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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

BIG SANDY RANCHERIA ENTERPRISES,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as
Attorney General of the State of California; and
NICOLAS MADUROS, in his official capacity
as Director of the California Department of Tax
and Fee Administration,

Defendants

Case No. 1:18-cv-00958-DAD-RPG

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS FIFTH CAUSE
OF ACTION OF FIRST AMENDED
COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION**

DATE: December 4, 2018

TIME: 9:30 a.m.

DEPT: 5, 7th Floor

Hon. Dale A. Drozd

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1 **I. INTRODUCTION**

2 Plaintiff Big Sandy Rancheria Enterprises (“BSRE”) brings this action seeking
 3 declaratory and injunctive relief barring California officials from enforcing various aspects of
 4 state law governing the sale of cigarettes. One of BSRE’s claims plainly falls outside the subject
 5 matter jurisdiction of this Court: BSRE’s fifth cause of action asks the Court to declare that its
 6 business operations are not subject to state taxes under the California Cigarette and Tobacco
 7 Products Tax Law. Under the Tax Injunction Act (“TIA”), the Court has no jurisdiction to issue
 8 declaratory or injunctive relief enjoining, suspending, or restraining the collection of state taxes.

9 After defendants moved to dismiss on this ground (and other grounds presented by the
 10 California Attorney General), BSRE amended its complaint. While it previously admitted that it
 11 was a corporation wholly owned by the Big Sandy Rancheria Band of Western Mono Indians
 12 (the “Tribe”), BSRE now alleges the legal argument that, as a section 17 corporation, it *is* the
 13 Tribe, thus confusingly alleging that both it and the Tribal governing body recognized by the
 14 federal government are “the Tribe.” That is not the law. A tribal corporation is a commercial
 15 entity, legally distinct from the sovereign tribal entity. As discussed below, while the Tribe’s
 16 governing body is exempt from the TIA, corporations owned by the Tribe – like BSRE – are not.
 17 Accordingly, the Court lacks jurisdiction over BSRE’s fifth cause of action, and must dismiss it
 18 without leave to amend.¹

24 ¹ The California Department of Tax and Fee Administration administers California’s sales
 25 and use tax, fuel, tobacco, cannabis and other taxes and fees to fund and administrate various
 26 state tax and fee programs. As such, its Director has a particular interest in enforcement of the
 27 federal Tax Injunction Act to ensure that the CDTFA’s functions are not impaired by litigation
 28 seeking an end-run around applicable state tax procedures. Director Maduros understands that
 the Attorney General is filing his own motion to dismiss addressing more broadly the Plaintiff’s
 substantive legal theories.

1 **II. BACKGROUND**

2 BSRE is a commercial tribal entity incorporated under section 17 of the Indian
3 Reorganization Act of June 18, 1934 (“IRA”), 25 U.S.C. § 5124. BSRE and its “subdivisions”
4 distribute tobacco products to Indian tribal government and tribal-member reservation-based
5 wholesalers and retailers on the Indian land of other tribes within California. (First Amended
6 Complaint (“FAC”) [ECF 13] ¶¶ 116-25.)

7 In its original complaint, BSRE correctly alleged that it is a federally chartered
8 corporation wholly owned by the Big Sandy Rancheria Band of Western Mono Indians, a
9 federally recognized Indian tribe. (ECF No. 1 p. 1 & ¶¶ 9, 79-80.) BSRE now attempts to blur its
10 status to adopt the mantle of the Tribe’s sovereign governing body. Its First Amended Complaint
11 alleges that both it and the Big Sandy Band of Western Mono Indians are “the Tribe” even
12 though they are different legal entities. (FAC ¶ 10.) BSRE argues that a tribal corporation
13 incorporated pursuant to section 17 of the IRA is an Indian tribe with the same tax immunity as
14 the tribal governmental body. (FAC ¶¶ 11-17.) Notably, the Tribe itself is *not* a party to this
15 lawsuit.

16 BSRE’s complaint alleges five causes of action. The fifth directly asks this Court to bar
17 California from imposing taxes on BSRE under the Cigarette and Tobacco Products Tax Law,
18 Cal. Rev. & Tax. Code §§ 30001 *et seq.* (FAC ¶¶ 190-97.) Without needing to address the
19 ripeness and other problems with such a broad contention, this claim is barred because this Court
20 lacks jurisdiction to enter declaratory or injunctive relief barring state taxes.

21 **III. THE FEDERAL DISTRICT COURTS HAVE NO SUBJECT MATTER**
22 **JURISDICTION TO ENJOIN STATE TAXES**

23 “Federal courts are courts of limited jurisdiction. They possess only that power
24 authorized by Constitution and statute.” *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (internal
25 quotation omitted). This court is presumed *not* to have jurisdiction unless otherwise shown.
26 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). Where jurisdiction is challenged,
27 the burden is on the plaintiff to prove that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co.*
28

1 *of Am.*, 511 U.S. 375, 377 (1994); *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir.
 2 2013). Claims falling outside the Court’s subject matter jurisdiction are subject to dismissal
 3 pursuant to Federal Rule of Civil Procedure 12(b)(1).

4 BSRE’s fifth cause of action asserts that California’s Cigarette and Tobacco Products Tax
 5 Law cannot be applied to it, and “seeks a judicial declaration that [BSRE] has no liability for the
 6 taxes imposed under the Cigarette and Tobacco Products Tax Law for the cigarettes and tobacco
 7 products it distributes.” (FAC ¶¶ 190-97.) This claim is squarely barred by the TIA, which
 8 provides that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or
 9 collection of any tax under State law where a plain, speedy and efficient remedy may be had in
 10 the courts of such State.” 28 U.S.C. § 1341. California’s tax procedures have repeatedly been
 11 held to provide “a plain, speedy, and efficient remedy.” *See Franchise Tax Bd. v. Alcan*
 12 *Aluminum*, 493 U.S. 331, 338-39 (1990); *California v. Grace Brethren Church*, 457 U.S. 393,
 13 414 n.31, 416-17 (1982); *Hyatt v. Yee*, 871 F.3d 1067, 1074 (9th Cir. 2017); *Jerron West, Inc. v.*
 14 *State of Cal., State Bd. of Equalization*, 129 F.3d 1334, 1339 (9th Cir. 1997).

15 The principal purpose of the TIA was “to limit drastically federal district court
 16 jurisdiction to interfere with so important a local concern as the collection of taxes.” *Grace*
 17 *Brethren Church*, 457 U.S. at 408-09 (internal quotation omitted). The Act prohibits claims for
 18 declaratory as well as injunctive relief. *Id.* at 411. The Act’s prohibition “has its roots in equity
 19 practice, in principles of federalism, and in recognition of the imperative need of a State to
 20 administer its own fiscal operations.” *Jerron West, Inc.*, 129 F.3d at 1338 (quoting *Tully v.*
 21 *Griffin, Inc.*, 429 U.S. 68, 73 (1976)).

22 BSRE recognizes this jurisdictional problem in its complaint, and tries to avoid it by
 23 alleging that the TIA “does not apply to civil actions brought by Indian tribes under 28 U.S.C.
 24 § 1362.” (FAC ¶ 8.) BSRE also alleges that, as a section 17 corporation, it *is* the Tribe and is
 25 thus exempt from the TIA. (FAC ¶¶ 13-16.) It claims this necessarily follows from the fact that it
 26 has the same tax immunity as the Tribe under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,
 27 151, 157 n.13 (1973) and an Internal Revenue Service ruling. (FAC ¶¶ 14-16.)

28

1 BSRE's assertion that a tribal corporation incorporated under section 17 of the IRA is
 2 legally indistinguishable from the governing body organized under section 16 of that Act is
 3 wrong. Congress adopted section 17 to allow Tribes to create *separate* legal entities that could
 4 waive sovereign immunity in connection with commercial transactions without affecting the
 5 sovereignty of the Tribe's governing body. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489,
 6 492-93 (9th Cir. 2002); *Parker Drilling Co. v. Metlakatla Indian Cmty.*, 451 F. Supp. 1127, 1131
 7 (D. Alaska 1978); *see Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985)
 8 (distinguishing between a tribe's commercial and sovereign role). As explained by the
 9 Department of the Interior:

10 The purpose of Congress in enacting section 16 of the Indian
 11 Reorganization Act was to facilitate and to stabilize the tribal
 12 organization of Indians residing on the same reservation, for their
 13 common welfare. It provided their political organization. The
 14 purpose of Congress in enacting section 17 of the Indian
 15 Reorganization Act was to empower the Secretary to issue a
 16 charter of business incorporation to such tribes to enable them to
 17 conduct business through this modern device, which charter cannot
 be revoked or surrendered except by act of Congress. This
 corporation, although composed of the same members as the
 political body, is to be a separate entity, and thus more capable of
 obtaining credit and otherwise expediting the business of the tribe,
 while removing the possibility of federal liability for activities of
 that nature. As a result, the powers, privileges and responsibilities
 of these tribal organizations materially differ.

18 *Interpretive Opinion on The Separability of Tribal Organizations Organized Under Sections 16*
 19 *and 17 of The Indian Reorganization Act*, 65 I.D. 483, 484 (1958).

20 Civil actions brought by federally recognized Indian tribes are not barred by the TIA.
 21 *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470-74
 22 (1976). *Moe* based that exemption on 28 U.S.C. § 1362, which provides jurisdiction in federal
 23 court for claims "brought by any Indian tribe or band with a governing body duly recognized by
 24 the Secretary of the Interior." 28 U.S.C. § 1362; *Moe*, 425 U.S. at 472-73.

25 The tribal governing body recognized by the Secretary of the Interior is the Big Sandy
 26 Rancheria Band of Western Mono Indians. (FAC ¶ 17.) BSRE is a tribal corporation, not the
 27 tribal governing body (i.e. the Tribe). BSRE cannot avoid that fact by ignoring the admission
 28

made in its initial pleading that it is a federally-chartered corporation “wholly owned by” the Tribe. (ECF No. 1, Complaint ¶ 9.)

The Ninth Circuit has held that the exemption to the TIA *only* applies to the Indian tribe’s governing body, and does not apply to “wholly controlled or owned subordinate economic tribal entities.” *Navajo Tribal Utility Authority v. Arizona Dep’t of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979). “Native corporations are not tribes or bands.” *Id.* (citation omitted); *see also Amarok Corp. v. Nevada, Dep’t of Taxation*, 935 F.2d 1068, 1070 (9th Cir. 1991). The Ninth Circuit has also expressly rejected BSRE’s argument that it is entitled to be treated the same as the Tribe’s governing body because they have the same tax status. “[S]uch a view speaks only to the question of tax immunity, not to the question of federal jurisdiction.” *Navajo Tribal Utility Authority*, 608 F.2d at 1233.

BSRE’s claim that it has no liability for taxes under the California Cigarette and Tobacco Produces Tax Law is thus barred by the Tax Injunction Act, 28 U.S.C. § 1341, and should be dismissed.

IV. CONCLUSION

Because the Court has no subject matter jurisdiction over BSRE’s fifth cause of action, that cause of action should be dismissed without leave to amend.

DATED: October 22, 2018

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By /s Michael von Loewenfeldt

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