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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE, et al.,

Plaintiffs,

vs.

JONODEV CHAUDHURI, et al.,

Defendants.

Case No. 2:13-cv-01920-KJM-KLN

REPLY BRIEF IN SUPPORT OF CHAIRMAN RAYMOND HUNTER'S MOTION TO DISMISS

Date: May 23, 2014
Time: 10:00 a.m.
Judge: Hon. Kimberly J. Mueller

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I. Introduction

Plaintiffs' opposition falsely claims that the First Amended Complaint ("FAC") seeks relief against Chairman Hunter to stop the alleged illegal construction of a casino on the Tribe's lands. The FAC makes no such claim. To the contrary, the FAC makes no operative allegations whatsoever against Chairman Hunter.

Plaintiffs concede that the "primary focus" of their FAC is the federal defendants' supposed Indian Lands Determination ("ILD") that the Tribe "has 'Indian land' that qualifies for gaming under the Indian Gaming Regulatory Act (IGRA)." Plaintiffs' Opposition, docket no. 30, at p.3, lines 1-3. The FAC claims that this supposed ILD violates the Indian Reorganization Act ("IRA"), IGRA, National Environmental Policy Act ("NEPA") and California's rights under the 10th Amendment. None of plaintiffs' claims allege that Chairman Hunter has violated federal law. The FAC fails entirely to state a claim against Chairman Hunter and should therefore be dismissed.

Plaintiffs also argue that Chairman Hunter lacks sovereign immunity under the doctrine of *Ex Parte Young* 209 U.S. 123 (1908). They are wrong. Because the FAC fails to allege that Chairman Hunter has violated any applicable federal law, there is no connection between his alleged actions and plaintiffs' claimed violation of federal law. Such a nexus is required under *Ex Parte Young*. In addition, *Ex Parte Young* does not apply where the relief sought actually runs against the government and not just the government official. Here, plaintiffs seek a declaration that the Tribe's land is not federal trust land, is not Indian land and is not eligible for gaming under IGRA. *See* FAC, Prayer for Relief at ¶¶ A-F. This relief, if granted, would bar the Tribe from exercising sovereignty over its lands and would foreclose its ability to receive the benefits of tribal government gaming under IGRA as Congress intended. Plaintiffs also seek to

bar federal approval or implementation of the Tribe's contract with its development partner. *See id*. ¶ G. Such relief, if granted, would expose the Tribe to potential financial liability, thus putting the Tribe's treasury at risk. Finally, *Ex Parte Young* does not apply here because Congress has provided remedies for alleged violations of the statutes – IRA, NEPA and IGRA – under which plaintiffs sue.

For these reasons, Chairman Hunter respectfully requests that the Court grant his motion to dismiss with prejudice.

II. Discussion

A. *Ex Parte Young* Does Not Apply Here

There are at least three independent bars to applying the *Ex Parte Young* doctrine here. First, there is no nexus whatsoever between Chairman Hunter and FAC's alleged responsibility for the claimed violations of federal law. Second, *Ex Parte Young* does not permit a plaintiff to accomplish an end run around tribal sovereign immunity by suing a tribal official where the relief sought actually runs against the government. Finally, where Congress has provided remedies – as it has in the APA and IGRA -- *Ex Parte Young* is not available.

1. There is No Nexus Between Chairman Hunter and the Alleged Violations

The *Ex Parte Young* doctrine requires that the government official sued must have some nexus to the alleged violation of federal law. *See Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (*quoting Ex parte Young*, 209 U.S. at 157). As the Supreme Court explained in *Young*:

> "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party."

Ex Parte Young, 209 US at 157.

Ex Parte Young does not apply here because Chairman Hunter has no "connection with

the enforcement of the act", and thus the FAC has "merely ma[de] him a party as a representative of the [Tribe], and thereby attempt[ed] to make the [Tribe] a party." *Id.*

2. *Young* Is Inapplicable Because the Relief Would Run Against the Tribe

If the prospective relief sought would invade a government's sovereignty, *Young* will not apply and the action will be barred by sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idah*o, 521 U.S. 261, 281 (1997). In *Coeur d'Alene Tribe*, the Court found that "the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control [of the property at issue] would shift from the State to the Tribe." *Id*. at 282. Similarly here, the FAC seeks relief that would deprive the Tribe of the "benefits of ownership and control" of its federal Indian lands. *Id. Coeur d'Alene Tribe* found that the "suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority ... would be to ignore the realities of the relief the Tribe demands." *Id.* Precisely the same is true for the impact the relief plaintiffs seek here would have on the Tribe's control over lands "long deemed by the [Tribe] to be an integral part of its territory." *Id.* The Court found it "apparent" that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id*. at 287. For these reasons, the Court found "the *Young* exception inapplicable." *Id.*[1]

