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IONE BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA, Plaintiff, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; CARL J. ARTMAN, ASSISTANT SECRETARY OF INDIAN AFFAIRS; and JAMES E. CASON, ASSOCIATE DEPUTY SECRETARY OF INDIAN AFFAIRS, Defendants; IONE BAND OF MIWOK INDIANS, Defendant-Intervenor.	Case No. 2:07-cv-00527-LKK-GGH **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY THE IONE BAND OF MIWOK INDIANS Fed. R. Civ. P. 12(b)(1) and 12(b)(6)** Date: October 22, 2007 Time: 10:00 am Place: Courtroom No. 4 Hon. Lawrence K. Karlton

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY THE IONE BAND OF MIWOK INDIANS

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I. INTRODUCTION

Defendant-Intervenor the Ione Band of Miwok Indians ("Tribe" or "Ione") hereby moves pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) to dismiss with prejudice the Plaintiff's Complaint ("Complaint") in the above-captioned matter on the grounds, respectively, that (a) Plaintiff has failed to state any claim upon which relief may be granted, and (b) this Court lacks subject matter jurisdiction over Plaintiff's claims because those claims are not ripe for review.

Plaintiff Amador County ("Plaintiff" or "County") seeks to invalidate, under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA"), an interim advisory legal opinion issued by the United States Department of the Interior's ("Department" or "DOI") Office of the Solicitor, Division of Indian Affairs. The opinion was issued as part of an internal procedure that the Department follows when deciding whether to take land into trust for the benefit of an Indian tribe for gaming purposes. Indeed, the DOI is currently in the process of deciding whether to take land into trust for the Tribe, and it is this process that the County, in the Complaint, asks the Court to halt.

Key to adjudicating this case is an understanding of the context in which the DOI drafted the legal opinion at issue and the role that it plays in the DOI's consideration of the Tribe's request to have land taken into trust. Ione is a federally recognized Indian tribe that does not currently have land set aside for its use as an Indian reservation. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,649 (Mar. 22, 2007). In an attempt to secure such land, the Tribe filed an application with the Department, requesting that it take land into trust for the Tribe's benefit (generally referred to as a "fee-to-trust application").

Because the Tribe hopes to operate a governmental gaming operation on the land pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), a question arose as to whether the particular land at issue qualifies for gaming under IGRA such that it can be taken into trust for gaming purposes. In an attempt to answer that question, and as a preliminary step in its consideration of the Tribe's fee-to-trust application, the DOI issued the

advisory legal opinion at issue in this case. As shown below, the opinion, which deals with the land's status under IGRA, is only one of a number of preliminary matters that the Secretary of the Interior ("Secretary") will consider in ultimately deciding whether to approve the Tribe's fee-to-trust application.

The Complaint presents two sets of arguments challenging the opinion. First, it attacks the procedure whereby the Solicitor's Office opined on the land's status, arguing that the DOI did not follow requirements set forth in the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), prior to issuing the opinion. Complaint at 15:20-27.[1] Second, it challenges the opinion's substance, arguing that the conclusions reached in the opinion are wrong. Complaint at 9:15-23; 20:4-9.

Both sets of arguments should be dismissed, first and foremost, because the governmental action at issue – the issuance of an interim legal opinion – is clearly not a "final agency action." Therefore, it is not subject to suit under the APA. Likewise, the arguments do not meet constitutional ripeness requirements and are not ripe for judicial review. In the alternative, even if the Court finds that the legal opinion at issue *is* a final agency action, which the Tribe denies, the NEPA-related arguments fail because NEPA does not apply to the issuance of an interim legal opinion.

The Tribe also notes that the County's substantive arguments collaterally attack the federal government's acts of recognition and termination and restoration made between 1972 and 1995. Such an attack would be time-barred as a matter of law and the Tribe reserves the right to address that issue at the appropriate time if this cause survives its Motion to Dismiss.

For these reasons, the Tribe respectfully requests that the Court grant its Motion to Dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction, with prejudice.

[1] References to the Complaint appear as: Complaint at page # : line # - line #.

II. BACKGROUND

A brief discussion of the background to the County's Complaint may be helpful in understanding why this lawsuit must be dismissed with prejudice.

A. Legal Background

The Indian Gaming Regulatory Act regulates gaming on Indian lands and restricts the lands upon which Indian tribes may operate gaming projects. Tribes may only operate gaming on "lands within the limits of any Indian reservation" and on "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe or individual . . . ." 25 U.S.C. §§ 2703(4)(A) and (B). Tribes that had reservations or trust land prior to IGRA's enactment on October 17, 1988, are permitted to operate gaming on their land pursuant to IGRA. However, tribes like Ione that did not have lands held in trust on their behalf prior to October 17, 1988, must satisfy any one of several conditions, listed at 25 U.S.C. § 2719, before they can conduct gaming on their lands.

One of the conditions pursuant to which a tribe may operate gaming on land taken into trust after October 17, 1988, found at 25 U.S.C. § 2719(b)(1)(B)(iii), provides that if the federal government takes the tribal land into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition," gaming may be operated thereon. *Id.* In other words, in order for Ione to operate gaming on land taken into trust for its benefit under section 2719(b)(1)(B)(iii), it must be a "restored tribe" and its land must be taken into trust by the federal government as part of a "restoration of [Ione's] lands." *Id.*

The Secretary of the Interior has general discretionary authority to take land into trust for the benefit of Indian tribes. 25 U.S.C. §§ 465 and 467. Regulations found at 25 C.F.R. Part 151 provide that tribal fee-to-trust applications must include, among other things, information about the tribe's need for additional land, the purposes for which the land will be used, and the extent to which the tribe has provided information that will allow the Secretary to comply with his obligations under NEPA. *See* 25 C.F.R. § 151.11.

In order to facilitate compliance with the statutes and regulations applicable to fee-to-trust applications made in connection with land to be used for gaming purposes, the DOI issued a

"Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations" (hereinafter "Checklist"), attached hereto as Exhibit 1 and referenced and relied upon in the Complaint at 8:20-25. This document contains a checklist that Regional Directors for the Bureau of Indian Affairs use as guidance when processing and compiling tribal gaming-related fee-to-trust applications for the Secretary's consideration. When, as in Ione's case, a tribe seeks to have land taken into trust for gaming purposes, Regional Directors are instructed to obtain a legal opinion from the Solicitor's Office on the question of whether the land would, if taken into trust, qualify for gaming (i.e., in the Tribe's case, whether the Tribe is a "restored tribe" and whether the land would be considered "restored land" under IGRA). *See* Checklist at 7. The Checklist also suggests the preparation of various environmental documents to facilitate compliance with NEPA, as well as other documentation designed to assist the Secretary in deciding whether to take the land into trust. *Id.* at 1, 7-10.

B. Procedural Background

Ione seeks to have the Secretary take several parcels of land, for which it has secured options, into trust for gaming purposes. To that end the Tribe submitted a fee-to-trust application. Complaint at 4:6-9. Because the Tribe seeks to operate gaming on that land, it subsequently asked the National Indian Gaming Commission ("NIGC") to opine on whether the land, if taken into trust, would qualify as "restored land" of a "tribe that is restored to Federal recognition" so that the Tribe could operate gaming on it pursuant to IGRA. Complaint at 4:10-12.

Rather than issue a legal opinion, the NIGC transferred the Tribe's request for an opinion to the Department of Interior's Office of the Solicitor, Division of Indian Affairs. Complaint at 5:14-22. It did so pursuant to a Memorandum of Agreement between the NIGC and the DOI wherein agencies agreed that when a tribe files a fee-to-trust application with the intent of conducting gaming on the land, the DOI Office of the Solicitor (rather than the NIGC, which previously issued legal opinions on this matter) will opine on whether the lands would constitute "Indian lands" or, more specifically in the Tribe's case, "restored lands," if taken into trust. *See* Complaint at 5:14-21. *See also* Memorandum of Agreement Between the National Indian

Gaming Commission and the Department of the Interior (hereinafter "MOA"), attached hereto as Exhibit 2. The legal opinion regarding land status is only one of the items submitted for the Secretary's final consideration in deciding whether to take land into trust for gaming purposes. *See* Checklist at 1, 2, 5, and 7.

On September 19, 2006 Defendant Carl Artman issued a memorandum expressing his opinion that, as a legal matter, the lands at issue would qualify as "restored lands" for a "tribe that is restored to Federal recognition" if and when they are taken into trust. *See* Memorandum from Carl J. Artman to James E. Cason, Sept. 19, 2006, at 1 (hereinafter "Artman Memorandum"), attached to the Complaint as Exhibit A, copy attached hereto as Exhibit 3. Defendant James Cason concurred in that opinion on September 26, 2006. *See* Letter from James E. Cason to Chairman Matthew Franklin, Sept. 26, 2006 (hereinafter "Cason Letter"), attached to the Complaint as Exhibit B, copy attached hereto as Exhibit 4. The Artman Memorandum and Cason Letter, which hereinafter sometimes referenced together as the "Artman/Cason opinion," are at issue in the County's Complaint.

III. ARGUMENT

A. Legal Standard For A Rule 12(b)(6) Motion

In resolving a Rule 12(b)(6) motion, a court must construe the complaint in the light most favorable to the plaintiff, generally accept all well-pleaded factual allegations as true, and determine whether the plaintiff can prove any set of facts to support a claim that would merit relief. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Under *Bell Atlantic v. Twombly*, ___ U.S. ___, ___, 127 S. Ct. 1955, 1974 (2007), the factual allegations of a complaint must show that the claimed relief is "plausible," not just "conceivable."

While Rule 12(b)(6) motions usually are decided based on a complaint and its attachments alone, a court may look to extrinsic evidence under certain circumstances. There are at least two exceptions to the general rule that consideration of extrinsic evidence converts a Rule 12(b)(6) motion to a summary judgment motion. First, a court may consider material that the plaintiff properly submitted as part of the complaint or, even if not physically attached to the complaint, material that is not contended to be inauthentic and that is necessarily relied upon by

the plaintiff's complaint. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute as noted in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681-82 (9th Cir. 2006). Second, under Federal Rule of Evidence 201, a court may take judicial notice of matters of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). For example, a court may consider pleadings, orders, and other papers filed with the court, and may also consider records of administrative bodies. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 1266 (1991).

The present Motion cites two documents that are cited in and relied upon by the Complaint *and* are judicially noticeable under Federal Rule of Evidence 201. *See* Request for Judicial Notice, filed herewith. The documents' authenticity is not in dispute. The Court may therefore consider these documents in the context of a motion pursuant to Rule 12(b)(6). *See Lee*, 250 F.3d at 688-89. These documents are:

1. A "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations" issued by the DOI in March 2005 and referenced in the Complaint at 8:20-27. A copy of this Checklist is attached hereto as Exhibit 1.

2. A Memorandum of Agreement Between the National Indian Gaming Commission and the Department of the Interior executed in May 2006 and referenced in the Complaint at 5:14-22. A copy of this MOA is attached hereto as Exhibit 2.

B. The Complaint Should Be Dismissed Because Plaintiff Lacks Standing To Sue

1. Plaintiff Lacks Standing Under The APA

The Plaintiff presents two sets of arguments under the APA, both of which are aimed at invalidating the Artman/Cason opinion. First, Plaintiff attacks the procedure whereby the Solicitor's Office opined on the land's status, arguing that the DOI did not follow requirements set forth in NEPA prior to issuing the opinion. Complaint at 15:20-27. Second, Plaintiff challenges the opinion's substance by questioning past actions through which the federal

government recognized Ione as an Indian tribe, and argues that the opinion's conclusions are wrong. Complaint at 9:15-23; 20:4-9. Plaintiff makes both sets of arguments under the APA.[2]

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where, as here, no other statute provides a private right of action, the "agency action" complained of must be "final agency action." 5 U.S.C. § 704. In *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), the United States Supreme Court stated that two criteria must be satisfied for agency action to be "final":

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow."

Id. at 177-78, 117 S. Ct. at 1168 (internal citations omitted).

In the Ninth Circuit the core question is whether the agency has completed its decision-making process and whether the result of that process is one that will directly affect the parties. *Oregon Natural Desert Ass'n v. United States Forest Serv.,* 465 F.3d 977, 982 (9th Cir. 2006). The *Oregon Natural Desert* court articulated three ways in which an agency's action is deemed final: (1) if the action "amounts to a definitive statement of the agency's position;" (2) if the action "has a direct and immediate effect on the day to day operations" of the subject party; or (3) if, based on the action, "immediate compliance with the terms is expected." *Id.* Absent "final agency action" a plaintiff lacks standing to bring claims under the APA. 5 U.S.C. § 704.

The Artman Memorandum and Cason Letter that the Plaintiff challenges do not satisfy either of the *Bennett v. Spear* requirements for final agency action, but most clearly fail to satisfy the first requirement, i.e. that the conditional legal opinions set forth in each mark the "consummation" of the agency's decision-making process. *Id.* at 177-178, 117 S. Ct. at 1168. Indeed, in *Miami Tribe of Oklahoma v. United States,* 198 Fed. Appx. 686 (10th Cir. 2006),

[2] Because NEPA does not provide for a private right of action, the County must rely on the judicial review provisions of the APA in bringing its claims. *See* 5 U.S.C. § 702.

attached hereto as Exhibit 5, a case similar in important respects to this one, an Indian tribe sought approval to conduct gaming on a parcel of land. The DOI issued an unfavorable opinion letter to the tribe, and the tribe sought to invalidate the letter, arguing under the APA that it was "final agency action." *Id.* at 690. The court, however, disagreed, holding that the DOI opinion letter is not final agency action because it "is only part of the process that will eventually result in the final" agency action. *Id.* The same is true in this case.

Other courts dealing with legal opinion letters likewise have ruled that the issuance of such letters does not constitute "final agency action." In *City of San Diego v. Whitman*, 242 F.3d 1097 (9th Cir. 2001), for example, the City asked the EPA for its opinion on whether the Ocean Pollution Reduction Act ("OPRA") would apply to its as-yet-unfiled application for renewal of a modified National Pollutant Discharge Elimination ("NPDES") permit. The EPA opined that OPRA would apply, and the City sought to challenge that opinion. The *Whitman* court held that the EPA's opinion letter was not "final agency action" and therefore not subject to judicial review, thus requiring the City to wait until the EPA applied its opinion before bringing suit under the APA. *Id.* at 1101.

This Court recently held, in reliance on *Oregon Natural Desert,* that a biological opinion was not "the 'last word' in authorizing any action or inaction by the [agency]" and therefore did not constitute final agency action. *Pacific Coast Fed'n of Fishermen's Ass'n/Inst. for Fisheries Res.*, No. 1:06-CV-00245, 2007 WL 1752289, slip op. at 12 (E.D. Cal. June 15, 2007), attached hereto as Exhibit 6. Similarly, in *Citizens Against Casino Gambling in Erie County v. Kempthorne,* 471 F. Supp. 2d 295 (W.D.N.Y. 2007), the court held that the Secretary of Interior's letter regarding the status of Indian lands and other related matters "is merely a legal opinion that does not constitute final agency action under IGRA for purposes of APA review." *Id.* at 327. The *Erie County* court found that it lacked jurisdiction to review the Secretary of Interior's "intermediate statutory opinions." *Id.*

As in the cases cited above, here too the Artman/Cason opinion is only an intermediate part of a process that may eventually result in final agency action on the Tribe's fee-to-trust application. The opinion is not an action that "serves as a final decision setting the parameters"

of the Secretary's ultimate determination on the Tribe's fee-to-trust application. *See Oregon Natural Desert,* 465 F.3d at 986 n.12. It does not amount to a definitive statement by the DOI of its position on the Tribe's fee-to-trust application. It does not have a direct and immediate effect on the day to day operations of anyone. And, finally, no immediate compliance with the opinion's terms is expected. *See id.* at 982. Finality is lacking because, even though the opinion has issued, the Secretary still "*may* decide to take certain actions." *Pac. Coast Fed'n,* slip op. at 13.

Indeed, the Artman Memorandum and Cason Letter themselves acknowledge that the Solicitor's opinion as to whether the lands at issue would be "restored lands" if taken into trust is merely part of the larger process for considering whether the Department will take the lands into trust for gaming purposes. *See* Artman Memorandum at 1; Cason Letter. Both documents open with a reference to the Tribe's fee-to-trust application, both mention the fact that the Tribe's fee-to-trust application seeks to have land taken into trust for gaming purposes, and both recite the fact that the question of whether the lands at issue are "Indian lands" is relevant for purposes of the Secretary's ultimate decision as to whether to take the lands into trust for gaming purposes. *Id.* Clearly, then, the documents themselves contemplate their own status as an interim legal opinion rather than final agency action.

That the legal opinion does not mark the "consummation" of the DOI's decision-making process is further evidenced by the above-referenced MOA, attached hereto as Exhibit 2, pursuant to which Mr. Cason issued his legal opinion. *See* Artman Memorandum at 1; Cason Letter; Complaint at 8:14-24. The MOA outlines the process by which the NIGC may seek legal advice from the DOI "for certain actions requiring action under IGRA dependant upon the determination of Indian lands." *See* MOA § 2. Both the DOI and the NIGC acknowledge that "whether a tribe [is a restored tribe on restored lands] is a decision made by the Secretary [of the Interior] when he or she decides to take land into trust for gaming." MOA § 1. The agencies agreed that when the Secretary is responsible for making the final decision (i.e. when a fee-to-trust application is involved), the Secretary's Solicitor's Office would issue a legal opinion to assist the Secretary in doing so, MOA § 3, such that both the interim opinion and the final

decision come out of the same agency. The MOA obviously considers the opinion an interim step taken in contemplation of a final decision by the Secretary regarding a tribe's fee-to-trust application.

Furthermore, the Checklist issued by the DOI and attached hereto as Exhibit 1 likewise evidences the fact that the opinion at issue was drafted as a preliminary assessment intended to assist the Secretary in making a final determination with regard to the Tribe's pending fee-to-trust application. That Checklist, sent by the Acting Principal Deputy Assistant Secretary of Indian Affairs, provides guidance to BIA Regional Directors on how to assemble tribal fee-to-trust applications together with other required documentation for final review by the Secretary. Checklist at 1 (noting that the checklist is intended "to assist . . . [Regional Directors] in preparing a complete land acquisition package for review and final action [by the Secretary] . . ."). The Checklist suggests that Regional Directors obtain, and include among the materials they are asked to forward to the Secretary, an opinion letter such as the one issued by Defendants Artman and Cason whenever a fee-to-trust application is filed under 25 U.S.C. § 2719. *Id.* at 2, 7. The Checklist provides:

> When the Regional Director believes that the acquisition satisfies one of the [IGRA] Section 20 exemptions other than (b)(1)(A), the transmittal Memorandum from the Regional Director must so indicate and must include an analysis establishing that such an exemption exists, and include supporting documentation, i.e., an appropriate Solicitor's Office legal opinion, in the acquisition file.

Id. at 2. Clearly, the legal opinion from the Solicitor's Office is an interim action meant to facilitate final decision-making by the Secretary. As is evident from the Checklist itself, which suggests that numerous documents and analyses be submitted to the Secretary along with a fee-to-trust application, the Office of the Solicitor's legal opinion is only one of many documents that the Secretary will consider prior to making a final decision.

In short, it is the Secretary's decision on the Tribe's fee-to-trust application that will constitute the "consummation of the agency's decision-making process." *Bennett v. Spear,* 520 U.S. at 177-78, 117 S. Ct. at 1168. The opinion letter does not necessarily predict how the Secretary will eventually resolve the Tribe's fee-to-trust application. Until the Secretary takes

final action on the fee-to-trust application, there is no way of knowing what the Secretary will actually decide to do. The present Artman/Cason opinion is merely part of the process; it is not "final agency action" in and of itself. Accordingly, this Court lacks jurisdiction to adjudicate Plaintiff's Complaint under the APA, and the Complaint therefore should be dismissed.

2. Plaintiff Lacks Constitutional Standing To Sue

While lack of standing to sue under the APA is sufficient grounds, in and of itself, for dismissing the Complaint, it is nonetheless worth mentioning that Plaintiff also lacks constitutional standing to sue in this case. The Supreme Court has adopted a three part test for determining whether a litigant has standing to sue in federal court under Article III of the United States Constitution. *See, e.g, Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'") (internal citations and quotations omitted). Under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992) standing requires, at a minimum, (1) injury in fact, (2) a causal connection between the injury alleged and the challenged action, and (3) a likelihood that the injury will be redressed by a favorable decision. *See also Gros Ventre Tribe v. United States,* 469 F.3d 801, 815 (9th Cir. 2006) (finding that the claims at issue in an APA-based challenge to a NEPA action either were barred by the statute of limitations, were not based on a "final agency action," or did not involve a controversy for which the plaintiffs had standing to pursue). When, as here, "the plaintiff is not himself the object of the government action or inaction he challenges," standing is "'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562, 112 S. Ct. at 2137 (citations omitted).

In this case Plaintiff has utterly failed to point to any injury that would emanate directly from the particular action that is at issue here, namely issuance of the Artman/Cason opinion. Indeed, the only harms the County discusses in its Complaint are speculative and contingent. The County speculates as to some harms that *might* arise from the construction of a gaming

facility that *might* be built by the Tribe if yet another future action that *might be taken* by the Secretary, namely the taking of land into trust for the benefit of the Tribe, occurs. Complaint at 16:8-18; 17:13-16; 18:13-19; 19:10-16. The County does not attack the actions from which the potential harm may emerge (i.e., construction of a gaming facility and/or the Secretary's decision to take land into trust), because those actions have not yet occurred and, in fact, may never occur. Instead, the County tries to prevent the Secretary from ever taking any action by attacking the Artman/Cason opinion.

The issuance of the Artman/Cason opinion is not final and has not, in and of itself, caused the Plaintiff any harm. Plaintiff therefore fails to allege any such harm. When the harms cited by a plaintiff do not emanate from the agency action that is under scrutiny in its lawsuit, the plaintiff lacks standing. *See, e.g., Nuclear Info. and Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 954 (9th Cir. 2006) (finding that plaintiff lacked standing because it could not show that "its members' concrete interest is threatened by *the challenged regulation* . . . .") (italics in original). In the Plaintiff's Complaint, there is neither injury in fact nor causality, both of which are required for standing.

Accordingly, Plaintiff lacks constitutional standing to sue, and this lawsuit should therefore be dismissed.

C. Alternatively, Plaintiff's Complaint Is Not Ripe For Review And Should Therefore Be Dismissed Under Rule 12(b)(1)

Even if this Court finds that "final agency action" exists in this case, which the Tribe denies, the County's Complaint should be dismissed because it is not ripe for review.

1. Legal Standard For A Rule 12(b)(1) Motion

In Federal Rule of Civil Procedure 12(b)(1) "facial attacks," i.e., motions attacking subject matter jurisdiction solely on the basis of the allegations in the complaint (together with documents attached to the complaint, judicially noticed facts and any undisputed facts evidenced in the record), a court must consider the allegations of the complaint as true and determine whether, based on those allegations, subject matter jurisdiction exists. *See Safe Air for Everyone v. Meyer,* 373 F. 3d 1035, 1039 (9th Cir. 2004). An "unripe" claim may be dismissed under Rule

12(b)(1) for lack of federal question jurisdiction. *See Ass'n of Am. Med. Colls. v. United States,* 217 F.3d 770, 784 n.9 (9th Cir. 2000) ("Whether statutory or constitutional in origin, an unripe claim is not justiciable.").

2. Plaintiff's Complaint Is Not Ripe For Review

The ripeness doctrine prevents premature adjudication. It is aimed at cases, such as this one, that do not yet have a concrete impact upon the parties. *See Thomas v. Union Carbide Agric. Prod. Co.,* 473 U.S. 568, 580, 105 S. Ct. 3325, 3332 (1985); *Exxon Corp. v. Heinze,* 32 F.3d 1399, 1404 (9th Cir. 1994). Inquiries into ripeness generally address two factors. First, a court will inquire as to the fitness of issues for judicial decision. Specifically, the court will determine whether the relevant issues are sufficiently focused to permit judicial resolution without further factual development. *See Clinton v. Acequia, Inc.,* 94 F.3d 568, 572 (9th Cir. 1996) ("[A] case is not ripe where the existence of the dispute itself hangs on *future contingencies that may or may not occur.*") (emphasis added). Second, the court will consider hardship to the parties of withholding court consideration and will inquire specifically whether the parties would suffer any hardship by the postponement of judicial action. *See Abbot Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980 (1970).

With regard to the first ripeness element, ordinarily, the challenged governmental action must be final before a lawsuit challenging such action is "ripe." *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118-19 (9th Cir. 1999) (holding that a challenge to an interim agency rate-making ruling was not ripe because a final ruling was pending which may have resulted in more favorable terms to the aggrieved party). As explained above in Part III.B.1, the County's Complaint is directed at an interim governmental action. That interim action is merely a legal opinion aimed at assisting the Secretary in making a final decision about the Tribe's fee-to-trust application. The Secretary is required to consider numerous factors in deciding whether to take land into trust for the Tribe's benefit, and the Solicitor's Office opinion about the land's status as "restored land" is only one of the factors that the Secretary will consider. *See* 25 C.F.R. Part 151. Until the Secretary makes his decision, no such final action

exists. The Court should dismiss the Plaintiff's Complaint because the "existence of the dispute itself hangs on *future contingencies that may or may not occur.*" *Clinton*, 94 F.3d at 572.

Furthermore, consideration of the second prong of the ripeness analysis likewise makes it clear that this case should be dismissed. Clearly, the County will suffer no hardship, other than its impatience, if judicial action is postponed. Indeed, the County merely asserts that the case is ripe for review based on its bald insistence that it "should not have to wait." Complaint at 16:21. The County does not point to any significant or relevant hardship. The County is impatient, but impatience alone is not sufficient for a finding of ripeness.

The County's attempt at forcing litigation at this time is particularly misplaced given that the Secretary may ultimately decide not to take the subject lands into trust for the Tribe's benefit, in which case the County (and the Defendants and the Court) would be spared costly and lengthy litigation. Rather than wait for final agency action on this matter, the County has tried instead to co-opt the Secretary's discretion by forcing his hand through a premature judicial proceeding. The County should not be permitted to do so because final agency action is lacking and because the County has shown no hardship that will arise if judicial action is postponed. The County's Complaint should be dismissed on grounds of ripeness.

D. Alternatively, Plaintiff's Arguments Under The National Environmental Policy Act Should Be Dismissed Because Plaintiff Fails To State A Claim Under That Act

The Tribe maintains that this action should be dismissed, first and foremost, because there is no "final agency action" that would support an APA claim. As an alternative, however, the Tribe maintains that even if this Court finds that Plaintiff has standing in this case, which the Tribe denies, and even if the Court finds that the case is ripe for review, which the Tribe also denies, the County's NEPA arguments should be dismissed because Plaintiff fails to state a claim under NEPA. Plaintiff argues, erroneously, that the Artman/Cason opinion was "arbitrary and capricious" because its issuance was a "major federal action" and the DOI failed to conduct environmental review pursuant to NEPA prior to issuing it. Complaint at 15: 20-22. Plaintiff's argument relies on the mistaken legal assumption that NEPA applies to acts such as the issuance of an Indian lands opinion because such acts are "major federal actions." NEPA, however, does

not apply to such acts, and Plaintiff's NEPA-based claim thus lacks foundation. Plaintiff fails to raise any cognizable claim under NEPA.

NEPA imposes environmental review requirements on federal agencies that effectuate "proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Major federal actions" include "actions with environmental effects that may be major and that are potentially subject to federal control and responsibility." 40 C.F.R. § 1508.18. Actions that are not "proposals for . . . major Federal actions significantly affecting the quality of the human environment" do not trigger NEPA and are not subject to its requirements. As demonstrated below, neither the Artman Memorandum nor the Cason Letter is a "proposal" for a "major federal action," and thus neither triggers NEPA's environmental review requirements.

1. The Challenged Opinion Is Not A "Proposal" For Action

On its own terms, NEPA's environmental review requirement applies only to "proposals" for major federal action. 42 U.S.C. § 4332(2)(c). Not every action taken by a federal agency constitutes a "proposal." Indeed, as the Supreme Court has recognized, "the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action . . . ." *Kleppe v. Sierra Club*, 427 U.S. 390, 406, 96 S. Ct. 2718, 2728 (1976).

The Council on Environmental Quality regulations ("CEQ regulations") have attempted to codify cases dealing with NEPA's applicability by defining the term "proposal":

> "Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated . . . .

40 C.F.R. § 1508.23. Under this definition, when an agency is in the early stages of its decision-making, and is gathering information required for a later decision but has not yet formulated any particular goal, no "proposal" exists. Thus, a proposal will be found to exist only if a project is definite. *See Envtl. Protect. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005, 1014-15 (9th Cir. 2006). *See also Realty Income Trust v. Eckerd,* 564 F.2d 447 (D.C. Cir. 1977) (finding that

a funding request to Congress for a building of "known dimensions" was either a proposal for legislation or a recommendation or proposal for a major federal action); *Shoshone-Paiute Tribe v. United States,* 889 F. Supp. 1297 (D. Idaho 1994) (finding that a proposed Air Force training area constituted "proposal" of a "major federal action"). However, when an agency takes only preliminary action, such as issuing a policy statement preliminary to a rule making, NEPA review is not required. *Pub. Citizen, Inc. v. Nuclear Regulatory Comm'n,* 940 F.2d 679, 682-84 (D.C. Cir. 1991). *See also Monarch Chem. Works, Inc. v. Thone,* 604 F.2d 1083, 1090-91 (8th Cir. 1979) (finding NEPA review was *not* required where no "definitive planning" was present).

The legal opinion at issue here is not a proposal for any action. Indeed, the opinion does not recommend any action, one way or another, on the Tribe's fee-to-trust application. That application may well be denied despite the opinion. Rather, the opinion merely states that *if* that application is approved, then the subject lands will be considered "restored lands" for purposes of IGRA. *See* Artman Memorandum at 1. Far from being a proposal for anything definite, the opinion at issue refrains completely from proposing anything at all. There is no definitive project or plan. Accordingly, the opinion letter fails to meet even the first criterion for the application of NEPA's review requirements.

2. The Challenged Opinion Does Not Propose Any "Action" And Thus Is Not A "Major" Federal Action

NEPA does not apply unless a federal agency has proposed an "action." 42 U.S.C. § 4332(2)(c). The term "action" is not defined in NEPA, but the CEQ regulations list four categories into which "actions" tend to fall. 40 C.F.R. § 1508.18. The four sets of exemplary acts that constitute "actions" under NEPA are:

> 1. Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
>
> 2. Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

> 3. Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
>
> 4. Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18(b).

Clearly, the type of legal opinion at issue here is far different from the types of acts considered by the CEQ regulations to be "actions" as that term is used in NEPA. The legal opinion at issue is a statement of the DOI's opinion of the status of lands. It does not contain an approval of any proposed action with regard to that land; it does not grant any sort of permit with regard to the land; it does not adopt any proposed action with regard to the land; it does not confer on the land any sort of status not already present in the land. The opinion does nothing more than declare one agency's opinion of the land's status. No "action" is present in the opinion, nor does the opinion itself constitute "action" as that term is used in NEPA. Accordingly, no "major" federal action exists here and NEPA's review requirements do not apply.

3. <u>There Is No Major Federal Action "Significantly Affecting" The Quality Of The Human Environment</u>

NEPA does not apply unless a federal agency has proposed a major federal action "significantly affecting" the environment. 42 U.S.C. § 4332(2)(c). Under this definition, there must be a causal relationship between a federal action and any claimed environmental effect. *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774, 103 S. Ct. 1556, 1561 (1983). The *Metropolitan Edison* Court held that "to determine whether . . . [NEPA] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Id.* at 773; 103 S. Ct. at 1561.

In this case, the opinion letter at issue does not, in and of itself, have any direct causal relationship with any possible effects to the environment. Indeed, the Cason/Artman opinion

letter effects no change in anything at all. It is not an action in and of itself, nor does it permit or require or otherwise effect such action. The opinion does not even affect the status of the land at issue. It merely declares the DOI's opinion regarding that status. Accordingly, the letter does not "affect" the environment at all.

Perhaps because it recognizes that there is no causation between the Artman/Cason opinion and any environmental effects, the County does not explicitly claim that such causation exists. Rather, the County glosses over the question of causation and talks about the "massive environmental, traffic, public safety, law enforcement and social service problems" that will ensue, *not* as a result of the Artman/Cason opinion at issue, but rather as a result of "a Class III gaming facility," Complaint at 16:14-16, that the Tribe *may or may not* construct on the land *if* the Secretary takes the land into trust, which the Secretary *may or may not* do. Clearly, if any of the environmental harms identified by the County are to occur, they will occur, as the County itself concedes, as a result of construction of a gaming facility. Complaint at 16:14. But the construction of that facility is not at issue in this case, nor is the taking of land into trust, because neither of those events has occurred nor has a decision been made to execute them. Thus, while the County has identified some future environmental effects, it has utterly failed to link those effects *causally* to the Artman/Cason opinion at issue in its Complaint.[3]

In short, Plaintiff fails to state a claim under NEPA because, contrary to Plaintiff's assertion, issuance of the Artman/Cason opinion was not a "proposal[] for . . . [a] major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c).

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[3] In *Metropolitan Edison*, the Court held that some effects caused by a change in the physical environment "in the sense of 'but for' causation" would not fall within NEPA because "the causal chain is too attenuated." *Metropolitan Edison*, 460 U.S. at 773-74; 103 S. Ct at 1561. Thus, even if the fee to trust application would not be granted but for the opinion letter, and even if the proposed gaming facility would not be constructed but for the opinion letter, both of which the Tribe denies, causation would still be lacking because "the causal chain is too attenuated." *Id.*

E. Conclusion

For all of the reasons stated above, the Tribe respectfully requests that this Court dismiss this lawsuit with prejudice.

Date: July 17, 2007

Respectfully submitted,

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