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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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FRIENDS OF AMADOR COUNTY, BEA
CRABTREE, JUNE GEARY,

NO. CIV. 2:10-348 WBS KJM

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

KENNETH SALAZAR, SECRETARY OF
THE UNITED STATES DEPARTMENT
OF INTERIOR, United States
Department of Interior, THE
NATIONAL INDIAN GAMING
COMMISSION, GEORGE SKIBINE,
Acting Chairman of the
National Indian Gaming
Commission, THE STATE OF
CALIFORNIA, Arnold
Schwarzenegger Governor of the
State of California,

Defendants.

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Plaintiffs Friends of Amador County, Bea Crabtree, and
June Geary brought this action against defendants Kenneth Salazar
in his capacity as the Secretary of the United States Department
of Interior ("Secretary"), the National Indian Gaming Commission

1 ("NIGC"), and George Skibine (collectively the "Federal
2 Defendants"), as well as the State of California ("State") and
3 Governor Arnold Schwarzenegger ("Governor," collectively the
4 "State Defendants") arising out of plaintiffs' objections to a
5 tribal-state compact allowing the construction of a casino by the
6 Buena Vista Rancheria of Me-Wuk Indians ("Tribe") in Amador
7 County. Presently before the court is the State Defendants'
8 motion to dismiss the Complaint pursuant to Federal Rule of Civil
9 Procedure 12(b)(1) for lack of subject matter jurisdiction, Rule
10 12(b)(6) for failure to state a claim upon which relief can be
11 granted, and Rule 19 for failure to join a required party.

12 I. Factual and Procedural Background

13 In 1999, then-California Governor Gray Davis entered
14 into a series of tribal-state compacts with fifty-nine different
15 Indian tribes, including the Tribe, allowing class III gaming¹ on
16 tribal land pursuant to the compacting requirements of the Indian
17 Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. (Compl.
18 ¶ 22.) These compacts were subsequently ratified by the
19 California legislature. (Id.) In August 2004, the Tribe and the
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21 ¹ Three classes of gaming are subject to regulation under
22 IGRA. Class I gaming includes "social games solely for prizes of
23 minimal value or traditional forms of Indian gaming," 25 U.S.C. §
24 2703(6), and is subject to solely tribal regulation. Id. §
25 2710(a)(1). Class II gaming is regulated through joint federal-
26 tribal regulation, id. § 2710(a)(2), and includes bingo and other
27 similar games and card games that are "explicitly authorized" or
28 "are not explicitly prohibited by laws of the State . . . but
only if such card games are played in conformity" with the
state's laws and regulations. Id. § 2703(7). Class III gaming
includes "all forms of gaming that are not class I gaming or
class II gaming," such as casino games, slot machines, and
lotteries, id. § 2703(8), and can only be authorized through a
tribal-state compact, subject to federal approval and oversight.
Id. § 2710(d)(1).

1 Governor negotiated and completed an amended compact (the
2 "Compact"), which was ratified by the California legislature and
3 submitted to the Secretary as required by IGRA in September 2004.
4 See Cal. Gov't Code § 12012.45. The Secretary then approved the
5 Compact, which became effective as a matter of law. Notice of
6 Approved Tribal-State Class III Gaming Compact, 69 Fed. Reg.
7 76004-01 (Dec. 20, 2004).

8 Plaintiffs allege that the Compact between the State
9 and the Tribe is illegal under IGRA. The Complaint alleges that
10 the Tribe's land is not eligible for class III gaming because it
11 is owned in fee simple, not in trust by the federal government,
12 and accordingly is not "Indian land" as required under the
13 statute. (Compl. ¶¶ 8-9.) The Complaint further claims that the
14 Tribe's federal recognition is invalid because it was established
15 by individuals who were not true descendants of the Buena Vista
16 Rancheria of Me-Wuk Indians and alleges that plaintiffs Crabtree
17 and Geary are true descendants of the peoples who lived on the
18 Buena Vista Rancheria land. (Id. ¶¶ 16-18.) Plaintiffs
19 accordingly allege that the Federal Defendants' approval of class
20 III gaming on the Tribe's land was arbitrary, capricious, and
21 contrary to IGRA and that the State Defendants acted unlawfully
22 when they determined that the Tribe was eligible for class III
23 gaming and entered into the Compact. (Id. ¶¶ 10, 22-27.)

24 The Complaint alleges four causes of action. The first
25 claim alleges that both the Federal and State Defendants violated
26 IGRA by approving class III gaming on ineligible lands. (Id. ¶
27 34.) The second claim alleges that the State Defendants violated
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1 article IV, section 19 of the California Constitution² by
2 approving an illegal tribal-state compact because the Tribe is
3 ineligible for class III gaming under IGRA. (Id. ¶ 36.)
4 Plaintiffs' third claim alleges that the approval of the Tribe's
5 gaming ordinance and the Compact violated the Administrative
6 Procedure Act ("APA"), 5 U.S.C. §§ 500-596, because such approval
7 was arbitrary and capricious and in violation of IGRA. (Id. ¶
8 42.) The fourth claim alleges that the Governor failed to make
9 the necessary determination required by § 2719 of IGRA that the
10 proposed gaming would not be detrimental to the surrounding
11 community. (Id. ¶¶ 50-52.) The Complaint requests the court to
12 declare that the Tribe's land is not eligible for gaming under
13 IGRA, that the Compact is invalid under IGRA and APA, and that
14 the environmental assessment of the land was inadequate. The
15 Complaint also asks the court to enjoin the Tribe from further
16 pursuit of class III gaming on its land and create a constructive
17 trust over funds currently being paid to the Tribe. The State
18 Defendants now move to dismiss plaintiffs' first, second, and

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22 ² Article IV, section 19 of the California Constitution
provides in relevant part:

23 [T]he Governor is authorized to negotiate and conclude
24 compacts, subject to ratification by the Legislature, for
25 the operation of slot machines and for the conduct of
26 lottery games and banking and percentage card games by
27 federally recognized Indian tribes on Indian lands in
California in accordance with federal law. Accordingly,
slot machines, lottery games, and banking and percentage
card games are hereby permitted to be conducted and
operated on tribal lands subject to those compacts.

28 Cal. Const. art IV § 19(f).

1 fourth causes of action³ pursuant to Federal Rules of Civil
2 Procedure 12(b)(1), 12(b)(6), and 19.

3 II. Discussion

4 A. Motion to Dismiss for Lack of Subject Matter
5 Jurisdiction

6 "Federal courts are courts of limited jurisdiction.
7 They possess only that power authorized by Constitution and
8 statute." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S.
9 375, 377 (1994). The court is presumed to lack jurisdiction
10 unless the contrary appears affirmatively from the record.

11 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006).

12 Consistent with these basic jurisdictional precepts, the Ninth
13 Circuit has articulated the standard for surviving a motion to
14 dismiss for lack of jurisdiction as follows:

15 When subject matter jurisdiction is challenged under
16 Federal Rule of Civil Procedure 12(b)(1), the plaintiff
17 has the burden of proving jurisdiction in order to
18 survive the motion. A plaintiff suing in a federal court
19 must show in his pleading, affirmatively and distinctly,
20 the existence of whatever is essential to federal
jurisdiction, and, if he does not do so, the court, on
having the defect called to its attention or on
discovering the same, must dismiss the case, unless the
defect be corrected by amendment.

21 Tosco Corp. v. Cmtys. for a Better Env't, 236 F.3d 495, 499 (9th
22 Cir. 2001), abrogated on other grounds by Hertz Corp. v. Friend,
23 --- U.S. ----, 130 S. Ct. 1181 (2010) (internal citations and
24 internal quotation marks omitted). Additionally, "[i]f the court
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26 ³ The State Defendants do not challenge plaintiffs' third
27 cause of action for violation of the APA, because it is only
28 alleged against the Federal Defendants and because the APA cannot
be used to review the decisions of state government agencies.
See 5 U.S.C. § 701(b)(1).

1 determines at any time that it lacks subject-matter jurisdiction,
2 the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

3 The Eleventh Amendment to the United States
4 Constitution provides: "The Judicial power of the United States
5 shall not be construed to extend to any suit in law or equity,
6 commenced or prosecuted against one of the United States by
7 Citizens of another State, or by Citizens or Subjects of any
8 Foreign State."

9 Eleventh Amendment immunity poses "a bar to federal
10 jurisdiction over suits against non-consenting States." Alden v.
11 Maine, 527 U.S. 706, 730 (1999). Sovereign immunity extends to
12 suits in federal court against a state by its own citizens as
13 well as by citizens of another state. Edelman v. Jordan, 415
14 U.S. 651, 662-63 (1974). This jurisdictional bar applies to
15 suits "in which the State or one of its agencies or departments
16 is named as the defendant" and "applies regardless of the nature
17 of the relief sought," Pennhurst State Sch. & Hosp. v. Halderman,
18 465 U.S. 89, 100 (1984), including suits for equitable relief.
19 Cory v. White, 457 U.S. 85, 91 (1982).

20 "The Eleventh Amendment immunity is designed to allow a
21 state to be free to carry out its functions without judicial
22 interference directed at the sovereign or its agents." V. O.
23 Motors, Inc. v. Cal. State Bd. of Equalization, 691 F.2d 871, 872
24 (9th Cir. 1982). While California has waived its immunity from
25 suit by tribes asserting claims related to tribal-state compacts,
26 Cal. Gov't Code § 98005, the State has not waived its immunity
27 from suit by individuals claiming a Compact violates IGRA or the
28 California Constitution. Accordingly, any such claims alleged

1 directly against the State are barred. See Seminole Tribe of
2 Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress's
3 enactment of IGRA could not abrogate a state's sovereign
4 immunity).

5 However, "[g]enerally injunctions against state
6 officers are not barred by the Eleventh Amendment." Taylor v.
7 Westly, 402 F.3d 924, 930 (9th Cir. 2005) (citing Ex parte Young,
8 209 U.S. 123 (1908)). This exception is premised on the notion
9 that "no state could or would authorize a state officer to act
10 contrary to the federal Constitution, so any such action would be
11 ultra vires" Id. To determine whether "the doctrine of
12 Ex Parte Young avoids an Eleventh Amendment bar to suit, a court
13 need only conduct a straightforward inquiry into whether [the]
14 complaint alleges an ongoing violation of federal law and seeks
15 relief properly characterized as prospective." ACS of Fairbanks,
16 Inc. v. GCI Commc'n Corp., 321 F.3d 1215, 1216-17 (9th Cir. 2003)
17 (citation omitted).

18 Plaintiffs have alleged that the Governor violated
19 federal law--IGRA--when he approved the Compact to allow the
20 Tribe's class III gaming plans. Taking plaintiffs' allegations
21 as true, the Governor acted ultra vires and is properly subject
22 to suit under Ex parte Young. See Artichoke Joe's v. Norton, 216
23 F. Supp. 2d 1084, 1110 (E.D. Cal. 2002). Plaintiffs' first and
24 fourth claims allege that the Governor violated IGRA when he
25 entered into the Compact with the Tribe, and thus plaintiffs ask
26 the court to declare the Compact invalid, enjoin any future
27 action related to the Tribe's planned casino, and enjoin future
28 payments from the State to the Tribe. Although the Ex parte

1 Young doctrine may not be invoked to provide declaratory relief
2 against a state official for solely past violations of federal
3 law, Green v. Mansour, 474 U.S. 64, 68 (1985), it is appropriate
4 where the past violation of law is accompanied by an ongoing
5 violation of federal law. Papasan v. Allain, 478 U.S. 265, 282
6 (1986). The declaratory and injunctive relief requested by
7 plaintiffs is appropriate because plaintiffs allege the
8 Governor's decision to approve the Compact continues to violate
9 federal law and presently harms them. See Artichoke Joe's, 216
10 F. Supp. 2d at 1111.

11 In Seminole Tribe, the Supreme Court held that the Ex
12 parte Young doctrine did not apply to the Seminole Tribe's suit
13 against Florida to enforce § 2710(d)(3) of IGRA "because Congress
14 enacted a remedial scheme, § 2710(d)(7), specifically designed
15 for the enforcement of that right." Seminole Tribe, 517 U.S. at
16 76. The Court found that the detailed procedures established by
17 Congress through which a Tribe could resolve grievances arising
18 in the negotiation of tribal-state compacts precluded the Tribe
19 from access to a suit under the Ex parte Young doctrine because
20 that remedy was much broader than the remedies available under
21 IGRA and was therefore inconsistent with the Act. See id. at 74
22 ("[W]here Congress has prescribed a detailed remedial scheme for
23 the enforcement against a State of a statutorily created right, a
24 court should hesitate before casting aside those limitations and
25 permitting an action against a state officer based upon Ex parte
26 Young.").

27 The Seminole Tribe exception to Ex parte Young is
28 inapplicable here. Unlike the provisions at issue in Seminole

1 Tribe, Congress did not create a detailed remedial scheme to
2 enforce § 2710(d)(1), the section that permits class III gaming
3 by tribes. See Artichoke Joe's, 216 F. Supp. 2d at 1110 n.34.
4 IGRA does not provide a specific method for citizens to challenge
5 the legitimacy of determinations of eligibility for class III
6 gaming and the State Defendants do not identify any section of
7 IGRA that contains the sort of detailed remedial scheme provided
8 in § 2710(d)(7). See Seminole Tribe, 517 U.S. at 74-75.
9 Accordingly, plaintiffs' first and fourth claims against the
10 Governor for violations of IGRA are not barred by sovereign
11 immunity and are properly brought under the Ex parte Young
12 doctrine.

13 However, because Ex parte Young does not apply to
14 supplemental state law claims, see Pennhurst, 465 U.S. at 120-22,
15 the court will grant the Governor's motion to dismiss based on
16 sovereign immunity with regard to plaintiffs' second claim
17 against him under article IV, section 19 of the California
18 Constitution. See 28 U.S.C. § 1367(c); Ulaleo v. Paty, 902 F.2d
19 1395, 1400 (9th Cir. 1990) (explaining that it "would offend
20 federalism" and not further the justification for the Ex parte
21 Young exception for a federal court to decide a claim that a
22 state violated its own constitution).

23 B. Motion to Dismiss for Failure to State a Claim

24 On a motion to dismiss, the court must accept the
25 allegations in the complaint as true and draw all reasonable
26 inferences in favor of the plaintiff. See Scheuer v. Rhodes, 416
27 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
28 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322

1 (1972). To survive a motion to dismiss, "a complaint must
2 contain sufficient factual matter, accepted as true, to 'state a
3 claim to relief that is plausible on its face.'" Ashcroft v.
4 Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009) (quoting Bell
5 Atlantic Corp v. Twombly, 550 U.S. 544, 570 (2007)).

6 As the Supreme Court has noted, "the fact that a
7 federal statute has been violated and some person harmed does not
8 automatically give rise to a private cause of action in favor of
9 that person." Touche Ross & Co. v. Redington, 442 U.S. 560, 568,
10 (1979) (citation omitted). The statute "must either explicitly
11 create a right of action or implicitly contain one." In re
12 Digimarc Corp. Derivative Litigation, 549 F.3d 1223 (9th Cir.
13 2008). IGRA does not explicitly authorize private individuals to
14 sue under the statute for failure of a state, tribe, or the
15 National Indian Gaming Commission to comply with its provisions.
16 However, IGRA does expressly provide for various causes of action
17 that can be brought by tribes, states, and the federal government
18 for violations of particular provisions of IGRA. Hein v. Captain
19 Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1260 (9th
20 Cir. 2000); see, e.g., 25 U.S.C. § 2710(d)(7)(A)(ii), (iii)
21 (State and Secretary of the Interior may bring suit); id. §
22 2711(d) (tribes may bring suit to compel action by Chairman after
23 a time lapse); id. § 2714 (certain decisions made by the
24 Commission are final agency decisions appealable under the APA).

25 To determine whether a private right of action is
26 implied in a statute, a court must consider:

27 (1) whether the plaintiff is "one of the class for whose
28 especial benefit the statute was enacted--that is,
[whether] the statute create[s] a federal right in favor

1 of the plaintiff"; (2) whether "there [is] any indication
2 of legislative intent, explicit or implicit, either to
3 create such a remedy or to deny one"; (3) whether the
4 cause of action is "consistent with the underlying
5 purposes of the legislative scheme"; and (4) whether "the
6 cause of action [is] one traditionally relegated to state
7 law, in an area basically the concern of the States, so
8 that it would be inappropriate to infer a cause of action
9 based solely on federal law."

6 In re Digimarc, 549 F.3d at 1231 (quoting Cort v. Ash, 422 U.S.
7 66, 78 (1975)). The second factor, legislative intent, is "the
8 key inquiry in this calculus," since the other factors provide
9 indicia of intent. Id. (quoting Opera Plaza Residential Parcel
10 Homeowners Ass'n v. Hoang, 376 F.3d 831, 835 (9th Cir. 2004)).

11 The Supreme Court has held that "when legislation
12 expressly provides a particular remedy or remedies, courts should
13 not expand the coverage of the statute to subsume other
14 remedies." Nat'l R.R. Passenger Corp. v. Nat'l Assoc. of R.R.
15 Passengers, 414 U.S. 453, 458 (1974). The Ninth Circuit has
16 noted that "where IGRA creates a private cause of action, it does
17 so explicitly," and thus "plaintiffs [cannot] sue for every
18 violation of IGRA by direct action under the statute." Hein, 201
19 F.3d at 1260.

20 Had Congress intended for individuals to have a private
21 cause of action to enforce the class III gaming requirements of
22 IGRA, it would have provided for it explicitly, as it did for
23 enforcement of other sections of the Act by tribes, states, and
24 the federal government. See Tamiami Partners, Ltd. v. Miccosukee
25 Tribe of Indians of Fla., 63 F.3d 1030, 1049 (11th Cir. 1995)
26 ("Obviously, then, when Congress wished to provide a private . .
27 . remedy, it knew how to do so and did so expressly.") (quoting
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1 Redington, 442 U.S. at 572); see also Hartman v. Kickapoo Tribe
2 Gaming Comm'n, 319 F.3d 1230, 1232 (10th Cir. 2003) (holding that
3 an individual's claims against a tribe for violations of IGRA had
4 to be dismissed because "IGRA provides no private right of action
5 against the Tribe, the State, the federal government or any
6 official or agency thereof.").⁴ Accordingly, plaintiffs' claims
7 against the Governor will be dismissed.⁵

8 IT IS THEREFORE ORDERED that the State of California
9 and Governor Arnold Schwarzenegger's motion to dismiss
10 plaintiffs' claims against the State Defendants be, and the same
11 hereby is, GRANTED.

12 DATED: October 15, 2010

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15 WILLIAM B. SHUBB
16 UNITED STATES DISTRICT JUDGE
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21 ⁴ While the Complaint could be read to allege that the
22 Governor violated both IGRA and the terms of the Compact,
23 plaintiffs' counsel acknowledged at oral argument that plaintiffs
24 do not bring a claim under the Compact. Indeed, as third parties
25 to the Compact, they could not do so. Section 15.1 of the
26 Compact provides that, "[e]xcept to the extent expressly provided
27 under this Gaming Compact, this Gaming Compact is not intended
28 to, and shall not be construed to, create any right on the part
of a third party to bring an action to enforce any of its terms."
(State Defs.' Req. Judicial Notice Ex. H ("Compact") § 10.1.)

⁵ Because plaintiffs' claims against the State Defendants
are dismissed pursuant to Rules 12(b)(1) and 12(b)(6), the court
will not address the State Defendants' argument that the
Complaint should be dismissed for failure to join the Tribe as a
required party under Rule 19.