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NORTHERN ARAPAHO TRIBE,

Plaintiff,

v.

SYLVIA BURWELL, Secretary of the United States Department of Health and Human Services, and JACOB J. LEW, Secretary of the United States Department of the Treasury,

Defendants.

No. 2:14-cv-00247

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

On February 26, 2015, after receiving extensive briefing and presiding over nearly three hours of argument, this Court issued a comprehensive, 28-page opinion denying Plaintiff's motion for a preliminary injunction. *See* ECF No. 21 ("PI Opinion"). That opinion adopted every significant argument advanced by Defendants and concluded that (1) this action is barred by the Anti-Injunction Act, *id.* at 8-11; (2) Plaintiff had waived any challenge to the regulations at issue, *id.* at 11-17; and (3) Plaintiff's claims are inconsistent with the text of the Affordable Care Act notwithstanding the various interpretive canons that Plaintiff invokes, *id.* at 19-25. Each of these three holdings provided an independently sufficient reason to reject Plaintiff's claims and deny Plaintiff's motion for a preliminary injunction.

On March 19, 2015, Defendants filed a motion to dismiss consistent with both their arguments and the Court's ruling, *see* ECF No. 27 ("Defs' MTD"), and Plaintiff has now filed its opposition brief, *see* ECF No. 38 ("Pl's Opp."). But with only a few immaterial exceptions, Plaintiff does not challenge the Court's carefully considered reasons for rejecting its claims more than two months ago. Instead, Plaintiff barely even mentions the Court's ruling, and simply repeats the arguments that this Court has already heard and rejected.

As explained further below, the Court has already done all the heavy legal lifting that it needs to do in this case. For all the reasons that the Court has already identified for denying Plaintiff's motion for a preliminary injunction, the Court should grant Defendants' motion to dismiss, enter judgment in Defendants' favor, and close this case.

ARGUMENT

I. The Court Should Dismiss This Case For Lack Of Subject Matter Jurisdiction Under The Anti-Injunction Act.

In denying Plaintiff's motion for a preliminary injunction, the Court properly held that this action is barred by the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421. *See* PI Opinion at 8-11. In so holding, the Court determined that this action seeks "to restrain the IRS from assessing

the payments described in 26 U.S.C. § 4980H," *id.* at 8, and that those payments constitute a tax for purposes of the AIA, *id.* at 9-11. Plaintiff's arguments to the contrary fail.

A. Application Of The Anti-Injunction Act Does Not Depend Upon The Validity Of The Challenged Regulations.

Plaintiff first suggests that the AIA does not bar this suit because the IRS regulations that it challenges are invalid, and "[i]f the regulations are not valid under the ACA, . . . no 'tax' provision of the ACA could apply to bar the claim." Pl's Opp. at 4 (Part II.A). Plaintiffs provide no support for this proposition, though they may intend to invoke the case law suggesting that the AIA might not apply where "it is clear that under no circumstances could the Government ultimately prevail." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737 (1974) (internal quotation marks omitted). In light of the Court's determination that Plaintiffs are unlikely to succeed on the merits of their claims, *see* PI Opinion at 20-25, this doctrine clearly does not apply here.

B. The Applicable Large Employer Payment Is A Tax Under The Anti-Injunction Act.

Plaintiff further contends the AIA does not apply because Section 4980H creates a penalty, not a tax. Pl's Opp at. 3-7 (Part II.B). Plaintiff quotes at length from the Fourth Circuit's decision in *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), a decision that the Court already considered and found unpersuasive. *See* PI Opinion at 9-11. Moreover, notwithstanding Plaintiff's suggestion that *Liberty University* constitutes the "leading Circuit Court case" on this issue, Plaintiff neglects to mention that between the Court's order denying Plaintiff's preliminary injunction motion and Plaintiff's filing its memorandum in opposition to the instant motion to dismiss, the Fifth Circuit entered an opinion agreeing with Defendants' position and squarely rejecting *Liberty University*. *See Hotze v. Burwell*, --- F.3d ----, No. 14-20039, 2015 WL 1881418, at *12 (5th Cir. Apr. 24, 2015) ("We do not find *Liberty University* persuasive. The *Liberty University* court's primary error . . . was in interpreting the statutory references to the employer-mandate exaction as an 'assessable payment' in a way that nullified the references to it as a 'tax.'"). This Court was on solid ground in finding that the employer-mandate constitutes a tax in February, and it would be on even more solid ground doing so now.

C. Plaintiff May Not Avoid The Anti-Injunction Act By Bringing Suit In A *Parens Patriae* Capacity.

In three overlapping subsections, Plaintiff argues that the AIA does not bar this suit because Plaintiff is bringing suit in a *parens patriae* capacity on behalf of its members, and a tax refund suit would not provide its members the relief that Plaintiff is seeking on their behalf. *See generally* Pl's Opp. at 7-13 (Parts II.C-E). This theory fails for multiple reasons.

First, while the *parens patriae* doctrine sometimes allows a tribe to bring an action on behalf of its members, the doctrine could only apply if the tribe brought suit on behalf of *all* its members. *See, e.g., United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001) ("[T]his doctrine is reserved for actions which are asserted on behalf of *all* of the sovereign's citizens."); *Navajo Nation v. Superior Court of State of Wash. for Yakima Cnty*., 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999) *aff'd*, 331 F.3d 1041 (9th Cir. 2003) ("The governmental entity must raise claims which affect all its members, not just a select few."); *Ala. & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist*., 817 F. Supp. 1319, 1328 (E.D. Tex. 1993) (similar); *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990) (similar); *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269, 277 (D. Mont. 1983) (similar). Here, Plaintiff does not suggest that it has brought this action on behalf of all its members, nor would such a claim make any sense, since its claims only affect those individuals who are tribal employees or their family members.

Second, to bring a *parens patriae* suit, Plaintiff must still show an injury-in-fact under Article III. *See Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc*., 256 F.3d 879, 885 (9th Cir. 2001); *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). When filing a *parens patriae* action, such an injury only exists when a "sufficiently substantial segment of its population" suffered an injury. *Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 799 (10th Cir. 2011) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)); *see Santee Sioux Tribe of Neb.*, 254 F.3d at 734. Here, Plaintiff does not indicate how many persons belong to the Northern Arapaho Tribe, but Plaintiff has pleaded that it employs fewer than one thousand persons, not all of whom belong to the Tribe, *see* ECF No. 1 (Complaint) ¶¶ 9,

11. Plaintiff fails to show that a sufficiently substantial portion of its population has been injured, such that it would have standing through *parens patriae*.

Third, even if Plaintiff could bring suit in a *parens patriae* capacity, it is not clear that doing so would avoid the application of the AIA. Plaintiff's theory is apparently that if all tribal members are considered parties to this action, then those parties, who are not subject to the large employer mandate and are statutorily exempt from having to pay a tax penalty, *see* 26 U.S.C. § 5000A(e)(3), may not sue for a tax refund, and would thus have no other vehicle for presenting their statutory arguments. But even if Plaintiffs were correct that this theory could permit an individual member of the Tribe to avoid the AIA (and even assuming such an individual would have standing to challenge a tax that individuals do not owe), Plaintiffs provide no support for the proposition that this theory would permit the Tribe itself, which is subject to the tax and may sue for a tax refund, to bring a *parens patriae* action. *South Carolina v. Regan*, 465 U.S. 367 (1984), which was not a *parens patriae case,* is entirely inapposite because unlike that case, here, the party subject to the tax — the tribal employer — is a party to the suit. Defendants have also previously explained why this case is distinguishable from *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), because here a tax is the only consequence for failing to comply with the employer mandate, and thus the AIA applies. *See* ECF No. 13 (Defs' PI Opp.) at 11 n.11. Finally, Plaintiff's invocation of *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) entirely misses the mark; the language that Plaintiff quotes, *see* Pl's Opp. at 9, considers whether the suit is barred by the Administrative Procedure Act, not the AIA.

* * *

Finally, if the Court upholds its prior determination that the AIA bars this suit, Defendants respectfully submit that the case should be dismissed for lack of subject matter jurisdiction, rather than for failure to state a claim, *contra* PI Opinion at 11. Defendants explained in their motion to dismiss that in the Tenth Circuit the AIA provides a jurisdictional bar, *see* Defs' MTD at 5-7, and Plaintiff has not disputed the point. Indeed, Plaintiff refers to the AIA as a potential "jurisdictional bar." Pl's Opp. at 4.

II. The Court Should Dismiss This Case For Failure To State A Claim Because Plaintiff Has Waived Its Claims, And Its Claims Fail On The Merits.

Even if the AIA did not bar this suit, Plaintiff would still fail to state a claim for two reasons: Plaintiff's claims are waived, and they fail on the merits.

A. Plaintiff's Challenges To The IRS Regulations Are Waived.

The Court's opinion denying Plaintiff's motion for a preliminary injunction appropriately concluded that Plaintiff had waived the opportunity to challenge the regulations at issue. *See* PI Opinion at 11-17. Plaintiff advances three arguments in opposition, but none is sufficient to disturb that conclusion.

1. Comments Submitted By The Elk Valley Rancheria Did Not Put Defendants On Notice Of The Key Issues In This Case.

Challenging this Court's conclusion that in response to the Notice of Proposed Rulemaking, no party raised the issue that Plaintiff raises here, Plaintiff points to a comment submitted by the Elk Valley Rancheria, *see* ECF No. 38-1, that the Court already considered in its waiver determination. *See* PI Opinion at 13 (addressing this comment).[1] But rather than arguing that the Elk Valley Rancheria raised the same issue that is the subject of this suit, Plaintiff essentially argues that the Elk Valley Rancheria's comment reflected a misconception that Defendants were obligated to correct: "the Rancheria believed its tribal members could be employed by the Tribe (or any Large Employer) and still receive the § 1402(d) benefits which Defendants' regulation in fact prohibits." Pl's Opp. at 14.

In reality, it is the relevant statutes — not "Defendants' regulation" — which provide that if an individual eligible for affordable coverage through his employer nonetheless purchases coverage on an individual exchange, he will not be eligible for premium tax credits and cost-sharing reductions. *See* 26 U.S.C. § 36B(c)(2) (no premium tax credits for individuals eligible for affordable employer coverage); 42 U.S.C. § 18071(f)(2) (only individuals eligible for

[1] Plaintiff wrongly suggests that Defendants "presented to the Court only a portion of the Elk Valley Rancheria comment." Pl's Opp. at 13. Defendants quoted from the most relevant portion of the Elk Valley Rancheria's comment, but they also provided a hyperlink to the entire comment. *See* Defs' MTD at 12 n.11.

premium tax credits are eligible for reduced cost sharing). And it is well-established that "[e]very one is presumed to know the law." *United States v. Hodson*, 77 U.S. (10 Wall.) 395, 409 (1870).

Notwithstanding the clear statutory language and the presumption that persons are on notice of what federal law provides, Plaintiff apparently believes that Defendants were obligated to respond to and correct every mistaken legal assumption contained in every comment — a proposition for which Plaintiff has provided no support, and for which Defendants are aware of none. The actual test is whether a comment raised an issue "so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (quoting *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)).

Applying that standard, the Elk Valley Rancheria did not raise the same claims that Plaintiff raises here. The issue in this suit is whether a tribe may be an employer within the meaning of 26 U.S.C. § 4980H. *See, e.g.*, PI Opinion at 1 ("This case asks whether [the Tribe] should be exempted from the 'large employer mandate' of the [ACA]."). Elk Valley Rancheria's comment did not raise this issue, but instead took it as given that large tribal employers are subject to the employer mandate. *See* ECF No. 38-1 at 1 ("The Tribe has an interest in the outcome of the Proposed Rule because the Tribe is a large employer under the ACA . . . .").

2. Defendants Properly Published Notice In The Federal Register.

Plaintiff asserts that it was not required to comment on the proposed rulemaking because Defendant "failed to comply with Executive Order 13175 of 2000 or with the Treasury Department's own Tribal Consultation Policy." *See* Pl's Opp. at 17. Defendants have previously explained that the Executive Order Plaintiff cites does not create enforceable rights, *see* Defs' PI Opp. at 21-22 (citing authority), and the Treasury Department's Tribal Consultation Policy similarly "is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person." 79 Fed. Reg.

71816, 71817 (Dec. 3, 2014). Nor is this surprising, since courts cannot impose upon agencies procedural requirements beyond those contained in the Administrative Procedure Act unless required by another statute. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). In short, "the Tribe's assertion that it never received sufficient notice is not well-taken and does not excuse any waiver." PI Opinion at 14.

3. Plaintiff's Claim Is Waived Even If Characterized As Substantive.

Finally, Plaintiff again invites the Court to hold that it is "permitted to bring a substantive challenge to the Defendants' regulations regardless of whether the Rancheria or any other commenter raised similar concerns in the notice-and-comment period." Pl's Opp. at 19. While Plaintiff asserts that Judge Barrett's concurrence in *Big Horn Coal Co. v. Temple*, 793 F.2d 1165 (10th Cir. 1986) "is persuasive authority," Pl's Opp. at 21, the Court has already held that this rule "is not the law in the Tenth Circuit." PI Opinion at 15.

B. Plaintiff's Claims Fail On The Merits Because The Challenged Regulations Are Consistent With The Language, Structure, And Purpose of the ACA.

Finally, if the Court reaches the merits of this case, it should reject Plaintiff's claims. As the Court has appropriately concluded, "Congress expressed its intent in § 4980H that the large employer mandate apply to all large employers, including Indian tribes," PI Opinion at 20, and because there is "no ambiguity in § 4980H, . . . canons of statutory interpretation favoring liberal construction in Indians' favor do not apply," *id.* at 24. Plaintiff presents no significant arguments to the contrary.

1. Because Section 4980H Is Unambiguous, The Court Need Not Consider Interpretative Canons.

The Court's essential ruling in its preliminary injunction opinion as to the merits of Plaintiff's statutory claims was correct: absent ambiguity, there is no need for interpretative canons. Plaintiff tries to fashion an ambiguity in the statute by pointing to "Congress' intent to fashion a special set of laws and benefits for Native American health care." Pl's Opp. at 22. But while the ACA does contain many features that are beneficial to Native Americans, Plaintiff

points to no ambiguity sufficient to disturb the Court's earlier conclusion that there is "no ambiguity in § 4980H." PI Opinion at 24.

2. Interpretive Canons Do Not Save Plaintiff's Claims.

Plaintiff nonetheless contends that the statute must be interpreted in its favor because the statute does not specifically indicate that it applies to Native Americans. Defendant has previously explained that Plaintiff's argument flies in the face of *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000), *aff'd* 534 U.S. 84 (2001), which rejects the proposition that generally applicable tax laws should be read to exclude tribes. *See* Defs' MTD at 16-17; *accord* PI Opinion at 21 ("If Congress wished to exempt Indian tribes from this mandate that otherwise might be reasonably construed as applying to them, it needed to do so explicitly.").

Plaintiff attempts to distinguish *Chickasaw Nation*, but its efforts fail. *First*, Plaintiff suggests that *Chickasaw* applies only when Congress invokes its "plenary power . . . to abrogate the rights of tribes," Pl's Opp. at 24, but this argument is entirely unsupported by authority. *Second*, Plaintiff observes that *Chickasaw Nation* involved tax obligations, *id.* at 25, but that is also true of this suit; indeed, *Chickasaw Nation*, like this case, involved a Miscellaneous Excise Tax imposed by Subtitle D of the tax code. *Third*, Plaintiff points to the treaty obligations that it believes are implicated in this case, *id.*, but Plaintiff has no answer to the Court's conclusion that the Treaty it invokes "simply does not apply in this case." PI Opinion at 24.[2]

Finally, Plaintiff argues that the doctrine that laws of general applicability apply to Indian tribes is a "long-abandoned statement." Pl's Opp at 26. To the contrary, as this Court has found, *see* PI Opinion at 23, the Tenth Circuit has repeatedly indicated that "[w]hen a federal law of general applicability is silent on the issue of applicability to Indian tribes," the law "applies equally to Indians unless" one of three exceptions applies: "'(1) the law touches exclusive rights

[2] Plaintiff similarly returns to *Dobbs v. Anthem Blue Cross Blue Shield* ("*Dobbs II*"), 600 F.3d 1275 (10th Cir. 2010). However, as the Court noted in its order denying the preliminary injunction, Plaintiff's "reliance upon [*Dobbs II*] is unavailing" because "the Tribe is not asserting the ACA interferes with the exercise of its sovereign authority." PI Opinion at 21-22.

of self-governance in purely intramural-matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .'" *United States v. Fox*, 573 F.3d 1050, 1052 (10th Cir. 2009) (quoting *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir. 1989) (some quotation marks omitted); *see also, e.g.*, *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1198-1200 (10th Cir. 2002) (*en banc*); *Nero*, 892 F.2d at 1462-63; *Phillips Petroleum Co. v. E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986). Indeed, decisions applying the doctrine of general applicability postdate the decisions that Plaintiff believes call it into question, *see* Pl's Opp at 26-28. And as this Court has also appropriately found, none of the exceptions to the doctrine applies here. *See* PI Opinion at 23.

CONCLUSION

The Court's order denying Plaintiff's motion for a preliminary injunction resolved all of the fundamental issues in this case. For the reasons the Court has already explained, the reasons stated in Defendants' motion to dismiss, and the reasons stated above, Defendants respectfully request that the Court grant their motion to dismiss.

Respectfully submitted this 18th day of May, 2015,

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