, totaling over 300 pages, were proffered by the JIV supposedly in support of Defendant Hunter's motions to dismiss.

Defendant Hunter's motion was ambiguous as to whether he was making a facial or factual challenge under Rule 12(b)(1). (ECF No. 23 at 8-9.) And, given the barrage of extrinsic evidence filed by the JIV on Defendant Hunter's behalf, it appeared as though he was bringing a factual challenge under Rule 12(b)(1). Consequently, Plaintiffs brought an ex parte application to continue the May 23, 2014 hearing on Defendant Hunter's motion to dismiss and to set an evidentiary hearing on October 24, 2014. (ECF No. 27.) In response, Defendant Hunter filed an opposition to Plaintiffs' ex parte application, in which he unequivocally states that: "Chairman Hunter's motion to dismiss is a facial challenge to the first amended complaint, not a 'speaking' motion as plaintiffs' (sic) erroneously claim. Chairman Hunter's motion makes two arguments, neither of which rely (sic) on extrinsic evidence." (ECF 28 at 3, ll. 11-15.)

The Court has not ruled on Plaintiffs' request to continue the May 23, 2014 hearing on the Defendants' motions to dismiss to have an opportunity to conduct discovery and, perhaps, have an evidentiary hearing before responding to Defendants' motions. Plaintiffs are filing this opposition in accordance Local Rule 230. If the Court subsequently grants Plaintiffs' request, and continues the hearing, Plaintiffs respectfully request an opportunity to conduct discovery and to supplement this memorandum if necessary and appropriate.

ARGUMENT

1. Standard of Review for Motions to Dismiss.

Defendant Hunter brought his motion to dismiss pursuant to Federal Rule of Procedure 12(b)(1) (subject matter jurisdiction) and Federal Rule of Civil Procedure 12(b)(6) (failure to

state a claim). As outlined above, Defendant Hunter asserts that his Rule 12(b)(1) motion is a facial challenge, not a factual challenge to the complaint. As a consequence the standard of review for both the Rule 12(b)(1) and 12(b)(6) motions are very similar. In both circumstance the Court must assume the allegations in the complaint are true and interpret them favor, and to the benefit of, the Plaintiffs.

Subject Matter Jurisdiction – Rule 12(b)(1)

A Rule 12(b)(1) motion to dismiss a complaint for lack of subject matter jurisdiction can either be a factual or facial challenge of the allegations in the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Defendant Hunter is bringing a facial challenge. (ECF 28 at 3.)

In ruling on a Rule 12(b)(1) motion that attacks a complaint on its face, the court must accept the allegations in the complaint as true. *Sarei v. Rio Tinto PLC.*, 221 F.Supp. 2d 1116, 1129 (CD Cal. 2002). *See also Genetek Bldg. Products v. Sherwin-Williams Co.*,491 F.3d 320, 330 (6th Cir. 2007.) "If a defendant mounts a 'facial' challenge to the legal sufficiency of the plaintiff's jurisdictional allegations, the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." *Erby v. United States*, 424 F.Supp. 2d 180, 182 (D.D.C. 2006). When deciding a Rule 12(b)(1) facial challenge, the court must review the factual allegations in the plaintiff's complaint and draw all reasonable inferences from them in plaintiff's favor and dispose of the case accordingly. *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) *See also Carrier Corp. v. Outokumpu Oyi*, 673 F.3d 430, 440-444 (6th Cir. 2012).

Failure to State a Claim – Rule 12(b)(6)

A Motion to Dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is designed to test the legal sufficiency of the claims in the complaint. In ruling on a Rule 12(b)(6) motion "all well pleaded allegations of material fact are taken as true and

construed in a light most favorable to the non-moving party." *Wyler Summit P'Ship v. Turner Broad Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998)(citation omitted).

There is a strong presumption against dismissing an action for failure to state a claim. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 234 (1974) *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) A court should not grant a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

2. The Jamul Indian Village Claim of Sovereign Immunity.

Most of the allegations regarding the creation, development and organization of the JIV are included as paragraphs 35 to 109 of Plaintiffs' First Amended Complaint. (ECF No. 15 at 13-35.) For the purpose of evaluating Defendant Hunter's motion to dismiss, those factual allegations must be accepted as true by this Court. They are incorporated here by this reference.

The JIV did not exist as separate tribal entity prior to 1980. Specifically, it was not an identifiable group that functioned as a single autonomous political entity. The JIV has never applied for, or received, formal federal recognition under 25 C.F.R. Part 83.

During the 1970's, at the suggestion of the Bureau of Indian Affairs (BIA), the JIV began to organize itself as a "half-blood Indian community" instead of pursuing formal federal acknowledgement as a federally recognized tribe under Part 83. The JIV voluntarily chose to organize itself as a half-blood Indian community [and not a tribe] even though they were informed by the BIA of the limitations Bureau of Indian Affairs (BIA) in the 1970s.

