

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL T. WARREN,

Plaintiff,

vs.

06-CV-0226E(Sr)

UNITED STATES OF AMERICA, et al.,

Defendants.

**REPLY MEMORANDUM OF DEFENDANTS PATAKI AND
RITCHKO-BULEY IN SUPPORT OF MOTION TO DISMISS**

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Preliminary Statement

On May 31, 2006, defendants George E. Pataki and Cheryl Richko-Buley (“state defendants”) filed a motion (docket no. 6) seeking dismissal of the complaint to the extent that it seeks relief against them the grounds that this Court lacks or should decline to exercise, jurisdiction, that certain of plaintiff’s claims are barred by *res judicata*, and that the complaint fails to state a claim. Thereafter plaintiff filed as of right an amended complaint (docket no. 17), which differs from the original by omitting certain claims. On August 20, 2006, state defendants filed a new motion (docket no. 20), pointing out that the two causes of action previously pleaded against them, *i.e.*, the original complaint’s second and eighth causes of action, are pleaded as the second and third causes of action of the amended complaint and adopting the state defendants’ previous arguments as to them. Docket no. 21 ¶¶ 4-5.¹

¹ As a result, while state defendants referred in their main memorandum to the second and eighth causes of action, they now refer to them as the second and third, respectively.

On August 20, 2006, plaintiff filed his opposition to the motion (docket nos. 33-35) and now, pursuant to the Court's schedule set on October 10, 2006, state defendants submit this memorandum in reply to the opposition.²

Argument

POINT I

**PLAINTIFF'S INVOCATION OF EX PARTE YOUNG
AND OTHER ARGUMENTS TO AVOID THE BAR OF
THE ELEVENTH AMENDMENT LACKS MERIT**

In their original memorandum state defendants argued that plaintiff's claims against them were based on state law and so this Court lacks jurisdiction under the Eleventh Amendment. Docket no. 8 at 7-10. Plaintiff responds with a number of arguments, all of which must fail.

To begin with, plaintiff's arguments, challenging the State's entering into a gaming compact ("Compact") with the Seneca Nation, are all based on an argument which he has not previously raised, and least with respect to the state defendants, and which he cannot raise against these defendants; that his claim is based on the Administrative Procedure Act ("APA") (5 U.S.C. § 551 *et seq.*). His amended complaint cites this provision only in its general jurisdictional statement (docket no. 17), but now plaintiff's memorandum dedicated to responding to the state defendants' motion plaintiff repeatedly invokes the APA. *See, e.g.*, docket no. 17 at 9 ("a Plaintiff may challenge agency action under the APA"; "a government contractor could sue under the APA"; "Federal Courts have jurisdiction under the APA to decide validity of state law incorporated by reference in a federal statute"); *id.* at 14 (regarding

² Several of the points in plaintiff's memorandum, such as those relating to standing and indispensable parties, do not appear to respond to arguments made by state defendants and so are not addressed here.

