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BIG SANDY RANCHERIA ENTERPRISES,
a federally-recognized Indian tribe, incorporated
under the Indian Reorganization Act

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

BIG SANDY RANCHERIA ENTERPRISES, a federally-recognized Indian tribe, incorporated under the Indian Reorganization Act,

Plaintiff,

vs.

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-EPG

OPPOSITION TO DEFENDANT MADUROS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: February 5, 2019
Time: 9:30 a.m.
Courtroom: 5
District Judge Dale A. Drozd

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INTRODUCTION

In this brief, plaintiff Big Sandy Rancheria Enterprises ("BSRE") opposes the motion to dismiss filed by defendant Nicolas Maduros ("Maduros"), Doc. 16-1, which argues that BSRE's fifth claim for relief is barred by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and also addresses the TIA arguments presented in the separate motion to dismiss filed by defendant Xavier Becerra ("Becerra"), Doc. 15-1 at 10-13. BSRE responds to the other aspects of Becerra's motion by separate filing.

BACKGROUND

BSRE "is the name under which the Tribe is federally-chartered, organized and operating pursuant to and in accordance with section 17 of the Indian Reorganization Act ('IRA' or 'Indian Reorganization Act') of June 18, 1934, c. 576, § 17, 48 Stat. 984, 988, 25 U.S.C. § 5124." First Amended Complaint (Doc. 13, "FAC") ¶ 10. In addition to its corporate organization under section 17, the Tribe is also organized under its Constitution, adopted pursuant to section 16 of the IRA, 25 U.S.C. § 5123, under the name Big Sandy Band of Western Mono Indians. FAC ¶ 10.

Big Sandy Distributing, IRA, a division of BSRE, is a wholesaler of cigarettes.[1] FAC ¶¶ 100, 123. Its customers are retailers of cigarettes. FAC ¶ 123. These retailers are Indian tribes or tribal members. *Id.* The Indian retailers are located on their own reservations. *Id.* BSRE's sales to these Indian retailers occur on the retailers' reservations. FAC ¶ 124. Predicated on the general principle that state laws are not applicable to tribal Indians on their Indian reservation, and on the Indian Trader Statutes, 25 U.S.C. §§ 261-264, which preempt state authority over any person's sales

[1] The State Cigarette Tax Law defines "wholesaler" to mean a person (other than a licensed distributor) who sells tax-paid cigarettes for resale. Cal. Rev. & Tax. Code § 30016. BSRE is not a wholesaler within this definition, because it sells untaxed cigarettes for resale. The term *wholesaler* in BSRE's briefs is not intended to refer to this statutory definition, but rather to its ordinary meaning. *See Black's Law Dictionary* (10th ed. 2014), wholesaler ("Someone who buys large quantities of goods and resells them in smaller quantities to retailers or other merchants, who in turn sell to the ultimate consumer."). BSRE is also a wholesaler of non-cigarette tobacco products, which are ordinarily subject to similar but not identical State taxes, regulations, and licensing requirements. Because the legal principles are essentially the same, BSRE's briefs refer to *cigarettes* and *tobacco products* interchangeably.

to an Indian on the Indian buyer's own reservation, BSRE alleges that these wholesale sales are not subject to State taxation, licensing or regulation. *See* FAC ¶¶ 85-89, 163-197.

The cigarettes BSRE sells are manufactured by Azuma Corporation ("Azuma").[2] FAC ¶ 117. Azuma is a corporation formed under the laws of the Alturas Indian Rancheria, a federally-recognized Indian tribe ("Alturas"). *Id.* Azuma is wholly owned and operated by Alturas and located within Alturas Indian country. *Id.* When the FAC was drafted and filed, BSRE also imported and sold cigarettes manufactured by Grand River Enterprises Six Nations, Ltd. ("GRE"), which is a Canadian corporation owned by members of the Six Nations of the Grand River, a recognized First Nation of Canada, located on the Six Nations of the Grand River Reserve. *Id.* However, BSRE now no longer imports GRE cigarettes, and no longer sells them except to the limited extent it may have remaining stock on hand.[3] BSRE also intends to begin manufacturing cigarettes on its reservation, which it will then distribute for resale. FAC ¶ 121.

The tribal retailers to whom BSRE sells its products resell them to consumers at retail locations within such retailers' own reservations. FAC ¶ 125. Many of these retailers are tribal governments who sell their cigarettes at their casinos owned and operated by such tribal governments pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and Tribal-State gaming compacts. FAC ¶ 126. Based on provisions in these gaming compacts that disclaim the applicability of State laws to the sale and use of tobacco products at Tribal casinos, and the preemptive power of IGRA with respect to commerce related to tribal gaming, BSRE alleges that such sales are not subject to State taxes or regulations, except as may be provided in the applicable Tribal-State gaming compact. *See* FAC ¶¶ 126-130. Further, the value marketed by these tribal retailers (and by BSRE and Azuma) is "generated on reservations by activities in which the tribes have a significant interest." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

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[2] Azuma was never raided by federal agents for cultivating marijuana, despite Becerra's gratuitous assertion that this happened. *See* Doc. 15-1 at 4. The Department of Justice press release Becerra cites does not mention Azuma. *See id.* at 4 n.5 (citing press release).

[3] GRE's brands were recently added to the AG's directory of compliant cigarettes. *See* California Tobacco Directory, https://oag.ca.gov/tobacco/directory (stating GRE brands were added December 21, 2018).

California demands compliance with its Directory Statute, Cal. Rev. & Tax. Code § 30165.1, which protects the major tobacco manufacturers' market share, because if Big Tobacco were to lose market share, California would be denied the Big Tobacco funding it depends on to pay its debts. *See* FAC ¶¶ 21-67. Accordingly, because Azuma's brands are not listed on the directory of Becerra-approved cigarettes, the State attempts to apply the provisions of the Directory Statute to BSRE's commerce and bar its possession and sale of Azuma cigarettes. Presumably, BSRE-manufactured cigarettes will also be banned. To avoid this result, according to the State, the manufacturer (Azuma or BSRE) must either join the MSA, agreeing to make payments to the State based on the volume of cigarettes distributed, or deposit a similar amount into a 25-year escrow (among other requirements). *See* FAC ¶¶ 39-43; Cal. Rev. & Tax. Code § 30165.1(b). BSRE alleges that federal Indian law preempts the imposition of this regulatory burden for its possession of cigarettes and for its subsequent sale of cigarettes to Indian buyers on their reservations.

California also requires a "distributor" (as it defines the term) to affix cigarette tax stamps and remit cigarette excise taxes on each distribution of cigarettes. However, Becerra also admits, "certain purchasers may not be taxable at the time of sale" and the tax scheme "requires distributors to collect taxes only after they become due." Doc. 15-1 at 5. BSRE is not the only "distributor" in the chain of commerce – every person who sells, uses, consumes, or stocks "untaxed cigarettes" is a "distributor" under California law, including BSRE's retailer customers and including many (if not all) of the ultimate consumers. *See* Cal. Rev. & Tax. Code § 30008 (defining "distribution"), § 30011 (defining "distributor").[4]

The issue is which distributor has the collection and remittance obligation in this case. BSRE alleges that, under principles of federal Indian law, none of its "distributions" are taxable, and BSRE has no legal obligation under California law to collect taxes if they later become due upon subsequent taxable retail sales to which BSRE is not a party. Between the retailer-"distributors"

[4] The term "*untaxed cigarette*" is defined as "any cigarette which has not yet been distributed in such a manner as to result in a tax liability under this part." Cal. Rev. & Tax. Code § 30005. This definition is notable because it hinges on whether tax *liability* has arisen, rather than whether tax *payment* has been made.

and BSRE, only the retailers are in the position to determine whether the cigarettes can be taxed, and to collect any tax that may become due.

Finally, California requires every cigarette distributor to hold two licenses. *See* FAC ¶¶ 78-82; Cal. Rev. & Tax. Code § 30140; Cal. Bus. & Prof. Code § 22975. BSRE contends that the State's licensing requirement, including all the associated regulatory burdens on BSRE, are also preempted. Although federal law allows that states may, in certain circumstances, impose minimal regulatory burdens upon reservation Indians when necessary to facilitate the collection of valid state taxes owed by non-Indians, BSRE contends that California's requirements (holding State licenses and reporting all distributions[5]) are not designed or reasonably tailored to achieve that purpose.

For its first two claims, the FAC alleges that federal common law, tribal sovereignty and the federal Indian Trader Statutes preempt the application of the Directory Statute to BSRE's transactions with Indian tribes and tribal members within their reservations. FAC ¶¶ 163-176. Claims three and four allege that the application of the State's licensing requirements to BSRE is similarly preempted. FAC ¶¶ 177-188.

The fifth claim, which is the only claim at issue here, "seeks a judicial declaration that the Tribe has no liability – either directly or pursuant to a collection and remittance requirement – for the taxes imposed under the Cigarette and Tobacco Products Tax Law for the cigarettes and tobacco products it distributes," under a combination of federal preemption principles and a fair reading of the State's cigarette tax statutes. FAC ¶ 197; *see id.* ¶¶ 189-196. Maduros and Becerra argue that the TIA divests the Court of jurisdiction over BSRE's fifth claim for relief.

[5] Distributors must file monthly reports of their "distributions of cigarettes and purchases of stamps and meter register units during the preceding month[.]" Cal. Rev. & Tax. Code § 30182(a). Distributors who "collect the tax from the purchaser" pursuant to Cal. Rev. & Tax. Code § 30108 are to file monthly reports "showing the number of cigarettes with respect to which he or she was required to collect the tax[.]" *Id.* § 30183(a). The State's mandatory reporting forms also call for the distributor to report details of "disbursements," including the buyer's name and the location where the cigarettes were delivered. *See* CDTFA-810-CTF Rev. 2 (10-17), Cigarette Tax Disbursement Schedule; CDTFA-501-CD (S1F) Rev. 13 (10-17), Cigarette Distributor's Tax Report.

THE TAX INJUNCTION ACT DOES NOT BAR BSRE'S TAX CLAIM.

The TIA does not bar actions brought by Indian tribes under 28 U.S.C. § 1362.[6] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 470-74 (1976). No court opinion has squarely decided whether the TIA exception applies when the Indian tribal plaintiff is the section 17 *incorporated* Tribe, rather than the section 16 *constitutional* Tribe. All indications from relevant authorities, however, demonstrate that the form of the Tribe's organization is irrelevant to its capacity to bring suit under section 1362 and its corresponding qualification for the "Indian tribes" exception to the TIA. The corporate organization and the constitutional organization are nothing but two faces of the same Tribe, each possessing the Tribe's right to test in federal court a state tax system's compliance with federal law.

I. The Tax Injunction Act.

A. The TIA's limited scope does not cover BSRE's fifth claim.

The TIA provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Supreme Court has noted the two "closely related" objectives of the TIA:

> (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court – usually out-of-state corporations asserting diversity jurisdiction – and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.

Hibbs v. Winn, 542 U.S. 88, 104 (2004) (citing S.Rep. No. 75-1035 at 1-2 (1937)). The TIA is therefore directed at "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Hibbs* at 105. It "'restrain[s] state taxpayers from instituting federal actions to contest their [own] liability for state taxes,' … suits that, if successful, would deplete state coffers." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 425

[6] "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

(2010) (quoting *Hibbs* at 108, second alteration by *Levin* Court). However, "[n]owhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration." *Hibbs* at 105. (internal quotation marks omitted). Nor does the TIA bar every suit that "merely inhibits" or has a "negative impact" on the assessment, levy or collection of a state tax. *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124, 1133 (2015). Instead, the question "is whether the relief to some degree *stops* 'assessment, levy or collection[.]'" *Id.* (emphasis added).

BSRE's fifth claim seeks a judicial declaration that, in all instances where a State excise taxes are due on the cigarettes distributed by BSRE, the legal incidence of the tax falls on the cigarette consumer (i.e., the purchaser in the retail sale), and the responsibility to collect the tax and remit it to the State falls on the retailer, not on BSRE. The tax claim therefore relates to State tax collection only insofar as it asks for judicial confirmation about *who* the State conscripts to collect the tax on its behalf from the taxpayer. The relief sought would not stop the State's collection of any taxes owed by the taxpayer, but only would direct the State's attention from BSRE to the retail distributors. As a result, BSRE's claim, if successful, would not "deplete state coffers," *Levin* at 425. It is therefore not within the TIA's scope, even if BSRE were not exempt from the statutory bar.

B. Indian tribes are exempt from the TIA.

The TIA is inapplicable to suits brought by Indian tribes, just as it is "inapplicable to suits brought by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.'" *Moe*, 425 U.S. at 470, 475 (quoting *Dept. of Employment v. United States*, 385 U.S. 355, 358 (1966)). Relying on 28 U.S.C. § 1362, construed in light of its legislative history, *Moe* found "an indication of a congressional purpose to open federal courts to the kind of claims that could have been brought by the United States as trustee, but were not so brought," giving Indian tribes that desired to litigate federal questions access to federal courts that "would be at least in some respects as broad as that of the United States suing as the tribe's trustee." *Moe* at 472-73. *Moe* recognized the longstanding principle that the United States has an "'interest … in securing immunity to the Indians from taxation conflicting with the measures [the United States has] adopted

for their protection.'" *Id.* at 473 (quoting *Heckman v. United States*, 224 U.S. 413, 441 (1912)). *Moe* further explained that the "proper basis for the protection asserted here … is that which *McClanahan* identified, i.e., that state taxing jurisdiction has been preempted by the applicable treaties and federal legislation." *Id.* at 474 n.13 (citing *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973)). Since tribes suing under section 1362 "were to be accorded treatment similar to that of the United States had it sued on their behalf," and "[s]ince the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law," the Court held the tribal plaintiff in *Moe* was similarly "not barred from doing so" there. *Id.* at 474-75; *see Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1046 n.5 (9th Cir. 2000) (in case where constitutional tribe and section 17 incorporated tribe were co-plaintiffs, court noted exemption to TIA in suits brought by Indian tribes under § 1362).

Defendants accept this premise, but contest whether BSRE, as an incorporated tribe under section 17 of the IRA rather than a constitutional tribe organized under section 16, qualifies as an Indian tribe eligible for the exemption from the TIA.

II. Tribal access to federal courts under section 1362 does not depend on the Tribe's form of organization.

Because *Moe* tied the similar treatment of Indian tribes and the United States under the TIA to their similar access to federal courts pursuant to 28 U.S.C. § 1362, examining section 1362 sheds light on how to treat a section 17 incorporated tribe under the TIA.

Section 1362 authorizes actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," without distinguishing between the constitutional tribe provided for in IRA section 16 and the "incorporated tribe" provided for in IRA section 17. The reference to a "duly recognized" governing body indicates that the tribe commencing a suit under section 1362 must have a Secretarially-recognized government. This reference does not mean that section 1362 is limited to tribes acting through their constitutionally organized governing body or in a governmental capacity, since tribes can become incorporated under section 17 only if they already have a governing body. *See* 25 U.S.C. § 5124 (federal charter of incorporation "shall not become operative until ratified by the governing body of such tribe").

> The Supreme Court has summarized the congressional objectives of section 1362:
>
> Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. § 1331, the general federal question jurisdictional statute. Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state courts when an identical suit brought on their behalf could have been heard in federal court.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 559 n.10 (1983) (citing S.Rep. No. 89-1507, at 2-3 (1966); H.R. Rep. No. 89-2040, at 2, 4 (1966), *reprinted in* 1966 U.S.C.A.N.N. at 3145). As *Moe* stated, the United States and Indian tribes share an interest in "securing immunity to the Indians from taxation" when "state taxing jurisdiction has been preempted by the applicable treaties and federal legislation." *Moe* at 473, 474 n.13. Actions addressing such tax immunity are thus among the actions that the United States may bring on behalf of Indian tribes, and therefore they are squarely within the scope of section 1362, giving Indian tribes access to federal courts to bring such actions themselves.

The legislative history of section 1362 also shows that Congress was particularly concerned with "cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States[.]" H.R.Rep. No. 89-2040 at 2. Under section 17 of the IRA, a federal charter "may convey to the incorporated tribe" broad powers over "property of every description, real and personal, including the power to purchase restricted Indian lands[.]" 25 U.S.C. § 5124.[7] The right of incorporated tribes

[7] Section 17 of the IRA, as amended, reads as follows:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands

to own restricted Indian lands means that they share this congressionally-recognized need for a federal forum for actions involving such lands.

Describing federal preemption as the basis of the "protection" of Indians from state taxes, *Moe* cited a pair of then-recent companion cases, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *McClanahan*. *Moe* at 474 n.13. Among the rulings in *Mescalero*, the Court observed that it was "unclear from the record whether the [Mescalero Apache] Tribe has actually incorporated itself as an Indian chartered corporation pursuant to [section 17 of the IRA]" or if it was operating as the constitutional entity organized under section 16, and held that, "[i]n any event, *the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business*." *Mescalero* at 157 n.13 (emphasis added). The Court then held that federal law preempted the state use tax imposed on the Tribe (whether the incorporated tribe or constitutional tribe) for ski lifts installed as permanent improvements to the Tribe's tax-exempt land. *Id.* at 158.[8] Both a constitutional tribe and an incorporated tribe, therefore, identically possess the interest identified in *Moe* to secure their immunity under federal law from state taxation. Therefore, section 1362, which was enacted to provide Indian tribes access to federal courts to bring such claims, applies equally to a constitutional tribe and an incorporated tribe.

III. The nature of a section 17 "incorporated tribe" allows it to challenge state tax collections based on tribal tax immunities under federal law.

Further indicating that section 1362 and the TIA exception must apply with equal force to the incorporated and constitutional tribe is the fact that sections 16 and 17 of the IRA merely provide alternative methods by which an Indian tribe – meaning the tribe as a people who collectively make up the sovereign state – may organize itself with structures that allow the individuals to identify together as a legal person. BSRE's depiction of itself in the FAC as an "incorporated tribe" is not

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included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 5124.

[8] *Mescalero* also upheld the state "gross receipts tax" on the Tribe's income from operating a business beyond its reservation borders. *Id.* at 157-58.

intended to obfuscate or to blur the distinction between the tribal entities, but to use the language of section 17 and to reflect the legal effect of incorporation under the IRA as intended by Congress.

Prior to the enactment of the IRA in 1934, tribal government structures varied significantly, with some tribes possessing a complex governmental form and others a simple, decentralized structure. *Cohen's Handbook of Federal Indian Law* § 4.04[1], at 254 (Nell Jessup Newton, ed., 2012). For example, the Iroquois Confederacy in New York was comprised of six warring nations united under a constitution with an elaborate system for checks and balances. *Id.* Under this constitution, member nations selected chiefs to sit on a Council of Fifty to resolve important issues. *Id*. Another such example is the Creek Nation in Oklahoma, which was a confederacy of eighty self-governing towns. *Id.* at 255. The towns were divided into those that enacted laws and regulations addressing the internal matters of the confederation and others that conducted foreign relations and military campaigns. *Id.*

Conversely, Big Sandy's pre-contact government was relatively simple in that it consisted only of a Chief and his messengers. 8 *Handbook of North American Indians* 433-434 (Spier, ed., 1978). The Chief's powers, although not absolute, were substantial in that he could order the death of an "evil-doer" and would govern when the Tribe would move and hold ceremonies. *Id.* Notwithstanding the importance of the Chief, Big Sandy's pre-contact settlements were generally small and loosely organized. *Id.* at 431. Big Sandy's ancestors traded with other Indian tribes located on either side of the Sierra Nevada range. *Id.* at 427. Such trade was primarily in natural products, such as acorns, pine nuts, obsidian and rabbit skins. *Id.* "In addition to securing items for their own use, the [Tribe's ancestors] were also middlemen in trades" with other Indian tribes. *Id.* In effect, the Tribe's ancestors could be said to have been distributors of native products.

As the nineteenth century progressed, the federal government increasingly manipulated tribal governmental and cultural structures. *Cohen's Handbook of Federal Indian Law* § 4.04[2], at 256 (Newton, ed., 2012). For example, in 1887, Congress adopted the General Allotment Act, also known as the Dawes Act, with the intent of disorganizing Indian tribes and breaking up tribal reservations. David E. Wilkins, *Introduction* in Felix S. Cohen, *On Drafting Tribal Constitutions*, at xxiii (U. Okla. Press 2007) ("Wilkins"). Congress viewed breaking up tribal governments and

communal ownership of land as a critical step in assimilating Indians into Euro-American society. *Id.* By the 1930s, however, the federal government recognized the grave error of the General Allotment Act.[9] Specifically, the drafters of the IRA "were convinced … that the tribal organization via written constitutions, charters, and bylaws was the most appropriate means for Native nations to protect and exercise their basic right of political and economic self-determination." Wilkins at xxi. Thus, Congress enacted the IRA with the purpose of reestablishing tribal governance, revitalizing tribal economies and cultures, and reconstituting tribal land bases. *Cohen's Handbook of Federal Indian Law* § 4.04[3][a][i], at 256 (Newton, ed., 2012).

The IRA's legislative history indicates that the purpose of section 17 was to "'permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.'" *Mescalero* at 159 (Douglas, J., dissenting in part) (quoting S. Rep. No. 73-1080, 1 (1934)). The establishment of a section 17 corporation is within the discretion of the Secretary of the Interior, and its charter only confers powers that the Secretary is willing for the corporation to possess. 25 U.S.C. § 5124. "Any charter so issued shall not be revoked or surrendered except by Act of Congress." *Id.* Other provisions require ratification of the charter by the tribe's governing body and restrict the incorporated tribe's authority to alienate reservation trust or restricted lands. "These limitations are obviously aimed at preserving the tribe's assets and

[9] In support of the reform measures contained in the IRA, Commissioner of Indian Affairs John Collier described the virtues of the General Allotment Act as slight when contrasted with the destructive effects of the law and its administration. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise*, Hearing before the Committee on Indian Affairs, U.S. Senate, 73rd Cong. 251-52 (May 17, 1934). During floor debate in the House of Representatives, Representative Edgar Howard, co-sponsor of the Act and Chairman of the House Committee on Indian Affairs, explained the result of General Allotment Act, stating that "[a]lthough many thousands of Indians are living in tribal status on the various reservations, their own tribal institutions have very largely disintegrated or been openly suppressed…" 73 Cong. Rec. 11729 (1934) (statement of Rep. Howard). Rep. Einar Hoidale said that "the General Allotment Act of 1887 alone has been responsible for tremendous losses to the Indians" and that "[i]ts purpose really was to destroy the tribal status…" 73 Cong. Rec 11870 (1934) (statement of Rep. Hoidale). When the IRA was debated in the Senate, Senator Burton Wheeler, co-sponsor of the Act and Chairman of the Senate Committee on Indian Affairs, said, "[m]y observation has been that while the Government has been seeking to train the Indians of the United States, as a matter of fact most of them are in a much more deplorable condition economically than they ever have been in their lives." 73 Cong. Rec. 11123 (1934) (statement of Sen. Wheeler).

existence – suggesting that the tribe exists, at least in part, through its section 17 corporation, notwithstanding the fact that the corporation is a distinct legal entity." *Uniband, Inc. v. Commissioner*, 140 T.C. 230, 262 (2013).

In the Handbook of Federal Indian Law published by the Department of the Interior in 1941, author Felix S. Cohen, the Assistant Solicitor for the Department of the Interior and principle author of the IRA,[10] addressed the "corporate capacity" of Indian tribes in light of the IRA. Felix S. Cohen, *Handbook of Federal Indian Law*, ch. 14 § 4, at 277-279 (photo. reprint 1988) (1941). Cohen explained that "the incorporation provisions" of the IRA "have been consistently interpreted by the administrative authorities of the Federal Government and by the tribes themselves as *modifying only the structure of the tribe* and not relieving it of any tribal obligations or depriving it of any tribal property." *Id.* at 279 (emphasis added).

Cohen observed that an Indian tribe, like other governments, is, "in a broader sense, … a body corporate," meaning a "group of individuals to which the law ascribes legal personality, i.e., the complex of rights, privileges, powers, and immunities enjoyed by natural persons generally," regardless of the tribe's incorporation under section 17. *Id.* at 277. Under this view, the federal charter issued under section 17 merely establishes a tribe's corporate status in the narrower sense of "something chartered by a government," *id.*, thereby providing a certain formal structure to the tribe, while the tribe's essential identity remains as it was prior to the issuance of a section 17 charter.

Cohen's analysis was carried over to the Department of the Interior's revised edition of the Federal Indian Law handbook in 1958. Dept. of Interior, *Federal Indian Law*, ch. VI § B.4, at 476-481 (1958). This is the same Interior Department whose Deputy Solicitor, Edmund Fritz, issued the 1958 opinion on which the defendants rely. *See* Doc. 16-1 at 4, Doc. 15-1 at 12 (quoting Separability of Tribal Organizations Under Secs. 16 and 17 of the IRA, Opn. M-36515, 65 Interior Dec. 483 (Nov. 20, 1958)). The 1958 Solicitor's opinion describes the "distinction between the organization

[10] "[Felix] Cohen, of course did not work alone in drafting the IRA, although it appears it that he was its principle author." Wilkins at xxi. Indeed, Cohen was appointed as solicitor for the Department of the Interior "expressly to help draft the basic legislation that came to be known as the Wheeler-Howard bill, or the Indian Reorganization Act (IRA)." *Id.* at xv.

of an Indian municipal government under section 16 of the Indian Reorganization Act and that of a business corporation under section 17 of the act." Separability of Tribal Organizations at 484. The opinion notes, consistent with the Handbook, that the "corporation" and the "political body" are "composed of the same members," though the two "tribal organizations" possess "powers, privileges and responsibilities" that "materially differ." *Id.* Section 16 and section 17 represent alternatives that Congress provided to organize Indian tribes, entities that (in most cases) already existed as corporate bodies in the broader sense, and neither section provides for the *creation* of a new legal entity (as would be the case with a corporation in the narrow sense).[11] Instead, they provide *structures* for an Indian tribe's organization in forms deemed by Congress to be in the public interest.[12] Both structures, constitutional or chartered, organize the same set of individuals, the members of the Tribe. Where a tribe elects to use both structures, each one is a face of the tribe, and neither one's identity is altered or diminished by the existence of the other.

As Cohen indicated, there is substantial precedent for the view that regards a sovereign state as a "body corporate." Chief Justice Marshall, writing as Circuit Justice and addressing the United States' capacity to enter into contracts, declared that the "United States is a government, and consequently a body politic and corporate… This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes." *United States v. Maurice*, 26 F.Cas. 1211, 1216 (Marshall, Circuit Justice, C.C.D.Va. 1823). The Court reiterated this formulation in 1934, the same year that Congress enacted the IRA. *Helvering v.*

[11] An Indian tribe's "character as a governmental entity" exists however it may be organized, "so long as it retains its character as a tribe," but its "character as a governmental entity is conclusively established and takes practical form when the tribe is organized under a constitution under section 16 of [the IRA] and incorporated as a Federal corporation under section 17." Eligibility of Indian Tribes for Loans and Grants Under National Housing Act of 1937, Opn. M-30807, 57 Interior Dec. 145, 149 (Aug. 6, 1940); *see also* Indian Corporation—Borrowing from Government Agency (Feb. 4, 1952), *reprinted in* 2 Dept. of the Interior, Opinions of the Solicitor Relating to Indian Affairs 1917-1974, at 1562-63 (noting that the IRA "did not … create Indian tribes, or bring them into existence as bodies corporate. They were bodies corporate prior to the enactment of that statute, because they existed already as domestic dependent nations and exercised sovereign powers, subject only to control and regulations by the United States").

[12] A Solicitor's opinion issued while the bill that would become the IRA was under consideration confirmed the "constitutional authority of the United States to incorporate an Indian tribe, for the more convenient administration of Indian affairs[.]" Indian Corporations—Federal Charters (May 15, 1934), *reprinted in* 1 Dept. of the Interior, Opinions of the Solicitor Relating to Indian Affairs 1917-1974, at 409-10.

Stockholms Enskilda Bank, 293 U.S. 84, 92 (1934) (describing United States as "a body politic and corporate"); *see also Cotton v. United States*, 52 U.S. 229, 231 (1850) (holding that the United States is "a corporation or body politic" capable of maintaining suit at common law); *United States v. Tingey*, 30 U.S. 115, 128 (1831) (holding that the capacity to enter into contracts is "an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers"); *Dixon v. United States*, 7 F.Cas. 761, 762 (Marshall, Circuit Justice, C.C.D.Va. 1811) (noting that the "United States of America will be admitted to be a corporation"); 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 67 (rev. Sept. 2018) (stating that the "word 'corporation' in its most expansive meaning may be applied to a nation or state, and thus used, the United States and the several states may be termed 'corporations'"). The Supreme Court has used similar terms to describe an Indian tribe, holding that the Pueblo of Santa Rosa, an "Indian town" located in New Mexico which had enjoyed "a large measure of self-government" for years under Spanish, Mexican and United States dominion, was undoubtedly a "body corporate and as such capable of suing or defending" in court, either as a result of its longstanding self-governing status or because a set of federal and territorial enactments established and maintained its "corporate status[.]" *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 111-12 (1919). A 1940 Interior Department Solicitor's opinion explained that "when the tribe is incorporated," it is a "public corporation carrying on public enterprises," chartered "as a 'body politic and corporate of the United States of America.'" Eligibility of Indian Tribes for Loans and Grants Under National Housing Act of 1937, Opn. M-30807, 57 Interior Dec. 145, 149 (Aug. 6, 1940).

Beginning with the passage of the IRA 85 years ago, the federal government has treated constitutional tribes and incorporated tribes as two faces of a single tribe. Both sections 16 and 17 initially required a majority vote of tribal members to ratify a constitution or a charter. Indian Reorganization Act of June 18, 1934, §§ 16 & 17, 48 Stat. 984, 987-88. Now a charter requires ratification by the tribe's "governing body," rather than direct approval by the membership, 25

U.S.C. § 5124, but federal regulations still provide similar supervisory and oversight responsibilities over the adoption, ratification and amendment of both section 16 constitutions and section 17 federal charters. 25 C.F.R. §§ 81.1, 81.4. Such oversight is carried out through a so-called Secretarial election, which is a Federal election conducted by the Secretary in accordance with the requirements of the particular tribal governing document. *Cohen's Handbook of Federal Indian Law* § 4.06[2][a]-[b], at 286-87 (Newton, ed., 2012); *see also Cheyenne River Sioux Tribe* v. *Andrus*, 566 F.2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Under the pertinent regulation, 25 C.F.R. part 81, the Secretary conducts an election called for by any Indian tribe that is reorganized or incorporated under the IRA, prior to such tribe adopting or amending its section 16 constitution and prior to ratifying or amending its section 17 charter of incorporation, if the tribal constitution or charter so provides. *See* 25 C.F.R. § 81.2(a)(1)-(7). Such federal elections are not contemplated for the adoption or amendment of other types of tribal structure, such as tribal articles of organization for limited liability companies or tribal articles of incorporation.

The foregoing undermines the State's essential premise that BSRE's "corporate" status renders it fundamentally different from the constitutional Big Sandy Band of Western Mono Indians. Both entities are "corporate" in nature, just as both are tribal in nature. *See Cohen's Handbook of Federal Indian Law* Ch. 6, § A.4.c, at 327 (Strickland, et al., eds. 1982) ("Corporations created pursuant to section 17 of the IRA are tribal in character—they must be wholly owned by the tribe and are essentially alter egos of the tribal government."). The incorporation of the Tribe under section 17 imbues BSRE with a structure that differs and stands apart from the Tribe's constitutional structure, but it does not diminish the incorporated Tribe's access to federal courts in order to bring actions under federal law, including such actions that would enjoin state tax collection.

The State relies on Ninth Circuit decisions that decline to apply the tribal TIA exemption to "'wholly controlled or owned subordinate economic tribal entities,'" but neither case involves an incorporated tribe chartered under section 17. Doc. 16-1 at 5 (quoting *Navajo Tribal Utility Authority v. Arizona Dept. of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979) and citing *Amarok Corp. v. Nevada Dept. of Taxation*, 935 F.2d 1068, 1070 (9th Cir. 1991)); *see also* Doc. 15-1 at 11 (quoting *Navajo Tribal Utility Authority*).

In *Navajo Tribal Utility Authority*, the Ninth Circuit held that the district court lacked jurisdiction under 28 U.S.C. § 1362 (or under other jurisdiction-granting statutes) to hear the Authority's suit for declaratory and injunctive relief against the imposition of state taxes upon a power company from which the tribal Authority purchased electricity. *Navajo Tribal Utility Authority* at 1230. The Court characterized the Authority as "a subordinate economic enterprise of the Navajo Indian Tribe," a "subordinate, semi-autonomous tribal entit[y]," and a "wholly controlled or owned subordinate economic tribal entit[y]." *Id.* at 1229, 1231. It was created under Navajo Tribal law as a "somewhat, although not a completely, independent entity," with a Board of Directors that "is not synonymous with the Tribal Council or even a committee thereof." *Id.* at 1232. The "subordinate" and "semi-autonomous" nature of the Authority ultimately decided the outcome of the case, as the court concluded that access to federal courts under section 1362 requires that the tribe's "leadership" must be behind the action, and so, "[t]o the extent that [the Authority's] interests are identified with the Tribe's, the Tribe itself will be able to protect those interests, should its leadership decide to do so." *Id.* at 1231-32; *see also id.* at 1234 (holding that "[a]t least in the absence of a significantly greater identification between tribal leadership and membership, on the one hand, and management of the subordinate tribal enterprise, on the other, than that demonstrated here, we cannot treat [the Authority] as the Tribe for jurisdictional purposes"). An entity created by, and subordinate to, a tribal government is categorically different from an "incorporated tribe" because such an entity under section 17 stands as a personification of the tribe itself, organized with a corporate structure and federal charter. Rather than being subordinate to the tribal government or independent from the tribe, the incorporated tribe's leadership is the tribe's leadership, and its membership is the tribe's membership. *See* Separability of Tribal Organizations, 65 Interior Dec. at 484 (the two bodies are "composed of the same members"); FAC ¶ 95 (BSRE's Board of Directors is comprised of the Tribal Council).

The *Amarok* case is also readily distinguishable. There, the Amarok Corporation sued the State of Nevada seeking declaratory and injunctive relief against a state tax levy assessed against Amarok for construction work it performed on tribal trust land. *Amarok Corp.*, 935 F.2d at 1069. Amarok was "a private Indian-owned entity," so the Court treated it according to the rule applicable

to individual Indians, and held that while Indian tribes were exempt from the TIA's jurisdictional bar, that exemption did not extend to suits brought by individual members of Indian tribes, and therefore no such exemption was available to an individual member's business entity. *Id.* at 1070. An incorporated tribe such as BSRE, a corporate embodiment of the tribe itself, cannot be analogized to an individual Indian or a tribal member's private corporation.

The State cites another set of decisions to illustrate that a section 17 corporation is a separate legal entity from a section 16 constitutionally organized tribe, but these cases do not assist it. *See* Doc. 16-1 at 4; Doc. 15-1 at 12. Some of these cases deal with the effect of "sue and be sued" clauses found in section 17 charters, generally holding that, where such a clause waives the chartered entity's sovereign immunity, it does not affect the sovereign immunity of the constitutional entity. *See Linneen v. Gila River Indian Community*, 276 F.3d 489, 492-93 (9th Cir. 2002); *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982) (and cases cited therein); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1136 (D. Alaska 1978). They shed no light on whether the chartered tribe, though distinct from the constitutional tribe, can similarly bring an action under section 1362. Indeed, the fact that an incorporated tribe possesses sovereign immunity tends to indicate its inherent tribal identity (although immunity alone may not show conclusively that the entity *is* the tribe for purposes of section 1362 or the TIA, as tribal sub-entities or instrumentalities can sometimes be clothed in the tribe's immunity). Another case notes in dictum, in a footnote, that a tribal corporation of any description – including a tribe incorporated under section 17, a corporation created pursuant to tribal law, or one created under state law – is a citizen of the state in which it resides, and may therefore be subject to diversity jurisdiction in federal court. *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1094 n.1 (9th Cir. 2002). The court included section 17 corporations in this group without noting that the characteristics of an incorporated tribe are unique among these tribal corporations, and it would stretch the decision considerably to tie the court's unconsidered dictum about corporate citizenship to BSRE's ability to challenge state taxes under federal law under section 1392. A final case, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), explains that an Indian tribe, even through a single

entity, can act "as a commercial partner" and "as a sovereign." *Id.* at 200.[13] It is unremarkable that a tribe might organize itself into distinct entities to fill these roles, with each one given a structure appropriate to fit its role. The IRA gives Indian tribes a congressionally-backed method of doing so.

Congress enacted section 17 to permit Indian tribes to operate in the business world with greater ease by using a corporate structure familiar to the business world. Congress later enacted section 1362 to give Indian tribes access to federal courts to raise issues of federal law, including claims that would enjoin state collection. It follows that Congress did not intend section 1362 to disadvantage tribes based on their form of organization. It would defy the purpose of section 17 to require the constitutional tribe to become involved in every tribal lawsuit involving tribal business conducted in the form Congress provided for that purpose, in order to make use of the jurisdictional act passed for the tribes' benefit.

Indian tribes incorporated under a section 17 charter are correctly treated as tribes in other relevant contexts, including for both state tax purposes and federal tax purposes. As noted above and in the FAC, ¶ 14, in *Mescalero Apache Tribe v. Jones*, where an Indian tribe contended that federal law preempted the imposition of state taxes upon the tribe, the Supreme Court decided that it was irrelevant whether the tribal plaintiff was an incorporated tribe under section 17 or organized under a constitution adopted pursuant to section 16, holding that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 157 n.13. Under *Mescalero*, an Indian tribe's action asserting an immunity from state taxes based on federal law cannot be excluded from court under section 1362, or barred by the TIA, based on the fact that the tribal plaintiff is organized in the form of a section 17 corporation.

[13] Indeed, the Navajo Tribe declined to accept the IRA's provisions and therefore is not organized under section 16 or section 17. *See Kerr-McGee* at 198. Big Sandy adopted the IRA on June 25, 1938, by a vote of 38 to 1. *See* Dept. of Interior, U.S. Indian Service, Ten Years of Tribal Government Under the IRA (Pub. 10M), table A (1947).

As also noted in the FAC, ¶¶ 15-16, the Internal Revenue Service has ruled that a section 17 corporation "shares the same tax status as an Indian tribe," and is therefore not subject to federal income tax, the same as an Indian tribe organized by a method other than a section 17 charter. Rev. Rul. 81-295, 1981-2 C.B. 15; *see also* Rev. Rul. 94-16, 1994-1 C.B. 19 (holding that section 17 incorporated tribes are not subject to federal income tax on income earned from activities on or off a reservation); Treas. Reg. (26 C.F.R.) § 301.7701-1(a)(3) (2011) (stating that "tribes incorporated under section 17 of the [IRA] … are not recognized as separate entities for federal tax purposes"). The IRS Office of General Counsel concluded, based on the language of section 17, that "the corporation and the tribe are one and the same." IRS Gen. Couns. Mem. 38853 (May 17, 1982). Notably, the IRS has distinguished tribes incorporated under section 17 from tribal corporations formed under state law, holding that such state-law entities are subject to federal income tax. Rev. Rul. 94-16; *see also Uniband, Inc. v. Commissioner*, 140 T.C. at 259-64.

Several of the points outlined above were made by Judge Betty Fletcher in her thorough dissenting opinion in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865-69 (9th Cir. 1985). *Williams* was an outgrowth of a pair of actions that spanned federal and state courts and produced a Supreme Court opinion, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), in which the Court found certain state taxes preempted by federal law. *See Williams*, 810 F.2d at 846. In *Williams*, the Tribal plaintiffs, "[a]rmed with a favorable state court judgment on their federal claims" thanks to the *Bracker* ruling, pressed a civil rights claim under 42 U.S.C. § 1983 and sought attorney's fees under 42 U.S.C. § 1988. *Id.* at 845, 847. The Ninth Circuit held that the state's imposition of taxes that interfered with (but did not violate) a comprehensive federal regulatory scheme and ran afoul of federal policies could not support the plaintiffs' claim under § 1983, and therefore the tribal plaintiffs could not recover attorney's fees under § 1988. *Id.* at 850, 852. In dissent, Judge Fletcher concluded the Tribe validly stated its § 1983 claims. *Id.* at 857 (Fletcher, J., dissenting). Judge Fletcher then addressed several issues the majority opinion did not reach, including whether the Tribe's action could be brought in federal court under the "Indian tribes" exception to the TIA. *Id.* at 857 n.3, 865-69 (Fletcher, J., dissenting). The majority opinion acknowledged, but did not contradict, the dissent's TIA analysis, which seems to be the only judicial

opinion in the federal reports on the specific question of the TIA's application to section 17 entities. *Id.* at 851 n.10.

Judge Fletcher reported that the "Tribe brought this action in its capacity as an incorporated business entity under section 17" of the IRA. *Id.* at 866 (Fletcher, J., dissenting). It challenged Arizona's taxes "based on the tax burden it incurred while operating in a proprietary capacity," as distinct from its "capacity as a sovereign[.]" *Id.* at 867. Despite the tribe "acting as a business corporation," *id.*, it still "qualifie[d] for the 'Indian tribes' exception" to the TIA in accordance with *Moe*, *id.* at 868. Section 1362, Judge Fletcher noted, "does not distinguish between the 'governmental' tribe provided for in IRA section 16 and the 'incorporated tribe' provided for in section 17." *Id.* Congress "was fully aware that Indian tribes could act in both sovereign and proprietary capacities. Therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that it intended the provision to encompass actions brought by tribes in their corporate capacity as well." *Id.* The Indian canon of construction, in which "'statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor," bolstered this conclusion. *Id.* (quoting *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir. 1980)). Judge Fletcher's opinion distinguished the *Navajo Tribal Utility Authority* case, noting that in *Williams*, the Tribe "followed the precise guidelines suggested in *Navajo Tribal Utility*" – that the tribe's "'leadership … decide[] that litigation is necessary to protect the rights of the tribe'" – having "brought the action in its own name on behalf of a tribal enterprise it totally controls," with "nothing in the record to suggest" that the section 17 entity was "semi-autonomous, or that its interests diverged from the Tribe's in any way." *Id.* at 868-69 (quoting *Navajo Tribal Utility Authority* at 1232).

So, too, in this case, where the Tribe's leadership, coextensive and synonymous with the leadership of BSRE, decided to commence the suit in the name under which the Tribe is incorporated, to protect the rights of the Tribe from state burdens incurred while it operates in its "proprietary" capacity, and where the interests of BSRE and the constitutionally-organized Tribe are completely congruent. *See* FAC ¶ 95 (BSRE's section 17 charter "vests governance of [BSRE] in the Tribe's

governing body, the Tribal Council of the Big Sandy Band of Western Mono Indians, acting as the Board of Directors of BSR Enterprises").

CONCLUSION

Based on the foregoing, BSRE respectfully requests that the Court deny the State's motions to dismiss.

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