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

Defendants.

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

**REPLY IN SUPPORT OF MADUROS'
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Date: February 20, 2019

Time: 9:30 a.m.

Courtroom: 5, 7th Floor

Hon. Dale A. Drozd

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I. INTRODUCTION

The parties agree that the Plaintiff Big Sandy Rancheria Enterprises (“BSRE”) is a separate legal entity from the federally recognized Indian tribe Big Sandy Band of Western Mono Indians (the “Band”). The parties agree that BSRE is a federally chartered corporation, and that the purpose of such “section 17” corporations is to allow Indian tribes to conduct business without risking the Tribe’s own sovereign immunity. The parties agree that BSRE’s claimed exemption from the Tax Injunction Act (“TIA”) is based on 28 U.S.C. section 1362, which provides a federal forum to “any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.” And, finally, the parties agree that no case has previously held that a section 17 corporation is entitled to sue under section 1362 or otherwise exempt from the TIA.

Despite this, BSRE asserts that it has the same rights under section 1362 as the Band. It insists that it and the Band are just “two faces” of the Tribe. It argues that it has a “governing body recognized by the Secretary of the Interior” because *the Band’s governing body* is so recognized. BSRE is unable to cite any authority supporting its attempt to be separate from the Band, but also indistinguishable from it, depending on whichever status favors BSRE.

BSRE and the Band are not the same thing. They are two separate legal entities. The Band is a federally recognized Indian tribe. BSRE is a corporation owned by the Band. The Band has a “governing body recognized by the Secretary of the Interior.” BSRE does not. BSRE, like any corporation, has a Board of Directors. The fact that, BSRE claims, its Board of Directors is comprised of the members of the Band’s tribal council is irrelevant.

Notwithstanding BSRE’s discursive discussion of the history of native trading and nineteenth century theories about the “body corporate,” section 1362 is clear. It applies to claims by the Tribe *qua* political body – the entity with the governing body formerly recognized as such by the Secretary of the Interior. As the Ninth Circuit has previously held, section 1362 does not apply to corporations owned by a Tribe. The fact this particular corporation is incorporated under federal law makes no difference to that analysis. The Court lacks jurisdiction to determine

whether state taxes may be assessed, levied, or collected from BSRE, and its fifth cause of action should be dismissed.

II. ARGUMENT

A. BSRE'S FIFTH CAUSE OF ACTION FALLS SQUARELY WITHIN THE TIA

Before addressing the genuine question at issue, BSRE makes a cursory argument that its claim is not prohibited by the TIA because BSRE does not claim no one will ever eventually owe taxes on the cigarettes its sells, only that it has no obligation to collect and remit such taxes. (Opp'n pp. 5-6.) BSRE cites no apposite law for this argument. Beyond cases generally addressing why Congress decided to prohibit the federal courts from adjudicating whether state taxes can be assessed, levied, or collected, BSRE's only "authority" is *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124 (2015), a case that has nothing in common with this one.

The plaintiff in *Brohl*, the Direct Marketing Association, challenged a Colorado law that required all retailers who did *not* collect sales tax to (1) inform their customers of the customers' obligation to pay use tax, and (2) provide the state with details about those transactions. *Brohl*, 135 S.Ct. at 1127-29. There was no issue in *Brohl* concerning whether anyone owed taxes or whether any tax applied to particular transactions. The Supreme Court held that challenge to Colorado's disclosure requirements was *not* preempted by the TIA because the case did not involve "assessment, levy, or collection" of any tax. *Id.* at 1130-31. This case, however, does.

BSRE's fifth causes of action expressly seeks a declaration that it "has no liability for the taxes imposed under the Cigarette and Tobacco Products Tax Law for the cigarettes and tobacco products it distributes." (First. Am. Complaint ¶¶ 190-97.) Unless BSRE is exempt from the TIA under section 1362, its claim is directly prohibited by the Tax Injunction Act's prohibition on district courts "enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy, or collection of any tax under State law..." 28 U.S.C. § 1341; *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (TIA applies to claims for declaratory as well as injunctive relief). BSRE's assertion that some other person might later be held account for the same taxes is irrelevant to the clear limit on this Court's power to hold that BSRE has no such liability.

B. BSRE HAS NO RIGHT TO SUE UNDER 28 U.S.C. § 1362

1. BSRE and the Big Sandy Band of Western Mono Indians Are Legally Separate And Distinct Entities

BSRE wants this Court to find that both it and the Band are Indian tribes (indeed, the same Indian tribe) within the meaning of section 1362. BSRE brashly declares that “[w]here 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 other.” (Opp’n p. 13.) It notably is unable to cite *any* authority for this, the critical assertion in its opposition. The fact that the Big Sandy Band of Western Mono Indians incorporated BSRE does not mean that BSRE and the Band are “two faces of the same tribe.” The “tribe” is not a cultural concept. It is a legal entity with certain powers under, as relevant here, 28 U.S.C. section 1362. Specifically, it is the Band, not BSRE.

As BSRE is forced to admit, it and the Band are *separate* and distinct legal entities. *Uniband, Inc. v. Commissioner*, 140 T.C. 230, 262 (2013). (See Opp’n 12.) BSRE admits that the Department of the Interior considers “Indian municipal governments under section 16” and “a business corporation under section 17” as possessing “powers, privileges, and responsibilities” that “materially differ.” (Opp’n p. 13.) BSRE is, to use its own words, “distinct from the constitutional tribe.” (Opp’n p. 17.) They are separate, with materially different powers and privileges, for a reason. As explained in the moving papers, and as BSRE admits, the purpose of section 17 is to allow tribal entities to create separate legal entities to conduct business without waiving the sovereign immunity of the Tribe’s governing body. (See ECF No. 16-1 at p. 4.) As a separate and distinct legal entity, BSRE’s ability to bring its claims must be judged on its own merits, not with reference to what the Band could do (but has not done).

1 **2. The Plain Language Of Section 1362 Demonstrates That It Only**
2 **Applies To A Tribe’s Political Structure**

3 The question before the Court is not whether the Band can sue under section 1362. It has
4 not even attempted to do so. The question is whether section 1362 applies to BSRE. And the
5 language of the statute very clearly does not.

6 “The district courts shall have original jurisdiction of all civil actions, brought by any
7 Indian tribe or band with a governing body duly recognized by the Secretary of the Interior,
8 wherein the matter in controversy arises under the Constitution, laws, or treaties of the United
9 States.” 28 U.S.C. § 1362. To trigger jurisdiction under section 1362, the plaintiff (“brought
10 by”) must be an “Indian tribe or band with a governing body duly recognized by the Secretary of
11 the Interior...” Whether or not BSRE can be in any sense considered part of an “Indian tribe or
12 band” for some purposes, it indisputably *does not* have “a governing body duly recognized by
13 the Secretary of the Interior.” As BSRE’s own pleadings admit, the entity with a governing body
14 recognized by the Secretary of the Interior is the Band. (FAC ¶ 17.) As the Attorney General
15 pointed out – and BSRE makes no attempt to deny – the public list of such Tribes includes the
16 Band, not BSRE. Notice of Indian Entities Recognized, 83 Fed. Reg. 34,863, 34,863 (July 23,
17 2018).

18 BSRE cannot, and does not, argue that *it* has a governing body recognized by the
19 Secretary of the Interior. Instead, it insists that *the Band* has such a body. (Opp’n p. 7.) BSRE
20 again tries to blur the difference between the Band and itself, arguing that they are both “the
21 tribe” without regard to the limiting language of section 1362.

22 The statute is clear. Section 1362 only provides jurisdiction where the suit is “brought
23 by” the tribe whose governing body is recognized by the Secretary of the Interior. 28 U.S.C.
24 § 1362. That would empower the Band to sue. It provides no such rights to BSRE.

1 **3. Ninth Circuit Law Clearly Holds That Tribal Corporations Cannot**
2 **Sue Under Section 1362**

3 As discussed in the moving papers, and the Attorney General’s concurrent motion, the
4 Ninth Circuit has held that section 1362’s exemption to the TIA only applies to the Indian tribe
5 as a political entity, and *not* to “wholly controlled or owned subordinate economic tribal
6 entities.” *Navajo Tribal Utility Authority v. Arizona Dep’t of Revenue*, 608 F.2d 1228, 1231 (9th
7 Cir. 1979). “Native corporations are not tribes or bands.” *Id.* (citation omitted); *see Amarok*
8 *Corp. v. Nevada, Dep’t of Taxation*, 935 F.2d 1068, 1070 (9th Cir. 1991).

9 BSRE insists these cases are distinguishable because they did not involve corporations
10 formed under section 17 of the Indian Reorganization Act. BSRE asserts *ipse dixit* that it is not a
11 subordinate economic entity, but instead a “face” of the Tribe or the “alter ego” of the Tribe. Yet
12 BSRE’s own original complaint alleged that it was “wholly owned by” the Tribe. (ECF No. 1,
13 Complaint ¶ 9.) BSRE cannot manufacture jurisdiction by walking away from its prior pleadings
14 or word play. BSRE is undoubtedly a tribal corporation, not a sovereign political entity. BSRE
15 cites no authority for its insistence that it “stands as a personification of the tribe” for the purpose
16 of section 1362.¹

17 BSRE also claims that the form in which an Indian tribe chooses to structure itself should
18 not affect its tax liability under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n.3 (1973).
19 The Ninth Circuit has already expressly rejected the assertion that having the same tax immunity
20 as a tribe or band means that a corporation can sue under 28 U.S.C. § 1362. “[S]uch a view
21 speaks only to the question of tax immunity, not to the question of federal jurisdiction.” *Navajo*
22 *Tribal Utility Authority*, 608 F.2d at 1233.

23
24
25 ¹ BSRE relies heavily on a dissenting opinion from Judge Betty Fletcher in *White*
26 *Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985) wherein Judge Fletcher argued
27 that courts should consider a section 17 corporation exempt from the TIA. Dissents are obviously
28 not law. It is telling that not only was Judge Fletcher not able to convince any of the other
 members of that panel to join her views, no court has subsequently done so in the 33 years since
 she penned that dissent.

But the *Mescalero* case is important for a different reason ignored by BSRE – it illustrates how these tax challenges are supposed to proceed. *Mescalero* was not filed in federal court; it was reviewed by the Supreme Court on certiorari from the New Mexico state courts after the tribal corporation paid the disputed tax under protest and sued for a refund under state law. *Mescalero*, 411 U.S. at 146-47. The case does not discuss the TIA or section 1362, because the plaintiff properly brought its tax challenge in state court. That is precisely what the TIA requires BSRE to do here.²

4. BSRE’s Appeal To History and 19th Century Philosophy Provide No Basis To Disregard The Plain Language of 1362 And This Court’s Precedent

Having no authority for its key arguments, BSRE leans heavily on rhetoric. BSRE argues that the fact it is legally a corporation, not a political body, is irrelevant because in nineteenth century parlance a sovereign state is a “body politic and corporate” and thus both it and the Band are, in some sense, “corporate.” BSRE fails to tie this philosophical view of the nature of governments to the statutory interpretation at issue here.

BSRE also provides a lengthy history of various political forms native tribes used to structure themselves, as well as their practices of trading native flora and similar items. While this is sociologically interesting, it sheds no light on the issues before the Court. BSRE cites no legislative history showing that Congress meant to include section 17 corporations when it provided jurisdiction to “any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior” in 28 U.S.C. § 1362.³

This Court is a court of limited jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 489 (2004). The presumption is that the Court lacks jurisdiction, not that it has it. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). The plain language of Title 28, sections 1341 and 1362,

² BSRE makes no attempt to argue that the recourse available under California law is not plain, speedy, and efficient.

³ 28 U.S.C. § 1362 was adopted in 1966 (Public Law 89-635), thirty-two years after the Indian Reorganization Act of 1934.

demonstrates that there is no jurisdiction here because (a) BSRE seeks to have its business declared immune from California's tobacco tax laws, and (b) BSRE is not a tribe or band with a governing body duly recognized by the Secretary of the Interior. No matter how many times BSRE repeats its theory that it and the Band are simultaneously both "the tribe", the fact remains that there is no authority for the proposition that a corporation chartered under section 17 of the Indian Reorganization Act of June 18, 1934 is legally equivalent to the political "tribe or band" with a governing body recognized by the Secretary of the Interior within the meaning of 28 U.S.C. section 1362.

III. CONCLUSION

As the Ninth Circuit has recognized, section 1362 provides federal jurisdiction for claims by officially recognized Indian tribes or bands, not by tribal corporations. Like any other corporation, a tribal corporation must pursue its tax claims in state court – just as happened in *Mescalero Apache Tribe*, 411 U.S. 145. Because BSRE does not fall within the scope of 28 U.S.C. § 1362, the Tax Injunction Act, 28 U.S.C. § 1341, bars this Court from exercising jurisdiction over BSRE's challenge to California's tobacco tax laws. Accordingly, BSRE's fifth cause of action should be dismissed without further leave to amend.

DATED: January 24, 2019

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