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The JIV eventually organized itself as a new tribal entity under the IRA. And in 1981 the Department of Interior approved the constitution for the JIV. At that point, the JIV became what is known as a "created tribe with delegated powers of self-government."

In 1982 the JIV was included by the BIA on their list of "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs" (78 Fed. Reg. 26,384 (May 6, 2013).) The BIA in its notice claims: "The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged tribes." (*Id*) This is the basis for the JIV's claim of sovereign immunity.

3. If the JIV has Sovereign Immunity, then Defendant Hunter is an appropriate defendant to represent the JIV's interests in this case.

The Ninth Circuit has held that the *Ex Parte Young* doctrine "permits actions for prospective non-monetary relief against State or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." *See Ex Parte Young,* 209 U.S. 123 (1908)." *Salt River Project Agricultural Improvement and Power District v. Lee,* 672 F.3d 1172, 1181 (9TH Cir. 2012).

In this case, Plaintiffs named Defendant Hunter as Chairman of the JIV for prospective declaratory and injunctive relief and to enjoin the continued construction of an illegal casino on the property in violation of federal law. Chairman Hunter, like the tribal officials in *Salt River Project,* has acted "beyond [his] jurisdiction, without basis in law, and in violation of federal law." *Id.* And, as outlined above, the allegations against Defendant Hunter are clearly stated in the FAC. In fact, the *Salt River Project* case was specifically referenced in Plaintiffs' FAC when Defendant Hunter was added as a Defendant. (ECF No. 15 at 10 ll. 8-13.) The reason Defendant Hunter was named as a defendant in this case was not a secret.

Defendant Hunter, in his 10 page memorandum in support of his motion to dismiss, cited over 50 cases. But he did not mention or discuss the *Salt River Project* case. Most of the cases

referenced by Defendant Hunter are offered to support his contention that the JIV is entitled to sovereign immunity from suit. But, these cases offered in support of JIV's sovereign immunity, only emphasize the need to name Defendant Hunter in this case under the *Ex Parte Young* doctrine. Assuming the JIV's sovereign immunity claim has merit, then it was appropriate to name JIV Chairman Hunter as a representative defendant for the JIV.

Incredibly, and directly contrary to the Ninth Circuit's decision in *Salt River Project,* Defendant Hunter claims that the *Ex Parte Young* does not apply him. He argues that if the suit against a tribal official operates against the tribe, then the suit is barred. Defendant Hunter cites *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.* 276 F.3d 1150 (9th Cir. 2002) to support this contention. Defendant Hunter urges this Court to follow the Ninth Circuit's lead in *Dawavendewa,* and reject Plaintiffs' *Ex Parte Young* claim against him. But Defendant Hunter does not reveal, or perhaps did not realize, that the Ninth Circuit specifically considered and distinguished the *Dawavendewa* case because tribal officials were not named in that case:

> "*Dawavendewa* is distinguishable because there – unlike here – the tribal officials were **not** parties to the action and thus could not represent the absent tribe's interests, a fact that we explicitly noted. *See id.* at 1160 ("[N]or has [the plaintiff] named any tribal officials as parties to this litigation.") Thus, because the tribal officials adequately represent the [tribe's] interests here, the district court erred in holding that the tribe was a necessary party under Rule 19."
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> (*Salt River Project, supra.* 672 F.3d at 1181; emphasis in the original)

Defendant Hunter is the Chairman and a tribal official of the JIV. Thus he is an appropriate defendant, and can adequately represent the JIV's interest in this case. In fact, this has already happened here. Defendant Hunter and JIV have the same lawyer and have already filed joint briefing in this case. Instead of dismissing Defendant Hunter, this Court should follow the Ninth Circuit's lead and decision in the *Salt River Project* case. Specifically the court should find that the JIV is not a necessary party to this lawsuit because Chairman Hunter is a named defendant and can adequately represent the interests of the JIV in this case.

CONCLUSION

For the forgoing reasons, the Plaintiffs respectfully request that Defendant Hunter's Motion to Dismiss Plaintiffs First Amend Complaint be denied. For the purposes of this motion, the Court must assume the allegations in the FAC and interpret them in favor of the Plaintiffs. Plaintiffs' FAC includes sufficient allegations regarding this Court's subject matter jurisdiction. And the FAC clearly states a claim against Defendant Hunter. The motion should be denied.

On the other hand, if the Court finds that any of the allegations in the FAC are deficient in any way, Plaintiffs respectfully request a reasonable opportunity to amend the complaint to correct those deficiencies.

Dated: May 9, 2014.

Respectfully submitted,

/s/ Kenneth R. Williams
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