No. ________

In The Supreme Court of the United States

NO CASINO IN PLYMOUTH, et al.

Petitioners,

v.

NATIONAL INDIAN GAMING COMMISSION, et al.

Respondents,

and

IONE BAND OF MIWOK INDIANS,

Intervenor-Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH R. WILLIAMS
2999 Douglas Blvd., Suite180
Roseville, CA 95661
Telephone: (916) 238-6668
Attorney for Petitioners

CERTIORARI PRINTING
info@certioraripriting.com
Fax (805) 995-3881, Phone (805) 801-1881

QUESTIONS PRESENTED

The Secretary of Interior has authority under the Indian Reorganization Act (IRA) to acquire land in trust for tribes that were recognized in 1934. *Carcieri v. Salazar*, 555 U.S. 379 (2009). The National Indian Gaming Commission (NIGC) has authority under the Indian Gaming Regulatory Act (IGRA), "to regulate gaming on Indian lands, and nowhere else." *Mich. v. Bay Mills,* 572 U.S. 782, 795 (2014). Recognition pursuant to 25 CFR Part 83, is a "prerequisite" for a tribe to receive "the protection, services and benefits of the federal government" including IGRA and IRA benefits. *Carcieri,* 555 U.S. at 385.

Plaintiffs challenged two federal approvals for the Ione Band of Miwok Indians, namely: (1) the 2012 approval of an IRA trust transfer by the Department of Interior (DOI) even though the Ione Band was not federally recognized in 1934 and (2) the 2018 approval of a gaming ordinance by the NIGC even though the Ione Band does not have "Indian lands" as defined by IGRA. Nor has the Ione Band been acknowledged as a tribe per 25 CFR Part 83.

The Ninth Circuit reviewed defendants' motion for judgment on the pleadings (FRCP 12(c)), *de novo,* and dismissed plaintiffs' complaint – in a four page unpublished memorandum - without leave to amend and without a hearing. The panel did not address the serious factual allegations in the complaint. Instead, it dismissed the complaint based on Ninth Circuit "precedent" that is contrary to *Carcieri* and that was superseded by a subsequent interpretation by the DOI. See *Nat'l Cable Telecom. v. Brand X Internet*, 545 U.S. 967, 982-83 (2005) ("*Brand X*").

The questions presented are:

1. Did the Ninth Circuit err when it dismissed plaintiffs' challenge to DOI's approval of a trust transfer for the Ione Band which was not a recognized tribe in 1934 as required by the IRA?

2. Did the Ninth Circuit err when it dismissed plaintiffs' challenge to NIGC's authority to approve a gaming ordinance for the Ione Band which has no Indian lands as defined by IGRA?

3. Did the Ninth Circuit err when it dismissed plaintiffs' claim that federal acknowledgement as a tribe under 25 CFR Part 83 is a prerequisite for the Ione Band to receive IRA and IGRA benefits?

PARTIES TO THE PROCEEEDINGS

The parties include:

A. Petitioners.

1. No Casio In Plymouth (NCIP) – a non-profit community interest group. .
2. Individual Plaintiffs – members or supporters of NCIP, including:
   a. Dueward W. Cranford II,
   b. Dr. Elida A. Malick,
   c. Jon Colburn,
   d. David Logan,
   e. William Braun, and
   f. Catherine Coulter.

B. Respondents.

1. National Indian Gaming Commission
2. NIGC Chairman Chaudhuri
3. Secretary of Interior Ryan Zinke
4. Deputy Secretary Donald Bernhart
5. Department of Interior
6. Acting Assistant Secretary Laverdure
7. BIA Regional Director Dutschke

C. **Defendant/Intervener.**

1. Ione Band of Miwok Indians

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, No Casino In Plymouth, Dueward W. Cranford III, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun and Catherine Coulter respectfully submit this petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

OPINIONS BELOW

A copy of the July 20, 2023 Memorandum of the Ninth Circuit Court of Appeals is submitted with this petition; it is not reported. (No. 22-15756; App.3 B).

A copy of the May 10, 2022 District Court Order is submitted with this petition; it is not reported. (No. 2:18-cv-01398-TLN-CKD; App.8 C) The Order granted defendants' MJOP pursuant to FRCP 12(c) which was appealed by Petitioners. The Order also granted the Ione Band's motion to intervene pursuant to FRCP 24(a) which was not appealed.

JURISDICTION

The Ninth Circuit entered judgment on July 20, 2023. Plaintiffs filed a timely motion for panel rehearing and rehearing *en banc*. The Ninth Circuit denied panel rehearing and rehearing *en banc* on November 7, 2023. (App.1 A.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706 et seq., 28 U.S.C. §§ 2201 and 2202, and 25 U.S.C. §§ 2701 et seq. Jurisdiction of the Court of Appeal for the Ninth Circuit was invoked under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

A. Section 5 of the Indian Reorganization Act of 1934. (25 U.S.C. § 5108)

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

///

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

B. Section 19 of the Indian Reorganization Act of 1934. (25 U.S.C. § 5129)

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . .

C. Definition of Indian Lands. (25 USC § 2703(4))

For purposes of this chapter- [IGRA]

///

(4) The term "Indian lands" means:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

D. Federally Recognized Indian Tribe List Act

PL No. 103-454, Title I, 108 Stat. 4791 (1994)

SECTION 103. The Congress finds that:

(1) the Constitution, as interpreted by Federal case law, invest Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority the United States has a trust responsibility to recognized tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "*Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*;" or by a decision of a U.S. court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
///

INTRODUCTION

In 2009, this Court held that Section 19 of the IRA *unambiguously* required that a tribe be federally recognized in 1934 to receive fee-to-trust transfer benefits under Section 5 of the IRA. *Carcieri*, 555 U.S. at 382-383. But in 2017 a three judge panel of the Ninth Circuit took the opposite position. It held that Section 19 was *ambiguous* and should be interpreted to mean a tribe need only be recognized "at the time the decision is made to take the land into trust" under Section 5. *Amador v. DOI,* 872 F.3d 1012, 1024 (9th Cir. 2017) (*Amador)*. And, under the Ninth Circuit's law of the circuit doctrine, *Amador* became "circuit precedent."

The Ninth Circuit panel in this case concluded, in its unpublished Memorandum decision, that *Amador* was binding "circuit precedent" it was required follow regardless of *Carcieri*. And, based on *Amador,* the three judge panel here held that the Ione Band was entitled to a fee-to-trust transfer under the IRA even though it was not a federally recognized tribe in 1934. Then the Ninth Circuit panel went further and held that *Amador* precluded two other claims in Plaintiffs' complaint, the IGRA and Part 83 claims, which were not in issue in *Amador*. The panel's decision to dismiss these three claims based on *Amador* raises three important related questions which need to be resolved by this Court.

The first question is whether a tribe, which was not federally recognized in 1934, is eligible to receive fee-to-trust benefits under Section 5 of the IRA of 1934. This Court answered this question fifteen years ago and very clearly held that a tribe must be both recognized and under federal jurisdiction in 1934 to receive such benefits. *Carcieri* 555 U.S. at 395. And, initially, in 2015, the Ninth Circuit correctly described the holding in *Carcieri* in *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015; *en banc*):

> The Supreme Court [in *Carcieri*] held that the term "'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. The Narragansett tribe was not under Federal jurisdiction in 1934 and was not recognized by the United States until 1983, meaning that the Secretary of the Interior's decision to take land into trust for the Narragansett was invalid.

However, as noted above, two years later, in 2017, the Ninth Circuit took the opposite position and held – contrary to *Carcieri* and *Big Lagoon* – that Section 19 of the IRA was ambiguous and interpreted it to mean a tribe need only be recognized "at the time the decision is made to take the land into trust." *Amador v. DOI,* 872 F.3d at 1024.

Then in 2020, three years after *Amador*, the DOI – the agency with the expertise in this arena – reviewed Section 19 of the IRA and confirmed that it was not ambiguous and concluded a tribe must be recognized in 1934 to receive IRA trust benefits. Thus, the Ninth Circuit's misinterpretation of the IRA in *Amador* was not only in conflict with *Big Lagoon* and *Carcieri,* it was finally corrected and superseded by a subsequent interpretation by the DOI. (App. E.) *Brand X*, 545 U.S. at 982-983. And, as consequence, *Amador* is no longer "circuit precedent" and could not preclude plaintiffs' challenge to the DOI's 2012 approval of an IRA fee-to- trust transfer for of the Ione Band because it was not a "recognized tribe under federal jurisdiction" in 1934.

The second question is did the NIGC have jurisdiction in 2018 under the IGRA to approve a gaming ordinance for the Ione Band which admitted it does not have Indian lands or a reservation but hopes to acquire trust lands at an unknown later date. Defendants claim it was appropriate for the NIGC to approve the gaming ordinance in *anticipation* of the possibility that Ione Band may acquire Indian land in the future. But the NIGC has no jurisdiction to approve a gaming ordinance for a tribe that may or may not acquire Indian land sometime in the future. See *Michigan v, Bay Mills Indian Comm. supra.*

Indian lands, as defined by the IGRA are restricted to lands "within the limits of any Indian reservation." 25 U.S.C. § 2703(4). Here, the Ione Band admits in its Constitution, at Article II, Section 1(c), that it does not have a reservation. That Section

provides, in pertinent part, that "upon the establishment of a reservation for the Tribe," its territory will include "all land within the exterior boundaries of such reservation." It was not possible for the Ione Band to have Indian lands "within the limits" of a non-existent reservation in 2018 when the ordinance was approved.

The Ninth Circuit failed to address this important issue. Instead it held that Plaintiffs' challenge to the NIGC's 2018 approval of the gaming ordinance was somehow precluded by *Amador*. This is impossible! *Amador* was decided in 2017, a year <u>before</u> the Ione Band gaming ordinance was approved by the NIGC in 2018. The NIGC was not a party in *Amador*, nor was its jurisdiction challenged by the County in *Amador*.

In contrast, in 2018, as specifically allowed by IGRA, Plaintiffs filed this separate APA challenge to the NIGC's jurisdiction to approve the Ione Band's gaming ordinance. 25 U.S.C. § 2714. The Ninth Circuit panel's decision, if not reversed, would preclude Plaintiffs from litigating this important issue and, if not enjoined, a large Indian casino could be built on non-Indian land in the middle of plaintiffs' small rural community in Plymouth, California.

The third question asks whether recognition pursuant to 25 CFR Part 83 is a "prerequisite" for a tribe to seek or receive federal statutory benefits under the IRA and IGRA. In 1978, the DOI promulgated regulations establishing a uniform procedure for "acknowledging" tribes. 25 C.F.R. § 83.1 et seq. Recognition under these regulations "[i]s a prerequisite to the protection, services, and benefits

of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States" 25 C.F.R. § 83.2. And, in 1994, Congress endorsed the Part 83 procedures in the *Federally Recognized Tribal List Act* as the only administrative way for a tribe to be recognized. PL 103-454, Title I, Sec. 103(3) (108 Stat. 4791).

The other two ways for a tribe to be recognized, as authorized by the List Act, are by an Act of Congress or "a decision of a United States court." Id. But neither apply here. There is no Act of Congress which recognizes the Ione Band as a tribe. And, although there was a federal court lawsuit, it resulted in a 1992 decision, confirmed by a judgement in 1996, that the Ione Band was not a federally recognized tribe and that it had not exhausted its administrative remedies under Part 83. *Ione Band v. Burris/DOI* (USDC ED Cal. No. Civ. S-90-993).

The Ninth Circuit panel did not mention the decision and judgment in *Ione Band v. Burris/DOI.* Instead the panel held Plaintiffs' claim that Part 83 acknowledgement is a necessary "prerequisite" for a tribe to receive benefits pursuant to IRA or IGRA was also somehow precluded by *Amador* as "circuit precedent." That is not correct. Indeed, the panel admitted *Amador* "did not explicitly opine on whether Ione Band was required to seek" Part 83 recognition as a prerequisite to obtain IRA and IGRA benefits. (App. B at p. 4.)

Furthermore, a year before *Amador* was decided, the Ninth Circuit held that Part 83 recognition "is a prerequisite to the protection, services and benefits of

the Federal government available to Indian tribes." *Timbisha Shoshone v. DOI,* 824 F.3d 807, 809 (9th Cir 2016). Thus the law of the Ninth Circuit, as confirmed by *Timbisha,* is that Part 83 recognition is a "prerequisite" for a tribe to receive federal benefits.

This rule is consistent with this Court's decision in *Carcieri* 555 U.S. at 385. This is also the rule in the D.C. Circuit, First Circuit, Tenth Circuit and Federal Circuit. *Mackinac Tribe v. Jewell,* 829 F.3d 754 (D.C. Cir. 2016), *Passamaquoddy Tribe v. State of Maine,* 75 F.3d 784, 792 n.4 (1st Cir. 1996), *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1058 n.4 (10th Cir. 1993) and *Samish Indian Nation v. U.S.*, 419 F.3d 1355, 1373 (Fed. Cir. 2005).

The Ninth Circuit panel did not distinguish *Timbisha* or the decisions from the other Circuits on the Part 83 issue. The panel's Memorandum decision that Part 83 recognition is not a prerequisite is an outlier; there is a judicial consensus that Part 83 recognition is a prerequisite for a tribe to receive federal benefits. And by holding that Part 83 acknowledgement is not a prerequisite, the panel has created a conflict with this Court, within the Ninth Circuit and with at least four other Circuit Courts on this issue. Certiorari should be granted and the Ninth Circuit panel's decision should be reversed to insure the judicial consistency that Part 83 recognition is a prerequisite for a tribe to receive federal benefits – including IRA and IGRA benefits - is maintained.

The resolution of these three issues by this Court is of exceptional importance – especially to the tribes and communities within the geographic jurisdiction

of the Ninth Circuit. If it is not reversed, the panel's decision will create a two-tier system governing the eligibility of tribes to receive IRA and IGRA benefits. Tribes within the Ninth Circuit jurisdiction will not need to be acknowledged pursuant to Part 83 to have standing to seek or receive such benefits. Also tribes within the Ninth Circuit's jurisdiction will not need to have Indian lands to be eligible for IGRA benefits and tribes will not need not to be recognized in 1934 to qualify for IRA benefits. However, tribes outside the Ninth Circuit's jurisdiction will still need Indian lands to be eligible for IGRA benefits and will still need to be recognized in 1934 to qualify for IRA benefits and will still need to obtain Part 83 recognition to have standing to seek or receive such benefits. These disparities are unnecessary and will only cause confusion and inequity. Petitioners respectfully submit that these potential problems should be prevented by this Court by granting this petition and vacating *Amador* and reversing the Ninth Circuit panel's errant decision.

STATEMENT OF THE CASE

A. NIGC's 2018 approval.

This case was triggered when, on March 6, 2018, the NIGC approved an "Amended and Restated Tribal Gaming Ordinance, Res. No. 2018-4" for the Ione Band. Petitioners fortuitously learned of this approval from an online publication with limited circulation. The NIGC waited another two years to publish public notice of this approval in the Federal Register. (85 Fed. Reg. 12806; March 4, 2020.)

NIGC's jurisdiction to approve this gaming ordinance was contingent on whether the Ione Band

had "Indian lands" which is defined by IGRA as follows:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C §2703(4); emphasis added.

The Administrative Record (AR) with respect to NIGC's approval of the gaming ordinance includes the Ione Band's Constitution which confirms it does not have a reservation or Indian lands. Article II, Section 1 of the Ione Band Constitution defines the "Territory of the Tribe" to include:

> "a) all land now held or previously held or hereafter acquired by the Tribe;
> b) all land held in trust by the United States for the benefit of the Tribe; and
> c) upon establishment of a reservation for the Tribe, all land within the exterior boundary of such reservation, whether or not owned by the tribe, and notwithstanding the issuance

of any patent in fee, right-of-way or easement." (Emphasis added.)

(Ninth Cir. No. 22-15756; DE 14-3 at 205.)

Thus, the Ione Band, admits it does not have a reservation or lands "within the limits of any Indian reservation" as required by IGRA. Thus, the NIGC lacked the authority to approve the Ione Band gaming ordinance. And its 2018 purported approval of the Ione Band gaming ordinance is void as a matter of law. *Mich. v. Bay Mills supra.*

B. The DOI's 2012 approval.

This lawsuit also challenges a proposed fee-to-trust transfer for the Ione Band pursuant to the IRA that was approved by Defendant Laverdure, a DOI civil service employee serving as an "acting" Assistant Secretary, on May 24, 2012 (77 Fed. Reg. 31871-31872). Laverdure approved the proposed acquisition of 12 parcels of privately owned property in trust for the Ione Band for gaming purposes. *Id.*

Petitioners challenged Laverdure's approval because the Ione Indians were not a "recognized tribe now under federal jurisdiction" in 1934 and, therefore, were not eligible for a fee-to-trust transfer under Section 5 of the IRA. *Carcieri v. Salazar, supra.* This fact was confirmed by contemporaneous correspondence from the DOI. (Copies were attached to Plaintiffs' complaint (See App. page 36.)

On August 15, 1933, O.H. Lipps, DOI Field Superintendent, in a letter to the Commissioner of Indian Affairs, John Collier (Ninth Cir. No. 22-15756; DE 14-3 at 55-57) determined that the Ione Indians:

> "[a]re classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments in their own right held in trust by the Government."

On August 21, 1933, Commissioner Collier wrote a letter which confirmed that the Ione Indians were non-ward Indians and not a recognized tribe with a reservation. (Ninth Cir. No. 22-15756; DE 14-3 at 58-59.) Collier was responding to a letter from several Ione Indians, regarding possible relief available for a group of Indians classed as non-wards. They asked whether financial aid may be given to the Ione Indians "from funds made available under the public works program." Collier forwarded a copy of this letter to Superintendent Lipps with a request that he respond and noting that "[w]ards and non-wards are entitled to share equally in work and relief made available through the public works program."

The Ione Indians did not contest the 1933 conclusions by the DOI, included in these two letters, that they were not members of a recognized tribe or the fact that they do not live on a reservation in 1934. Nor have Defendants offered any evidence to dispute these conclusions. The Ione Band was obviously not a federally recognized tribe in 1934 and, therefore, it is not entitled to the proposed fee-to-trust transfer under Sections 5 and 19 of the IRA.

Furthermore, this undeniable fact was confirmed by Defendant Laverdure when he approved the 2012 trust transfer for the Ione Band. He found that, although the Ione Band was not a recognized tribe in 1934, it did not need to be. In his view, it was sufficient that the Ione Band was "under federal jurisdiction" in 1934 to receive IRA benefits. The Ninth circuit reached the same conclusion in *Amador*. The Court also found that the Ione Band was not recognized in 1934 but, wrongly, concluded that this did not preclude them from benefiting from a trust transfer allowed by the IRA.

C. The Ione Band's Part 83 petition.

In 1978 the DOI published tribal recognition regulations in the Federal Register which became effective on October 2, 1978. (43 Fed. Reg. 39361; 25 C.F.R. Part 83). In 1979, the Ione Indians were listed as a group which, although not federally recognized, was "deemed" to have a petition for recognition "pending" with the BIA. But, even though this "deemed pending" petition was given priority by the BIA, the Ione Indians have not yet submitted a Part 83 petition.

Also, as noted above, instead of pursuing its Part 83 petition, the Ione Band sought a writ of mandamus to compel the DOI to recognize them as a tribe without requiring them to complete the Part 83 process. *Ione Band v. Burris/DOI, supra.* In 1992, the district court granted the DOI's motion for summary judgment and held the Ione Band was not a federally recognized tribe and it had failed to exhaust its remedies under Part 83. This decision in

favor of the DOI was confirmed in a judgment in 1996 which was not appealed by the Ione Band.

The Ione Indians are not now, and never have been, acknowledged under Part 83. And, therefore, the Ione Band is precluded from applying for, or receiving, federal benefits (including those allowed by the IRA and IGRA) until it completes the process and succeeds in obtaining acknowledgement as a tribe under Part 83. Until that happens, and the Ione Band achieves Part 83 recognition, NIGC's approval of the Ione Band gaming ordinance under the IGRA and DOI's approval of the Ione Band fee-to-trust transfer under the IRA should be set aside.

D. The District Court proceedings.

1. Complaint for Declaratory and Injunctive Relief. (App. D.)

Plaintiffs filed their complaint in this case on May 22, 2018. There were six remaining claims in the complaint when defendants filed a motion for judgement on the pleadings (MJOP) two years later, including claims for:

(a) Violation of the Indian Gaming Regulatory Act of 1988.
(b) Violation of the Appointments Clause of the Constitution.
(c) Violation of the Indian Reorganization Act of 1934.
(d) Violation of 25 CFR Part 83 included in the Tribal List Act of 1994.
(e) Violation of the Equal Protection Clause of the

Fifth Amendment.

(f) Violation of Constitutional Federalism and the Tenth Amendment.

Plaintiffs include a community group known as No Casino In Plymouth (NCIP) and six of its members and supporters. All the individual Plaintiffs live or own property in, or near, the small rural town of Plymouth California – where the Ione Band intends to construct a large intrusive Indian casino.

Defendants include the NIGC and Chairman of the NIGC for their role in approving a gaming ordinance in 2018 for the Ione Band. Defendants also include the DOI, the Secretary of Interior and other DOI officials for their role in approving a fee-to-trust transfer in 2012 for the Ione Band.

Defendants also include three federal employees (Laverdure, Chaudhuri and Dutschke), sued in their personal capacities, for violating Plaintiffs' rights.

The factual allegations in the complaint are detailed and supported by key documents attached to the complaint. The alleged facts, taken as true at this stage, establish that Plaintiffs are entitled to the remedies requested with respect to each claim. *Chavez v. U.S.,* 683 F.3d 1102, 1108 (9th Cir. 2012).

2. Defendants' MJOP.

On June 25, 2020, federal Defendants (except DOI) filed the MJOP pursuant to Federal Rule of Civil Procedure, Rule 12(c). But, despite its label, the MJOP was not based on pleadings in this lawsuit. The serious factual allegations in the Complaint were not discussed or evaluated in the MJOP. Instead, the MJOP was based entirely on *Amador*.

Specifically, defendants argued the conclusion in *Amador* that a tribe need not be recognized in 1934 to receive fee-to-trust benefits under Section 5 of the IRA is binding "circuit precedent." Consequently Defendants claimed that – under *Amador* - it was sufficient for the Ione Band to be recognized at the time of the trust acquisition. One immediate problem with this argument is the fact that the Ione Band was not recognized in 2012 when the fee-to-trust transfer was approved by Laverdure and it still has not been recognized per Part 83.

Defendants also argued that the Ione Band need not be acknowledged per Part 83 to receive IRA and IGRA benefits. But defendants did not mention the federal judgement in *Ione Band v. Burris/DOI,* rendered in DOI's favor, which required the Ione Band to exhaust its remedies under Part 83 to be recognized as a tribe with standing to seek or receive federal benefits – including IRA and IGRA benefits,

Finally, Defendants did not address the Equal Protection and Federalism claims against the three federal employees sued in their individual capacities in the MJOP. See *Bivens v Six Unknown Named Agents*, 403 US 388, 389 (1971). In fact, none of these employees joined the MJOP in their personal capacities. (Nor did the AG certify that any of these employees was acting within the scope of his employment with respect to these claims. See 28 U.S.C. § 2679(d)(1).)

3. Plaintiffs Opposition to the MJOP.

On July 23, 2020, Plaintiffs filed an opposition to the MJOP. Plaintiffs first summarized and

reaffirmed all six claims in the Complaint. Plaintiffs did not waive any of those claims or any of the factual allegations offered in support of each of those claims. And, under FRCP 12(c), these allegations are presumed to be true for the purposes of the MJOP.

Plaintiffs also argued that *Amador* did not govern this case. It involved different pleadings filed by different parties and adjudicated different issues. It could not be circuit precedent that required the dismissal of this case.

Also, the interpretation in *Amador* that Section 19 was ambiguous was contrary to *Carcieri* and was superseded by the interpretation by the DOI that Section 19 of the IRA was not ambiguous (App. E; Sol. Op. M-37055) issued three months before the MJOP was filed. Also plaintiffs argued the Ione Band was not recognized per Part 83 and, consequently, did not have standing to seek or receive IRA and IGRA benefits.

Finally, Plaintiffs also brought to the court's attention that the MJOP was filed on behalf of some – but not all – of the Defendants. As a consequence, the MJOP failed to address the claims against the non-moving parties including the claims against the federal employees sued in their individual capacities. Also the DOI did not join the MJOP no doubt because it had adopted an interpretation of Section 19 of the IRA that superseded the interpretation in *Amador*.

4. The district court's decision. (App. C.)

The district court granted defendants MJOP and dismissed the complaint without a hearing or leave to amend. The district court held *Amador* disposes of

"Claims One through Four." The court also held plaintiffs failed to state a claim for relief in Claim Five (Equal Protection) and Claim Six (Federalism). The court denied plaintiffs' request for leave to amend. Plaintiffs appealed to the Ninth Circuit.

E. The Ninth Circuit's proceedings.

1. Memorandum Decision. (App. B.)

On July 20, 2023, the Ninth Circuit issued its four-page unpublished Memorandum decision granting the MJOP and dismissing Plaintiffs' entire complaint without giving Plaintiffs leave to amend or an opportunity to be heard.

The Ninth Circuit reviewed the MJOP, *de novo*. The panel dismissed "Claims One, Three and Four" on the basis they were barred by *Amador* as the law of the circuit. The panel dismissed plaintiffs' three Constitutional claims for pleading reasons, unrelated to *Amador*. Leave to amend was denied.

2. Petition for Rehearing *En Banc*.

In its Memorandum decision, the Ninth Circuit states that "NCIP does not argue that an exception to law of the circuit doctrine applies." (App. B at 2.). This was not correct. NCIP explicitly argued that the misinterpretation of Section 19 of the IRA in *Amador* was superseded in 2020 by a contrary interpretation of Section 19 of the IRA issued by the DOI on March 9, 2020. (Ninth Circuit No. 22-15756; DE 13 Appellants Opening Brief at 37-38 and DE 27 Reply Brief at 18-22.) NCIP cited this Court's decision in *Brand X,* and the Ninth Circuit's decision in *Silva v. Garland,* 993 F.3d 705 (9th Cir. 2021), for the rule

that an agency's interpretation of an ambiguous statute prevails even if it conflicts with prior circuit precedent. Indeed, in response, federal Defendants admitted that "[b]y finding statutory ambiguity, *Amador* left open the possibility that the DOI might permissibly adopt a different IRA interpretation" and in that "context, the 'law or the Circuit' doctrine would not apply." (Id. DE 22; Ans. Brief for the Federal Defendants (FAB) at 50-51. (The Ione Band elected not to file a brief; DE 30.)

Unfortunately, the Ninth Circuit panel overlooked these arguments in their Memorandum. The panel did not discuss the *Brand X* exception to the law of the circuit doctrine. Nor did the panel mention the defendants concession that "the 'law of the Circuit doctrine'would not apply." Therefore, plaintiffs were compelled to file a petition for rehearing and rehearing *en banc.* (Ninth Cir. No. 22-15756; DE 41.) The panel unanimously voted to deny the petition for rehearing on November 7, 2023. (App. 1 A,)

REASONS FOR GRANTING THE WRIT

I. This petition should be granted to resolve a conflict between the Ninth Circuit's decision in *Amador* and this Court's decision in *Carcieri* that a tribe must be recognized in 1934 to receive IRA trust benefits.

Section 5 of the IRA of 1934 gave the Secretary of Interior exclusive authority to acquire land in trust for Indians. 25 U.S.C. § 5108. Section 19 of the IRA includes three definitions of the "term 'Indian' as used in this Act." 25 U.S.C. § 5129. The first

definition is applicable here; it includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." Id.

In 2009, this Court interpreted this definition in Section 19 of the IRA. *Carcieri v. Salazar, supra.* Justice Thomas wrote the 6 to 3 majority opinion and held the phrase "recognized tribe now under federal jurisdiction" was not ambiguous and the Secretary's broad interpretation that it covers any recognized tribe, regardless of when it was recognized, was not entitled to *Chevron* deference. *Chevron v. NRDC,* 467 U.S. 837 (1984). Instead, the majority concluded that the plain language of Section 19 of the IRA provides that, to be eligible for trust benefits under Section 5 of the IRA, a tribe must have been <u>both</u> federally recognized and under federal jurisdiction in 1934.

In contrast, Justice Souter filed a dissenting opinion and argued "that the two concepts, recognition and jurisdiction, may be given separate content." Thus, Justice Souter suggested that, to qualify for the IRA fee-to-trust benefits, a tribe could be either "Federally recognized" or "under Federal jurisdiction" in 1934. This "two concept-separate content" idea was rejected by the majority opinion. And, that is why Justice Souter candidly admits that he could not concur with the majority opinion and he had to cast his vote is in the dissenting column. (Justice Ginsburg joined Justice Souter's dissent. Justice Stevens wrote a separate dissent.)

In 2010, the DOI attempted to "administratively fix" the *Carcieri* decision by reinterpreting the phrase "recognized tribe now under federal jurisdiction" in a Record of Decision for the Cowlitz Indian Tribe

(Cowlitz ROD). See *Confederated Tribes of Grande Ronde Comm. v. Jewell,* 805 F.3d 551 (D.C. Cir. 2016). The DOI concluded that this phrase was ambiguous and should be parsed and evaluated in two parts. The DOI determined the second half of this phrase was subject to a temporal limitation and should be interpreted to mean "under federal jurisdiction in 1934." But the DOI concluded that the first half of this phrase was not subject to the same temporal limitation and a tribe need not be recognized in 1934 to be eligible to receive IRA benefits provided it is "federally recognized" at the time the IRA is applied. The Cowlitz ROD was consistent with Justice Souter's dissent. But it was inconsistent with Justice Thomas' majority opinion in *Carcieri* and was, therefore, wrong.

In 2012, Laverdure approved the proposed Ione Band trust transfer challenged in this lawsuit. He ignored the majority opinion in *Carcieri* and, instead, adopted DOI's interpretation in the Cowlitz ROD. Laverdure split the phrase "recognized tribe now under federal jurisdiction" in two as though they were two separate tests with two separate meanings. Laverdure conceded the Ione Band was not recognized in 1934. He then focused on the "under federal jurisdiction" half of the test - which he claimed is ambiguous and subject to his interpretation as the "acting" Assistant Secretary. Laverdure found the Ione Band was under federal jurisdiction in 1934 and claimed his conclusion was entitled to *Chevron* deference.

In 2017, the Ninth Circuit in *Amador* agreed with the Cowlitz ROD and Defendant Laverdure

that, to be eligible for IRA fee-to-trust benefits, a tribe did not need to be federally recognized in 1934. Instead, the Court held it is sufficient the tribe was federally "recognized at the time the decision is made to take land into trust." *Amador,* 872 F.3d at 1025. The Court also agreed with Laverdure's claim that the statute was "ambiguous." But the Ninth Circuit reached this conclusion in *Amador* on its own accord and without giving the Cowlitz ROD or Laverdure's interpretation of the IRA any *Chevron* deference. *Id* at 1026. On the other hand, the Ninth Circuit gave the DOI's interpretation "great respect" under *Skidmore*. *Skidmore v. Swift,* 323 U.S. 134 (1944)

On March 9, 2020, the DOI issued an opinion (App. E; DOI Solicitor Opinion M-37055) which withdrew the Cowlitz' and Laverdure's interpretation of Section 19 of the IRA that was relied on by the court in *Amador*. The DOI determined the Cowlitz interpretation "is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase 'recognized Indian tribe now under federal jurisdiction'." M-37055 was clearly a reversal of DOI's previous interpretation. But it is consistent with this Court's decision in *Carcieri* that a tribe must have been federally recognized in 1934 to be eligible for IRA trust benefits. (Ninth Cir. No. 22-15756; DE 14-3 at 116-121.) It supersedes the prior interpretation of Section 19 in *Amador*. *Brand X*, 545 U.S. at 982-983.

Furthermore, M-37055 is entitled to *Chevron* deference. An agency's interpretation warrants *Chevron* deference when it was "intended to have general applicability and the force of law." *Fox v.*

Clinton, 684 F.3d 67, 78 (D.C. Cir. 2012). M-37055 was "intended to have general applicability and the force of law." It was supported by a 31 page legal memorandum by three Deputy Solicitors and a 10 page memo outlining guidelines for implementing the DOI's new and correct interpretation of the IRA. (Ninth Cir. No. 22-15756; DE 41.) M-37055 meets all the criteria that entitle it to *Chevron* deference. See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

On June 25, 2020, over two months after DOI issued its 2020 definitive interpretation of Section 19 of the IRA, other Defendants filed the MJOP at issue here. The MJOP is based entirely on *Amador's* misinterpretation of Section 19 of the IRA which was based on the Cowlitz two part process that was withdrawn and superseded by M-37055. Notably, the DOI did not join the MJOP.

The Ninth Circuit's misinterpretation of Sections 19 of the IRA in *Amador* is contrary to this Court's decision in *Carcieri.* It has also been superseded by the DOI's subsequent interpretation of Section 19 of the IRA in M-37055. The Ninth Circuit panel's decision under review here should be reversed. And the Ninth Circuit's 2017 *Amador* decision should be vacated so there is no misunderstanding regarding its potential application as binding "circuit precedent" going forward.

II. This Court should reverse the Ninth Circuit's decision allowing NIGC to exceed its jurisdiction and approve a gaming ordinance for a tribe which does not have Indian lands eligible for gaming as defined by IGRA.

The NIGC in this case exceeded its jurisdiction when, in 2018, it approved a gaming ordinance for the Ione Band which, as outlined earlier, admits it does not have a "reservation" or Indian land, as defined by IGRA, that is eligible for gaming. See 25 U.S.C. §2703(4). The NIGC's attempt to regulate and allow gaming for a tribe that has no Indian lands is contrary to the directive of this Court in *Michigan v. Bay Mills* that the NIGC has authority "to regulate gaming on Indian lands, **and nowhere else**." Id. 572 U.S. at 795; (emphasis added)

The NIGC's "ultra vires" decision to approve the Ione Band gaming ordinance triggered the filing of this lawsuit. The first claim for relief in the complaint challenges the NIGC's 2018 approval of the Ione Band's gaming ordinance. But the Ninth Circuit panel held Plaintiffs' claim is somehow precluded by *Amador* which was decided a year earlier in 2017. That is impossible! The panel's conclusion defies logic.

The Ninth Circuit opens its Memorandum decision by stating that "NCIP purports to challenge the Department of Interior's (DOI's) approval of the Ione Band's tribal gaming ordinance in 2018." That a creative mischaracterization. As specifically allowed by IGRA (25 U.S.C. § 2714), Plaintiffs explicitly challenged the NIGC's 2018 approval of the Ione Band gaming ordinance in their first claim for relief. The DOI had no jurisdiction and played absolutely no role in the NIGC's 2018 approval of the Ione Band's gaming ordinance

The Ninth Circuit continues by next claiming that "in substance" Plaintiffs' challenge to NIGC's 2018

approval of the gaming ordinance is actually a challenge "to DOI's earlier, 2012 Record of Decision" that takes land into trust for the Ione Band. The obvious purpose of the panel's effort to merge the NIGC's 2018 approval of the gaming ordinance into the 2012 DOI's approval deigned to support the notion that Plaintiffs' challenge to the 2018 NIGC approval is also precluded by *Amador* as circuit precedent. This effort to confuse the two approvals should be rejected.

Amador did not, and could not, decide Plaintiffs' challenge of the NIGC's 2018 approval of the Ione Band gaming ordinance. *Amador* was decided in 2017, a year <u>before</u> the NIGC approved the Ione Band gaming ordinance in 2018. And, unlike this case, neither the NIGC nor the NIGC Chairman were not named as defendants in *Amador*. In this case Plaintiffs named both the NIGC and NIGC Chairman as Defendants. Plaintiffs challenged the NIGC's 2018 approval of the Ione Band gaming ordinance because the Ione Band does not have Indian lands as defined by the IGRA and, thus, the NIGC did not have jurisdiction to approve the ordinance. This issue was not decided in *Amador*. Nor could it have been.

The existence of Indian land and a reservation is not only a prerequisite for the approval of an Indian casino, it is also a jurisdictional requirement for the NIGC to review and approve gaming ordinances. *Michigan v. Bay Mills Indian Comm., supra.* (IGRA creates a framework for regulating gaming activity on Indian lands. See 2702(3)) This Court held that: "Everything—literally everything— in IGRA affords tools (for either state or federal

officials) to regulate gaming **on Indian lands, and nowhere else.**" *Id.* (emphasis added.)

And so that there would be no misunderstanding regarding the definition of Indian lands for IGRA purposes, this Court included it in the first footnote:

> The Act [IGRA] defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the U.S. for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." §2703(4).
>
> *Mich. v. Bay Mills*, 572 U.S. at 795 n.1.

Thus having an "Indian reservation" is the first requirement for having "Indian land" eligible for gaming under IGRA. And, as summarized above, the Ione Band, in its Constitution, concedes that they do not have a reservation. This admission is enough to resolve this case in favor of Plaintiffs. The Ione Band does not have a reservation and, therefore, could not have had Indian land eligible for gaming under IGRA. The NIGC had no jurisdiction or authority to approve the Ione Band gaming ordinance.

Finally, although the Ione Band does not have land "within the limits of any Indian reservation," Defendants argued, in their Answering Brief, that the NIGC still had authority to approve the Ione Band's gaming ordinance on an "anticipatory basis." (Ninth Circuit No. 22-15756 DE 22; FAB at 31.) This

argument is not credible. There is no authority in administrative law, the IGRA or elsewhere for such "anticipatory approvals" by the NIGC.

An agency "has no power to act...unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The NIGC cannot approve a gaming ordinance unless it has jurisdiction over Indian land. See *Citizens Against Casino Gambling v. Kempthorne,* 471 F.Supp.2d 295 (W.D.N.Y. 2007) "Stated simply, the NIGC has no statutory authority to empower a regime under which tribes could build casinos at any location, whether or not on Indian lands." *N. Coast Comm. Alliance v. Salazar,* 573 F.3d 738, 751 (9TH Cir. 2009).

In sum, Defendants admit the Ione Band does not have a "reservation" and, therefore, they could not have Indian lands "within the limits of any Indian reservation" as defined by IGRA. 25 U.S. §2704(3). That admission precludes NIGC jurisdiction to approve the gaming ordinance for the Ione Band. These important issues were not decided by the Ninth Circuit, in *Amador*. And the Ninth Circuit panel's conclusion that, in 2017, *Amador* somehow resolved this issue in advance of NIGC's 2018 approval of the Ione Band's gaming ordinance is obviously wrong. It should be reversed by this Court.

III. This petition should be granted to resolve a Circuit conflict, generated by the Ninth Circuit's decision here, regarding whether Part 83 recognition is a "prerequisite" for a tribe to receive federal benefits.

This Court's majority opinion in *Carcieri* confirmed that Part 83 recognition is required before a tribe may seek "the protection, services and benefits of the Federal government." *Carcieri* 555 U.S. at 385 (citing 25 CFR § 83.2). And Justice Stevens restated the same rule in his dissenting opinion in *Carcieri*. Id. at 405 ("Because federal recognition is generally required before a tribe can receive federal benefits, the Secretary has interpreted the definition of 'tribe' to refer only to recognized tribes. See 25 CFR § 83.2 (2008)"). Thus the Justices agreed that Part 83 recognition was a prerequisite for a tribe to seek federal benefits.

The Narragansett, the tribe involved in *Carcieri,* had obtained Part 83 recognition in 1983 and, therefore, could apply for fee-to-trust transfer under Section 5 of the IRA. But this Court held that, although the Narragansett had Part 83 recognition and could apply for IRA benefits, they were not entitled to receive IRA fee-to-trust benefits because they were not a federally recognized tribe in 1934. In contrast, the Ione Band has not obtained Part 83 recognition and, therefore, they are not eligible to apply for IRA trust benefits or IGRA gaming benefits. In effect, without Part 83 recognition, the Ione Band lacks "standing" to apply for IRA and IGRA benefits.

The federal benefits a Part 83 recognized tribe may seek include "the right to operate gaming facilities under the IGRA." *California Valley Miwok v. United States,* 515 F.3d 1262, 1264 (DC Cir. 2008). IGRA "has no application to tribes that do not seek and attain formal federal recognition." *Passamaquoddy Tribe v. State of Maine,* 75 F.3d 784,

792 n.4 (1st Cir. 1996). See *Pit River Home & Agric. Coop. Assn v. United States*, 30 F.3d 1088, 1094–96 (9th Cir. 1994) (an Indian association is not a recognized tribe unless it obtains Part 83 recognition) and *Frank's Landing Indian Community v. NIGC*, 918 F.3d 610, 617-16 (9th Cir. 2019) (formal recognition pursuant to Part 83 is a prerequisite to obtaining gambling benefits under IGRA.) Thus, as a matter of law, and until the Ione Band obtains recognition under 25 CFR Part 83, it does not have standing to seek benefits and gaming preferences under IGRA.

Likewise, to seek or receive IRA benefits, a tribe must first obtain Part 83 acknowledgement. *Mackinac Tribe v. Jewell,* 829 F.3d 754 (D.C. Cir. 2016). In *Mackinac*, a tribe without Part 83 recognition sued the Secretary of Interior for the right to organize under the IRA. The D.C. Circuit held the Mackinac tribe must first obtain Part 83 recognition before they can seek or obtain the benefits of the IRA including the right to organize. See *James v. US Dept. of HHS,* 824 F.2d 1132, 1136 - 1138 (D.C. Cir. 1987) (An Indian group may apply for federal recognition pursuant to Part 83, "thereby, qualifying for federal protection, services and benefits.. A petition for Part 83 federal recognition is required as a prerequisite to acknowledgment.") Thus, without Part 83 recognition, the Ione Band is not eligible to apply for a trust transfer under IRA or a casino under IGRA.

This Part 83 prerequisite rule has been confirmed by almost every court that has considered the issue. See *Western Shoshone Business Council v.*

Babbitt, 1 F.3d 1051, 1058 n.4 (10th Cir. 1993) (Part 83 recognition is required before a tribe can bring suit). See also *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273-1274 (9th Cir. 2004) (Part 83 recognition is required before a tribe is entitled "to immunities and privileges afforded to other federally acknowledged tribes by virtue of their government-to-government relationship with the U.S." (quoting 25 CFR § 83.2)).

In 2016, a year before *Amador,* the Ninth Circuit reaffirmed the importance of Part 83 recognition as a prerequisite for a tribe to receive IGRA benefits:

> "For many tribes, federal recognition is of great importance because '[s]uch status is a prerequisite to the protection, services and benefits of the Federal government available to Indian tribes by virtue of their statues as tribes.'. . . (Citing 25 C.F.R. § 83.2 (1994)) . . . Moreover, only federally recognized tribes may operate gambling facilities under [IGRA]."
> *Timbisha Shoshone,* 824 F.3d at 809.

Even in *Amador,* the Ninth Circuit stated the rule:

> "The purpose of [the Part 83 regulations] was to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence ... is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes," including the benefits of the IRA.
> *Amador*, 872 F.3d at 1017.

But, although *Amador* included the Part 83 prerequisite rule, for some reason it did not apply it. Apparently, unlike the Plaintiffs here, the County of Amador did not assert this requirement. But even if the County made that choice, it is not binding on the Plaintiffs in this case.

The Ninth Circuit panel in its Memorandum states that, while *Amador* "did not explicitly opine on whether Ione Band was required to seek" Part 83 recognition, the *Amador* decision "directly contradicts NCIP's claims that such recognition is a prerequisite for tribes to obtain statutory benefits." (App. B at 4.) This is not correct. As quoted above, *Amador* includes the Part 83 prerequisite rule; it did not contradict it.

The Memorandum decision is the first court case that is contrary to the judicial consensus of this Court in *Carcieri*, the Ninth Circuit in *Timbisha,* and the other Circuits listed above, that Part 83 is a prerequisite for a tribe to seek IRA and IGRA benefits. The panel's Memorandum decision has created an unnecessary conflict within the Ninth Circuit, a conflict with the other Circuit Courts and a conflict with this Court. This Court should grant review to resolve these conflicts.

CONCLUSION

For the forgoing reasons, Petitioners request that the petition for a writ of certiorari be granted.

Dated: February 4, 2024.

Respectfully submitted,

<u>/s/ Kenneth R. Williams</u>
KENNETH R. WILLIAMS
Counsel for Petitioners
kenwilliams5165@gmail.com

APPENDICES

A. November 7, 2023, Ninth Circuit Court of Appeals **Order** denying plaintiffs rehearing No.22-15756 D.C. No.2:18-cv-01398-TLN-CKD ……………………………………………….App.1

B. July, 20, 202 Ninth Circuit Court of Appeals **Memorandum** affirming dismissal of plaintiffs complaint without leave to amend No. 22-15756; D.C. No. 2:18-cv-01398-TLN-CKD ………………………………………..App.3

C. May 10, 2022, U.S. District Court For the E.D. of Cal. **Order** granting defendants' Motion for Judgment on the Pleadings (MJOP) without leave to amend No. 2:18-cv-01398-TLN-CKD ……………………………………………..App. 8

D. May 22, 2018 Complaint For Declaratory and Injunctive Relief (w/o att.) Case No. 2:18-cv-01398-TLN-CKD …………………………App. 36

E. April 29, 2020 Request for Judicial Notice of DOI Solicitor Opinion M-37055;………..App. 85

APPENDIX A

FILED NOV 7 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH; DUEWARD W. CRANFORD II; ELIDA A. MALICK; JON COLBURN; DAVID LOGAN; WILLIAM BRAUN; CATHERINE COULTER,

Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION; JONODEV CHAUDHURI, Former NIGC Chairman; U.S. DEPARTMENT OF THE INTERIOR; RYAN K. ZINKE, Secretary of Interior; DAVID BERNHARDT, Deputy Secretary of the Interior and former Solicitor; DONALD E. LAVERDURE, Former DOI employee; AMY DUTSCHKE, BIA Pacific Regional Director and member of the Ione Band

Defendants-Appellees,

and IONE BAND OF MIWOK INDIANS,

Intervenor-Defendant- Appellee.

No. 22-15756 D.C. No. 2:18-cv-01398-TLN-CKD
Eastern District of California, Sacramento ORDER

Before: WARDLAW and M. SMITH, Circuit Judges, and RAYES,* District Judge.

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* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the petition for rehearing en banc is **DENIED**.

APPENDIX B

FILED JUL 20 2023.
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS
No. 22-15756; D.C. No. 2:18-cv-01398-TLN-CKD

MEMORANDUM*

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH; et al,
Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION; et al,
Defendants-Appellees,

and

IONE BAND OF MIWOK INDIANS,
Intervenor-Defendant- Appellee.

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted July 18, 2023**
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except a provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes is suitable for decision without oral argument. *See* Fed. R. App. P.

34(a)(2).

Before: WARDLAW and M. SMITH, Circuit Judges, and RAYES,*** District Judge.

No Casino in Plymouth (NCIP) and several of its members appeal from the district court's order granting judgment on the pleadings in favor of the government on each of NCIP's six claims.1 As the parties are familiar with the facts, we do not restate them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm. In sum, the law of the circuit doctrine forecloses three of NCIP's six claims. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017). One of NCIP's claims fails on the merits, and NCIP has waived its remaining two claims.

1. NCIP purports to challenge the Department of the Interior's ("DOI's") approval of the Ione Band of Miwok's ("Ione Band's") tribal gaming ordinance in 2018. But in substance, three of NCIP's claims (Claims One, Three, and Four) turn on challenges to DOI's earlier, 2012 Record of Decision ("2012 ROD") taking land into trust in Plymouth, California for the benefit of the Ione Band and approving the use of certain lands for tribal gaming. In a prior appeal, we considered and rejected the claims and legal theories NCIP now attempts to

*** The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

1 The members and supporters of NCIP party to this action are Deuward W. Cranford II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun, and Catherine Coulter.

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resuscitate in the instant appeal. *See County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012 (9th Cir. 2017); *see also NCIP v. Zinke*, 698 Fed. App'x 531 (9th Cir. 2017) (mem.) (dismissing NCIP's prior appeal on standing grounds).

"Under our law of the circuit doctrine, a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." *Zermeno-Gomez*, 868 F.3d at 1052 (internal quotation marks omitted) (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)). This doctrine is subject to limited exceptions. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (recognizing that a three-judge panel may overrule a prior panel's decision if "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable").

NCIP does not argue that an exception to the law of the circuit doctrine applies. Instead, NCIP attempts to collaterally attack *Amador*, 872 F.3d 1012, arguing that the dispute was not ripe because the panel "decided a potential future dispute contingent on the subject property being taken into trust pursuant to the 2012 ROD—which never happened." Neither an en banc panel of our court nor the Supreme Court has revisited the panel's holding in *Amador*. *Zermeno-Gomez*, 868 F.3d at 1052.

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There is no ripeness exception to the law of the circuit doctrine. No intervening Supreme Court

precedent has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Gammie*, 335 F.3d at 900. Accordingly, the law of the circuit doctrine applies.

In *Amador*, we squarely rejected theories underlying four of NCIP's six claims. First, we upheld the validity of the 2012 ROD, observing (1) that Ione Band "is a recognized Indian Tribe" and that "[DOI] did not err in concluding that the Band is eligible to have land taken into trust on its behalf," 872 F.3d at 1028, and (2) that DOI did not err in allowing tribal gaming on such lands. *Id.* at 1031. Second, we held that a tribe did not need to be federally recognized in 1934 in order to be "under Federal jurisdiction" for purposes of the Indian Reorganization Act, 25 U.S.C. § 5129, *id.* at 1028. Third, while the *Amador* panel did not explicitly opine on whether Ione Band was required to seek recognition under "Part 83" regulations, 25 C.F.R. §§ 83.1–12, the panel's holding directly contradicts NCIP's claims that such recognition is a prerequisite for tribes to obtain statutory benefits.

2. We reject NCIP's second claim, which contends that the 2012 ROD violated the Appointments Clause because it was approved by an Acting Assistant Secretary of Indian Affairs who was not nominated by the president and confirmed

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by the senate. Assuming without deciding that the Assistant Secretary *as a permanent position* is a Principal Officer, the *Acting* Assistant Secretary remained an Inferior Officer because he was charged

"with the performance of the duty of the superior for a limited time and under special temporary conditions." *United States v. Eaton*, 169 U.S. 331, 343 (1898); *see also Morrison v. Olson*, 487 U.S. 654, 672 (1988) (restating *Eaton*'s holding).

3. NCIP has waived consideration of the two constitutional claims (Claims Five and Six) it attempts to raise on appeal. In proceedings before the district court, NCIP alleged that the government's 2012 ROD and 2018 approval of Ione Band's tribal gaming ordinance violated the Equal Protection Clause of the Fifth Amendment and the Tenth Amendment. On appeal, NCIP raises identical arguments, but refashion those claims into *Bivens* claims—oddly suing individual defendants in their personal capacities, yet seeking injunctive relief to rescind actions taken in defendants' official capacities. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). NCIP's *Bivens* action is "newly minted" on appeal and therefore waived. *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) (deeming causes of action waived because party failed to argue them in the proceedings below). Accordingly, we need not address the merits of NCIP's remaining two claims.

AFFIRMED.

APPENDIX C

United States District Court
For the Eastern District of California

NO CASINO IN PLYMOUTH, DUEWARD W. CRANFORD II, DR. ELIDA A. MALICK, JON COLBURN, DAVID LOGAN, WILLIAM BRAUN, AND CATHERINE COULTER,

Plaintiffs, v.

NATIONAL INDIAN GAMING COMMISSION, JONODEV CHAUDHURI, DEPARTMENT OF INTERIOR, RYAN ZINKE, DAVID BERNHARDT, DONALD E. LAVERDURE, AND AMY DUTSCHKE,

Defendants, v.

IONE BAND OF MIWOK INDIANS,

Proposed Defendant Intervenor.

No. 2:18-cv-01398-TLN-CKD

ORDER

This matter is before the Court on Defendants National Indian Gaming Commission ("NIGC"), E. Seqouyah Simermeyer, David Bernhardt, Kate MacGregor, and Tara Sweeney's (collectively, "Defendants") Motion for Judgment on the Pleadings pursuant to Federal Rule of

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Civil Procedure ("Rule") 12(c).1 (ECF No. 41.) Plaintiffs No Casino in Plymouth, Dueward W. Cranford

II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun, and Cathern Coulter

collectively, "Plaintiffs") oppose the motion. (ECF No. 44.) Defendants filed a reply. (ECF No. 52-1.) Also before the Court is the Ione Band of Miwok Indians' ("Proposed Defendant Intervenor") Motion to Intervene pursuant to Rule 24(a)(2) and Request for Judicial Notice. (ECF Nos. 62, 66.) Defendants filed a response. (ECF No. 63.) Plaintiffs filed an opposition to both the motion and request. (ECF Nos. 63, 68.) Proposed Defendant Intervenor filed a reply. (ECF No. 67.)

Having carefully considered the briefing filed by both parties, the Court hereby GRANTS Defendants' Motion for Judgment on the Pleadings without leave to amend and GRANTS Proposed Defendant Intervenor's Motion to Intervene and Request for Judicial Notice. (ECF Nos. 41, 62, 66.)

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 22, 2018, Plaintiffs filed a Complaint for declaratory and injunctive relief. (ECF No. 1 .)[1]

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[1] Pursuant to Rule 25(d), Defendants replaced former NIGC Chairman Jonodev Chaudhuri with current Chairman Seqouyah Simermeyer, former Secretary Ryan Zinke with Secretary David Bernhardt, former Deputy Secretary David Bernhardt with Kate Macgregor, and former Assistant Secretary-Indian Affairs Michael Black with Tara Sweeney. (ECF No. 41-1 at 2 n.1.) Defendants state Amy Dutschke is not

Plaintiffs assert seven causes of action against Defend-ants.[2]2 (ECF No. 1 ¶¶ 1–7.) This lawsuit primarily presents a challenge to the Department of the Interior's ("DOI") Record of Decision ("ROD")[3]3 and approval of the Ione Band of Miwok Indians' ("Tribe" or "Band") gaming ordinance[4]4 (*Id.* ¶¶ 1–2.) On May 24, 2012, then-Acting Assistant Secretary of Indian

Affairs Donald Laverdure ("Laverdure") issued the ROD at issue that announced the DOI's taking of 228.04 acres of land in Amador County into trust for the Band. (*Id.*) The ROD also allowed the Band to construct a casino complex and conduct gaming once the land was taken into trust. (*Id.* at ¶ 1.) Pursuant to IGRA, 25 U.S.C. § 2702(1), NIGC Chairman

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a "proper party" to the case because she has been recused from the matter since 2001. (Id.)

[2] 2 The Court previously dismissed Plaintiffs' seventh cause of action for violations of Cal. Constitution, Art. 4, §§ 19(e), (f) and Cal. Penal Code § 11225 et seq. (ECF No. 38.)

[3] A ROD is a notice of a final agency determination. See Fed. Reg., The Daily J. of the U.S. Gov't, Land Acquisitions; Ione Band of Miwok Indians of Cal., A Notice by the Indian Affairs Bureau on 05/30/2012, https://www.federalregister.gov/d/2012-13084.

[4] Pursuant to the Indian Gaming Regulatory Act ("IGRA"), Indian tribes are required to receive NIGC's approval of a gaming ordinance before engaging in gaming. 25 U.S.C. § 2710(b),(d) .

Jonodev Chaudhuri approved the Tribe's gaming ordinance on March 6, 2018. (*Id.* at ¶¶ 1, 91.) Plaintiffs' claims challenge various determinations as follows: (1) the Tribe's gaming ordinance (*id.* at ¶ 107); (2) Laverdure's authority to approve the ROD under the Appointment Clause of the U.S. Constitution (*id.*at ¶ 118); (3) the Tribe's federally recognizeed status under the Indian Reorganization Act ("IRA") (*id.* at ¶ 127); (4) the Tribe's federal recognition under 25 C.F.R. Part 83 (*id.* at ¶ 136); (5) Defendants' violation of Plaintiffs' Equal Protection rights by favoring the Tribe, a race-based group, through approval of the ROD and gaming ordinance (*id.* at ¶¶ 141–43); and (6) Defendants' violation of federalism protections (*id.* at ¶ 150–51). On June 25, 2020, Defendants filed the instant motion for judgment on the pleadings. (ECF No. 41.) On July 23, 2020, Plaintiffs filed an opposition to the motion (ECF No. 44), and on August 20, 2020, Defendants filed a reply (ECF No. 52-1).

On December 9, 2021, Proposed Defendant Intervenor, the Tribe, filed the motion to intervene. (ECF No. 62.) Proposed Defendant Intervenor seeks to intervene for the purpose of moving to dismiss pursuant to Rule 12(b)(7). (ECF No. 62-1 at 6.) The property and transactions that are the subject of this litigation challenge the "Tribe's land, the Tribe's status as a federally recognized tribe, and the validity of the Tribe's Gaming Ordinance." (*Id.* at 8.) On January 13, 2022, Defendants filed a response and Plaintiffs separately filed an opposition. (ECF Nos. 63, 64.) Proposed Defendant Intervenor filed a reply on January 20, 2022. (ECF No. 67.) On

January 20, 2022, Proposed Defendant Intervenor filed a Request for Judicial Notice. (ECF No. 66.) On January 25, 2022, Plaintiffs filed an opposition. (ECF No. 68.)

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II. RULE 12(C) MOTION

A. Standard of Law

Rule 12(c) provides that, "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The issue presented by a Rule 12(c) motion is substantially the same as that posed in a Rule 12(b)(6) motion — whether the factual allegations of the complaint, together with all reasonable inferences, state a plausible claim for relief. *See Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054–55 (9th Cir. 2011). Thus, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

In analyzing a 12(c) motion, the district court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). However, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *U.S. ex rel. Chunie v. Ringrose (Chunie)*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). "A judgment on the pleadings is properly

granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Ventress v. Japan Airlines*, 603 F.3d 676, 681 (9th Cir. 2010) (citations omitted).

If the Court "goes beyond the pleadings to resolve an issue," a judgment on the pleadings is not appropriate and "such a proceeding must properly be treated as a motion for summary judgment." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989); Fed. R. Civ. P. 12(d). A district court may, however, "consider certain materials — documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice — without converting the motion to dismiss [or motion for judgment on the pleadings] into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

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B. Analysis

Defendants move for judgment on the pleadings, arguing Plaintiffs cannot challenge the federal agency action because: (1) the Ninth Circuit has affirmed both the Tribe's status as federally recognized and Laverdure's authority to issue the 2012 ROD as Acting Assistant Secretary of Indian Affairs; and (2) the Complaint fails to state claims for which relief can be granted. (ECF No. 41-1 at 7–9, 11–13.) The Court will address each argument in turn.

i. Whether Ninth Circuit Authority Disposes of Plaintiffs' Claims

Defendants argue the Ninth Circuit in *County of*

Amador issued dispositive rulings on Claims One through Four[5] in the instant matter, including: (1) the Tribe's gaming ordinance; (2) Laverdure's authority to issue the ROD; (3) the Tribe's federally recognized status[6] . (ECF No. 41-1 at 8–9 (citing *Cnty. of Amador*, 872 F.3d at 1015–20).) In opposition, Plaintiffs argue the 2018 gaming ordinance was not at issue in *County of Amador*, and the court did not conclusively decide Laverdure had authority to take land into trust for the Tribe. (ECF No. 44 at 8–11.) Plaintiffs also contend the Tribe lacks Part 83[7]

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[5] Plaintiffs' first four claims present challenges to the following: (1) the Tribe's gaming ordinance (ECF No. 1 ¶ 107); (2) Laverdure's authority to approve the ROD under the Appointment Clause of the U.S. Constitution (id. at ¶ 118); (3) the Tribe's federally recognized status under the Indian Reorganization Act ("IRA") (id. at ¶ 127); (4) the Tribe's federal recognition under 25 C.F.R. Part 83 (id. at ¶ 136).

[6] Plaintiffs' Claims Three and Four both address the Tribe's federally recognized status and thus are combined into one issue.

[7] DOI promulgated what is now commonly referred to as the "Part 83" regulations in 1978. Cnty. of Amador, 872 F.3d at 1017; 25 C.F.R. pt. 83. These regulations "establish[] procedures and criteria for [DOI] to use to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 83.2. This recognition "is a prerequisite to the protection, services, and benefits of the Federal Government

recognition to be eligible for IRA and IGRA

After the promulgation of Part 83 regulations, the Tribe faced some difficulty in achieving federal recognition. *Cnty. of Amador*, 872 F.3d at 1018. However, in 1994, the government considered the Tribe "recognized" and included it on the official list of "Indian Entities *Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." Id.*

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benefits.[8] (*Id.* at 12–14.) Plaintiffs argue the Tribe's inclusion on the administrative list of "Indian Entities" eligible to receive service for the Bureau of Indian Affairs does not mean the Tribe is federally recognized. (*Id.* at 14–15.)

In *County of Amador*, the Ninth Circuit considered two challenges to the same 2012 ROD

> at issue in the present case, based on whether: (1) the Tribe qualified to have land taken into trust for its benefit under the IRA; and (2) the Tribe may conduct gaming on the parcels pur-

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available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States." Id.

[8] Benefits of federal recognition under the IRA include "assistance for such purposes as corrections, child welfare, education, and fish and wildlife and environmental programs." *Timbisha Shoshone Tribe v. U.S. Dep't of Interior,* 824 F.3d 807, 809 (9th Cir. 2016)(quoting American Indian Law Deskbook § 2:6). Further, "[o]nly federally recognized tribes may operate gaming facilities under the IGRA." Id.

suant to IGRA. 872 F.3d at 1020. As a preliminary matter, the court affirmed Laver-dure "was empowered to take the Plymouth Parcels into trust" and therefore had the authority to approve the ROD. *Id.* at 1019 n.5.

Then, the Ninth Circuit held "the Band is a recognized Indian tribe that was 'under Federal jurisdiction' in 1934, and [DOI] did not err in concluding that the Band is eligible to have land taken into trust on its behalf under 25 U.S.C. § 5108." *Id.* at 1028. With respect to recognition under 25 C.F.R. Part 83, the court stated, "the Band was effectively recognized without having to go through the Part 83 process" because "a tribe could be 'restored' to Federal recognition outside the Part 83 process." *Id.* at 1028–31. Thus, as a federally recognized Tribe, the court held DOI "did not err in allowing the Band to conduct gaming operations on the Plymouth Parcels" in accordance with IGRA. *Id.* at 1031.

The Ninth Circuit resolved issues identical to those in the present case. *Id.* at 1015–20. The "law of the circuit doctrine" mandates that "a published decision of [a Ninth Circuit] court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2010) (en banc)) (internal quotation marks omitted). Thus, the Ninth Circuit's decision on the Tribe's federally recognized status and the Tribe's status in 1934 under the IRA are binding on this

Court. Further, the Ninth Circuit clearly found Laverdure's actions within his powers. *Cnty. of Amador*, 872 F.3d at 1019 n.5.

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Accordingly, the Court finds *County of Amador* disposes of Plaintiffs' Claims One through Four on the following issues: (1) the Tribe's gaming ordinance; (2) Laverdure's authority to issue the ROD; and (3) the Tribe's federally recognized status under the IRA and Part 83. Accordingly, the Court GRANTS Defendants' motion for judgment on the pleadings on Claims One through Four.[9]

ii. Whether the Complaint States Claims for Which Relief Can be Granted

Plaintiff's remaining claims are Claim Five, Defendants' violation of Plaintiffs' Equal Protection rights by favoring the Tribe, a race-based group, through approval of the ROD and gaming ordinance (ECF No. 1 at ¶¶ 141–43) and Claim Six, Defendants' violation of feder-

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[9] If a complaint fails to state a plausible claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quoting Doe v. U.S., 58 F.3d 494, 497 (9th Cir. 1995)). For reasons discussed further below, the Court will not grant leave to amend as the pleadings cannot be cured by the allegation of other facts.

alism protections (*id.* at ¶ 150–51). Defendants argue Plaintiffs' equal protection claim fails because "[p]rovision of benefits to federally recognized tribes on the basis of their status as tribes does not offend equal protecttion principles." (*Id.*) Further, Defendants argue Plaintiffs' federalism claim, which alleges that the Tribe receives exemptions from state and local law, is inaccurate. (*Id.* at 12.) Plaintiffs do not respond to these arguments in any meaningful way. (*See* ECF No. 44.)

"Where a party fails to address arguments against a claim raised in a motion . . . , the claims are abandoned and dismissal is appropriate." *Shull v. Ocwen Loan Servicing, LLC*, No. 13-CV-2999-BEN (WVG), 2014 WL 1404877, at *2 (S.D. Cal. Apr. 10, 2014); *see*, *e.g.*, *Women's Recovery Ctr., LLC, v. Anthem Blue Cross Life & Health Ins. Co.*, No. 8:20-cv-00102- JWH-ADSx, 2022 WL 757315, at *7 (C.D. Cal. Feb. 2, 2022) ("Courts in this district, as well as many other districts, have found that a failure to address an argument in opposition briefing constitutes a concession of that argument."); *Yarkin v. Starbucks Corp.*, No. C 07-01969 CRB, 2008 WL 895688, at *1 (N.D. Cal. Mar. 31, 2008). Thus, Plaintiffs' failure to respond to

Defendants' arguments is a concession of those arguments.

Even if Plaintiffs had opposed, the Court finds Defendants' arguments persuasive. With respect to Plaintiffs' Equal Protection argument, Claim Five, the Supreme Court has held that any "preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *U.S. v. Antelope*, 430 U.S. 641, 646 (1997) (quoting *Morton*, 417 U.S. at 554). As such, Plaintiffs' argument for Equal Protection fails because the tribe is not a distinct racial group but a separate, "quasi-sovereign entity[]." *Id.* With respect to Plaintiffs' federalism argument, Claim Six, Congress has "plenary power" to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *U.S. v. Lara*, 541 U.S. 193, 200, 202 (2004). Thus, Congress is not exempting the Tribe from state and local law (ECF No. 1 ¶ 150) but using its authority to grant IRA and IGRA benefits to the federally recognized Tribe.

Accordingly, the Court need not consider the arguments and GRANTS Defendants' motion for judgment on the pleadings on Claims Five and Six.

III. RULE 24(A)(2) MOTION

A. Standard of Law

Pursuant to Rule 24(a)(2), a party may intervene as a matter of right when:

(1) The application is timely;

(2) The party has a significant protectable interest relating to the property or transaction that is the subject of the action;

(3) The disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and
(4) the existing parties may not adequately represent the applicant's interest. Fed. R. Civ. P. 24(a)(2); *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (quoting *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)).

"Each of these four requirements must be satisfied to support a right to intervene." *Chamness*, 722 F.3d at 1121 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)).

In evaluating whether these requirements are met, courts "are guided primarily by practical and

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equitable considerations." *Alisal Water Corp.*, 370 F.3d at 919. Further, courts generally "construe [the Rule] broadly in favor of proposed intervenors." *United States v. City of L.A., Cal.*, 288 F.3d 391, 397 (9th Cir. 2002) (alteration in original).

B. Analysis

Proposed Defendant Intervenor is the Tribe whose federal recognition and gaming ordinance is at issue. (ECF No. 1 ¶¶ 1–2.) Proposed Defendant Intervenor argues, pursuant to Rule 19, this action cannot proceed in its absence. (ECF No. 62-1 at 1; *see* ECF No. 1 ¶¶ 1–2.) Proposed Defendant Intervenor seeks limited intervention to dismiss the complaint pursuant to Rule 12(b)(7). (ECF No. 62-1 at 4.) Plaintiffs oppose the motion and argue Proposed Defendant Intervenor has no property interest in

the case and the motion is untimely. (ECF No. 64 at 10, Defendants take no position on the Proposed Defendant Intervenor's motion for intervention. (ECF No. 63.)

Additionally, Proposed Defendant Intervenor filed a request for judicial notice. (ECF No. 66.) Plaintiffs oppose the request. (ECF No. 68.) The Court will first address the request for judicial notice. Then, the Court will address each of the four Rule 24(a)(2) factors in turn.

i. Request for Judicial Notice

The Court may judicially notice a fact that is not subject to reasonable dispute, either because it is generally known within the court's jurisdiction or because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. "The court may take judicial notice at any stage of the proceeding." *Id.*

Proposed Defendant Intervenor requests the Court take judicial notice of Exhibits One and Two.10 (ECF No. 66 at 1.) Plaintiffs oppose the motion and argue the following: (1) the grant deeds were recorded in 2020 and are irrelevant to the case (ECF No. 68 at 5); (2) the land described in the deeds is not the land described in the 2012 ROD (*id.* at 7); (3) the request concerns a disputed fact of whether the DOI approved the land to be taken into trust for the Tribe

10 Exhibits One and Two contain "copies of the grant deeds transferring said land to the United States in trust for the Tribe, and acceptances of conveyance by the Bureau of Indian Affairs, recorded in Amador County as DOC 2020-0002270-00 and DOC-2020-

000271-00." (ECF No. 66 at 1.)

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(*id.* at 8); and (4) the grant deed and acceptances are not verified for authenticity (*id.* at 9). Pursuant to Federal Rule of Evidence ("Rule") 201(e), Plaintiffs request an evidentiary hearing "on the propriety of taking judicial notice and the nature of the fact to be noticed." (*Id.* at 4.)

The Court will address each of Plaintiffs' arguments in turn, and then address the request for an evidentiary hearing.

a. Whether the Grant Deeds are Relevant

Plaintiffs argue the grant deeds are irrelevant to the present case because "the grant deeds do not mention, or claim to be issued pursuant to, the 2012 ROD."11 (ECF No. 68 at 6.) Plaintiffs contend a court may only take judicial notice of matters which have a "direct relation to the matters at issue." (*Id.* (quoting *Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).)

Plaintiff has not presented evidence or cited to authority which states a grant deed must mention or claim to be issued pursuant to a relevant ROD. Both exhibits note the recording was requested by the "Bureau of Indian Affairs, U.S. Dept. of the Interior" and should be mailed to the Bureau's office when the parcels are recorded. (ECF No. 66-1 at 1; ECF No. 66-2 at 1.) Further, the description of the grant deed declares to give the land "to the United States of America in Trust for the Ione Band of Miwok Indians of California." (ECF No. 66-1 at 1; ECF No. 66-2 at

1.) The language of the grant deeds is sufficient to determine the grant deeds are relevant as both pertain to the taking of land in trust for the Tribe. Accordingly, the Court finds Plaintiffs' arguments unpersuasive, and further finds the grant deeds relevant to the instant action.

b. Whether the Land Described Pertains to the ROD

Plaintiffs argue the grant deeds do not cover the same land parcels described in the 2012 ROD. (ECF No. 68 at 7.) Plaintiffs contend the grant deeds only transferred trust title for ten out

11 Plaintiffs also argue the grant deeds were recorded in 2020, two years after the ROD expired and was withdrawn. (ECF No. 68 at 5.) Plaintiffs cite to 28 U.S.C. § 2401(a) to support this assertion. (*Id.*) However, that section only states that "civil actions commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). As discussed further below in footnote 13, Plaintiffs have not provided any authority to support the assertion that the ROD is expired and the Solicitor withdrew the ROD. As such, the Court will not address this argument further.

of the twelve parcels specified in the ROD. (*Id.*) Proposed Defendant Intervenor requested the Court judicially notice the grant deeds as "the land that the [DOI] approved to take into trust for the benefit of the Tribe in 2012 . . . was conveyed to the United

States in trust for the Tribe." (ECF No. 66 at 1.) Proposed Defendant Intervenor does not claim DOI approved all the parcels, and the quoted language does not suggest that. The DOI approved ten parcels to take into trust for the Tribe pertaining to the 2012 ROD. Accordingly, the Court finds the land described pertains to the ROD, even if not all twelve parcels were taken into trust.

c. Whether the Request Concerns a Disputed Fact

Plaintiffs argue the Court cannot take judicial notice of this matter because it is a disputed fact whether, in 2012, the DOI approved the transfer of land to the Tribe. (ECF No. 68 at 8.) "A court may take judicial notice of the undisputed matters of public record, e.g., the fact that a hearing took place, but it may not take judicial notice of disputed facts stated in public records." *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1057 (quoting *Lee v. City of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001)).

The Ninth Circuit ruled on this issue, finding that the DOI "did not err in concluding that the Band is eligible to have land taken into trust on its behalf." *Cnty. of Amador*, 872 F.3d at 1028. A fact is indisputable and subject to judicial notice if it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned under Rule 201(b)(2)." *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983 (S.D. Cal. 2005) (quoting *U.S. v. Ritchie*, 342 F.3d 903, 909 (9th. Cir. 2003)). Thus, despite Plaintiffs contention to the contrary, it is not a reasonably disputed fact whether the DOI approved the transfer of land as the

Ninth Circuit and the grant deeds filed with the Amador County Recorder are sources whose accuracy cannot be reasonably questioned. Accordingly, the Court holds the request for judicial notice does not concern a disputed fact.

d. Whether the Deeds and Acceptances are Authentic

Plaintiffs argue the accuracy of the grant deeds and "acceptances" are questionable. (ECF No. 68 at 9.) Plaintiff contends the documents are not authenticated or certified by the custodian of records for the Amador County Recorder's Office. (*Id.*) Further, Plaintiffs argue the

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signatures present on the documents may not be credible. (*Id.*)

"Under Rule 201, a court may take judicial notice of matters of public record." *Sears, Roebuck & Co. v. Metro. Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956). Courts often take judicial notice of grant deeds and similar documents of public record. *See Sunbelt Rentals v. Hawks Truck Stop*, 2010 WL 1729165, at *1 (E.D. Cal. Apr. 27, 2010) (granting judicial notice of deed of trust and assignment of property); *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010) (taking judicial notice of a deed of trust and assignment of deed of trust because both are publicly recorded documents).

The grant deeds and acceptances are both matters of public record. To the extent Plaintiffs are concerned about the credibility of the documents, the

grant deeds were both signed under certification of a notary public. (ECF No. 66-1 at 1; ECF No. 66-2 at 1.) Furthermore, the Amador County Recorder's Official Records Index website displays both grant deeds. Amador County Clerk/Recorder's Official Records Index (search under "Documents Number" tab), https://mint.amadorgov.org/RecorderWorksInternet/. Accordingly, the Court finds the Amador County Clerk and Recorder's Official Records Index and notary verification provide sufficient proof that both deeds are accurate matters of public record.

e. Request for Evidentiary Hearing

Plaintiffs' opportunity to be heard has been satisfied as Plaintiffs reply brief addressed all concerns relating to Proposed Defendant Intervenor's request for judicial notice. *See Papai v. Harbor Tug and Bargo Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995) (holding plaintiff's reply brief, which addressed his concerns with the request for judicial notice, was a sufficient opportunity to be heard). Accordingly, the Court finds Plaintiffs have had an adequate opportunity to be heard, and as such, Proposed Defendant Intervenor's request for judicial notice is GRANTED.

ii. Rule 24(a)(2) Factors

a. Timeliness of Application

In determining whether a motion is timely, the Court considers: (1) the stage of the proceeding; (2) any prejudice to the other parties; and (3) the reason for and length of any delay. *Orange Cnty. v. Air Cal.*,

799 F.2d 535, 537 (9th Cir. 1986). A motion is generally considered

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timely when "made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

Plaintiffs filed the Complaint on May 22, 2018. (ECF No. 1.) Proposed Defendant Intervenors filed the present motion to intervene on December 9, 2021. (ECF No. 62.) Defendants filed the currently pending motion for judgment on the pleadings on June 25, 2020. (ECF No. 41.) Proposed Defendant Intervenor contends the motion is timely because of the nascent stage of the proceeding, as evinced by the lack of a set hearing date. (ECF No. 62-1 at 6.) Proposed Defendant Intervenor waited to file this motion due to a pending action before the Supreme Court. (*Id.*) In that matter, the Supreme Court declined to overturn a dismissal of a similar action for failure to join the absent tribe on December 6, 2021. (*Id.* (citing *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83 (2021), *reh'g denied*, No. 20-1559, 2021 WL 5763396 (U.S. Dec. 6, 2021)).)

In opposition, Plaintiffs argue the motion is untimely because the lawsuit was filed almost four years ago, and the Court's Initial Pretrial Scheduling Order requires any requests to add parties to be

brought within 60 days of service. (ECF No. 64 at 17.) Plaintiffs contend disrupting the Court's pending consideration of the motion for judgment on the pleadings at the final stage would be prejudicial. (*Id.* at 19.) In reply, Proposed Defendant Intervenor argues the limited purpose of moving to dismiss pursuant to 12(b)(7) cannot prejudice the parties in this case. (ECF No.67 at 3.) Proposed Defendant Intervenor also contends the Court could consider this motion prior to or simultaneously with the pending motion for judgment on the pleadings. (*Id.*)

1. Stage in the Proceeding

The length of time since a suit was filed does not alone determine timeliness. *United States v. State of Oregon* (*Oregon I*), 913 F.2d 576, 588 (9th Cir. 1990). "Where a change of circumstances occurs, and that change is the 'major reason' for the motion to intervene, the stage of proceedings factor should be analyzed by reference to the change in circumstances, and not the commencement of the litigation." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir.

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2016) (quoting *Oregon I*, 913 F.2d at 588). "[A] change of circumstance, which suggests that litigation is entering a new stage, indicates that the stage of the proceeding and reason for delay are factors which militate in favor of granting the application [to intervene]." *United States v. State of Oregon* (*Oregon II*), 745 F.2d 550, 552 (9th Cir. 1984) (motion to intervene due to a change in

circumstances was timely even when sought fourteen years after the action was initiated).

The parties have engaged in substantial litigation, including a motion to dismiss and motion for judgment on the pleadings, over the course of four years. (*See* ECF Nos. 15, 41.) However, Proposed Defendant Intervenor argues the Supreme Court's denial to rehear *Jamul* constitutes a major change in circumstances and justifies the motion to intervene at this time. (ECF No. 62-1 at 6–7.) As such, the Court will analyze this factor by reference to the change in circumstances. *Smith*, 830 F.3d at 854. This issue is discussed further below in tandem with the third factor.

2. Prejudice to Other Parties

Prejudice is only relevant to the extent that it "flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented." *Kalbers v. U.S. Dep't of Just.*, 22 F.4th 816, 825 (9th Cir. 2021) (quoting *Smith*, 830 F.3d at 857). "Prejudice must be connected in some way to the timing of the intervention motion" and simply because adding another party may "make resolution more difficult does not constitute prejudice." 22 F.4th at 825 (quoting *Oregon II*, 745 F.2d at 552–53 (alteration in original) (internal quotation marks omitted).

Proposed Defendant Intervenor is seeking intervention only to request dismissal under Rule 12(b)(7) and contends this limited action will not prejudice other parties. (ECF No. 62-1 at 1.) Proposed

Defendant Intervenor is not seeking to litigate new issues or otherwise delay the litigation. *Cf. United States v. Wash.*, 86 F.3d 1499, 1504 (9th Cir. 1996) (proposed defendant intervenor's motion was prejudicial to other parties as it would "complicate the issues and prolong the litigation"). Further, Proposed Defendant Intervenor is not causing undue prejudice as it intervened as soon as it knew its interests would not be adequately represented per the

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decision in *Jamul* discussed further below. *See Smith*, 830 F.3d at 859 ("When our inquiry is properly narrowed to the prejudice attributable to Appellants' delay in moving to intervene after the time Appellants knew, or reasonably should have known, that their interests were not being adequately represented by existing parties, the prejudice to existing parties becomes nominal at best."). Accordingly, the Court holds this factor supports finding the motion is timely. *3. Reason for and Length of Delay* "Delay is measured from the date the proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties, not the date it learned of the litigation." *Kalbers*, 22 F.4th at 823 (quoting *United States v. Wash.*, 86 F.3d 1499, 1503 (9th Cir. 1996)) (internal quotation marks omitted).

Proposed Defendant Intervenor delayed its motion in anticipation of the Supreme Court rehearing *Jamul*. (ECF No. 62-1 at 6.) Proposed Defendant Intervenor contends it realized its interests would not be adequately represented when the Supreme

Court denied the rehearing of *Jamul* on December 6, 2021. (ECF No. 62-1 at 6–7.) This motion was filed only three days after, on December 9, 2021. The Court accepts this reasonable explanation for delay, as *Jamul* is applicable to the present case. *See Officers for Just. v. Civ. Serv. Comm'n of S.F.*, 934 F.2d 1092, 1095 (9th Cir. 1991) (finding a motion to intervene timely when the party who formerly represented the intervenor's interests changed its position). Accordingly, the Court finds the motion to intervene was timely filed and will not prejudice the existing parties or cause delay within the meaning of Rule 24.

b. Significant Protectable Interest

Proposed Defendant Intervenor argues it has strong protectable interests in the outcome of this litigation. (ECF No. 62-1 at 7.) Proposed Defendant Intervenor points to the recent Ninth Circuit case, *Jamul*, in which the plaintiff challenged the tribe's federal recognition and gaming ordinance. (*Id.* at 7–8.) The Ninth Circuit held the plaintiff's challenges "would have far- reaching retroactive effects on the [tribe's] existing sovereign and proprietary interests." (*Id.* at 8 (quoting *Jamul*, 974 F.3d at 984).) Thus, the action could only proceed with the tribe as a party. *Jamul*, 974 F.3d at 984. Plaintiffs do not make an argument against this factor in their

opposition.12 (*See* ECF No. 64.)

"A proposed intervenor 'has a significant protectable interest in an action if (1) it asserts an interest

that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims." *Kalbers*, 22 F.4th at 827 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)) (internal quotation marks and citation omitted).

As in *Jamul*, the invalidation of Proposed Defendant Intervenor's gaming ordinance or its status as a recognized tribe will affect its land and rights. As such, it has an interest in the outcome of the litigation. *See Dine Citizens v. Bureau of Indian Affs., 932 F.3d 843, 853 (9th Cir.* 2019) (holding a challenge to the coal mining activities conducted by a tribal-owned corporation warranted intervention because it had a legally protectable interest which could be impacted by *the litigation).*

Accordingly, the Court finds Proposed Defendant Intervenor has satisfied the requisite showing of a protectable interest.

c. Disposition of Action May Impair or Impede Ability to Protect Interest

"If an absentee would be substantially affected in a practical sense by the determination made in an action, [the absentee] should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Rule 24 advisory committee's notes). Here, the pending litigation could directly impair or impede Proposed Defendant Intervenor. If the Court found Proposed Defendant Intervenor was not a federally recognized tribe, the government would not be able to hold its land in trust and the gaming

ordinance would be invalid. (ECF No. 62-1 at 8 (quoting *Jamul*, 974 F.3d at 997).) Accordingly,

12 Although Plaintiffs do not make a direct argument against this factor, Plaintiffs argue Proposed Defendant Intervenor does not have Article III standing to intervene. (ECF No. 64 at 10.) Plaintiffs argue this case does not involve any property claimed by Proposed Defendant Intervenor because the 2012 ROD expired on May 30, 2018, and none of the parcels were taken into trust. (ECF No. 64 at 10.) Plaintiffs admit "in the Ninth Circuit the requirement of Article III standing is incorporated into the four-part intervention test as part of the requirement that the applicant for intervention must 'assert an interest relating to the property or transaction which is the subject of the action.'" (*Id.* at 3 (quoting *Portland Audubon So. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989).) Plaintiffs' assertion that the 2012 ROD expired is unfounded and unsupported by their complaint or other filings before the Court. (*See* ECF Nos. 1, 44.) Therefore, the Court need not address this argument.

this factor is satisfied.

d. No Existing Adequate Representation

Proposed Defendant Intervenor argues "the United States cannot adequately represent a tribe where the relief sought would create a conflict between the United States and the [T]ribe." (ECF No. 62-1 at 8.) Further, "[i]f the Court were to agree [with Plaintiffs], the federal defendants' interest in

complying with federal law would force them to take a position that is in direct conflict with [Proposed Defendant Intervenor's] fundamental interest to uphold its status as a federally recognized Indian tribe with gaming-eligible trust land." (*Id.* at 9.)

In opposition, Plaintiffs argue Defendants and Proposed Defendant Intervenor have identical interests in the litigation, thus Defendants can adequately represent such interests. (ECF No. 64 at 19.) Plaintiffs contend Proposed Defendant Intervenor is admitting that "if [Plaintiffs] prevail[], and the Federal Defendants were required to comply with federal laws, that would diverge from [Proposed Defendant Intervenor's] interest in continuing to violate federal law." (*Id.* at 20.)

A proposed intervenor is adequately represented when "(1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153–54 (9th Cir. 1998).

The Court finds Proposed Defendant Intervenor's arguments to be persuasive. "Federal defendants would not adequately represent an absent tribe where their obligations to follow relevant [] laws were in tension with tribal interests . . . ." *Jamul*, 974 F.3d at 997 (citing *Dine Citizens*, 932 F.3d at 855). Further, the burden of showing inadequate representation is "minimal" and Proposed Defendant Intervenor need only demonstrate "that

representation of its interests 'may be' inadequate." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki*, 324 F.3d at 1086). Accordingly, the Court finds this factor has been met, and as such, the Court finds intervention appropriate.

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IV . CONCLUSION

For the reasons set forth above, the Defendants' Motion for Judgment on the Pleadings (ECF No. 41) is GRANTED and Plaintiffs' claims are DISMISSED without leave to amend. Proposed Defendant Intervenor's Motion to Intervene (ECF No. 62) and Request for Judicial Notice (ECF No. 66) are GRANTED. The Clerk of the Court is ordered to close this case.

IT IS SO ORDERED.

DATED: May 10, 2022
Troy L. Nunley
United States District Judge

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APPENDIX D

KENNETH R. WILLIAMS, SB No. 73170
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 449-9980
Fax: (916) 446-7104
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH, DUEWARD W. CRANFORD II, Dr.ELIDA A. MALICK, JON COLBURN, DAVID LOGAN, WILLIAM BRAUN and CATHERINE COULTER,

Plaintiffs,

v.

NATIONAL INDIAN GAMING COMMISSION; JONODEV CHAUDHURI former NIGC Chairman; DEPARTMENT OF INTERIOR; RYAN ZINKE, Secretary of Interior; DAVID BERNHARDT, Deputy Secretary of the Interior and former Solicitor; DONALD E. LAVERDURE former DOI employee; and AMY DUTSCHKE, BIA Pacific Regional Director and member of the Ione Band,

Defendants.

Case No. 2:18-cv-01398 TLN-CKD

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, No Casino In Plymouth (NCIP), Dueward W. Cranford II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun and Catherine Coulter file this complaint against Defendants: the National Indian Gaming Commission

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(NIGC or Commission); Jonodev Chaudhuri, former Chairman of the NIGC; the Department of Interior (DOI); Ryan Zinke, Secretary of the Interior; David Bernhardt, Deputy Secretary of the Interior and former DOI Solicitor; Donald E. Laverdure, former DOI Employee; and Amy Dutschke, BIA Pacific Regional Director and member of the Ione Band and allege against each of them as follows:

INTRODUCTION

1. Plaintiffs request that the Court vacate Defendant Chaudhuri's March 6, 2018 approval the "Amended and Restated Tribal Gaming Ordinance, Res. No. 2018-4" submitted by an unrecognized group of Ione Indians with no "Indian land" eligible for Indian gambling under the Indian Gaming Regulatory Act (IGRA). Chaudhuri, the former NIGC Chairman, lacked the authority to approve the gaming ordinance or to allow a casino to be constructed by Ione Indians on nonIndian land in Plymouth, Amador County, California.

2. Plaintiffs also request that the Court vacate of the Record of Decision (ROD) issued by Defendant Laverdure, a former DOI employee, on May 24, 2012 and published on May 30, 2012. (77 Fed. Reg. 31871-31872.) The ROD purports to take 228.04 acres of

privately owned land in Amador County into trust for of an unrecognized group of Indians. Laverdure lacked the authority to issue the ROD. The approval of the ROD by Laverdure, then a General Schedule (GS) federal employee, violates the Appointments Clause of the Constitution and the 1934 Indian Reorganization Act (IRA; copy attached).

3. Plaintiffs also seek declaratory and injunctive relief because no group of Ione Indians was a recognized tribe under federal jurisdiction in 1934 which is required to receive IRA fee-to-trust benefits. The DOI determined in 1933 that the Indians living near Ione in Amador County were not "wards" of the federal government. The DOI also concluded in 1934 that because the Ione Indians were "non-wards", and not a recognized tribe with a reservation, they were not entitled to participate in, or receive the benefits of, the IRA. These 1933-1934 DOI determinations were not challenged by the Ione Indians.

4. Plaintiffs also seek declaratory and injunctive relief because no group of Ione Indians has been federally recognized under 25 C.F.R. Part 83 and, therefore, no such group is entitled to benefits accorded only to federally recognized tribes under the IRA or IGRA. In 1992, this Court held, at the DOI's request, that Ione Indians were not a recognized tribe and that they failed to exhaust their administrative remedies under 25 CFR Part 83. *Ione Band v. Burris/DOI* (U.S. District Court, ED Cal. No. CIV-S-90-0993). This decision was confirmed by a judgment in 1996 which was not appealed by DOI

or any Ione Indian. It is final and binding on the Defendants.

5. Plaintiffs also seek declaratory and injunctive relief against all Defendants on the basis that by approving and allowing the construction of a casino for a group of Indians which is not a Part 83 federally recognized tribe and which has no Indian land eligible for gaming is a violation of Plaintiffs' Equal Protection

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rights which prohibits discrimination in favor of any individual or group based on race. The Ione Indians are a race-based group which, despite the directive of the district court in *Ione Band v. Burris/DOI,* has not petitioned for Part 83 federal recognition. Defendants' efforts to give IRA and IGRA benefits to the Ione Indians as though they were a federally recognized tribe violates equal protection and cannot withstand strict-scrutiny.

6. Plaintiffs also seek declaratory and injunctive relief against all Defendants on the basis that their actions also violate Plaintiffs' protection from abusive government under the constitutional principle of Federalism. The abuse in this case is being exercised by officials and employees of the DOI, BIA and NIGC –including Defendants Dutschke, Laverdure and Chaudhuri – who intentionally ignored and evaded the rules and the laws, including the mandates and requirements of the IRA and IGRA, to give benefits and preferences to an unrecognized group of Ione Indians with no Indian land.

7. Plaintiffs also seek declaratory and injunctive relief against all Defendants on the basis that the construction of the proposed casino on non-Indian land would violate California's Constitutional prohibitions of Indian gambling on non-Indian land and of the large Nevada style casinos in California. Also the construction of the proposed casino would be a public and private nuisance which is prohibited, and should be precluded and abated, under California law and, if necessary and appropriate, for which damages should be assessed.

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JURISDICTION AND VENUE

8. The jurisdiction of this Court is invoked per 28 U.S.C. §§1331, 5 U.S.C. §701-706 et seq., 28 U.S.C. §§ 2201 and 2202 and 25 USC §§ 2701 et seq.
9. The 2012 approval of the ROD by Laverdure is a final agency action reviewable under the Administrative Procedures Act (APA) and the IRA.
10. The 2018 approval of the gaming ordinance by Chaudhuri is a final agency action subject to judicial review under the APA and IGRA.
11. Venue is proper in United States District Court for the Eastern District of California under 28 U.S.C. §§ 1391(b) (2) and 1391(e), 5 U.S.C. § 703.
12. The 12 parcels, that are the subject of this lawsuit, are located in the Eastern District and all the Plaintiffs reside in the Eastern District of California.

STANDING

13. Plaintiffs have standing to bring this action because they will each suffer an injury in fact if the subject property is taken into trust and the proposed casino is constructed in Plymouth. Their injuries are actual and imminent, and not conjectural or hypothetical, especially given Defendant Laverdure's approval of the ROD and Defendant Chaudhuri's approval of the gaming ordinance both of which are procedural prerequisites to the construction of the casino. There is a direct causal connection between the proposed casino and the injuries that Plaintiffs will suffer if it is constructed in Plymouth including increased pollution, increased traffic, increased crime, and decrease in property values, an

irreversible change in the rural character of Plymouth, and other adverse aesthetic, socioeconomic, and environmental impacts. These injuries will be redressed by a court decision favorable to the Plaintiffs in this case which vacates the approval of the ROD by Defendant Laverdure and vacates the approval of the gaming ordinance by Defendant Chaudhuri and, therefore, precludes construction of the proposed casino.

14. Plaintiffs also have standing under the Equal Protection provisions of the constitution which prohibits discrimination and preferences of any kind – positive or negative - based on racial classifications. The Supreme Court has held that preferences given to tribes which have been federally recognized are political, not racial, in nature and therefore do not

violate Equal Protection. *Morton v. Mancari,* 417 U.S. 535 (1974) But the Supreme Court has also held that preferences in favor of a group of Indians which is not a federally recognized tribe are racial preferences prohibited by the Equal Protection provisions of the Constitution. *Id.* The casino and gambling benefits and preferences that the Defendants proposed to give to an unrecognized group of Indians based on their race is a violation of Equal Protection and would be injurious and detrimental to Plaintiffs and others in the community who do not receive or enjoy such preferences including the exemptions from property and businesses taxes that would otherwise be used to benefit and improve Plymouth. Such tax exemptions will give the unrecognized group of Indians favored by the

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Defendants an unfair competitive business adventage in a wide variety of business – not just gambling – including the hotels, restaurants, gas sales, wine sales, grape growing, RV parks etc. This unfair advantage will result in the loss of businesses in the Plymouth area who cannot reasonably compete with businesses which have no or low tax preferences. These potential injuries will be redressed by a court decision favorable to the Plaintiffs in this case which vacates the approval of the ROD by Defendant Laverdure and vacates the approval of the gaming ordinance by Defendant Chaudhuri and, therefore, precludes construction of the casino and insures that all individuals and all businesses are treated equally.
15. Plaintiffs also have standing under the principles

of federalism inherent in the Constitutional structure of our government which divides authority between federal and state governments for the protection of individuals. The primary benefit of the federalist system is that it serves as a check on the abuses of government power by the ever growing administrative state including abuses bythe staff and officials of the NIGC, DOI and BIA. The misuse and abuse of power by the federal officials in this case, including Defendants Laverdure, Dutschke and Chaudhuri (and other officials), were designed to give an unrecognized Indian group with no Indian land an illegal casino in Plymouth to the injury and detriment of NCIP and its members and community supporters. These injuries will be redressed by a court decision favorable to the Plaintiffs in

this case which vacates the approval of the ROD Defendant Laverdure and vacates the approval of the gaming ordinance by Defendant Chaudhuri and, therefore, precludes construction of the casino and restores Plaintiffs' federalist constitutional protections.

16. Plaintiffs, as residents of California and Amador County, also have standing to enforce the gambling and casino prohibitions in the California Constitution especially those adopted by public initiative. Plaintiffs, as residents of California and Amador County, also have standing to enforce California's nuisance laws and to preclude and abate the proposed casino and to recover damages that are caused by that nuisance. These injuries will be

redressed by a court decision favorable to the Plaintiffs in this case which declares that the proposed casino is illegal and prohibited by California's Constitution and which declares the proposed casino would be a nuisance which should be precluded, enjoined and abated and for which damages should be assessed.

17. These facts, which establish the standing of NCIP on behalf of its members, supporters and the community, also apply to each and every individual Plaintiff as members and supporters of NCIP and as members of the Plymouth community. The individual Plaintiffs also reserve their right to assert their separate and specific claims, if necessary, for injuries caused by any entity or individual as a result of the proposed casino.

PARTIES

Plaintiffs

18. Plaintiff, No Casino in Plymouth (NCIP), is a representative citizens group and a non-profit corporation. NCIP members and supporters reside, own property and/or operate businesses in and around the Plymouth area that would be directly and adversely impacted by the construction of the proposed Ione Indian casino. NCIP was founded early in 2003 in response to the proposal by the Ione Indians to build a large Las Vegas style casino in their small, rural Plymouth community. NCIP was founded because the proposed casino will have direct adverse impacts on NCIP, its members and

supporters and the community. NCIP has been active from 2003 to the filing of this lawsuit in an attempt to stop the construction of the proposed casino. NCIP requests a favorable decision in this case to prevent and redress the injuries that will be caused if the proposed casino is constructed in Plymouth.

19. Plaintiff, Dueward W. Cranford II (also known as Butch Cranford) is one of the founding members of NCIP and has been an active member of NCIP for since 2003. He is a longtime resident of the Plymouth area. His residence is within view of the proposed casino and he owns properties in Plymouth less than a half mile from the proposed casino. The value of his residence and properties would be adversely affected if the proposed casino were built in Plymouth. And the small-town, rural lifestyle enjoyed by him and his family,

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would be negatively impacted, if not destroyed, if the proposed large Las Vegas style casino is built in the middle of Plymouth. These injuries would be redressed by decision favorable to the Plaintiffs in this case which precludes construction of the proposed casino.

20. Plaintiff, Dr. Elida Malick is a founding members of NCIP and has been an active member of NCIP for since 2003. She and her family have lived and worked in the Plymouth area since 2001. She established a small animal veterinary clinic and hospital just outside the City limits of Plymouth. The proposed casino would be built directly across the street from Dr. Malick's veterinary hospital. The

documented negative impacts of increased drug use and crime surrounding Indian casinos is a real concern with respect to veterinary clinics. Veterinary hospitals are known targets for drug related break-ins and robberies. This risk of serious injury to Dr. Malick's veterinary business and hospital would be redressed by a decision favorable to the Plaintiffs in this case which precludes construction of the proposed casino.

21. Plaintiff, Jon Colburn is one of the founding members of NCIP and has been an active member of NCIP for since 2003. He is a longtime resident of, and owns properties in, the Plymouth area. He is the current mayor of the City of Plymouth and has been active in the community and governmental affairs of Plymouth for decades. The value of his properties would be adversely affected if the proposed casino were built in Plymouth. Also his rural and quiet lifestyle

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would be negatively impacted by the casino. These injuries would be redressed by a decision favorable to the Plaintiffs in this case.

22. Plaintiff, David Logan is a longtime supporter of NCIP. He lives and works in the Plymouth area. He is a Rancher and owns Vineyard Property and other properties in the Plymouth area. He supports NCIP's efforts to protect the community by preventing the construction of a casino in Plymouth. The proposed casino, if built, will adversely impact his business and the value of his properties. A casino will also destroy the rural lifestyle that he and his family

currently enjoy by increasing traffic, crime and drugs, and light and view pollution in the Plymouth area. These injuries will be avoided and will be redressed by a decision in favor of Plaintiffs in this case which precludes the possibility of a casino being constructed in Plymouth.

23. Plaintiffs, William Braun and Catherine Coulter are members and
supporters of NCIP and have lived near Plymouth for 23 years. They reside off a small county road, near the proposed casino site, that is already heavily used by commuters and agricultural traffic going to and from Plymouth. The proposed casino will cause cumulative increases in traffic flow, congest traffic and jeopardize safe transportation to and from Plymouth. This increase in traffic will adversely affect their ability to safely access their property and the quiet enjoyment of their property and rural lifestyle. These injuries will be avoided and redressed by a decision favorable to the Plaintiffs in this case.

Defendants

24. Defendant, National Indian Gaming Commission (NIGC or Commission), is an "independent agency" within the DOI that is responsible for making Indian lands determinations before the NIGC Chairman approves gaming ordinances pursuant to IGRA. The NIGC has no authority to allow Indian gambling or an Indian casino on non-Indian land as defined by IGRA.

25. Defendant, Jonodev Chauduri, was the Chairman of the NIGC until April 2018, with delegated

authority to approve gaming ordinances for recognized tribes conducting Indian gambling on Indian lands as defined by IGRA. Chairman Chaudhuri lacked the authority to approve the gaming ordinance on non-Indian land for an unrecognized group of Ione Indians. He is being sued in his prior official capacity and in his personal capacity.

26. Defendant, Department of Interior (DOI) is an agency of the United States and is responsible for managing the affairs of Indians and Indian tribes through the Bureau of Indian Affairs (BIA). The DOI is responsible for insuring that its employees at the DOI, BIA and NIGC comply with the law and that they do not abuse their authority.

27. Defendant, Ryan Zinke, is the current Secretary of Interior and oversees the DOI, BIA and NIGC. He was appointed and confirmed in 2017. He succeeded Secretary Sally Jewell who was in office in 2012 when the ROD was issued by Defendant Laverdure. He is being sued in his official capacity.

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28. Defendant, David Bernhardt, is the Deputy Secretary of Interior. He was appointed by the President and confirmed by the Senate in 2017. He has delegated authority from Secretary Zinke to review and approve or deny fee-to-trust transfers for recognized tribes for gambling purposes. Mr. Bernhardt is also a former DOI Solicitor and, in that capacity, in 2009 determined that Ione Indians were not a “restored tribe” as that term is used in IGRA and that the subject property in this case was not

Indian land eligible for gambling under IGRA. He is being sued in his former official capacity as DOI Solicitor and in his current official capacity as Deputy Secretary.

29. Defendant, Amy Dutschke, is the BIA Pacific Regional Director. Defendant Dutschke is also member of a group of the Indians claiming to be Ione Indians (Dutschke group), which she recently helped organize to the exclusion of some Ione Indians. Defendant Dutschke, and the recently enrolled members of her family and friends will benefit, if the subject property is taken into trust for a casino for the Ione Indians. Defendant Dutschke misused and abused her position of authority in the BIA to benefit herself, her family and her friends in the Dutschke group outside the Ione area to the detriment of the public and to the exclusion of Indians in the Ione area. She is being sued in her official capacity and her personal capacity.

30. Defendant, Donald E. Laverdure, was a DOI employee in 2012 who, without authority, issued the ROD purporting to take the subject property into trust for

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gambling by an unrecognized group of Ione Indians. He was a deputy to Assistant Secretary for Indian Affairs Larry Echo Hawk. And when Assistant Secretary Echo Hawk resigned in April 2012 he supposedly designated Defendant Laverdure to serve as "acting assistant secretary" on an interim basis until a new Assistant Secretary was appointed by the President and confirmed by the Senate. Congress in

the IRA gave exclusive authority to the Secretary of Interior to take land into trust for recognized tribes that were under federal jurisdiction in 1934. Defendant Laverdure was not the Secretary of Interior in 2012. He did not have authority to take land into trust for an unrecognized group of Indians that did not exist in 1934. Defendant Laverdure is being sued in his prior official and personal capacities.

FACTS

31. In 1934, Congress enacted the Indian Reorganization Act (IRA), also known
as the Wheeler-Howard Act. (Copy attached.)
32. Section 5 of the IRA provides that "[t]he Secretary of Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to land . . . for the purpose of providing lands for Indians."
33. Section 19 of the IRA includes three definitions of "Indian" to include: (a) "all persons of Indian descent who are members of any recognized tribe now [1934] under Federal jurisdiction," and

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(b) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation," and
(c) "shall further include all other persons of one-half or more Indian blood."
34. The Indians living near or in the Ione area were not residing on a reservation in 1934 and were not

members of a federally recognized tribe in 1934.
35. On August 15, 1933, O.H. Lipps, Sacramento DOI Field Superintendent, in a letter to the Commissioner of Indian Affairs, John Collier, determined that the Indians living near or in Ione are "non-ward Indians" and "they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments in their own right held in trust by the Government." (A copy Superintendent Lipps' 1933 letter to Commissioner Collier is attached.)
36. On August 21, 1933, John Collier, the Commissioner of Indian Affairs, wrote a letter to Frank B. Bell, an Ione Indian which confirmed that the Ione Indians were non-ward Indians and not a recognized tribe with a reservation. Commissioner Collier was responding to a letter dated July 29, 1933, signed by Mr. Bell "and several other Indians, regarding relief conditions among a group of Indians classed as non-wards in Amador County." Mr. Bell and the other Ione Indians asking whether financial aid may be given to the Ione Indians "from funds made available under the public works program." Commissioner Collier forwarded a copy of the Ione Indians' request to Superintendent Lipps the

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Sacramento Field Office with a request that he respond to Mr. Bell's letter and noting that "[w]ards and non-wards re entitled to share equally in work and relief made available through the public works program." (A copy of Commissioner Collier's 1933

letter to Mr. Bell, the Ione Indian representative, confirming their non-ward status is attached.)
37. In 1934, the DOI had determined that the group of Indians living near Ione were not members of a federally recognize tribe, did not live on a reservation and were not "wards" of the federal government. Therefore, DOI did not invite the Ione Indians to organize as a tribe under Section 18 of the IRA.
38. The Ione Indians did not contest or appeal the 1933 and 1934 determinations by the DOI that they were non-ward Indians and were not entitled to organize under the IRA. Nor did they ever claim to be federal wards or a recognized tribe under federal jurisdiction in 1934 or to have a reservation in 1934.
39. Defendant Laverdure's 2012 approval of the ROD and Defendant Chaudhuri's 2018 approval of the Ione Indian gaming ordinance are contrary to, and unwarranted collateral attacks on, the 1933 determinations by Superintendent Lipps and Commissioner Collier and on the 1934 decision by the DOI that the Ione Indians were not entitled to organize under the IRA.
40. On August 24, 1978 the DOI published tribal acknowledgement regulations in the Federal Register which became effective October 2, 1978. 43 Fed. Reg. 39361; currently located at 25 C.F.R. Part 83 (Part 83).

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41. Federal recognition under Part 83 is a prerequisite for any group of Indians to receive benefits, preferences or assistance from the federal government including IRA and IGRA benefits. 25

CFR 83.2.

42. In 1979, the Ione Indians were listed by the BIA as a group of Indians which, although not federally recognized, had a Part 83 petition "pending" with the BIA. But, although the "pending" petition was given priority by the BIA, the Ione Indians never completed or submitted a Part 83 petition.

43. The Ione Indians are not now – and never have been - a federally recognized tribe under Part 83. Nor could they meet the requirements of Part 83.

44. In 1988, Congress passed IGRA which allowed gambling on Indian lands by federally recognized tribes. 25 USC 2701 et seq. "Indian lands" is defined in IGRA as a reservation or trust land under tribal government control in 1988.

45. Under IGRA, the NIGC was given authority and jurisdiction over Indian gambling. NIGC has an obligation to insure that Indian gambling is only conducted on Indian lands eligible for gambling under IGRA. The NIGC has no authority to regulate or allow gambling on non-Indian land.

46. Under IGRA, the NIGC Chairman has the authority to approve gaming ordinances for Part 83 recognized tribes which the NIGC has determined have Indian land eligible for gaming under IGRA. The NIGC Chairman does not have the authority to make Indian lands determinations or to approve a gaming ordinance for an unrecognized Indian group with no Indian land.

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47. In April 1989 Glenn A. Villa, Sr., "Chairman" of one faction of Ione Indians ("Villa Faction") asked the

DOI "for Federal Recognition as an Indian Tribe and the establishment of an Indian Reservation."

48. In January 1990 Harold Burris, a representative of a different faction of Ione Indians ("Burris Faction") wrote a letter to the DOI opposing the Villa Faction's request for federal recognition and a reservation.

49. The DOI denied the request by the Villa Faction for federal recognition and recommended that they submit a Part 83 petition for recognition.

50. On August 1, 1990 the Villa Faction sued the Burris Faction and the DOI, on behalf of the Ione Band of Miwok Indians, seeking a declaration that the Ione Indians were a federally recognized tribe. *Ione Band et al. v. Harold Burris et al.* (USDC ED Cal. No. CIV-S-90-0993). (*Ione Band v. Burris/DOI*)

51. The DOI and the Burris Faction responded to the Villa Faction's lawsuit by arguing that Ione Indians were not a federally recognized tribe and they have abandoned and did not renew their petition for recognition under Part 83, the only administrative way for a tribe to obtain federal recognition. The Ione Band has never petitioned for or received Part 83 recognition.

52. And the DOI, in motions for summary judgment in *Ione Band v. Burris/DOI,* joined by the Burris Faction, asserted and reaffirmed that Part 83 was the only administrative way for a group of Indians to obtain federal recognition and that the Ione Indians had not sought or received Part 83 recognition.

53. On April 2, 1992 the federal district court for

the Eastern District of California in *Ione Band v. Burris/DOI* ruled in favor of the DOI and Burris Faction. After summarizing all the alternative recognition mechanisms proposed by the Villa Faction, District Court Judge Karlton held that:

> "Plaintiffs' [Ione Band's] argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that 'the Secretary may acknowledge tribal entities outside the regulatory process,' . . . and that the court, therefore, should accept jurisdiction over plaintiff' claims compelling such recognition. **I cannot agree.** Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA [Part 83] acknowledgement process, the United States motion for summary judgment on these claims must be GRANTED." (Emphasis added.)

54. Thus the district court held that the Ione Indians cannot demonstrate that they are entitled to federal recognition because they failed to exhaust their administrative remedies by petitioning for recognition under Part 83. Despite this ruling, the Ione Indians have never petitioned for Part 83 recognition.

55. On February 25, 1994, the Part 83 regulations were revised to establish seven mandatory criteria

necessary for a group of Indians to obtain federal recognition as a tribe. 25 CFR § 83.11. Failure to meet any one of these criteria means that the Indian group is not entitled to recognition or a government-to-government relationship with the U.S. 25 CFR § 83.5(a). The Ione Indians could not meet the seven criteria.

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56. Furthermore Part 83 also mandates that the DOI "will not acknowledge . . .[a]n association, organization, or any entity of any character formed in recent times." 25 CFR § 83.4(a).The Ione Indians were only recently organized as an unrecognized group in 2002 and could not obtain Part 83 recognition now.

57. On November 2, 1994, Congress passed the Federally Recognized Indian List Act. ("1994 List Act".) Congress defined federally recognized tribes that could be included on the list to tribes: (1) recognized by Act of Congress, (2) recognized pursuant to Part 83, or (3) recognized by a federal court decision. The Ione Indians do not meet any of these three definitions.

58. A final judgment was entered in *Ione Band v. Burris/DOI* in September 1996 confirming the 1992 Order that the Ione Indians was not a Part 83 federally recognized tribe and that they had failed to exhaust their administrative remedies under Part 83. This 1996 final judgement was not appealed by the DOI or the Ione Indians and it is binding on the Defendants here.

59. Defendant Laverdure's 2012 approval of the ROD

and Defendant Chaudhuri's 2018 approval of the Ione Indians' gaming ordinance are barred by, and are a collateral attack on, the 1992 Order and the 1996 final judgment in *Ione Band v. Burris/DOI* that the Ione Indians were not a Part 83 recognized tribe. They are also contrary to the 1994 List Act.

60. In 2002, six years after the judgement in *Ione Band v. Burris/DOI* a third group of Indians claiming to be Ione Indians, including Defendant Dutschke,

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and many of her relatives and friends, combined to form a new group of Indians, called for the purpose of this complaint the Dutschke group. The Dutschke group which was authorized by the BIA Pacific Regional Office, with the assistance of Defendant Dutschke, to expand enrollment to include Dutschke herself, her relatives and other non-Ione Indians.

61. The Villa Faction opposed the formation of the Dutschke group and its attempted take-over and diffusion of the Ione Indian community by Defendant Dutschke and her relatives and friends from outside the Ione area.

62. In April 2003 the newly formed Dutschke group announced that, pursuant to IGRA, it would seek to establish a major gambling casino and related facilities in Plymouth – over 10 miles away from the City of Ione.

63. At the time of the announcement by the Ione Indians that they intended to construct a Las Vegas style casino in Plymouth, 73% of Plymouth voters said they opposed the construction of the proposed

casino.

64. NCIP was formed as a citizens group in April 2003 to oppose the construction of the casino and the potential related adverse impacts to their community caused the Las Vegas style casino proposed by the Ione Indians.

65. Neither the Dutschke group of Indians, many of who reside outside of Amador County, nor any other group or faction of Ione Indians who reside in Amador County, has "Indian land" eligible for gaming under IGRA.

66. In 2003 Elida Malick, a founding member of the NCIP wrote a letter to the DOI objecting to the proposed casino. This letter was the first of many letters from NCIP and its members, especially from Plaintiff Dueward Cranford II, to the DOI, BIA and NIGC over the last 15 years objecting to the fee-to-trust transfer and to the proposed casino in Plymouth. NCIP's opposition to, and efforts to stop, the proposed casino continues to this day as evidenced by this timely filed complaint.

67. On September 3, 2004, the DOI adopted Chapter 3 (Secretarial Succession) Part 302 (Automatic Succession) of the Departmental Manual. (Copy attached.) Section 3.2 provides that Solicitor of the DOI, when directed by the Secretary, shall perform the duties of the Assistant Secretary in the event of the "death, resignation, absence or sickness" of the Assistant Secretary. 302 DM 3.2 did not allow or provide that a deputy to the Assistant Secretary can perform the duties of the Assistant Secretary in the

event of the resignation of the Assistant Secretary. Nor did it give the Assistant Secretary the authority to designate a DOI employee as his successor upon resignation.

68. In the fall of 2004 the Ione Indians requested an Indian lands opinion from the NIGC that they were a tribe with Indian land eligible for gambling. The NIGC has not responded and has not issued or posted a decision that any of the twelve parcels are Indian land eligible for Indian gambling under IGRA.

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69. On February 1, 2006, Penny Coleman, NIGC General Counsel, submitted testimony before the Senate Committee on Indian Affairs. As a part of her testimony she stated that the NIGC is required to make an Indian lands determination before approving a gaming ordinance. Ms. Coleman confirmed the NIGC had a pending Indian lands review for the Ione Indians.

70. On September 19, 2006, Carl J. Artman, DOI Associate Solicitor wrote a legal memorandum that opined that the Ione Indians were a “restored tribe” eligible for Indian gambling under IGRA. There was no legal or factual support for Artman’s legal opinion. The Ione Indians were never recognized as a tribe by Congress. Thus they could not be, and have not been, “terminated” or “restored” as a tribe by Congress. In any event, Artman’s opinion was later withdrawn by his Supervisor, Solicitor Bernhardt and it was not adopted by the NIGC as its final agency decision pursuant to IGRA.

71. On October 5, 2006, the BIA published proposed

new rules that an Indian tribe must follow when seeking to conduct gaming on lands acquired after October 17, 1988. (71 Fed. Reg. 58769; 25 CFR Part 292.) To qualify for the restored tribe exception, the proposed regulations required that the tribe must demonstrate that it was once federally recognized and then was terminated and then, consistent with the 1994 List Act, it must demonstrate that it was restored to federal recognition by an Act of Congress, Part 83 recognition or a judicial determination involving the U.S. The Ione Indians were never recognized and,

therefore, could not be terminated. And, even if the Ione Band had been previously recognized and terminated, their recognition was never "restored" by Congress, Part 83 recognition or a judicial determination.

72. The Part 292 regulations as proposed in 2006 did not include Section 292.26. There was no public notice or chance to comment on Section 292.26.

73. In April 2008 the DOI published a notice for a Draft Environmental Impact Statement (DEIS) for a proposed fee-to-trust transfer of the12 parcels, and for the construction of a casino in Plymouth, for the Ione Indians.

74. On May 20, 2008, the BIA published the final rule for Gaming on Trust Lands Acquired After October 17, 1988 known as the Part 292 Regulations. (73 Fed. Reg. 29354.) The Part 292 regulations were effective June 19, 2008. 75. The final Part 292 Regulations included, for the first time, "Subpart D –

Effect of the Regulations, Section 292.26." It was added after the fact and signed by Artman. It was specific regulation designed to protect the legal memorandum Artman wrote in 2006 even though it was contrary to Part 292.

76. Section 292.26 was added to the Part 292 regulations after the public circulation period in violation of the APA. Thus Section 292.26 is void.

77. On January 16, 2009, Defendant Bernhardt, then Solicitor of the DOI, issued a memorandum withdrawing Associate Solicitor Artman's 2006 legal opinion. While reviewing the DEIS, Solicitor Bernhardt reviewed Associate Solicitor Artman's 2006 opinion and "concluded that it was wrong." Solicitor Bernhardt

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withdrew and reversed the Artman opinion stating that: It no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the [Ione] Band is not a restored tribe within the meaning of IGRA. (A copy of Defendant Bernhardt's 2009 memorandum is attached.)

78. On February 24, 2009, the U.S. Supreme Court decided *Carcieri v. Salazar,* 555 U.S. 379. In that case, in a six-Justice majority opinion written by Justice Thomas, the Supreme Court held that Section 19 of the IRA was not ambiguous and that to qualify for IRA fee-to-trust benefits a tribe must have been federally recognized in1934. The Court held that: "Congress left no gap in [Section 19 of the IRA] for the agency to fill."

79. The Supreme Court in *Carcieri* also held that to

qualify for IRA fee-to-trust benefits, a tribe must have been both federally recognized and under federal jurisdiction in 1934. The Supreme Court also acknowledged that a tribe must be federally recognized under Part 83 to receive IRA fee-to-trust benefits.

80. Justice Souter dissented in *Carcieri* arguing "that the two concepts, recognition and jurisdiction, may be given separate content." Souter felt that a tribe could be either "federally recognized" **or** "under federal jurisdiction" in 1934 to receive for IRA benefits. This view was inconsistent with Justice Thomas' majority opinion and is the reason that Justice Souter dissented.

81. On April 20, 2009, the President nominated Larry Echo Hawk as Assistant Secretary of Indian Affairs and he was later confirmed by the Senate.

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82. On April 27, 2012, Assistant Secretary Echo Hawk resigned. The DOI Solicitor, as required by DOI Manual (302 DM Section 3.2), should have been named as his successor until a new Assistant Secretary was appointed by the President and confirmed by the Senate. But that did not happen.

83. Instead, Assistant Secretary Echo Hawk designated Defendant Laverdure to be an "acting" Assistant Secretary. Assistant Secretary Echo Hawk lacked the authority to designate his own successor when he resigned. No did have the authority to designate Laverdure, a GS federal employee, as "acting assistant secretary." Instead, if necessary, DOI Manual, Part 302, Section 3.2 (2004) (copy

attached) allows the Secretary to designate the DOI Solicitor as the successor to the Assistant Secretary "in the event of death, resignation, absence, or sickness." Also the DOI Solicitor, like the Assistant Secretary, but unlike GS federal employee Laverdure, was appointed by the President and confirmed by the Senate as a principal official of the United States.

84. The Secretary of Interior (not an "acting" Assistant Secretary nor a deputy Assistant Secretary) has the exclusive authority under the IRA to accept lands in trust for tribes that were federally recognized in 1934. And Secretary of Interior Jewel had that exclusive authority and was in office during Laverdure's five month tenure and when he issued the illicit ROD.

85. On May 24, 2012, less than a month after he assumed his "acting" duties, Defendant Laverdure issued the ROD which purports to allow the 12 parcels to

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be taken in trust for Ione Indians. By issuing the ROD Laverdure tried to usurp the authority that Congress gave exclusively to Secretary Jewel.

86. Laverdure discusses several letters that predate 1934 written in the early part of the last century outlining unsuccessful efforts to acquire land for homeless, non-ward Indian living near Ione. None of these letters were written to, or by, the Ione Indians as a group much less a tribal governmental entity. Even Defendant Laverdure concedes in the ROD that these early letters were not evidence that the Ione

Indians were a recognized tribe.
87. Laverdure also references a "series of letters in 1933" by the DOI, including letters from Superintendent Lipps and Commissioner Collier. But Laverdure does not cite the August 1933 letters from Commissioner Collier and Superintendent Lipps which determined and confirmed that the Ione Indians were non-ward Indians and were not a federally recognized tribe and did not have a reservation in 1934. Nor does Laverdure mention that the Ione Indians were not invited by the Secretary to organize under the IRA in 1934.
88. Defendant Laverdure ignores the majority decision in *Carcieri* and the requirement that a tribe must have been both "federally recognized" and "under federal jurisdiction" in 1934 to qualify for a fee-to-trust transfer under the IRA. Laverdure also misinterprets Justice Breyer's concurring opinion.
89. Instead, consistent with Justice Souter's dissent, Laverdure splits the IRA phrase "recognized tribe now under federal jurisdiction" in two as though there

were two separate tests with two separates meanings. He then ignores the "recognized tribe" half of the test -implicitly conceding that the Ione Band was not a recognized tribe in 1934. Laverdure then focuses on the "under federal jurisdiction" half of the test - which he claims is ambiguous and subject his interpretation as the "acting" Assistant Secretary. Laverdure finally creates a confusing two part test to "interpret" the phrase "under federal jurisdiction"

and contends this test is entitled to *Chevron* deference. Laverdure's analysis is contrary to law and *Carcieri* and the decision and judgment in *Ione Band v. Burris/DOI*; it should be rejected.

90. Laverdure also relies on the withdrawn Associate Solicitor Artman's 2006 opinion and the void Section 292.26 to support his claim that the Ione Indians are a "restored tribe" with "restored lands" and therefore eligible for Indian gambling under IGRA. The NIGC, not Defendant Laverdure, has the exclusive authority to make these determination. The NIGC has not decided that the Ione Indians are a restored tribe with restored lands. Laverdure claim that the Ione Indians is a restored tribe with restored land, like the Associate Solicitor Artman's opinion, is wrong. Laverdure's conclusion is also contrary to Solicitor Bernhardt's 2009 opinion. It is without authority and is null and void.

91. On March 6, 2018, NIGC Chairman, Defendant Chaudhuri, sent a letter approving the Ione Indians' gaming ordinance. (Copy attached.) The proposed gaming ordinance had been submitted to the NIGC for review on February 9,

2018, by Tracy Tripp and Sara Dutschke Setshwaelo – "elected officials" of the Dutschke group of Ione Indians. Contrary to the assertion of Chaudhuri, the gaming ordinance was not "consistent with the requirements of [IGRA] and NIGC regulations" because the Ione Indians are not a Part 83 recognized tribe with Indian land eligible for a gambling casino under IGRA.

92. Defendant Chaudhuri did not reference any Indian lands claimed by the Ione Indians that would be eligible for gambling IGRA in his cover letter approving the gaming ordinance. Nor has the NIGC ever determined that the Ione Indians have Indian land eligible for Indian gambling under IGRA.
93. Defendant Chaudhuri's approval of the Ione Indian gaming ordinance is directly contrary to the 2009 conclusion by Defendant, and then DOI Solicitor, David Bernhardt, stating that it's the Department's position that the Ione Indians are not a recognized or restored tribe and that they do not have Indian land or restored land eligible for Indian gambling or a casino under IGRA.
94. None of the 12 parcels referenced in the ROD has been transferred into trust for the Ione Indians and all of the parcels remain in private ownership. 95. IGRA prohibits gambling on lands acquired by the U.S. in trust for a tribe after October 17, 1988, unless one of several limited exceptions applies. None of the exceptions apply to the Ione Indians. Thus even if the 12 parcels were transferred into trust now, in 2018, they would be acquired 30 years after 1988 and, therefore, would not be eligible for Indian gambling under IGRA.

FIRST CLAIM FOR RELIEF
Indian Gaming Regulatory Act

96. Plaintiffs repeat and re-allege paragraphs 1 through 95 inclusive, and the following paragraphs, of this Complaint as if fully set forth herein.
97. Under IGRA, the three member NIGC has the

exclusive authority and jurisdiction to determine whether or not a subject property, assuming it is taken into trust, is Indian land eligible for Indian gambling under IGRA.

98. The NIGC has no jurisdiction to approve Indian gambling or an Indian casino on non-Indian land or to approve Indian gambling by a group of Indians that has not been recognized Congress, Part 83, or a federal court decision.

99. In 2004, the Ione Indians asked the NIGC for a determination that the subject property, that they intend to ask be taken into trust, would qualify as Indian land eligible for gaming under IGRA. That 2004 request is still pending.

100. There has been no determination by the NIGC that the subject property is Indian land eligible for gaming or that the Ione Indians are a Part 83 federally recognized tribe eligible to operate a casino under IGRA.

101. Although they may express a legal opinion, neither a DOI Associate Solicitor, nor any other lawyer for the DOI or NIGC, has the authority to decide that a property is "Indian land" eligible for gaming under IGRA. Only the Commission has that authority.

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102. Defendant Chaudhuri lacked the authority or jurisdiction to approve the Ione Indian gaming ordinance on March 6, 2018 because the Commission has not, and could not, determine that the land on which the proposed casino is to be constructed is Indian land eligible for gaming under IGRA. The

land remains in private ownership. It is not Indian land as defined by IGRA.

103. The approval of a site-specific gaming ordinance by the NIGC Chairman is not valid unless there has been an Indian lands determination by the Commission. The Commission has not made such a determination for any land owned or claimed by the Ione Indians.

104. Even if approved by the NIGC Chairman, an Indian gaming ordinance is not effective, and Indian gambling cannot be initiated, until it is published in the Federal Register. Chaudhuri's approval of the Ione Indian gaming ordinance, even if considered valid, has not been published in the Federal Register.

105. The Ione Indians are not a recognized tribe and they own no Indian land eligible for gaming under IGRA.

106. Defendant Chaudhuri's approval of the Ione Indian gaming ordinance has no support in the record or law. Defendant Chaudhuri's approval of the Ione Indian gaming ordinance was without authority and is contrary to law. It should be vacated and declared null and void.

107. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding the

validity of the gaming ordinance approved by Defendant Chaudhuri for an unrecognized group of Indians with no Indian land eligible for Indian gambling under IGRA. A declaratory judgment in

favor of Plaintiffs and against the Defendants on these issues is necessary and proper.
108. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, an unlawful casino may be allowed by Defendants in the rural Plymouth community in Amador County. The Defendants should be enjoined from publishing or implementing the gaming ordinance or allowing the construction or operation of the proposed casino. Injunctive relief is necessary and proper.

SECOND CLAIM FOR RELIEF
Appointments Clause of the Constitution

109. Plaintiffs repeat and re-allege paragraphs 1 through 108 inclusive, and the following paragraphs, in this Complaint as if fully set forth here.
110. The Appointments Clause of the Constitution divides officers of the federal government into two classes: (1) Principal Officers selected by the President with the advice and consent of the Senate, and (2) Inferior Officers who may be appointed, without the advice and consent of the Senate, by the President, heads of departments, or the judiciary. US Const. Art. II, § 2, cl. 2.

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111. A Principal Officer under the Appointments Clause of the Constitution is an appointee of the President, who is confirmed by the Senate, and who

exercises "significant authority pursuant to the laws of the United States" or "performs significant government duty exercised pursuant to a public law."
112. The Secretary of Interior is the Principal Officer, appointed by the President and confirmed by the Senate, with the exclusive authority under the IRA to take land into trust for the benefit of Indian tribes that were federally recognized and under federal jurisdiction in 1934.
113. When deciding whether to take land into trust for a recognized Indian tribe, the Secretary of Interior is exercising significant authority on behalf, and pursuant to the laws, of the U.S. Taking land into trust is a significant governmental duty delegated by Congress only to the Secretary, in part, because it affects the governmental balance protected by our federal system.
114. Congress did not delegate, or authorize the Secretary of Interior to redelegate, the authority to take land into trust for a recognized Indian tribe to
Inferior Officers or DOI employees such as Defendant Laverdure.
115. Former Secretary of Interior Jewell was appointed by the President and confirmed by the Senate and was in office in 2012, with exclusive authority to review and approve fee-to-trust applications under the IRA, when Defendant Laverdure issued the ROD purporting to take the subject property in trust. 116. Defendant Laverdure was a DOI employee and, at most, an Inferior Officer

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of the U.S. at the time he issued the ROD in 2012.

He was not a Principal Officer appointed by the President and confirmed by the Senate.

117. Defendant Laverdure lacked the authority under the IRA to take land into trust for the Ione Indians or any faction of Indians or group of Indians. He also lacked the authority to issue the ROD.

118. The ROD issued by Defendant Laverdure in 2012 is unauthorized and contrary the Appointments Clause of the Constitution. The ROD also violates the exclusive authority delegated by Congress in the IRA to the Secretary of Interior to take land into trust for federally recognized tribes. The ROD is void and should be reversed and vacated.

119. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding the authority of Defendant Laverdure to approve the ROD and the fact that Congress has given the Secretary the exclusive authority to take land into trust for federally recognized tribes. A declaratory judgment in Plaintiffs' favor and against the Defendants on these issues is necessary and proper.

120. Plaintiffs' remedies at law are inadequate. Injunctive relief is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief, an unlawful casino may be built in the rural Plymouth community. Defendants should be enjoined from implementing ROD or allowing the construction of the proposed casino. Injunctive relief is necessary and proper.

THIRD CLAIM FOR RELIEF
Indian Reorganization Act

121. Plaintiffs repeat and re-allege paragraphs 1 through 120 inclusive, and the following paragraphs of this Complaint, as if fully set forth herein.

122. Congress limited the application of the IRA to only those Indian tribes that were federally recognized in 1934. The Ione Indians were not a federally recognized tribe in 1934.

123. As determined by Commissioner of Indian Affairs John Collier and Superintendent O.H. Lipps in 1933, the Ione Indians were not wards under federal jurisdiction or a federally recognized tribe in 1934. Nor did they have or live on a reservation in 1934.

124. In 1934, the Ione Indians were classified by DOI as "non-ward Indians" and, consequently, were not invited by the DOI to participate in the IRA. Nor were they included on the 1934 list of tribes covered by the IRA

125. No Ione Indian or group of Indians in the Ione area in 1934 was a recognized tribe under federal jurisdiction eligible for fee-to-trust benefits under Section 5 of the IRA.

126. Even if he had the authority to take land into trust (and he didn't), Laverdure's conclusions in the ROD that the Ione Indians are a federally recognized tribe entitled to fee-to-trust benefits under the IRA is wrong and is a collateral attack on the 1933-1934 determinations by Superintendent Lipps and

Commissioner Collier and the DOI that the Ione

Indians were non-ward Indians and were not a federally recognized tribe with a reservation in 1934.

127. Thus, even if it is assumed that Laverdure had the authority to take land into trust, the Ione Indians were not a federally recognized tribe in 1934 as required by IRA. The Ione Indians did not participate in, and are not entitled to the benefits of the IRA. The ROD is not supported by the record or the law. The ROD is contrary to the Supreme Court's decision in *Carcieri*. It is void and should be reversed and vacated.

128. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding the validity of the ROD and fee-to-trust transfer approved by Defendant Laverdure for an unrecognized group of Indians which were non-ward Indians and not a federally recognized tribe in 1934 as required by the IRA. A declaratory judgment in favor of Plaintiffs and against the Defendants on these issues is necessary and proper.

129. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, the illicit ROD may be implemented and an unlawful casino may be allowed by Defendants in the rural Plymouth community in Amador County. The Defendants should be enjoined from implementing the ROD or allowing the

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construction or operation of the proposed casino for

the Ione Indians – an unrecognized group of Indians with no right to fee-to-trust benefits under the IRA of 1934. Injunctive relief is necessary and proper.

FOURTH CLAIM FOR RELIEF
25 CFR Part 83

130. Plaintiffs repeat and re-allege paragraphs 1 through 129 inclusive, and all the following paragraphs of this Complaint as if fully set forth herein.

131. To receive federal benefits and assistance, including fee-to-trust benefits under the IRA and the Indian gambling benefits under IGRA, a group like the Ione Indians must first petition for, and obtain, federal recognition under Part 83. 25 CFR § 83.2.

132. The Ninth Circuit has recently confirmed that: "Only [Part 83] federally recognized tribes may operate gambling facilities under [IGRA]." *Timbisha Shoshone Tribe v. DOI*, 824 F.3d 807, 809 (9th Cir. 2016).

133. In 1992, the U.S. District Court held in *Ione Band v. Burris/DOI* that the Ione Indians were not a federally recognized tribe and that they failed to exhaust their remedies under Part 83. This decision was confirmed by a final judgment in 1996 which was not appealed. It is binding on the Defendants.

134. No faction or group of Ione Indians since the 1992 decision and 1996 final judgment in *Ione Band v. Burris/DOI* has sought or obtained federal recognition under Part 83.

135. Defendants' attempts to provide IRA and IGRA

benefits to any group or faction of the Ione Band before it obtains federal recognition under Part 83 is a violation of the procedures required by law.

136. The purported approval of the fee-to-trust transfer in the ROD and the purported approval of the gaming ordinance in favor of Ione Indians who do not have Part 83 recognition are void and should be reversed and vacated.

137. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding whether an unrecognized group of Indians, which has not sought or obtained Part 83 federal recognition, is entitle to the benefits of the IRA and IGRA. A declaratory judgment in favor of Plaintiffs and against the Defendants on these issues is necessary and proper.

138. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, an unlawful casino for a group of Indians who have not complied with Part 83 may be allowed by Defendants in the rural Plymouth community in Amador County. The Defendants should be enjoined from publishing or implementing the gaming ordinance or allowing the construction or operation of the proposed casino. Injunctive relief is necessary and proper.

FIFTH CLAIM FOR RELIEF

Equal Protection

139. Plaintiffs repeat and re-allege paragraphs 1 through 138 inclusive, and the following paragraphs, of this Complaint as if fully set forth herein.

140. Each Defendant has acted, or has threatened to act, under the color of governmental authority to allow the construction of the proposed casino by a group of Indians which has not obtained Part 83 federal recognition and which does not have lands eligible for gaming under the IRA or IGRA.

141. Defendants attempt to give the fee-to-trust and benefits in the IRA and the Indian gambling and casino benefits in IGRA to a group of Ione Indians, which is not a Part 83 recognized tribe, is based on a racial classification and is a violation of the Fifth Amendment and Equal Protection clause of the Constitution. *Adrand v. Pena,* 515 U.S. 200 (1995). "[A]ny person of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.*

142. Discrimination in favor of a group of Indians that is not a federally recognized tribe violates the Equal Protection clause of the Constitution. *Morton v. Mancari,* 417 U.S. 535 (1974).

143. Defendants' discrimination in favor of the Ione Band, an unrecognized group of Indians, by approving the fee-to-trust transfer in the ROD and by

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approving their proposed gaming ordinance and casino is a violation Plaintiffs' equal protection rights.

144. Plaintiffs and other non-Indian members of the community were not given the same opportunities and benefits and preferences given to the Ione Indians by the Defendants.
145. The approvals of the ROD and gaming ordinance and other actions by the Defendants giving benefits to an unrecognized group of Ione Indians based on their racial classification cannot withstand strict scrutiny and they should be reversed and vacated.
146. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding whether the actions of Defendants allowing an unrecognized race-based group of Indians to receive benefit under the IRA and IGRA violate the Equal Protection clause of the Constitution. A declaratory judgment in favor of Plaintiffs and against the Defendants on these issues is necessary and proper to protect the Equal Protection rights of the Plaintiffs.
147. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, an unlawful casino may be allowed by Defendants in the rural Plymouth community in Amador County in violation of the Equal Protection clause of the

United Sates Constitution. The Defendants should be enjoined from allowing the construction or operation

of the proposed casino for a race-based unrecognized group of Indians to the detriment of Plaintiffs and the community. Injunctive relief is necessary and proper.

SIXTH CLAIM FOR RELIEF
Federalism

148. Plaintiffs repeat and re-allege paragraphs 1 through 147 inclusive, and the following paragraphs, of this Complaint as if fully set forth herein.

149. Each Defendant has acted, or has threatened to act, under the color of governmental authority to allow the construction of the proposed casino by a group of Indians which has not obtained Part 83 federal recognition and which does not have Indian land eligible for gaming under IGRA.

150. Defendants attempt to give the fee-to-trust benefits in the IRA and the Indian gambling and casino benefits in IGRA to a group of Ione Indians, and to exempt those Ione Indians from the application of State and local law, which is not a Part 83 recognized tribe, is an abuse of their authority and a violation of the federalism protections afforded to the Plaintiffs and all citizens of California and which is inherent in the dual government system created by the Constitution. *Bond v. United States,* 131 S. Ct. 2355 (2011).

151. "[T]he Constitution divides authority between federal and state governments for the protections of individuals [not states]." *New York v. United*

States, 505 U.S. 144 (1992). "[T]he principle benefit

of the federalist system is a check on abuses of government poser." *Gregory v. Ashcroft, governor of Missouri,* 501 U.S. 452 (1991). The "danger posed by the growing power of the administrative state cannot be dismissed" - and should not be underestimated. *Arlington v. FCC,* 133 S.Ct. 1863 (2013). Defendants abused their authority by giving IRA and IGRA benefits to the Ione Indians and by exempting the Ione Indians from State and local laws and regulations.

152. Defendants do not have the authority to unilaterally declare that the Ione Band, which is not a Part 83 recognized tribe, is entitled to all the benefits of the IRA and IGRA available only to federally recognized tribes - including the right to have trust land held in its favor under the IRA and the right to conduct Indian gambling or construct a casino under IGRA. The principles of federalism should check this abuse of federal law and should preclude the construction of the proposed casino in violation of State law.

153. The approval of the ROD by Defendant Laverdure and the approval of gaming ordinance by Defendant Chaudhuri for an unrecognized group of Indians created by the BIA Pacific Regional Office, under the supervision and with the permission of Defendant Dutschke, and which has not been recognized under Part 83, violates the principle of federalism designed to protect Plaintiffs from such governmental abuses. The approval of the ROD and gaming ordinance should be reversed and vacated.

154. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding whether the actions of Defendants allowing an unrecognized group of Indians to receive benefit under the IRA and IGRA violate the constitutional principles of Federalism. A declaratory judgment in favor of Plaintiffs and against the Defendants on these issues is necessary and proper.
155. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, an unlawful casino may be allowed by Defendants in the rural Plymouth community in violation of the principles of federalism. Without an injunction, the abuse of power by Defendants to benefit the Ione Indians would be rewarded to the detriment of the public. Defendants should be enjoined from allowing the construction or operation of the proposed casino for an unrecognized group of Indians. Injunctive relief to prevent further abuses by the Defendants is necessary and proper.

SEVENTH CLAIM FOR RELIEF

Cal. Constitution, Art. 4, Sec. 19(e)&(f) and Cal. Penal Code Sec. 11225 et seq.

156. Plaintiffs repeat and re-allege paragraphs 1 through 155 inclusive, and the following paragraphs, of this Complaint as if fully set forth herein.

157. Plaintiffs seek for injunctive relief and damages,

if appropriate and according to proof, against the Defendants for allowing the construction of an illegal gambling casino on the subject property and for creating a public nuisance in violation of federal and State law.

158. The California Constitution prohibits "casinos of the type currently operating in Nevada and New Jersey" from being authorized to open or operate in California. Cal. Const. Art. 4, Sec. 19(e).

159. The California Constitution limits Indian gambling in California to "federally recognized tribes on Indian lands in California in accordance with federal law." Cal. Const. Art. 4, Sec. 19(f).

160. The Ione Indians do not have Indian land in Amador County or elsewhere in California eligible for Indian gambling as defined by IGRA.

161. The Ione Indians are not a federally recognized tribe and have not petitioned to become a "federally recognized tribe" under Part 83.

162. The construction of a Nevada or New Jersey style casino by an unrecognized group of Indians on non-Indian land in Plymouth is prohibited by California's Constitution.

163. California Penal Code section 11225, provides that: "Every building or place used for the purpose of illegal gambling . . . is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

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164. California Penal Code section 11226 provides that any resident of the County where the illegal

gambling is occurring may sue to enjoin, abate and prevent a nuisance caused by illegal gambling and to perpetually enjoin the person conducting or maintaining the illegal gambling operation.

165. The construction of a casino by an unrecognized group of Indians on non- Indian land in Plymouth is a public and private nuisance and a violation of law that will cause significant harm to the Plaintiffs who live or have businesses or property near the proposed casino.

166. The negative effects of building and operating the proposed casino in Plymouth include: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the land near the casino; (c) increased traffic; (d) increased light, noise, and air pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of resources to treat gambling addiction; (j) weakening of the family conducive atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with gambling.

167. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, against the Defendants, enjoining the construction and operation of the proposed casino is necessary to abate and prevent a public nuisance and to prevent irreparable injury to Plaintiffs.

168. Plaintiffs also seek damages, if appropriate and

according to proof, for any injury that has been, or will be, caused, by the notice, construction or operation of the proposed casino and the illegal gambling operations allowed or approved by Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendants as follows:

A. Declare and find that Defendant Chaudhuri's March 6, 2018 approval of the gaming ordinance violates IGRA and is without authority and void because the Ione Indians are not a federally recognized tribe with Indian land eligible for Indian gambling as defined by IGRA.

B. Declare and find that Defendant Laverdure, and the other Defendants, lacked authority to take land into federal trust status for the Ione Indians under IRA, IGRA or any other provision of law because the Ione Indians were non-ward Indians, and were not a federally recognized tribe in 1934.

C. Declare and find that none of the privately owned 12 parcels referenced in the ROD is Indian land eligible for Indian gambling under IGRA;

D. Declare and find that Ione Indians have not obtained federal recognition under Part 83 and therefore are not entitled to the benefits of IRA or IGRA,

E. Declare and find that the ROD is void and reverse and vacate the decisions

in the ROD to take land into trust under the IRA for a casino under IGRA;
F. Declare and find that the approval of the gaming ordinance is void and vacate all decisions by Defendants which allow Indian gambling or the proposed casino under the IRA or IGRA;
G. Enjoin Defendants, their agents, employees and successors from taking any action to implement the ROD or the Ione Indian gaming ordinance;
H. Find and declare the proposed casino, if allowed for an unrecognized group of Ione Indians, would violate the Equal Protection clause of the Constitution and constitutional principles of Federalism.
I. Find and declare the proposed casino, if constructed, would violate the prohibitions in California's Constitution and public and private nuisance laws which should be abated and for which damages should be assessed.
J. Award Plaintiffs' costs and attorney's fees to the extent permitted by law including, but not limited to, the Equal Access to Justice Act; and
K. Grant such other and further relief as to the court deems just and proper.

Dated: May 22, 2018

Respectfully submitted,

s/ *Kenneth R. Williams*
KENNETH R. WILLIAMS
Attorney for Plaintiffs

APPENDIX E

KENNETH R. WILLIAMS (SBN 73170)
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 449-9980
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH,
DUEWARD W. CRANFORD II, Dr.
ELIDA A. MALICK, JON
COLBURN, DAVID LOGAN,
WILLIAM BRAUN and CATHERINE
COULTER,

Plaintiffs,

v.

NATIONAL INDIAN GAMING
COMMISSION, JONODEV
CHAUDHURI former NIGC Chairman;
DEPARTMENT OF INTERIOR;
RYAN ZINKE, Secretary of Interior;
DAVID BERNHARDT, Deputy
Secretary of the Interior and former
Solicitor; DONALD E. LAVERDURE
former DOI employee; and AMY
DUTSCHKE, BIA Pacific Regional
Director and member of the Ione Band,

Defendants.

Case No. 2:18-cv-01398-TLN-CKD

PLAINTIFFS NOTICE OF ADDITIONAL AUTHORITY, AND REQUEST FOR JUDICIAL NOTICE OF SOL. OP. M-37055.

Judge: Honorable Troy L. Nunley

On March 9, 2020, Daniel H. Jorjani, Solicitor for the United States Department of Interior (DOI), issued a Memorandum (Sol. Op. M-37055) to the Secretary of Interior, David Bernhardt, and the Assistant Secretary for Indian Affairs, Tara Sweeny, withdrawing Solicitor's Opinion M-37029 which was issued on March 12, 2014.1 (Secretary Bernhardt, Assistant Secretary Sweeny and the DOI are all Defendants in this lawsuit.2.) Specifically, Solicitor Jorjani withdrew the "two part procedure" outlined in M-37029 for determining "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act."

As summarized by Solicitor Jorjani, M-37029 had "adopted the analysis and interpretive framework set forth in the Cowlitz ROD" including the "the two part procedure for determining whether a tribe was 'under federal jurisdiction' in 1934." The Cowlitz ROD "two-part procedure" was issued in 2010 after the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Solicitor Jorjani concluded that this two-part procedure was inconsistent with the

"ordinary meaning, statutory context, legislative history, or contemporary administrative understanding" of the phrase "recognized tribe now under federal jurisdiction" and was directly contrary to the Supreme Court's majority opinion in *Carcieri*.

1. A copy of M-37055 is attached to this notice. Plaintiffs request that the Court take judicial notice of M-37055 and the withdrawal of M-37029. Fed. R. Evid. Rule 201.
2 Defendants Bernhardt and Sweeny were automatically substituted as Defendants
pursuant Federal Rule of Civil Procedure 25(d). (See Electronic Court File (ECF) No. 39 fn. 1.)
3 Although issued on March 9, Plaintiffs did not become aware of M-37055 until after the
March 10 hearing and decision by this Court on Defendants' motion to dismiss. (ECF No. 38.)

3

In Carcieri, the DOI had argued that a tribe need not have been recognized in1934, or under federal jurisdiction in 1934, to be eligible to have land taken intotrust under the Indian Reorganization Act of 1934 (IRA). Justice Thomas, and the majority of Supreme Court Justices in Carcieri, rejected DOI's argument and held that the plain language of the IRA provides that a tribe must have been both a
federally recognized tribe and under federal jurisdiction in 1934 to qualify for a fee-to-trust transfer. But, instead of abiding by Carcieri's clear mandate, Defendant Laverdure adopted the now discredited Cowlitz ROD "two-part procedure" as the legal basis

for the 2012 Ione Band ROD. (AR 010049.)

In his analysis in the Ione Band ROD, Defendant Laverdure ignores the majority decision in Carcieri and dropped the requirement that a tribe must have been both "federally recognized" and "under federal jurisdiction" in 1934 to qualify for a fee-to-trust transfer under the IRA. Instead, Defendant Laverdure applied the now withdrawn Cowlitz "two part procedure" and claimed that, although the Ione Band was not recognized in 1934, it was under federal jurisdiction in 1934.

In 2014, two years after Defendant Laverdure issued the Ione Band ROD, the Cowlitz ROD "two part procedure" was formalized in Solicitor Opinion M-37029. But, fortunately, just seven weeks ago, Solicitor Jorjani issued M-37055 and finally withdrew M-37029. He notes that his Office began its review of M-37029 two-part procedure and "the interpretation [in the Cowlitz ROD] on which it relied" in 2018. And, after reviewing the matter for 2 years, Solicitor Jorjani concludes:

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> "This review has led me to conclude that Sol. Op. M-37029's interpretation of Category 1 [in Section 19 of the IRA] is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase 'recognized tribe now under federal jurisdiction' [in the IRA]. Therefore, I hereby withdraw Sol. Op. M-37029."

Although it took ten years for the DOI to reverse its faulty interpretation of the IRA in the Cowlitz ROD, Plaintiffs welcome Solicitor Jorjani's conclusion and decision to withdraw the Cowlitz ROD and M-37029. His actions are consistent with the plain language, statutory context, legislative history, and administrative understanding of the IRA and with the Supreme Court's Carcieri decision.

And, of even more immediate importance for the disposition of this case, Solicitor Jorjani's M-37055 opinion confirms that Defendant Laverdure's reliance on the 2010 Cowlitz ROD was misplaced and is wrong as a matter of law. Consequently, Defendant Laverdure's approval of the Ione Band ROD in 2012 was, and is, null and void ab initio (from the outset). The Ione Band ROD is a "mere nullity." Pacific Gas and Electric Co. v. Unite States, 664 F.2d 1133, 1136 (9th Cir. 1981) (an agency's "interpretation" of a statute which "supersedes the language chosen by Congress" is "out of harmony with the statute [and] is a mere nullity").

Dated: April 29, 2020.

Respectfully submitted,

/s Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs

UNITED STATES DEPARTMENT OF THE INTERIOR

OFF'ICE OF THE SOLICITOR
Washington, D.C. 20240
March 9, 2020

IN RE PLY REFER TO
M-37055

Memorandum

To: Secretary
Assistant Secretary - Indian Affairs

From: Solicitor

Subject: Withdrawal of Solicitor's Opinion M-37029, "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act"

On March 12,2014,the Solicitor issued M-37029 ("Sol. Op. M-37029") that interpreted certain phrases found in the first definition of "lndian" ("Category l ") at Section 19("Section 19") of the Indian Reorganization Act of 1934[10] ("lRA").r Sol. Op. M-37029 was published following the 2009 opinion of the United

[10] I Act of June I 8, 1934, c. 576, 48 Stat. 984, codified at 25 U.S.C. g 5 l0l, er seq.

States Supreme Court ("Supreme Court") in *Carcieri v Salazar*,[11] which concluded that the phrase "now under federal jurisdiction" requires tribal applicants for trust-land acquisitions to have been "under federal jurisdiction" in 1934. The Supreme Court did not, however, construe the meaning of the phrases "recognized [Indian tribe" or "under federal jurisdiction."

In 2010. the Department of the Interior ("Department") interpreted these phrases and other aspects of Section 19 in a record of decision for a fee-lo-trust application submitted by the Cowlitz Indian Tribe ("Cowlitz ROD-).[12] The Cowlitz ROD concluded that the phrase "under federal jurisdiction" was ambiguous. and interpreted it to mean "an action or series of actions (...) that are sufficient to establish, or that generally reflect federal obligations, duties. responsibility for or authority over the tribe by the Federal Government."[13] The Cowlitz ROD separately interpreted the phrase "recognized Indian tribe" and concluded it was not subject to the temporal limitation contained in "now under federal jurisdiction," meaning that an applicant tribe is

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[11] 2 *Carcieri v. Salazar*, 555 U.S. 379 (2009).

[12] U.S. Department of the Interior, Assistant Secretary - Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87 acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 77-106 (Dec. 17,2010).

[13] Cowlitz ROD at 94

"recognized" for purposes of Category I so long as it is "federally recognized" at the time the IRA is applied.[14]

Sol. Op. M-37029 adopted the analysis and interpretive framework set forth in the Cowlitz ROD with little substantive change, including the Cowlitz ROD's two-pan procedure for determining whether a tribe was "under federal jurisdiction" in 1934.

2

Since the issuance of Sol. Op. M-37029 in 2014, attorneys in the Office of the Solicitor ("Solicitor's Office") have consulted with the Bureau of Indian Affairs ("BIA") to determine eligibility for trust-land acquisitions under Category I using Sol. Op. M-37029's two-part procedure. In each case, the Department has assessed the evidence submitted by an applicant tribe to determine whether such evidence sufficiently demonstrated that the tribe was "under federal jurisdiction" in 1934. Considerable uncertainty remains, however, over what evidence may be submitted to demonstrate federal jurisdictional status in and before 1934. Because of this, many applicant tribes spend considerable time and resources researching and collecting any and all evidence that might be relevant to this inquiry, in some cases prompting submissions totaling thousands of pages.

To remove such uncertainties and to assist tribes in assessing eligibility, in 2018, the Solicitor's Office began a review of Sol. Op. M-37029's two-part procedure for determining eligibility under Category

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[14] Cowtitz ROD at 87-89

I , and the interpretation on which it relied. This review has led me to conclude that Sol. Op. M-37029's interpretation of Category I is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction." Therefore, I hereby withdraw Sol. Op. M-37029.

Concurrent with this Opinion, I am issuing procedures under separate cover to guide Solicitor's Office attorneys in determining the eligibility of applicant tribes under Category l. This guidance derives from an interpretation of Category I that better reflects Congress' and the Department's understanding in 1934 of the phrase "recognized Indian tribe now under federal Jurisdiction

____________/s__________________
Daniel H. Jorjani

6. Checklist for Solicitor's Office Review of Feeto-Trust Applications, Memorandum from the Solicitor to Regional Solicitors. Field Solicitors, and SOl-Division of Indian Affairs at 9 (Jan 5, 2017).