IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EL DORADO COUNTY, a Political Subdivision of the State of California,

Plaintiff,

v.

GAIL A. NORTON, in her Capacity as Secretary of the Interior, PHILIP N. HOGAN, in his Capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, AURENE MARTIN, in her Capacity as Assistant of the Interior for Indian Affairs, and BUREAU OF INDIAN AFFAIRS,

Defendants.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Intervenor.

NO. CV S-02-1818 GEB KJM

ORDER

Plaintiff filed a First Amended Complaint challenging both the approval of a casino project under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), and the federally recognized status of the Indian Band sponsoring the proposed casino. The Federal Defendants move to dismiss or strike Counts 12 and 13 of the Amended Complaint, asserting that the Band's Indian status is not subject to challenge. The Band, intervening in the suit, brings a

motion for judgment on the pleadings, making substantively the same arguments.

BACKGROUND

In its initial complaint, Plaintiff El Dorado County ("the County") asserted that defendants National Indian Gaming Commission ("NIGC"), Chairman of the NIGC, the Bureau of Indian Affairs ("BIA"), and Secretary of the Interior ("the Federal Defendants") committed numerous violations of NEPA by approving the development and interchange components of a hotel and casino project. The project was proposed by the Shingle Springs Band of Miwok Indians ("the Band"), and was to be located at the Shingle Springs Rancheria in El Dorado County. The Band moved to intervene in the action, and its application was granted.

The County subsequently filed a motion seeking leave to file a first amended complaint. The motion was granted and the First Amended and Supplemental Complaint was filed on March 3, 2003. The Amended Complaint adds claims challenging the federal recognition of the Band as an Indian tribe and the classification of the Shingle Springs Rancheria as "Indian lands" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA").[1] In its twelfth claim, the County requests a declaratory finding that the Band may not organize under the Indian Reorganization Act of June 18, 1934, 73 P.L. 383 ("IRA") and that the Band's Articles of Association are not an Indian Constitution. (First Amended Complaint ¶¶ 139-144.) In its thirteenth claim, the County requests a finding that the BIA violated the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. ("APA"), by

[1] Supplemental claims regarding an environmental assessment completed after the filing of the action were also added.

recognizing the Band as an Indian tribe unlawfully and without Congressional authority. (First Amended Complaint ¶¶ 145-155.)

In 1979, the BIA published an administrative list identifying "Indian Tribal Entities That have a Government-to-Government Relationship With the United States" ("Tribal Status List"). The Band was listed as one of the Tribes on the 1979 List.[2] See 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979). The list was subsequently republished on a regular basis, each publication featuring the "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California." See, e.g., Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328, 46331 (July 12, 2002); 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995); 53 Fed. Reg. 52829, 52831 (Dec. 29, 1988); 47 Fed. Reg. 53130, 53133 (Nov. 24, 1982).

The Band began to develop and operate a casino on the Rancheria in the mid-1990's. The County contends it opposed this project at that time "because it posed unacceptable environmental and public health and safety risks from unsafe road access, inadequate water supply and wastewater disposal, substandard construction, and fire hazards." (First Amended Complaint ¶ 36.)

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[2] The County contends that the 1979 list did not include the Band, listing only the "Shingle Springs Rancheria (Verona Tract) of Miwok Indians, California." (County Opp'n. to Fed. Mot. at 11.) The Federal Defendants respond that the list actually contained the listing "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California." (Fed. Mot. at 8.) The specific wording is unimportant, as it is apparent that the term Rancheria may be used to refer to both federal trust lands and the Indian Bands for whom the land was purchased. See, e.g., United Auburn Indian Community v. Sacramento Area Director, Bureau of Indian Affairs, No. 92-186-A, 1993 I.D. LEXIS 9 (I.B.I.A. May 28, 1993).

The Band filed an Answer to the First Amended Complaint on June 19, 2003. On July 21, 2003, the Federal Defendants filed a motion seeking dismissal of counts twelve and thirteen of the First Amended Complaint. They sought in the alternative to strike count twelve. The Band filed a motion for judgment on the pleadings on the same day, seeking dismissal of counts twelve and thirteen and asking that count twelve be stricken.

