UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally recognized Indian Tribe; et al.,

Plaintiffs,

vs. Case No. 1:15-cv-00625 JB/GBW

STATE OF NEW MEXICO, et al.,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS III AND IV OF PLAINTIFFS' COMPLAINT

Defendants Susana Martinez ("Governor Martinez"), Jeremiah Ritchie ("Ritchie"), Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty, III, and Carl E. Londene (together the "Individual Defendants") submit this reply in support of their Motion to Dismiss Counts III and IV of Plaintiffs' Complaint ("Motion"). Now that the Court has ordered the dismissal of Count IV, Defendants' Motion is moot as to that issue. The dismissal of Count III is also warranted because Talachy is not a proper plaintiff under either Section 1983 or 1985, neither Section 1983 nor 1985 provides Talachy with a right of action against the Individual Defendants and Talachy has not alleged facts to support his claim that the Individual Defendants violated any federal right, Talachy does not allege any denial of equal protection of any laws upon which to base a claim under Section 1985(3), and Governor Martinez and Ritchie should be dismissed for the additional reason that Plaintiffs' sole allegation against them fails to state a claim upon which relief can be granted.

A. Talachy Is Not a Proper Plaintiff Under Either § 1983 or § 1985.

Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701,711-12 (2003), *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514-15 (9th Cir.

2005), and *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1298 (D. Kan. 2004), stand for the propositions that Indian tribes lack standing to bring suit pursuant to 42 U.S.C. § 1983 and, further, individual tribal members have no standing to sue under Sections 1983 or 1985 to vindicate any sovereign or communal rights of the tribe itself, even if the individual tribal members benefit from those rights. Accordingly, Talachy has no standing to sue (either on his own behalf or on the behalf of other tribal members) under Section 1983 and 1985 for the Individual Defendants' alleged violation of the *Pueblo's* right to operate Class III gaming without being subject to the jurisdiction of the State.

In his Response to the Motion, Talachy attempts to distinguish *Winnebego* and *Skokomish* on the grounds that in those cases the rights that the tribal officials and members were trying to pursue were communal rights, rather than individual rights, and IGRA "expressly provides protection for the rights of individual tribal members" by "sanction[ing] the continued operation of 'individually-owned' Class II gaming operations." (Pls.' Resp. to Mot. at 4 (citing 25 U.S.C. § 2710(b)(4)(B)(i).) Even assuming the accuracy of Talachy's characterization of 25 U.S.C. § 2710(b)(4)(B)(i),[1] that argument is inapposite. The allegations in the Complaint deal only with the Pueblo's operation of *Class III* gaming facilities after the expiration of its previously negotiated *Class III* gaming compact with the State of New Mexico. (*See generally* Pls.' Compl., Dkt. No. 1.) Nowhere in the Complaint do Plaintiffs allege any action by any of the Individual Defendants that infringe on any *Class II* gaming rights held individually by Talachy or any other tribal members, or even the Pueblo. (*See id.*) Individually held Class II gaming rights are simply not at issue here. Therefore, as Talachy implicitly concedes, the right that Talachy claims the Individual Defendants have infringed upon – Class III gaming – is a tribal or

[1] 25 U.S.C. § 2710(b)(4)(B)(i) merely states that certain provisions of IGRA do not "bar the continued operation of an individually owed class II gaming operation that was operating on September 1, 1986, if" certain conditions are met.

communal right, not the right of any individual tribal member, making this case fall squarely into the holdings of *Inyo County*, *Winnebego* and *Skokomish*.

Talachy attempts to distinguish these cases in one other respect by arguing that his claims seek to redress the violation of "both sovereign and federal statutory rights to govern gaming activities on Indian lands." (Pls.' Resp. to Mot. at 4.) This argument attempts to make a distinction without a difference because, to the extent that IGRA confers any right, it is a tribal right, not an individual right. Furthermore, the primary case that Talachy cites to support this argument does not state that an individual tribal member may have standing to vindicate sovereign rights so long as those rights are also statutory rights. Instead, it confirms that individual tribal members have no standing to assert the tribe's sovereign rights and merely notes that, there, no sovereign rights were asserted. *See South Fork Band v. Dept. of the Interior*, 643 F. Supp. 2d 1192, 1201, n.4 (D. Nevada 2009) (distinguishing *Inyo County* and *Skokomish* because "those cases turned on the tribes' assertion of sovereign rights. Here, the tribes do not assert sovereign rights.").[2]

And while it is true that, under certain circumstances, a claim based on violation of federal rights might be brought on behalf of tribal members, none of those circumstances are applicable here. As the Ninth Circuit explained in *Skokomish*, "the hallmark for determining the scope of section 1983 coverage is whether the right asserted is one that protects the individual against government intrusion." 410 F.3d at 515 (internal citations and quotation marks omitted).[3]

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[2] The Court can note that *South Fork Band* presents the converse of the fact pattern of the case at bar. In that case, the tribe was asserting rights on behalf of its members, as opposed to tribal members' assertion here of their tribe's claimed rights under IGRA to conduct gaming free of state interference. *South Fork Band* fails to support the Plaintiffs' position for this reason as well.

[3] Nor does Talachy's citation to *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979), and *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985), help his position. *Thompson* merely holds, unremarkably, that claims based on violation of individual members' "due process and equal protection rights" may be brought under Section 1983. *Thompson*, 487 F. Supp. at 216. Talachy is bringing no such claims here. And his invocation of *White Mountain Apache Tribe* is even more puzzling. First, that case held that an Indian tribe could *not* premise a

The right that Talachy claims in Count III – to be free from the Individual Defendants' "wrongful[] assert[ion of] State jurisdiction over gaming activities on the Pueblo's Indian lands" (Pls.' Compl. ¶¶ 138-39) – is not such a right. Instead, this "right" that Talachy is asserting is the same "sovereign right" that the United States Supreme Court found was improper for the plaintiffs in *Inyo County* to bring under Section 1983. *Inyo County*, 538 U.S. at 712. *See also Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989) ("Because the right to tribal government protects the powers conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983.)

B. Neither § 1983 nor § 1985 Is a Source of Any Right, and Talachy Has Not Alleged Facts To Support his Claim that the Individual Defendants Violated Any Federal Right that is a Predicate for his Section 1983 Claim.

In his response, Talachy implicitly concedes that neither Section 1983 nor Section 1985 themselves confer any rights.[4] Instead, he simply refers the Court to the preemption arguments that Plaintiffs make in another response brief. (Pls.' Resp. to Mot. at 5.) As explained in greater detail in the Motion (Dkt. No. 71), the Individual Defendants' December 4, 2015 Motion to Dismiss Count IV on the Basis of Qualified Immunity (Dkt. No. 60), and Defendants' Reply in support of their Motion to Reconsider and Either Vacate or Modify the Court's October 7, 2015 Preliminary Injunction, and for Relief Pursuant to Fed. R. Civ. P. 62.1 (filed concurrently with this reply), which the Individual Defendants incorporate by reference, federal law neither applies to nor preempts the State's enforcement of its licensing laws applicable to non-Indian gaming

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Section 1983 claim based on preemption of state law under the Supremacy clause – precisely what Plaintiffs have attempted to do in Counts III and IV of their Complaint. Second, Talachy fails to acknowledge that the language on which he relies, 810 F.2d at 865 n. 16, is both part of the *dissenting* opinion, not the court's ruling, and squarely negated by *Inyo County* (and *Skokomish*).

[4] Talachy wholly fails to address the federal law/federal right distinction articulated in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002). The test for recognizing a federal right is the same as the test for recognizing an implied cause of action: "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.* at 283. IGRA does not create any implied causes of action. *See, e.g.*, *Alabama v. PCI Gaming Auth'y*, 801 F.3d 1278, 1294-1300 (11th Cir. 2015); *Tohono O'odham Nation v. Ducey*, No. CV-15-1135, 2015 WL 5475290, *9 (D. Ariz. Sept. 16, 2015).

manufacturers that sell equipment to non-Indian gaming operators off tribal lands. Accordingly, Talachy has failed to allege facts that would support a claim that the Individual Defendants violated his federal rights.

C. Talachy Identifies no Denial of Equal Protection to Support his Section 1985 Claim.

Talachy appears to acknowledge that his Section 1985 claim is subject to dismissal unless it alleges "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *O'Connor v. St. John's College*, 290 Fed. Appx. 137, 141 n.4 (10th Cir. 2008) (citation & internal quotation marks omitted). Talachy therefore asserts that "[t]he Complaint clearly alleges that the Individual Defendants conspired to wrongfully assert jurisdiction because of their invidiously discriminatory animus against the Pueblo and its members." (Pls.' Resp. to Mot. at 6.) However, Talachy never identifies where in his 41-page Complaint this allegation is made, and the Individual Defendants submit there is none. The Complaint claims that the Individual Defendants are acting with the intent of forcing the Pueblo to accept the State's preferred version of a new compact (which other Indian tribes have accepted), not because of any intent to discriminate against the Pueblo and its members on their basis of their race. The Complaint simply alleges no facts upon which a claim of class-based discrimination can be based, and the Section 1985 claim must therefore be dismissed as a matter of law.

D. Talachy Complains of Actions Taken by the NMGCB, Not Governor Martinez or Jeremiah Ritchie.

As explained in greater detail in the Motion (Dkt. No. 71), the Individual Defendants' December 4, 2015 Motion to Dismiss Count IV on the Basis of Qualified Immunity (Dkt. No. 60), and Defendants' Reply in support of their Motion to Dismiss Count II of Plaintiffs' Complaint (filed concurrently with this reply), which the Individual Defendants incorporate by reference, Talachy's allegations against Governor Martinez and Jeremiah Ritchie fail for the

additional reason that Talachy's single allegation of indirect action utterly fails to state a claim upon which relief can be granted.

For the reasons stated above and in the Motion, Defendants respectfully request that the Court dismiss Count III of the Complaint.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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