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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TWENTY-NINE PALMS BAND OF MISSION INDIANS, a federally recognized Indian Tribe, Plaintiff, v. ARNOLD SCHWARZENEGGER, et al., Defendants.	Case No. EDCV 08-1753-VAP (OPx) **[Motion filed on April 5, 2010]** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITHOUT LEAVE TO AMEND**

Through this action, Plaintiff Twenty-Nine Palms Band of Mission Indians ("Plaintiff" or "the Tribe") challenges the imposition of California's personal income tax on income received by its members in connection with a casino operated on Tribal lands. Defendants Selvi Stanislaus, John Chiang, Betty T. Yee, and Ana Matosantos ("Defendants") now move to dismiss Plaintiff's Third Amended Complaint ("TAC"). For the reasons set forth below, the Court GRANTS Defendants' motion and dismisses the Third Amended Complaint without leave to amend.

I. BACKGROUND

A. Plaintiff's Factual Allegations

Plaintiff is a federally recognized Indian tribe. (TAC ¶ 6.) It has twelve members over eighteen years of age. (TAC ¶ 11.) Plaintiff has real property located in Coachella, California and near Twenty-Nine Palms, California comprising its reservation. (TAC ¶ 12.) It operates a class III gaming casino on its reservation in Coachella. (TAC ¶ 14.) No members of the Tribe reside on the reservation.[1] The land in Coachella is divided into two portions; one is occupied by the casino and its parking lot, and the other is unsuitable for habitation due to its proximity to a sanitation plant. (TAC ¶ 21.) The land in Twenty-Nine Palms is undeveloped, and not currently suitable for housing. (TAC ¶ 22.)

In connection with the casino, Plaintiff periodically prepares and submits to the Bureau of Indian Affairs ("BIA") a revenue allocation plan ("RAP"). The RAP controls how Plaintiff distributes net income from its casino. (TAC ¶ 15-16.) Plaintiff makes per capita payments to its members from its net casino revenues as

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[1]Plaintiff alleges that "[a]pproximately one-fourth of the Tribal members are living out of state in part to avoid [the tax]." (TAC ¶ 28(h).) Neither side has indicated whether California has attempted to impose its personal income tax on Tribe members residing both off-reservation and outside of California. The Court assumes that California has not sought to do so, and that the only claims raised in the Third Amended Complaint relate to Tribe members residing in California.

authorized by the RAP. (TAC ¶ 16.) Additionally, certain of Plaintiff's members are employed by Plaintiff "relative to issues involving the Casino." (TAC ¶ 20.)

The State of California, through imposition of its personal income tax, taxes monies received by members of Plaintiff both through the per capita payments and in connection with work performed for Plaintiff relating to the casino. (TAC ¶ 5.) In contemplating the terms of the RAP, Plaintiff does not take California's personal income tax into account. (TAC ¶ 17.)

B. Procedural History

Plaintiff filed its Complaint on December 2, 2008. Pursuant to the parties' stipulation and the Court's Order, Plaintiff filed a First Amended Complaint on March 27, 2009, alleging claims for (1) breach of tribal compact; (2) federal preemption; and (3) exemption of income under the Indian Gaming Regulation Act ("IGRA"), doctrine of tribal sovereignty, and state law. On September 4, 2009, the Court granted Defendants' motion to dismiss the First Amended Complaint and granted Plaintiff leave to amend with respect to certain aspects of its second and third claims for relief.

Plaintiff filed a Second Amended Complaint on October 1, 2009. On February 24, 2010, the Court granted Plaintiff leave to file a Third Amended Complaint, which Plaintiff filed on February 26, 2010. The Third Amended Complaint contained a single claim for relief against Defendants, all members of California's Franchise Tax Board, entitled "federal preemption," and seeks an order enjoining Defendants from imposing California's personal income tax on Tribe members and a declaration that Tribe members are not obligated to pay California's personal income tax.[2]

Defendants filed their Motion to Dismiss Plaintiff's Third Amended Complaint on April 5, 2010. Plaintiff's Opposition and Defendants' Reply were filed timely.

C. Requests for Judicial Notice

In support of the Motion and Opposition, Defendants and Plaintiff respectively request that the Court take judicial notice of certain facts. Both sides have filed objections to the other's requests. The Court addresses each separately.

[2]Although not specified in the prayer for relief, presumably Plaintiff only seeks such an order and declaration to the extent that California seeks to tax income derived from the Tribe's gaming operation of Tribe members residing in California.

1. Defendants' Request for Judicial Notice

Defendants request that the Court take judicial notice of the following documents: (1) an 1895 proclamation by President Grover Cleveland; (2) a December 12, 2007 press release by Plaintiff; (3) a March 20, 2007 press release by Plaintiff; (4) a draft environmental assessment; (5) a letter dated February 18, 2008 from Michael Derry of Wastenot Tribal Services to Beverly Sweetwater of the BIA; (6) 25 C.F.R. Part 290; (7) a letter dated January 4, 1994 from Anthony J. Hope of the National Indian Gaming Commission to Plaintiff; (8) I.R.S. Publication 3908; (9) a letter dated October 6, 2004 from George Skibine of the Department of the Interior to Mike Dean of Plaintiff; and (10) a draft environmental assessment. The Court takes judicial notice of Part 290 of the Code of Federal Regulations. With respect to the remaining documents, as discussed below, the Court has not relied on such documents in deciding this Motion. Accordingly, Defendants' request for judicial notice of these documents is moot.

2. Plaintiff's Request for Judicial Notice

In its Opposition to the Motion, Plaintiff requests the Court take judicial notice of four documents: (1) a letter dated December 8, 2009 from Daniel Kopulsky of California's Department of Transportation to Beverly Sweetwater of the BIA; (2) a letter dated December 10,

2009 from Andrea Lynn Hoch of the California Governor's Office to Francine Munoz of the BIA; (3) a letter dated March 21, 1994 from Plaintiff to Terry Heidi of the National Indian Gaming Commission; and (4) a letter dated April 25, 2003 from Aurene Martin, Assistant Secretary of Indian Affairs, to Gus Fran of the Forest County Potwatomi Community. Plaintiff also submitted the Declaration of Anthony Madrigal ("Madrigal Declaration), to which it attached an archaeological assessment prepared by Applied EarthWorks, Inc. Defendants object to each of the four documents, as well as the Madrigal Declaration and the attached archaeological assessment.

The Madrigal Declaration and the attached archaeological assessment relate to an environmental assessment of a Tribal cemetery on the Tribe's reservation and to archaeological remains found on the Tribe's reservation. These facts are not capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned, see Fed. R. Evid. 201(b), and the Court declines to take judicial notice of them.

Similarly, the four letters of which Plaintiff requests the Court take judicial notice and the contents thereof are not capable of ready determination by resort to sources whose accuracy cannot reasonably be

questioned. The Court declines to take judicial notice of these letters.

II. LEGAL STANDARD

Under Rule 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. As a general matter, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition, the Court must accept all material allegations in the complaint - as well as any reasonable inferences to be drawn from them - as true. See Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic, 550 U.S. at 555 (citations omitted). Rather, the allegations

in the complaint "must be enough to raise a right to relief above the speculative level." Id.

In other words, the allegations must be plausible on the face of the complaint. See Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (citations and internal quotations omitted).

Although the scope of review is limited to the contents of the complaint, the Court may also consider exhibits submitted with the complaint, Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990), and "take judicial notice of matters of public record outside the pleadings," Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988). A court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

III. DISCUSSION

Plaintiff challenges the legality of California's personal income tax as applied to (1) per capita payments from casino revenues made to its members under the RAP; and (2) wages received by its members for work performed in connection with the casino.[3] In its September 4, 2009 Order granting Defendants' motion to dismiss the First Amended Complaint, the Court granted Plaintiff leave to amend for the narrow purpose of alleging facts showing that the tax as applied to Plaintiff's members either is impliedly preempted by the IGRA or interferes with Plaintiff's tribal sovereignty. For the reasons discussed below, the Court concludes (1) the IGRA does not impliedly preempt California's personal income tax as applied the Plaintiff's members, and (2) the tax does not interfere with Plaintiff's sovereignty.

A. Plaintiff Fails to Allege Sufficiently That Application of the Tax Is Preempted by the IGRA

The Court already has held that the IGRA does not explicitly preempt application of the tax to Tribe members. (Doc. No. 33 at 14:1–15:10.) In its September

[3]Plaintiff alleges "[a] number of the Members are employed by the Tribe relative to issues involving the Casino." This allegation, however, is so vague and generalized as to be practically meaningless. The Court nevertheless construes this allegation in the light most favorable to Plaintiff, meaning, for purposes of this Motion, that the Court assumes that such members are employed directly by the Tribe and that all work is performed on the reservation.

4, 2009 Order, the Court left open the question of whether or not application of the tax was implicitly preempted by the IGRA. Plaintiff now argues that the Third Amended Complaint contains sufficient allegations to show that application of the tax to its members is implicitly preempted by the IGRA. (Opp'n at 14:1-15:21.)

"The preemption analysis in Indian tribal cases differs from that used in other circumstances. Congress attaches great significance to the firm federal policy of promoting tribal self-sufficiency and economic development. It intended that this policy be given broad preemptive effect. Moreover, no express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy." Crow Tribe of Indians v. Montana, 819 F.2d 895, 898 (9th Cir. 1987) (internal citations and quotations omitted) (emphasis in original).

Accordingly, in order to plead sufficiently that application of California's tax to Tribe members is implicitly preempted by the IGRA, Plaintiff must allege facts plausibly showing that application of the tax to its members interferes with either (1) the purpose of or (2) the operation of the IGRA. See Iqbal, 129 S. Ct. at 1949. For the reasons discussed below, the Court

concludes Plaintiff has failed to do so, and GRANTS Defendants' Motion to the extent Plaintiff's claim is based on implied preemption by the IGRA.[4]

1. The Tax Does Not Conflict with the Purpose of the IGRA

Plaintiff inaccurately states the congressional purpose behind the IGRA; it argues the "IGRA is intended to promote tribal economic development, self-sufficiency, and strong tribal interest." (Opp'n at 15:10-12.) In support of this proposition, Plaintiff relies on 25 U.S.C. § 2701(4).[5] Section 2701(4) announces Congress's finding that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." This is a general statement of federal policy towards Indian tribes, and not a statement of the specific purpose behind the IGRA. The Supreme Court recognized that

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[4]The Ninth Circuit's recent decision in Rincon Bank of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, __ F.3d __, Case No. 08-55809, 2010 WL 1542452 (9th Cir. Apr. 20, 2010), does not affect the Court's analysis. Rincon involved express provisions of the IGRA which prevented states from imposing taxes or assessments on tribes for purposes other than defraying the cost of regulating tribal gaming. Here, by contrast, California's state income tax is directed towards individuals, not the Tribe itself, and is non-discriminatory with respect to the source of income.

[5]Plaintiff actually cites 25 U.S.C. § 2701(1). (See Opp'n at 15:10-12.) As the quoted language actually appears at 25 U.S.C. § 2701(4), the Court assumes this was in error, and that Plaintiff intended to rely on 25 U.S.C. § 2701(4).

"Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 48 (1996); see also Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1193 (9th Cir. 2008) ("IGRA's core objective is to regulate how Indian casinos function so as to assure the gaming is conducted fairly and honestly by both the operator and players."). For purposes of this Motion, the Court adopts the expression of purpose behind the IGRA set forth by the Supreme Court in Seminole Tribe, rather than the broad general statement of federal policy advanced by Plaintiff. While creating a statutory basis for the operation and regulation of gaming by Indian tribes was certainly intended to advance the general policy favoring tribal economic development and self-sufficiency, see 25 U.S.C. § 2702(1), the specific purpose of the IGRA is narrower than the broader federal policy.[6]

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[6]To the extent Plaintiff may be arguing application of the tax is preempted by a conflict with the broader federal policy because the tax adversely impacts Tribal resources, this argument also fails. The Supreme Court repeatedly has recognized the ability of states, under appropriate circumstances, to impose taxes on Indian tribes and their members. See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) ("We further hold . . . that Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the state outside Indian country."); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157-58 (1973) (holding that New Mexico may tax income from ski resort owned and operated

(continued...)

Plaintiff fails to explain how application of California's personal income tax to individual tribal members living off-reservation conflicts with Congress's objective of providing a statutory basis for the operation and regulation of gaming by Indian tribes. Plaintiff argues the tax "clearly has a negative impact on the Tribe, its RAP, and its ability to provide for its members." (Opp'n at 15:17-18.) Such vague, conclusory assertions fail to demonstrate a conflict between application of the tax and the purposes of IGRA, however. Application of the tax to Tribe members living off reservation lands does not affect the operation of the casino, and is not an attempt to impose any regulations on the casino. Accordingly, application of the tax to Tribe members living off-reservation does not conflict with the purpose of the IGRA.

2. Plaintiff Fails to Allege Sufficiently that the Tax Conflicts with the Operation of the IGRA

It appears that Plaintiff also maintains that imposition of the tax on its members interferes with the operation of the IGRA. (See Opp'n at 6:21-24, 18:17-19:2, 20:20-21:3.) To the extent Plaintiff asserts

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[6](...continued)
by tribe off-reservation). State taxes plainly do not conflict with the federal policy of promoting tribal economic development and self-sufficiency merely because they impose an economic burden on a tribe or its members.

that application of the tax conflicts with the IGRA's implementation, its argument fails.

In support of this claim, Plaintiff asserts that "this case involves disrupting the federally regulated RAP, a tribal law, which was agreed to with and approved by the federal government." (Opp'n at 18:17-18.)[7] The only specific way in which Plaintiff alleges that the tax interferes with the operation of the IGRA, however, is by "requiring the Tribe to . . . readjust and redistribute the categories in its RAP." (Opp'n at 6:17-22.)

The California income tax requires no such thing. Plaintiff identifies no provision in California tax law that "requires" it to do anything. The tax is not imposed on the Tribe, and requires nothing of the Tribe. It simply requires Tribe members who live off-reservation to pay personal income tax on income received either from distributions of Tribal gaming revenue or for work

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[7]Plaintiff also maintains that "[t]he Supreme Court in Cabazon has already ruled that the federal interest in on-reservation gaming is more important than this state's interest in regulating it." (Opp'n at 18:18-20.) The Court already has rejected this argument, however, recognizing that the balancing test set forth in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) does not apply here because the Bracker test applies exclusively to on-reservation transactions between a nontribal entity and a tribe or tribe member. (Doc. No. 33 at 15:22-16:8.)

performed in connection with the Tribe's casino.[8] If the Tribe wishes to ensure its members receive a certain amount of after-tax income, it is free to endeavor to amend the RAP to provide for that level of income. This is Plaintiff's choice, however; it has cited no authority showing that the State of California requires it to do so.

B. The Tax Does Not Infringe Upon Tribal Sovereignty

In its September 4, 2009 Order, the Court also granted Plaintiff leave to amend to allege that application of the tax to Tribe members interferes with Plaintiff's tribal sovereignty. In the Third Amended Complaint, Plaintiff attempts to do so.

Through its Indian tax immunity jurisprudence, the Supreme Court has recognized that "the 'who' and the 'where' of [a] challenged tax have significant consequences." Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101 (2005). The Supreme Court has "explained that this jurisprudence relies 'heavily on the

[8]According to Plaintiff, the RAP only applies to "income from net gaming proceeds." (Opp'n at 5:11-12.) Compensation for work performed in connection with the casino, however, is a cost of operating the casino. Such compensation thus presumably is not paid out of "net gaming proceeds" and is not governed by the RAP. Plaintiff's argument fails for this additional reason with respect to application of the tax to income received by Tribe members for work performed in connection with the casino.

doctrine of tribal sovereignty which historically gave state law no role to play within a tribe's territorial boundaries.'" Id. at 112 (quoting Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123-23 (1993)).

Though Plaintiff now argues that the legal incidence of California's income tax falls on "the Tribe or its members," (see Opp'n at 9:18-11:8), the Court has already held that the legal incidence of the tax falls on the Tribe's members with respect to both types of income at issue, and declines to revisit that ruling. (Doc. No. 33 at 16:10-17:2.)

The crucial question here, then, is where the legal incidence of the state's income tax occurs. On the one hand, the Supreme Court has recognized that "[a]bsent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country." Chickasaw, 515 U.S. at 458 (emphasis added).[9] On the other hand, the Supreme Court has also recognized that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory

[9]Defendants apparently do not dispute Plaintiff's contention that no federal statute expressly authorizes application of California's income tax to the Tribe members.

state law otherwise applicable to all citizens of the State." Mescalero, 411 U.S. at 148-49.

Perhaps unsurprisingly, Plaintiff urges the Court to find that the legal incidence of the tax falls on the reservation, (see Opp'n at 11:10-13:28), while Defendants maintain that the legal incidence of the tax falls off the reservation.

Plaintiff argues that because its casino operations occur on reservation lands, the legal incidence of any tax on income ultimately generated from those operations and distributed to Tribe members — either in the form of per capita distributions or wages for employment — falls on the reservation. (See Opp'n at 11:10-12:19.) Plaintiff cites no authority for the proposition that the legal incidence of an income tax falls on the location where the activities generating the income occur, however.[10] Furthermore, such a rule would run contrary to the "well-established principle of interstate and international taxation . . . that a jurisdiction . . . may tax all the income of its residents, even income earned outside the taxing jurisdiction." Chickasaw, 515 U.S. at 462-63 (emphasis in original).

[10]Each of the cases relied on by Plaintiff in support of this argument involve either an excise tax or sales tax.

Plaintiff alternatively argues that the economic effects of the tax are ultimately felt by the Tribe because the Tribe must either (1) adjust its per capita distributions (and, presumably, wages paid to its employees) to provide its members with sufficient income to obtain housing, or (2) invest Tribal funds to construct housing on its reservation so that its members may avoid California's income tax.[11] (See Opp'n at 12:20–13:28.) This argument also fails, however.

Plaintiff's alternative argument ignores the distinction between the party bearing the legal incidence of a tax and the party bearing the ultimate economic burden of that tax. Simply showing that a party bears the economic burden of a tax is insufficient to show that party bears the legal incidence of the tax. See Barona, 528 F.3d at 1189 ("The party bearing the legal incidence of a state tax may well differ from the party bearing the economic burden of that tax."); Coeur D'Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 681 (9th Cir. 2004) ("The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic

[11]To the extent Plaintiff argues that the tax interferes with its sovereignty by requiring it to construct on-reservation housing, this argument is not well-taken. As discussed above, Plaintiff has identified no provision of California tax law that requires the Tribe to do anything at all. Whether or not to invest in construction of housing on its reservation remains entirely within the discretion of the Tribe.

burden."). Rather, the Ninth Circuit has held that "to discern where the legal incidence lies, [courts] ascertain the legal obligations imposed upon the concerned parties, and this inquiry does not extend to divining the legislature's 'true' economic object." Coeur D'Alene, 384 F.3d at 681. Plaintiff has failed to identify any California law imposing any legal obligation upon the Tribe. The only legal obligation imposed by California's income tax is on Tribe members, and that obligation is imposed within California's borders.

Here, regardless of where the activities generating the income occur, the Tribe members ultimately receive that income at the location where they reside, i.e., within the State of California. By living within the State of California, the Tribe members avail themselves of the benefits of expenditures made by California's state and local governments. California imposes its income tax on the Tribe members within California borders, and Tribe members are obliged to pay California's income within California borders. California has not sought to apply its income tax to any person or entity located on Tribal lands. Accordingly, the legal incidence of California's income tax falls off the reservation.

As the legal incidence of the tax falls off the reservation, the rule announced in Mescalero — i.e., that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State" — applies here. 411 U.S. at 148-49. Plaintiff has identified no express federal law forbidding imposition of California's personal income tax to Tribal members living within California's borders; accordingly, Plaintiff's claim fails to the extent it alleges preemption based on tribal sovereignty.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion. The Court declines to grant Plaintiff leave to amend, as Plaintiff has now had four opportunities to present sufficient factual allegations to state a claim, and has failed to do so. Furthermore, Plaintiff has failed to explain it could remedy the deficiencies set forth above through further amendment. Accordingly, Plaintiff's Third Amended Complaint is DISMISSED with prejudice.

Dated: May 19, 2010

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge