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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

TWENTY-NINE PALMS BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER, , in his official capacity as Governor of the State of California; THE STATE OF CALIFORNIA; SELVI STANISLAUS in her official capacity as Executive Officer of the Franchise Tax Board,

Defendants.

Case No. EDCV08-1753 VAP (OPx)

OPPOSITION TO MOTION TO DISMISS AMENDED COMPLAINT

The Hon. Virginia A. Phillips

Date: August 3, 2009
Time: 10:00 a.m.
Crtrm.: 2

[Complaint Filed: 12/2/2008]

Trial Date: n/a

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I. INTRODUCTION

This case involves a challenge to the State of California's (the "State's") unlawful imposition of personal income tax on the per capita gaming distributions and income earned by Tribal members from on-reservation activities.[1] The imposition of personal income tax constitutes a breach of contract, interferes with tribal sovereignty, and is preempted by federal law. In addition, the income is exempt under state and federal law. The claims for relief in the Amended Complaint are more than sufficient to survive defendants' motion to dismiss.[2]

The Court has jurisdiction over this action. The Twenty-Nine Palms Band of Mission Indians (the "Tribe") has sued the State as well as Arnold Schwarzenegger, in his official capacity as governor of the State of California, and Selvi Stanislaus, in her official capacity as executive officer of the Franchise Tax Board ("FTB"), for prospective relief. Because both Schwarzenegger and Stanislaus are sued in their official capacity and have ties to enforcement of the personal income tax imposed on the Tribe's members, Ex Parte Young applies and the Tribe has standing. The State concedes it has consented to jurisdiction in federal court.

The first claim for breach of tribal compact is essentially a claim for breach of contract. Defendants seek dismissal of this claim based upon their preferred interpretation of the meaning of the tribal compact. The Tribe strongly disputes defendants' interpretation. This issue cannot be resolved on a motion to dismiss since the interpretation of the meaning of a contract necessarily entails the introduction of and consideration of various types of extrinsic evidence relating to the making of the contract and its intended meaning.

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[1] Tribal members are required by federal law to pay federal income tax.

[2] Defendants' motion to dismiss fails to comply with Local Rule 11-3.1.1 in that the proportionally spaced font is smaller than 14 point. Because the memorandum of points and authorities is 30 pages even with the reduced font, the brief exceeds this Court's order allowing the parties to exceed the standard page limitation.

The second claim for federal preemption and third claim for exemption under federal and state law are also proper because the facts alleged in the Amended Complaint are more than sufficient to establish a set of facts under which the Tribe is entitled to relief. As detailed below, these claims implicate important federal rights with the explicit goal and purpose of protecting the sovereignty and self-governance of Indian tribes. The legal issues are highly complex and require the consideration of significant extrinsic evidence such as what land the Tribe has, why its members cannot reside on it, and how the Tribe and its self-governance will be impacted if state income taxes are allowed to continue. These issues cannot be resolved on a motion to dismiss and defendants have provided no authority which would support such a result. [3]

II. STANDARD FOR A MOTIONS TO DISMISS

Defendants' motion is based upon both Rule 12(b)(1) and 12(b)(6). In connection with a Rule 12(b)(1) motion, a court must accept as true all material allegations in the complaint. Wilbur v. Locke, 423 F.3d 1101, 1107 (9th Cir. 2005). A court must "draw all reasonable inferences from them in [plaintiff's] favor" in ruling on a jurisdictional challenge. Valentin v. Hospital Bella Vista, 254 F.3d 358, 361 (1st Cir. 2001).

In deciding a motion to dismiss based upon Rule 12(b)(6), a court must accept all facts as true. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996). From a procedural standpoint, Rule 12(b)(6) motions are disfavored.

[3] The reality that there are significant disputed facts which must be developed, considered, and weighed is borne out by defendants entirely improper and inadmissible attempt to seek judicial notice of "facts" in state court pleadings in a case involving different parties and issues. (See Ross Decl., ¶¶ 2-4 ; Objection to Request for Judicial Notice.) Defendants attempt to use these pleadings as evidence regarding what land the Tribe has and whether the Tribe's members are really precluded from living on the reservation. Taking into account the Tribe's entire reservation, significantly less land was reserved for the Tribe than other tribes. Nevertheless, by making these arguments, defendants are implicitly admitting that the resolution of the "off reservation" issue requires extrinsic evidence thereby precluding defendants' motion to dismiss.

"The motion to dismiss for failure to a state a claim is viewed with disfavor and is rarely granted." Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997); United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (12(b)(6) dismissal is proper only in "extraordinary" cases). Rather, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

III. FACTUAL BACKGROUND

The Twenty-Nine Palms Band of Mission Indians is an Indian tribe that is federally recognized by the Secretary of the Interior of the United States of America. (Amended Complaint ¶ 6.) The Tribe is quite small. It has only 12 members who are over 18 years of age. (Amended Complaint ¶ 11.) Pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), the Tribe and the State entered into the Tribal-State Gaming Compact regarding Class III Gaming (the "Compact"). (Amended Complaint ¶ 13.) The Compact was signed by the governor and ratified by the legislature. (Exhibit 1 to Amended Complaint.) Pursuant to the Compact, the Tribe operates a Class III gaming casino (the "Casino") in Coachella, California on the Tribe's reservation. (Amended Complaint ¶ 13.) The economic viability of the Casino is the lifeblood of the Tribe. (Amended Complaint ¶ 16.)

In accordance with IGRA, the Tribe periodically prepares and submits to the federal Bureau of Indian Affairs a detailed financial plan for the Casino that is reviewed, approved and monitored by the federal Bureau of Indian Affairs. This plan is called a revenue allocation plan. (Amended Complaint ¶ 15.) The revenue allocation plan of the Tribe contains detailed funding requirements and financial allocation provisions as required by the Bureau of Indian Affairs and federal law. (Amended Complaint ¶ 15.) The plan dictates and details how the Tribe's net gaming proceeds must be distributed and includes the per capita payments to its members. The plan provides for per capita distributions to members of the Tribe

and takes into consideration, among other things, the members' obligations to pay federal income taxes with respect to the per capita payments made under the revenue allocation plan. (Amended Complaint ¶ 15.) The revenue allocation plan does not take into consideration the personal income tax that the State seeks to impose on the Tribe's members. (Amended Complaint ¶ 15.)

The Tribe's reservation is comprised of two separate parcels. Neither parcel contains any residential housing. (Amended Complaint ¶ 17.) The first parcel is in Coachella and is taken up entirely by the Casino and Casino parking lot. (Amended Complaint ¶ 17.) The other parcel is comprised of approximately 92 acres and is located across the Interstate-15 freeway away from the Casino. This parcel is near a sanitation plant whose effluence flows through a canal next to the 92-acre parcel, thereby making the land unsuitable for homes or the raising of families. (Amended Complaint ¶ 17.) The Tribe takes the additional off-reservation housing costs into account when it establishes its payments pursuant to the revenue allocation plan. (Amended Complaint ¶ 17.)

IV. ARGUMENT

A. The Court Has Jurisdiction Under the Eleventh Amendment and Ex Parte Young

In general, the Eleventh Amendment prohibits parties from suing a state in federal court. An exception to the Eleventh Amendment was announced by the Supreme Court in Ex Parte Young, 209 U.S. 123, 160, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The Supreme Court held that state officials who have a connection to enforcement of the challenged action may be sued in their official capacity in order to enjoin them from enforcing allegedly unconstitutional laws. Ex Parte Young, 209 U.S. 123. The Ex Parte Young doctrine is a legal fiction that an action is not against a state and is therefore not subject to the sovereign immunity bar. Agua Caliente Band of Cahuilla Indians v. Klehs, 223 F.3d 1041, 1045 (9th Cir. 2000). The "doctrine strikes a delicate balance by ensuring on the one hand that states enjoy the

sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, 'giving recognition to the need to prevent violations of federal law.'" Id., quoting, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

Suits for prospective injunctive relief may proceed against individuals in their official capacities. Capitol Industries-EMI, Inc. v. Bennett, et al, 681 F.2d 1107, 1120 (9th Cir. 1982); AT&T Communications v. Bellsouth Communications Inc., 238 F.3d 636 (5th Cir. 2001) (action against commissioners of public service commission); Agua Caliente, 223 F.3d 1041 (action by tribe against state tax officials). The cases defendants cite are inapposite because they involve contexts in which the attorney general or other official lacked any connection with the enforcement of the state law.[4] In contrast, as explained below, both the executive officer of the FTB and the governor have direct ties to enforcement of personal income tax. Because the Tribe seeks only prospective relief, the claims fall within Ex Parte Young and the Tribe may proceed in federal court.

1. The Claims Against Executive Officer Selvi Stanislaw Fall within Ex Parte Young

As a state official with ties to enforcement of the personal income tax laws, Selvi Stanislaus, executive officer of the FTB, falls within Ex Parte Young. The Ninth Circuit has already concluded that an action for prospective relief against the executive officer of the FTB is permissible under Ex Parte Young. Capitol Industries, supra, 681 F.2d at 1120.

Capitol Industries involved a foreign company, EMI Limited, that owned a group of subsidiaries including Capitol Industries. EMI Limited sued the

[4] See e.g. Southern Pacific Transportation Co. v. Brown, 651 F.2d 513 (9th Cir. 1980) (attorney general maintained only advisory power); Long v. Van de Kamp, 961 F.2d 151 (9th Cir. 1992) (attorney general maintained only general supervisory authority); Snoeck v. Brussa, 153 F.3d 984, 986 (9th Cir. 1998) (members of Nevada Commission on Judicial Discipline lacked connection to enforcement).

FTB's executive officer and board members to challenge a proposed tax assessment. The FTB argued that the EMI Limited's claim was barred by the Eleventh Amendment. The Ninth Circuit disagreed, stating that the "Eleventh Amendment does not bar federal court actions against state officials to enjoin them from enforcing unconstitutional statutes." Id. at 1120. The Ninth Circuit concluded the "case falls squarely within the doctrine of Ex Parte Young. In such cases, the Eleventh Amendment does not preclude access to the federal courts." Id. at 1120.[5]

Here, defendants concede that the FTB is the "sole state agency authorized by state law to administer and enforce the state's Personal Income Tax Law." (Moving Papers, page 9, lines 6-7.) Cal. Rev. & Tax. Code § 19501. The FTB has the power to demand information and require attendance and testimony at hearings for the purpose of administering the personal income tax laws. Cal. Rev. & Tax. Code § 19504. Any power granted to the FTB may be performed by any officer unless expressly provided that the power shall be performed only by the board itself. Cal. Govt. Code § 15702. In fact, almost all of the powers granted to and duties imposed on the FTB may be exercised and performed by the executive officer. 18 Cal. Code Regs. § 17000.10.

The executive officer is one of the top-ranking officials of FTB. Cal. Gov't. Code § 15701. The FTB may not impose penalties unless approved in writing by the supervisor of the FTB employee making the determination or a higher level official approved by the executive officer. Cal. Rev. & Tax. Code § 19187. The executive officer is authorized to sign subpoenas upon tax payers for certain tax violations. Cal. Rev. & Tax. Code § 19504(c)(2). The executive officer is directly involved with settlement of lawsuits involving tax issues, including reviewing, recommending and approving settlements. Cal. Rev. & Tax. Code §§ 19442, 19443.

[5] If the Court concludes that FTB's board members are more appropriate defendants than the executive officer, the Tribe requests leave to name the board members as defendants.

Clearly, the executive officer is connected with enforcement of personal income tax within the meaning of Ex Parte Young. As a result, the motion to dismiss Stanislaus pursuant to the Eleventh Amendment must be denied.

2. The Claims Against Governor Schwarzenegger Fall Within Ex Parte Young

The governor also has authority to enforce and administer issues pertaining to the state's revenues and taxes. The governor not only has general powers of supervision over all financial policies of the state, the governor "shall," whenever he deems it necessary, institute proceedings to conserve the rights and interests of the State. Cal. Gov't. Code § 13070.

The governor's connection to enforcement includes his ability to issue executive orders. An executive order is a plan, requirement, rule or regulation. Cal. Govt. Code § 17516; Cal. Rev. & Tax. Code § 2209. The governor exercises this authority with regard to taxation whenever he deems appropriate. For example, the governor issued Executive Order S1-03, in which he unilaterally rescinded a letter by the Director of Finance regarding vehicle license fees, ordered the Department of Motor Vehicles to reinstate the General Fund to offset the vehicle license fee, and directed the Department of Motor Vehicles to refund to taxpayers these vehicle license fees. The governor further ordered the Department of Motor Vehicles to take any steps necessary to carry out this order. Cal. Exec. Order S-1-03 (11/17/2003). The governor also issued Executive Order W-66-93 in which he created a strike force consisting of the FTB and other agencies to target enforcement relating to failure to pay taxes. Cal. Exec. Order W-66-93 (10/26/93). Thus, the governor not only has the authority to enforce issues relating to the state's revenues and taxes, but has exercised that authority. The Ninth Circuit has already concluded that the Eleventh Amendment does not bar a claim against the governor of California relating to breach of contract or improper fees and taxes. Cabazon Band Of Mission Indians v. Wilson, 124 F.3d 1050, 1058-1060 (9th Cir. 1997) ("Cabazon

III) . The motion to dismiss the governor under the Eleventh Amendment must be denied.

3. There Is No Case Law Barring Jurisdiction

Defendants mistakenly rely upon Seminole Tribe of Florida, 517 U.S. 44, 47, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) for their assertion that the Eleventh Amendment bars the second and third causes of action. In Seminole, the Supreme Court held that the Indian Commerce Clause does not provide an independent basis for jurisdiction. Because the tribe in that case sued the state itself, the parties did not argue and the Court did not address Ex Parte Young. The Ex Parte Young doctrine serves as an independent basis for federal jurisdiction. AT&T, 238 F.3d at 643, 647.[6] Because this Court has jurisdiction over this action under Ex Parte Young, Seminole is not relevant.

B. There Exists A Justiciable Case Or Controversy Between The Tribe And The Governor

Three requirements must be met for standing: (1) the plaintiff must have suffered an injury; (2) there must be a causal connection between the injury and the wrongful act; and (3) it must be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Defendants mistakenly argue that the second and third elements are lacking.

The cases upon which defendants rely involve circumstances in which the plaintiffs sued defendants with no ability to correct the wrongful act or where the plaintiffs themselves were not directly injured by the wrongful act. For example, in Simon v. Kentucky Welfare Rights Org., 426 U.S. 26, 96 S. Ct. 1917, 48 L. Ed. 2d 252 (1996), the plaintiffs sued the Secretary of the Treasury and the Commissioner of Internal Revenue challenging a revenue ruling that allegedly encouraged hospitals

[6] Defendants concede that the State has consented to federal jurisdiction as to the breach of contract claim. (Moving Papers, page 18, line 27- page 19, line 2.)

to deny services to indigent patients. The Court noted that the implicit corollary is that if the regulation were revised to require hospitals to serve indigent patients to receive favorable tax treatment, hospitals would be discouraged from denying treatment. Simon, 426 U.S. at 42. The Court, however, stated that the denial of access to hospitals did not necessarily relate to the revenue ruling and that it was speculative whether the requested relief would result in indigent patients receiving hospital services. Id. The Court thus concluded that the plaintiffs lacked standing.

Defendants also cited to Lujan, which involved the Endangered Species Act's requirement that federal agencies funding projects ensure that the projects are not likely to jeopardize endangered species. The Fish and Wildlife Service and National Marine Fisheries Service promulgated a regulation extending the protection of endangered species to actions taken in foreign nations but later rescinded that regulation. The plaintiffs were wildlife organizations who sued the Secretary of the Interior seeking a declaratory judgment that the new regulation was in error. The Court stated that where "a plaintiff's injury arises from the regulation (or lack of regulation) of *someone else*, much more is needed" to prove that standing requirements are satisfied. Id. (emphasis in original). The Court found causation lacking because the plaintiff's asserted injury arose from the government's unlawful regulation of a third party. Lujan, 504 U.S. at 562. In addition, the Court concluded that redressability was a problem specifically because the agencies funding the projects were not parties to the action. Id. at 568.

In contrast to Lujan and Simon, both causation and redressability are satisfied in the present action. Unlike in Lujan, this action does not arise from the regulation of a third party and heightened scrutiny is not necessary. Taking the facts of the complaint as true, the governor signed the Compact promising not to impose

personal income taxes on the distributions of Tribal members.[7] The State, through the FTB, has been imposing personal income tax. The imposition of personal income tax breaches the contract and violates federal and state law. The governor has caused the injury by allowing Tribal members to be taxed. The injury can be redressed by the governor in a number of ways, including the issuance of executive orders. As a result, standing is satisfied.

C. The Motion To Dismiss Should Be Denied As To The First Claim For Breach Of Contract Because The Complaint Alleges Facts Upon Which Relief May Be Granted

Dismissal of the first claim for breach of contract is not appropriate because defendants cannot establish that the Tribe cannot prove any set of facts that would entitle it to relief. The goal of contract interpretation "is to give effect to the mutual intent of the parties as it existed at the time of contracting." See United States Cellular Invest. Co. of Los Angeles v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002); MacKinnon v. Truck Ins. Exch., 31 Cal.4th 635 (2003); see Cal. Civ. Code § 1636. General principles of contract interpretation apply to gaming compacts. Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1098 (9th Cir. 2006).

The Tribe alleges that the essence of the Compact is that the Tribe will pay the State millions of dollars per year in licensing fees and, in return, the Tribe is to operate the Casino in accordance with the Compact provisions and IGRA. (Amended Complaint ¶ 18 .) Section 10.3(c) provides:

> "As a matter of comity, with respect to persons employed at the Gaming Facility, **other than members of the Tribe**, the Tribal Gaming operations shall withhold all taxes due to the State as provided in the California

[7] The fact that Governor Schwarzenegger did not sign the compact is of no import since he is sued in his official capacity. As the successor, Governor Schwarzenegger is the appropriate defendant. See Fed. R. Civ. Proc. 25(d); Mumford v. Basiniski, 105 F.3d 264, 273 (6th Cir. 1997).

> Unemployment Insurance Code and the Revenue and Taxation Code, and shall forward such amounts as provided in said Codes to the State."

The intent of the parties and the circumstances at the time the Compact was signed, including whether Indians were currently being taxed on per capita distributions and casino income, is relevant to the interpretation. When the Compact was entered into, the State knew that per capita payments from tribal gaming would be heavily supervised by the federal government, pursuant to the revenue allocation plan. The State knew the per capita payments would include a portion for members' living expenses. The State knew that the federal Bureau of Indian Affairs would be in control of the revenue allocation plan payments and would only be considering federal income taxes. The State also knew that no Tribal members lived on the Tribe's reservation. Thus, the parties included the language in § 10.3(c) in the Compact, exempting the members from personal income tax. Section 10.3(c), taken as a whole and in the context in which it was negotiated, constituted a negotiated elimination of state income taxes for Tribal members' income derived from employment with the Casino and for per capita distributions pursuant to the revenue allocation plan. The State may not trump all of the overwhelming evidence here regarding the intent of the Compact through a motion to dismiss.

Defendants disagree with the Tribe's interpretation of the contract, asserting that Section 10.3(c) refers to the Tribe's voluntary assumption to withhold state income taxes from the wages of **nonmember** gaming facility employees. Defendants argue that a tribe may be required to collect taxes on its reservation from **nonmember** Indians even absent a compact.[8] This point merely supports the Tribe's

[8] In support of this statement, defendants mistakenly rely upon California State Bd. Of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11-12, 106 S. Ct. 289, 88 L. Ed. 2d 9 (1985) (tribe required to collect sales tax on non-Indians who purchase cigarettes) and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 151, 100 S. Ct. 2069, 64 L. Ed. 2d 10 (1980) (same).

argument – if the Tribe is already required to collect taxes on behalf of the State, Section 10.3(c) is meaningless. Moreover, this dispute is about income to member Indians under the compact.

The defendants have presented no legal authority supporting their contract interpretation. Neither Cabazon III, supra, 124 F.3d 1050, 1058-1060 nor any other case cited by defendants provides that a commitment in a compact must be explicit rather than implied. In fact, the opposite is true. Cabazon III provides that state authority over class III gaming is limited by the explicit terms of the applicable Compact. Cabazon III, 124 F.3d at 1060.

The other cases cited by defendants are taken out of context. In Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52, 106 S. Ct. 2390, 91. L. Ed. 2d 35 (1986), various groups challenged Congress's amendment to the Social Security Act prohibiting states from withdrawing from the social security system (terminating their contracts) after a certain date. In the excerpt quoted by defendants, the Court simply stated that courts should be reluctant to conclude that Congress lacked the right to amend the Act. In United States v. Winstar Corp., 518 U.S. 839, 878-879, 116 S. Ct. 2342, 135 L. Ed. 2d. 964 (1986), the Court concluded that the federal government's promise to forever refrain from regulatory changes must appear absolutely clear to be enforceable. This principle has no application to a contract signed by a state for a limited number of years that does not contain a promise to refrain from ever making regulatory changes.

The meaning of Section 10(c) in the Compact is not one that can be decided in a motion to dismiss. It is a factual issue for the Court. Defendants' motion to dismiss as to the first claim, therefore, must be denied.

D. The Motion Must Be Denied As To The Second And Third Claims Because State Personal Income Taxes Interfere With Tribal Sovereignty And Are

These cases are not relevant to whether the State contractually agreed to forego personal income tax.

Preempted By IGRA

1. The State Personal Income Taxes Interfere With Tribal Sovereigny

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. See United States v. Wheeler, 435 U.S. 313, 322-323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). The exercise of state authority may be barred by inherent tribal sovereignty if it unlawfully infringes on the right of Indians to make their own laws and be ruled by them.[9] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 103 S. Ct. 2378, 76 L. Ed. 2d (1953). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" California v. Cabazon Band of Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L. Ed. 2d 244 (1987), citing, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154, 100 S. Ct. 2069, 2082, 65 L. Ed. 2d 10 (1980). Once the federal government recognizes a tribe as a political body, the tribe retains its sovereignty until Congress divests it of that sovereignty. Cohen's Handbook of Federal Indian Law (2005) § 4.01[1][a]. Where the state seeks to tax Indian activities on reservation land, courts consider traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of self-sufficiency and economic development. Cabazon Band of Indians, 480 U.S. at 216 (1987). While Congress has the power to authorize the imposition of state taxes over Indians, the courts will find the Indians exempt **unless Congress has expressly authorized the tax**. Cabazon Band of Indians 480 U.S. at 216, fn. 17. Congress has not authorized the imposition of personal income tax on per capita gaming distributions.

In Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995), the Supreme Court held that a member of an Indian tribe, living off his reservation, could be taxed on Casino employment

[9] Tribal sovereignty and federal preemption are related but independent barriers to the assertion of state authority. Bracker, 448 U.S. at 142.

income by the state in which he was domiciled. However, Justice Ginsburg, in writing the majority (5 to 4) opinion, qualified the decision as follows: "**Notably, the tribe has not asserted here, or before the Court of Appeals that the state's tax infringes on tribal self-governance**." Id. at 465 (emphasis added). Thus, infringement on tribal sovereignty was not considered in that decision. Here, the Tribe has asserted, based upon the unique facts presented, that personal income tax on its members does impose a significant infringement upon its self-governance.

The State's imposition of personal income tax infringes upon tribal sovereignty because it forces the Tribe to rearrange the way the Tribe operates the Casino and uses the reservation land to accommodate the personal income tax. Unlike many tribes, the Tribe's reservation contains no housing and is not suitable for housing. The Tribe's revenue allocation plan includes an amount for living expenses, including housing. Imposing personal income tax on the members disrupts tribal sovereignty in a number of ways including dictating how the Tribe operates the Casino and allocates its land. It places the Tribe in a dilemma: Does it now have to rearrange the structure and organization of the Casino or parking lot to build some type of housing in order to avoid personal income tax? If the Tribe uses the parking lot or Casino space for housing, how does it makeup for the lost income considering that without the Casino, the Tribe has no revenue? Does it have to try and build some type of housing for members on the other small plot of land next to the sewer treatment plant to avoid personal income tax? If so, how will this affect the health and safety of the members? How will this affect the schooling of the members' children? Both of these Hobson's choices will result in substantial disruption and distraction of Tribal governance for years to come. The zoning and environmental issues which the Tribe would be required to deal with would be immense. The reservation is the Tribe's land and the Tribe would have to deal with all of the regulatory authorities if it is required to build housing for its members on the small reservation in order for them to avoid personal income tax.

Tribal sovereignty is also infringed because imposition of personal income tax directly impacts the way in which the Tribe allocates and adjusts its revenue allocation plan distributions. The Tribe must revise its revenue allocation plan to account for the personal income tax. The interference that the personal income tax has on tribal sovereignty is akin to the state forcing Congress to amend the federal budget. The State is not entitled to interfere with this tribal sovereignty.

2. The State Personal Income Tax Is Preempted by IGRA

a. The State's Limited Interests Are Outweighed By Strong Federal And Tribal Interests

The Supreme Court has rejected the proposition that a state law is only preempted if there is an express congressional statement to that effect. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 432 (9th Cir. 1994) ("Cabazon II"). Where the federal government heavily regulates an area, courts do not apply mechanical conceptions but must make a "particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Bracker, 448 U.S. 136, 148.

In determining whether federal law preempts state activity on tribal lands, courts use different standards than with other areas of federal preemption. Cabazon II, 37 F.3d at 432. State authority is preempted if it "interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." Cabazon II, 37 F.3d at 433; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). In balancing these interests, there is no need for congress to explicitly announce that a state activity is preempted. Crow Tribe of Indians v. Montana, 819 F.2d 895, 898, aff'd, 484 U.S. 997 (1988). "Ambiguities in federal law are, as a rule, resolved in favor of tribal independence."

Cabazon II, 37 F.3d at 432, quoting, Cotton Petroleum v. New Mexico, 490 U.S. 163, 177, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

For example, in Bracker, the state of Arizona attempted to impose its motor carrier license tax and fuel tax on a non-Indian logging company operating on a reservation. The Supreme Court noted the detailed set of regulations governing the harvesting and sale of tribal timber. Bracker, 448 U.S. at 145. The Court concluded that there was no room for the state taxes within the pervasive federal regulatory scheme. Accordingly, the Court held the state taxes were preempted. The Court stated that the imposition of taxes would obstruct federal policies. The Court also noted it was unable to identify any regulatory function or service performed by the state that would justify the tax. Id. at 148. Accordingly, the Court concluded the tax was preempted.

Following Bracker, the Ninth Circuit concluded that IGRA preempted state law. Cabazon II, supra, 37 F.3d 430. In Cabazon II, two Indian bands filed a lawsuit against the governor and the state of California challenging the state's authority to collect taxes for simulcast wagering (offtrack betting) on the reservation.[10] The bands were conducting the offtrack betting pursuant to IGRA and a compact negotiated between the state and each band. Id. at 432. The Ninth Circuit analyzed whether Congress preempted the extension of state authority onto Indian reservations by implication by reviewing the federal, tribal and state interests.

Analyzing the federal interests, the Ninth Circuit explained that the text of IGRA sets forth those federal interests. IGRA is intended to "promot[e] tribal economic development, self-sufficiency, and strong tribal interests." 25 U.S.C. § 2701(1). IGRA also seeks to ensure that the Indian tribe is the primary beneficiary of the gaming operation. Id. at 433, citing, 25 U.S.C. §§ 2701(1) and (2). Because

[10] Although the tax was called a "license fee," the state conceded that it was a true "tax." Cabazon II, 37 F.3d at 432.

the State received more in taxes from offtrack betting than the bands, the Ninth Circuit concluded that the taxes threatened the federal interests because the tribes were not the primary beneficiary.[11]

Analyzing the tribal interests, the Ninth Circuit concluded that the tax falls directly upon the racing association but that the bands bear the actual burden of the tax. The court considered the nature of the taxed activity. Id. at 434. Although the offtrack betting involved activity off the reservation, the value came from within the reservation borders. The bands made a substantial investment in the gaming operations and were not merely conduits for others.

Analyzing the State's interests, the Ninth Circuit noted that those interests were weaker than the federal and tribal interests. The State's interest was weakened because "IGRA specifically recognizes such state regulation and establishes a mechanism -the compacts- by which the bands can reimburse the state for regulatory costs, outside of the state tax structure." In addition the court required that the state demonstrate a close relationship between the tax imposed on reservation activity and the state interest asserted to justify the tax. Id. at 435. The Ninth Circuit concluded that the express objectives of IGRA, when combined with the tribes' interests, precluded the application of the tax. Id.

b. State Income Taxes of Per Capita Distributions Conflict With IGRA

Here, as in Bracker, IGRA is a comprehensive scheme governing the revenue allocation plans, tribal distributions, and how the distributions are allocated. 25 C.F.R. 290 et. seq. In accordance with IGRA regulations, tribes prepare a revenue allocation plan which are approved and monitored by the federal government. 25 C.F.R. § § 290.5, 290.19, 290.20. IGRA's regulations dictate exactly how gaming revenue proceeds are to be allocated, including funding tribal

[11] IGRA requires distributions to be distributed out for particular purposes in a particular way.

programs, providing for the general welfare of the Tribe or its members, and donating to charitable organizations. 25 C.F.R. § 290.12. The revenue allocation plan must specify precise percentages that will be devoted to each. 25 C.F.R. § 290.12(a). The Tribe, in its revenue allocation plan, must specify who receives the per capita distribution. 25 C.F.R. § 290.14. Where the federal government heavily regulates an area, the court must make a "particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Bracker, 448 U.S. 136, 148. As in Bracker, the area of law is so heavily regulated that it is preempted by IGRA.

Balancing the federal, tribal, and state interests, it becomes clear that IGRA preempts state income tax of per capita distributions. The federal interests include to "promot[e] tribal economic development, self-sufficiency, and strong tribal interests." 25 U.S.C. § 2701. The imposition of state income taxes undermines these goals. The Tribe drafted its own revenue allocation plan, tailored to the Tribe's needs, and submitted the plan to the federal government for review and approval. The revenue allocation plan contains details regarding how all of the Tribe's net gaming proceeds from tribal activities will be distributed. 25 C.F.R. §§ 290.4, 290.12. The federal government then approved the plan. (65 Fed. Reg. No. 53, p. 14461 (March 17, 2000); 25 C.F.R. §§ 290.2, 290.5.)

The Tribe's plan does not take into consideration the substantial personal income tax that the State is seeking to impose on the Tribe's members. Should these taxes be permitted to continue, the Tribe will be forced to revise the distribution of the gaming revenues and the percentages in order to accommodate the personal income tax. IGRA and its regulations create a comprehensive scheme for review and approval of a revenue allocation plan and specifically identify the

conditions for per capita distributions.[12] The Bureau of Indian Affairs monitors and approves the Tribe's revenue allocation plan in accordance with detailed federal requirements with an understood amount of tax burden. The State's effort to levy personal income taxes directly disrupts this detailed federal scheme.

Moreover, given the complex facts of this case, the personal income tax creates a substantial infringement on Tribal sovereignty, governance and independence. There is nothing more critical to Tribal self-governance than housing and its sole source of revenue, which must be distributed in a way dictated by the federal government. The Tribe's revenue allocation plan is expressly designed to enhance the general welfare of the Tribe and its members and to enable them to attain economic assistance from government assistance programs. Here, the personal income tax has a dramatic, negative impact on Tribal self-government. It has the potential of creating havoc in the way the Tribe can use its very limited land and resources. If the personal income tax is permitted to continue, the Tribal Council's activities could be consumed by addressing financial, environmental, regulatory and other issues involving housing on the reservation.

In assessing the Tribe's interest, it is also important to consider the nature of the activity taxed. Cabazon II, 37 F.3d at 434. Here, the activity involves Tribal member per capita distributions, pursuant to IGRA, and income earned by tribal members from work performed on the reservation. Thus, the State is taxing income earned exclusively on the reservation. The legal incidence and the burden of the tax fall directly on the Tribe and its members.

The State's interests, however, are relatively weak. IGRA specifically contemplates federal taxation but not imposition of personal income tax. 25 U.S.C. § 2710(b)(c)(D) and 2710 and 2710(d)(4). The State does not have a strong interest

[12] Per capita distributions are only permissible if certain requirements are fulfilled, including the tribe's preparation of a revenue allocation plan, federal approval of that plan, and that the payments are subject to federal taxation. 25 U.S.C. § 2710(b)(3).

in taxing per capita distributions or Tribal members' income earned by working at the Casino. Instead, the State merely wants to tax because it can. This is hardly a sufficient justification for interfering the IGRA's comprehensive structure.

While the court in Jefferson v. Comm'r of Revenue, 631 N.W.2d 391 (2001) concluded that IGRA did not preempt Minnesota state income tax, this decision is neither binding nor persuasive on this court.[13] The Minnesota court concluded that state taxation may not be preempted unless expressly preempted by Congress. Id. at 396. This approach blatantly conflicts with the law of the Ninth Circuit and the Supreme Court. As explained in Cabazon II, the "'Supreme Court has, as a matter of federal Indian law, explicitly rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.'" Cabazon II, 37 F.3d at 431, quoting, Bracker, 448 U.S. 136, 144. Instead, courts employ the balancing approach referenced above. Under that approach, the interests of the Tribe and the federal government significantly outweigh the interest of the state. Accordingly, the personal income tax is preempted.

3. The Supreme Court Precedent Precluding Taxation of Indians In Indian Country Does Not Dictate The Outcome Of This Case

Defendants may not hide behind McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1972) in order to avoid the Tribe's claims. In McClanahan, the Supreme Court concluded that states may not impose income taxes on tribal members where the source of the individual's income is from reservation activities if the Indian lives in "Indian Country." McClanahan deals only with whether the state may tax Indians in Indian Country and does not address the issues and circumstances posed by the Amended

[13] In Jefferson, importantly, the tribal member did not provide any evidence or argument as to the state income tax infringing upon tribal sovereignty. The court suggested that the result could be different if such evidence had been provided. Jefferson, 631 N.W.2d at 397.

Complaint. Defendants' argument that the members of the Tribe do not live on the reservation, therefore, misses the mark. Neither the Supreme Court nor the Ninth Circuit have addressed whether income and per capita distributions from gaming activities pursuant to IGRA and a tribal compact are subject to state income taxes.

4. There Are Extensive Factual Issues Which Preclude Granting A Motion To Dismiss

Given the highly unique circumstances of this case, the extremely strong federal policies in favor of Tribal sovereignty and self-governance, including the Tribe's revenue allocation plan (which is outside the scope of this motion to dismiss), and the series of Hobson's choices if the Tribe is required to re-allocate its usable property or develop its unusable property, numerous factual issues are raised by this motion. These issues will, in turn, directly impact the Tribe's self-governance. All of these issues require evidence from which this Court may then determine whether the Tribal members' income from reservation activities is immune from state income taxation notwithstanding the fact they do not live on the reservation. Because extrinsic evidence is required to answer these questions, defendants' motion to dismiss at the pleading stage must be denied.

E. The Motion To Dismiss As To The Third Claim Should Be Denied Because The Gaming Revenue Is Exempted From Personal Income Tax Based On Its Classification As A Partnership.

1. The Operation Is A Partnership for Purposes of California Personal Income Tax

The Amended Complaint alleges that the "operation of gaming on the Reservation by the Tribe, the Tribal Corporation and its Members to produce Class III Gaming Income (the "Operation") is a business, financial operation or venture." (Amended Complaint, ¶32.) Both federal and California regulations provide that the Operation may be classified as a partnership for income tax

purposes even though the Operation itself is not a separate legal entity for non-tax purposes. Section 23038(b)-1 of Title 18 of the California Code of Regulations, provides in part as follows:

> Whether an organization is an entity separate from its owners for California income and franchise tax purposes is a matter of California income and franchise tax law and does not depend on whether the organization is recognized as an entity under local law. … A joint venture or other contractual arrangement may create a separate entity for California income and franchise tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom….

The quoted language is identical to the corresponding provisions of United States Treasury Department Regulations § 301.7701-1(a). 26 C.F.R. § 301.7701-1(a). Thus, paragraphs 32 through 37 of the Amended Complaint allege facts sufficient to establish treatment of the Operation as a partnership for federal and California income tax purposes.

Although defendants do not dispute the existence of a partnership for income tax purposes, defendants incorrectly state the income tax consequences of this partnership. As demonstrated in more detail below, applicable income tax law provides that, as a consequence of treatment of the Operation as a tax partnership: (a) the income of such partnership is exempt from California personal income tax; (b) **the character of the income of such partnership as so exempt "flows through" to members of the Tribe in their capacities as partners**; (c) such tax-exempt income increases tax basis of members of the Tribe in their interests in such partnership; and (d) per capita distributions to members of the Tribe do not result in any income or gain that is subject to personal income tax, because distributions by a

partnership result in no taxable income or gain to a partner (except to the extent such distributions exceed the basis of the partner in the partnership).

a. Income of the Operation Is Exempt From Personal Income Tax

The Tribal Corporation enjoys the same exemption from personal income taxes as the Tribe itself. See Revenue Ruling 81-295, 1981-2 CB 15 (holding that a federally chartered Indian tribal corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation). Incorporation does not constitute a waiver of the sovereign immunity enjoyed by the Tribe:

> Even though a tribal corporation is formed as a business organization to engage in the conduct of corporate business enterprises, **it is not separate and distinct** from the tribe and so shares its immunity from federal income taxes. That immunity extends to all business activities carried on within the boundaries of the reservation.

General Counsel Memorandum 38853 (May 17, 1982) (emphasis added).

The Operation and each of its constituents, including the Tribe and the Tribal Corporation, are persons authorized in accordance with IGRA to conduct the Class III gaming operation on the reservation, including the Casino. (Amended Complaint, ¶ 38.) The Operation, the Tribal Corporation and each such authorized person are instrumentalities of the Tribe or treated as one for this purpose. (Amended Complaint, ¶ 39.) The Tribe has not agreed to the imposition personal income taxes on Class III gaming income from the Operation, the Tribal Corporation or any such authorized person. (Amended Complaint, ¶ 40.)

In addition, Sections 2710(b)(3) and 2710(d)(1)(A)(ii) of IGRA limit the purposes to which net revenues from Class III gaming revenues may be applied. Those purposes include federal income tax but do not include any other taxes **other than taxes to which a tribe has agreed pursuant to a compact with a State**. But

here, the State can point to no contract where the Tribe or its members have agreed to be subject to personal income tax. Therefore, imposition of personal income tax upon the members of the Tribe with respect to their distributive shares of income from the Operation is preempted by federal law under the U.S. Constitution's Indian Commerce Clause, Art. I, § 8, Clause 3.

The Operation shares the exemption from income taxes of the Tribe and the Tribal Corporation with respect to Class III gaming income from the Casino.

b. Income of the Operation Remains Exempt from Personal Income Tax When Allocated to Members of the Tribe

Pursuant to fundamental principles of partnership taxation, the character of income from the Operation as exempt from income taxes flows through to the members with respect to each member's share of such income, and such income remains exempt from state income taxes in the hands of the members when allocated to them and when received by them as per capita distributions pursuant to the revenue allocation plan.

Internal Revenue Code Section 702(b) provides as follows:

> The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

25 U.S.C. § 702(b).

A simple way to state the principle of Section 702) (b) is that tax-exempt income of a partnership retains its character as tax exempt in the hands of the members of the partnership. For example, interest income from tax-exempt municipal bonds that are owned by a partnership is treated as tax-exempt in the hands of the partners.

As a technical matter, this result is achieved as follows: Paragraph (a)(7) of Section 702(a), referred to in Section 702(b) quoted above, applies to "other items of income, gain, loss, deduction, or credit, to the extent provided by regulations prescribed by the Secretary." 26 U.S.C. § 702. Under the Treasury Regulations, § 1.702-1(a)(8(i), these items include any item of income, gain, loss, deduction, or credit subject to a special allocation under the partnership agreement which differs from the allocation of partnership taxable income or loss generally. 26 C.F.R. § 1.702-1. The amounts of income from the Operation allocated to members of the Tribe are determined in accordance with special allocations under the revenue allocation plan rather than based on income or loss of the Operation generally. Thus, in accordance with Section 702(b), income from the Operation allocated to members of the Tribe retains its character as exempt from income taxes when so allocated to members of the Tribe.

The foregoing analysis follows the principles adopted by the Internal Revenue Service in Revenue Procedure 72-18, § 4.05, dealing with the limitation on deductibility of interest of interest on indebtedness incurred by partnerships that own tax-exempt state and local bonds. The revenue procedure holds that it is the intent of the partnership (and not the intent of its individual partners) that is relevant to determine whether the indebtedness was incurred to purchase or carry the tax-exempt bonds (and thus determining whether the interest was or was not deductible).

Allocations of income from the Operation to members of the Tribe also are covered by paragraph (a)(7) of Section 702 (so that the character of such income "flows through" to members of the Tribe) as a result of the application of Treasury Regulations § 1.702-1(a)(8)(ii). This regulation provides that each partner must also take into account separately the partner's distributive share of any partnership item which, if separately taken into account by any partner, would result in an income tax

liability for that partner, or for any other person, different from that which would result if that partner did not take the item into account separately.

In other words, if a person other than the Tribe, the Tribal Corporation, or a member of the Tribe derives income as a partner in the Operation, that other person would not be exempt from taxation on the income – IGRA, the Compact and the revenue allocation plan do not extend so far as to preclude income taxation of any other persons. The sovereignty of the Tribe and its exercise thereof, including but not limited to determining the manner in which the Tribe provides for the welfare of Members of the Tribe, does not extend to federal, state or local taxation of persons who are not members of the Tribe.

c. Tax-Exempt Income from the Operation Allocated to A Member of the Tribe Increases the Tax Basis of the Member in the Operation

Each Tribal Member's share of income from the Operation increases the tax basis of the Member's interest in the Operation. Section 705(a)(1) of the Internal Revenue Code provides that the adjusted basis of a partner's interest in a partnership shall be "(1) increased by the sum of his distributive share for the taxable year and prior taxable years of: (a) taxable income of the partnership as determined under section 703(a), (b) income of the partnership exempt from tax under this title, and (c) the excess of the deductions for depletion over the basis of the property subject to depletion." 26 U.S.C. § 705(a)(1).

Thus, both taxable and tax-exempt income of a partnership increase the basis of a member of the partnership in his or her interest in the partnership. Accordingly, income of the Operation allocated to members of the Tribe in accordance with the Compact and the revenue allocation plan adopted pursuant thereto increases the basis of a member in his or her interest in the Operation. This enables distributions to be made to embers of the Tribe without triggering taxable gain, as explained immediately below.

d. Per Capita Distributions Pursuant to the Revenue Allocation Plan Do Not Trigger personal income taxes

> Section 731(a)(1) of the Internal Revenue Code provides as follows:
>
> In the case of a distribution by a partnership to a partner … gain shall not be recognized to such partner, except to the extent that any money distributed exceeds the adjusted basis of such partner's interest in the partnership immediately before the distribution.

26 U.S.C. § 731(a)(1).

As demonstrated above, income from the Operation allocated to a member of the Tribe pursuant to the revenue allocation plan increases the tax basis of that member in his or her interest in the Operation, even though the income is exempt from personal income taxes. Pursuant to Section 731, distributions of cash to the Members are applied to the basis of the member in such member's interest in the Operation and so the distributions do not result in recognition of taxable gain.

2. Defendants' Arguments In Favor of Taxation Are Inapposite

In arguing for taxation, defendants make arguments that are inapposite and misapprehend the allegations of the Amended Complaint and the applicable rules of income taxation.

First, defendants argue that "partnership income is always taxed, only the tax is imposed after the income is distributed to the partners." If this were true, then interest on tax-exempt bonds held by a partnership would be taxable when distributed to the partners. Such a result would be manifestly incorrect.

Second, defendants argue that per capita distributions to individual Tribal members are expressly made subject to federal income tax, and mischaracterizes the Amended Complaint as an argument that per capita distributions are per se tax-exempt. The Tribe makes no such "argument." The Amended Complaint alleges that imposition of personal income tax with respect to

allocations and distributions to members pursuant to the revenue allocation plan is pre-empted pursuant to IGRA. As stated in paragraph 46 of the Amended Complaint, "Per capita distributions are not taxable to the Members for purposes of personal income taxes (i) because the increase in a Member's basis in the Operation from allocation to the Member of income from the Operation offsets per capita distributions from the Operation pursuant to the Revenue Allocation Plan, (ii) pursuant to IGRA Section 2710(d)(4) or (iii) since imposition of personal income taxes would interfere with sovereignty of the Tribe or its exercise thereof, including but not limited to taxation of Members or the manner in which the Tribe provides for the welfare of Members including housing." No allegation is made that federal income taxation does not apply.

Finally, defendants argue that the allegations of the Complaint would require an exemption from personal income tax for persons other than members of the Tribe. As indicated previously, pre-emption of personal income tax is premised on the application of IGRA and the revenue allocation plan to the particular Operation of the Casino and exercise of sovereignty by the Tribe in providing for the welfare of its members. The exemption from personal income taxes does not extend to other persons.

This principle is well-illustrated by the case of Craik v. United States, 31 F. Supp. 132 (Ct. Cl. 1940). The court held that a nonresident alien individual partner of a partnership operating in the United States was not subject to United States federal income taxation on his distributive share of the partnership's foreign-source income, since the foreign-source character of the income flowed through from the partnership to the nonresident alien individual partner and nonresident alien individuals were not taxable on foreign-source income of the type earned by the partnership. Nonetheless, the character of the income as exempt in the hands of the nonresident alien individual partner would not extend so far as to exempt from United States federal income taxation the distributive share of a United States

citizen or resident member of the partnership. Likewise, the exemption from personal income taxes of income of the Operation extends to the members of the Tribe whose welfare is the concern of IGRA, the Compact and the revenue allocation plan adopted pursuant thereto, but would not extend to other persons. Defendants' argument in this regard is entirely inapposite.

F. The Tax Injunction Act Does Not Bar the Third Claim for Relief

In general, the Tax Injunction Act, 28 U.S.C. § 1341 prohibits federal courts from enjoining the collection of any state tax where the plaintiff has a plain, speedy and efficient remedy may be had in state court. The Tax Injunction Act does not apply for two reasons. First, the Act does not apply to lawsuits brought by Indian tribes under federal law. Moe, et al. v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al., 425 U.S. 463, 96 S. Ct. 1634, 1644, 1645, 48 L. Ed. 2d 96 (1976). District courts have original jurisdiction of all civil actions brought by any Indian tribe wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1362. The purpose of § 1362 was to "open the federal courts to the kind of claims that could have been brought by the United States as trustee [for the Indians], but for whatever reason were not so brought." Moe, 425 U.S. at 473. Because the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, an Indian tribe is not barred from doing so. Moe, 425 U.S. at 475; see also Chippewa Trading Co. v. Cox, 365 F.3d 538, 544 (6th Cir. 2004) (Tax Injunction Act applies to individual Indian, not tribe).

In addition, the Tax Injunction Act does not apply because the Tribe has no "plain, speedy and efficient remedy" in state court. California provides taxpayers with administrative and judicial remedies for challenging assessments. Capitol Industries, supra, 681 F.2d at 1113. The Tribe is not a taxpayer. Because no such relief is available for non-taxpayers, the Act does not apply. Id. at 1118 -

1119 (lawsuit by foreign parent corporation not barred by Tax Injunction Act). The Tax Injunction Act, therefore, does not apply to the Tribe's third claim.

V. CONCLUSION

Based on the foregoing, the Tribe respectfully requests that the Court deny defendants' motion to dismiss. Alternatively, the Tribe requests leave to amend.

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