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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

BLUE LAKE RANCHERIA, a federally recognized Indian Tribe, et al.,

Plaintiffs,

vs.

MARTY MORGENSTERN, individually and in his capacity as Secretary of the California Labor and Workforce Development Agency, et al.,

Defendants.

UNITED STATES,

Intervenor.

CASE NO. **2:11-cv-01124-JAM-JFM**

Judge: **Hon. John A. Mendez**
Courtroom: **6**
Date: **March 11, 2015**
Time: **9:30 a.m.**

Date of Filing: **April 26, 2011**
Date of Trial: **May 23, 2016**

PLAINTIFF BLUE LAKE RANCHERIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF CLAIMS

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Plaintiff Blue Lake Rancheria ("the Tribe") respectfully submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment or, in the alternative, Summary Adjudication of Claims. This motion is not being brought on behalf of plaintiffs Blue Lake Rancheria Economic Development Corporation or Mainstay Business Solutions itself, as Defendants' counsel have indicated they intend to seek discovery as to whether those plaintiffs are entitled to tribal sovereign immunity.

I. INTRODUCTION

By this Motion, the Tribe seeks summary judgment or, in the alternative, partial summary judgment against California state official named Defendants Marty Morgenstern, in his official capacity as Secretary of the California Labor and Workforce Development Agency; Pam Harris, in her official capacity as Chief Deputy Director of the Employment Development Department of the State of California ("EDD"); Jack Budmark, in his official capacity as a Deputy Director of the Tax Branch of the EDD; and Sarah Reece, in her official capacity as an Authorized Representative of the EDD[1].

This action arises from a dispute which began in approximately mid-2008 between Mainstay Business Solutions ("Mainstay") and the EDD over the amount of money that EDD claimed Mainstay owed to it. Mainstay is a division of a federally-chartered tribal corporation. Mainstay disputed the amount calculated by EDD and attempted to discuss this with EDD on numerous occasions. EDD instead chose to commence collection activities not just against Mainstay, but against all the plaintiffs, including the Tribe. Without any prior notice to the Tribe, the EDD recorded and filed Notices of State Tax Lien against the Tribe across California. Those collection activities violated federal tribal sovereign immunity law.

Under federal tribal sovereign immunity law, Defendants, in certain instances, can impose a tax on the Tribe, but they cannot *enforce* collection of the tax unless the Tribe expressly waived its

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[1] Summary judgment is sought as to the listed Defendants in their official capacities only. Any successors-in-office have been substituted automatically into this action pursuant to Federal Rule of Civil Procedure 25(d). Summary judgment is not being sought against intervenor United States of America, Defendant Kathy Dunne, or any Defendant in his or her individual capacity.

sovereign immunity, or Congress has abrogated that immunity. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Neither waiver nor abrogation has occurred in this case. Defendants' collections efforts also violate the Tribe's substantive rights pursuant to 25 U.S.C. § 476(e), because they unlawfully encumbered tribal lands and assets without the Tribe's consent.

The Complaint states two claims for relief. The First Claim for Relief seeks a declaratory judgment declaring the unlawfulness of Defendants' collection efforts. The Second Claim for Relief seeks a permanent injunction prohibiting Defendants from continuing those efforts. There are no material facts in dispute in this action as to the Tribe's entitlement to sovereign immunity. This Court should therefore grant summary judgment in favor of the Tribe as to Plaintiffs' claims.

II. FACTUAL BACKGROUND

A. The Tribe, EDCo, and Mainstay

The Tribe is a federally-recognized Indian tribe. (Statement of Undisputed Material Facts ("UMF"), ¶ 1.) The Tribe is governed by a written constitution, adopted under the Indian Reorganization Act of 1934, 25 U.S.C. section 476 ("the IRA"), and approved by the Secretary of the United States Department of Interior, Bureau of Indian Affairs ("the Tribal Constitution"). (UMF, ¶ 2.) Under the Tribe's Constitution, the Tribe is governed by a five-member Business Council, with certain powers reserved to the Tribe's General Council, which is made up of the Tribe's voting members. (UMF, ¶ 3.)

The Tribe's Constitution provides specific procedures by which the sovereign immunity of the Tribe may be waived. (UMF, ¶ 4.) The Tribe has never given an express waiver of its sovereign immunity to EDD or any of the Defendants through these procedures. (UMF, ¶ 5.)

The United States owns approximately 91 acres of land located in Humboldt County, California, in trust for the tribe. (UMF, ¶ 6.) The Tribe also owns some lands in fee within Humboldt County, including parcels in Manila, California, which it purchased to protect an important Native American archeological site. (UMF, ¶ 7.)

Blue Lake Rancheria Economic Development Corporation ("EDCo") is the Tribe's federally-chartered tribal corporation formed pursuant to 25 U.S.C. section 477 (Section 17 of the IRA), by a charter issued by the U.S. Department of the Interior, Bureau of Indian Affairs, on December 29, 2004. (UMF, ¶ 8.)

Mainstay is a division of EDCo. (UMF, ¶ 9.) From 2003 through 2011, Mainstay operated a temporary staffing and employee leasing business which placed employees on a temporary or permanent basis with companies throughout California and other states. (UMF, ¶ 10.)

B. California's State Unemployment Insurance Program and Mainstay's Participation

The Federal Unemployment Tax Act ("FUTA") is part of a joint federal-state program for unemployment insurance. 26 U.S.C. § 3301 et seq.; *Inlandboatmen's Union of Pac. Nat'l Health Benefit Trust v. United States*, 972 F.2d 258, 259 (9th Cir. 1992). California's Unemployment Insurance Program ("UI Program") is authorized by FUTA, and is executed through California's Unemployment Insurance Code ("UIC"). 26 U.S.C. § 3304. *See generally* Cal. Unempl. Ins. Code. The EDD operates California's UI Program which provides benefits to qualified unemployed workers in the State of California. Cal. Unempl. Ins. Code. §§ 301-306.

FUTA imposes a federal excise tax on all employers. 26 U.S.C. § 3301. Employers who participate in state unemployment insurance programs receive a credit against the FUTA tax. 26 U.S.C. § 3302. FUTA exempts from the federal excise tax services performed in the employ of an Indian tribe. 26 U.S.C. § 3306(c)(7); *see also* 26 U.S.C. § 3306(u) (defining Indian tribe to include business enterprises wholly owned by an Indian tribe). In 2001, FUTA was amended to require states to permit Indian tribes to make an election to be treated as a "reimbursable employer." *See* 26 U.S.C. § 3309(d). A "reimbursable employer" is one which elects to reimburse the State UI fund on a dollar-for-dollar basis for all benefits paid to their former employees. Cal. Unempl. Ins. Code § 803(b).

In 2003, Mainstay elected to participate in the California UI Program as a reimbursable employer as permitted by FUTA. (UMF, ¶ 11.) Mainstay participated as a reimbursable employer from approximately June 17, 2003 to June 30, 2010. (UMF, ¶ 12.) The Tribe did not execute any

waiver of sovereign immunity related to Mainstay's participation as a reimbursable employer. (UMF, ¶ 13; *see also* UMF, ¶ 5.)

Beginning in approximately mid-2008, a dispute arose between Mainstay and the EDD regarding whether the EDD had made improper assessments against Mainstay. (UMF, ¶ 14.)

C. Defendants' Lien Enforcement Actions

On April 8, 2011, Defendants recorded Notices of State Tax Lien, purportedly pursuant to California Government Code § 7171, against the Tribe in various California counties, including the Counties of Sacramento, Humboldt, Los Angeles, Orange, San Diego, Alameda, Monterey, San Bernardino, Fresno, Solano, San Joaquin, Riverside and Santa Clara, and filed a Notice of State Tax Lien with the California Secretary of State. (UMF, ¶ 15.) Pursuant to California Government Code section 7171, state tax liens attach to all of the real and personal property, including after-acquired property, of the named taxpayer. Cal. Govt. Code § 7171(c). The recording and filing of Notices of State Tax Lien perfect the state tax lien against subsequently perfected judgment liens, security interests, and deeds of trust. Thus, the Notices of State Tax Lien encumbered all real and personal property of the Tribe, without regard to whether such property was tribal trust property. Each of the Notices of State Tax Lien was for an amount exceeding $16.4 million. (UMF, ¶ 16.)

On or about April 20, 2011, counsel for plaintiffs sent EDD a letter asking it to release all recorded and filed notices of state tax lien. (UMF, ¶ 17.) Plaintiffs' counsel also asked the EDD to provide copies of all recorded and filed Notices of State Tax Lien, to detail all enforced collection activities, and to notify Plaintiffs' counsel of all planned enforcement collection activities. (UMF, ¶ 18.) On or about April 22, 2011, Plaintiffs' counsel received a letter from EDD stating that it would not provide notice to plaintiffs' counsel of any of its planned collection activities, and that its actions taken to date would remain "undisturbed." (UMF, ¶ 19.) The EDD subsequently issued subpoenas to Plaintiffs' banks seeking records relating to Plaintiffs' assets. (UMF, ¶ 20.)

Each of the Defendants against whom this Motion is brought was directly involved in the EDD's collections efforts. Defendant Morgenstern was (and his successor is) the Secretary of the California Labor and Workforce Development Agency, of which the EDD is a department. (UMF, ¶

21.) He also wrote a letter to Mainstay defending the EDD's collection activity and arguing that it does not violate tribal sovereign immunity. (UMF, ¶ 22.) Defendant Harris was (and her successor is) the Chief Deputy Director of the Employment Development Department of the State of California, and was acting as the head of the EDD in April 2011. (UMF, ¶ 23.) Defendant Budmark was the Deputy Director of the Tax Branch of the EDD. (UMF, ¶ 24.) He was also copied on correspondence from the EDD to Mainstay regarding Mainstay's reimbursement obligation. (UMF, ¶ 25.) Defendant Reece, as the "Authorized Representative" of EDD, signed each of the Notices of State Tax Lien that were recorded with County Recorders and filed with the California Secretary of State, including in Humboldt County where the Tribe's reservation land is situated. (UMF, ¶ 26.)

D. Procedural History of this Action

Plaintiffs filed the Complaint for Declaratory Relief and Injunctive Relief ("Complaint") on April 26, 2011. (Docket Item No. 1.) On August 11, 2011, this Court issued an Order (the "Preliminary Injunction Order") granting plaintiffs' Motion for Preliminary Injunction finding, among other things, that plaintiffs had shown a probability of prevailing on their claims. (Docket Item No. 41.) In the Preliminary Injunction Order, the Court enjoined Defendants from efforts to collect unemployment contributions and ordered them to release existing liens on plaintiffs' assets.

On June 15, 2011, Defendants filed a Motion to Dismiss this action, which this court denied in its Order of December 6, 2011. (Docket Items Nos. 26 & 53.)

Defendants filed a Notice of Appeal from the Preliminary Injunction Order granting the preliminary injunction, but subsequently dismissed their appeal. (Docket Items Nos. 42 & 45.)

III. SUMMARY OF THE COMPLAINT

The Complaint states two claims for relief against Defendants.

The First Claim for Relief is for Declaratory Relief as to all Defendants. In this claim, the Tribe seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring that Defendants' collection actions violate the Tribe's tribal sovereign immunity under federal law and unlawfully

encumber tribal lands and other tribal assets, both on and off the reservation, in violation of federal law, including 25 U.S.C. § 476. (*See* Complaint, pp. 6-7.)

The Second Claim for Relief is for Injunctive Relief as to all Defendants. In this claim, the Tribe seeks preliminary and permanent injunctive relief pursuant to 28 U.S.C. section 2202 prohibiting Defendants' violation of the Tribe's tribal sovereign immunity and federal law, including 25 U.S.C. § 476, through their collections activities. (*See* Complaint, p. 7.) Specifically, the Tribe seeks an order enjoining further collection activities by Defendants, compelling Defendants to notify all parties it has served with a Notice of State Tax Lien that the liens are released, and compelling Defendants to record a State Tax Lien Release in each and every county in which such a lien was recorded and with the California Secretary of State. (*See id.*)

IV. STANDARDS FOR SUMMARY JUDGMENT

"A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed.R.Civ.P. 56(b).

When evaluating a motion for summary judgment, the courts view the evidence through the prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). "Summary judgment should be granted where the evidence is such that it would require a directed verdict for the moving party." *Id.* at 251 (internal quotation omitted). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Id.* at 247-48.

Summary judgment is not a disfavored procedural shortcut, but a "principal tool by which factually insufficient claims or defenses can be isolated and prevented from going to trial with the

attendant unwarranted consumption of public and private resources." *U.S. ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995).

V. ARGUMENT

A. The Tribe is Entitled to Summary Judgment on the First Claim for Declaratory Relief

A party's right to a declaratory judgment by a federal court is governed by 28 U.S.C. § 2201. That section provides: "In a case of actual controversy within its jurisdiction…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 a declaration." 28 U.S.C. § 2201. Declaratory relief may be obtained through summary judgment. *State of Cal., Acting By and Through the Dept. of Water Resources v. The Oroville-Wyandotte Irrigation Dist.*, 411 F.Supp. 361, 368 (E.D. Cal. 1975); *see also* Fed.R.Civ.P. 57 ("These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201").

1. This Case Involves an "Actual Controversy" Pursuant to 28 U.S.C. § 2201.

To show an "actual controversy" under section 2201, there must be "a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech*, 549 U.S. 118, 127 (2007); *Scott v Pasadena Unified School Dist.*, 306 F.2d 646, 658 (9th Cir. 2001).

There is a substantial controversy here between the Tribe and the Defendants, who have adverse interests. Defendants believe that they are entitled to encumber the Tribe's assets with state tax liens, and did in fact do so prior to this Court's issuance of a preliminary injunction. The Tribe asserts that Defendants may not encumber Defendants' assets with state tax liens pursuant to federal law, including the doctrine of tribal sovereign immunity and 25 U.S.C. 476(e).

The substantial controversy between the parties, moreover, is "of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *MedImmune*, 549 U.S. 118 at 127. Defendants had already begun the process of encumbering the Tribe's assets prior to this Court's preliminary injunction prohibiting those actions. Defendants' position as to the legality of these

actions and their continuing intention to collect from the Tribe demonstrates that the need for declaratory relief is real and immediate.

2. The Tribe is Entitled to a Judgment Declaring that Defendants' Collection Efforts are Barred by Tribal Sovereign Immunity

Defendants' enforced collection actions against the Tribe are barred by tribal sovereign immunity. Federally recognized Indian tribes are immune from suit by any entity or individual, including state governmental agencies. *See, e.g., Okla. Tax Comm'n v. Potawatomi Tribe,* 498 U.S. 505, 50 (1991). Indian tribes are only subject to suit in two circumstances: (1) if Congress has authorized such suit by expressly abrogating sovereign immunity; or (2) if the tribe has waived its sovereign immunity. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).

Tribal sovereign immunity is a matter of federal law and cannot be diminished by the States. *Kiowa,* 532 U.S. at 756. Although a State may have authority to tax or regulate tribal activities outside of Indian country, it does not mean that an Indian tribe no longer enjoys immunity from suit. *Id.* at 755. Immunity from suit includes efforts by a state governmental agency to collect taxes by means of tax liens and levies. *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization,* 492 F. Supp. 55 (N.D. Cal. 1979), *aff'd in part*, 757 F.2d 1047 (9th Cir. 1985)[2]; *see also Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 520-522 (5th Cir. 1966) (holding that tribe's waiver of liability in "sue and be sue" clause of charter did not waive tribe's immunity to levy, lien, or attachment). The Supreme Court of the United States has recognized that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa,* 523 U.S. at 755; *see also Okla. Tax Comm'n,* 498 U.S. at 514 (noting that sovereign immunity bars the State from "pursuing the most efficient

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[2] The district court's rulings published at 492 F. Supp. 55 were affirmed in part by the Court of Appeals; the Court of Appeals' decision also reversed later rulings by the district court which were unfavorable to the tribal plaintiff, and the U.S. Supreme Court reversed in part the Court of Appeals' holding respecting those later rulings. *See Cal. St. Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

remedy" but adequate alternatives exist, such as lobbying Congress for legislation). Thus, absent congressional abrogation or waiver, the Tribe is immune from Defendants' collection activities.

a. The Federal Unemployment Tax Act ("FUTA") Did Not Abrogate Tribal Sovereign Immunity.

Defendants have previously argued in this action that FUTA abrogates the Tribe's sovereign immunity. This Court has correctly held against Defendants regarding that argument.

To abrogate tribal sovereign immunity, Congress must "unequivocally" express that purpose. *Michigan v. Bay Mills Indian Community* ("*Bay Mills*"), 134 S.Ct. 2024, 2031 (2014); *Santa Clara Pueblo,* 436 U.S. at 58. Abrogation may not be implied. *Id.*; *Memphis Biofuels, LLC v. Chicasaw Nation Indus.,* 585 F.3d 917, 921 (6th Cir. 2009).

For example, in the Indian Gaming Regulatory Act, Congress has expressly abrogated tribes' immunity from suit by a state by granting jurisdiction to the United States district courts over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact. . . ." 25 U.S.C. § 2710(d)(7)(A)(ii). However, even this express abrogation is limited by its express terms. *Bay Mills*, 134 S.Ct. at 2032-2035 (holding that IGRA abrogation did not apply to Indian gaming activity occurring *outside* of Indian lands).

The mere applicability of a federal law to tribes is insufficient to abrogate their sovereign immunity; the abrogation still must be provided by Congress in express terms. *See, e.g., Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343, 357 (2d Cir. 2000) (federal Copyright Act applies to tribes but does not abrogate tribal sovereign immunity); *Fla. Paraplegic, Ass'n, Inc. v. Misccosukee Tribe of Fla.,* 166 F.3d 1126, 1131-32 (11th Cir. 1999) (federal American with Disabilities Act applies to Indian tribes, but tribal sovereign immunity bars action against tribe to enforce the act); *Memphis Biofuels, LLC v. Chicasaw Nation Industries*, 585 F.3d 917, 920-921 (6th Cir. 2009) (Section 17 of IRA does not abrogate sovereign immunity of a Section 17 tribal corporation); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1137-1138 (N.D. Okla. 2001) (Copyright Act applies to tribal corporation formed under tribal law, but does not abrogate its sovereign immunity); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. Conn. 2004) (Family and

Medical Leave Act does abrogate tribal sovereign immunity); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035-1036 (11th Cir. Ala. 2001) (employment discrimination claim pursuant to 42 U.S.C. §1981 barred by sovereign immunity); *compare Krystal Energy Corp. v. Navajo Nation,* 357 F.3d 1055 (9th Cir. 2004) (finding express Congressional abrogation of sovereign immunity in the Bankruptcy Code, 11 U.S.C. § 106(a)).

FUTA contains no statement abrogating tribal sovereign immunity, nor does it even mention sovereign immunity. 26 U.S.C. § 3301 *et seq.* Without express Congressional abrogation, the Tribe enjoys sovereign immunity from the Defendants' collection actions. Any argument that FUTA abrogates tribal sovereign immunity would be an argument of abrogation by implication, which is precluded by Supreme Court law. *Bay Mills*, 134 S.Ct. at 2031.

Congress could have expressly abrogated sovereign immunity; it did not. Without express Congressional abrogation, the Tribe enjoys sovereign immunity from the Defendants' collection actions.

b. The Tribe Has Not Waived Sovereign Immunity.

In the absence of Congressional abrogation, Indian tribes enjoy sovereign immunity unless there is a "clear" waiver of that immunity. *Okla. Tax Comm'n,* 498 U.S. at 509. Waiver of sovereign immunity cannot be implied or imputed, but rather it must be unequivocally expressed. *Santa Clara Pueblo,* 436 U.S. at 58; *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1379 (8th Cir. 1985) ("[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation."). Here, the Tribe did not expressly waive its sovereign immunity. (UMF, ¶¶ 4, 5, 14.)

The Tribe's Constitution provides specific procedures by which the sovereign immunity of the Tribe may be waived. (UMF, ¶ 4.) The Tribe gave no express and unequivocal waiver of its sovereign immunity as to Defendants or EDD through these procedures. (UMF, ¶ 5.)

In sum, because Congress has not abrogated, and the Tribe has not waived tribal sovereign immunity, Defendants' collection activities are unlawful. This Court should therefore grant summary judgment on in favor of the Tribe on its First Claim for Relief for Declaratory Relief.

3. The Tribe is Also Entitled to a Judgment Declaring that Defendants' Collection Efforts are Barred by 25 U.S.C. § 476(e)

In addition to violating the Tribe's sovereign immunity, Defendants' collection activities also violate the IRA, specifically 25 U.S.C. § 476(e), by unlawfully encumbering tribal lands and assets without the consent of the Tribe. Section 476(e) provides the Tribe authority to "prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . . ." The Ninth Circuit has viewed section 476(e) as endowing tribes with the substantive right to have their lands encumbered only with the tribes' consent. In *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), our Court of Appeals noted that the tribal plaintiff, which like Blue Lake Rancheria was organized under the IRA, would be able to invoke 25 U.S.C. section 476 to thwart any attempt by San Bernardino County to lease tribal property without the tribe's consent. *Id.* at 1259. The Ninth Circuit reasoned that section 476 "explicitly gives the tribe the right to prevent the lease of tribal lands." *Id.* Here, Defendants' encumbrances on the Tribe's property similarly violate its rights under section 476(e).

B. The Tribe is Entitled to Summary Judgment on its Second Claim for Injunctive Relief

Permanent injunctions may be granted on summary judgment. *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *see also Latta v. SEC*, 356 F.2d 103, 103 (9th Cir. 1965).

A party's right to an injunction based on a declaratory judgment is governed by 28 U.S.C. § 2202. *Powell v. McCormack*, 395 U.S. 486, 499 (1969). That section provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Although a claim pursuant to section 2202 is based on a successful claim for declaratory relief pursuant to section 2201, it is an independent claim for relief. *See e.g.*, *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522 (2d Cir. 1958).

The types of "further relief" available pursuant to section 2202 include an injunction. *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *see also Penthouse Intern., Ltd v. Barnes*, 792 F.2d 943, 949-950 (9th Cir. 1986). The injunction may be granted concurrently with section 2201

declaratory relief; a separate hearing is not necessary so long as the defendant had notice and an opportunity to be heard regarding the possible injunction prior to the issuance of the declaratory relief. *See Penthouse Intern., Ltd*, 792 F.2d at 950 (holding that post-trial order providing simultaneous declaratory and injunctive was proper pursuant to sections 2201 and 2202).

Upon satisfaction of the necessary elements for an injunction, district courts are empowered to enjoin state officials from enforcing state taxes in violation of tribal sovereignty. *See Okla. Tax Comm'n,* 498 U.S. at 509-11. In *Okla. Tax Comm'n*, a tribe filed an action in federal district court seeking an injunction against enforcement of sales taxes on cigarettes at a tribal store. *Id.* at 507. The district court granted the injunction in part (as to sales of cigarettes to tribe members) and the Court of Appeals affirmed that injunction. *Id.* at 508. The Supreme Court granted certiorari and, although it acknowledged the state's right to impose the tax on sales to non-tribe-members, affirmed the issuance of the injunction and the Court of Appeals' instructions to dismiss the state's counterclaims seeking to enforce the sales tax. *Id.* at 509-11. In response to the state's argument that preventing it from enforcing the tax on sales to non-tribe-members gave them "a right without a remedy," the Supreme Court noted that the state had other remedies against non-tribe entities, and that if those were insufficient, the state could "seek appropriate legislation from Congress." *Id.* at 514.

A plaintiff seeking a permanent injunction must satisfy four elements: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and a defendant, a remedy in equity is warranted; and (4) that the pubic interest would not be disserved by a permanent injunction." *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006). Each of those elements is satisfied here.

1. The Tribe Has Suffered and Will Suffer Irreparable Injury for Which There is No Adequate Legal Remedy.

Without a permanent injunction enjoining Defendants' collections efforts, the Tribe will suffer irreparable harm to their tribal sovereign immunity, to which they have a right of "full enjoyment." *See Kiowa,* 532 U.S. at 1172 (irreparable harm found where tribe forced to defend

itself in court lacking jurisdiction). The element of irreparable harm is established when the court, after a full trial, would be unable to provide an effective monetary remedy. *Winnebago Tribe of Nebraska v. Stovall ("Winnebago I"),* 216 F.Supp.2d 1226, 1232 (D. Kan. 2002); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

The Defendants' violation of the Tribe's sovereign immunity through its collections activity constitutes a harm for which there is no effective monetary remedy, for at least two reasons recognized by the courts. First, a violation of sovereign immunity is an intangible injury for which damages would be difficult to quantify. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (intangible injuries qualify as irreparable harm); *see also Winnebago I,* 216 F.Supp.2d at 1233 (sovereign immunity "cannot be measured in dollars"); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2010) (damages caused by state interference with tribal self-government is not easily subject to valuation).

Second, just as in *Prairie Band of Potawatomi Indians*, the Tribe may have no effective remedy here for violations of its sovereign immunity due to the EDD's and Defendants' own sovereign immunity. *See Prairie Band of Potawatomi Indians*, 253 F.3d at 1251. The Eleventh Amendment bars suits for damages against states, state agencies, and state officials in their official capacity. *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999). The *Ex Parte Young* exception to the Eleventh Amendment does not apply to suits seeking damages. *Cardenas v. Anzai*, 311 F.3d 929, 935 (9th Cir. 2002). Moreover, a tribe may not bring claims pursuant to 42 U.S.C. § 1983 for civil rights violations arising solely from its status as a sovereign. *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 708-712 (2003).

Thus, absent a permanent injunction, Defendants' actions will cause certain and great damage to the Tribe's right to sovereign immunity that cannot be remedied monetarily.

2. An Injunction is Warranted in Light of the Balance of Hardships.

The balance of hardships element requires the Court to balance the claims of injury by each party and to consider the effects of granting the permanent injunction on each party. *Fisher v. Kealoha*, 976 F.Supp.2d 1200, 1208 (D. Haw. 2013). Here, the harm to the Tribe if a permanent injunction is not issued greatly outweighs the effects on Defendants if the permanent injunction is issued. As described above, if the Court does not issue a permanent injunction, the harm to the Tribe's sovereignty will be certain and great.

On the other hand, there is no legitimate potential harm to Defendants if the permanent injunction is issued. Defendants have no right under the doctrine of tribal sovereign immunity and federal law to encumber the Tribe's assets. The requested injunction would, therefore, impose no cognizable burden on Defendants other than to ensure that they comply with federal law and this Court's declaration of the Tribe's rights.

The irreparable harm to the Tribe's sovereignty if the Court does not grant a permanent injunction greatly outweighs any cognizable harm to Defendants if the Court enjoins Defendants' collection activities. *See Winnebago I,* 216 F.Supp.2d at 1232-33.

3. The Public Interest Would Not Be Disserved by a Permanent Injunction.

Tribal sovereign immunity, self-sufficiency, and self-government are all important public concerns. *See Winnebago I,* 216 F.Supp.2d at 1233-34; *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson,* 874 F.2d 709, 716 (10th Cir. 1989) ("[T]he injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government."); *Okla. Tax Comm'n,* 498 U.S. at 510 ("Congress has consistently reiterated its approval of the [sovereign] immunity doctrine.") An order enjoining Defendants from violating the Tribe's sovereign immunity and illegally causing it harm to would serve, not disserve, the public interest.

Because all four elements required for a permanent injunction are satisfied, this Court should grant summary judgment on the Tribe's Second Claim for Relief.

C. Neither the Eleventh Amendment, Nor the Tax Injunction Act Affect This Court's Jurisdiction

In the context of Defendants' Motion to Dismiss and their Opposition to Plaintiffs' Motion for a Preliminary Injunction, Defendants have previously argued that this Court lacks jurisdiction due to their alleged Eleventh Amendment immunity and due to the Tax Injunction Act. On both occasions, this Court correctly disagreed with those arguments. Defendants do not have Eleventh Amendment immunity because under *Ex Parte Young*, 209 U.S. 123 (1908), and *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000) a court may hear a suit for prospective declaratory and injunctive relief against state officers. The Tax Injunction Act, moreover, does not apply to this action because that statute's jurisdictional bar does not apply to Indian tribes bringing suit under 28 U.S.C. section 1362. *Agua Caliente*, 223 F.3d at fn 5.

VI. CONCLUSION

For the reasons set forth herein, plaintiff Blue Lake Rancheria urges this Court to grant its Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment against Defendants Marty Morgenstern, Pam Harris, Jack Budmark, and Sarah Reece in their official capacities.

Dated: February 10, 2015.

BOUTIN JONES INC.

By: /s/ Michael E. Chase
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