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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.**

**SELVI STANISLAUS, in her official capacity as Executive Officer of the Franchise Tax Board, JOHN CHIANG, in his official capacity as Member and Chair of the Franchise Tax Board, BETTY T. YEE in her official capacity as a Member of the Franchise Tax Board and ANA MATOSANTOS in her official capacity as a Member of the Franchise Tax Board,**

Defendants.

EDCV08-1753 VAP (OPx)

**DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT**

**(Fed. R. Civ. P. 12(b)(6))**

**Oral Argument Requested**

Date: May 10, 2010
Time: 2 p.m.
Courtroom: 2
Judge: The Honorable Virginia A. Phillips
Trial Date: n/a
Action Filed: 12/2/2008

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## INTRODUCTION

Plaintiff Twenty-Nine Palms Band of Mission Indians' (Tribe) opposition to the motion to dismiss the third amended complaint (TAC) filed by Defendants Selvi Stanislaus, John Chiang, Betty T. Yee, and Ana Matosantos (State Defendants) fails to establish that the TAC adequately states a claim for relief that California's nondiscriminatory personal income tax imposed on Tribal members' per capita payments and casino employment wages is impliedly preempted by the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA), or interferes with Tribal self-governance. The Tribe unsuccessfully attempts to distinguish this case from others finding inapplicable the tax exemption identified by the Supreme Court in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) (*McClanahan*). The Tribe also misunderstands that congressional authorization for state income tax is not required here because, absent express federal law to the contrary, California has sovereign authority to tax Indians resident within its borders who do not live on reservations. IGRA does not impliedly preempt the tax because the tax does not interfere with the Tribe's gaming operation or Congress' purpose of ensuring that the Tribe is the primary beneficiary of its gaming operation. (Mot. 8-13.) Further, the tax does not interfere with Tribal self-governance because it impacts only members living off-reservation and does not substantially affect essential governmental functions.

## ARGUMENT

### I. CASES DISCUSSING THE *MCCLANAHAN* EXEMPTION ARE DIRECTLY ON POINT

The Tribe mistakenly argues that *McClanahan* and cases discussing the *McClanahan* exemption are irrelevant.[1] (Opp'n 7-8 & n.2.) Those cases, however, are germane to the Tribe's requested relief.

[1] Curiously, the opposition relies primarily upon *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981) (*Crow I*) and *Crow Tribe of Indians v.* (continued…)

In *McClanahan*, the Supreme Court held that 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. Here, the Tribe asks this Court to find that its members are exempt from state income tax on per capita payments and casino employment wages *wherever* the members reside, because that income is distributed on the reservation and derives from casino gaming revenue generated on the reservation. (Opp'n 11-13.) Thus, the Tribe asks this Court to apply the *McClanahan* exemption to its members. As demonstrated, however, the exemption is inapplicable here because no members live on the reservation. (Mot. 5-7.)

The Tribe's claim here is similar to one rejected by the Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 464, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (n. omitted) (*Chickasaw*):

> The Tribe seeks to block the State from exercising its ordinary prerogative to tax the income of every resident; in particular, the Tribe seeks to shelter from state taxation the income of tribal members who live in Oklahoma outside Indian country but work for the Tribe on tribal lands. For the exception the Tribe would carve out of the State's taxing authority, the Tribe gains no support from the rule that Indians and Indian tribes are generally immune from state taxation, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973), as this principle does not operate outside Indian country. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-126, 113 S. Ct. 1985, 1990-1992, 124 L. Ed. 2d 30 (1993) [(*Sac and Fox*)].

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(…continued)
*Montana*, 819 F.2d 895 (9th Cir. 1987) (*Crow II*), which followed *McClanahan*'s analytical context for reviewing Indian tax questions. *Crow I*, 650 F.2d at 1108-09; *Crow II*, 819 F.2d at 902.

In *Sac and Fox*, the Court reversed a decision that misconstrued *McClanahan* as immunizing tribal members' income from state taxation whenever the income derived from tribal employment on tribal trust lands, and specifically required that the member also live on trust land. The Court held that residence "is a significant component of the *McClanahan* presumption against state tax jurisdiction," and narrowed the scope of its availability to "tribal members living and working on land set aside for those members." 508 U.S. at 123-24. Later, in *Chickasaw*, the Court ruled that Oklahoma may tax the income of tribal members who earn income working for the tribe on tribal lands, but who live outside Indian country. 515 U.S. at 464. Because in this case it is not alleged that any Tribal members live on the Tribe's reservation, the Tribe cannot establish that its members are exempt from California's personal income tax.

The Tribe's attempt to distinguish *Mike v. Franchise Tax Board*, 106 Cal. Rptr. 3d 139 (Cal. Ct. App. 2010) (*Mike*), *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391 (Minn. 2001) (*Jefferson*) and *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009), *aff'd sub nom. Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (*Osage*) is unavailing. (Opp'n 7-8 & n.2.) *Mike* is instructive because if a tribal member living on another tribe's reservation does not qualify for the *McClanahan* exemption, then no member qualifies for the exemption where, as here, it is alleged that none live on the reservation. Indeed, the taxpayer in *Mike*, a member of the plaintiff Tribe here and represented by the same counsel, did "not dispute that, if she resided in California outside the boundaries of any 'Indian Country' . . . , there would be no bar to California taxing the income." *Mike*, 106 Cal. Rptr. 3d at 141. *Jefferson* effectively applied the same principles in *Sac and Fox* and *Chickasaw* to find no exemption, and *Osage* is particularly compelling because if, as in that case, the exemption does not apply where it is impossible for a tribe to live on its reservation

because all reservations in the state have been disestablished, then it does not apply here, where the Tribe has a reservation it claims is unsuitable for housing.

## II. ABSENT EXPRESS FEDERAL LAW TO THE CONTRARY, THE STATE HAS SOVEREIGN AUTHORITY TO TAX PERSONAL INCOME OF TRIBAL MEMBERS LIVING OFF-RESERVATION NO MATTER THE INCOME SOURCE; EXPRESS CONGRESSIONAL AUTHORIZATION IS NOT OTHERWISE REQUIRED

The Tribe claims the State Defendants fail to point to any congressional authorization to tax the income at issue. (Opp'n 8:11-17, 25:8-16.) In support, the Tribe misrepresents the holding in *Chickasaw*, which did not impose that requirement or cite *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 25 753 (1985)[2] for that proposition. Nonetheless, the Tribe misunderstands controlling law.

Ordinarily, "[d]irect state taxation of tribal property or the income of reservation Indians is presumed to be preempted absent express congressional authorization." *Crow I*, 650 F.2d at 1109. But, as the Tribe recognizes, this rule only applies to taxation occurring inside Indian country. (Opp'n 9:8-10 (citing *Chickasaw*, 515 U.S. at 459).) In this case, however, there is no allegation that the members live on the reservation or within Indian country.

Instead, the controlling rule here is that outside Indian country, absent "express federal law to the contrary," Indians are subject to nondiscriminatory state taxes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). States have the "sovereign right" and "ordinary prerogative" to tax *all* income of every resident, including income earned outside its jurisdiction.

[2] The Tribe cites *Blackfeet* for the blanket proposition that "any doubt must be resolved in favor of the Indians." (Opp'n 25:13-14; *see also* Opp'n 8 n.4) But the Indian canon applies only to construction of ambiguous statutes. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). It does not apply where, as here, there is no statutory ambiguity. Even if the canon applies here, which it does not, it must yield when, as here, it conflicts with "the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

*Chickasaw*, 515 U.S. at 462-64. "The state may tax persons resident within its borders who do not live on reservations because it has conferred upon these persons the benefit of domicile and its accompanying privileges and advantages." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 25 969, 976 (W.D. Wis. 2000). "Domicil [sic] 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." *Chickasaw*, 515 U.S. at 463 (internal quotation marks and citation omitted). That Tribal members' income derives from per capita payments from an on-reservation casino, or employment at that casino, does not immunize it from state taxation. California residents are taxable on all income regardless of source. Cal. Rev. & Tax. Code § 17041. The taxpayer must reside on her member reservation where she earned the income to qualify for the *McClanahan* exemption. *McClanahan*, 411 U.S. at 170-71; *Osage*, 597 F. Supp. 2d at 1262; *Mike*, 106 Cal. Rptr. 3d at 147. The Tribe has not cited any federal law that expressly prohibits the imposition of state income tax on members residing off-reservation, and this Court has found that IGRA does not expressly preempt the tax here. (Order Granting Mot. to Dismiss Am. Compl. (Order) (Doc. 33) 14-15.)

Therefore, the State's personal income tax in this instance is within its sovereign authority and does not require express congressional authorization.

## III. TRIBAL MEMBERS LIVING OFF-RESERVATION BEAR THE LEGAL INCIDENCE OF THE TAX

Because it is alleged that no Tribal members live on the reservation and federal law dictates that the income source is irrelevant in those circumstances, the implied preemption analysis stops there and this Court need not engage in a categorical analysis of the tax consequences. Even if this Court undertakes such an analysis, the TAC fails to state a claim for relief.

"[T]he 'who' and the 'where' of the challenged tax have significant consequences[,]" and "'[t]he initial and frequently dispositive question in Indian tax

cases . . . is *who* bears the legal incidence of [the] tax[.]'" *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2006) (quoting *Chickasaw*, 515 U.S. at 458) (italics added in *Wagnon*). The legal incidence is on the party "who" bears the legal responsibility to pay the tax under the taxing statutes, *Crow I*, 650 F.2d at 1110, and "where" refers to where the transaction giving rise to the tax liability occurs, *see Chickasaw*, 515 U.S. at 463.

**A. Tribal Members Bear the Legal Incidence of the Tax**

The Tribe argues the legal incidence of the tax falls on the Tribe *and* its members.[3] (Opp'n 9-11.) But this Court previously found the members bear the legal incidence.[4] (Order 16-17.) State Defendants agree with the Court.

California Revenue and Taxation Code section 17041 imposes the legal incidence of personal income tax on the individual taxpayer. In California, the individual taxpayer, not the Tribe, files a tax return and may seek a refund, *see Mike*, 106 Cal. Rptr. 3d at 141, and the taxpayer, not the Tribe, could be prosecuted for tax deficiencies, Cal. Rev. & Tax. Code §§ 19701, 19706.

The allegations that State Defendants seek to impose the tax on the Tribe's members, which supported the Court's earlier finding, are also present in the TAC. (TAC ¶ 29.) Further, the TAC unambiguously alleges that Tribal members "bear the legal incidence of the tax." (*Id.* ¶ 10.) Although elsewhere the Tribe alleges that the legal incidence falls on the Tribe *and* its members (*id.* ¶ 25), there is no allegation that the Tribe pays its members' tax obligations. Instead, it is

[3] The issue is not, as the Tribe suggests, who bears the legal incidence of the Revenue Allocation Plan or per capita payments (Opp'n 2:5-6) but the legal incidence of the State's tax on per capita payments and casino employment wages.

[4] The Tribe misrepresents this Court's previous holding to be that "the Supreme Court has noted that the state may not impose a tax if the legal incidence of the tax rests on a tribe or on tribal members on the reservation, even if the member lives off the reservation." (Opp'n 1:16-22 (citing Order 18).) Neither the Supreme Court, nor this Court, has so held. Instead, this Court noted that *Sac and Fox* and *Chickasaw* left open the question whether the legal incidence of a tax could fall on a reservation if a tribe alleges the tax infringes on tribal sovereignty. (Order 18:16-20; *see also* Opp'n 16:8-10 (misstating *Chickasaw* holding).)

specifically alleged that the Revenue Allocation Plan *does not* consider California's personal income tax on per capita payments. (*Id.* ¶ 17.) Thus, the members bear their own tax obligations and the tax has no effect on the Tribe. (*See also* Mot. 12-13 (distributed per capita payments are members' property); *accord* Opp'n 2:14 (per capita payments are "unique property of only tribal members").)

The Tribe argues that it bears the legal incidence of the tax because it must decide how to allocate gaming revenue, federal regulations permit it to distribute gaming revenue to its members via per capita payments made according to a Revenue Allocation Plan, and part of the Tribe's per capita payment accounts for off-reservation housing. (Opp'n 10:13-24.) But, according to federal regulations, per capita payments expressly do not include, and a Revenue Allocation Plan is not required for, payments made by a tribe for "*social welfare*, medical assistance, education, *housing* or other similar, specifically identified needs." 25 C.F.R. § 290.2 (2008) (defining "per capita payment") (italics added). In fact, per capita payments and a Revenue Allocation Plan are not required for a tribe to utilize gaming revenue for the general welfare of the tribe and its members. 25 U.S.C. § 2710(b)(2)(B); 25 C.F.R. §§ 290.7-290.9. Moreover, the Tribe's argument that the tax "forces the Tribe to reallocate its general welfare allocations to account for the" tax (Opp'n 10:22-23) is belied by the allegation that its Revenue Allocation Plan does not consider California's income tax on per capita payments (TAC ¶ 17).

The Tribe's citation to *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 738 (9th Cir. 1995) (Opp'n 9 n.5), is helpful as it underscores the State Defendants' argument that reduction of tribal revenue does not invalidate a state tax (Mot. 16-17). While the State Defendants disagree that the Tribe bears the legal incidence in this case, *Salt River* reinforces the notion that even if the Tribe is somehow affected by the tax, the members bear the legal incidence. *Id.*

Also, the Tribe falsely asserts that it and its members are indistinguishable because the Tribe is "akin to a partnership for tax purposes." (Opp'n 11 n.6; *see*

*also id.* 10:24.) The regulations cited by the Tribe merely indicate that federal and state law prescribe the classification of various organizations for tax purposes. Even if the Tribe was considered a partnership, whether a partnership is tax-exempt is irrelevant to the taxability of income ultimately distributed to partners, or members in this instance. Partnerships are disregarded for income tax purposes, and are merely pass-through entities, never themselves being subject to taxation. *Randall v. Loftsgaarden*, 478 U.S. 647, 650, 106 S. Ct. 3143, 92 L. Ed. 2d 525 (1986). Tribal members do not share the Tribe's tax-exempt status and, conversely, determinative of legal incidence, the Tribe does not share its members' obligation under California law to pay personal income tax.

Further, State Defendants ordinarily would agree that the legal incidence of the tax on Tribal members' casino employment wages falls on the members. (*See* Opp'n 11:3-8.) But in this instance there is no allegation that any Tribal members are actually employed at or by the Tribe's on-reservation casino. Instead, the Tribe merely alleges that some members "are employed by the Tribe relative to issues involving the Casino." (TAC ¶ 20.) This vague allegation requires State Defendants and the Court to speculate about whether any members are actually employed by the casino. As this Court noted, "the allegations in the complaint 'must be enough to raise a right to relief above the speculative level.'" (Order 7:6-8 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).) Moreover, the failure to allege that the tax on members' casino employment wages caused the Tribe to suffer an "injury in fact" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical," is fatal. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Therefore, insufficient facts are alleged to support relief based on state taxation of members' casino wages.

**B. The Tax Occurs Off the Reservation**

This Court has already found that in determining whether federal law

impliedly preempts state income tax here, the implicit preemption balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) (*Bracker*), which applies exclusively to on-reservation activities, is inapplicable because the members live off-reservation. (Order 15-16.) The TAC does not allege, as argued in the opposition, that per capita payments and casino wages are distributed on the reservation because checks for these income types are "cut" there. (Opp'n 11:21-22.) New allegations in opposition to a Rule 12(b)(6) motion are irrelevant and may not be considered by the Court. *See Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). Also, as noted, there is no allegation that any Tribal members actually work on the reservation, either at the casino or elsewhere. In any event, it matters not whether the members work on the reservation or where the checks are issued. "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized." *Chickasaw*, 515 U.S. at 463.

The Tribe mistakenly relies upon *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), for the proposition that the tax occurs on the reservation because the taxed income derives from gaming revenue generated on the reservation. (Opp'n 12-13.) In *Cabazon*, the Court held that state regulation of Indian-run bingo games was preempted by federal action. *Id.* at 216-222. Here, however, it is not alleged that the State is regulating or taxing the gaming activity. The individual members' per capita payments and casino employment wages are not the Tribe's property. (*See* Mot. 12-13 (distributed per capita payments are members' property); *accord* Opp'n 2:14 (per capita payments are "unique property of only tribal members").) The members pay their own tax obligations and the tax has no effect on the Tribe. (Mot. 9-13.)

Also, the Tribe erroneously argues that the State seeks to dictate to the Tribe that it may provide only on-reservation housing for its members, no matter the disruptive consequences to Tribal operations. (Opp'n 13:6-10.) Not so. The Tribe

has options for providing housing to its members but the members living off-reservation must pay income tax on per capita payments and casino employment wages even if the Tribe is unable to put housing on its reservation. (Mot. 15:27-16:14, 21:14-22:4.)

## IV. THE TAX DOES NOT CONFLICT WITH IGRA'S OPERATION OR PURPOSE

The Tribe does not dispute that the tax does not interfere with IGRA's purpose of assuring that Indian gaming is conducted fairly and honestly, or the Tribe's ability to determine which gaming activities are allowed. (*See* Mot. 8:16-9:13.) Nor does the Tribe respond to the State Defendants' explanation why the tax does not interfere with IGRA's purpose to "promote tribal economic development, tribal self-sufficiency, and strong tribal government" by ensuring that the Tribe "is the primary beneficiary of the gaming operation." (*Id.* 9:14-13:17 (quoting 25 U.S.C. § 2702(1)-(2)).) Instead, the Tribe mistakenly relies upon *Crow I* and *Crow II* to assert that IGRA impliedly preempts the tax. (Opp'n 14-15.) But the *Crow* cases do not apply to the implied preemption analysis here.

Unlike taxation of Indians in this case, the *Crow* cases concerned taxation of non-Indian mineral lessees. *Crow I*, 650 F.2d at 1106, 1110. Also, the *Crow* cases applied the *Bracker* balancing test, *id.* at 1109, which this Court found inapplicable to the preemption analysis here because the members live off-reservation. (Order 15-16.) The *Crow* cases turned on "the magnitude of the tax preventing the tribe from receiving a large portion of the economic benefits of the coal." *Crow I*, 650 F.2d at 1113; *Crow II*, 819 F.2d at 899. Here, however, there is no allegation that the tax substantially affects the Tribe's gaming revenue, only its members' residual income. IGRA does not mandate per capita payments but authorizes them "only if" the tribe has met its other governmental obligations. 25 U.S.C. § 2710(b)(2)(B); 25 C.F.R. §§ 290.8-290.9. Because, as the Tribe acknowledges, per capita payments are "unique property of only tribal members" (Opp'n 2:14), the members bear the legal incidence of the tax (TAC ¶ 10), and the Tribe does not pay the tax (*id.* ¶ 17),

the tax has no effect on the Tribe (*see* Mot. 9-13).

Moreover, the court invalidated the taxes in *Crow* because they were "extraordinarily high." *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 715, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998) (*Crow III*). The tribe alleged that the state had realized $27 million from its severance tax while the tribe had received only $8 million in royalties. *Crow I*, 650 F.2d at 1113. The Supreme Court later clarified that the state "had the power to tax Crow coal, but not at an exorbitant rate." *Crow III*, 523 U.S. at 715. While the Tribe here alleges that California's personal income tax rate "approaches 10%" (TAC ¶ 28(c)), there is no allegation concerning the rate members pay or whether it is exorbitant compared with other states.

Further, the severance tax in *Crow* is different from personal income tax. Personal income tax is a nondiscriminatory revenue-raising device, whereas severance tax serves the additional purpose of resource regulation. *Crow I*, 650 F.2d at 1114. In *Crow*, the coal was not the state's to regulate. *Id.*; *Crow II*, 819 F.2d 899. Here, however, California has sovereign authority to collect income tax from Indians resident within state boundaries but not on their member reservations "because it has conferred upon them the benefit of domicile and its accompanying privileges and advantages." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d at 976. Thus, the *Crow* cases are inapposite and the tax is not impliedly preempted by IGRA.

## V. THE TAX DOES NOT INFRINGE UPON TRIBAL SELF-GOVERNANCE

The opposition primarily reasserts allegations in the TAC (Opp'n 15-19), which State Defendants have demonstrated in the opening memorandum fail to allege sufficient facts to support a claim for interference with tribal sovereignty (Mot. 15-22). A few points, however, warrant further comment.

Again, the Tribe relies primarily on the *Crow* cases. There, the Ninth Circuit held a state's coal severance tax infringed on tribal sovereignty because it interfered with the tribe's coal tax, which otherwise could generate funds for tribal services

and employment for members. *Crow II*, 819 F.2d at 902. Here, however, imposing the tax at issue does not interfere with the Tribe's ability to generate gaming revenue for Tribal services or provide employment for members because per capita payments are not required, can only be made if the Tribe has met its other funding requirements, and the Tribe does not pay its members' tax obligations.

Further, the Tribe's Revenue Allocation Plan is not a "negotiated contract" with the federal government. (*See* Opp'n 5:8-9, 6:23, 18:18.) Instead, it is nothing more than a document a tribe submits to the Bureau of Indian Affairs (BIA) that describes how a tribe will allocate net gaming revenue. 25 C.F.R. § 290.4. That the BIA must approve the plan does not convert it to a "negotiated contract," as it does not create any rights or obligations between the Tribe and federal government.

Contrary to the Tribe's assertion, it is not alleged here that the State is improperly taxing gaming revenue. (*See* Opp'n 18 n.9.) Instead, it is alleged that the State Defendants are improperly taxing per capita payments and casino employment wages of tribal members living off the Tribe's reservation. Moreover, California has not "required" the Tribe to enter into agreements with local entities regarding access to police, fire, emergency and utility services. (Opp'n 18 n.10.) The class III gaming compact that the Tribe negotiated with California in 1999 requires the Tribe to address off-reservation environmental impacts of Tribal projects that build or expand a Gaming Facility. (Compact (Doc. 1 Ex. 1) § 10.8.) The Compact does not require local agreements, and no such agreements would be required for the Tribe to undertake other developments, like on-reservation housing.

Last, the Tribe does not allege, as argued in the opposition, that without gaming revenue, it cannot provide for its members. (Opp'n 21:8-9.) In any event, it is an indisputable, judicially noticeable fact that federally recognized Indian tribes in California that operate fewer than 350 class III Gaming Devices receive $1.1 million annually from the State Indian Gaming Revenue Sharing Trust Fund. (Compact §§ 4.3.2(a)(i), 4.3.2.1(a).)

## CONCLUSION

For reasons stated above and in the opening memorandum, the State Defendants respectfully request this Court to dismiss the TAC without leave to amend.[5]

Dated: April 26, 2010

Respectfully submitted,

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[5] The Tribe's argument that the documents State Defendants ask this Court to judicially notice do not advance their cause (Opp'n 22-25) is addressed in the accompanying response to the Tribe's objection to the judicial notice request.