

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BLUE LAKE RANCHERIA, a  
federally-recognized Indian  
Tribe; BLUE LAKE RANCHERIA  
ECONOMIC DEVELOPMENT  
CORPORATION, a federally-  
charted tribal corporation;  
and MAINSTAY BUSINESS  
SOLUTIONS, a federally-  
authorized division of Blue  
Lake Rancheria Economic  
Development Corporation,

Plaintiffs,

v.

DAVID LANIER, in his official  
capacity as Secretary of the  
California Labor and  
Workforce Development Agency;  
PATRICK W. HENNING, JR., in  
his official capacity as  
Director of the Employment  
Development Department of the  
State of California ("EDD"),  
PAM HARRIS, individually and  
in her official capacity as  
Chief Deputy Director of the  
EDD, JACK BUDMARK,  
individually and in his  
official capacity as Deputy  
Director of the Tax Branch of  
the EDD; TALBOTT SMITH,  
individually and in his  
capacity as a Deputy Director

No. 2:11-cv-01124-JAM-JFM

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

1 of the Unemployment Branch of  
2 the EDD; KATHY DUNNE,  
3 individually and in her  
4 official capacity as a Senior  
5 Tax Compliance Representative  
6 of the EDD; SARAH REECE,  
7 individually and in her  
8 official capacity as an  
9 Authorized Representative of  
10 the EDD,

Defendants.

Blue Lake Rancheria ("Plaintiff" or "the Tribe") alleges that the California Employment Development Department ("EDD") violated its tribal sovereign immunity by attaching liens on tribal assets. Plaintiff now moves for summary judgment. Although discovery remains open for several more months, Defendants have not raised any discoverable facts that could alter the Court's conclusion, described herein, that Plaintiff is entitled to summary judgment.<sup>1</sup>

#### I. UNDISPUTED FACTS AND PROCEDURAL BACKGROUND

Plaintiff is a federally-recognized tribe. Mobbs' Decl. ¶ 3 Exh. 1. For several years, a division of the Tribe's federally-chartered corporation called Mainstay Business Solutions ("Mainstay")<sup>2</sup> operated a "temporary staffing and employee leasing business." Ramos Decl. ¶ 3; Defendants' Response to Plaintiff's Statement of Facts ¶¶ 8-10. In 2003, Mainstay elected to participate in a joint federal-state unemployment insurance

---

<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 8, 2015.

<sup>2</sup> Mainstay and Blue Lake Rancheria Economic Development Corps are also plaintiffs in this matter, but they have not joined this motion for summary judgment.

1 program. See 26 U.S.C. § 3301 et seq.; Ramos Decl. ¶ 4.  
2 Mainstay became a "reimbursable employer." Ramos Decl. ¶ 4. As  
3 such, the state would pay former employees and Mainstay would  
4 later reimburse the state for those costs. See Cal. Unempl. Ins.  
5 Code § 803.

6 In 2008, a dispute arose as to the amount Mainstay owed in  
7 reimbursement. Ramos Decl. ¶ 7. When the parties were unable to  
8 resolve their dispute, EDD attached liens to the Tribe's property  
9 under California Government Code section 7171 in several  
10 counties. Ramos Decl. ¶ 8; see id. Exh. A. EDD also issued  
11 subpoenas to Plaintiff's banks seeking information about the  
12 Tribe's assets. Rubin Decl. ¶ 4; see id. Exh. C.

13 The Tribe filed suit against officers of EDD (collectively,  
14 "Defendants") seeking to enjoin their collection actions and  
15 cancel the liens, and for a declaratory judgment that Defendants'  
16 actions violated Plaintiff's sovereign immunity. See Compl.  
17 (Doc. #1) ¶¶ 34-41. The Tribe now brings this motion for summary  
18 judgment to dispose of all its claims (Docs. #82, 83).  
19 Defendants oppose the motion (Doc. #92) and, in the alternative,  
20 request that the Court defer adjudication until later in  
21 discovery, which is set to close in November. See Amended Pre-  
22 trial Scheduling Order (Doc. #79) at 3. Intervenor United States  
23 takes no position on this motion (Doc. #93).

24 ///

25 ///

26 ///

## 27 II. OPINION

### 28 A. Legal Standard

1 "An injunction is a matter of equitable discretion; it does  
2 not follow from success on the merits as a matter of course."  
3 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 32 (2008).  
4 The party seeking a permanent injunction must show "(1) that it  
5 has suffered an irreparable injury; (2) that remedies available  
6 at law, such as monetary damages, are inadequate to compensate  
7 for that injury; (3) that, considering the balance of hardships  
8 between the plaintiff and defendant, a remedy in equity is  
9 warranted; and (4) that the public interest would not be  
10 disserved by a permanent injunction." W. Watersheds Project v.  
11 Abbey, 719 F.3d 1035, 1054 (9th Cir. 2013) (citations and  
12 quotation marks omitted).

13 B. Judicial Notice

14 Defendants request judicial notice (Doc. #92-9) of several  
15 court filings and documents recorded or produced by the  
16 California Department of State. Because each is a matter of  
17 public record and Plaintiff does not dispute them, the Court  
18 takes judicial notice. See Fed. R. Evid. 201; see Santa Monica  
19 Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2  
20 (9th Cir. 2006); Lee v. City of Los Angeles, 250 F.3d 662, 689  
21 (9th Cir. 2001).

22 ///

23 ///

24 ///

25 ///

26 ///

27 C. Analysis

28 1. Success on the Merits

a. Sovereign Immunity

i. Defendants' Request to Defer  
Adjudication

Defendants request that the Court "defer[]" its ruling on sovereign immunity "until discovery is complete and the factual issue of the Tribe's waiver has been fully briefed." Opp. at 12:5-6. Plaintiff argues that Defendants have not met the requirements of Rule 56(d) to support this request. Reply at 1-3.

Rule 56(d) permits a court to defer consideration of a motion for summary judgment if a party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d). "The requesting party must show (1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." Family House & Finance Center, Inc. v. Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008). The party must also demonstrate that it was diligent in pursuing discovery. See In re Imperial Credit Indus., Inc. Sec. Litig., 252 F. Supp. 2d 1005, 1016 (C.D. Cal. 2003), aff'd sub nom. Mortensen v. Snavely, 145 F. App'x 218 (9th Cir. Aug. 17, 2005). Failure to comply with any of these requirements is grounds for denial of the request, and the court may proceed to summary judgment. Family House & Finance Center, 525 F.3d at 827; In re Imperial Credit Indus., Inc. Sec. Litig., 252 F. Supp. 2d at 1016 (citations omitted).

Defendants here have provided a declaration in support of

1 their request, see Bowers Decl. ¶ 2, but it does not justify a  
2 deferred ruling. The only paragraph of the declaration  
3 concerning sovereign immunity is paragraph 4.a., which puts forth  
4 the following "fact[]" that "likely exist[s]": "[Plaintiff]  
5 consented to [EDD's] collection through the Tribe's voluntary  
6 election of reimbursable financing of its unemployment insurance  
7 costs under 26 U.S.C. § 3309(d) and California Unemployment  
8 Insurance Code § 801 et seq." The declaration further describes  
9 Defendants' plan to "demand production of documents related to  
10 the Tribe's election and [to] depose the following current and/or  
11 former Tribal officers, employees, and/or agents: [enumerating  
12 individuals]." Bowers' Decl. ¶ 4.a.

13 The first problem with Defendants' declaration is that this  
14 purported "fact" is actually a legal conclusion. Sac & Fox  
15 Nation v. Hanson, 47 F.3d 1061, 1063 (10th Cir. 1995) (referring  
16 to "the legal question of when a party can assert sovereign  
17 immunity"); cf. Shapiro v. Republic of Bolivia, 930 F.2d 1013,  
18 1017 (2d Cir. 1991) (discussing "the essentially legal question  
19 of whether appellees' actions, as alleged, have triggered an  
20 exception to the general rule of foreign sovereign immunity");  
21 see Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 722 (9th  
22 Cir. 2008). Defendants suggest that waiver is a factual  
23 question, but none of their authorities support that proposition.  
24 See Opp. at 11.

25 A second problem is that the Court has already foreclosed  
26 Defendants' legal theory of waiver. Indeed, the Court has twice  
27 determined as a matter of law that neither 26 U.S.C. § 3309 nor  
28 Plaintiff's decision to participate affected the Tribe's

1 sovereign immunity. See Order Granting Plaintiffs' Motion for a  
2 Preliminary Injunction (Doc. #40) at 11-12; Order Denying  
3 Defendants' Motion to Dismiss (Doc. #53) at 14. Defendants have  
4 not described any "specific facts" that would change this  
5 determination. See Tatum v. City & Cty. of San Francisco, 441  
6 F.3d 1090, 1100 (9th Cir. 2006) (requiring party requesting Rule  
7 56(d) relief to "identify by affidavit the specific facts that  
8 further discovery would reveal, and explain why those facts would  
9 preclude summary judgment"). The Court therefore concludes that  
10 Defendants' "fact" is not relevant to this motion.