In *Shermoen*, the Ninth Circuit affirmed the District Court's denial of leave to amend the complaint to name tribal officials as defendants. Although the amended complaint sought "to

[1] *See also Virginia Office for Protection & Advocacy v. Stewart* __ U.S. __, 131 S.Ct. 1632, 1638 (2011) (*Ex Parte Young* doctrine not applicable when state is the real, substantial party in interest); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) ("general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949) ("the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign").

name individual tribal council members as defendants, it is clear from 'the essential nature and effect' of the relief sought that the tribe 'is the real, substantial party in interest.'" *Shermoen v. U.S.*, 982 F.2d 1312 (9th Cir. 1992) (*quoting Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945)). *Shermoen* observed that "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,', or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Id.* (*quoting Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

Shermoen acknowledged the *Ex Parte Young* fiction, but observed that,

> "'a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the ***disposition of unquestionably sovereign property***.'"

Shermoen, 982 F.2d at 1320 (*quoting Larson*, U.S. 337 at 691 n. 11) (emphasis added). *See also State of Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir.1969). In other words, "if the relief sought will operate against the sovereign, the suit is barred." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002).

Here, as in *Shermoen*, "[t]he relief sought ... would prevent the absent tribe[] from exercising sovereignty" over their federal trust lands. *Shermoen*, 982 F.2d at 1320. "It is difficult to imagine a more intolerable burden on governmental functions." *Id.* Plaintiffs seek to "interfere with the [Tribe's] public administration" of its Indian lands, *id.*, by removing the Tribe's lands from federal trust status, and declaring it not a "reservation" and not "Indian lands" over which the Tribe can exercise governmental authority. FAC, Prayer for Relief ¶ A. Plaintiffs' requested declaration that the Tribe's lands are "held in fee" and not "in trust for the JIV" and that they are subject to "State and local taxation and regulation," FAC Prayer for Relief, ¶ E, would "restrain the [Tribal] Government from acting" with respect to those lands.

Shermoen, 982 F.2d at 1320. As previously noted, tribal governmental authority is closely linked to having federal Indian lands. *See Opening Brief,* docket no. 23, at p. 14 of 18: 23--15:2 and cases cited therein. Here, because "the relief sought will operate against the sovereign, the suit is barred." *Dawavendewa*, 276 F.3d at 1160. For this reason, this suit should be dismissed with prejudice as against defendant Chairman Hunter.

a. *Salt River Projects* Is Readily Distinguishable and Actually Supports Chairman Hunter's Motion to Dismiss

Plaintiffs claim that *Salt River Projects* supports their opposition. It does not. In that case, a power plant owner/operator sued Navajo tribal officials to enjoin them from applying tribal labor laws. Plaintiff argued that federal law prohibited the Tribe from applying its laws: "All present existing Indian uses of any land described herein are hereby extinguished and prohibited for the term of the § 323 Grant ...." *Salt River Project v. Lee*, 672 F.3d 1176, 1178 fn. 2 (9th Cir. 2012). The lease issued under 25 U.S.C. § 323 provided in pertinent part that the "Tribe covenants that ... it will not directly or indirectly regulate or attempt to regulate the Lessees in the ... operation of the Navajo Generation Station ...." *Id*. at 1178 fn. 1.

The requisite nexus between the tribal official defendants and the federal law allegedly violated was plainly present. The tribal official defendants -- the Navajo Labor Relations Director, the Navajo Labor Commission, and judges of the Tribe's Court -- were undisputedly enforcing tribal law that the complaint alleged violated federal law. *See* 672 F.3d at 1178. The "complaint specifically alleged that the tribal officials were acting 'beyond [their] jurisdiction, without basis in law, and in violation of federal law' – including the federal statutory right-of-way." 672 F.3d at 1181.

Here by contrast, there is no allegation that Chairman Hunter took any of the actions plaintiffs complain of, be it issuing the purported ILD, taking the Tribe's land into federal trust status, or considering approval of the Tribe's contract with its development partner. Nor could

plaintiffs amend to make such allegations, as those actions are plainly matters for federal – not tribal – officials and agencies to undertake. Congress has not delegated to tribal officials the authority to make Indian Lands Determinations under IGRA, to take land into federal trust for the benefit of tribes, or to approval gaming development and management agreements.

b. *Dawavendewa* Supports Chairman Hunter's Motion

Plaintiffs' opposition attempts to distinguish *Dawavendewa* arguing that "tribal officials were not named in that case." Plaintiffs' Oppo. at 8:15. Plaintiffs miss the point. Dawavendewa was a Hopi tribal member who challenged a hiring preference for Navajo tribal members. The "district court dismissed Dawavendewa's complaint for failure to join the [Navajo] Nation as an indispensable party." *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1153 (9th Cir. 2002). The Ninth Circuit affirmed that Rule 19 holding, and "further conclude[d] that ***tribal officials cannot be joined*** to replace the immune Nation; rather, the Nation itself is indispensable to this suit." *Id.* (emphasis added). The Ninth Circuit expressly considered the *Ex Parte Young* doctrine, *see id.* at 1159, but rejected it "as an attempted end run around tribal sovereign immunity," just as Plaintiffs have attempted to do here by adding Chairman Hunter's name to the FAC. *Id.* at 1160. "In *Shermoen*, we addressed a similar ploy hatched by a plaintiff attempting to circumvent tribal sovereign immunity.... [P]laintiffs sought to file a second amended complaint, naming individual members of the Hoopa Valley Tribe's governing council as defendants." *Id*. The Ninth Circuit "reject[ed] plaintiff's attempt to prolong its suit" by amending the complaint to name tribal officials. *Id*. The court "reiterated the general rule: 'a suit is against the sovereign if [the] judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.'" *Id*. (*quoting Shermoen*, 982 F.2d at 1320). The court observed that "even if Dawavendewa alleged some

wrongdoing on the part of Nation officials, his real claim is against the Nation itself." *Id*. at 1161. The court looked to the true nature of plaintiffs' suit: "At bottom," the court concluded, "the lease at issue is between [defendant Salt River Project] and the [Navajo] Nation, and the relief Dawavendewa seeks would operate against the Nation as a signatory to the lease. As such, we reject Dawavendewa's attempt to circumvent the Nation's sovereign immunity by joining tribal officials in its stead." *Id.* at 1161. Here, at bottom, plaintiffs seek to strip the Tribe of the benefits of its federal Indian lands, of its governmental authority over those lands, of its federal statutory right to operate a government gaming enterprise on its lands, and of its contractual relationship with its development partner. This Court should reject plaintiffs' attempt to name Chairman Hunter "as an attempted end run around tribal sovereign immunity ...." *Id.* at 1160.

3. Statutory Remedies Obviate the Need for the *Ex Parte Young* Doctrine

A federal action against a state officer based on *Ex Parte Young* is not permitted where Congress has prescribed a "detailed remedial scheme for enforcement against a [government] of a statutorily created right ...." *Seminole Tribe of Florida v. Florida,* 517 US 44, 74 (1996). Under such circumstances, courts should "hesitate before casting aside" the federal remedy and enjoining the government officer. *Id.*; *see also Sofamor Danek Group, Inc. v. Brown,* 124 F.3d 1179, 1184 (9th Cir. 1997). Congress has already prescribed remedies for alleged violations of the IRA, NEPA and IGRA. Federal officials' compliance with the former two statutes may be challenged under the APA, as plaintiffs have done here.

IGRA provides its own detailed remedial scheme. IGRA requires the States to negotiate in good faith with Tribes regarding gaming activities on tribal lands. *See* 25 U.S.C. § 2710(3). In *Seminole Tribe*, the Court noted that IGRA authorized suit against the State for failure to do so. It held that Florida's Governor could *not* be enjoined under *Ex Parte Young* from "continuing to violate" the federal law. The Court held that IGRA's detailed remedial scheme

allowing enforcement actions made it doubtful that Congress intended the States' Governor personally to be subject to enforcement sanctions. *Seminole Tribe*, 517 U.S. at 74-75.

For all of these reasons, *Ex Parte Young* is not available as a means of testing the legality of official actions under those statutes.

B. The FAC Fails to State A Claim Upon Which Relief May be Granted

The FAC alleges four claims for relief, none of which allege any violation of federal law by Chairman Hunter. The First Claim alleges that the federal defendants violated the Indian Reorganization Act of 1934 by taking land into trust for the Tribe. *See* FAC at ¶¶ 110-113, 115. Chairman Hunter is not alleged to have taken the Tribe's land into federal trust for the Tribe's benefit. Indeed, he is not alleged to have taken any action at all with respect to this claim. Nor could he, as the IRA authorizes only federal officials – not tribal officials – to take lands into trust for Indian tribes. *See, e.g.,* 25 U.S.C. § § 465, 467, 479. This claim also alleges that there is no evidence to support the federal defendants' supposed ILD that the Tribe's land is a reservation or qualifies as Indian lands under IGRA. It does not allege that Chairman Hunter issued the supposed ILD, nor could it since – as plaintiffs' have conceded – ILDs are issued by federal agencies, not tribal leaders. *See* FAC at ¶ 20 (NIGC is the federal agency "responsible for making Indian lands determinations under IGRA").

The FAC's Second Claim alleges that defendants infringed on state jurisdiction over non-public domain property by taking the Tribe's land into trust. This claim concedes that "[b]y definition, an Indian reservation is created by the [United States] Secretary [of the Interior], or an authorized federal land officer ...." FAC at ¶ 121. It alleges that the federal defendants' supposed ILD decided that the Tribe's land "is reservation or Indian land eligible for gambling free from State and local regulation ...." *Id.* at ¶ 127. There is no allegation that Chairman Hunter created the Tribe's reservation or is responsible for holding the Tribe's land in federal

trust free from state regulation. To the contrary, the FAC alleges that it is the federal government that takes title to Indian lands. *See, e.g.,* FAC ¶ 4 (IRA "authorizes the Secretary of Interior to take land into trust ..."); ¶ 46 ("This land was conveyed to the United States ...."); *id*. ex. D (1978 grant deed reflecting title in "The United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of Interior may designate"). Indeed, there are no operative allegations whatsoever against Chairman Hunter in or related to the Second Claim.

The FAC's Third Claim alleges that the defendants violated IGRA by issuing the supposed "ILD that the Parcel is a reservation or Indian lands eligible for gambling under IGRA ...." *Id*. at ¶ 132. Nowhere does the FAC allege that Chairman Hunter issued the supposed ILD and, as plaintiffs effectively conceded, he lacks the capacity to do so. *See* FAC ¶ 3 ("ILD is a final agency action of the NIGC").

The FAC's Fourth Claim is that "Defendants approval of the ILD violates ... NEPA ...." *Id*. at ¶ 139. Like the first three claims, this claim does not make any operative allegations against Chairman Hunter. Like the first three claims, it does not even mention him. Nor could it, as the FAC itself recognizes: "NEPA requires that 'all agencies of the Federal Government shall ... include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official.'" *Id*. at ¶ 140 (*quoting* 42 U.S.C. § 4332).

Plaintiffs' FAC fails to contain a "short and plain statement of the claim showing that the pleader is entitled to relief" as to Chairman Hunter. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (discussing Fed.R.Civ.P. 8(a)(2)). It fails to give Chairman Hunter fair notice of what the claim against him is and what the grounds are upon which it rests. *See Harris v. Procter & Gamble Cellulose Co.*, 73 F.3d 321 (11th Cir. 1996). It fails to plead facts sufficient "to show

that a legal wrong has been committed," it "omits an averment necessary to establish the wrong" purportedly alleged against Chairman Hunter and it "fails so to link" Chairman Hunter "with the wrong as to entitle the plaintiff to redress." *Sutton v. Eastern Viavi Co.*, 138 F.2d 959, 960 (7th Cir. 1943).

In sum, the FAC does not contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 677-78. It does not even rise to the level of "an unadorned, the-defendant-unlawfully-harmed-me accusation ...." *Id.* at 678. The FAC fails to plead facts that would allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. It alleges no misconduct by Chairman Hunter.[2]

IV. Conclusion

For the foregoing reasons, Chairman Hunter respectfully requests that the Court grant his motion to dismiss with prejudice.

Dated: May 16, 2014

Law Office of Frank Lawrence
By /s/
Frank Lawrence
Attorney for Jamul Indian Village
Chairman Raymond Hunter

[2]Even if the FAC had alleged a claim that the Tribe was constructing a casino in violation of federal law, as plaintiffs' opposition incorrectly claims, there is no allegation that Chairman Hunter is individually capable of starting or stopping any such construction. Nor could there be. The federal right to construct and operate a casino belongs only to federally-recognized tribal governments. Congress' primary purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1). Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands ...." *Id*. § 2701(5). IGRA provides that only tribal governments may conduct gaming on Indian lands. *See id.* at § 2710(b)(1), (d)(1)-(2). "[N]et revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." *Id*. § 2710(b)(2)(B). Chairman Hunter, both in his individual and official capacities, lacks the ability to start or stop the process of the Tribe developing and operating a government gaming enterprise.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF NEVADA)

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 578 Sutton Way, No. 246, Grass Valley, California 95945. On May 16, 2014 I caused the foregoing document described as **REPLY BRIEF IN SUPPORT OF CHAIRMAN RAYMOND HUNTER'S MOTION TO DISMISS** to be served on the interested parties in this action, identified below, by electronic filing and service pursuant to Local Rule 135 (Fed. R. Civ. P. 5), Case Management / Electronic Case Files docketing and file system of the above referenced court:

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[x] ELECTRONIC SERVICE pursuant to Local Rule 135 (Fed. R. Civ. P. 5), Case Management / Electronic Case Files docketing and file system.

Executed on May 16, 2014, at Nevada City, California.

s
Frank Lawrence