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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TWENTY-NINE PALMS BAND)	Case No. EDCV 08-1753-VAP
OF MISSION INDIANS,)	(OPx)
Plaintiff,)	
v.)	[Motion filed on June 5,
)	2009]
ARNOLD SCHWARZENEGGER,)	ORDER GRANTING MOTION TO
GOVERNOR OF THE STATE OF)	DISMISS AMENDED COMPLAINT
CALIFORNIA, et al.)	
Defendants.)	

Defendants' Motion to Dismiss Plaintiff's Amended Complaint ("Motion") came before the Court for hearing on August 3, 2009. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion.

I. BACKGROUND

A. Plaintiff's Allegations

Plaintiff Twenty-Nine Palms Band of Mission Indians ("Plaintiff") is a federally-recognized Indian tribe based in California composed of twelve (12) persons over

1 the age of eighteen years ("members"). (First Amended
2 Complaint ("FAC") ¶¶ 1, 5, 6.)

3

4 Plaintiff formed a wholly-owned federal corporation
5 chartered under the provisions of 25 U.S.C. section 477
6 ("Tribal Corporation"); it operates a casino ("the
7 casino") in Coachella, California which offers Class III
8 gaming pursuant to a tribal-state gaming compact
9 ("Compact") with the state of California, signed by
10 California Governor Arnold Schwarzenegger
11 ("Schwarzenegger"). (FAC ¶¶ 11-14.)

12

13 The Tribal Corporation distributes revenue to
14 Plaintiff's members in two ways: (1) as wages for work at
15 the casino; and (2) as per capita distributions pursuant
16 to a Revenue Allocation Plan ("RAP") approved and
17 monitored by the Bureau of Indian Affairs ("BIA"). (FAC
18 ¶ 15.) The RAP does not account for California's
19 personal income tax ("the tax"). (FAC ¶¶ 15, 17, 22.)

20

21 According to the FAC, Plaintiff occupies land in
22 Coachella, California, which is recognized by the federal
23 government as an Indian reservation ("the reservation").
24 (FAC ¶¶ 5, 12, 17.) No members of Plaintiff live on the
25 reservation and it would be "very difficult to put
26 housing" on it. (FAC ¶ 17.)

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1 Plaintiff names both Schwarzenegger and Selvi
2 Stainslaus¹ ("Stainslaus"), executive officer of the
3 Franchise Tax Board, in their official capacities. (FAC
4 ¶¶ 7-8.) The Franchise Tax Board assesses and collects
5 the tax for California. (FAC ¶ 7.) Schwarzenegger,
6 Stainslaus, and the State of California are referred to
7 collectively as "Defendants."

8
9 Plaintiff alleges collection of the tax on per capita
10 distributions and casino earnings violates: (1) the
11 Compact; (2) the U.S. Constitution's Indian Commerce
12 Clause, Art. I section 8, Clause 3, the U.S.
13 Constitution's Supremacy Clause, the Indian Gaming
14 Regulatory Act ("IGRA"), 25 U.S.C. section 2701 et seq.
15 ("IGRA"), and tribal sovereignty; and (3) California tax
16 law. (FAC ¶¶ 28-30.)

17
18 **B. Indian Commerce Clause**

19 "Congress has broad power to regulate tribal affairs
20 under the Indian Commerce Clause. . . ." White Mountain
21 Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).
22 Tribes have enjoyed "historic immunity from state and
23 local control," including state taxation. N.M. v.
24 Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

25
26 _____
27 ¹Stainslaus's name appears as "Stainslaus" in the
28 caption of the FAC, as "Stainslaw" in some of the
pleadings, and also as "Stainslau" at paragraph 7 of the
FAC. The Court uses the spelling in the caption
throughout.

1 When determining whether Indian persons are subject
2 to state taxes, the Court looks to the person and place
3 on which the legal incidence of the tax falls; this
4 approach "accommodates the reality that tax
5 administration requires predictability." Okla. Tax
6 Comm'n v. Chickasaw Nation, 515 U.S. 415, 460 (1995).
7 The "general rule" is "that 'Indians going beyond
8 reservation boundaries have generally been held subject
9 to nondiscriminatory state law otherwise applicable to
10 all citizens of the State.'" Chickasaw, 515 U.S. at 465.

11

12 **C. Barriers to State Regulation**

13 There are "two independent but related barriers to
14 the assertion of state regulatory authority over tribal
15 reservations and members": (1) explicit or implicit
16 preemption by federal law; (2) "unlawful[] infringe[ment]
17 'on the rights of reservation Indians to make their own
18 laws and be ruled by them'", often described as tribal
19 sovereignty. Bracker, 448 U.S. at 143; Cabazon Band of
20 Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir.
21 1994) ("Cabazon II").

22

23 **D. IGRA**

24 IGRA, which Congress enacted pursuant to its Indian
25 Commerce Clause powers, "provides a comprehensive
26 framework for regulating gaming on Indian land. See 25
27 U.S.C. § 2701-2721." Idaho v. Shoshone-Bannock Tribes,

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1 465 F.3d 1095, 1096 (9th Cir. 2006); Seminole Tribe of
2 Fla. v. Fla., 517 U.S. 44, 47 (1996). IGRA governs the
3 Class III gaming at issue here and confers jurisdiction
4 on federal courts to enforce tribal-state compacts.²
5 Idaho, 465 F.3d at 1096; Cabazon Band of Mission Indians
6 v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997) ("Cabazon
7 III"); (see FAC Ex. 1.)

8

9 **E. Procedural History**

10 Defendants filed their Motion to Dismiss Amended
11 Complaint ("Mot.") on June 5, 2009 for hearing on July
12 20, 2009; the parties stipulated to continue the hearing
13 to August 3, 2009. Plaintiff timely filed Opposition and
14 Defendants Replied.

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II. LEGAL STANDARD

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A. Rule 12(b)(1)

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Pursuant to Federal Rule of Civil Procedure 12(b)(1),
a district court must dismiss an action if the court
lacks jurisdiction over the subject matter of the suit.
Fed. R. Civ. P. 12(b)(1). The party seeking to invoke
federal jurisdiction bears the burden of establishing
that jurisdiction exists. Scott v. Breeland, 792 F.2d

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²"Class III gaming may be conducted on Indian lands if it is: (1) authorized by the tribe seeking to conduct the gaming; (2) located in a State which does not bar such gaming; and (3) 'conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State' 25 U.S.C. § 2710(d)(1)." Idaho, 465 F.3d at 1096.

1 925, 927 (9th Cir. 1986). A complaint will be dismissed
2 under Rule 12(b)(1) for lack of subject matter
3 jurisdiction if (1) the cause does not "arise under" any
4 federal law or the United States Constitution, (2) there
5 is no "case or controversy" within the meaning of that
6 constitutional term, or (3) the cause is not one
7 described by any jurisdictional statute. Baker v. Carr,
8 369 U.S. 186, 198 (1962).

9

10 **B. Rule 12(b)(6)**

11 Under Rule 12(b)(6), a party may bring a motion to
12 dismiss for failure to state a claim upon which relief
13 can be granted. As a general matter, the Federal Rules
14 require only that a plaintiff provide "'a short and plain
15 statement of the claim' that will give the defendant fair
16 notice of what the plaintiff's claim is and the grounds
17 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47
18 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); Bell Atlantic
19 Corp. v. Twombly, 550 U.S. 544, 545 (2007). In addition,
20 the Court must accept all material allegations in the
21 complaint - as well as any reasonable inferences to be
22 drawn from them - as true. See Doe v. United States, 419
23 F.3d 1058, 1062 (9th Cir. 2005); ARC Ecology v. U.S.
24 Dep't of Air Force, 411 F.3d 1092, 1096 (9th Cir. 2005).

25

26 "While a complaint attacked by a Rule 12(b)(6)
27 motion to dismiss does not need detailed factual

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1 allegations, a plaintiff's obligation to provide the
2 'grounds' of his 'entitlement to relief' requires more
3 than labels and conclusions, and a formulaic recitation
4 of the elements of a cause of action will not do." Bell
5 Atlantic, 127 S. Ct. at 1964-65 (citations omitted).
6 Rather, the allegations in the complaint "must be enough
7 to raise a right to relief above the speculative level."
8 Id. at 1965. "[T]he pleading standard Rule 8 announces .
9 . . demands more than an unadorned, the-defendant-
10 unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129
11 S. Ct. 1937, 1949 (2009).

12
13 Although the scope of review is limited to the
14 contents of the complaint, the Court may also consider
15 exhibits submitted with the complaint, Hal Roach Studios,
16 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
17 (9th Cir. 1990), and "take judicial notice of matters of
18 public record outside the pleadings," Mir v. Little Co.
19 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

20
21 **III. DISCUSSION**

22 **A. Justiciability**

23 Defendants claim there is no case or controversy
24 between Plaintiff and Schwarzenegger "because there is no
25 causal connection between the Governor's actions and the
26 alleged injury, and the alleged injury cannot be
27 redressed by the requested relief" as "the Governor does
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1 not have direct, primary responsibility for imposing or
2 collecting state personal income tax." (Mot. 7, 9.)
3 Defendants make a similar argument as to Stainslaus.

4

5 **1. Schwarzenegger**

6 Under Long v. Van de Kamp, 961 F.2d 151, 152 (9th
7 Cir. 1992) (per curiam), "there must be a connection
8 between the official sued and enforcement of the
9 allegedly unconstitutional statute" In Long, the
10 Ninth Circuit held the Eleventh Amendment barred
11 plaintiffs' suit against the California Attorney General:
12 "the searches of plaintiffs' premises were not the result
13 of any action attributable or traceable to the Attorney
14 General" and "[a]bsent a real likelihood that the state
15 official will employ his supervisory powers against
16 plaintiffs' interests, the Eleventh Amendment bars
17 federal court jurisdiction." 961 F.2d at 152.

18

19 Here, Plaintiff offers evidence the governor of
20 California can, and has, used his supervisory power to
21 affect taxation. First, according to California
22 Government Code section 12010, "[t]he Governor shall
23 supervise the official conduct of all executive and
24 ministerial officers," including the Franchise Tax Board.
25 (See Mot. 9 citing Cal. Const. Art. V § 1.) Second,
26 Plaintiff adduces evidence California's governor issued
27 two executive orders, in 1993 and 2003, "unilaterally . . .

28

1 . direct[ing] the Department of Motor Vehicles to refund
2 to taxpayers [certain] vehicle license fees," and
3 "creat[ing] a strike force consisting of the FTB
4 [Franchise Tax Board] and other agencies to target
5 enforcement relating to failure to pay taxes,"
6 respectively. (Opp'n 7 citing Cal. Exec. Order S1-03,
7 Cal. Exec. Order 2-66-93³; Pl.'s App. of Authorities and
8 Request for Judicial Notice Re Opp'n to Mot. to Dismiss
9 Amended Compl. ("Pl.'s RJN") Ex. D.)⁴

10

11 Cabazon III also supports the proposition that the
12 Eleventh Amendment does not block suits against
13 California's governor arising from breach of a state-
14 tribal compact or related taxation issues, although
15 Cabazon III does not directly address Ex Parte Young, 209
16 U.S. 123 (1908). See Cabazon III, 124 F.3d at 1058-60.

17

18 Plaintiff has borne its burden of showing a decision
19 in its favor against Schwarzenegger could result in
20 redress. (See Opp'n 8 citing Lujan v. Defenders of
21 Wildlife, 504 U.S. 555, 560 (1992).) Accordingly, the

22

23

24 ³According to Pl.'s RJN, Plaintiff provides a copy of
25 only the 2003 Executive Order as Plaintiff has requested
but not received the 1993 Executive Order from the
California State Library.

26

27 ⁴Where the Court considers a motion to dismiss
pursuant to Rule 12(b)(1), unlike Rule 12(b)(6), it can
28 consider matters outside the pleadings presented by the
moving party. (Mot. 6 citing Ass'n of Am. Med. Colleges
v. U.S., 217 F.3d 770, 778 (9th Cir. 2000).)

1 Court denies the Motion insofar as it seeks dismissal
2 based on the justiciability of a suit against
3 Schwarzenegger.

4

5 **2. Stainslaus**

6 Stainslaus is the Executive Officer of the Franchise
7 Tax Board. (Mot. 19.) Although she moved the Court to
8 find the suit against her was nonjusticiable, she has
9 conceded she is subject to suit for violations of IGRA.
10 (Opp'n 5; Reply 3.) Also, the Ninth Circuit has found
11 persons may bring suit against Franchise Board Tax
12 Members alleging state taxes are unconstitutional under
13 Ex Parte Young. See Capitol Industries-EMI Inc. v.
14 Bennett, 681 F.2d 1107, 1120 (9th Cir. 1982); (Mot. 18-
15 19.) See also Cabazon III, 124 F.3d at 1056, 1058-60.
16 In sum, Plaintiff's claims against Schwarzenegger and
17 Stainslaus are justiciable.

18

19 **B. First Claim: Breach of Compact**

20 Plaintiff claims Defendants breached the Compact by
21 attempting to collect the tax. The Court has
22 jurisdiction because California consented to suit in
23 federal court for breach of the Compact. (FAC Ex. 1,
24 Compact §§ 9.1(d), 9.4.) Also, "IGRA necessarily confers
25 jurisdiction onto federal courts to enforce Tribal-State
26 compacts and the agreements contained therein." Cabazon
27 III, 124 F.3d at 1056.

28

1 Plaintiff alleges the parties to the Compact
2 negotiated to eliminate the tax on wages and per capita
3 distributions. (FAC ¶ 20.) Plaintiff cites no provision
4 of the Compact for this proposition but claims the
5 Compact, "taken as a whole, in the context in which it
6 was negotiated," was "a negotiated elimination of PIT
7 [the tax]" (FAC ¶ 20.)

8
9 In other words, Plaintiff asks the Court to disregard
10 the text of the Compact and instead interpret its meaning
11 based on evidence about Compact negotiations. The Court
12 will not consider extrinsic evidence where, as here, the
13 Compact language is unambiguous: the Compact nowhere
14 explicitly exempts members of Plaintiff from the tax.
15 See Cabazon III, 124 F.3d at 1057. Accordingly, the
16 Court GRANTS the Motion as to the first claim WITHOUT
17 LEAVE TO AMEND.

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**C. Second Claim: Federal Preemption and Tribal
Sovereignty**

Plaintiff's second claim alleges Schwarzenegger and
Stainslaus violate IGRA and infringe on tribal
sovereignty when attempting to collect the tax from
Plaintiff's members on per capita distributions and on
income earned from work at the casino.

1 **1. Eleventh Amendment immunity for Schwarzenegger,**
2 **Stainslaus**

3 Schwarzenegger and Stainslaus assert they are immune
4 from relief under the Eleventh Amendment as both act in
5 their official capacities as officers of California when
6 enforcing the state's tax laws. (See FAC ¶¶ 7-8.)⁵ They
7 rely on Seminole for the proposition that Ex Parte Young
8 does not permit suit for actions involving IGRA.
9 Seminole is distinguishable on its logic, however.

10

11 In Seminole, plaintiff tribe sued to force the
12 governor and state of Florida to engage in good-faith
13 negotiations to form a tribal-state compact pursuant to
14 IGRA. The Supreme Court found IGRA's intricate remedial
15 provisions relevant to good-faith bargaining prevented
16 application of Ex Parte Young. Seminole, 517 U.S. 44,
17 47; (Mot. 18.) There is no such intricate remedial
18 scheme here through which Plaintiff can seek adjudication
19 of its claim regarding the tax. Id., 517 U.S. at 47.

20

21 Accordingly, Seminole does not apply; Ex Parte Young
22 permits suit against Schwarzenegger and Stainslaus. See
23 Cabazon III, 124 F.3d at 1057. Ninth Circuit authority

24

25

26 ⁵ California was not named in the second claim.
27 California did not consent in the Compact to be sued for
28 violation of IGRA, only for breach of compact, and
29 accordingly has not expressly waived its Eleventh
30 Amendment immunity for the second claim. See Cabazon
III, 124 F.3d at 1057; (see Compact §§ 9.1(d), 9.4.)

1 supports this position. In Cabazon III, the Ninth
2 Circuit permitted suit against California's governor when
3 a tribe asked the court to find state taxes preempted by
4 federal law. See Cabazon III, 124 F.3d at 1057.

5

6 **2. Federal preemption and tribal sovereignty**

7 According to the FAC, "Defendants' effort to impose
8 and collect and [sic] PIT [the tax] on the Members, and
9 receive PIT from the Members, is preempted by federal law
10 under the U.S. Constitution's Indian Commerce Clause,
11 Art. I, § 8, Clause 3, the U.S. Constitution's Supremacy
12 Clause, and IGRA" and interferes with tribal sovereignty.
13 (FAC ¶¶ 28-30.) Plaintiff alleges the Indian Commerce
14 Clause and IGRA preempt imposition of the tax because
15 Congress enacted IGRA pursuant to its broad powers under
16 the Indian Commerce Clause. Bracker, 448 U.S. at 143;
17 Seminole, 517 U.S. at 47.

18

19 Federal law can preempt state law either expressly or
20 implicitly. Federal preemption and tribal sovereignty
21 are "independent but related barriers to the assertion of
22 state regulatory authority over tribal reservations and
23 members." Bracker, 448 U.S. at 143. As the cases on
24 which both sides rely discuss these barriers together,
25 the Court does so here.

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1 **a. Express preemption by IGRA**

2 Federal law can preempt state tax law expressly when
3 the taxed activities or sales occur, or the persons taxed
4 reside, off-reservation.⁶ Chickasaw, 515 U.S. at 458,
5 465 ("'[E]xpress federal law to the contrary' overrides
6 the general rule that 'Indians going beyond reservation
7 boundaries have generally been held subject to
8 nondiscriminatory state law otherwise applicable to all
9 citizens of the State.'").

10

11 IGRA section 2710(d)(4) states in its entirety:

12 Except for any assessments that may be
13 agreed to under paragraph (3)(C)(iii) of
14 this subsection, **nothing in this section**
15 **shall be interpreted as conferring upon a**
16 **State or any of its political**
17 **subdivisions authority to impose any tax,**
18 **fee, charge, or other assessment upon an**
19 **Indian tribe or upon any other person or**
20 **entity authorized by an Indian tribe to**
21 **engage in a class III activity.** No State
22 may refuse to enter into the negotiations
23 described in paragraph (3)(A) based upon
24 the lack of authority in such State, or
25 its political subdivisions, to impose
26 such a tax, fee, charge, or other
27 assessment.

21 This provision refers to the power of California to
22 impose taxes upon tribal governments and their authorized
23 gaming operators; it does not refer to natural persons
24 such as Plaintiff's members. (Mot. 21.) The Ninth
25 Circuit's holding in Cabazon II supports this reading.

26

27 ⁶ A tribe is generally immune from state taxation of
28 tribe members residing on their reservation. Chickasaw,
515 U.S. at 458.

1 The Cabazon II Court held that "section 2710(d)(4) [of
2 IGRA] is not on its face a prohibition on state taxation"
3 and accordingly found that IGRA did not explicitly
4 preempt California law regarding certain fees not at
5 issue here. Cabazon II, 37 F.3d at 433.

6
7 Accordingly, the Court GRANTS the Motion as to
8 Plaintiff's second claim WITHOUT LEAVE TO AMEND insofar
9 as Plaintiff alleges IGRA explicitly preempts collection
10 of the tax.

11
12 **b. Implicit preemption and tribal sovereignty**

13 "In determining whether federal law preempts a
14 state's authority to regulate activities on tribal lands,
15 courts must apply standards different from those applied
16 in other areas of federal preemption." Cabazon II, 37
17 F.3d at 433. First, "the 'who' and the 'where' of the
18 challenged tax have significant consequences . . . "
19 Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95,
20 101 (2006).

21
22 The Court does not employ the Bracker implicit
23 preemption balancing test, which takes federal, state,
24 and tribal interests into account, although Plaintiff
25 urges the Court to rely on it.⁷ (See Opp'n 13 citing

26 _____
27 ⁷Cabazon II provides a good summary of the Bracker
28 test. First, "no specific congressional intent to
(continued...)

1 Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202,
2 217 (1987) ("Cabazon I");) Bracker, 448 U.S. 136. The
3 Bracker test applies "exclusively to on-reservation
4 transactions between a nontribal entity and a tribe or
5 tribal member" see Wagnon, 546 U.S. at 112.
6 Plaintiff's members live off-reservation, however; hence,
7 the balancing test does not apply. See Chickasaw, 515
8 U.S. at 458.

9

10 **i. On whom the legal incidence of the tax**
11 **falls**

12 The "who," or the persons on whom the legal incidence
13 of the tax falls, are the members of Plaintiff tribe.
14 See Chickasaw, 515 U.S. at 453, 462 (legal incidence of
15 state income tax falls on tribe member whose wages derive
16 from tribal employment); Wagnon, 546 U.S. at 102-103
17 (examining whether legal incidence of fuel tax fell on
18 tribe or non-tribal distributor of fuel); (FAC ¶¶ 15, 16,

19

20 ⁷(...continued)
21 preempt state activity is required; 'it is enough that
22 the state law conflicts with the purpose or operation of
23 a federal statute, regulation, or policy.'" Cabazon II,
24 37 F.3d at 433 (internal citation omitted). Second,
25 "[s]tate jurisdiction is pre-empted by the operation of
26 federal law if it interferes or is incompatible with
27 federal and tribal interests reflected in federal law,
28 unless the state interests at stake are sufficient to
justify the assertion of state authority.'" Id.
(internal citation omitted) The Court determines such
incompatibility by "balancing these federal, tribal, and
state interests . . ." Id. (internal citation omitted)
Finally, "'ambiguities in federal law are, as a rule,
resolved in favor of tribal independence.'" Id.
(internal citation omitted)

1 30 (Schwarzenegger and Stainslaus seek to impose the tax
2 on Plaintiff's members).)

3

4 **ii. Where the legal incidence of the tax**
5 **falls**

6 Plaintiff argues the legal incidence of the tax falls
7 on the reservation because its assessment interferes with
8 tribal governance. See Wagon, 546 U.S. at 101-02; Okla.
9 Tax Comm'n v. Sac and Fox, 508 U.S. 114, 126 (1993); (FAC
10 ¶¶ 28-29.) Although the FAC states it would be difficult
11 to put housing on the reservation, Plaintiff pleads no
12 facts showing how assessment of the tax disrupts or
13 otherwise infringes on tribal sovereignty. (FAC ¶¶ 17,
14 28-30.)

15

16 Plaintiff nevertheless argues the Court should
17 consider the implications on tribal sovereignty of
18 assessing the tax on wages and per capita distributions.
19 For example, to avoid imposition of the tax, would
20 Plaintiff need to re-arrange the casino or its parking
21 lot to make space for housing? (See Opp'n 14.) If so,
22 would "the Tribal Council's activities. . . be consumed
23 by addressing financial, environmental, regulatory and
24 other issues involving housing on the reservation"?
25 (Opp'n 19.)

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1 Pursuant to Iqbal and Bell Atlantic, this is
2 insufficient. "[T]he pleading standard Rule 8 announces
3 does not require 'detailed factual allegations,'" but a
4 plaintiff must provide enough information to "raise a
5 right to relief above the speculative level." Bell
6 Atlantic, 550 U.S. at 545; Iqbal, 129 S. Ct. at 1950.
7 Plaintiff asks the Court to engage in speculation
8 regarding the effect of assessment of the tax on tribal
9 sovereignty. See Bell Atlantic, 550 U.S. at 545; Iqbal,
10 129 S. Ct. at 1950; (see Opp'n 14, 19.) Accordingly, the
11 Court GRANTS the Motion WITH LEAVE TO AMEND as to the
12 second claim insofar as it is based on implicit
13 preemption by federal law or infringement on tribal
14 sovereignty.

15
16 The Court permits Plaintiff leave to amend because
17 Chickasaw and Sac and Fox leave open the question of
18 whether the legal incidence of a state tax could fall on
19 the reservation if a tribe alleges collection of a tax
20 infringes on tribal sovereignty. The Chickasaw Court
21 premised its holding a tax fell outside the reservation
22 in part on the plaintiff's failure to raise tribal
23 sovereignty as a bar to taxation. 515 U.S. at 464.
24 Likewise, in Sac and Fox, the Supreme Court explicitly
25 declined to decide "whether the Tribe's right to self-
26 governance could operate independently of its territorial
27 jurisdiction to pre-empt the State's ability to tax
28

1 income earned from work performed for the Tribe itself
2 when the employee does not reside in Indian country."
3 508 U.S. at 126; see also Jefferson v. Comm'r of Revenue,
4 631 N.W. 391, 397 (2001) (denying relief where plaintiffs
5 offered no "clear explanation as to how the imposition of
6 Minnesota's income tax on tribal members residing off the
7 reservation infringes on tribal self-governance.").

8
9 In conclusion, the Court GRANTS the Motion as to the
10 second claim WITHOUT LEAVE TO AMEND insofar as it is
11 based on explicit preemption by IGRA. It GRANTS the
12 Motion WITH LEAVE TO AMEND insofar as the second claim is
13 based on implicit preemption by federal law and
14 infringement on tribal sovereignty.

15
16 **D. Third Claim: IGRA, Tribal Sovereignty, State Law**

17 Plaintiff alleges collection of the tax: (1) is
18 preempted or otherwise forbidden by IGRA; (2) interferes
19 with tribal sovereignty; and (3) violates California tax
20 law. (FAC ¶¶ 46-47.)

21
22 The first argument, that IGRA forbids assessment of
23 the tax, lacks merit. Plaintiff shows IGRA requires per
24 capita distributions be subject to federal income tax.
25 25 U.S.C. § 2710(b)(3)(D). Plaintiff fails to provide
26 authority for the proposition IGRA forbids the state from
27 taxing the per capita distributions, however. See 25

28

1 U.S.C. 2710(d)(4). As discussed above, section
2 2710(d)(4) neither enlarges nor constricts Defendants'
3 ability to collect the tax on per capita distributions
4 and earnings. See Cabazon II, 37 F.3d at 433 ("section
5 2710(d)(4) [of IGRA] is not on its face a prohibition on
6 state taxation" and does not explicitly preempt
7 California law regarding collection of certain fees in
8 connection with gaming). The Court GRANTS the Motion as
9 to the third claim, insofar as it is based on violation
10 of IGRA or explicit preemption by IGRA, WITHOUT LEAVE TO
11 AMEND.

12
13 The second argument fails as well. As discussed in
14 the preceding section, Plaintiff alleges no facts from
15 which the Court could find the legal incidence of the tax
16 falls on the reservation. See Chickasaw, 515 U.S. at 464;
17 Sac and Fox, 508 U.S. at 126; (FAC ¶ 17; Opp'n 19, 21.)
18 Accordingly, the Court GRANTS the Motion as to the third
19 claim WITH LEAVE TO AMEND insofar as it is premised
20 interference with tribal sovereignty or implicit
21 preemption by the Indian Commerce Clause. See Bell
22 Atlantic, 550 U.S. at 545; Iqbal, 129 S. Ct. at 1950;
23 (FAC ¶¶ 46, 48.)

24
25 Third, Plaintiff alleges assessment of the tax on
26 wages and per capita distributions violates California's
27 tax laws. (FAC ¶¶ 44, 46-47.) "California income tax
28

1 law generally is based upon federal income tax law . . .
2 ." Ordlock v. Franchise Tax Board, 44 Cal. 3d 212, 216
3 (2006). Plaintiff's Opposition relies heavily on the
4 allegedly tax-exempt treatment of certain monies under
5 federal tax law for the proposition they are also not
6 subject to taxation under California law. (Opp'n 24-27.)
7 The FAC also cites federal tax law regarding the proper
8 classification under California law of wages and per
9 capita distributions. (FAC ¶¶ 44, 47.)

10

11 This argument lacks merit, as the Court lacks
12 jurisdiction insofar as the third claim is premised on
13 violation of state law. The FAC contains several bases
14 for jurisdiction: 28 U.S.C. section 1291 (final decisions
15 of district courts); 28 U.S.C. section 1362 (jurisdiction
16 over suits arising under federal law brought by tribes);
17 IGRA; the Indian Commerce Clause; 28 U.S.C. section 2281
18 (injunctions, repealed); the Compact; and state pendent
19 jurisdiction. (FAC ¶ 2.)

20

21 Of these, only the last is at issue with respect to
22 the third claim because it is premised on violation of
23 California tax laws. (FAC ¶¶ 39, 44, 46, 47.) The
24 Eleventh Amendment bars pendent state law claims against
25 a non-consenting state defendant in federal court. (Mot.
26 26-27 citing Pennhurst State School & Hospital v.
27 Halderman, 465 U.S. 89, 120 (1984).) According to

28

1 Pennhurst, "a claim that state officials violated state
2 law in carrying out their official responsibilities is a
3 claim against the State that is protected by the Eleventh
4 Amendment . . . this principle applies as well to state-
5 law claims brought into federal court under pendent
6 jurisdiction." 465 U.S. at 121. The third claim alleges
7 Schwarzenegger and Stainslaus, acting in their official
8 capacities, violate state tax law when they assess the
9 tax. See Pennhurst, 465 U.S. at 121; (FAC ¶¶ 46-47.)
10 Accordingly, the Court lacks jurisdiction to consider
11 whether assessment of the tax violates California law.
12

13 Plaintiff does not dispute the effect of the Eleventh
14 Amendment on the third claim. (Reply 11.) The court
15 GRANTS the Motion as to the third claim insofar as it is
16 based on violation of California law WITHOUT LEAVE TO
17 AMEND.

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19

IV. CONCLUSION

20 For the above reasons, the Court GRANTS the Motion as
21 to the first claim WITHOUT LEAVE TO AMEND.

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23 It GRANTS the Motion as to the second claim WITH
24 LEAVE TO AMEND insofar as it is based on implicit
25 preemption by federal law or interference with tribal
26 sovereignty. It GRANTS the Motion as to the second claim

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1 WITHOUT LEAVE TO AMEND insofar as it alleges the tax is
2 expressly preempted by IGRA.

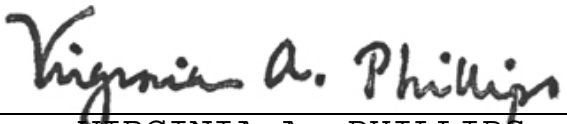
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4 Likewise, the Court GRANTS the Motion as to the third
5 claim WITH LEAVE TO AMEND insofar as it is based on
6 implicit preemption by federal law or interference with
7 tribal sovereignty. It GRANTS the Motion WITHOUT
8 LEAVE TO AMEND insofar as it alleges the tax is expressly
9 preempted by IGRA, violates IGRA, or violates California
10 law.

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12 Dated: September 4, 2009

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VIRGINIA A. PHILLIPS
United States District Judge

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