11 A final problem is that Defendants have not shown diligence.  
12 They blame their failure to conduct adequate discovery related to  
13 sovereign immunity on "Plaintiffs['] mo[tion] to amend their  
14 complaint on January 6, 2015, [which] rais[ed] a question of the  
15 operative complaint[.]" Opp. at 13:2-3. Defendants' excuse is  
16 not well taken. The proposed amendment in no way affected the  
17 sovereign immunity issue, which in fact has been the main issue  
18 in this case since its inception.

19 Because Defendants have not identified any specific facts  
20 relevant to the Tribe's sovereign immunity, the Court denies  
21 their request to defer adjudication. The Court therefore  
22 considers the merits of Plaintiff's sovereign immunity  
23 allegations.

24 ii. Off-reservation Assets

25 Defendants argue that sovereign immunity does not apply to  
26 tax enforcement actions in general, and even if it did, it does  
27 not bar the state from taking such actions against "off-  
28 reservation assets." Opp. at 9. Defendants identify these

1 assets as "Mainstay's off-reservation bank accounts and accounts  
2 receivable[.]" Id. Plaintiff maintains that immunity does bar  
3 these actions, no matter where its assets are located. Mot. at  
4 8-9; Reply at 4-5.

5 The Court agrees with Plaintiff. Defendants' first argument  
6 is flawed, because it fails to recognize the "difference between  
7 the right to demand compliance with state laws and the means  
8 available to enforce them." Kiowa Tribe of Oklahoma v. Mfg.  
9 Technologies, 533 U.S. 751, 755 (1998). Here, the Tribe does not  
10 contest that Defendants had authority to demand compliance with  
11 state law: that is, to require the Tribe to pay reimbursements  
12 consistent with the unemployment insurance program. The real  
13 issue is whether Defendants could enforce compliance by  
14 initiating collection actions under California Government Code  
15 section 7171.

16 While no controlling case has considered the availability of  
17 a section 7171 collection action to place a lien on tribal  
18 property, the Court concludes that these actions are barred by  
19 sovereign immunity. Indeed, the cases establish that immunity  
20 bars similar methods of enforcement. See Namekagon Dev. Co. v.  
21 Bois Forte Reservation Hous. Auth., 517 F.2d 508, 510 (8th Cir.  
22 1975) (noting tribe's "general immunity from levy and execution"  
23 of payment obligations); Maryland Cas. Co. v. Citizens Nat'l Bank  
24 of W. Hollywood, 361 F.2d 517, 521 (5th Cir. 1966) ("The waiver  
25 of the immunity to being sued was expressly qualified, and  
26 excluded from the waiver was the levy of any judgment, lien or  
27 attachment upon the property of the [tribe]."); Chemehuevi Indian  
28 Tribe v. Cal. State Bd. of Equalization, 492 F. Supp. 55, 60



1 (N.D. Cal. 1979) (holding that sovereign immunity barred  
2 enforcement of tax through counterclaim against tribe),<sup>3</sup> aff'd,  
3 757 F.2d 1047 (9th Cir. 1985).

4 As to the "off-reservation assets" argument, the Court also  
5 agrees with Plaintiff that sovereign immunity barred Defendants'  
6 collection activities, no matter where the Tribe's assets were  
7 located. Defendants' argument to the contrary relies entirely on  
8 Washington v. Confederated Tribes of Colville Indian Reservation,  
9 447 U.S. 134 (1980). In Confederated Tribes, the state levied a  
10 tax on cigarettes, and seized cigarettes en route to the  
11 reservation when the tribe did not pay. Id. at 140. The tribe  
12 argued that the seizures were improper because "no state tax  
13 [was] due while the cigarettes [were] in transit." Id. at 161.  
14 But the Court concluded that the state's "interest in enforcing  
15 its valid tax [was] sufficient to justify" the seizures. Id.  
16 The Court found it "significant that these seizures t[ook] place  
17 outside the reservation, in locations where state power over  
18 Indian affairs is considerably more expansive[.]" Id. at 162.

19 Confederated Tribes does not control the facts of this case.  
20 Defendants here did not seize lawfully taxed goods; rather, they  
21 sought to enforce payment obligations by instituting a lien on  
22 all of the Tribe's property. The fact that some of that property  
23

---

24 <sup>3</sup> The parties contest which aspects of this case survived the  
25 Supreme Court's reversal and the Ninth Circuit's subsequent  
26 decision on remand. See 106 S. Ct. 289 (1985) (per curiam); 800  
27 F.2d 1446 (9th Cir. 1986). On appeal, the Ninth Circuit affirmed  
28 the district court's holding that sovereign immunity barred the  
counterclaim. 757 F.2d at 1052. The Supreme Court then reversed  
on other grounds and did not consider the counterclaim issue, so  
it was not at issue on remand. 800 F.2d at 1447 n.1.

1 may be located outside of the reservation does not avoid the  
2 sovereign immunity bar. See Michigan v. Bay Mills Indian Cmty.,  
3 134 S. Ct. 2024, 2031 (2014) ("Our precedents . . . have not  
4 previously drawn the distinctions [between on- and off-  
5 reservation conduct for purposes of sovereign immunity]. They []  
6 established a broad principle, from which we thought it improper  
7 to start carving out exceptions. Rather, we opted to 'defer' to  
8 Congress about whether to abrogate tribal immunity for off-  
9 reservation commercial conduct.") (citations, quotation marks,  
10 and alterations omitted); Kiowa, 533 U.S. at 754 ("To date, our  
11 cases have sustained tribal immunity from suit without drawing a  
12 distinction based on where the tribal activities occurred. . . .  
13 To say substantive state laws apply to off-reservation conduct  
14 . . . is not to say that a tribe no longer enjoys immunity from  
15 suit."). Concluding that sovereign immunity applies, the Court  
16 next turns to whether Plaintiff's immunity was abrogated or  
17 waived.

18                   iii.       Abrogation or Waiver of Sovereign  
19                               Immunity

20       This Court has twice determined that Congress did not  
21 abrogate tribal sovereign immunity through the Federal  
22 Unemployment Tax Act, 26 U.S.C. § 3301 et seq. See Order  
23 Granting Plaintiffs' Motion for a Preliminary Injunction at 11;  
24 Order Denying Defendants' Motion to Dismiss at 14. Defendants  
25 urge the Court to reconsider these holdings, see Opp. at 13-15,  
26 but Defendants have provided no new argument or new basis for  
27 this Court to conclude that the language of 26 U.S.C. 3309  
28 "clear[ly]" and "unequivocally" abrogates the Tribe's immunity.

1 See Bay Mills, 134 S. Ct. at 2031.

2 As to waiver, Plaintiff has put forth evidence that the  
3 Tribe did not waive sovereign immunity by the procedures outlined  
4 in the Tribe's constitution and that "[n]either the General  
5 Council nor the Business Council of the Tribe has passed a  
6 resolution or taken any other action . . . waiving sovereign  
7 immunity of the Tribe in favor of the EDD or any of the  
8 defendants in this action." Plaintiff's Statement of Facts ¶¶ 2,  
9 4-5 (citing Mobbs' Decl. ¶ 4, Exh. 2; Ramos' Decl. ¶ 2).  
10 Defendants provide no contrary evidence, and instead argue that  
11 Plaintiff's evidence is insufficient. Opp. at 12.

12 Defendants essentially complain that Plaintiff has not done  
13 enough to prove a negative - that the Tribe did not waive  
14 immunity. See Opp. at 12; Defendants' Response to Plaintiff's  
15 Statement of Facts ¶ 4 ("Undisputed that the Tribal Constitution  
16 contains the quoted language, disputed to the extent it is a  
17 legal conclusion that the provision is the only way that the  
18 Tribe may waive sovereign immunity."). But the law does not  
19 require Plaintiff to disprove every possible means of waiver;  
20 rather, Plaintiff may meet its burden by "pointing out through  
21 argument [] the absence of evidence" to support other party's  
22 case. Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th  
23 Cir. 2000). It is then incumbent upon Defendants to provide  
24 affidavits or other sources of evidence that "set forth specific  
25 facts showing that there is a genuine issue for trial."  
26 Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting  
27 Fed. R. Civ. P. 56(e)). Because Defendants have provided no  
28 facts supporting a theory of waiver, summary judgment is

1 warranted. Cf. Egan v. Cty. of Del Norte, 2014 WL 46609, at \*5  
2 (N.D. Cal. Jan. 6, 2014) ("Because Defendants have met their  
3 initial burden of informing the court of the basis of their  
4 contention that they are entitled to summary judgment as to  
5 Plaintiff's claim based on municipal liability, the burden shifts  
6 to Plaintiff to establish a genuine issue of material fact.

7 . . . Plaintiff has provided the court with no citation to any  
8 evidence creating such a genuine issue, and instead argues that  
9 Defendants have failed to prove the negative. Therefore, the  
10 court finds Defendants' evidence to be undisputed."). Plaintiff  
11 has thus established success on the merits.

12 b. 25 U.S.C. § 476(e)

13 Plaintiff brings this motion under the alternative basis  
14 that Defendants' actions violated 25 U.S.C. section 476(e).  
15 Because the Court has determined that Plaintiff succeeds on the  
16 merits of the sovereign immunity argument, the Court does not  
17 reach this issue.

18 2. Equitable Defenses and Balance of Equities

19 Defendants make multiple arguments relating to the equities  
20 - all unavailing. First, they urge the Court to deny relief  
21 pursuant to the doctrine of unclean hands. Opp. at 18-19. This  
22 argument fails, because "[s]overeign immunity involves a right  
23 which courts have no choice, in the absence of a waiver, but to  
24 recognize." People of State of Cal. ex rel. Cal. Dept. of Fish &  
25 Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir.  
26 1979). Recognizing that the Tribe's sovereign immunity barred  
27 Defendants' collection actions, the Court must reject Defendants'  
28 unclean hands defense. See Pan Am. Co. v. Sycuan Band of Mission

1 Indians, 884 F.2d 416, 419 (9th Cir. 1989) ("Indian sovereignty,  
2 like that of other sovereigns, is not a discretionary principle  
3 subject to the vagaries of the commercial bargaining process or  
4 the equities of a given situation.").

5 Defendants next raise a Rule 56(d) request to delay  
6 adjudication to explore whether Plaintiff had "intent to hinder,  
7 delay or defraud creditor EDD in its collection" and whether it  
8 "improperly exploited tribal status as a business advantage[.]"  
9 Bowers Decl. ¶¶ 4.e, 4.f. The Court again finds this request  
10 unpersuasive, because Defendants have not raised any issue that  
11 would affect the outcome of this motion. In particular,  
12 Plaintiff's reasons for invoking sovereign immunity do not affect  
13 this Court's duty to recognize that immunity. See Quechan Tribe  
14 of Indians, 595 F.2d at 1155; Pan Am., 884 F.2d at 419.

15 The Court also reminds Defendants that this case involves  
16 only the issue of whether Defendants violated Plaintiff's  
17 sovereign immunity by their collection actions. This Court makes  
18 no decision about Plaintiff's liability arising from Mainstay's  
19 role as a reimbursable employer. The Court therefore disregards  
20 Defendants' attempts to raise factual disputes about how much  
21 Plaintiff actually owes. See Defendants' "Counterstatement of  
22 Material Facts" ¶¶ 24-34, 44-46.

23 3. Irreparable Harm and Availability of Damages

24 Plaintiff here has established irreparable harm, because  
25 damages would not be available. Indeed, injunctive relief is the  
26 only form of relief available to the Tribe; if the Court does not  
27 enjoin the liens, Plaintiff would be unable to obtain damages  
28 from Defendants because of the state's own immunity. See Ex

1 parte Young, 209 U.S. 123, 167-68 (1908); Agua Caliente Band of  
 2 Cahuilla Indians v. Hardin, 223 F.3d 1041, 1048 & n.7 (9th Cir.  
 3 2000). And this unavailability of alternate remedies makes the  
 4 harm from the violation of sovereign immunity irreparable. See  
 5 Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852 (9th  
 6 Cir. 2009) ("[B]ecause [plaintiffs] will be unable to recover  
 7 damages against the Department even if they are successful on the  
 8 merits of their case, they will suffer irreparable harm if the  
 9 requested injunction is not granted."), vacated on other grounds  
 10 sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.,  
 11 132 S. Ct. 1204 (2012).

#### 12 4. Public Interest

13 Although the parties offer little argument on this subject,  
 14 the Court concludes that the public interest would not be  
 15 disserved by a permanent injunction. See Keweenaw Bay Indian  
 16 Cty. v. State, 11 F.3d 1341, 1348-49 (6th Cir. 1993) (stating  
 17 that upholding sovereign immunity "served the fundamental public  
 18 interest goal of respecting tribal sovereign immunity") (citing  
 19 Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765,  
 20 777 (D.C. Cir. 1986)).

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

III. ORDER

For the reasons set forth above, the Court DENIES Defendants' request to defer adjudication and GRANTS Plaintiff's motion for summary judgment. Plaintiff shall submit a proposed form of Judgment to the Court within ten days of this Order.

IT IS SO ORDERED.

Dated: May 12, 2015

  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE