IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:14-cv-22066-KMW

BILLY CYPRESS, ETHEL HUGGINS, JOHNSON BILLIE, JAMES CLAY, AUDREY CLAY, NINA BILLIE, AGNES BRADY, BETTY CLAY, EDNA TIGERTAIL, EVELYN CYPRESS, GREG KELLY, HEATHER CYPRESS, LUTHER TIGER, MARY KELLY, JASPER NELSON, PRISCILLA BUSTER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY AND JACOB J. LEW, in his Official Capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE INTERIOR and SALLY JEWEL, in her Official Capacity as Secretary of the Interior,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiffs, BILLY CYPRESS, ETHEL HUGGINS, JOHNSON BILLIE, JAMES CLAY, AUDREY CLAY, NINA BILLIE, AGNES BRADY, BETTY CLAY, EDNA TIGERTAIL, EVELYN CYPRESS, GREG KELLY, HEATHER CYPRESS, LUTHER TIGER, MARY KELLY, JASPER NELSON, PRISCILLA BUSTER (hereinafter collectively "Plaintiffs"), pursuant to Rule 12(b)(6), Fed.R.Civ.P., hereby respectfully submit their Memorandum of Law in Opposition to the Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket Entry 11) (hereinafter "DE #) filed by defendants, UNITED STATES OF

AMERICA, UNITED STATES DEPARTMENT OF THE TREASURY AND JACOB J. LEW, in his Official Capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE INTERIOR and SALLY JEWEL, in her Official Capacity as Secretary of the Interior (collectively "UNITED STATES").

INTRODUCTION

Plaintiffs are all members of the federally-recognized Miccosukee Tribe of Indians of Florida. This action was filed by sixteen (16) individual members of the Tribe after its governing body declined to represent them in this action. Plaintiffs filed this action because the UNITED STATES seeks to assess and collect personal-income taxes upon monetary distributions by the Tribe from a "separate tribal trust account of distributable tribal revenues" (DE 1, at ¶ 18), which are derived from the land and whose sources are exempt, in part, from taxation. Congress expressly prohibited such taxes when it enacted 25 U.S.C. § 459e, and exempted distributions of gross receipts distributed to Tribal members from allotted lands from taxation. Contrary to the UNITED STATES' suggestions, it is not simply trying to tax payments to the Plaintiffs which are made directly from the net revenues of the Tribe's gaming operations.

The UNITED STATES has moved to dismiss the Complaint for lack of subject matter jurisdiction. (DE 11) It generally contends that this court lacks subject matter jurisdiction since: (1) the UNITED STATES has not waived its sovereign immunity in this case; and (2) the Anti-Injunction and Declaratory Judgment Acts expressly prohibit the tax relief requested. The face of the Complaint, however, clearly disputes these contentions. Sovereign immunity was waived expressly in two separate statutes, section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), and the Miccosukee Reserved Area Act ("MRAA"), 16 U.S.C. § 410, *et al.* (1998). The Complaint further states facts and makes allegations that the Anti-Injunction and

Declaratory Judgment Acts do not bar such relief, since this tax falls squarely within the applicable judicial exception to application of these statutes.

The UNITED STATES cannot prevail on its claim to assess and collect taxes on all exempt income, regardless of its source, and the Plaintiffs have no adequate remedy at law and will be irreparably injured if they cannot pursue this lawsuit, but have to pay the tax and attempt to sue the UNITED STATES for a refund, since they cannot do so without the Tribe, an indispensable party.

Finally, even if this Court were to grant the pending motion, any dismissal should be without prejudice and with leave to amend. Plaintiffs subsequent to filing this memorandum of law will be separately filing a Motion for Leave to Amend their Complaint.

ARGUMENT

SUBJECT MATTER JURISDICTION EXISTS AND THE UNITED STATES' MOTION TO DISMISS MUST BE DENIED.

A. FACIAL OR FACTUAL CHALLENGE

Preliminarily, the UNITED STATES attempts to justify its four pages of factual background based upon extrinsic matters outside the pleadings by stating that such a factual challenge is proper under Rule 12(b)(1), Fed.R.Civ.P. Although that generally is true, *see, e.g.*, *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003), a factual challenge is typically made to the district court's subject matter jurisdiction and is contained in affidavits and other evidence. *See, e.g., id.* at 924-25. However, much of the extrinsic evidence is relevant to an attack on the merits of Plaintiffs' claims rather than this court's subject matter jurisdiction. Certainly, such "evidence," primarily other cases brought by the Miccosukee Tribe as construed by the UNITED STATES, would change the nature of this motion and its

consideration by the court. *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990); *In re Waterfront License Corp.*, 231 F.R.D. 693, 697-98 (S.D. Fla. 2005). However, after clouding the record and attempting to influence this court that Plaintiffs' claims lack merit, contrary to the reason for a "factual" challenge, the UNITED STATES ultimately agrees that its motion should be considered a "facial attack" and governed by the settled rules for considering a motion to dismiss under Rule 12(b)(6). (DE 11, at 5) Consequently, this Court when considering the UNITED STATES' facial attack must accept the well-pleaded factual allegations in the complaint as true for purposes of the motion and draw all reasonable inferences in favor of the Plaintiffs in determining its subject matter jurisdiction. *E.g., Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

B. SUBJECT MATTER JURISDICTION

Accepting the well-pled allegations in the complaint as true, Plaintiffs submit that the Complaint facially establishes the subject matter jurisdiction of this court and the UNITED STATES' waiver of sovereign immunity. First, jurisdiction exists under 28 U.S.C. § 1331 and 28 U.S.C. § 2201(a), which generally grant this Court jurisdiction over a civil action which presents a federal question and seeks a declaratory judgment, respectively. Section 1331 vests the district court with "original jurisdiction of all civil actions arising out of the Constitution, Laws, or Treaties of the UNITED STATES." 28 U.S.C. § 1331 (1980), while section 2201 permits the District Court to declare the rights of the parties in matters, "except with respect to Federal taxes," other than certain statutory actions. 28 U.S.C. § 2201(a).

C. WAIVERS OF SOVEREIGN IMMUNITY

1. SECTION 702 OF ADMINISTRATIVE PROCEDURES ACT

The UNITED STATES argues that it is immune from this lawsuit unless Congress has waived its sovereign immunity.[1] *See, e.g., U.S. v. Idaho ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 6-8, 113 S.Ct. 1893, 1896 (1993). However, Plaintiffs have pled that sovereign immunity has been expressly waived by Congress in two separate sources. First, Plaintiffs allege that Congress expressly waived sovereign immunity in an action for equitable relief, but not money damages, in Section 702 of the Administrative Procedures Act, 5 U.S.C. § 702 (1976). (*Complaint*, at ¶ 93) (hereinafter, "DE 1, at ¶ ##") *See Bowen v. Massachusetts*, 487 U.S. 879, 891-95, 108 S.Ct. 2722, 2731-33 (1988). "Section 702 is . . . a general waiver of sovereign immunity for suits against the United States seeking nonmonetary relief, even if the claim does not arise under the APA." *Miccosukee Tribe of Indians of FL v. U.S.*, 680 F.Supp. 1308, 1315-16 (S.D. Fla. 2010) (citations omitted), *affirmed*, 716 F.3d 535 (11th Cir. 2013). Plaintiffs seek declaratory relief and not damages as defined in the Act, so the sovereign immunity of the UNITED STATES has been waived for Plaintiffs' claims. *Id.*

Section 702 provides, in pertinent part, that:

[1] The UNITED STATES also correctly notes that subject matter jurisdiction does not exist in suits against federal agencies, see *JPB Acquisitions, LP v. U.S. ex rel. F.D.I.C.*, 224 F.3d 1260, 1263 (11th Cir. 2000), and persons in their official capacity, *see Kentucky v. Graham*, 473 U.S. 159, 165-66, 10-5 S.Ct. 3099, 3104-05 (1985), absent waivers of sovereign immunity.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. (emphasis added)

2. MICCOSUKEE RESERVED AREA ACT

Second, Plaintiffs assert that sovereign immunity was waived expressly in the Miccosukee Reserved Area Act ("MRAA"), 25 U.S.C. § 1741, *et seq.* (1998). The Act was "replete with traditional notions of tribal self-determination and non-interference." *Miccosukee Tribe of Indians of Florida v. United States*, 2000 WL 35623105, at *7 (S.D. Fla. 2000). The MRAA provides, in pertinent part, that:

> **Action brought by Tribe.** -- The Tribe may bring a civil action in the United States district court for the district in which the MRA is located to enjoin the United States from violating any provision of this Act [this note]."

The UNITED STATES argues that this waiver of sovereign immunity applies only to the Tribe and not its members. However, the Complaint alleges otherwise. (DE 1, at ¶ 74-77) Instead, the Complaint alleges that the reference to "the Tribe" in the MRAA includes its members. This allegation must be construed as true for purposes of ruling on a motion to dismiss. *See Hill*, 321 F.3d at 1335. Among other things, the MRAA states: "Since 1964, the Miccosukee Tribe of Indians of Florida have lived and governed their own affairs on a strip of land on the northern edge of the Everglades National Park pursuant to permits from the National Park Service and other legal authority. The current permit expires in 2014." The Tribe's

members, including the Plaintiffs herein, are the beneficiaries of the terms of the statutory scheme. *See id.* At a minimum, the word "**Tribe**" is ambiguous, and cannot be construed against the Plaintiffs in ruling upon a motion to dismiss. *See, e.g., Hill*, 321 F.3d at 1335.

D. NEITHER THE TAX ANTI-INJUNCTION NOR DECLARATORY JUDGMENT ACTS BAR THIS LAWSUIT.

Relying upon the exception contained in section 702 of the APA, the UNITED STATES asserts that this lawsuit is barred by the Anti-Injunction Act, 26 U.S.C. § 7421, and Declaratory Judgment Act, 28 U.S.C. § 2201.[2] The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The Declaratory Judgment Act states, in pertinent part, that a court may not declare the rights of the parties' with respect to the collection of federal taxes. Notwithstanding this statutory language, the UNITED STATES correctly acknowledges that a judicial exception to the prohibitions exists. *See, e.g.*, *Enochs v. Williams Packing & Navigation,* 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961) It erroneously contends, however, that Plaintiffs cannot establish either one of the two prongs necessary to be entitled to the exception.

[2] The exception in section 702 provides, in part, that:

> *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. (emphasis added)

JUDICIAL EXCEPTION TO ACTS' BAR

In *Williams Packing,* the Supreme Court recognized that an injunction against the assessment or collection of a tax is permissible where: (1) equitable jurisdiction exists because the taxpayers will suffer irreparable injury unless their lawsuit is permitted, and (2) under no circumstances could the UNITED STATES ultimately prevail in a lawsuit challenging the assessment. *See Williams Packing*, 370 U.S. at 5-7, 82 S.Ct. at 1127-29. As Plaintiffs shall demonstrate below, both of these factors are satisfied in this case and Plaintiffs' lawsuit is not prohibited.

a. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW IF THEY HAVE TO PAY THE TAX AND SUE FOR A REFUND.

Taxpayers generally have an adequate remedy when the federal government unlawfully assesses and collects a tax since they can pay the tax and then file an action against the federal government in federal court for a refund. *See* 28 U.S.C. § 1346(a)(1). However, this general rule does not apply in this case since the Plaintiffs cannot do so without joining the Tribe. Rule 19(a) provides that a person or entity over whom the Court has personal jurisdiction and whose presence will not deprive the Court of subject matter jurisdiction must be joined if he claims an interest in the subject of the action and is "so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring ... inconsistent obligations because of the interest." Fed.R.Civ.P. 19(a)(1)(B)

The Tribe is an indispensable party to any such suit since the Plaintiffs' claims arise out of treaties, statutes and laws between the Tribe and the United States and disposing of the action without the Tribe readily could impair its interests. *See Klamath Tribe Claims Committee v.*

U.S., 106 Fed.Cl. 87, 95-96 (Fed.Cl. 2012), aff'd, 541 Fed.Appx. 974 (Fed.Cir. 2013); *Rosales v. U.S.*, 89 Fed.Cl. 565, 584-86 (Fed.Cl. 2009); *United Keetoowah Band of Cherokee Indians of OK v. U.S.*, 67 Fed.Cl. 695, 699-705 (Fed.Cl. 2005), *reversed and remanded*, 480 F.3d 1318 (Fed.Cl. 2007). Yet, the Tribe is a sovereign which cannot be joined involuntarily in such a lawsuit. *See Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224, 1002 1228-29 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 664, 81 USLW 3199 (2012); *Klamath Tribe*, 106 Fed. at 92-97; *United Keetoowah Band*, 67 Fed.Cl at 702. Inability to join the Tribe as an indispensable party would require the dismissal of any lawsuit for a tax refund. *See Klamath Tribe*, 106 Fed.Cl. 92-97; *United Keetoowah Band*, 67 Fed.Cl. at 699-705. Since the Plaintiffs' lawsuit for a tax refund would have to be dismissed before reaching the merits, the remedy at law is inadequate.

Moreover, as noted in the pleadings, the Tribe would not agree to join this lawsuit voluntarily. The Tribe is stated to have refused to bring this lawsuit on the Plaintiffs' behalf. Indeed, the UNITED STATES asserts that the Tribe now has rejected the very arguments advanced by the Plaintiffs herein. Clearly, the inability to join the Tribe as an indispensable party and the resulting dismissal of their action render the Plaintiffs remedy woefully inadequate.

b. PLAINTIFFS WILL SUSTAIN IRREPARABLE INJURY IF THEY HAVE TO PAY THE TAXES ON THE ON THE TRIBE'S TRUST DISTRIBUTIONS.

The lack of an adequate remedy at law through a suit for a refund is not the only reason that the Anti-Injunction Act does not bar this lawsuit. As alleged in the Complaint, Plaintiffs may suffer irreparable injury if they are forced to pay the taxes, since:

> The disbursements of trust income . . . [without taxation] are essential to sustaining tribal members in their existing communities where they continue to maintain [their] . . . separate language, identity and culture. Disruption and interference with the ability of Miccosukee's to live together on what is left of their tribal lands might well force, in effect, removal of Miccosukee's to find livelihoods elsewhere, thereby effectively imposing an assimilation that Miccosukee's continue to oppose. (DE, at ¶ 88).

Certainly, this is not simply a financial hardship. Instead, taxation could cause serious consequences to the Plaintiffs regarding their very way of life as members of the Miccosukee Tribe, a lifestyle of living without federal governmental assistance (or interference) that has developed in South Florida over centuries. Certainly, the destruction of the Plaintiffs' very way of life amounts to irreparable injury and escapes the bar of the Anti-Injunction and Declaratory Judgment Acts.

c. THE UNITED STATES UNDER NO CIRCUMSTANCES CAN PREVAIL IN ITS ATTEMPT TO ASSESS AND TO TO COLLECT TAXES ON ALL GROSS RECEIPTS.

The UNITED STATES asserts that the Plaintiffs cannot prevail on the merits since they are "subject to payment of federal income taxes, . . . unless an exemption from taxation can be found. . . ." (DE 11, at p. 12) (quoting *Comm'r v. Walker*, 326 F.2d 261, 263 (9th Cir. 1964)). Contrary to this assertion, however, such an exemption for the planned taxation was enacted by Congress in 1975. Title 25 U.S.C. § 459e, styled "**Tax exemption for conveyed lands and gross receipts; distribution of gross receipts to tribal members**," expressly provides that:

> All property conveyed to tribes pursuant to this subchapter and all the receipts therefrom referred to in section 459d of this title, shall be exempt from Federal, State, and local taxation so long as such property is held in trust by the United States. Any distribution of such receipts to tribal members shall neither be considered as income or resources of such members for purposes of any such taxation nor as income, resources, or otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such member or his household would otherwise be entitled to under the Social Security Act [42 U.S.C.A. § 301 et seq.] or any other Federal or federally assisted program.

25 U.S.C. § 459e (1975). *See also* Rev. Rul. 60-96, 1960-1 C.B. 18, 1960 WL 13007 (IRS RRU) (income directly derived from homestead allotted to member of Indian tribe exempt from tax for income received by him); Rev. Rul. 57-523, 2 C.B. 51, 1957 WL 11009 (IRS RRU)(income directly derived from Indian lands, while held in trust, exempt under the General Allotment Act from federal income tax); Rev. Rul. 56-342, C.B. 1956-2, 20 (oil lease bonus, grazing fees, and farm income received by taxpayer exempt from federal income tax, to extent such income arose from lands held for taxpayer in trust).

Contrary to its contention, assessing and collecting federal income taxes on the distribution of gross receipts to members of the Miccosukee Tribe is illegal. Nevertheless, the UNITED STATES offers several arguments to attempt to escape this clear congressional exemption. First, it is argued that the Plaintiffs did not directly refer to section 459e in the Complaint. That is not true. (DE 1, ¶¶ 14, 15). Even if the Complaint did not mention this statutory section twice, the concept that income from such land was not taxable is mentioned throughout the Complaint. (DE 1, at ¶ ¶ 14, 15, 16, 55, 59, 60, 62, 63-69, 83-92). Clearly, this argument lacks merit.

Next, the UNITED STATES argues that the exemption "does not apply to income generated . . . from gaming." (DE 11, at p. 14) Although this contention is true, the UNITED STATES proposes to assess and collect income tax on all gross receipts distributed to members of the Miccosukee Tribe, regardless of their source. Such a tax is prohibited and is not rendered lawful by the fact that taxes on gambling revenues are permissible.

Under no circumstances can the federal government prevail on this claim completely. The federal government definitely will lose in its attempt to assess and collect taxes on exempt gross receipts. Certainly, for purposes of a Motion to Dismiss, the Plaintiffs' allegations that the federal government is attempting to assess and collect taxes on exempt gross receipts must be accepted as true and the motion denied.

CONCLUSION

Accordingly, the Plaintiffs respectfully submit that this court has subject matter jurisdiction over this dispute and the Motion to Dismiss of the UNITED STATES should be denied. The Complaint alleges that the UNITED STATES has waived sovereign immunity in section 702 of the APA and section 1741 of the MMRA. The exceptions to these sovereign immunity waivers contained in the Anti-Injunction and Declaratory Judgment Acts are not applicable since the Plaintiffs have established the judicial exception to their applicability. First, the Plaintiffs have no adequate remedy at law by filing a tax refund action after voluntarily paying the taxes. The Tribe would be an indispensable party to any such litigation and could not be too named in the lawsuit because of its sovereign immunity. Such a lawsuit, therefore, would have to be voluntarily dismissed.

The Plaintiffs would be irreparably injured further if the United States could tax the gross receipts which the Tribe distributes to members from the revenues derived from the land.

As alleged by Plaintiffs, such taxes could seriously effect and, perhaps, destroy their established way of life as a member of the Tribe, which certainly amounts to irreparable injury. Finally, the United States could not prevail in its attempt to tax all such monies distributed from the Tribe's Trust Account since portions of such monies have been exempted from taxation by Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 17, 2014 the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system to the parties listed below, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive Notices of Electronic Filing.

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