UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BLUE LAKE RANCHERIA, a federally recognized Indian Tribe; BLUE LAKE RANCHERIA ECONOMIC DEVELOPMENT CORPORATION, a federally-chartered tribal corporation; and MAINSTAY BUSINESS SOLUTIONS, a federally authorized division of Blue Lake Rancheria Economic Development Corporation,

Plaintiffs,

v.

MARTY MORGENSTERN, individually and in his official capacity as Secretary of the California Labor and Workforce Development Agency; PAM HARRIS, individually and in her official capacity as Chief Deputy Director of the Employment Development Department of the State of California ("EDD"); JACK BUDMARK, individually and in his official capacity as a Deputy Director of the Tax Branch of the EDD; TALBOTT SMITH, individually and in his official capacity as a Deputy Director of the Unemployment Branch of the EDD; KATHY DUNNE, individually and in her official capacity as a Senior Tax Compliance Representative of EDD; SARAH

Case No. 2:11-CV-01124 JAM-JFM

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

REECE, individually and in her official capacity as an Authorized Representative of the EDD; THE STATE OF CALIFORNIA; THE EMPLOYMENT DEVELOPMENT DEPARTMENT, a department of the State of California; and DOES 1-50, inclusive,

Defendants.

This matter is before the Court on Defendants' Marty Morgenstern ("Morgenstern"), Pam Harris ("Harris"), Jack Budmark ("Budmark"), Talbott Smith ("Smith"), Kathy Dunne ("Dunne") and Sarah Reece ("Reece"), the State of California (the "State"), and the Employment Development Department ("EDD") (collectively "Defendants") Motion to Dismiss (Docs. #26, #36) Plaintiffs' Blue Lake Rancheria ("the Tribe"), Blue Lake Rancheria Economic Development Corporation ("EdCo"), and Mainstay Business Solutions ("Mainstay") (collectively "Plaintiffs") Complaint (Doc. #1).

Defendants move to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim. Plaintiffs oppose the motion (Doc. #46).[1] For the reasons set forth below, the motion to dismiss is DENIED.

I. FACTUAL ALLEGATIONS AND SUMMARY OF ARGUMENTS

Plaintiffs seek to enjoin Defendants from enforcement of State unemployment insurance taxes. Defendants are attempting to collect approximately $19,285,572.67 in state unemployment

[1] This matter was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). Oral argument was scheduled for September 21, 2011.

insurance contributions that Defendants assert are owed by Mainstay. Plaintiffs allege that if any money is owed, it is less than the amount Defendants seek to recover. Compl., ¶ 26. Plaintiffs argue that Defendants' collection activities violate tribal sovereign immunity and unlawfully encumber tribal land and tribal assets. Compl., ¶ 31. The Complaint alleges that Plaintiffs have not waived sovereign immunity, nor has Congress abrogated the Tribe's sovereign immunity. Compl., ¶¶ 32,33. Accordingly, the Complaint seeks a declaration that Defendants' collection activities are violating Plaintiffs' tribal sovereign immunity and unlawfully encumbering tribal assets and land, both on and off the reservation. The Complaint also seeks an injunction enjoining Defendants from continuing to bring levies and liens on Tribal assets and property, and requiring Defendants to cancel any existing liens and return any funds seized in response to the existing liens.

Plaintiffs' suit concerns the collection of unemployment insurance contribution payments, pursuant to the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq. ("FUTA"). FUTA is a joint federal-state program for unemployment insurance. FUTA was amended in 2001 to require states to allow Indian tribes to elect to be a reimbursing employer. A reimbursing employer reimburses the State for all benefits paid to former employees. (Cal. Unempl. Ins. Code 803(b).) Mainstay elected to be a reimbursing employer under FUTA, and held this designation from 2003 to 2010. Compl., ¶ 24. Mainstay ceased making full contribution payments as required, prompting Defendants to eventually begin the collection activities at

issue in this suit.

II. PROCEDURAL BACKGROUND

Plaintiffs brought a motion for a preliminary injunction, which this Court heard on June 29, 2011 (see Transcript, Doc. #31). The Court granted the motion on August 11, 2011 (Doc. #40), following the submission of supplemental briefing by both parties. The preliminary injunction enjoined Defendants from further collection activities, ordered them to withdraw and release any liens and levies placed on Plaintiffs' assets and deposit with the Court the amount that had already been collected through the liens and levies. Defendants deposited the required sum with the Court, and have filed a notice of appeal (Doc. #42) of the preliminary injunction order. Plaintiffs have voluntarily dismissed from the suit defendants the State of California and the Employment Development Department (Doc. #45). Accordingly, "Defendants" for purposes of this order refers only to the individual defendants, not the dismissed State and EDD defendants.

Defendants' Reply brief (Doc. #47) also raised the new argument that only defendant Harris is a properly named defendant, because under California Unemployment Insurance Code § 301(c) only the Director of EDD is vested with responsibility for filing and releasing liens. However, as Plaintiffs' contend in the sur-Reply (Doc. #52) ordered by this Court, Defendants offer no legal authority for their argument. Each individually named Defendant is alleged to have some connection with the collection actions at issue in this suit, Compl., ¶ 14, as

required under Ex Parte Young, 209 U.S. 123 (1908) for suits against state officers. See also Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992). Accordingly, at this time the Court will not dismiss any of the individually named defendants from this suit.

III. OPINION

A. Legal Standard

1. 12(b)(6) Motion to Dismiss

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the

complaint pursuant to Federal Rule of Civil Procedure 15(a). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

2. 12(b)(1)Motion to Dismiss

> Dismissal is appropriate under Rule 12(b)(1) when the District Court lacks subject matter jurisdiction over the claim. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. Because challenges to standing implicate a federal court's subject matter jurisdiction under Article III of the United States Constitution, they are properly raised in a motion to dismiss under Rule 12(b)(1).

Meaunrit v. ConAgra Foods Inc., 2010 WL 2867393, *3 (N.D. Cal. July 20, 2010) (internal citations omitted). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction. See Rattlesnake Coalition v. United States Envtl. Protection Agency, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

There are two permissible jurisdictional attacks under Rule 12(b)(1): a facial attack, where the court's inquiry is limited to the allegations in the complaint; or a factual attack, which permits the court to look beyond the complaint at affidavits or other evidence. Savage v. Glendale Union High School, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction, whereas in a factual attack, the challenger disputes the truth

of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Li v. Chertoff, 482 F.Supp.2d 1172, 1175 (S.D. Cal. 2007) (internal citations omitted). If the moving party asserts a facial challenge, the court must assume that the factual allegations asserted in the complaint are true and construe those allegations in the light most favorable to the plaintiff. Id. at 1175, citing Warren v. Fox Family Worldwide, Inc., 328 F. 3d 1136, 1139 (9th Cir. 2003). If the moving party asserts a factual attack, the court may resolve the factual disputes, looking beyond the Complaint to matters of public record, without presuming the truthfulness of the plaintiff's allegations. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000).

Here, Defendants ask the Court to take judicial notice of several affidavits and request an evidentiary hearing as to any disputed facts concerning the Court's jurisdiction, implying a factual attack.[2] The affidavits (Doc. #25, exhibits 1-5), are affidavits on the docket that were previously submitted in opposition to Plaintiffs' motion for a preliminary injunction. The affidavits address factual disputes surrounding whether or not any of the tax assessments were in error, whether Plaintiffs may have the money to repay delinquent assessments, and what procedures were followed to review Plaintiffs' account. Documents attached to two of the affidavits that were submitted show the form Plaintiffs filled out to become a reimbursing employer, the information that was sent to Indian tribes in

[2] The Court did not hold an evidentiary hearing in relation to this motion, but did hold an extensive hearing reviewing all evidence presented in connection with the preliminary injunction; the same evidence which Defendants now ask the Court to consider.

California regarding the option to be a reimbursing employer, and internal information about the reimbursing employer option to which Defendants were privy. These documents are not relevant to the question of the Court's jurisdiction, as they do not address the jurisdictional challenges brought by Defendants concerning Eleventh Amendment immunity, Ex Parte Young, or the Tax Injunction Act. Accordingly, because the extrinsic evidence submitted by Defendants is not relevant to the jurisdictional challenge, the Court will view Defendants' challenge as a facial attack, limiting review to the allegations of the Complaint and taking the allegations of the Complaint as true.

3. Judicial Notice

Defendants incorporate by reference their brief in opposition to the motion for preliminary injunction (Doc. #25), and ask the Court to take judicial notice of several affidavits that were submitted in conjunction with the opposition to the motion to dismiss. (See FN 1 of Defendants' Motion to Dismiss). Defendants request judicial notice of previously submitted declarations of Stanley M. Adge, Robert T. Brewer, Loretta Paullin-Delaney, Michelle Sutton-Riggs and Martin Swindell (Doc. #25, exhibits 1-5).

Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal

citations omitted). Courts may consider extrinsic evidence when "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document. . . ." Knievel v. ESPN, 393 F.3d 1069, 1076 (9th Cir. 2005). Further, as discussed above, the court may consider extrinsic evidence when deciding factual challenges to jurisdiction under Rule 12(b)(1).

Plaintiffs attached to the Complaint EdCo's Federal Charter of Incorporation (Doc. #1, ex. #1), and notices of levies and liens from EDD (Doc. #1, ex. #2). The Court will consider these documents, as they are attached to the Complaint. Plaintiffs also note that should the Court consider matters outside the pleadings as requested by Defendants, this will convert the Rule 12(b)(6) motion into Rule 56 motion for summary judgment. See Keams v. Tempe Technical Institute, Inc., 110 F.3d 44, 46 (9th Cir. 1997), and that if converted, all parties must be given a reasonable opportunity to present all material that is pertinent to the motions. See Fed. R. Civ. P. 12(d).

The Court will not convert the 12(b)(6) motion to dismiss into a motion for summary judgment by considering matters outside the pleadings. The affidavits do not form the basis of the Complaint, and are not matters of public record, thus the Court will not take judicial notice as requested by Defendants. See Dao v. University of California, et al., 2004 WL 1824129, *4 (N.D. Cal. Aug. 13, 2004) (noting that affidavits are not pleading exhibits unless they form the basis of the complaint, and the Ninth Circuit has found reversible error where a court

took judicial notice of an affidavit outside of the pleadings without converting the motion to dismiss into a motion for summary judgment).

B. Jurisdictional Challenges

1. Eleventh Amendment Immunity

Defendants argue that the Court should dismiss the Complaint for lack of jurisdiction. The Eleventh Amendment grants states sovereign immunity from suit. See, e.g., Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000). "Since the Supreme Court's decision in Ex parte Young, 209 U.S. 123 (1908), Courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." Id.

In Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), a tribe's claim to submerged lands located within the boundaries of the Coeur d'Alene Reservation was not found to be within the Ex Parte Young exception. Agua Caliente, 223 F.3d at 1046 (citing Coeur d' Alene, 521 U.S. at 282. The tribe in Couer D'Alene brought land title claims and sought declaratory and injunctive relief establishing its exclusive right to use and enjoy the submerged lands and prohibiting defendants from regulating the lands. The Supreme Court determined that Ex Parte Young did not apply because of the unique nature of the tribe's claims, which the Court determined were the functional equivalent of a quiet title action that would have divested the state of substantially all regulatory power over the land at

issue. Agua Caliente , 223 F.3d at 1046, citing Coeur d'Alene, 498 U.S. 505.

However, in Agua Caliente, an Indian tribe challenged the state's application California's sales tax on purchases made by non-Indians at a hotel located on a reservation as a violation of federal law prohibiting state taxation of value generating activities on reservation land. The Ninth Circuit held that this case was distinguishable from Couer d'Alene, and that the Ex Parte Young doctrine applied. The Agua Caliente Court held that action was properly characterized as a suit for declaratory relief against state officers to enjoin an ongoing violation of federal law, rather than a suit against the state itself, thus it came under the Ex Parte Young exception to Eleventh Amendment immunity, even though the tribe had an available remedy under state law. The Court stated that "there existed an alternate forum in state court in which the Tribe *could* raise its claims neither divested the district court of jurisdiction nor removed the case from the Young exception for Eleventh Amendment purposes." Agua Caliente, 223 F.3d at 1049 (emphasis in original). The Court noted that the Supreme Court's decision in Coeur d'Alene supported this conclusion, as Justice Kennedy stated in the principal opinion that even if there is a prompt and effective remedy in a state forum, a second instance in which Young may serve an important interest is when the case calls for the interpretation of federal law. Id.

Defendants contend that Plaintiffs' claims are barred by sovereign immunity and the Eleventh Amendment, as the Ex parte Young fiction does not lift the sovereign immunity bar to

Plaintiffs' claims for prospective relief against the individual Defendants. Plaintiffs argue that since they dismissed defendants the State of California and EDD, the sovereign immunity arguments are no longer relevant as to the State and EDD. With respect to the remaining Defendants, Plaintiffs contend that the Ex Parte Young exception to Eleventh Amendment immunity applies to this suit.

The Court finds Plaintiffs' argument persuasive that this suit for declaratory and injunctive relief falls within the Ex Parte Young exception to the Eleventh Amendment. Accordingly, the Court finds that Eleventh Amendment immunity is not a bar to Plaintiffs' Complaint.

2. Tax Injunction Act

Defendants next contend that Plaintiffs' claims are barred by the Tax Injunction Act. Plaintiffs argue in opposition that the Tax Injunction Act does not apply to this suit, as it is a suit brought by an Indian tribe under 28 U.S.C. § 1362.

The Tax Injunction Act, 28 U.S.C. § 1341 states that "the district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." However, the Tax Injunction Act's jurisdictional bar does not apply to Indian tribes bringing suit under 28 U.S.C. § 1362. Agua Caliente, 223 F.3d at FN 5 (citing Moe v. Confederated Tribes of the Colville Indian Reservation, 425 US 463, 472-474 (1976)). California v. Grace Brethren Church, 457 U.S. 393 (1982), the case relied on by Defendants to argue that the Tax Injunction Act bars this Court's jurisdiction is

inapplicable, as it was not a suit brought by an Indian tribe under 28 U.S.C. § 1362. Thus, this Court does not find that its jurisdiction over Plaintiffs' suit is barred by the Tax Injunction Act.

C. Claims for Relief

Plaintiffs bring two claims for relief: (1) a claim for declaratory relief, seeking a declaratory judgment that Defendants' collection actions violate Plaintiffs' tribal sovereign immunity; and (2) a claim for injunctive relief enjoining Defendants from continuing to serve notices of levy and liens on Plaintiffs' assets. Defendants argue that Plaintiffs' claims for declaratory and injunctive relief should be dismissed for failure to state a claim, under several theories.

1. Abrogation and Waiver of Sovereign Immunity

First, Defendants contend that Congress abrogated tribal sovereign immunity against the State's collection of taxes under the UI program. Alternatively, Defendants assert that by electing to participate in California's reimbursable program, Plaintiffs expressly waived tribal sovereign immunity to the State's collection of Plaintiffs' tax delinquency. Plaintiffs have alleged that Congress did not abrogate sovereign immunity, nor did the tribe waive immunity.

Federally recognized Indian tribes are immune from suit by any entity, including state governmental agencies, absent a clear waiver by the tribe or congressional abrogation. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (citing Santa Clara Pueblo v. Martinez, 436

U.S. 49, 58 (1978). Waiver cannot be implied or imputed, it must be unequivocally expressed. Santa Clara Pueblo, 436 U.S. at 58. Tribal sovereign immunity is a matter of federal law, and cannot be diminished by the States. Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751, 756 (1998).

"There is a difference between the right to demand compliance with state laws and the means available to enforce them." Kiowa, 523 U.S. at 755; see also Okla. Tax Comm'n, 498 U.S. at 514 (noting that while sovereign immunity bars the Sate from pursing the most efficient remedy, adequate alternatives, such as lobbying Congress for legislation, exist).

Further, tribal sovereign immunity also extends to entities that are arms of the tribe. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). When an Indian tribe establishes an entity to conduct business activities, that entity is immune if it functions as an arm of the tribe. Id. Further, "like foreign sovereign immunity, tribal immunity is a matter of federal law." Kiowa, at 523 U.S. 759. Though Defendants assert that Congress clearly abrogated tribal sovereign immunity when it amended FUTA to require states to permit Indian tribes to participate in state reimbursable programs, the Court is not persuaded by this argument. The 2001 FUTA Amendments at issue state that:

> The State law shall provide that a governmental entity, included an Indian tribe, or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation

> attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

26 U.S.C. § 3309(a)(2). The statute goes on to state that states may take "reasonable measures" to ensure that Indian tribes electing the reimbursable program pay their unemployment insurance tax, such as requiring a tribe to post a payment bond. 26 U.S.C. § 3309(d). However, the 2001 Amendments do not clearly state that tribal sovereign immunity is abrogated. Because abrogation of tribal sovereign immunity must be express and may not be implied, the Court does not find that the 2001 FUTA Amendments expressly abrogate tribal immunity. Likewise, Plaintiffs have alleged that the tribe did not waive its immunity, and Defendants' argument that Plaintiffs' did so simply by electing to become a reimbursable employer is not persuasive.

2. Immunity for Individual Indians

Defendants argue that tribal sovereign immunity neither bars collection activities against individual Indian's serving as Plaintiff's agents or officers, nor prohibits the seizure of tribal assets located off the reservation. As noted by Plaintiffs, none of the plaintiffs are individual Indians, therefore arguments regarding the sovereign immunity of individual Indians are not relevant to the motion to dismiss.

3. Seizure of Assets Outside the Reservation

With respect to seizure of tribal assets off the reservation, Plaintiffs assert that sovereign immunity applies to tribal assets and property, regardless of whether it is

located on or off of a reservation. The Complaint alleges that Defendants' collection actions unlawfully encumber tribal lands and other tribal assets, both on and off reservation. Compl., ¶ 31. While the state power over Indian affairs is considerably more expansive outside the reservation than within reservation boundaries, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 162 (1980), tribal immunity does extend to activities off the reservation. Winnebago Tribe of Nebraska v. Stovall, 216 F.Supp.2d 1226, 1235-36 (D. Kan., 2002) (citing Kiowa, 523 U.S. 751); aff'd 314 F.3d 1202 (10th Cir. 2003). The allegations of the Complaint are sufficient at this early stage to overcome the argument that Defendants may have some authority over tribal assets outside the reservation.

4. Tax Refund Suit

Defendants contend that Plaintiffs fail to state a claim for a tax refund because the time to petition for reassessment of their taxes has expired and they are not entitled to a refund as they have failed to pay the tax. However, the Complaint does not bring a claim for a tax refund nor contain allegations that Plaintiffs are entitled to a tax refund. On the contrary, the allegations of the Complaint are that Mainstay has been working with Defendants to determine how much money Mainstay owes, and has paid Defendants a partial refund on money owed. Compl., ¶ 26. Thus, the Court does not find merit in Defendants' tax refund argument, and will not dismiss the suit on the grounds that it is actually a tax refund case.

5. Nonjudicial Collection

In Defendants' Reply brief, they attempt to distinguish

nonjudicial collection from judicial suits, arguing that the doctrine of sovereign immunity does not bar nonjudicial collection activity. Defendants contend that to the extent that Indian tribes have sovereign immunity, it is only immunity against suit, and not immunity against nonjudicial collection activities such as the liens and levies at issue in this case. Plaintiffs address this argument in the Sur-Reply, arguing that the doctrine of tribal sovereign immunity is broader than simply immunity from suit, and extends to immunity from state administrative proceedings such as Defendants' nonjudicial collection activity. Plaintiffs note that Defendants fail to cite any authority supporting the theory that tribal sovereign immunity from state jurisdiction applies only to court proceedings and not to state administrative processes.

Tribal sovereign immunity is based on Congress' recognition that Indian tribes possess the attributes of a common law sovereign. See In re Greene, 980 F.2d 590, 596 (9th Cir. 1992). Plaintiffs contend that there is no meaningful distinction between a sovereign being involuntarily subjected to state court proceedings, including the court's authority to enforce its decision, and a sovereign being involuntarily subjected to a state administrative process, including the state agency's authority to administratively enforce its decision. Consistent with this reasoning, courts have recognized tribal immunity from state administrative processes. In Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd., 60 Cal.App.4th 1340, 1347-48 (1998), the court ruled that the tribe had sovereign immunity from the workers' compensation process and that the

Worker's Compensation Appeals Board had no jurisdiction over the tribe to enforce its laws, based on sovereign immunity.

In Winnebago Tribe, the District Court issued a preliminary injunction, affirmed by the Tenth Circuit, barring the State of Kansas from enforcing its Motor Vehicle Fuel Tax Act against a tribal corporation. Kansas was, among other things, seizing the tribal corporation's property, entering orders for jeopardy assessments, and issuing tax warrants. The court granted the tribe's motions for a temporary restraining order and a preliminary injunction, finding that these nonjudicial collection activities to violate the tribe's sovereign immunity. Winnebago Tribe, 216 F.Supp.2d at 1235-1240.

Tribal immunity is a matter of federal law and not subject to diminution by the states. Kiowa, 523 U.S. at 756. In the absence of countervailing authority, the Court finds persuasive Plaintiffs' argument that sovereign immunity bars nonjudicial collection activities, as the state cannot circumvent tribal immunity by obtaining through administrative procedures what could not be obtained through the judicial process. At this stage in the proceedings, the Court will not dismiss the Complaint on the basis of Defendants' argument that the distinction between liens and levies obtained through a state administrative procedure and those obtained through a judicial process is sufficient to overcome the protections of tribal sovereign immunity.

6. 25 U.S.C. § 476

Lastly, Defendants' Reply brief raised the argument that "Plaintiffs allege in their Complaint, but do not brief in

opposition to EDD's motion, that Defendants' nonjudicial collection activity violates 25 U.S.C. section 476." Reply, p. 11. Defendants contend that 25 U.S.C. § 476 is not a source of substantive rights, and that the Complaint should be dismissed for that reason. Defendants did not raise any argument against 25 U.S.C. § 476 in their Motion to Dismiss, thus the Court asked Plaintiffs to address this new argument in the Sur-Reply.

The Indian Reorganization Act of 1934 ("IRA") provides that an Indian tribe may elect to organize (pursuant to its terms) and to adopt a constitution, which shall become effective upon ratification by the tribe and approval of the Secretary of the Interior. 25 U.S.C. § 476(a). The Complaint alleges that "Blue Lake Rancheria is governed by a Constitution, adopted under the Indian Reorganization Act, 25 U.S.C. § 476, and approved by the Secretary of the United States Department of Interior." Compl., ¶ 17. Section 476(e) provides that, upon approval of the constitution:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.

Plaintiffs point out that Defendants offer no authority to support their argument that Section 476 is not a source of substantive rights and mandates dismissal of the complaint. Further, Plaintiffs argue that the Supreme Court has directed that statutes are to be construed liberally in favor of Indian

tribes, with ambiguous provisions interpreted in their benefit. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 US 251, 269 (1992). The Ninth Circuit has viewed Section 476 as endowing tribes with the right to lease tribal land only with the tribes' consent. See Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1259 (9th Cir. 1976) (noting that Section 476 "explicitly gives the tribe the right to prevent the lease of tribal lands."). Thus, Plaintiffs' contend that Section 476 has been recognized as a source of substantive rights regarding a tribes' control of its property. While the impact of Section 476 has not been extensively briefed, the Court at this time is not persuaded by Defendants' unsupported argument that Plaintiffs' Complaint must be dismissed for failure to state a claim as to which relief may be granted under 25 U.S.C. § 476.

IV. ORDER

For the reasons set forth above, Defendants' motion to dismiss is DENIED. Defendants are ordered to file their Answer to the Complaint within twenty (20) days of the date of this Order.

IT IS SO ORDERED.

Dated: December 5, 2011

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE