

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

KEWEENAW BAY INDIAN COMMUNITY,
a federally-recognized Indian tribe, on its own
behalf and as *parens patriae* for its members,

Hon. Gordon J. Quist

Plaintiff,

Civil Action No. 2:05-CV-0224

v.

ROBERT J. KLEINE, Treasurer of the State of
Michigan; JAY RISING, former Treasurer of
the State of Michigan; MICHAEL
REYNOLDS, Administrator of the Collection
Division of the Michigan Department of
Treasury; WALTER A. FRATZKE, Native
American Affairs Specialist of the Michigan
Department of Treasury; and TERRI LYNN
LAND, Secretary of State of Michigan,

Defendants.

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

Defendants seek summary judgment on all counts of the Second Amended Complaint for Declaratory and Injunctive Relief filed by the Keweenaw Bay Indian Community (“the Community”). Defendants argue in their motion that this Court lacks jurisdiction to hear any of the Community’s claims. As discussed below, Defendants’ arguments are wholly without merit, and their motion should be denied in its entirety.

BACKGROUND

Defendants’ motion seeks dismissal of this case based on serious distortions of the Community’s legal claims. Accordingly, the Community believes it will be helpful to the Court

to begin by providing a brief summary of the claims as well as the events giving rise to this lawsuit.

The Community brought this lawsuit against Defendants, five officials of the State of Michigan, under the authority of Ex parte Young, 209 U.S. 123 (1908). As discussed below, Ex parte Young recognized an exception to Eleventh Amendment immunity for actions brought against state officials to enjoin ongoing violations of federal law. All of the violations of federal law involve Defendants' illegal enforcement of the Michigan Sales Tax Act, Mich. Comp. Laws §§ 205.51-205.78 (the "Sales Tax Act") and the Michigan Use Tax Act, Mich. Comp. Laws §§ 205.91-205.111 (the "Use Tax Act"), with respect to transactions involving the Community and its members. Defendants are (1) Jay B. Rising, the Treasurer of the State of Michigan from January 6, 2003 to approximately April 6, 2003, (2) Robert J. Kleine, Defendant Rising's successor in office, (3) Michael Reynolds, the Administrator of the Collection Division of the Michigan Department of Treasury (the "Department"), (4) Walter A. Fratzke, the Department's Native American Affairs Specialist since 1997, and (5) Terri Lynn Land, the Secretary of State of the State of Michigan. The offices of Treasurer and Secretary of State are constitutional offices in the State of Michigan. See Mich. Const. art. V, sec. 3. The holders of these offices are the heads of Michigan's Departments of Treasury and State, respectively, and direct the actions of approximately 1,620 and 1,798 employees, respectively.¹ The Treasurer oversees the "collect[ion], invest[ment], and disburse[ment] of all state monies[,] administers major tax laws, . . . and distributes revenue sharing monies to local units of government"

¹ See Trends in the State Classified Workforce, Twenty-Seventh Annual Workforce Report, Fiscal Year 2005-06, State of Michigan Department of Civil Service, Section One, found at <http://www.michigan.gov/documents/mdcs/27th_AWFR_Section_One_186267_7.pdf#pagemode=bookmarks> (providing data on number of employees of the Departments of Treasury and State as of September 23, 2006) (visited Feb. 13, 2007).

<<http://www.michigan.gov/treasury/0,1607,7-121-1755---,00.html>> (visited Feb. 16, 2007).

Defendant Fratzke, by his own admission, has been “responsible [since 1997] for coordinating Native American tax issues for [the Department of] Treasury, including the application of Michigan’s sales tax . . . and use tax . . . ,” with broad responsibilities that include “assisting in the development and coordination of [the Department of] Treasury’s administration and enforcement of taxation of tribes, tribal members, and tribal entities” Affidavit of Walter Fratzke ¶¶ 3-4, Doc. 53, filed Nov. 22, 2006. Defendant Land oversees the Department of State’s administration of motor vehicle registration and licensing and the collection of related Michigan sales and use taxes. Answer ¶ 10.

The Community’s Complaint² primarily seeks declaratory and injunctive relief against Defendants in their official capacities. The claims for declaratory relief are asserted in Counts I through V and VII through XXXI of the Community’s Complaint, and the claim for injunctive relief is asserted in Count XXXII.³ The Community also has asserted one claim for damages arising under 42 U.S.C. § 1983, in Count VI. The Community’s Section 1983 claim for damages is brought against Defendants Rising, Reynolds, and Fratzke in their individual capacities only. Complaint ¶¶ 7-9, 84-88.

Defendants’ violations of federal law consist of two broad categories. The first category of violations relates to Defendants’ actions to collect state sales and use taxes that the Department assessed against the Community with respect to calendar years 1993 and 1994 (the “1993-94 Tax Assessments”). See Complaint ¶¶ 32-44. The Department purported to make

² All references and citations to the Complaint are to the Community’s Second Amended Complaint for Declaratory and Injunctive Relief filed herein.

³ Because he no longer holds the office of Treasurer, injunctive relief no longer will be necessary with respect to Defendant Rising.

these assessments pursuant to a tax agreement between the Community and the State of Michigan that was entered into in 1977 (the “1977 Tax Agreement”). Complaint ¶ 23; Answer ¶¶ 20, 23, 32-34. Defendants have collected or attempted to collect the 1993-94 Tax Assessments by exercising purported “set-off” rights against funds held by the State which belong to the Community or its members. Answer ¶¶ 33, 39, 42. The Community funds most recently subjected to offsets, in 2005, included federal funds earmarked for the Community and its members pursuant to federal Medicaid, Women, Infants & Children, Safe and Stable Families, and child day care programs, as well as refunds of state motor fuel taxes and prepaid sales taxes with respect to motor fuel. Complaint ¶ 42.⁴ In its Complaint, the Community alleges that offsets against the Community’s funds are improper because the 1993-94 Tax Assessments were not permitted under the 1997 Tax Agreement and were illegal as a matter of federal law. In response to the offsets against the Community’s funds, the Community exercised set-off rights of its own against funds payable by the Community to the State of Michigan pursuant to the terms of a consent judgment entered into between the Community and the State. Complaint ¶ 45; Answer ¶ 45. The State of Michigan’s website explains that the “payments to the State are deposited into the Michigan Strategic Fund, administered by the Michigan Economic Development Corporation” <http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182-11370--,00.html> (visited Feb. 20, 2007). The Community’s claims addressing the first category of violations of federal law, as well as violations of state and tribal law arising within the Court’s supplemental jurisdiction, are set forth in Counts I through VIII and XXVIII through XXXI of the Complaint (along with the claim

⁴ The Department “precollects” these state taxes from the Community. However, because the legal incidence of the taxes falls on the Community or its members with respect to transactions occurring within Indian country, the taxes cannot be imposed as a matter of federal law.

for injunctive relief in Count XXXII and the claim for attorneys' fees arising under 42 U.S.C. § 1988 in Count XXXIII) and are summarized in the table attached as Exhibit A to the Affidavit of Skip Durocher filed with this brief.⁵

The second category of federal law violations relates to Defendants' actions since the termination of the 1977 Tax Agreement to enforce the Sales and Use Tax Acts with respect to the Community's and its members' purchase and use of tangible personal property and services. See Complaint ¶¶ 46-59. The Community's claims addressing the second category of violations are set forth in Counts IX through XXVI of the Complaint (along with the claim for injunctive relief in Count XXXII). All but three of these counts relate to transactions occurring within the Community's Reservation and Trust Lands. The three remaining counts relate to transactions occurring within the area ceded to the United States (the "Ceded Area") in the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"). The Community's claims addressing the second category of violations are summarized in the table attached as Exhibit B to the Durocher Affidavit.⁶

Defendants' brief contains numerous misstatements and hyperbole in support of their effort to dismiss this case, the most serious of which are as follows:

1. Defendants claim that the Community "seeks relief that extends beyond Defendants and their successors to the entire Department of Treasury and 'any other Michigan

⁵ Defendants have raised a valid objection to the breach of contract claim asserted in Count XXVII, pointing out that such a claim presumably would lie only against the State of Michigan, which is not a party to this action. Defendants' Brief in Support of Defendants' Motion for Summary Judgment 21-22. Accordingly, the Community will stipulate to dismissal of the breach of contract claim.

⁶ The Community has moved for partial summary judgment on Counts IX and XIII, based on the *per se* rules against state taxation of Indian tribes, tribal members and Indian traders with respect to transactions occurring within "Indian country." If the Community prevails in its motion, the Court will not need to reach Counts X to XII or Counts XXII to XXV.

agency or official.” Def. Br. 11.⁷ Defendants are mistaken. The claims brought against Defendants in their official capacities seek relief expressly applicable to Defendants and their successors in office. For the quoted language “any other Michigan agency or official,” Defendants cite paragraphs 67, 71, 79, 83, 94, 98, 102, 106, 110, 114, 118, 122, 126, 130, 134, 138, 142, 147, 150, 156, 160, 163, 164, 168, 169, 173, 179, 182, 186, 194(e), and subparagraph (f) on page 58 of the Complaint, Def. Br. 11, but in these paragraphs the Community merely states that the relief against Defendants and their successors is appropriate because further offending actions by *Defendants* “would constitute an act in excess of Defendants’ authority and any authority that the State of Michigan could confer on Defendants or any of its officials.” See, e.g., Complaint ¶ 67.

2. Defendants claim that “the Community’s declaratory relief effectively asks this Court to order the State of Michigan to rewrite its tax code.” Def. Br. 8. To the contrary, the Community merely seeks a declaration that federal law forbids the application of state law to the transactions at issue in this case.

3. With respect to the claims in Counts XX, XXI and XXVI based on the 1842 Treaty, Defendants state that the Community seeks to “dives[t] Michigan of complete sovereignty over the Ceded Area.” Def. Br. 9. To the contrary, these Counts are addressed only to the effect of Article II of the 1842 Treaty on the application of the Sales and Use Tax Acts to transactions involving the Community and its members in the Ceded Area.

⁷ “Def. Br.” refers to Defendants’ Brief In Support of Defendants’ Motion for Summary Judgment.

ARGUMENT

I. THERE IS NO ELEVENTH AMENDMENT JURISDICTIONAL BAR TO THE COMMUNITY’S CLAIMS.

Defendants assert that all of the Community’s claims are barred by the Eleventh Amendment. Def. Br. 2-10. Defendants are wrong.

A. Tribal Suits Against State Officials to Enjoin Enforcement of State Taxes Fall within the Exception to the Eleventh Amendment Established in Ex parte Young.

Starting with the landmark case of Ex parte Young, 209 U.S. 123 (1908), the federal courts have consistently recognized an exception to the Eleventh Amendment for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin ongoing violations of federal law. The Ninth and Tenth Circuits recently confirmed this principle in cases similar to this one, holding that the Eleventh Amendment does not bar a tribe’s suit against state officials to enjoin enforcement of state tax laws. Winnebago Tribe of Nebraska v. Stovall, 341 F.3d 1202 (10th Cir. 2003); Sac & Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000), cert. denied, 531 U.S. 1144 (2001); Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1049 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001) (“[T]here is a long tradition of federal courts exercising jurisdiction over tribal challenges to state taxation.”).

The holdings in these cases are equally applicable here, where the Community seeks declaratory and injunctive relief against the Michigan officials responsible for administering and enforcing the offending sales and use taxes. As the Tenth Circuit explained:

Surely if an Indian tribe may maintain suit on its own behalf in federal court to enjoin collection of a state’s cigarette sales tax [as was permitted in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), without any mention of Eleventh Amendment immunity], it may maintain a similar suit on its own behalf to enjoin collection of a state’s motor fuel distribution tax.

Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this case.

213 F.3d at 572-73. Moreover, as Defendants are well aware, the Community recently prevailed in its action brought under Ex parte Young to enjoin the Michigan officials responsible for administering the Michigan real property tax from imposing this tax on fee land owned by the Community and its members within the Reservation and Trust Lands. Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514 (6th Cir.), cert. denied, 127 S. Ct. 680 (2006). Likewise, in this case, the Community may bring suit to enjoin enforcement of Michigan's sales and use taxes.

B. Defendants' Unlawful Enforcement of the Michigan Sales and Use Tax Statutes Justifies This Lawsuit.

The Community appropriately brought suit against the Michigan officials – the heads of the Departments of Treasury and State, as well as the Department of Treasury's collection division administrator and Native American Affairs Specialist – who are responsible for the violations of federal law alleged by the Community. The naming of these officials as defendants, for acts in their official capacities undertaken on behalf of the State, is entirely appropriate under established Ex parte Young jurisprudence. As long as the named state officials have a particular duty to “enforce” the statute in question and a demonstrated willingness to exercise that duty, as is demonstrably the case here, a suit against them to enjoin enforcement of the statute may go forward. Ex parte Young, 209 U.S. at 157 (“The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact”); see also Prairie Band Potawatomi Nation v. Wagon, ___ F.3d ___, 2007 WL 365921, at *6-*7 (10th Cir. Feb. 6, 2007) (Kansas Secretary of Revenue Joan Wagon, Director of Vehicles Sheila Walker and Superintendent of Kansas Highway Patrol William Seck, respectively, were appropriate defendants in case challenging the application of

Kansas motor vehicle registration and titling laws to vehicles registered and titled by tribal plaintiff). Here, the Community states claims against Defendants based upon their connection with the acts that form the basis of the Community's Complaint, and this suit is proper under the Ex parte Young exception to the Eleventh Amendment.

C. The Relief Sought By the Community is "Prospective" Relief Permitted by Ex Parte Young.

The Supreme Court recently clarified that "[i]n determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635, 645 (2002). Defendants argue that the Community seeks retrospective relief, but even a cursory review of the Complaint reveals that the Community seeks prospective relief. The Community's prayer for relief specifies the following six categories of declaratory and injunctive relief:

- (a) Enter a judgment in favor of the Community declaring that the 1993-94 Tax Assessments, the 1996 Audit Offsets, the 2005 Offsets, and the impositions of the Sales and Use Tax Acts described in paragraphs 47 to 58 are invalid;
- (b) Order Defendants to reverse the 1996 Audit Offsets and the 2005 Offsets and restore to the Community the funds improperly withheld as a result of the offsets;
- (c) Enjoin Defendants from taking any further actions to collect the 1993-94 Tax Assessments, through offsets or otherwise;
- (d) Enjoin Defendants from taking any further actions to impose or collect Michigan's sales and use taxes with respect to purchases, leases, rentals, use, storage, and consumption of goods and services by the Community and its members, and with respect to materials, supplies, and equipment incorporated into or used in construction projects for the Community and its members, within the

Community's Reservation and trust lands and within the Ceded Area, and to impose or enforce other requirements of the Sales and Use Tax Acts with respect to such purchases, leases, rentals, use, storage, and consumption;

- (e) Enjoin Defendants from providing erroneous or misleading information to contractors, subcontractors, suppliers, and other retailers with respect to the applicability of the Sales and Use Tax Acts to such purchases, leases, rentals, use, storage, and consumption, and with respect to such materials, supplies, and equipment;
- (f) Enjoin Defendants from imposing or enforcing any system requiring pre-approval from Defendant Fratzke, the Department, or any other Michigan agency or official of any tax-exempt purchase, lease, or rental of motor vehicles or other goods and services made by the Community, its members, and their contractors, subcontractors, and suppliers, or any other system requiring affirmative acts or reporting that constitutes more than a minimal burden on the exercise by the Community, its members, and Indian traders of their right to make tax-exempt purchases of goods or services.

Complaint pp. 57-58. The injunctive relief sought in paragraphs (c), (d), (e) and (f) is manifestly “prospective” relief. Although the declaratory relief sought in paragraph (a) refers to actions taken by Defendants or their predecessors in the past, the Court must determine the legality of these past actions as a necessary prerequisite to determining Defendants’ future obligations to refrain from further illegal actions, including future attempts to withhold Community property. Defendants’ contention that the Community may not seek a declaration regarding past violations of the law in an action under Ex parte Young is foreclosed by the Supreme Court’s holding in Verizon:

As for Verizon’s prayer for declaratory relief: That, to be sure, seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission’s action, so that the past financial liability of private parties may be affected. But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* “a monetary loss resulting from a past breach of a legal duty on the part of the defendant state

officials.” Edelman v. Jordan, 415 U.S. 651, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Insofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction.

535 U.S. at 646 (emphasis in original).⁸

The only question that remains, therefore, is whether the injunctive relief sought in paragraph (b) – ordering Defendants to take steps to reverse the 1996 and 2005 Offsets and restore to the Community its federal program funds and state tax refunds – is “prospective” relief. Defendants argue that such relief is prohibited by Edelman v. Jordan, 415 U.S. 651 (1974), but Edelman only prohibits remedies that impact the state treasury. Id. at 665-66. Here, Defendants have conceded that the offsets constitute funds owed to the Community. Accordingly, Defendants were not entitled to treat the offsets as general state revenue; instead, Defendants presumably have segregated the funds and held them in trust for the benefit of the Community. The remedy sought by the Community should be derived from these segregated funds, which does not impact the state treasury. The Sixth Circuit has indicated that such segregation of funds may permit recovery where funds are held in trust for a designated beneficiary, and this Court should conclude that the remedy is valid. See Gean v. Hattaway, 330 F.3d 758, 777 (6th Cir. 2003) (where designated Social Security funds were not held in trust by the State for plaintiffs’ benefit, payment was necessarily from the state treasury). At a minimum, there are issues of material fact regarding the impact of the remedy sought on the state treasury,

⁸ The Community’s action also is not barred by its potential *res judicata* effects. Defendants rely on Green v. Mansour, 474 U.S. 64 (1985), for the overbroad proposition that the Supreme Court bars suit where a party seeks declaration of legal obligations that may foreclose future litigation. Def. Br. 6-7. However, the Supreme Court was concerned only with the impact of federal proceedings in prematurely precluding future state court or agency proceedings. 474 U.S. at 72-73. Here, where the Community is an Indian tribe and elects to litigate in federal court, there is no deprivation of state court jurisdiction. Furthermore, the Community’s action is neither premature nor barred merely because the legal obligations that comprise this case or controversy may also impact subsequent disputes between the same parties.

and this Court should not grant summary judgment and allow discovery regarding this issue. See, e.g., Doucette v. Ives, 947 F.2d 21, 29 (1st Cir. 1991) (“Whether retroactive relief limited to the federal portion of the AFDC benefits would be a feasible way around the Eleventh Amendment necessitates a fact-specific inquiry concerning the impact of such an order on the state fisc.”).

Should this Court conclude that an order restoring the offsets to the Community would impact the state treasury, the Community respectfully requests leave to amend the Complaint to seek an order requiring Defendants to take all necessary steps to cause the Department to transfer restored funds directly to the Michigan Strategic Fund as a credit on behalf of the Community against amounts owed to the State pursuant to the consent judgment. Because that transfer would shift funds from one state fund to another, the impact to the state fisc would be nil and would not run afoul of the prohibitions of Edelman.⁹ Ernst v. Rising, 427 F.3d 351, 370 (6th Cir. 2005) (recognizing distinction between claims that impact the state treasury and requests for relief where “[t]he ancillary effect of the order on the state’s treasury would be absolutely nil.”), cert. denied, 126 S. Ct. 1584 (2006).

D. The Community’s Claims Do Not Implicate “Special State Sovereignty Interests” that Render This Action As One Against the State of Michigan.

Finally, Defendants contend there are “special sovereignty interests” present that effectively render this an action against the State of Michigan and warrant dismissal under the Eleventh Amendment. For this contention, Defendants rely on Idaho v. Coeur d’Alene Tribe, 521 U.S. 261 (1997), which held that Idaho was immune from suit where the tribe’s claims implicated Idaho’s core sovereignty interests because the tribe alleged an ownership interest in

⁹ In a recent financial audit of the Michigan Strategic Fund, conducted by the Michigan Auditor General pursuant to Article IV, Section 53 of the Michigan Constitution, the Michigan Strategic Fund is referred to as “A Component Unit of the State of Michigan.” <<http://audgen.michigan.gov/comprpt/docs/r0740104.pdf>> (visited Feb. 20, 2007).

submerged lands and the bed of a lake within its original reservation boundaries, characterized by the Court as essentially a quiet title action. At best, Coeur d'Alene “addressed a unique, narrow exception” to Ex parte Young that is not applicable in cases involving tribal challenges to state taxation. In Agua Caliente, the Ninth Circuit held that the injunctive and declaratory relief sought by Tribes to enjoin state taxation does not implicate any “special sovereignty interests”:

In Coeur d'Alene, it was the unique divestiture of the state’s broad range of controls over its own lands that made the Young exception to sovereign immunity inapplicable....[T]he question posed by Coeur d'Alene is not whether a suit implicates a core area of sovereignty, but rather whether the relief requested would be so much of a *divestiture* of the state’s sovereignty as to render the suit as one *against the state itself*. To interpret Coeur d'Alene differently would be to open a Pandora’s Box as to the relative importance of various state powers or areas of state regulatory authority. The majority did not countenance such a result.

* * *

[W]e cannot overlook the fact that the claims here are brought by an Indian tribe. Indeed, in the context of state taxation of *tribes*, there are preemption considerations and *competing* sovereignty interests, the merits of which are governed by a long line of cases.

223 F.3d at 1048 (emphasis in original). As in Agua Caliente, the competing sovereignty interests at issue where the Community is a sovereign tribe permit the Community to proceed with its suit to enjoin state taxation.

Moreover, as noted above, the Supreme Court recently clarified its decision in Coeur d'Alene in Verizon. While the principal opinion in Coeur d'Alene referred to a “careful balancing and accommodation of state interests when determining whether the Young exception applies in a given case,” this aspect of the opinion was joined by only two Justices. See Coeur d'Alene, 521 U.S. at 278. A majority of the Court in Verizon rejected this case-by-case approach in favor of the straightforward, rule-based inquiry described above. As discussed above, the Community’s claims for declaratory and injunctive relief are properly characterized as

prospective and, therefore, satisfy the “straightforward” inquiry. Accordingly, the Eleventh Amendment does not bar the Community’s claims.

II. THE STATE OF MICHIGAN IS NOT A NECESSARY AND INDISPENSABLE PARTY REQUIRING DISMISSAL UNDER RULE 19.

Defendants attempt an end run around Ex parte Young by contending that the State of Michigan is a necessary and indispensable party within the meaning of Rule 19 of the Federal Rules of Civil Procedure, necessitating dismissal of this lawsuit because of the State’s Eleventh Amendment immunity. As discussed above, this case fits squarely within established Ex parte Young jurisprudence. Thus, there can be no basis for concluding that the State of Michigan is a necessary and indispensable party. See generally C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 1617, at 270 n.32 (2d ed. 2001) (referring to § 4231 for further discussion of Ex parte Young in discussion of application of Fed. R. Civ. P. 19 to suits against states, indicating that a state cannot be a necessary and indispensable party where Ex parte Young applies).¹⁰

III. THE COMMUNITY HAS STATED A VALID CLAIM UNDER 42 U.S.C. § 1983.

A. The Community is a “Person” Entitled to Bring a Claim Pursuant to 42 U.S.C. § 1983.

Defendants contend that the Supreme Court in Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701 (2003), held that an Indian tribe is not a “person” entitled to bring a claim under Section 1983. Defendants’ assertion, which is not supported with even a jump citation to the Inyo County opinion, misrepresents both the Inyo County holding and the Community’s Section 1983 claim.

¹⁰ Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995), has no application here, because the tribe there sought a declaration regarding the validity of a compact to which the state was a party.

In Inyo County, the Supreme Court held that the Paiute-Shoshone Tribe may not use Section 1983 to vindicate a violation of its *sovereign immunity* by the County and its agents in executing a search warrant against the Tribe and its property. 539 U.S. at 711-12. The Court stated that the “particular claim of relief” brought by the Tribe would determine whether the tribe qualified as a person entitled to bring suit under 42 U.S.C. § 1983.¹¹ The Court held only that a tribe cannot use Section 1983 to vindicate rights rooted in the tribe’s status as a sovereign:

It is only by virtue of the Tribe’s asserted “sovereign” status that it claims immunity from the County’s processes. . . . Section 1983 was designed to secure private rights against government encroachment, . . . not to advance a sovereign’s prerogative to withhold evidence relevant to a criminal investigation. . . . Accordingly, we hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.

Id. at 1894 (emphasis added); see also Winnebago Tribe v. Kline, 297 F. Supp. 2d 1291, 1298

(D. Kan. 2004) (holding that tribes’ Section 1983 claims not proper where each claim “ultimately

¹¹ According to the Court:

As we have recognized in other contexts, qualification of a sovereign as a “person” who may maintain a particular claim for relief depends not “upon a bare analysis of the word ‘person.’” Pfizer Inc. v. Government of India, 434 U.S. 308, 317 (1978), but on the “legislative environment” in which the word appears, Georgia v. Evans, 316 U.S. 159, 161 (1942). Thus, in Georgia, the Court held that a State, as purchaser of asphalt shipped in interstate commerce, qualified as a “person” entitled to seek redress under the Sherman Act for restraint of trade. Id., at 160-163. Similarly, in Pfizer, the Court held that a foreign nation, as purchaser of antibiotics, ranked as a “person” qualified to sue pharmaceutical manufacturers under our antitrust laws. Pfizer, 434 U.S., at 309-320; cf. [Vermont Agency of Natural Resources v. United States ex rel.] Stevens, 529 U.S. [765], at 787, and n. 18 [(2000)] (deciding States are not “person[s]” subject to qui tam liability under the False Claims Act, but leaving open the question whether they “can be ‘persons’ for purposes of commencing an FCA qui tam action” (emphasis deleted)); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001) (“Although we generally presume that identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and the meaning of the same words well may vary to met the purposes of the law.” (internal quotation marks, brackets, and citations omitted)).

538 U.S. at 711; compare Georgia v. Evans, 316 U.S. at 162 (State is a “person” that may commence treble-damages action under Section 7 of Sherman Act) with Parker v. Brown, 317 U.S. 341, 352 (1943) (State is not a “person” subject to treble-damages liability under Section 7 of Sherman Act where it acts as sovereign to impose a restraint “as an act of government”).

invokes the Tribes' unique sovereign status"); Alaska Dep't of Health & Social Servs. v. Native Village of Curyung, ___ P.3d ___, 2006 WL 3691727 at *8 (Alaska Dec. 15, 2006) (holding that the "relevant criterion" for determining whether Alaska Native Villages could maintain a Section 1983 claim is "the nature of the right the villages seek to vindicate").

In sharp contrast to the tribal claims in Inyo County, the Community's Section 1983 claim seeks to secure only private rights of the Community under the United States Constitution, not the Community's sovereign prerogatives. Specifically, Count VI of the Complaint alleges that the 2005 Offsets deprived the Community of the following, purely private rights:

- The right to be free from takings of property without just compensation guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution;
- The right to be free from unreasonable search and seizures of property guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution; and
- The right to be free from deprivations of property without due process of law guaranteed by the Fourteenth Amendment of the United States Constitution.

Complaint ¶ 85. None of these rights emanates from the Community's sovereign status, and each is equally available to any private person. Compare Inyo County, 538 U.S. at 702 (distinguishing the sovereign character of the tribal claims before it from claims that, for instance, "the County lacked probable cause or the warrant was otherwise defective").

As Defendants know, this Court recently upheld the Community's right to bring a Section 1983 claim against violations of the same constitutional rights which are at issue here, *i.e.*, the Community's rights to be free of unreasonable searches and seizures and to due process under the Fourth and Fifth Amendments of the United States Constitution. Keweenaw Bay Indian Community v. Rising, No. 2:03-CV-111, slip op. at 21 (W.D. Mich. Sept. 30, 2004) (Bell,

C.J.).¹² Noting that the Community's Fourth and Fifth Amendment claims in that case asserted "private rights that are not designed to advance a sovereign's right to sovereignty," the Court rejected the defendants' argument in that case that Inyo County precluded the Community's Section 1983 claim. Id. The Court should reach the same conclusion here.

Finally, Defendants have erred in claiming that the "very essence" of the Community's Section 1983 claim is the "effect" of the 2005 Offsets "on the Community' sovereignty." Def. Br. 16. To the contrary, the "essence" of the Community's claims lies in Defendants' violation of its private constitutional rights, not on the *effect* such violation may have on its provision of governmental services. The effect of the violation may be considered in calculating the Community's damages resulting from the 2005 Offsets, of course, but it does not transform the Community's claims into vindications of its rights as a sovereign. Moreover, contrary to Defendants' suggestion, the Community in Count XXXII of the Complaint clearly seeks injunctive relief under Section 1983 only with respect to the 2005 Offset claims, not with respect to the other, non-Section 1983 claims addressed in Count XXXII.

Accordingly, there is no basis under Inyo County to dismiss the Community's Section 1983 claim.

B. The Community has Properly Stated a Section 1983 Claim for Damages Against Defendants Rising, Reynolds and Fratzke.

Defendants claim that the Community has failed to state a proper claim for damages against Defendants Rising, Reynolds and Fratzke (the "Section 1983 Defendants") in their individual capacities. Def. Br. 16-18. This argument is meritless.

Contrary to Defendants' contention, the Community plainly and explicitly pleaded Section 1983 claims against the Section 1983 Defendants in their individual capacities alone in

¹² Defendant Rising was a defendant in Rising, and, as Defendants have noted, Defendant Fratzke "provided the central testimony on behalf of Defendants" in that case. Def. Br. 20.

paragraphs 7 through 9 and 84 through 88 (Count VI) of the Complaint. The Community's statements in Count VI, moreover, do not "impute the acts of others to [the Section 1983 Defendants] instead of holding them liable for their own acts." Def. Br. 16. The paragraphs in Count VI expressly state that each of the Section 1983 Defendants (and only those Defendants) deprived the Community of federal rights by their "actions and failures to act relating to the 2005 Offsets." Complaint ¶ 85. At no point in describing its Section 1983 claim does the Community suggest that such claim arose from the action of Defendants' "predecessors," as Defendants suggest. Def. Br. 17. The paragraphs in the Complaint cited by Defendants which contain this phrase are either completely unrelated to the Community's Section 1983 claim (Complaint ¶¶ 39, 46, 47, 48(a), 52, 54), or appeared in the portion of the Count (Complaint ¶¶ 191, 192) that addresses injunctive relief arising in connection with claims *other than* the Section 1983 claim.

Finally, Defendants are flatly mistaken in claiming that the Community's claim against the Section 1983 Defendants rests on their "vague supervisory role" relating to the 2005 Offsets. Count VI directly alleges that the Section 1983 Defendants committed concrete "actions and failures to act" which deprived the Community of established federal rights. The evidence available to date clearly indicates that each Section 1983 Defendant played a direct role in effecting, facilitating, or failing to prevent or rectify the 2005 Offsets which underlies the Community's 1983 claims. Defendant Rising's name appears at the top and Defendants Reynolds' name appears at the bottom of each of the repeated offset notices sent to the Community in May and June of 2005. Durocher Affidavit ¶ 7, Ex. C. Similarly, Defendant Fratzke was early on informed of the 2005 Offsets as they repeatedly occurred in May and June 2005 and communicated with the Community on behalf of the State in defending and justifying the 2005 Offsets. Durocher Affidavit ¶ 8, Ex. D. In light of the highly unusual nature of the

2005 Offsets, which deprived the Community among other things of funds from the federal government for which the State of Michigan was merely a trustee, Defendant Rising presumably needed to grant his approval of and acquiescence to the 2005 Offsets. The Community expects to uncover in much greater detail the precise roles played by each of the Section 1983 Defendants after additional discovery. Durocher Affidavit ¶ 9.

Because Inyo County does not forbid the Community's Section 1983 claims and the Community has properly pleaded these claims against the Section 1983 Defendants in their individual capacities for actions and failures to act which deprived the Community of private federal rights, the Court should deny Defendants' motion for summary judgment on the Community's Section 1983 claims.¹³

IV. THE COMMUNITY'S CLAIMS BASED ON THE 1842 TREATY ARE NOT BARRED BY *RES JUDICATA* OR COLLATERAL ESTOPPEL.

Relying upon principles of *res judicata*, Defendants contend that the Court's decision in Keweenaw Bay Indian Community v. Rising, 2005 WL 2207224 (W.D. Mich. Sept. 12, 2005), precludes the Community from litigating its 1842 Treaty claims in this case. Defendants' arguments are entirely misplaced. The decision in Rising is not even final, because Rising is on appeal in the Sixth Circuit. Id., *appeal docketed*, No. 05-2398 (6th Cir. Oct. 11, 2005). And regardless of how the Sixth Circuit decides the 1842 Treaty claim in Rising, the causes of action and issue raised in Rising are materially different from the causes of action and issue raised by the 1842 Treaty claims in this case. Thus, the Community cannot be barred from pursuing these claims by *res judicata* or collateral estoppel.

¹³ Because there is no basis to dismiss the Community's Section 1983 claim, there is no basis to dismiss the Community's claim for attorneys' fees arising under 42 U.S.C. § 1988. See Def. Br. 24-25.

There is not even a colorable argument that the Community's 1842 Treaty claims are barred by *res judicata* (also referred to as claim preclusion). A claim will be barred by *res judicata* only if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Bittinger v. Tecumseh Products Co., 123 F.3d 877, 879-80 (6th Cir. 1997) (eliminating italics appearing in original); see also Kane v. Magna Mixer Co., 71 F.3d 555, 560 (6th Cir. 1995), cert. denied, 517 U.S. 1220 (1996). In Rising, the Community challenged the imposition of the Michigan Tobacco Products Tax ("MTP Tax") on the Community's sales of tobacco products to *non-Indian* consumers, an entirely different cause of action involving an entirely different state tax than the Community's challenge here to the imposition of the Michigan Sales and Use Tax Acts on *Indians* and *Indian traders*. See J.Z.G. Resources, Inc. v. Shelby Insurance Co., 84 F.3d 211, 215 (6th Cir. 1996) (describing "cause of action" for purposes of *res judicata* as encompassing "all or any part o[f] the transaction, or series of connected transactions, out of which the action arose") (quoting Restatement (2d) of Judgments § 24 (1982)).

Nor is there any basis for applying the doctrine of collateral estoppel (also referred to as issue preclusion).¹⁴ The four requisites for issue preclusion are that (1) the issue precluded must be the same one involved in the prior proceeding; (2) the issue must actually have been litigated in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and (4) the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. E.g., Central

¹⁴ Given that the *res judicata* doctrine cannot possibly apply here, the Community assumes that Defendants intended to refer to the related collateral estoppel doctrine even though they did not mention the latter doctrine in their brief.

Transport, Inc. v. Four Phase Systems, Inc., 936 F.2d 256, 259 (6th Cir. 1991); N.L.R.B. v. Master Slack and/or Master Trousers Corp., 773 F.2d 77, 81 (6th Cir. 1985).

In Rising, the issue raised by the Community's 1842 Treaty claim is whether Article II of the 1842 Treaty preempts the imposition of the MTP Tax on the Community's sales of tobacco products to *non-Indian* consumers within the Ceded Area. Rising at *11. The Court had earlier held that the non-Indian *consumer* of the tobacco products, rather than the retailer (such as the Community), bore the legal incidence of the MTP Tax. Keweenaw Bay Indian Community v. Rising, No. 2:03-CV-111, slip op. at 15, 17 (W.D. Mich. Sept. 30, 2004). The central issue in Rising, therefore, was whether the 1842 Treaty prevented the Defendants from requiring the Community to *collect and remit* a tax (the MTP Tax) that was *imposed on a non-Indian*. In resolving this issue, the Court applied federal common law permitting a state to impose "minimal burdens" on Indians in order to collect taxes imposed on non-Indians. Rising at *11. The Court's conclusions plainly rested on the central federal cases establishing this "minimal burdens" doctrine. Rising at *5-*8.

The issues in the present case differ sharply from those in Rising. Counts XX, XXI and XVI of the Community's Complaint allege that Article II of the 1842 Treaty precludes Defendants from enforcing within the Ceded Area Michigan taxes that either fall directly on *Indians* (the Michigan use tax) or directly on an *Indian trader* for sales made to *Indians* (the Michigan sales tax). As the Community has discussed in its pending motion for partial summary judgment involving non-1842 Treaty Counts (IX and XIII), the Supreme Court has consistently and repeatedly held that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, absolutely bar a state from imposing a tax upon an Indian trader for sales made to Indians within their Indian country. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965); Central Machinery

Co. v. Arizona Tax Comm'n, 448 U.S. 160, 165 (1980). The Community has also established in its summary judgment motion that absent express congressional permission to the contrary, states are categorically barred from imposing a tax the legal incidence of which falls “directly on an Indian tribe or its members inside Indian country, rather than on non-Indians.” Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458 (1995). The 1842 Treaty claims in the present case turn on the operation of *these* doctrines within the Ceded Area, involving *per se* rules forbidding state taxation, not the “minimal burdens” doctrine addressed in Rising.

The Court’s decision in Rising regarding the 1842 Treaty, in fact, confirms two central elements of the Community’s current 1842 Treaty claims. The Community argues in the present case, as it did in Rising, that (i) Article II of the 1842 Treaty provides for the continued enforcement of the federal laws governing Indian trade with non-Indians within the Ceded Area, and (ii) these federal Indian trade laws are to be enforced within the Ceded Area *as though* such Ceded Area was Indian country. The Court in Rising held for the Community on these issues, concluding, after stating the Community’s position, that “[t]he 1842 Treaty *plainly* makes federal law applicable to the Ceded Area” Rising at *11 (emphasis added). Because the Court held that the “minimal burdens” standard applied to the Community’s sales within the Ceded Area, moreover, it implicitly agreed with the Community that the Ceded Area must be treated as though it was Indian country pursuant to the 1842 Treaty, because otherwise Defendants could enforce the MTP Tax without regard to the “minimal burdens” standard applicable to Indian country under federal law.

Because the causes of action and the 1842 Treaty issue in Rising differ from the causes of action and the 1842 Treaty issue raised in the present case, neither *res judicata* nor collateral estoppel bars the Community’s claims with respect to the 1842 Treaty.

V. THERE IS NO BASIS FOR DISMISSAL OF THE COMMUNITY’S CLAIM IN COUNT XXXI REGARDING THE PROPRIETY OF ITS OFFSETS UNDER TRIBAL LAW.

Defendants argue separately that the Court should dismiss the Community’s claim for declaratory relief regarding the legality of its own offsets against funds payable to the State of Michigan, made in Count XXXI of the Complaint. These arguments, too, are without merit.

Defendants argue that the Community is not entitled to have its set-off rights declared in this action “because it has no mutuality of obligation or debt with Defendants.” Def. Br. 23. This contention does not make sense, because the Community’s claims against Defendants in Count XXXI are made against them in their official capacities as representatives of the State of Michigan under Ex parte Young. The set-off rights at issue relate to funds payable by the State of Michigan to the Community, on the one hand, and funds payable by the Community to the State of Michigan, on the other hand. There are no individual obligations or debts of Defendants involved here. Thus, the Community’s exercise of set-off rights at issue in Count XXXI involves a classic situation in which set-off “avoid[s] the absurdity of making A [the Community] pay B [the State of Michigan] when B [the State of Michigan] owes A [the Community].” Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995) (internal quotation marks omitted). The State Treasurer Defendants, who undoubtedly authorized and oversaw the State of Michigan’s set-offs of Community funds, are more than capable of representing the State of Michigan’s interests with respect to the set-off rights of the State and the Community that are at issue in this case.

Defendants also contend that dismissal of Count XXXI is justified because the Community failed to explain in its Complaint “what tribal law says . . . regarding the right to setoff” or why tribal law “would . . . govern in such instance.” Def. Br. 23. Under principles of notice pleading, however, the Community was not required to make its legal argument in its

Complaint. To satisfy notice pleading under the Federal Rules of Civil Procedure, a claimant is only required to set forth a “short and plain statement of the claim” sufficient to 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).

There is no question that Indian tribes have the inherent sovereign power to create tribal common law, to pass legislation affecting a broad range of policy areas, and to engage in administrative and/or judicial rulemaking. Tribes also have the discretion to adopt by reference portions of state or federal law. See generally Cohen's Handbook of Indian Law § 4.05 (2005 ed.) (and cases and authorities cited therein). In the Community’s case, although the Community’s Tribal Council has not enacted any statutory law regarding set-off as of this date, the Tribal Council has enacted a statute adopting federal common law as the common law of the Community.¹⁵ The Community’s offsets were made in response to Defendants’ offsets and illegal imposition of the Sales and Use Tax Acts and were premised on the Community’s position that Defendants’ actions were illegal as a matter of federal law. Until the Court determines the legality of the 1996 and 2005 Offsets, it is premature for the Court to determine the legality of the Community’s offsets. And in any event, Defendants have offered no basis for the Court to dismiss Count XXXI.

¹⁵ Section 2.101 of the Tribal Code of the Community provides:

[T]he Federal Common Law, to the extent applicable to matters within the jurisdiction of the [Tribal] Court, is adopted.

It shall be the duty of the Trial Court to interpret Federal Common Law and its application to matters before the Court in accordance with decisions of the federal court system.

In addition, under Section 2.102 of the Tribal Code, the Tribal Court “may accord weight to applicable decisions of the Courts of the State of Michigan and other jurisdictions.”

CONCLUSION

For the foregoing reasons, the Community respectfully requests that this Court deny Defendants' motion for summary judgment.

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Respectfully submitted,

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