DISCUSSION

I. Timeliness Of Motion To Strike

Plaintiff contends that the Band's motion to strike should be denied as untimely because it was filed after the Band filed its answer to the complaint. Rule 12(f) of the Federal Rules of Civil Procedure provides that a motion to strike may be made "[u]pon motion made by a party before responding to a pleading . . ."[3] The Band's motion to strike was filed over a month after it filed its Answer to the First Amended Complaint, and is therefore untimely. See Culinary and Service Employees Union, AFL-CIO Local 555 v. Hawaii Employee Benefit Administration, 688 F.2d 1228, 1232 (9th Cir. 1982) ("The district court has authority under Rule 12(f) to strike a pleading, in whole or in part, only if a motion is made before the moving party has filed a responsive pleading . . ."); Wilson v. Cagle, 711 F. Supp. 1521, 1535 (N.D. Cal. 1988) (same).[4] The Band's motion to strike is denied.

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[3] Unless otherwise indicated, all citations to Rules herein refer to the Federal Rules of Civil Procedure.

[4] The Band asserts that Rule 12(f) allows district courts to independently strike claims, even in the absence of an appropriate motion. On the contrary, the Ninth Circuit in Culinary and Service Employees Union found similar reasoning to be grounds for reversal. See 688 F.2d at 1232.

II. Timeliness Of Motion For Judgment On The Pleadings

Plaintiff contends that the Band's motion for judgment on the pleadings should be dismissed as untimely because it was filed before the Federal Defendants filed their Answer to the First Amended Complaint. Rule 12(c) provides that a motion for judgment on the pleadings may be brought "[a]fter the pleadings are closed but within such time as not to delay the trial. . ." Ordinarily, "this means that a rule 12(c) motion must await the answers of all defendants." Moran v. Peralta Community College District, 825 F. Supp. 891, 894 (N.D. Cal. 1993); Carmen v. San Francisco Unified School District, 982 F. Supp. 1396, 1401 (N.D. Cal. 1997). The Federal Defendants have not yet filed an Answer to the First Amended Complaint, so the pleadings are not "closed." The Band's motion for judgment on the pleadings is premature.

Nevertheless, it is apparent that most of the substantive arguments raised in the Band's motion raise a challenge to this court's subject matter jurisdiction. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. . . .", Rule 12(h)(3) allows for even an untimely motion to prompt examination of subject matter jurisdiction. See Augustine v. United States, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983). See also Mertens v. Flying Tiger Line, Inc., 35 F.R.D. 196, 197 (S.D.N.Y. 1963); Graham v. United States, 2002 WL 188573, at *1 (E.D. Pa. Feb. 5, 2002). To the extent that the Band's motion challenges subject matter jurisdiction, its arguments will therefore be considered along with the Federal Defendants' jurisdictional challenges; any portion of the Band's motion which does not challenge subject matter jurisdiction is denied as untimely.

III. Motion To Dismiss Count Twelve: Lack Of Case Or Controversy

Plaintiff requests a declaratory judgment that the Band does not have a right to organize under the IRA, and that the Articles of Association adopted by the Band in 1976 do not constitute an Indian Tribal Constitution. (First Amended Complaint ¶¶ 139-43.) Defendants seek dismissal this claim, contending that it does not raise a case or controversy for jurisdictional purposes.[5]

The Declaratory Judgment Act creates a remedy for cases of "actual controversy," see 28 U.S.C. § 2201, where there exists a "substantial controversy, between parties having adverse interests, or a sufficient immediacy and reality to warrant issuance of a declaratory judgment." Culinary Workers Union, Local 226, v. Del Papa, 200 F.3d 614, 617 (9th Cir. 1999) (citation omitted). An actual controversy is not at issue when Plaintiff's claim for declaratory judgment merely "attempts to gain a litigation advantage by obtaining an advance ruling on an affirmative defense." Calderon v. Ashmus, 523 U.S. 740, 747 (1998).

The underlying controversy here relates to the propriety and justiciability of the Band's federal recognition as an Indian Tribe. Although organization under the IRA may be a persuasive factor in a judicial determination of whether a group constitutes a Tribe, see Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992), a declaratory finding that the Band cannot organize under the IRA does not preclude a finding that it was federally recognized. See Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 604 (9th Cir. 1984) ("The purpose of the IRA was to enable and encourage Indian

[5] The County offered neither written nor oral argument against Defendants' motions to dismiss and strike Count 12.

self-government. Organization under the IRA was not the only form of self-government acceptable to Congress.") (citation omitted), aff'd, 471 U.S. 195 (1985); Logan v. Andrus, 457 F. Supp. 1318, 1329 (N.D. Okla. 1978) ("[A]bsent express legislation to the contrary, the Osage tribe possesses the inherent sovereign power to form a constitutional government, irrespective of any authority which might have been granted in [the IRA and Oklahoma Indian Welfare Act]. . . .").

Here, it appears that Plaintiff is attempting to prevent future argument that the enactment of the Band's 1976 Articles of Association constituted federal recognition. Resolution of this element "would not resolve the entire case or controversy" as to Defendants, "but would merely determine a collateral legal issue governing certain aspects of their pending . . . suit[]." Calderon, 523 U.S. at 747. Count 12 does not state a justiciable case or controversy, and is therefore dismissed for lack of subject matter jurisdiction.[6]

IV. Motion To Dismiss Count Thirteen: Statute Of Limitations

The County alleges in Count 13 that the BIA listing of the Band on its Tribal Status List in 1979, 1981 and 1995 violated the APA because it was contrary to law and without Congressional authorization. (First Amended Complaint ¶¶ 32, 34-35, 154.) It alleges that "[t]he NIGC's approval of the Development Component of the [current] Casino Project" also violated the APA because the approval was "based upon and applie[d] the BIA's unlawful identification of the Band as an Indian tribe. . . ." (Id. ¶ 155.)

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[6] Because Defendants' motions to dismiss Count 12 under Rule 12(b)(1) are granted, the Federal Defendants' motion to dismiss under 12(b)(6) and to strike are moot and need not be reached.

The Band now seeks to dismiss Count 13, arguing that the County's challenge to the 1979 Tribal Status List is barred by the statute of limitations.[7] (Band Mot. at 15-17.) The County argues that the recognition of the Band on the Tribal Status List did not become "final as applied to the County" until the development component of the current casino project was approved by the NIGC on January 22, 2002, (First Amended Complaint ¶ 6), and that its challenge to the Tribal Status List did not accrue until that time.

The statute of limitations governing the APA requires an action to be "filed within six years after the right of action first accrues." Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364 (9th Cir. 1990) (citing 28 U.S.C. § 2401(a)). A cause of action does not accrue under § 2401(a) "until plaintiff[] kn[ows] or should . . . know[] the facts upon which [its] claims are based. . . ." See Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, North Dakota and South Dakota v. United States, 895 F.2d 588, 594 (9th Cir. 1990). Such actions also do not generally accrue until plaintiff "can successfully maintain a suit in the district court." Allen v. United Food & Commercial Workers Int'l Union, AFL-CIO, CLC, 43 F.3d 424, 427 (9th Cir. 1994). The County's APA claim was therefore required to have been brought "within six years of the agency's

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[7] The Federal Defendants merely "note" that the County's claim in Count 13 is barred by the statute of limitations, (Fed. Mot. at 13 n.9), but it is appropriate to consider the Band's motion under Rule 12(h)(3) because accrual of the APA statute of limitations is a jurisdictional question. See McGraw v. United States, 281 F.3d 997 (9th Cir.) (considering statute of limitations in 12(b)(1) motion), amended and superseded on other grounds, 298 F.3d 754 (9th Cir. 2002); see also Ramming v. United States, 281 F.3d 158, 165 (5th Cir. 2001) ("Limitations periods in statutes waiving sovereign immunity are jurisdictional. . . .").

application of the disputed decision to the [County]." Wind River Mining Corp. v. United States, 946 F.2d 710, 715-716 (9th Cir. 1991).[9]

The question disputed here is when the Band's recognition as a sovereign entity was "applied" to the County in a way that could have supported a legal challenge. There is no dispute that the Tribal Status List containing the Band's listing was published in the federal register in 1979, and on numerous subsequent dates. These publications generated constructive notice that the BIA recognized the Band's sovereign status, which satisfies the notice element for accrual of the County's challenge to the Band's recognized status. See Shiny Rock, 906 F.2d at 1364 (finding publication of an agency action in the Federal Register to be "legally sufficient notice to all interested or affected persons regardless of actual knowledge. . .").

The Band contends this listing was applied to the County when the Band exercised "civil regulatory jurisdiction of any kind." (Reporter's Transcript at 15:14-23.) However, the only regulatory actions which have been placed at issue are the Band's attempt "in the mid-1990's" to develop and operate a casino and its attempt in 2002 to gain approval of the current casino project. (First Amended Complaint ¶¶ 3, 36.) For purposes of this motion, therefore, it need only be determined whether the County was first subjected to the Band's sovereign powers when the casino was developed and operated in the 1990's, or when the second casino project was approved in 2002.

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[9] The County's claim is governed by the Wind River standard because it "contests the substance of an agency decision as exceeding constitutional or statutory authority." See 946 F.2d at 715; see also Artichoke Joe's California Grand Casino v. Norton, __ F. Supp. __, 2003 WL 21995180, at *7 (E.D. Cal. 2003) ("Artichoke Joe's II") (applying Wind River to similar APA challenge).

The County argues it had no basis for challenging the Band's Tribal Status in the 1990s because the Band's first casino was a Class II gaming facility, which is "legal in California." (Reporter's Transcript at 46:8-13.) In other words, although the Band's first casino was developed and operated pursuant to the Band's sovereign authority, a similar casino could have been legally operated on the County's own lands. See 25 U.S.C. § 2710(b)(1)(A) (providing that Tribes may engage in and regulate class II gaming on Indian Lands when "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity").[9]

However, the County alleges in its First Amended Complaint that it opposed the Band's first casino project, not because it involved class II gaming, but "because it posed unacceptable environmental and public health and safety risks [to the County] from unsafe road access, inadequate water supply and wastewater disposal, substandard construction, and fire hazards." (First Amended Complaint ¶ 36.) The County was put on notice in 1996 that the Band was acting in a sovereign capacity to construct and operate the casino on Rancheria land, when both the County and the Band in its sovereign capacity were added as third party defendants to a suit challenging road use associated with the construction and operation of the casino. See Reporter's Transcript at 12:17-23; Shingle Springs Rancheria v. Grassy Run Community Services District, et al., No. Civ. S-96-1414-

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[9] In contrast, class III gaming in California may only be conducted on Indian lands. See, i.e., Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1122 (E.D. Cal. 2002) ("Artichoke Joe's I") ("California permits class III gaming by tribes with compacts under Proposition 1A. . . .").

DFL/JFM (E.D. Cal. filed Aug. 1, 1996), Docket No. 28 (Counterclaim and Cross-Claim), filed Oct. 23, 1996.[10]

The County admittedly suffered detrimental effects resulting from the Band's exercise of sovereign power, even though it did not bring suit to challenge the "unacceptable environmental and public health and safety risks" posed by construction and operation of the first casino. The power held by the Band in its sovereign capacity was involved in that dispute, since the County virtually acquiesced that it lacked regulatory authority over the Band sufficient to address the environmental matters at issue.[11] The Band's recognition in 1979 was therefore "applied" to the County when it suffered detrimental effects arising from construction and operation of the first casino.

Although the injury allegedly suffered by the County in 1996 as a result of the Band's first casino may have been a lesser injury than that claimed to have been suffered in 2002, "the statute of limitations [does] not begin to run . . . when the [Band] last applie[s the agency decision], but instead when the [Band] first

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[10] Counsel for the Band identified the case number for this action in a September 16, 2003 letter mailed to the Judge and filed herewith.

[11] State entities are generally precluded from regulating the exercise of Tribal sovereignty over Indian lands, see McClanahan v. Arizona, 411 U.S. 164, 172 (1973) (federal preemption), even when a Tribe's regulations "affect[] land use outside the reservation." Nance v. E.P.A., 645 F.2d 701, 714-15 (9th Cir. 1981) (upholding Tribal control over the entrance of pollutants onto the reservation); see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 268-69 (1992) (disapproving application of County excise tax to reservation lands); Gobin v. Snohomish County, 304 F.3d 909, 914-16 (9th Cir. 2002) (disapproving County's right to "exert in rem land use regulation" over reservation lands).

applied the [decision] to [the County]." Florida Keys Citizens Coalition, Inc. v. West, 996 F. Supp. 1254, 1256 (S.D. Fla. 1998) (emphasis in original). "This comports with the notion that a plaintiff's cause of action accrues when [it] first learns of a wrong and can then sue to correct that wrong." Id. The County waited for more than six years, following the BIA's recognition of the Band as a sovereign Tribe and the application of adverse effects from that recognition to the County, before raising its APA challenge. The statute of limitations for the APA claim has therefore expired, and Count 13 is dismissed.[12]

The County may file an amended complaint within twenty days of the date this order is filed, amending the allegations in Counts 12 and 13, if it is able to do so consistent with the findings stated herein.

IT IS SO ORDERED.

DATED: October 28, 2003

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

[12] Because Count 13 is barred by the statute of limitations, the County's request for discovery on the issue of federal recognition is denied. Moreover, this ruling moots Defendants' argument that Count 13 relates to a non-justiciable political question. Defendants' motions to strike the extrinsic evidence presented by Plaintiff in support of its claim also need not be reached.

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United States District Court
for the
Eastern District of California
October 29, 2003

* * CERTIFICATE OF SERVICE * *

2:02-cv-01818

El Dorado County

v.

Secretary of Int

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 29, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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