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IN THE UNITED STATES DISTRICT COURT

FOR THE 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.	EDCV08-1753 VAP (OPx) **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** **(Fed. R. Civ. P. 12(b)(1), (6))** **Oral Argument Requested** Date: July 20, 2009 Time: 10:00 a.m. Courtroom: 2 Judge: The Honorable Virginia A. Phillips Trial Date: n/a Action Filed: 12/2/2008

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INTRODUCTION

Defendants Governor Arnold Schwarzenegger (Governor), the State of California (State) and California Franchise Tax Board Executive Officer Selvi Stanislaus (Stanislaus) (collectively State Defendants) move to dismiss Plaintiff Twenty-nine Palms Band of Mission Indians' (Tribe) amended complaint because the Court lacks subject matter jurisdiction and the amended complaint fails to state a claim upon which relief can be granted.

The Tribe asserts that State Defendants' effort to impose personal income tax liability on Tribal members' per capita distributions or casino wages breaches the class III gaming compact between the Tribe and the State (Compact).[1] The Tribe further alleges that imposition of such a tax by the Governor or Stanislaus is preempted by federal law and exempt under federal and state law. Procedurally, the amended complaint is deficient because it fails to allege a causal connection between the Governor and the alleged injury. In addition, the alleged injury cannot be redressed by the requested relief because the Governor is not legally authorized to impose or collect state personal income tax, thereby eliminating any justiciable controversy between the Tribe and the Governor. Further, the Tribe's federal and state law claims against the Governor are barred by the Eleventh Amendment, as are the allegations that Stanislaus violated the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA). Finally, the third claim for relief is proscribed by the Tax Injunction Act, 28 U.S.C. § 1341, and the state law claim in the third claim for relief is barred by the Eleventh Amendment.

Substantively, the first claim for relief fails to state a claim for breach of Compact because the disputed Compact provision represents an agreement between the Tribe and the State providing for the Tribe's extension of comity to the State to

[1] A true and correct copy of the Compact is attached as Exhibit A to State Defendants' request for judicial notice (Defs.' RJN) filed concurrently with this motion.

withhold state employment taxes from nonmember gaming operation employees and not, as the Tribe asserts, a negotiated elimination of personal income tax.

The second claim for relief fails to state a claim for federal preemption under the Constitution's Indian Commerce Clause and Supremacy Clause because, while a tribal member living on her tribe's reservation is ordinarily exempt from state personal income tax on income earned from on-reservation activities, no Tribal member in this case lives on the Tribe's reservation. The Tribe's claim that its reservation is uninhabitable and its members have been "forced" to live off-reservation is misleading as the Tribe fails to identify a separate and significant portion of its reservation that remains undeveloped, and on which it planned to build a second casino, hotel and RV park. In any event, the reason tribal members do not live on their respective reservations is irrelevant to a determination whether the state income tax exemption applies.

The second claim for relief also fails to state a claim for preemption under IGRA because the statute provides no protection from the imposition of state personal income tax on individual Tribal members.

Finally, the third claim for relief fails to state a claim that the tax is exempted by IGRA, the doctrine of tribal sovereignty, and state law because the Tribe's gaming operation is not a partnership and, if it were, partnership income is taxed after it is distributed to the "partner," or Tribal member in this instance.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on May 29, 2009.

BACKGROUND

The Tribe is a federally recognized Indian tribe with twelve adult members. (Amended Compl. ¶¶ 6, 11.) Its reservation[2] includes about 240 acres located

[2] State Defendants refer to the Tribe's trust land as a reservation for ease of reference. They take no position here as to whether the land constitutes a reservation under federal law.

between the Cities of Indio and Coachella in Riverside County, and 160 contiguous acres separately located within the City of Twentynine Palms in San Bernardino County. (Amended Compl. ¶ 12; Defs.' RJN, Ex. B, *Mike v. Franchise Tax Bd.*, San Diego County Super. Ct., No. 37-2007-00067324-CU-MC-CTL, Stipulation (*Mike* Stipulation) ¶ 5.) No Tribal members live on the reservation. (*See* Amended Compl. ¶ 17.)

For a federally recognized Indian tribe lawfully to conduct class III gaming on its Indian lands, IGRA requires, among other things, that tribal gaming activities be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State and approved by the Secretary of the Interior [(Secretary)]. 25 U.S.C. § 2710(d)(1), (3)(B)." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003).

In California, "[t]the Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes located within the State . . . ." Cal. Gov't Code § 12012.25(d) (West 2005); *see* Cal. Const. art. IV, § 19(f). After the Governor negotiates and signs a compact with a tribe, it must be ratified by the state Legislature before it is sent to the Secretary for approval. Cal. Const. art. IV, § 19(f); Cal. Gov't Code § 12012.25(c), (e) & (f). In 1999, the State entered into class III gaming compacts with over sixty federally recognized Indian tribes in California, including the Tribe, which the Secretary approved in May 2000. Cal. Gov't Code § 12012.25(a)(53); 65 Fed. Reg. 31,189 (May 16, 2000); Amended Compl. ¶ 13.

The Tribe operates a Gaming Facility on a portion of its reservation located in Riverside County. (Amended Compl. ¶¶ 12, 14, 17.) Although the Tribe claims its members have been "forced to live off the Reservation" because it "would be very difficult to put housing there," the amended complaint references only a portion of the Tribe's reservation located in Riverside County and otherwise ignores an undeveloped 160-acre portion of its reservation located in the City of Twentynine Palms in San Bernardino County. (Amended Compl. ¶ 17; Defs.' RJN, Ex. B, *Mike* Stipulation ¶¶ 5, 7.) Indeed, the Tribe recently proposed to develop a second Gaming Facility, hotel and RV park on the portion of its reservation located in Twentynine Palms.[3] (Defs.' RJN, Ex. B, *Mike* Stipulation ¶ 7.)

The Compact requires the Tribe to, among other things, participate in state statutory programs related to employment. (Compact § 10.3.) In this context, the Compact specifies the Tribe's tax withholding responsibility with respect to nonmember Gaming Facility employees:

> As a matter of comity, with respect to persons employed at the Gaming Facility, other than members of the Tribe, the Tribal Gaming Operation shall withhold all taxes due to the State as provided in the California Unemployment Insurance Code and the Revenue and Taxation Code, and shall forward such amounts as provided in the said Codes to the State.

(*Id.* at § 10.3(c).)

According to the Tribe, pursuant to IGRA, it periodically prepares a Revenue Allocation Plan that details, among other things, how casino revenue is distributed to members, also known as "per capita distribution." (Amended Compl. ¶ 15.) The Tribe alleges that the Revenue Allocation Plan considers, among other things, the members' obligations to pay federal income taxes on the per capita distribution, but not state personal income tax. (*Id.*)

The Tribe alleges this action is about whether the State may lawfully seek to impose personal income tax upon Tribal members' per capita distributions or casino employment income. (Amended Compl. ¶ 5.) The Tribe presents three claims for relief: (1) State Defendants breached the Compact by seeking to impose the tax; (2) the Governor's and Stanislaus' efforts to impose and collect the tax infringe upon

[3] Apparently, the Tribe may have canceled its plans for a second Gaming Facility. (*See* Defs.' RJN, Ex. B, *Mike* Stipulation ¶ 7.)

tribal sovereignty and are preempted by federal law—namely the Constitution's Indian Commerce Clause and Supremacy Clause, and IGRA; and (3) Tribal member income is exempt from taxation under IGRA, the doctrine of tribal sovereignty and state law because the gaming operation should be treated as a partnership in which the Tribe's tax-exempt status "flows through" to members as the ultimate income distributees. (*Id.* at ¶¶ 20, 23-48.) The Tribe seeks injunctive and declaratory relief. (*Id.* at 11, Prayer ¶¶ 1-2.)

In a similar action filed in state court, Angelina Mike, an individual Tribal member represented by the same attorneys litigating this case for the Tribe, sued the California Franchise Tax Board (FTB) for a refund of personal income tax withheld by the Tribe and forwarded to the state for the 2000 tax year. (Defs.' RJN, Ex. C, *Mike v. Franchise Tax Bd.*, Compl. (*Mike* Compl.); Ex. B, *Mike* Stipulation ¶ 14.) Mike claimed that IGRA and the Compact prohibit the tax; her income is tax-exempt because she resides in Indian Country, albeit on another tribe's reservation; and state tax law must be applied in a nondiscriminatory basis. (*Id.*, Ex. C, *Mike* Compl. ¶ 8.) She alleged she could not live on the Tribe's reservation "because there are no housing units on reservation land nor space to build housing units." (*Id.*) On October 28, 2008, the trial court entered judgment for the FTB, finding:

> That an Indian who received a distribution from her tribe is not exempt from state personal income taxes unless she lives on her own tribe's reservation. It is not sufficient to live on the reservation of another tribe. Living on another tribe's reservation is the same thing as living in non-Indian Country.

(Defs.' RJN, Ex. D, *Mike v. Franchise Tax Bd.*, Judgment 1:27-2:2.) Mike has appealed. (*Id.* at Ex. E, *Mike v. Franchise Tax Bd.*, Notice of Appeal.)

STANDARD ON MOTION TO DISMISS

State Defendants move to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(1) and (6). On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001). In reviewing a facial challenge to subject matter jurisdiction, a court will take the allegations in the complaint as true. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The court views the allegations as a whole; if a conclusory averment of subject matter jurisdiction is contradicted by other allegations in the pleading, the case may be dismissed. *See Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct. 725, 83 L. Ed. 1111 (1939).

However, in reviewing a substantive or factual challenge under Rule 12(b)(1), a court is not required to accept the non-moving party's factual allegations as true. *Thornhill Pub. Co. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Instead, the court may consider evidence related to the jurisdictional issue and resolve factual disputes as necessary, if the jurisdictional question can be separated from the merits of the case. *Id.*; *see Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (noting that a district court "obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes").

Under Rule 12(b)(6), a claim may be dismissed either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). In a Rule 12(b)(6) motion,

> [a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.

Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (citations omitted).

ARGUMENT

I. THERE IS NO JUSTICIABLE CASE OR CONTROVERSY BETWEEN THE TRIBE AND THE GOVERNOR

Article III of the Constitution limits federal courts to the resolution of cases and controversies. *Davis v. Fed. Election Com'n*, ___ U.S. ___, 128 S. Ct. 2759, 2768, 171 L. Ed. 2d 737 (2008). "That restriction requires that the party invoking federal jurisdiction have standing—the 'personal interest that must exist at the commencement of the litigation.'" *Id.* (citation omitted). Lack of standing is a subject matter jurisdiction argument properly brought under Rule 12(b)(1). *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

To demonstrate standing, a plaintiff must (1) have suffered an "injury in fact" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical"; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted). Here, the amended complaint fails to state a constitutional case or controversy because there is no causal connection between the Governor's actions and the alleged injury, and the alleged injury cannot be redressed by the requested relief.

A. The Amended Complaint Fails to Allege a Causal Nexus Between the Governor's Conduct and the Alleged Injury

Federal Rule of Civil Procedure 8(a) requires a plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127, S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007); *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 343 (2d Cir. 2006) ("we stop well short of saying that Plaintiffs bear no burden at the pleading stage" because they must allege "those facts *necessary* to a finding of liability" (citation omitted) (original emphasis)). The expected "notice" must contain enough facts for a court to "infer potential victory," and important factual material is omitted at the pleader's peril. *Bryson v. Gonzales*, 534 F.3d 1282, 1286-87 (10th Cir. 2008).

Here, the allegations fail even the most liberal notice pleading standard because the Tribe does not put the Governor on notice about what he did to cause the alleged injury. The Tribe sues the Governor "in his official capacity as an officer and representative of the State of California." (Amended Compl. ¶ 8.) As an injury, the Tribe alleges

> The Franchise Tax Board, an arm of the State of California, has imposed and continues to impose, assess and collect taxes with respect to Plaintiff and its members. The State of California authorizes and ratifies the imposition, assessment and collection of taxes through its actions and reaps the benefits of those taxes.

(*Id.* at ¶ 24.) The Tribe also claims the "*State of California* seeks to impose [personal income tax] on the Members" (*id.* at ¶ 15 (emphasis added)), and the "central issue in dispute is whether *the State* may impose California state personal income tax" (*id.* at ¶ 5 (emphasis added)). These allegations fail to describe any connection between the Governor and any state taxes that may have been, or could be, imposed upon Tribal members.

The Tribe also alleges State Defendants breached the Compact by "seeking to impose" personal income tax on Tribal members, and State Defendants' "effort to impose" the tax is preempted by federal law. (Amended Compl. ¶¶ 25-26, 30, 48.) Yet there are no allegations explaining what the Governor did, or what efforts he made, if any, to impose the disputed tax. Absent a properly alleged causal nexus between the Governor's actions and the asserted injury, the Tribe lacks standing to sue the Governor, and the case against him should be dismissed.

To meet the causation requirement, the Tribe's injury must be fairly traceable to the Governor's conduct. It cannot be "'the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (citation and alterations omitted). In this case, the Governor does not have direct, primary responsibility for imposing or collecting state personal income tax. Instead, the FTB is the sole state agency authorized by state law to administer and enforce the state's Personal Income Tax Law. Cal. Rev. & Tax. Code § 19501; *see People ex rel. Franchise Tax Bd. v. Superior Court*, 210 Cal. Rptr. 695, 701, 164 Cal. App. 3d 526 (Cal. Ct. App. 1985); *see also* Cal. Rev. & Tax. Code § 19503 (requiring FTB to prescribe rules and regulations necessary to enforce Personal Income Tax Law), 19504(a) (FTB duties include determining and collecting tax liabilities imposed by Personal Income Tax Law), 19862 (authorizing FTB to withhold taxes), 19201 (authorizing FTB to seek judgment for delinquent taxes), 19205 (authorizing FTB to execute tax judgments), 19231 (authorizing FTB to issue warrants to collect taxes), 19262 (authorizing certain procedures for FTB to follow in actions to collect delinquent taxes), & 19371(a) (authorizing FTB to sue for delinquent personal income taxes). Indeed, the Tribe acknowledges that the FTB "is empowered to assess and collect taxes under the personal income tax law of the State of California," and the FTB "has imposed and continues to impose, assess and collect taxes with respect to [the Tribe] and its members." (Amended Compl. ¶¶ 7, 24.)

On the other hand, the Governor has no direct authority to impose or collect personal income tax. The Governor is the state's supreme executive officer, and is generally required to "see that the law is faithfully executed." Cal. Const. art. V, § 1; Cal. Gov't Code § 11150. He also supervises "the official conduct of all executive and ministerial officers." Cal. Gov't Code § 12010. But these broad executive duties do not establish a causal link between the Governor and personal income tax that may be imposed on Tribal members. In short, the Tribe has sued the wrong party.

Neither the Supreme Court nor the Ninth Circuit has found difficulty with dismissing actions where plaintiffs sue the wrong party. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (although plaintiffs successfully alleged injury, "injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant"), Several Ninth Circuit cases that follow *Simon* are directly on point.

In *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam), the court held the plaintiff had failed to show a case or controversy with the California Attorney General in an action challenging a statute not directly enforced by the Attorney General. The court found that the Attorney General had not in any way indicated that he intended to enforce the statute, or that he intended to encourage local law enforcement agencies to do so. *Id.* (citing *Simon*, 426 U.S. at 38-41).

In *Southern Pacific Transportation Company v. Brown*, 651 F.2d 613, 615 (9th Cir. 1980), the court held that a state attorney general's power to advise local prosecutors was insufficient to create a justiciable controversy against the attorney general. The court noted that "when a state officer is sued to enjoin enforcement of state law, he must have 'some connection' with enforcement or suit against him would be equivalent to suit against the state and would violate the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123, 157 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976)." The suit presented no justiciable controversy because "[t]he attorney general's power to direct and advise does not make the alleged injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young*." *Id.*

Similarly, in *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998), the court explained that "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *See also id.* at 987 ("[a]ny supposed threat . . . by the

Commission, and there has never been one, can therefore be seen to be no more than 'imaginary, speculative or chimerical'").

More recently, in *Pritikin v. Department of Energy*, 254 F.3d 791 (9th Cir. 2001), the court held the plaintiff could not sue the Department of Energy to force it to budget for a program operated by a subsidiary agency. The court noted the plaintiff had not sued the party with "clear ability," or "statutory power and duty to act." *Id.* at p. 798; *see also Okpalobi v. Foster*, 244 F.3d 405, 424-29 (5th Cir. 2001) (just as an injunction is not available against a public official who has no role in administering a challenged law, so a declaratory judgment cannot be sought against the official as the predicate for seeking relief against someone else); *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 115 (3d Cir. 1993) (holding that although it is "theoretically possible" for two of the state's "highest policy officials" to initiate suit against plaintiff's interests, there was no evidence the officials would file suit to rectify a statutory infraction; state officials' "general duty" to uphold state law, standing alone, was insufficient to render them proper defendants).

Here, the Tribe faces similar causation problems. The Governor does not directly enforce the state's Personal Income Tax Law, nor has the Tribe alleged that the Governor intends to assess personal income tax upon Tribal members, or directed the FTB to do so. There simply is no connection between the FTB's imposition of personal income tax upon Tribal members and the Governor's generalized duties to see that all state laws are faithfully executed and supervise other executive officers. Any tax enforcement or collection responsibility lies not with the Governor but with the independent action of the FTB, which is absent from this suit.

The Tribe lacks standing because it has not alleged sufficient facts to establish an injury fairly traceable to the Governor. Thus, there is no case or controversy between the Tribe and the Governor, and the suit against him should be dismissed.

B. The Amended Complaint Fails to Establish that the Alleged Injury Could be Redressed by a Decision Against the Governor

Many of the problems the Tribe encounters in establishing causation also prove its factual inability to show that a decision in its favor "'will produce tangible, meaningful results in the real world'—or in other words—to establish that [its] claim is redressable." *Pritikin v. Dep't of Energy*, 254 F.3d at 799 (citation omitted). Instead, the Tribe impermissibly seeks to change the Governor's behavior only as a means to alter the conduct of a third party not before the Court, which is the direct source of the Tribe's alleged injury. *See id.* at 799-800.

As noted, in *Long v. Van de Kamp*, the Ninth Circuit found no causal connection between the California Attorney General's general supervisory powers and local law enforcement's enforcement of a particular statute. *Long v. Van de Kamp*, 961 F.2d at 152. Because there was no indication the Attorney General intended to pursue, or encourage local law enforcement to pursue, the particular statute, an injunction against the Attorney General would not forestall future searches and, therefore, there was no case or controversy. *Id.*

In this case, the Tribe seeks an order "enjoining the imposition of [personal income tax] on the Tribe's Members." (Amended Compl., Prayer ¶ 1.) The Governor, however, lacks authority to accord the desired relief because he does not impose or collect personal income tax on Tribal members. Because the Governor has not caused the alleged injury, a remedy directed against him will not relieve the injury. Nor has the Tribe demonstrated any likelihood that an order against the Governor would stop the FTB from imposing personal income tax on Tribal members. There is little justification for imposing the burdens of litigation on a defendant who has not caused and cannot redress the injury.

Because the Tribe has not shown an injury "fairly traceable" to the Governor's actions, or that the relief it seeks will remedy the injury, there is no case or controversy and the Court lacks jurisdiction to determine this suit against the Governor.

II. COMPACT SECTION 10.3(C) REPRESENTS A GENERAL COURTESY BETWEEN GOVERNMENTS, RATHER THAN AN EXPRESS ELIMINATION OF AN OTHERWISE PERMISSIBLE STATE INCOME TAX

The Tribe alleges that Compact section 10.3(c) constitutes a negotiated elimination of state tax on personal income received by Tribal members from both casino employment and per capita distributions, and State Defendants breached the Compact by "seeking to impose" the tax. (Amended Compl. ¶¶ 19-20, 25-26.) Even if the Governor were a proper defendant to this claim, the Tribe misconstrues relevant Compact language and this Court should dismiss the claim under Rule 12(b)(6) because it is not cognizable as a matter of law.

A. Compact Section 10.3(c) is Not a Negotiated Elimination of State Personal Income Tax

Federal common law provides an exemption from state personal income tax if (1) the individual is a member of a federally recognized Indian tribe, (2) whose income is derived solely from on-reservation sources, and (3) who resides on her tribe's reservation. *McClanahan v. State Tax Com'n of Arizona*, 411 U.S. 164, 165, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) (*McClanahan*)[4]; *see also Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 463, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 123-24, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

The Tribe asserts that Compact section 10.3(c) is a negotiated elimination of state personal income tax. (Amended Compl. ¶¶ 19-20.) Section 10.3(c) states

> As a matter of comity, with respect to persons employed at the Gaming Facility, other than members of the Tribe, the Tribal Gaming Operation

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[4] This exception, known as the "*McClanahan* exemption," is discussed in further detail in argument V, *post*.

> shall withhold all taxes due to the State as provided in the California Unemployment Insurance Code and the Revenue and Taxation Code and shall forward such amounts as provided in said Codes to the State.

Far from eliminating state tax on Tribal members' personal income, Compact section 10.3(c) embodies an agreement between the Tribe and the State solely with respect to nonmember Gaming Facility employees. The reference to "comity" does not connote an extension of comity on the part of the State to the Tribe, but rather a negotiated extension of comity by the Tribe to the State, in the form of the Tribe's voluntary contractual assumption of the obligation to withhold from the wages of nonmember Gaming Facility employees the taxes due the State from those employees. This negotiated term comports with federal law regarding state and tribal tax jurisdiction. Even absent a compact, a tribe on its reservation may be required to collect a state tax from nonmember individuals. *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) (per curiam); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151, 100 S. Ct. 2069, 64 L. Ed. 2d 10 (1980) (*Colville*).

Thus, Compact section 10.3(c) leaves the Tribe's withholding responsibility with respect to Tribal member employees entirely unaddressed and, therefore, subject to sources of law entirely separate from the Compact. More importantly, section 10.3(c) does not concern *Tribal members' obligations*—even members who are Gaming Facility employees—with respect to their own state tax obligations, leaving those tax obligations entirely to other sources of governing law. Section 10.3(c) relates solely to the Tribe's withholding obligations relevant to "persons *employed* at the Gaming Facility"—not income that members receive from per capita distributions. Therefore, section 10.3(c) is irrelevant to Tribal members' state income tax obligations related to their per capita distributions.

B. Elimination of State Personal Income Tax Must be Explicit and Cannot be Inferred

As discussed, the claimed exemption is absent from the plain language in Compact section 10.3(c). The Tribe does not identify any other express provision in the Compact exempting Tribal members from state personal income tax. Instead, the Tribe alleges that the Compact "*taken as a whole, in the context in which it was negotiated*, constituted a negotiated elimination of [personal income tax] for Members' income." (Amended Compl. ¶ 20 (emphasis added).)
To be enforceable, however, a commitment attributed to a compact must be explicit, not implied. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1058-60 (9th Cir. 1997) (rejecting State's argument that class III gaming compacts at issue there should be construed to contain implied promise not to engage in class III gaming not specifically authorized by the compacts, and holding the parties' obligations are circumscribed by four corners of each compact). This concept is firmly grounded in the canon of construction that:

> A contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

United States v. Winstar Corp., 518 U.S. 839, 878-79, 116 S. Ct. 2342, 135 L. Ed. 2d 964 (1986).

In this case, because no Tribal members reside on the reservation, no Tribal members qualify for the *McClanahan* exemption and an elimination of state personal income tax to those members would be a radical departure from established law.

In addition, the Tribe's Compact is one of over sixty virtually identical class III gaming compacts that the State entered into in 1999. *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 966 (9th Cir. 2008) (noting Compacts are "virtually identical bilateral compacts"). Each 1999 Compact includes section 10.3(c) as it appears verbatim in the Tribe's Compact. Had section 10.3(c) constituted an elimination of state personal income tax on all Compact-signatory tribes' members, regardless of residence, it would have been a monumental surrender of state sovereign power and resulted in significant lost tax revenue. Such surrender cannot be inferred but must be explicitly stated. *See Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 56, 106 S. Ct. 2390, 91 L. Ed. 2d 35 (1986) (holding sovereign power with respect to the modification of contract terms "will remain intact unless surrendered in unmistakable terms"); *Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878, 881 (9th Cir. 1982) (holding a tax exemption exists only in a statute or treaty that contains "express exemptive language").

State Defendants did not breach the Compact because the Compact does not expressly preclude the State from imposing personal income tax on Tribal members not qualifying for the *McClanahan* exemption, nor can such an exemption be implied. Therefore, the first claim for relief fails to state a cognizable legal claim and should be dismissed under Rule 12(b)(6).

III. THE ELEVENTH AMENDMENT BARS THE SECOND AND THIRD CLAIMS FOR RELIEF AGAINST THE GOVERNOR

The Tribe's second claim for relief is that state personal income tax on its members' per capita distributions and casino employment income is preempted by the Constitution and IGRA. (Amended Compl. ¶¶ 27-30.) The third claim for relief is that the tax violates IGRA, tribal sovereignty and state law. (*Id.* at ¶¶31-48.) Even if the Governor were a proper defendant, both claims for relief against him are barred by the state's sovereign immunity recognized in the Constitution's

Eleventh Amendment. Accordingly, this Court should dismiss those claims against the Governor under Rule 12(b)(1).

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It "'bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity.'" *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005) (citation omitted). It also bars suits by Indian tribes against states without their consent. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779-88, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). The State has not consented to suits in federal court by Indian tribes alleging that state personal income tax is unconstitutional or that it violates state law.

In *Ex parte Young*, 209 U.S. 123, however, the Supreme Court held that a suit challenging the constitutionality of a state official's action is not one against the state. Since the Supreme Court's decision in *Ex parte Young*, "'courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law.'" *Wilbur*, 423 F.3d at 1111 (citations omitted).

In this case, the Tribe seeks, among other things, "[a]n order from the Court enjoining the imposition of [personal income tax] on the Tribe's Members," and "[a] declaration that the Tribe's members are not required to pay [personal income tax]." (Amended Compl. 11, Prayer ¶¶ 1-2.) It is unclear whether the requested relief is prospective only, or is also retrospective. To the extent the second and third claims seek any retrospective relief, it is barred by the Eleventh Amendment. *See Wilbur*, 423 F.3d at 1111; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring in part) (under *Ex parte Young*, "[a] federal court cannot award retrospective relief, designed to remedy past violations of federal law") (citations omitted).

To the extent the Tribe seeks only prospective relief, the *Ex parte Young* exception does not apply to the Governor for the same reasons why the Tribe lacks standing. *See Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 916-17 (E.D. Wis. 2002) (causal connection requirement under *Ex Parte Young* "closely overlap[s] with causation and redressability inquiries for standing"); Argument I, *ante*. The Ninth Circuit has held that for *Ex parte Young* to apply "there must be a connection between the official sued and the enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement." *Long v. Van de Kamp*, 961 F.2d at 152; *Southern Pac. Transp. Co. v. Brown*, 651 F.2d at 615. A high-ranking state official's "general supervisory power" is insufficient to establish the connection with enforcement required by *Ex parte Young*. *Long v. Van de Kamp*, 961 F.2d at 152 (citing *Southern Pac. Transp. Co. v. Brown*, 651 F.2d at 614). Instead, there must be "a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests," otherwise the Eleventh Amendment bars federal court jurisdiction. *Id.* As demonstrated above, there is no direct connection between the Governor and the FTB's enforcement of the state Personal Income Tax Law. Nor has the Tribe alleged that the Governor has threatened enforcement. Accordingly, the *Ex parte Young* doctrine is inapplicable to the Governor.

The Eleventh Amendment also proscribes the Tribe's IGRA claim. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), the Supreme Court held that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity; therefore, IGRA could not grant jurisdiction over a state that did not consent to be sued. Also, the Court held the *Ex parte Young* doctrine inapplicable in light of IGRA's intricate remedial provisions. *Id.* Here, the State has consented to federal court jurisdiction in suits by the Tribe asserting that the State has breached the

Compact, or failed to negotiate an amendment in good faith. (Compact §§ 9.1(d), 9.4, 11.2.1(c) & 12.3.) But the State has *not* consented to tribal suits alleging the state Personal Income Tax Law violates IGRA and, according to *Seminole Tribe*, such consent cannot be implied.

Indeed, a state's waiver of Eleventh Amendment immunity must be unequivocal, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985), *superseded by statute on other grounds*, and its consent to suit in federal court will be construed narrowly, *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 53-54, 64 S. Ct. 873, 88 L. Ed. 2d 1121 (1944). A state may make a limited waiver of its Eleventh Amendment immunity by agreeing to a waiver for a limited purpose or for limited types of actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir. 1992). Here, the State has not waived its immunity from Tribal suits claiming state personal income tax is unconstitutional or violates IGRA, and the *Ex parte Young* doctrine does not apply to the Governor in this case. Therefore, the second and third claims for relief against the Governor are barred by the Eleventh Amendment and should be dismissed under Rule 12(b)(1) without leave to amend.

IV. THE ELEVENTH AMENDMENT BARS ANY CLAIM THAT STANISLAUS VIOLATED IGRA

As discussed in the previous argument, the Eleventh Amendment precludes the Tribe's claim against the Governor that California's personal income tax on Tribal members' per capita distributions and casino wages is preempted or exempted by IGRA, and that the *Ex Parte Young* exception does not apply. The argument and reasoning applies with equal force to Stanislaus as Executive Officer of the FTB. The State has not consented to tribal suits alleging the state Personal Income Tax Law violates IGRA and, according to *Seminole Tribe, Ex Parte Young* is inapplicable. Therefore, the IGRA claims against Stanislaus are prohibited by the Eleventh Amendment and should be dismissed under Rule 12(b)(1).

V. FEDERAL LAW ALLOWS THE STATE TO IMPOSE PERSONAL INCOME TAX ON INDIANS LIVING OFF-RESERVATION

A. Federal Case Law Permits State Taxation of Indians Living Off-Reservation

The Tribe alleges the Governor's and Stanislaus' "effort to impose and collect and (sic) [personal income tax] on the Members, and receive [personal income tax] from the Members, is preempted by federal law." (Amended Compl. ¶ 30.) No Tribal members reside on the Tribe's reservation (*see id.* at ¶ 15), thus the imposition of personal income tax on any members necessarily is on those living off-reservation.

Under federal common law, only a tribal member living on her tribe's reservation and earning income from on-reservation sources is exempt from state personal income tax on that income. *McClanahan*, 411 U.S. at 168-71. Indians "going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State," including tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). In *Colville*, 447 U.S. at 160-61, the Supreme Court reaffirmed the states' continued ability to tax Indians residing off their membership reservation:

> Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to preempt Washington's power to impose its taxes on Indians not members of the Tribe. . . . Similarly, the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

The reason tribal members do not live on their membership reservation has never been relevant to the determination of whether members qualify for the *McClanahan* exemption. For instance, in *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391, 395 n.4 (Minn. 2001), the Minnesota Supreme Court rejected as irrelevant tribal members' argument that because they had been "forced off the reservation and intended to return to the reservation," their on-reservation income was exempt from state taxation.

This Court should reach the same conclusion here. The Tribe's contention that "it would be very difficult to put housing on the Reservation" and that its members "have been forced to live off the Reservation" (Amended Compl. ¶ 17) is belied by the Tribe's failure to disclose its 160-acre, undeveloped reservation property located in the City of Twentynine Palms, where it planned to develop a second Gaming Facility, hotel and RV park (Defs.' RJN, Ex. B, *Mike* Stipulation ¶¶ 5, 7). In any event, the assertion is irrelevant because none of the Tribe's members live on the reservation and, therefore, none is entitled to the *McClanahan* exemption. Thus, the imposition of state personal income tax on both per capita distributions and casino employment income is permitted by federal law.

B. IGRA Does Not Prohibit State Personal Income Tax on Indians

The Tribe also alleges that IGRA prohibits the imposition of state personal income tax on its members. (Amended Compl. ¶ 30; *see also id.* at ¶¶ 39, 46-47.) IGRA states that it shall not be "interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon any Indian Tribe or upon any other person or entity authorized by an Indian Tribe to engage in any Class III activity." 25 U.S.C. § 2710(d)(4).

As discussed above, Compact section 10.3(c) does not impose a tax, or provide for the imposition of a tax, either on the Tribe, its members, or any person the Tribe has authorized to engage in a class III gaming activity. Further, IGRA does not independently afford tribal members a state personal income tax exemption. Title 25 U.S.C. § 2710(d)(4) protects only a tribal government and its authorized gaming operators from unilateral imposition of a state tax. Individual tribal members are neither a tribal government nor "a person or entity authorized by the Tribe to engage in any class III activity." Tribal members are merely income beneficiaries of the gaming operation. IGRA does not provide tribal members who do not otherwise qualify for the *McClanahan* exemption any protection from state taxation. "When Congress enacts a tax exemption, it ordinarily does so explicitly." *Chickasaw Nation v. United States*, 534 U.S. 84, 90, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (IGRA does not exempt tribes from paying certain gambling-related taxes that states are not required to pay). Congress included in IGRA neither an express nor implied personal income tax exemption for individual tribal members.

C. Neither the Revenue Allocation Plan, Tribal Sovereignty, nor Federal Law Prohibit the State From Imposing Personal Income Tax on Individual Tribal Members Living Off-Reservation

The Tribe alleges the Revenue Allocation Plan is "a tribal law and rule," and the State's personal income tax on Tribal members' per capita distributions made pursuant to the Revenue Allocation Plan infringes on Tribal sovereignty. (Amended Compl. ¶¶ 22, 28). According to the Tribe, because the Revenue Allocation Plan does not consider the members' state personal income tax obligations, and the Bureau of Indian Affairs approved the Revenue Allocation Plan, California's personal income tax is preempted by federal law. (*Id.* at ¶¶ 15, 30.) The Tribe also claims the state tax on members' casino wages infringes upon Tribal sovereignty and is preempted by federal law. (*Id.* at ¶¶ 15, 29).

The Revenue Allocation Plan is required by federal law to allow the Tribe to make per capita distributions of gaming proceeds. IGRA permits gaming tribes to make per capita distributions to members only when made according to an adopted revenue allocation plan that protects the rights of minors (and certain other persons), and is approved by the Secretary or a delegated official from the Bureau of Indian Affairs. 25 U.S.C. § 2710(b)(3); 25 C.F.R. §§ 290.2, 290.5 (2004). Secretarial approval ensures that per capita distributions are fair and equitable, and made only to duly-enrolled members from gaming revenues, thus furthering IGRA's policy objectives. *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996).

Contrary to the Tribe's assertion, 25 U.S.C. § 2710(b)(3) does not prohibit states from imposing personal income tax on Tribal members' per capita distributions because there is no explicit congressional exemption from state income tax. *See Chickasaw Nation v. United States*, 534 U.S. at 90. That the Tribe's federally-approved Revenue Allocation Plan fails to consider the members' state personal income tax obligations is as irrelevant to whether IGRA exempts per capita distributions from state income tax,[5] as it is to whether the Tribe's members are subject to California's personal income tax in the first instance.

As noted, the Minnesota Supreme Court has rejected the Tribe's argument here that 25 U.S.C. § 2710(b)(3) preempts state taxation of per capita distributions made pursuant to a revenue allocation plan:

> The [tribal members'] arguments fail for the simple reason that section 2710(b)(3)(D) does not expressly preempt state taxation of income received by tribal members in the form of per capita payments from reservation gaming activity. Indeed, the [tribal members] themselves observe that the IGRA "does not mention or reference state taxation." In the absence of any express provision indicating such an intent on the part of Congress, [*Oklahoma Tax Commission v.*] *Chickasaw Nation*[, 515 U.S. 450], [*White Mountain Apache Tribe v.*] *Bracker*[, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) (*Bracker*)], and [*New Mexico v.*] *Mescalero Apache Tribe*[, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)] lead inexorably to the conclusion that the IGRA does not preclude the State of Minnesota from imposing its income tax on the [tribal members] during periods when they resided within the state but off the Prairie Island Indian Reservation. We therefore reject the [tribal

[5] Despite the Tribe's argument that the Revenue Allocation Plan does not consider state taxation of per capita distributions, the Tribe in fact withheld state income taxes from the distribution at issue in *Mike v. Franchise Tax Board*. (Defs.' RJN, Ex. B, *Mike* Stipulation ¶ 14, Ex. C, *Mike* Compl. ¶ 5.)

members'] preemption claim.

Jefferson v. Com'r of Revenue, 631 N.W.2d at 397-98. The same results should apply here.

Similarly, the imposition of state personal income tax upon individual Tribal members employed by the Tribe's casino, but living off-reservation, does not infringe upon Tribal sovereignty and is consistent with federal law. The *McClanahan* exemption from state income taxation requires that tribal members live on their reservation *and* that their income derive wholly from reservation sources. *McClanahan*, 411 U.S. at 179. Here, the Tribal members do not qualify for the *McClanahan* exemption, regardless of the source of income, because they live off-reservation. "*McClanahan* never established either an exemption applying categorically to all tribal members living in Indian country, or an exemption which applied, regardless of the source of the tribal member's income." *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Com'n*, 597 F. Supp. 2d 1250, 1262 (N.D. Okla. 2009) (holding plaintiff tribe could not qualify for the *McClanahan* exemption from state income tax because there were no qualifying reservations in Oklahoma).

The *McClanahan* exemption comports with principles of federal preemption and Indian sovereignty. In *Bracker*, the Supreme Court established a sliding scale test, known as the "*Bracker* test," to determine if state tax on tribal interests is preempted by federal law. The Court requires "a particularized inquiry into the nature of the state, federal and tribal interest at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. At one end of the scale is the essentially per se rule that state taxation of Indians or tribes for transactions on the reservation is barred, absent a federal statute expressly authorizing the tax. *McClanahan*, 411 U.S. at 170-71. At the other end are off-reservation situations where state taxation is seldom preempted. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335. Indeed, Supreme Court "cases have recognized that tribal sovereignty contains a 'significant geographical component.'" *Id*. at 335 n.18 (citations omitted). Thus, Indians' off-reservation activities are generally subject to nondiscriminatory state laws, absent express federal law to the contrary. *Id.*; *see also Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 973 (10th Cir. 1987) ("[h]istorically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country, state jurisdiction has obtained").

There is no support in federal common law for the proposition that a tribal member is exempt from state income tax when residing off her tribe's reservation, even if the income source is gaming.

> Domicil itself affords a basis for such taxation. . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived.

Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. at 463 (internal quotation marks and citation omitted).

The mere fact that an Indian's income derives from per capita distributions from an on-reservation casino, or employment at that casino, is insufficient to immunize it from state taxation. The taxpayer must reside on her member reservation where she earned the income. *See McClanahan*, 411 U.S. at 170-71; *Colville*, 447 U.S. at 162. The Tribe's second claim for relief fails to state a cognizable legal claim because, under federal common law, the imposition of state personal income tax on Tribal members living off-reservation does not infringe upon Tribal sovereignty and is otherwise consistent with federal law.

VI. THE TAX INJUNCTION ACT BARS THE THIRD CLAIM FOR RELIEF

The Tribe's third claim for relief is that federal and state law exempts its members' per capita distributions and casino wages from state personal income tax. (Amended Compl. ¶¶ 31-48.) The Tribe alleges its Gaming Facility is the "lifeblood" of the Tribe and its members, and together they "function as one economic unit." (*Id.* at ¶ 16.) The Tribe claims it is a business (partnership) and the Tribe, the Tribal business, and its members together constitute the Tribe's "gaming operation." (*Id.* at ¶¶ 32-39.) To the extent the third claim for relief is brought by a Tribal business, or individual Tribal members, then the Tax Injunction Act, 28 U.S.C. § 1341,[6] bars jurisdiction because the business or members have an adequate remedy in state court. *See Chippewa Trading Co. v. Cox*, 365 F.3d 538, 545 (6th Cir. 2004) (exception to Tax Injunction Act allowing federally recognized Indian tribes to bring suit in federal court, 28 U.S.C. § 1362, does not apply to suits by individual Indians or private Indian corporations); *Amarok Corp. v. State of Nevada*, 935 F.2d 1068, 1070 (9th Cir. 1991) (same); *Jerron West, Inc. v. California State Bd. of Equalization*, 129 F.3d 1334, 1339 (9th Cir. 1998) ("[t]he Supreme Court and this court have concluded that California's tax refund remedy is generally a 'plain, speedy and efficient' remedy under the [Tax Injunction] Act"); *see also* Defs.' RJN, Ex. C, *Mike* Compl. (demonstrating adequate state remedy exists for individual Tribal members to challenge imposition of state personal income tax). Accordingly, the third claim for relief is barred by the Tax Injunction Act and should be dismissed under Rule 12(b)(1).

VII. THE ELEVENTH AMENDMENT BARS THE STATE LAW CLAIM

The Tribe's third claim for relief includes that its members' per capita distributions and casino wages are exempt from state personal income tax under, among others, unspecified state law. (Amended Compl. ¶¶ 31-48.) The Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court. *Pennhurst State Sch. and Hosp. v.*

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[6] The Tax Injunction Act provides, "The 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 Act applies to suits for injunctive and declaratory relief. *Nat'l Private Truck Council v. Oklahoma Tax Com'n*, 515 U.S. 582, 586-87, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995).

Halderman, 465 U.S. 89, 120, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). In that context, the Eleventh Amendment is an "explicit limitation on federal jurisdiction." *Id.* at 118.

Here, the State has not waived its Eleventh Amendment immunity from tribal suits in federal court claiming California's personal income tax violates state law. Nor has Congress specifically abrogated the State's sovereign immunity. *See Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. at 786-88 (28 U.S.C. § 1362, which vests district courts with original jurisdiction of "all civil actions" brought by federally recognized Indian tribe wherein the controversy arises under federal law, does not reflect "unmistakably clear" intent to abrogate Eleventh Amendment immunity); *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 540-42, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002) (holding, consistent with *Blatchford*, that 28 U.S.C. § 1367(a)'s broad grant of supplemental jurisdiction does not authorize federal court jurisdiction over state law claims against nonconsenting state defendants). Therefore, the state law claim is barred by the Eleventh Amendment and should be dismissed under Rule 12(b)(1).

VIII. NO STATE PERSONAL INCOME TAX EXEMPTION EXISTS FOR INDIANS RESIDING OFF-RESERVATION ON THE THEORY THAT A TRIBAL GAMING OPERATION IS A PARTNERSHIP

Ignoring the Tax Injunction Act's bar to an action brought by Tribal members or a Tribal business, and the Eleventh Amendment's bar to the Tribe's state law claim, the Tribal government alleges that for state taxation purposes its gaming operation must be treated as a partnership. (Amended Compl. ¶ 37.) According to the Tribe, gaming operation income is exempt from state taxation and, therefore, Tribal member per capita distributions are also exempt because the source is a tax-exempt partnership. (*Id.* at ¶¶ 41-42.) The Tribe claims that, as a partnership, its tax-exempt status "flows through" to its partners (the members), making per capita distributions tax-exempt. (*Id.* at ¶ 42.) It also claims per capita distributions to members are distributions to a partner under the Internal Revenue Code, 26 U.S.C.

§ 731, and the members' casino wages constitute "guaranteed payments" under 26 U.S.C. § 707(c). (*Id.* at ¶¶ 44-47.)

Even if the Tribe were considered a partnership, whether a partnership is tax-exempt is irrelevant to the taxability of the income ultimately distributed to the partners, or Tribal members in this case. Partnerships are disregarded for income tax purposes, and are merely "pass-through" tax entities—never themselves being subject to taxation. *Randall v. Loftsgaarden*, 478 U.S. 647, 650, 106 S. Ct. 3143, 3146, 92 L. Ed. 2d 525 (1986). This means the partnership's profits and losses "pass through" the partnership to its partners, who then pay taxes on their share of the profits (or deduct their share of the losses) on their personal income tax returns. *Id.*; 26 U.S.C. § 704(d). Thus, partnership income is always taxed, only the tax is imposed after the income is distributed to the partners.[7] *Scoggins v. Com'r*, 46 F.3d 950, 952 (9th Cir. 1995); *Valentino v. Franchise Tax Bd.*, 105 Cal. Rptr. 2d 304, 87 Cal. App. 4th 1284, 1291-92 (Cal. Ct. App. 2001).

Neither does IGRA support the Tribe's contention that members' per capita distributions are tax-exempt because the alleged Tribal partnership's exemption "flows through" to the distributees. (*See* Amended Compl. ¶ 46.) Despite the Tribal government's exemption from federal income tax, per capita distributions to individual Tribal members are expressly made subject to federal income tax. (*See* Argument V(A) & (C), *ante*.) IGRA provides that net revenues from gaming activities may be paid to tribal members only if "the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made." 25 U.S.C. § 2710(b)(3)(D). This undermines the Tribe's argument that

[7] "A partnership is a 'pass-through' entity for federal income tax purposes. The partnership itself is generally exempt from federal income tax, and its income and losses pass through to the partners and are reported on their individual tax returns. Statutes of all but a few states treat partnerships in the same general manner for state income tax purposes, but with various modifications." James A. Amdur, Annotation, *State Income Tax Treatment of Partnerships and Partners*, 2 A.L.R. 6th 1 (2005).

per capita distributions are per se tax-exempt. (*See also* Argument V(B), *ante* (demonstrating IGRA, 25 U.S.C. § 2710(d)(4), does not preclude state personal income tax on Tribal members living off-reservation).)

Further, the Supreme Court has rejected the argument that "a tax on tribal members employed by the Tribe would be seen as an impermissible tax on the Tribe itself." *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. at 466-67. The "dubious doctrine" of "typing taxation of wages earned by tribal employees as taxation of the Tribe itself, would require an exemption for all employees of the Tribe—not just tribal members, but nonmembers as well." *Id*. at 467. Federal law is clear that while tribal governments are exempt from tax, individual tribal member income is exempt only when it meets the *McClanahan* criteria.

Accordingly, the Tribe's third claim for relief should be dismissed under Rule 12(b)(6) for failure to state a legally cognizable claim.

IX. THIS COURT SHOULD DECLINE TO EXERCISE PENDENT JURISDICTION OVER THE STATE LAW CLAIM

A court may decline to exercise jurisdiction over pendent state law claims if, among other reasons, it has dismissed all claims over which it has original jurisdiction, or there are compelling reasons to decline jurisdiction. 28 U.S.C. § 1367(c). State Defendants have articulated sufficient reasons for this Court to dismiss the Tribe's federal claims without leave to amend. Even if the state law claim is actionable, the Court should decline to exercise jurisdiction and allow it to be resolved instead in individual Tribal members' state court actions against the FTB, as in *Mike v. Franchise Tax Board*.

CONCLUSION

For the reasons stated above, State Defendants respectfully request this Court dismiss the amended complaint without leave to amend.

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Respectfully submitted,

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