

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**BRUCE ALAN INGRASSIA AND
MILLIMAC ENTERPRISES,**)
)
 Plaintiffs,)
)
 v.)
)
 **CHICKEN RANCH BINGO AND
CASINO, AND CHICKEN RANCH
RANCHERIA,**)
)
 Defendants.)
)

CIV-F-09-1266 AWI SMS

**ORDER RE: MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

I. History¹

In 1986, Plaintiffs Bruce Alan Ingrassia and Millimac Enterprises produced a number of original visual images among them, “MiWuk Indian Riding on a Chicken.” Plaintiffs printed this image on hats, shirts, and other souvenirs. Defendants Chicken Ranch Rancheria Tribe and Chicken Ranch Bingo and Casino purchased these items for resale. Plaintiffs retained the copyright under the arrangement. It is unclear whether there was a written contract between Plaintiffs and Defendants. The business relationship lasted for a number of years and ended at an unspecified time. In 2007, Plaintiffs discovered that Defendants were selling items with the

¹The factual history is provided for background only and does not form the basis of the court’s decision; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 image of “MiWuk Indian riding on a Chicken” produced without Plaintiffs’ permission.

2 Plaintiff sued Defendants in the Superior Court of California, County of Tuolumne on
3 June 9, 2009, alleging breach of contract, common counts, and copyright infringement.

4 Defendants removed the case to federal court on July 20, 2009 under 28 U.S.C. §1441(b).

5 Defendants then filed a motion to dismiss for lack of subject matter jurisdiction under Fed. R.

6 Civ. Proc. 12(b)(1) due to tribal sovereign immunity. Plaintiffs opposed the motion. The court

7 requested additional briefing and evidence which the parties provided. The matter was taken

8 under submission without oral argument.

9

10

II. Legal Standards

11

“Sovereign immunity limits a federal court’s subject matter jurisdiction over actions

12

brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an

13

action against an Indian tribe.” Alvarado v. Table Mt. Rancheria, 509 F.3d 1008, 1015-16 (9th

14

Cir. 2007). “Suits against Indian tribes are...barred by sovereign immunity absent a clear waiver

15

by the tribe or congressional abrogation.” Oklahoma Tax Comm’n v. Citizen Band Potawatomi

16

Indian Tribe, 498 U.S. 505, 509 (1991); Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th

17

Cir. 1993). “There is a strong presumption against waiver of tribal sovereign immunity.”

18

Demontiney v. United States, 255 F.3d 801, 811 (9th Cir. 2001). Waiver of sovereign immunity

19

by a tribe may not be implied and must be expressed unequivocally. Kescoli v. Babbitt, 101 F.3d

20

1304, 1310 (9th Cir. 1996). Similarly, congressional abrogation of sovereign immunity may not

21

be implied and must be “unequivocally expressed” in “explicit legislation.” Krystal Energy Co.

22

v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2003). The plaintiff bears the burden of

23

showing a waiver of tribal sovereign immunity. See Breakthrough Mgmt. Group, Inc. v.

24

Chukchansi Gold Casino & Resort, 2007 U.S. Dist. LEXIS 67422, *7 (D. Colo. 2007);

25

Dontigney v. Conn. BIAC, 2006 U.S. Dist. LEXIS 55625, *10 (D. Conn. 2006); Morgan v.

26

Coushatta Tribe of Indians of La., 2001 U.S. Dist. LEXIS 25291, *7 (E.D. Tex. 2001).

27

Tribal sovereign immunity applies in both federal and state courts. Snow v. Quinault

28

Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), citing Santa Clara Pueblo v. Martinez, 436

1 U.S. 49, 58 (1978). “The immunity...extends to suits for declaratory and injunctive relief,” and
2 “is not defeated by an allegation that [the tribe] acted beyond its powers.” Imperial Granite Co.
3 v. Pala Band of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991). Tribal sovereign
4 immunity is not dependent on a distinction between on-reservation and off-reservation conduct
5 nor is it dependent upon a distinction between the governmental and commercial activities.
6 Kiowa Tribe v. Manufacturing Techs., 523 U.S. 751, 754-55 (1998). A tribe’s sovereign
7 immunity extends both to tribal governing bodies and to tribal agencies which act as an arm of
8 the tribe. Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). Tribal sovereign
9 immunity extends to tribal officials when acting in their official capacity and within the scope of
10 their authority but not to individual tribe members generally. United States v. Oregon, 657 F.2d
11 1009, 1013 n.8 (9th Cir. 1981).

12 13 **III. Discussion**

14 **A. Tribal Sovereign Immunity**

15 Defendants claim tribal sovereign immunity. Plaintiffs deny that either of the Defendants
16 have immunity from suit.

17 Plaintiffs provide no reason for their position with regards to the Chicken Ranch
18 Rancheria tribe. “The Supreme Court has consistently treated tribal recognition decisions by
19 Congress or the executive as entitled to a large degree of deference.” Artichoke Joe’s Cal. Grand
20 Casino v. Norton, 278 F. Supp. 2d 1174, 1179 (E.D. Cal. 2003). The Chicken Ranch Rancheria
21 of Me-Wuk Indians of California are included on a list of federally acknowledged tribes
22 promulgated by the Bureau of Indian Affairs, Department of the Interior. 72 Fed. Reg. 13648
23 (March 22, 2007). “[T]he inclusion of a group of Indians on the Federal Register list of
24 recognized tribes would ordinarily suffice to establish that the group is a sovereign power entitled
25 to immunity from suit.” Cherokee Nation v. Babbitt, 117 F.3d 1489, 1499 (D.C. Cir. 1997).

26 Plaintiffs assert that “no record has been presented to establish that the Casino operates as
27 an arm of the Tribe” sufficient to warrant immunity. Doc. 13, Plaintiffs’ Opposition, at 5:17-18,
28 quotations and citations omitted. Plaintiffs state “Chicken Ranch Bingo and Casino was and is a

1 business entity or association, the form of which is unknown at this time” and that Chicken
2 Ranch Rancheria tribe owned a business entity that “conducted business activities open to the
3 general public, including but not limited to gaming and retail sales of clothing and other
4 paraphernalia, primarily based at the commercial facility commonly known as Chicken Ranch
5 Bingo and Casino.” Doc. 1, Ex. 4, Complaint at 4:10-22. Defendants provide the declaration of
6 the Tribal Administrator, which states “The Tribe conducts gaming on its tribal trust lands under
7 the fictitious business name ‘Chicken Ranch Bingo and Casino’ pursuant a Tribal-State class III
8 gaming compact with the State of California and the requirements of the Indian Gaming
9 Regulatory Act. The Tribe, dba, the Chicken Ranch Bingo and Casino is not a corporation under
10 either tribal, state or federal law.” Doc. 17, Amended Costa Declaration, at 2:4-9. Defendants
11 have established their entitlement to tribal sovereign immunity.
12

13 **B. Abrogation and Waiver**

14 The burden is thus on Plaintiffs to show waiver of immunity from suit. Plaintiffs,
15 explicitly or implicitly, make four arguments: the U.S. Congress abrogated immunity in the
16 Copyright Act, the tribal-state compact waives immunity, the contract with Plaintiffs waives
17 immunity, and removal to federal court waives immunity.

18 Plaintiffs state, “It may well be found that Congress indeed intended the Copyright Act,
19 17 U.S.C. 101, et seq., as amended, to apply to all persons, foreign and domestic, Indian and
20 otherwise.” Doc. 13, Plaintiffs’ Opposition, at 6:11-14. As a general matter, “Congress may not
21 abrogate state sovereign immunity pursuant to its Article I powers.” Fla. Prepaid Postsecondary
22 Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 636 (1999). Federal copyright law is
23 enacted pursuant to Article 1, Section 8, Clause 8 of the U.S. Constitution, commonly termed the
24 copyright and patent clause. Plaintiffs provide no compelling argument that tribal immunity
25 should not apply in copyright suits.

26 Plaintiffs state, “Defendants have waived their purported defense of ‘sovereign immunity’
27 specifically or implicitly, by accepting and agreeing to a tribal-state compact, as contemplated in
28 accordance with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701, et seq.” Doc. 19,

1 Plaintiffs' Additional Memorandum, at 3:16-20. Plaintiffs argument fails for a number of
2 reasons. Among them, "The IGRA waives tribal sovereign immunity in the narrow category of
3 cases where compliance with the IGRA is at issue." Lewis v. Norton, 424 F.3d 959, 962 (9th Cir.
4 2005), citing Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997).
5 IGRA "prescribes the conditions under which Indian tribes may engage in commercial gaming on
6 their reservations." City of Roseville v. Norton, 348 F.3d 1020, 1022 (D.C. Cir. 2003). This suit
7 does not have to do with IGRA compliance so the waiver does not apply.

8 Plaintiffs argue that the original contract through which the artwork was produced
9 constitutes waiver. They do not provide the actual written documents, instead producing a
10 declaration of Plaintiff Ingrassia in which he states,

11 Defendant CHICKEN RANCH paid me cash back in 1986, said 'NO' to the work for
12 hire, did not pay for any artwork, and received a computer receipt. Also on or about June
13 19, 1995, I delivered an invoice to SANDRA FELICE on behalf of CHICKEN RANCH.
14 The invoice clearly states that the transaction was **not** a work for hire (with the check
15 mark in the NO box). The tribe never paid me for the artwork, nor were they billed for the
16 artwork or any of the setups. It was thus clearly understood and accepted by the
17 CHICKEN RANCH Defendants, without any protestations of immunity, that a lawful
18 copyright was asserted and invoked, and that ownership of the artwork and of the
19 copyright was retained by me and my company.

20 Doc. 22, Ingrassia Declaration, at 2:19-3:2. Even assuming Plaintiff Ingrassia has accurately
21 described the contents of the contract, it is plain that there is no waiver. Plaintiffs argue that
22 since Defendants did not affirmatively raise immunity at the time of contract formation,
23 immunity is lost. That is an incorrect statement of law. Tribal immunity applies unless Plaintiffs
24 can show an affirmative waiver in the contract. Plaintiffs have not provided any indication that
25 an affirmative waiver exists within the contract.

26 The last issue raised is whether removal from state to federal court constitutes waiver of
27 the immunity. The case law is not unanimous on the matter. In an older case from the District of
28 Nevada, the court found that removal did constitute waiver: "In the instant case, Respondent
Tribe filed a notice of removal joinder...We have found no Ninth Circuit case law directly on
point regarding the question of whether a defendant Indian tribe's removal of a case to federal
court constitutes a waiver of tribal sovereign immunity. However, Indian tribal sovereign
immunity is closely analogous to a state's immunity from suit under the Eleventh Amendment."

1 State Eng'r v. S. Fork Band of the Te-Moak Tribe of W. Shoshone Indians, 66 F. Supp. 2d 1163,
2 1172-73 (D. Nev. 1999). Though the case law concerning removal's effect on the Eleventh
3 Amendment was mixed, the District of Nevada concluded that immunity was waived in that case.
4 Subsequently, the U.S. Supreme Court found that "removal is a form of voluntary invocation of a
5 federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation
6 of a matter (here of state law) in a federal forum." Lapides v. Bd. of Regents, 535 U.S. 613, 624
7 (2002). The U.S. Supreme Court noted that for the claims in question, "a state statute had
8 waived sovereign immunity from state-law suits in state court." Lapides v. Bd. of Regents, 535
9 U.S. 613, 616 (2002).

10 Case law setting out the bounds of the Eleventh Amendment can not be directly applied
11 to tribal sovereign immunity without analysis as "Tribal sovereign immunity...is not precisely the
12 same as either international law sovereign immunity or sovereign immunity among the states." In
13 re Greene, 980 F.2d 590 (9th Cir. 1992), Rymer concurrence. The sovereign immunity of foreign
14 states is generally governed by the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §1602
15 et seq.) which includes a provision stating, "A foreign state shall not be immune from the
16 jurisdiction of courts of the United States or of the States in any case in which the foreign state
17 has waived its immunity either explicitly or by implication." 28 U.S.C. §1605(a)(1). The U.S.
18 Supreme Court terms Native American tribes "domestic dependent nations." Oklahoma Tax
19 Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991), citations omitted.
20 The Ninth Circuit has specifically examined whether they are foreign or domestic governments
21 and concluded they are domestic. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059 (9th
22 Cir. 2004). It follows that the Foreign Sovereign Immunities Act of 1976 does not apply to
23 Native American tribes. See Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006).

24 Subsequent to Lapides, an opinion from the Northern District examined the issue with
25 regard to tribal immunity and concluded that removal does not constitute waiver:

26 'Tribes are, foremost, sovereign nations.' American Vantage Companies, Inc v Table
27 Mountain Rancheria, 292 F.3d 1091, 1096 (9th Cir. 2002). Even though Indian tribes are
28 not foreign sovereigns, id., the Supreme Court has nevertheless found that in determining
whether an Indian tribe has waived its sovereign immunity, '[i]nstructive here is the law
governing waivers of immunity by foreign sovereigns.' Id. at 421 n.3; see also Kiowa

1 Tribe [of Oklahoma v Manufacturing Technologies, Inc, 523 U.S. 751, 759 (1998)]
2 ([W]e find instructive the problems of sovereign immunity for foreign countries.’).

3 Foreign sovereigns do not waive their sovereign immunity merely by removing to federal
4 court. See Rodriguez v Transnave Inc, 8 F.3d 284, 289 (5th Cir. 1993). Otherwise, a
5 foreign sovereign would be forced to ‘choose between asserting removal or the immunity
6 defense, but not both.’ Id. Among the reasons cited for this legal principle are the need for
7 a ‘uniform body of law in this area’ and the distinctly federal nature of foreign policy and
8 relations. Id. Similarly, because ‘Congress possesses plenary power over Indian affairs,’
9 South Dakota v Yankton Sioux Tribe, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L. Ed. 2d
10 773 (1998), ‘Indian tribes fall under nearly exclusive federal, rather than state, control.’
11 American Vantage Companies, 292 F.3d at 1096. Tribal sovereignty ‘exists only at the
12 sufferance of Congress and is subject to complete defeasance.’ United States v. Wheeler,
13 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). Given the distinctly federal
14 nature of Indian tribal sovereignty, the court finds the Supreme Court’s analogy with
15 foreign sovereigns persuasive in this setting. Forcing Indian tribes sued in state court to
16 choose between removal or waiver of sovereign immunity would interfere with federal
17 plenary power and interests in this arena. See Kiowa Tribe, 523 U.S. at 759 (‘Like foreign
18 sovereign immunity, tribal immunity is a matter of federal law.’). Cf. Maynard v.
19 Narragansett Indian Tribe, 984 F.2d 14, 15-16 (1st Cir. 1993) (relying on Indian tribe’s
20 sovereign immunity against claims after removal).

21 Sonoma Falls urges that the court equate sovereign immunity with Eleventh Amendment
22 and apply cases finding waiver of Eleventh Amendment immunity by the mere act of
23 removal. For this proposition, Sonoma Falls relies primarily on Lapides v Board of
24 Regents, 535 U.S. 613, 122 S Ct 1640, 1646, 152 L. Ed. 2d 806 (2002). Eleventh
25 Amendment immunity serves to ‘avoid the indignity of subjecting a State to the coercive
26 process of judicial tribunals at the instance of private parties,’ Puerto Rico Aqueduct and
27 Sewer Auth v Metcalf & Eddy, Inc, 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605
28 (1993), and is distinct from a state’s underlying sovereign immunity from suit. See
Ortiz-Feliciano v Toledo-Davila, 175 F.3d 37, 40 n.2 (1st Cir. 1999). The Court in
Lapides makes a similar distinction and limits its holding accordingly. See 122 S. Ct. at
1643 (‘Nor need we address the scope of waiver [of Eleventh Amendment immunity] by
removal in a situation where the State’s underlying sovereign immunity from suit has not
been waived or abrogated in state court.’). Indeed, throughout the opinion, the Court in
Lapides is careful to refer to Eleventh Amendment immunity and sovereign immunity as
distinct and separate doctrines.

29 Sonoma Falls Developers, LLC v. Dry Creek Rancheria Band of Pomo Indians, 2002 U.S. Dist.
30 LEXIS 28087, *16-19 (N.D. Cal. 2002).

31 After Sonoma Falls, the Ninth Circuit expanded on Lapides in a case concerning both
32 federal and state claims by holding, “removal itself affirmatively invokes federal judicial
33 authority and therefore waives Eleventh Amendment immunity from subsequent exercise of that
34 judicial authority....[We] hold to a straightforward, easy-to-administer rule in accord with
35 Lapides: Removal waives Eleventh Amendment immunity.” Embury v. King, 361 F.3d 562, 566
36 (9th Cir. 2004). Recently, the Ninth Circuit discussed Embury in dicta:

37 The Director argues that Lapides and Embury should essentially be confined to their

1 facts. Under this reading, the rule applies only where a state has already consented to suit
2 in its own state courts and thus, a state defendant removing a case to federal court takes
3 with it whatever sovereign immunity it had in state court. Other courts have endorsed this
4 narrow view of Lapides's waiver rule. While our Embury holding strongly suggests a
5 broader interpretation of Lapides, our conclusion that the Director consented to suit in
6 state court renders the issue moot for the purpose of this case.

7 Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 663 n.20 (9th Cir. 2009). This
8 broad interpretation (removal waives sovereign immunity over all claims, not just claims for
9 which state had no sovereign immunity in state court) is shared by other circuits. See Meyers v.
10 Texas, 410 F.3d 236, 250 (5th Cir. 2005); Estes v. Wyo. DOT, 302 F.3d 1200, 1204 (10th Cir.
11 2002). Embury's expansive language and the recent dicta eliminates the distinction made in
12 Sonoma Falls between Eleventh Amendment immunity as to federal venue and sovereign
13 immunity from suit.

14 At this point, the case law is not absolutely clear whether tribal sovereign immunity is
15 more like the immunity enjoyed by the states or by foreign sovereigns in the circumstance of
16 removal. There are a number of cases in which courts have applied tribal sovereign immunity
17 after removal without addressing the issue. See New York v. Shinnecock Indian Nation, 280 F.
18 Supp. 2d 1, 8 (E.D.N.Y. 2003); Maynard v. Narragansett Indian Tribe, 798 F. Supp. 94 (D.R.I.
19 1992); Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 1997 U.S. Dist. LEXIS 21776 (W.D. Mo.
20 Nov. 19, 1997). In other cases where tribes removed, courts have pierced immunity but not
21 based on waiver from removal. See Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623
22 F.2d 682 (10th Cir. 1980). These cases, in conjunction with Sonoma Falls, leads to the
23 conclusion that removal to federal court does not waive tribal sovereign immunity. However, the
24 issue is not settled and appeal may be fruitful for Plaintiffs.

25 **C. Remand**

26 This case was removed from Superior Court, County of Tuolumne. "If at any time before
27 final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be
28 remanded." 28 U.S.C. §1447(c). Sovereign immunity is commonly termed an issue of subject
matter jurisdiction, but some courts have found that, "sovereign immunity is a jurisdictional

1 consideration separate from subject matter jurisdiction.” Kreig v. Prairie Island Dakota Sioux, 21
2 F.3d 302, 305 (8th Cir. 1994). It is not clear whether the language of Section 1447(c) mandates
3 remand in cases where the “subject matter jurisdiction” lacking is an assertion of sovereign
4 immunity. Further, the Ninth Circuit has recognized a futility exception when subject matter
5 jurisdiction is lacking, stating, “Where the remand to state court would be futile, however, the
6 desire to have state courts resolve state law issues is lacking. We do not believe Congress
7 intended to ignore the interest of efficient use of judicial resources....District court resolution of
8 the entire case prevents any further waste of valuable judicial time and resources. The district
9 court correctly denied the motion to remand and dismissed the state claims.” Bell v. City of
10 Kellogg, 922 F.2d 1418, 1424-25 (9th Cir. 1991); accord Herman v. Salomon Smith Barney, Inc.,
11 266 F. Supp. 2d 1208, 1213 (S.D. Cal. 2003); Dale v. IRS, 2001 U.S. Dist. LEXIS 7013, *7
12 (E.D. Cal. April 27, 2001). In this case, the state court would not have jurisdiction over
13 Defendants if the federal court does not. No party has asked for remand in this case and it
14 appears that remand would be futile. The case will be dismissed.

15
16 **IV. Order**

17 Defendants’ motion to dismiss the case for lack of subject matter jurisdiction is
18 GRANTED. The clerk of the court is directed to close this case.

19
20 IT IS SO ORDERED.

21 Dated: December 15, 2009

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE