NICHOLAS C. YOST (State Bar No. 35297)
MATTHEW G. ADAMS (State Bar No. 229021)
SONNENSCHEIN NATH & ROSENTHAL LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300
Email: nyost@sonnenshein.com

MICHAEL S. PFEFFER (State Bar No. 88068)
JOHN A. MAIER (State Bar No. 191416)
MAIER PFEFFER & KIM, LLP
510 16th Street, Suite 302
Oakland, CA 94612
Telephone: (510) 835-3020
Facsimile: (510) 835-3040
Email: jmaier@jmandmplaw.com

Attorneys for Intervenor
Federated Indians of Graton Rancheria

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

STOP THE CASINO 101 COALITION, ROBERT AHERNE, AMY BOYD, LISA CATELANI, FRANK EGGER, MICHAEL ERICKSON, MICHAEL HEALY, LINDA LONG, LISA McELROY, PAM MILLER, MARILEE MONTGOMERY, FRED SOARES, JAMIE WALLACE, CHIP WORTHINGTON, and LINDA WORTHINGTON, Plaintiffs, vs. DIRK KEMPTHORNE, Secretary of the United States Department of the Interior; CARL J. ARTMAN, Assistant Secretary of the United States Department of the Interior for Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; JERRY GIDNER, Director, Bureau of Indian Affairs, Department of the Interior, DALE MORRIS, Pacific Regional Director, Bureau of Indian Affairs, Department of the Interior; and UNITED STATES BUREAU OF INDIAN AFFAIRS	Case No. 3:08-CV-02846 SI INTERVENOR'S MOTION TO DISMISS FIRST AMENDED COMPLAINT Judge: Honorable Susan Illston Date: March 27, 2009 Time: 9:00 a.m. Courtroom: 10
Federated Indians of Graton Rancheria, Intervenor.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL AND STATUTORY BACKGROUND 2

III. STANDARD OF REVIEW 7

IV. ARGUMENT 9

A. PLAINTIFFS LACK STANDING 9

1. Plaintiffs Lack Article III Standing 9

2. Plaintiffs Violate The Principles Of Prudential Standing By Seeking To Enforce The Rights Of Other Parties 12

B. PLAINTIFFS' CLAIMS ARE NOT RIPE 13

1. Plaintiffs' First Claim for Relief is Not Ripe 13

2. Plaintiffs' Fourth Claim for Relief is Not Ripe 14

C. PLAINTIFFS FAIL TO STATE ANY CLAIM ON WHICH RELIEF CAN BE GRANTED 15

1. Plaintiffs' First Cause of Action Fails to State a Claim on which Relief Can Be Granted 15

2. Plaintiffs' Second Cause of Action Fails to State a Claim on Which Relief Can Be Granted 15

a) The Tribe's Property Is Not Subject To Any Adverse Legal Claims; Therefore, Plaintiffs Fail To State A Claim On Which Relief Can Be Granted 15

(i) The Plain Language Of The Restoration Act Demonstrates That The Tribe's Williamson Act Contract Is Not An Adverse Legal Claim To The Tribe's Property 16

(ii) Applicable Standards Of Review And Construction Confirm That Plaintiffs Have Failed To State A Claim On Which Relief Can Be Based 18

b) The Ownership Of The Property Does Not Affect Its Eligibility For Trust Acquisition; Therefore, Plaintiffs Fail To State A Claim On Which Relief Can Be Based 20

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

(i) The Plain Language of the Restoration Act Provides that Trust Acquisition is Not Limited to Fee Land Owned by Distributees and Their Successors 20

(ii) Applicable Standards Of Review And Construction Confirm The Secretary's Determination That The Property Is Eligible for Trust Acquisition 21

3. Plaintiffs' Third Cause of Action Fails to State a Claim for Relief 22

(i) Plaintiffs Fail to State a Claim Under the Equal Footing Doctrine 22

(ii) Plaintiffs Fail to State a Claim Under the Tenth Amendment 23

4. Plaintiffs' Fourth Cause of Action Fails to State a Claim on Which Relief Can Be Granted 24

V. CONCLUSION 25

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Abbott Laboratories v. Gardner
387 U.S. 136 (1967).....13, 14

American Bioscience, Inc. v. Thompson
269 F.3d 1077 (D.C. Cir. 2001).....8

Artichoke Joe's California Grand Casino v. Norton
278 F. Supp. 2d 1174 (E.D. Cal. 2003).....12

Ass'n of Data Processing Serv. Org. v. Camp
397 U.S. 150 (1970).....9

Bell Atlantic Corp. v. Twombly
550 U.S. 544 (2007).....8, 9, 22

Bennett v. Spear
520 U.S. 154 (1997).....14

Bresgal v. Brock
843 F.2d 1163 (9th Cir. 1987).....21

Bryan v. Itasca County
426 U.S. 373 (1976).....18, 22

California ex rel. Younger v. Andrus
608 F.2d 1247 (9th Cir. 1979).....8

Carcieri v. Kempthorne
497 F.3d 15 (1st Cir. 2007).....23

Cayuga Nation v. Pataki
413 F.3d 266 (2d. Cir. 2005).....10

Cent. Delta Water Agency v. United States
306 F.3d 938 (9th Cir. 2002).....7

Chen-Cheng Wang ex. rel. United States v. FMC Corp.
975 F.2d 1412 (9th Cir. 1992).....8

Chevron v. Natural Resources Defense Council
467 U.S. 837 (1984).....17, 18, 22

City of New York v. United States
179 F.3d 29 (2d Cir. 1999) 24

City of Roseville v. Norton
219 F. Supp. 2d 130 (D.D.C. 2002).....passim

City of Sherrill v. Oneida Indian Nation
544 U.S. 197 (2005).....10

Clegg v. Cult Awareness Network
18 F.3d 752 (9th Cir. 1994) 8

County of Oneida v. Oneida Indian Nation of N.Y.
470 U.S. 226 (1985).....24

Coyle v. Smith
221 U.S. 559 (1911).....23

Delaware Nation v. Pennsylvania
446 F.3d 410 (3d Cir. 2006) 10

Fiedler v. Clark
714 F.2d 77 (9th Cir. 1983) 15, 24, 25

Garcia v. United States
469 U.S. 70 (1984).....16

Gardner v. Toilet Goods Ass'n
387 U.S. 167 (1967).....14, 15

Greenwood v. New Hampshire Public Utility Commission
527 F.3d 8 (1st Cir. 2008).....10

Kokkonen v. Guardian Life Ins. Co. of America
511 U.S. 375 (1994).....7, 8

Korea Kumho Petrochemical v. Flexsys America LP
2008 WL 686834 (N.D. Cal. March 11, 2008).....9

Levin Metals Corp. v. Parr-Richmond Terminal Co.
799 F.2d 1312 (9th Cir. 1986) 15, 25

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992).....9, 11, 12

Mansell v. Mansell
490 U.S. 582 (1989).....16

Matter of Borba
736 F.2d 1317 (9th Cir. 1984) 21

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Nance v. EPA
645 F.2d 701 (9th Cir. 1981) 12

Nat'l Park Hospitality Ass'n v. Dep't of the Interior
538 U.S. 803 (2003) 14, 15

National Labor Relations Board v. Jones & Laughlin Steel Corp.
301 U.S. 1 (1937) 21

New York v. United States
505 U.S. 144 (1992) 23

Ohio Forestry Ass'n v. Sierra Club
523 U.S. 726 (1998) 13, 14

Oregon Natural Desert Association v. Bureau of Land Management
531 F.3d 1114 (9th Cir. 2008) 7

Papasan v. Allain
478 U.S. 265 (1986) 18

Peter Letterese and Associates v. World Institute of Scientology Enterprises
533 F.3d 1287 (11th Cir. 2008) 10

Price v. United States General Serv. Admin.
894 F.2d 323 (9th Cir.1990) 8

Sacks v. Office of Foreign Assets Control
466 F.3d 764 (9th Cir. 2006) 7

Santa Fe Medical Services v. Segal
57 F.3d 342 (3d. Cir. 1995) 16

Seminole Tribe of Fla. v. Florida
517 U.S. 44 (1996) 6

Skelly Oil v. Phillips Petroleum
339 U.S. 667 (1950) 15, 24, 25

Statman v. Leisnoi, Inc.
545 F.3d 1161 (9th Cir. 2008) 21

Stock West Inc. v. Confederated Tribes of the Colville Reservation
873 F.2d 1221 (9th Cir. 1989) 8

United States v. John
437 U.S. 634 (1978) 24

United States v. McGowan
302 U.S. 535 (1938) 24

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

United States v. Menasche
348 U.S. 528 (1955).....21

United States v. Washington
157 F.3d 630 (9th Cir. 1998).....23

United States v. Wilson
159 F.3d 280 (7th Cir. 1998).....24

Van Buskirk v. Cable News Network, Inc.
284 F.3d 977 (9th Cir. 2002).....8

Warth v. Seldin
422 U.S. 490 (1975).....9, 12

Wiggins v. Hitchens
853 F. Supp. 505 (D.D.C. 1994).....8

Yahoo! Inc. v. La Ligue Contre Le Racism
433 F.3d 1199 (9th Cir. 2006).....13

Ynclan v. Evans
2007 WL 27933365 (N.D. Cal. Sept. 26 2007).....9

CALIFORNIA CASES

Friends of East Willits Valley v. County of Mendocino
101 Cal. App. 4th 191 (2002).....19

Hocking v. Title Insurance and Trust Company
37 Cal. 2d 644.....19, 20

FEDERAL STATUTES AND REGULATIONS

25 C.F.R. § 151.13.....passim

25 U.S.C. § 1300l 3

25 U.S.C. § 1300n-1(2).....18

25 U.S.C. § 1300n-3(a).....1, 18

25 U.S.C. § 1300n-3(c).....1

25 U.S.C. § 2702(1).....5

25 U.S.C. § 2703(4).....6

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

25 U.S.C. § 2703(4)(A) 6, 11, 14

25 U.S.C. § 2703(4)(B).....6 11, 14

25 U.S.C. § 2705(3).....7

25 U.S.C. § 2705(a)(3) 11, 14

25 U.S.C. § 2710(d).....6

25 U.S.C. § 2710(d)(1) 6, 11, 14

25 U.S.C. § 2710(d)(1)(A).....7

25 U.S.C. § 2710(d)(2) 11, 14

25 U.S.C. § 2710(d)(3) 11, 14

25 U.S.C. § 2710(d)(9) .....passim

25 U.S.C. § 2711(b).....passim

25 U.S.C.§§ 2719(a) and (b).....6

25 U.S.C. § 2719(b)(1)(B)(iii).....6

42 U.S.C. § 4332(2).....6, 11, 14

STATE STATUTES

Cal. Gov't Code §§ 51200-51297.4.....16

Cal. Gov't Code § 51230 17

Cal. Gov't Code § 51243 17

Cal. Gov't Code § 51244-45.....17

Cal. Gov't Code § 51245 17

Cal. Gov't Code § 51281-82.....17

`

FEDERAL AND STATE CONSTITUTIONS

Cal. Const. Article IV, § 19(f) 5, 6

U.S. Const. Amendment X .....passim

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

U.S. Const. Article I, § 8, cl. 3.....24

U.S. Const. Article III.....9, 10, 13

U.S. Const. Article IV, § 3, cl.1.....22

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 12(b).....1

Fed. R. Civ. P. 12(b)(1).....7

Fed. R. Civ. P. 12(b)(6).....7, 8

LEGISLATIVE MATERIALS

31 Fed. Reg. 2911 (Feb. 14, 1966).....3

69 Fed. Reg. 7022 (Feb. 12, 2004).....13

70 Fed. Reg. 7022-23 (Feb. 12, 2004).....7

70 Fed. Reg. 56933-34 (Sept. 29, 2005).....7

72 Fed. Reg. 10790-92 (March 9, 2007).....12

73 Fed. Reg. 25766-25768 (May 7, 2008).....5

2000 Oversight Report at 67.....3

H.R. 4434, 105th.....3

H.R. 946, 106th.....3

H.R. Doc. No. 363, 91st Cong., 2nd Sess. (1970).....3

H. Rep. No. 106-677.....2

House of Representatives, Serial No. 106-95 (May 16, 2000).....2

OTHER AUTHORITIES

Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*.....2

Cohen's Handbook of Federal Indian Law, § 15.04(3)(b) (2005 ed.).....24

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

I. INTRODUCTION

The Federated Indians of Graton Rancheria (the "Tribe") intervened in this case to support the decision of the Secretary of the Interior (the "Secretary") to take a parcel of land into trust for the Tribe under the Graton Rancheria Restoration Act (the "Restoration Act"), 25 U.S.C. § 1300n *et seq.*[1] The Tribe now moves under Federal Rule of Civil Procedure 12(b) to dismiss Plaintiffs' First Amended Complaint because Plaintiffs lack standing to assert the claims alleged in their First Amended Complaint, because Plaintiffs' claims are not ripe for review, and because Plaintiffs have failed to state any claim upon which relief may be granted.

Plaintiffs' First Amended Complaint challenges an action by the Secretary to acquire in trust, for the benefit of the Tribe, a 254-acre parcel of land (the "Property") located in Sonoma County, California (the "Trust Acquisition"). The Secretary acted pursuant to the Restoration Act, which explicitly mandates that "the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California" and, further, that such land "shall be part of the Tribe's reservation." 25 U.S.C. §§ 1300n-3(a),(c).

---

[1] This case involves the section of the Restoration Act codified at 25 U.S.C. § 1300n-3. That section provides as follows:

> (a) Lands to be taken in trust. Upon application by the Tribe, the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California, for the benefit of the Tribe after the property is conveyed or otherwise transferred to the Secretary and if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes.
>
> (b) Former trust lands of the Graton Rancheria. Subject to the conditions specified in this section, real property eligible for trust status under this section shall include Indian owned fee land held by persons listed as distributees or dependent members in the distribution plan approved by the Secretary on September 17, 1959, or such distributees' or dependent members' Indian heirs or successors in interest.
>
> (c) Lands to be part of reservation. Any real property taken into trust for the benefit of the Tribe pursuant to this title shall be part of the Tribe's reservation.
>
> (d) Lands to be nontaxable. Any real property taken into trust for the benefit of the Tribe pursuant to this section shall be exempt from all local, State, and Federal taxation as of the date that such land is transferred to the Secretary.

Ignoring this clear Congressional directive, Plaintiffs now seek (1) declaratory relief regarding the legal impact of the Trust Acquisition, (2) a determination that the Secretary violated the Administrative Procedure Act, (3) a declaration that the Secretary's decision violates the Constitution, and (4) an advisory opinion regarding the property's status as "Indian Lands" under the Indian Gaming Regulatory Act ("IGRA"). Plaintiffs lack standing to raise these claims, the claims are not yet ripe, and, in any event, Plaintiffs have not alleged any cause of action on which relief can be granted. Accordingly, Plaintiffs' claims must be rejected and this case dismissed.

II. FACTUAL AND STATUTORY BACKGROUND

California Indian history is as sad as it is complex. *See, e.g.*, Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pacific L.J. 391, 397-415 (1986). Prior to European settlement, an estimated 100,000 to 300,000 Indians lived in California. *Id.* at 397. By the end of the nineteenth century, the California Indian population had been reduced to approximately 17,000. *Id.* at 406.

The Tribe is the successor to the Graton Rancheria, a small community of California Indians that survived the depredations of the past 250 years, and for whom the federal government acquired land near the small, rural Sonoma County town of Graton. *Oversight Hearing before the Committee on Resources, House of Representatives*, Serial No. 106-95 at 106-07 (May 16, 2000) ("2000 Oversight Report").[2] See also H. Rep. No. 106-677, at 4-5 (2000).[3] Acquired in 1920, this small, 15.45-acre tract of land became known as the Graton Rancheria. *Id.*

In 1958, the Graton Rancheria was subjected to the federal "termination" policy of the mid-twentieth century. That policy sought to end Indians' reservation-based tribal identity by

[2] For the convenience of the court, a copy of the 2000 Oversight Report is attached hereto, and incorporated herein, as **Exhibit 1**.

[3] For the convenience of the court, a copy of House report 106-677 is attached hereto, and incorporated herein, as **Exhibit 2**.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

completely "integrating" them into the general population. 2000 Oversight Report at 105. The Graton Rancheria was split into parcels, the parcels were distributed to individuals residing there at the time, and the tribe and its individual members were rendered ineligible for federal Indian programs or services. 31 Fed. Reg. 2911 (Feb. 14, 1966). Since that time, the Tribe has been landless.

In 1970, the President and Congress repudiated the termination policy. *See* Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2nd Sess. (1970). Congress then undertook to remedy the effects of the termination policy on Indian tribes. *See* Pub. L. 102-416 at § 2. As part of that effort, the congressionally-created Advisory Council on California Indian Policy issued a report which noted that "[t]he Federated Indians of the Graton Rancheria meet the current criteria for restoration, and should thus be immediately restored by Congress." Advisory Council on California Indian Policy, Final report and recommendations to the Congress of the United States (the "1997 ACCIP Termination Report") at 1-5.[4] *See also* 2000 Oversight Report at 106. In response to the Council's report and the efforts of the Tribe, the Congresswoman whose district included Marin and Sonoma Counties introduced legislation to restore federal recognition to the Tribe. *See* H.R. 4434, 105th Congress, 2d Session; H.R. 946, 106th Congress, 1st Session, *see also 2000 Oversight Report* at 67 (Testimony of Congresswoman Woolsey). The Restoration Act, which once again extended to the Tribe and its members the status, rights, and privileges of a federally recognized Indian tribe, was signed into law by President Clinton in December, 2000. Pub. Law 106-568, 114 Stat. 2939 (2000) (codified at 25 U.S.C. §1300n, *et seq.*).

Recognizing that the Tribe had not yet identified a specific parcel for its reservation

[4] For the convenience of the court, the ACCIP Termination Report is attached hereto and incorporated herein as **Exhibit 3**. Twenty-seven of the tribes which were originally terminated under the California Rancheria Act have now been restored to federal recognition pursuant to court orders or stipulated entries of judgment. Another three terminated California tribes have been restored pursuant to federal legislation. *See* 25 U.S.C. §§ 1300l *et seq*. (United Auburn Indian Community); 25 U.S.C. § 1300m-1(a) (Paskenta Band of Nomlaki Indians); 25 U.S.C. § 1300n-2(a) (2000) (the Tribe).

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

when the Restoration Act was enacted, Congress mandated that, "[u]pon application by the Tribe, the Secretary *shall* accept into trust for the benefit of the Tribe *any real property located in Marin or Sonoma County*, California," and such trust lands "*shall* be part of the Tribe's reservation." 25 U.S.C. § 1300n-3(a), (c) (emphasis added).

In December, 2002, the Tribe began the process of identifying property suitable for its reservation and for the economic development necessary to purchase the property and to support tribal government facilities and services. *See* Declaration of Greg Sarris In Support of Tribe's Motion to Intervene (hereinafter "Sarris Decl.") at ¶¶ 6, 8. The Tribe considered approximately 48 properties in Marin and Sonoma Counties. *Id.* at ¶ 6. The Tribe determined, often in consultation with Sonoma County, that the vast majority of these properties were unsuitable. *Id.* Some properties were too small, others contained sensitive natural resources, and still others were located in jurisdictions which did not wish to support, on a government-to-government basis, the Tribe's attempts to secure self-determination and economic self-sufficiency. *Id.*

In August, 2005, the Tribe announced that it had identified property totaling approximately 254 acres near (and partially within) the City of Rohnert Park, California, commonly known as the "Wilfred site." Sarris Decl. at ¶ 8. The Tribe has since confirmed that the Wilfred site would be suitable to support tribal facilities and the economic development necessary to support those facilities (and associated governmental services). *Id. at* ¶ 8.

In March, 2006, the Tribe submitted an application to the Department of Interior requesting the Secretary to accept the Wilfred site (*i.e.*, the Property) into trust pursuant to the mandatory provision of the Graton Restoration Act. *See* Letter from Assistant Secretary-Indian Affairs Artman to Chairman Sarris (April 18, 2008) (the "Artman Letter") at 1.[5]

On April 18, 2008, the Assistant Secretary-Indian Affairs issued a letter to the Tribal Chairman announcing the Secretary's determination to acquire the Property into trust for the

[5] The Artman Letter is attached hereto, and incorporated by reference herein, as **Exhibit 4**. The Artman Letter also appears as Exhibit 3 to Plaintiffs' First Amended Complaint.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Tribe pursuant to the Restoration Act. Artman Letter at 1-7. Although the Assistant Secretary acknowledges that the Tribe intends to develop a gaming facility on the Property, his letter goes on to explain the limits of the Secretary's decision as follows:

> A determination on whether the property to be acquired will be eligible for gaming under the Indian Gaming Regulatory Act (IGRA) has not been made because such a determination is unnecessary when the Secretary's decision on whether to acquire the land in trust is not discretionary, but mandated by an act of Congress. At this time the Tribe does not have a class III tribal-state compact with the State of California. Notwithstanding the Secretary's ministerial decision to take the land in trust, the Tribe could not engage in gaming activities on the land without first complying with all applicable requirements of the IGRA.

Artman Letter at 6.

On May 7, 2008, the Assistant Secretary-Indian Affairs caused to be published in the Federal Register a Notice of Final Agency Determination To Take Land into Trust. *See* 73 Fed. Reg. 25766-25768 (May 7, 2008).[6] The Notice does not state that the Secretary has authorized or approved (or even reviewed) any tribal gaming project gaming purposes. *Id*. Nor does it state that the land to be accepted into trust has been determined suitable for gaming. *Id*.

On June 6, 2008, Plaintiffs filed a Complaint challenging the Secretary's approval of an application by the Tribe to acquire the Property in trust "for the express purpose of constructing and operating a gambling facility." Complaint at ¶ 1.

The Tribe moved to intervene,[7] and, on November, 17, 2008, the Tribe and the United States filed motions to dismiss Plaintiffs' complaint. Rather than oppose the motions to dismiss filed by the Tribe and the United States, Plaintiffs sought leave to amend their complaint. On January 29, 2009, Plaintiffs filed their First Amended Complaint (hereinafter, the "Complaint").

Both federal law and the California Constitution provide foundational authority permitting gaming by California Indian tribes. *See* 25 U.S.C. § 2702(1); Cal. Const. art. IV, § 19(f). As relevant here, IGRA provides a framework under which a Tribe may, under certain

[6] The Notice is attached hereto, and incorporated by reference herein, as **Exhibit 5**. The Notice also appears as Exhibit 4 to Plaintiffs' First Amended Complaint.

[7] The Tribe's Motion to Intervene was granted on December 15, 2008.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

circumstances, conduct gaming operations on tribal land. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48-49 (1996) (providing an overview of IGRA). Among other things, such operations must be (1) "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d). California permits tribal gaming. *See* Cal. Const. art. IV, § 19(f).

A gaming operation also must be conducted on lands "within the limits of any Indian reservation," or other lands "title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. §§ 2703(4), 2710(d)(1); 25 C.F.R. § 502.12. However, Section 20 of IGRA generally prohibits gaming on lands acquired in trust by the Secretary for the benefit of a tribe after October 17, 1988, unless at least one of several exceptions to the prohibition applies. *See* 25 U.S.C.§§ 2719(a) and (b). One such exception governs here: under 25 U.S.C. § 2719(b)(1)(B)(iii), the general prohibition does not apply to lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." Neither the Secretary nor the Chairman of the NIGC has yet determined whether the Property is eligible for gaming pursuant to Section 20 of IGRA. *See* 25 U.S.C. §§ 2703(4)(A), (B).[8] The Tribe cannot develop a gaming project on the Property unless and until the NIGC issues such a determination. 25 U.S.C. §§ 2703(4), 2710(d)(1); 25 C.F.R. § 502.12.

In addition, IGRA requires that the NIGC to approve any management contract for the operation and management of class II and class III tribal gaming. 25 U.S.C. §§ 2710(d)(9), 2711(b). The Tribe cannot develop any gaming facility on the Property until the NIGC issues a Record of Decision ("ROD") approving such a management contract. *Id*. *See also* 42 U.S.C. 4332(2), 40 C.F.R. §§ 1506.1, 1506.10 (no agency decision until 30 days after notice of ROD). The NIGC has not yet approved the proposed management contract between the Tribe and SC Sonoma Management LLC.[9]

[8] In fact, the Secretary has expressly stated that the Trust Acquisition does not constitute such a determination. *See* Artman Letter at 6.

[9] In addition, before any gaming takes place on the Property, the NIGC must approve a tribal

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

On February 12, 2004, the NIGC published a Federal Register notice of its intent to prepare an Environmental Impact Statement ("EIS") evaluating (1) a management contract between the Tribe and SC Sonoma Management LLC, and, with it, (2) the potential environmental impacts of a casino and hotel project proposed by the Tribe. 70 Fed. Reg. 7022-23 (Feb. 12, 2004).[10] Once the EIS is complete, the NIGC will prepare a ROD memorializing its decision with respect to the management contract. *See* 40 C.F.R. § 1505.2 (ROD). The ROD will also identify alternatives considered by the NIGC (including the potential environmental effects of those alternatives), and will identify and adopt any measures needed to mitigate the potential environmental effects of the selected alternative. *Id.* The ROD will constitute final agency action regarding the Tribe's proposed development of the Property. *See Oregon Natural Desert Association v. Bureau of Land Management*, 531 F.3d 1114, 1139 (9th Cir. 2008) (ROD constitutes final agency action).

III. STANDARD OF REVIEW

Under the Federal Rules of Civil Procedure, a case must be dismissed if a court lacks the authority to hear and decide the dispute or if a Plaintiff has failed to state a claim on which relief can be based. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(6).[11]

Federal courts are courts of limited jurisdiction. They possess only that power authorized by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Before reaching the merits of a case, then, a court must first consider

---

gaming ordinance and the Tribe must reach agreement with the State of California. *See* 25 U.S.C. §§ 2705(3), 2710(d)(1)(A) (gaming ordinance), 2710(d)(1)(C) (compact with State of California).

[10] A Supplemental Notice of Intent was published in the Federal Register on September 29, 2005. 70 Fed. Reg. 56933-34 (Sept. 29, 2005).

[11] A motion to dismiss for lack of standing can be brought under Rule 12(b)(6), instead of the jurisdiction provision of Rule 12(b)(1). *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006). *See also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (standing properly considered in deciding motion to dismiss because "[t]he elements of standing are 'an indispensable part of the plaintiff's case,' and accordingly must be supported at each stage of litigation in the same manner as any other essential element of the case").

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

whether it has subject matter jurisdiction over the claims asserted. *Chen-Cheng Wang ex. rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992) citing *Price v. United States General Serv. Admin.,* 894 F.2d 323, 324 (9th Cir.1990). Plaintiffs bear the burden of establishing subject matter jurisdiction, which the court presumes is lacking until Plaintiffs prove otherwise. *Kokkonen,* 511 U.S. at 377*; Stock West Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) citing *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979).

Because the focus of a Rule 12(b)(6) motion is on legal sufficiency, rather than the substantive merits of a claim, review is normally limited to the face of the complaint. *See Van Buskirk v. Cable News Network, Inc*., 284 F.3d 977, 980 (9th Cir. 2002).[12] While material allegations in a complaint must be accepted as factually correct, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Wiggins v. Hitchens*, 853 F. Supp. 505, 508 n.1 (D.D.C. 1994). *See also Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994). Moreover, a plaintiff must plead facts demonstrating that his right to relief is more than merely conceivable, but plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("*Twombley*").[13]

A complaint must contain sufficient detail to give defendants fair notice of both the plaintiff's claims and the grounds for those claims. Indeed, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 550 U.S. at 555. Rather, "[f]actual allegations must be enough to raise a right to relief above the

[12] The Tribe's decision to attach documents to this Motion is consistent with the rule restricting review to the face of the complaint. All seven exhibits to this Motion are documents which (1) were also attached to or explicitly referenced in Plaintiffs' Complaint and/or (2) consist legislative or regulatory authority provided for the Court's convenient reference.

[13] Where the district court reviews agency action under the APA, the entire case is a legal question that can be resolved under Rule 12(b)(6). *See American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001) All of Plaintiffs' claims should be dismissed under Rule 12(b)(6). The same result, however, would be obtained here if the court were to treat any portion of this motion as a motion for summary judgment.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

speculative level." *Id*. *See also Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D. Cal. March 11, 2008) (applying *Twombly*); *Ynclan v. Evans*, 2007 WL 27933365, (N.D. Cal. Sept. 26 2007) (dismissal for failure to "proffer enough facts to state a claim for relief that is plausible on its face").

IV. ARGUMENT

A. PLAINTIFFS LACK STANDING

The United States Constitution limits the jurisdiction of federal courts to actual "cases" and "controversies." U.S. Const. art. III. An "integral piece" of this requirement is that plaintiffs must have standing. *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 140 (D.D.C. 2002) *aff'd* 348 F.3d 1020 (D.C. Cir. 2003) *cert denied sub nom. Citizens for Safer Communities v. Norton*, 124 S. Ct. 1888 (2004). Constitutional (or "Article III") standing requires that a plaintiff establish (1) an injury in fact, which is both concrete and particularized, and actual or imminent, not merely conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury can be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Prudential standing principles further limit the jurisdiction of federal courts. Among other things, prudential standing requires that a plaintiff (1) assert his own legal rights and interests, rather than those of third parties and (2) assert claims which fall within the zone of interests to be protected by the statute or constitutional provision at issue. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (no standing to enforce rights of third party); *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970) (zone of interests requirement).

Here, both Constitutional requirements and prudential principles dictate that Plaintiffs lack standing.

1. Plaintiffs Lack Article III Standing

All four of Plaintiffs' claims for relief should be dismissed for lack of Article III standing. The Complaint contains no explicit allegations of standing. *See* Complaint at ¶¶ 1-115. Instead, Plaintiffs make general allegations suggesting they could, hypothetically, be

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

harmed by a gaming project which may (or may not) take place at the Property at some time in the future.[14]

First, Plaintiffs vaguely allege that development of the Property would disrupt their "settled expectations as residents and business owners in the area." Complaint at ¶ 4. Presumably, Plaintiffs mean to rely on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), where the Supreme Court concluded, on the basis of the laches doctrine, that the existence of "longstanding observances and settled expectations" barred untimely land claims. *See Sherrill*, 544 U.S. at 219. The *Sherrill* court did not hold that alleged "disruption of expectations" is sufficient to confer Article III standing. *Id*. at 219-221. Nor has any other published federal decision cited *Sherrill* for that proposition.[15] In addition, the alleged disruption of "settled expectations" identified by Plaintiffs is neither "actual and imminent" nor "concrete and particularized"; rather, it merely hypothesizes some vague (but presumably radical) departure from current conditions if and when the Tribe receives approval to develop the Property. *See* Complaint at ¶ 15 ("[t]he Coalition opposes the Secretary's acceptance of lands into trust for the purpose of a gambling casino because such action strips the Coalition and its members of the protection of California's laws…contrary to plaintiffs' justifiable expectations"). Moreover, and for similar reasons, there is no causal connection between the alleged "disruption of expectations" (an injury allegedly attributable to "the pending casino project") and the conduct about which Plaintiffs complain (namely, the Secretary's decision). *See* Complaint at ¶ 15.

Second, Plaintiffs suggest that they could be harmed directly if the Tribe eventually develops a gaming facility and resort on the Property. *See, e.g.*, Complaint at ¶ 15 ("***If***

---

[14] As noted above, however, there is, as yet, no agency action authorizing any gaming project at the Property.

[15] Indeed, the courts have consistently interpreted *Sherrill* in terms of the doctrine of laches. *See, e.g., Greenwood v. New Hampshire Public Utility Commission*, 527 F.3d 8, 15 (1st Cir. 2008); *Cayuga Nation v. Pataki*, 413 F.3d 266, 268 (2d. Cir. 2005); *Delaware Nation v. Pennsylvania*, 446 F.3d 410, 415 n.8 (3d Cir. 2006); *Peter Letterese and Associates v. World Institute of Scientology Enterprises*, 533 F.3d 1287, 1322 n.42 (11th Cir. 2008).

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

approved, the pending casino project would cause substantial harm to the natural environment…"), ¶ 30 ("***If*** [the Tribe] were allowed to…construct and operate the proposed Nevada-style casino project, plaintiffs will lose the protection of existing state regulation") (emphasis added). But none of these statements satisfies the "irreduceable Constitutional minimum" of "concrete and particularized" injury that is "actual and imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. As Plaintiffs themselves seem to recognize, the alleged environmental impacts of developing a gaming facility and resort are not "actual," but "hypothetical"; no such project has been approved and no construction is imminent.[16] *See* Complaint at ¶ 15. (plaintiffs "***would*** be harmed ***if*** [the Tribe's] proposed Casino is built") (emphasis added). Indeed, while the action about which Plaintiffs now complain—namely, the Trust Acquisition—could result in the Property becoming the Tribe's reservation, the Property cannot be developed and used for gaming without further federal and state action. *See* 25 U.S.C §§ 2710(d)(9), 2711(b) (approval of management contract); 25 U.S.C. §§ 2705(a)(3), 2710(d)(1),(2) (approval of gaming ordinance); 25 U.S.C. § 2710(d)(3) (compact with State of California); 25 U.S.C. §§ 2703(4)(A),(B) (land determination); 42 U.S.C. § 4332(2), 40 C.F.R. §§ 1506.1, 1506.10 (compliance with National Environmental Policy Act).

Third, Plaintiffs allege that they have suffered procedural injury "because they have been denied the opportunity to comment on the impacts of the casino project." Complaint at ¶ 10. Here, too, Plaintiffs allege no "actual and imminent" injury. *See Lujan*, 504 U.S. at 560-61. As explained above, the action about which Plaintiffs complain—namely, the Secretary's decision to approve the Trust Acquisition—does not propose or authorize the construction of a "casino project."[17] Indeed, no casino or commercial development project has been approved,

[16] For that same reason, Plaintiffs' allegations are also inadequate to meet the second (causation) and third (redressibility) prongs of the Constitutional standing test. *See Lujan*, 504 U.S. at 560-61.

[17] Again, for the same reasons, Plaintiffs' claims of procedural injury are also insufficient to meet the second (causation) and third (redressibility) prongs of the Constitutional standing test. *See Lujan*, 504 U.S. at 560-61.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

and no construction is actual or imminent. *See* 25 U.S.C. §§ 2710(d)(9), 2711(b) (requiring approval of management contract); *Lujan*, 504 U.S. at 560-61 (requiring concrete, actual injury). Moreover, under the National Environmental Policy Act ("NEPA") Plaintiffs do have an opportunity to comment on "the impacts of the casino project" during the statutorily-mandated comment periods ***for that project***. *See, e.g.*, 72 Fed. Reg. 10790-92 (March 9, 2007) (NIGC seeks public comments on draft Environmental Impact Statement for Tribe's proposed gaming project).

2. Plaintiffs Violate The Principles Of Prudential Standing By Seeking To Enforce The Rights Of Other Parties

Because Plaintiffs seek to enforce the rights of other parties, the Complaint is also inconsistent with the principles of prudential standing. Specifically, Plaintiffs' first claim for relief seeks a declaratory judgment confirming the legal rights of the State of California. *See* Complaint at ¶ 97 ("[i]n particular, plaintiffs contend that the Property would remain subject to California land use and water law…"). On its face, such a request violates the principle that litigants must advance their own interests (rather than the interests of a third party), and is therefore inconsistent with the principles of prudential standing. *See Warth v. Seldin*, 422 U.S. at 499 (no third party standing).

To the extent that Plaintiffs' third claim for relief alleges a violation of the Equal Footing Doctrine, the Enclaves Clause, and/or the Tenth Amendment, that claim is also inconsistent with the principles of prudential standing. *See* Complaint at ¶¶ 14 (description od the "nature of action"), 41-46 (discussing Constitution), 107-112 (third claim for relief). The federal courts have squarely rejected the argument that individuals and associations have standing to bring these three Constitutional claims. *See Roseville*, 219 F. Supp. 2d at 145-147 (D.D.C. 2002). *See also Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981) (the "Tenth Amendment is designed to protect the interest of the states *qua* states); *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003) (individuals lack standing to bring suit for alleged violation of Tenth Amendment). In fact, the *Roseville* court explicitly held that individuals and organizations challenging a trust acquisition for a

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

California Indian tribe have no standing to bring an action against the United States under the Equal Footing Doctrine, the Enclaves Clause, or the Tenth Amendment—the very Constitutional provisions cited by Plaintiffs in this case. *See Roseville*, 219 F. Supp. 2d at 145-47.

B. PLAINTIFFS' CLAIMS ARE NOT RIPE

In addition, Plaintiffs' first and fourth claims are not yet ripe. The ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). In deciding whether a claim is ripe for decision, the courts generally consider "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id*. at 149. *See also Yahoo! Inc. v. La Ligue Contre Le Racism*, 433 F.3d 1199, 1211-12 (9th Cir. 2006) (applying *Abbott Laboratories* test). These ripeness considerations require dismissal of Plaintiffs' claims.

1. Plaintiffs' First Claim for Relief is Not Ripe

Plaintiffs' first claim for relief seeks a declaration from this Court regarding the impact of the Secretary's Decision on potential future uses of the Property. Complaint at ¶ 99. By definition, a request for such an advisory opinion is unfit for judicial decision. U.S. Const. art. III ("case" or "controversy" requirement). Moreover, the question on which Plaintiffs seek advisory guidance—namely, use of the Property for gaming—will be addressed in a subsequent Congressionally-mandated process. *See* Complaint at ¶ 99 (seeking advisory opinion on status of California gaming law if Property is developed); 25 U.S.C. §§ 2710(d)(9), 2711(b) (IGRA requires approval of management contract); 69 Fed. Reg. 7022 (Feb. 12, 2004) (Notice of Intent to prepare Environmental Impact Statement evaluating management contract and proposed gaming project). Therefore, Plaintiffs' first claim for relief is not yet fit for judicial decision. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-36 (1998) (subsequent administrative process renders claim unripe).

The "hardship to the parties of withholding court consideration" also establishes that

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Plaintiffs' first claim for relief is unripe. *Abbott Laboratories*, 387 U.S. at 149. Plaintiffs' Complaint fails to identify—or even to suggest—any respect in which the Secretary's approval will be "felt immediately by those subject to it in their day-to-day affairs." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810 (2003) citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 164 (1967). Indeed, the Secretary's action neither creates the adverse consequences about which Plaintiffs complain nor forces Plaintiffs to modify their behavior in any other way. *See Ohio Forestry*, 523 U.S. at 734 (challenge unripe where federal action did not directly cause alleged harm and plaintiffs failed to allege any other modifications to behavior). Therefore, Plaintiffs' first claim for relief is not yet ripe.

2. Plaintiffs' Fourth Claim for Relief is Not Ripe

Plaintiffs' fourth claim for relief requests a judicial declaration that the Property does not qualify for gaming under the IGRA. Complaint at ¶¶ 113-15. By law, no gaming can take place on the Property until further administrative processes are completed. 25 U.S.C §§ 2710(d)(9), 2711(b) (approval of management contract); 25 U.S.C. §§ 2705(a)(3), 2710(d)(1),(2) (approval of gaming ordinance); 25 U.S.C. § 2710(d)(3) (compact with State of California); 25 U.S.C. §§ 2703(4)(A),(B) (land determination); 42 U.S.C. § 4332(2), 40 C.F.R. §§ 1506.1, 1506.10 (compliance with National Environmental Policy Act). During those processes, the Tribe's development plans will be further refined, alternatives to those plans—including both gaming and non-gaming alternatives—will be evaluated, and, eventually, the plans will be approved or disapproved. 42 U.S.C. § 4332(2); 40 C.F.R. §§ 1502.14, 1505.2. Therefore, neither the proposed gaming project nor any alternative thereto is fit for judicial review. *See Ohio Forestry*, 523 U.S. at 735-36 (proposed project unfit for judicial review prior to agency approval); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency actions not subject to judicial review until final). Moreover, and for similar reasons, the impacts and hardships about which Plaintiffs complain will not be "felt immediately." *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 809-10. Nor will the status of the Property under IGRA have any impact on Plaintiffs' "primary conduct" unless and until additional administrative approvals take place.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Id. citing *Toilet Goods*, 387 U.S. at 164. Therefore, Plaintiffs' fourth claim for relief is not yet ripe.

C. PLAINTIFFS FAIL TO STATE ANY CLAIM ON WHICH RELIEF CAN BE GRANTED

1. Plaintiffs' First Cause of Action Fails to State a Claim on which Relief Can Be Granted

Plaintiffs' first claim for relief requests a declaratory judgment concerning the ongoing regulatory rights of the State of California. But declaratory relief is a remedy, not a cause of action. *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 671 (1950); *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983). The operation of the Declaratory Judgment Act is procedural only and it does not create an independent basis for federal jurisdiction. *Skelly Oil*, 339 U.S. at 671; *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986). Put simply, Plaintiffs are not entitled to declaratory relief in the absence of any viable underlying claim. In this case, Plaintiffs' first claim for relief simply requests declaratory relief without stating or identifying any underlying cause of action. Complaint at ¶¶ 95-99. For that reason, they have not stated a claim on which declaratory relief can be granted. *Skelly Oil*, 339 U.S. at 671; *Fiedler*, 714 F.2d at 79. Accordingly, Plaintiffs' first cause of action should be dismissed.

2. Plaintiffs' Second Cause of Action Fails to State a Claim on Which Relief Can Be Granted

Plaintiffs' second cause of action alleges that the Secretary's decision was arbitrary and capricious because (1) the property is subject to an adverse legal claim and (2) the Property is currently owned by SC Sonoma Development LLC. Neither allegation states a claim on which relief can be granted.

a) The Tribe's Property Is Not Subject To Any Adverse Legal Claims; Therefore, Plaintiffs Fail To State A Claim On Which Relief Can Be Granted

The Restoration Act provides that the Secretary "shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California…if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes." 25 U.S.C. § 1300n-3(a). Plaintiffs allege that the

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Williamson Act[18] contract which currently applies to a portion of the Property (the "Contract") constitutes such a claim, and therefore renders the Secretary's decision arbitrary and capricious. Complaint at ¶ 103. They are mistaken. The plain language of the Restoration Act clearly establishes that the Contract is not an adverse legal claim to the Property. And even if the plain language of the Restoration Act did not control, applicable standards of review and construction dictate that the Contract is neither a "claim to [the P]roperty" nor "adverse." *See* 25 U.S.C. § 1300n-3(a). Therefore, Plaintiffs' allegations regarding the Williamson Act fail to state a claim.

(i) The Plain Language Of The Restoration Act Demonstrates That The Tribe's Williamson Act Contract Is Not An Adverse Legal Claim To The Tribe's Property

It is axiomatic that Congress expresses its intent through the ordinary meaning of language; therefore, every exercise of statutory interpretation should begin with the plain language of the statute itself. *See Mansell v. Mansell*, 490 U.S. 582, 588 (1989). Where statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result. *See Santa Fe Medical Services v. Segal*, 57 F.3d 342, 346 (3d. Cir. 1995). Moreover, a court may depart from the plain language of a statute only by an extraordinary showing of a contrary congressional intent in the legislative history. *See Garcia v. United States*, 469 U.S. 70, 75 (1984).

Here, the plain language of the Restoration Act offers clear direction with respect to the definition of an "adverse legal claim" to the Property. Specifically, 25 U.S.C. § 1300n-3(a) provides that "the Secretary shall accept into trust for the benefit of the Tribe any real property located in Marin or Sonoma County, California…if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or

[18] The California Land Conservation Act of 1965, better known as the Williamson Act, allows landowners in certain zoning districts to enter 10-year contracts with local governments. The contracts (1) require that the land be used for agricultural purposes and (2) provide tax benefits to the land owner. *See* Cal. Gov't Code §§ 51200-51297.4 (Williamson Act).

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

taxes." 25 U.S.C. § 1300n-3(a). In other words, the Secretary is required to accept eligible land into trust for the Tribe unless that land is encumbered by "outstanding liens, mortgages, or taxes." *Id.*

The Contract does not constitute or create an outstanding lien, mortgage, or tax obligation; rather, it is a contract under which the Tribe has temporarily agreed to use a portion of the Property for Agricultural purposes in exchange for equally-temporary tax benefits. Participation in the Williamson Act program is strictly voluntary, and landowners may decide not to renew their Williamson Act contracts at any time.[19] Cal. Gov't Code § 51245. Moreover, a Williamson Act contract does not create any rights of possession or ownership. *See* Cal. Gov't Code §§ 51243 (elements of contract), 51250 (breach of contract does not affect ownership of property). Thus, while a County government may sue to enforce the terms of a Williamson Act contract, such a suit does not give the County (or any other party) any rights to the subject property. *Id.* As a matter of law, then, the Williamson Act does not create any sort of lien against property. Nor does it constitute a mortgage or a tax obligation—in fact, the Williamson Act is explicitly designed to *reduce* property taxes on agricultural land. *See* Cal. Gov't Code § 51230. Therefore, the plain meaning of the Restoration Act demonstrates that the Contract cannot constitute an "adverse legal claim" to the Property. *See* 25 U.S.C. § 1300n-3(a).[20] *See also Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

[19] Williamson Act contracts run for 10 years, and, unless cancelled, are automatically renewed each year. *See* Cal. Gov't Code § 51244-45. Therefore, a notice of non-renewal generally begins a 9-year process during which (1) the contract expires and (2) property taxes are increased to full value. *Id.* Landowners can also seek immediate cancellation of a Williamson Act contract by applying to the local land use authority. Cal. Gov't Code § 51281-82.

[20] This conclusion is further bolstered by the examples of "adverse claims to property" listed in 25 U.S.C. § 1300n-3(a). Those examples include "outstanding liens, mortgages, or taxes," all three of which can provide a third party with a legal claim to an interest in land.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

(ii) Applicable Standards Of Review And Construction Confirm That Plaintiffs Have Failed To State A Claim On Which Relief Can Be Based

There is nothing ambiguous about the Restoration Act's definition of "adverse legal claims" to property. *See* U.S.C. § 1300n-3(a). Even if there were, however, the applicable standard of review and rules of construction dictate that the Contract is neither a "legal claim to property" nor "adverse."

First, "if Congress has not directly addressed the precise question at issue," the courts must give "considerable weight" to the interpretation of the executive agency charged with administering the relevant statute. *Chevron*, 467 U.S. at 843-44. The agency charged with administering the Restoration Act is the Department of the Interior. See 25 U.S.C. §§ 1300n-1(2), 1300n-3(a). Therefore, even if the Restoration Act's definition of "adverse legal claims" to property were ambiguous, the Secretary's interpretation of that phrase must be upheld unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id*. at 844. Here, Plaintiffs' Complaint fails to allege any such defect in the Secretary's determination. *See* Complaint at ¶¶ 100-106. To the extent that Plaintiffs address the Williamson Act at all, it is simply to assert that the existence of a Williamson Act contract "is a complete bar to the trust acquisition under the [Restoration] Act." Complaint at ¶ 103. But conclusory assertions of this sort are not sufficient to state a claim on which relief can be granted. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (courts need not accept as true "a legal conclusion couched as a factual allegation"). Therefore, Plaintiffs' second claim for relief should be dismissed.

Second, "statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Therefore, under the Indian law canon of construction, any reasonable doubts regarding the Restoration Act's definition of "adverse legal claims" to the Property must be resolved in favor of the Tribe. In other words, even if the Restoration Act is ambiguous with respect to the phrase "adverse legal claims to property," the Tribe's construction of that phrase must prevail. For this reason, too, Plaintiffs' second claim for relief

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

should be dismissed.

Third, the Contract is not "adverse." The Solicitor for the Department of the Interior determined that the Contract does not constitute an adverse legal claim. *See* Artman Letter at 5. Similarly, the Regional Director or the Department's Pacific Region concluded that the Contract does not restrict any current or proposed use of the Property. *See* Memorandum from Acting Regional Director, Pacific Region to Assistant Secretary-Indian Affairs (October 29, 2007) (the "October 29, 2007 Memorandum") at 8 (proposed gaming project would not be located on agricultural portion of the Property). [21] Indeed, Plaintiffs do not allege otherwise. *See* Complaint at ¶¶ 101-106. In addition, the Tribe has voluntarily waived its sovereign immunity so that the County of Sonoma can continue enforce the land use provisions of the Contract even after the Property is accepted into trust. *See* Federated Indians of Graton Rancheria General Council Resolution 09-03-GC.[22] *See also Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 194-203 (2002) (Williamson Act contract not nullified by trust acquisition). Therefore, as a matter of federal, state, and tribal law, the Contract is not "adverse."

Finally, it is worth noting that the regulatory standards applicable to other trust acquisitions clearly indicate that the focus of the United States' title inquiry is on "marketability of title." [23] *See* 25 C.F.R. § 151.13 (liens, encumbrances, and title infirmities need only be eliminated if they render title to the land unmarketable). Marketable title, in turn, is defined in terms of clear ownership of the land. *See*, *e.g.*, *Hocking v. Title Insurance and Trust Company*,

---

[21] For the Court's convenient reference, the October 29, 2007 Memorandum from Acting Regional Director, Pacific Region to Assistant Secretary-Indian Affairs is attached hereton, and incorporated herein, as **Exhibit 6**. The October 29, 2007 Memorandum is also cited and described in Paragraph 87 of the Complaint.

[22] For the court's convenient reference, Federated Indians of Graton Rancheria General Council Resolution 09-03-GC is attached hereto, and incorporated herein, as **Exhibit 7**.

[23] In order to prevent any confusion on the topic, the Tribe explicitly states for the record that it does not waive any arguments with respect to the application of any trust acquisition standards other than those found in the Restoration Act itself. *See* 25 U.S.C. § 1300n-3(a) ("the Secretary ***shall*** accept into trust for the benefit of the Tribe…) (emphasis added).

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

37 Cal. 2d 644, 650-51 citing *Copertini v. Opperman*, 76 Cal. 181, 186 (1888) ("the words 'good title' import that the owner has title, legal and equitable, to all the land"). In other words, only a defect in *the title itself* interferes with marketability; a mere restriction on use does not. *Hocking*, 37 Cal. 2d at 650 (title only is defective if "some other has title to a part or portion of the land"). Here, the Contract temporarily restricts the Tribe's use of a portion of the Property, but does not grant "some other [] title to a part or portion of the land." *See id*. Therefore, the Contract is not an adverse claim on the Property, and Plaintiffs' second claim for relief should be dismissed.

b) The Ownership Of The Property Does Not Affect Its Eligibility For Trust Acquisition; Therefore, Plaintiffs Fail To State A Claim On Which Relief Can Be Based

Plaintiffs also allege that the Restoration Act only permits land owned by the Graton Rancheria's distributees (or their heirs) to be taken into trust for the Tribe. Complaint at ¶ 102. That allegation, too, fails to state a claim on which relief can be based.

(i) The Plain Language of the Restoration Act Provides that Trust Acquisition is Not Limited to Fee Land Owned by Distributees and Their Successors

Plaintiffs base their allegations on 25 U.S.C. § 1300n-3(b). That section provides, in its entirety:

> (b) FORMER TRUST LANDS OF THE GRATON RANCHERIA.-Subject to the conditions specified in this section, real property eligible for trust status under this section shall include Indian owned fee land held by persons listed as distributees or dependent members in the distribution plan approved by the Secretary on September 17, 1959, or such distributees' or dependent members' Indian heirs or successors in interest.

25 U.S.C. § 1300n-3(b). This provision simply allows lands that (1) were distributed to individual Indians as part of the (improper) termination of the Graton Rancheria and (2) still owned by a member of the limited class of persons described in the statute to be returned to their former trust status. *See id*. Notably, 25 U.S.C. § 1300n-3(b) does not mandate that the Secretary take the former Graton Rancheria lands into trust "for the

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

benefit of the Tribe." *Id*. Moreover, 25 U.S.C. § 1300n-3(a) mandates trust acquisition in either Marin County or Sonoma County, but the land described in 25 U.S.C. § 1300n-3(b) (the former Graton Rancheria) is only located in Sonoma County. See 2000 Oversight Report at 105-107. Thus, 25 U.S.C. § 1300n-3(b) provides trust acquisition process which is separate and distinct from 25 U.S.C. § 1300n-3(a). The Secretary based his decision on 25 U.S.C. § 1300n-3(a). October 27, 2007 Memorandum at 1-2; Artman Letter at 1. Therefore, the requirements of 25 U.S.C. § 1300n-3(b) are not applicable here. *Id*.[24]

(ii) Applicable Standards Of Review And Construction Confirm The Secretary's Determination That The Property Is Eligible for Trust Acquisition

Applicable standards of review and construction confirm that the Secretary properly determined that the Property is eligible for trust acquisition under the Restoration Act. Courts are required to "attempt to give effect, if possible, to every clause and word of a statute." *Statman v. Leisnoi, Inc.*, 545 F.3d 1161, 1168 (9th Cir. 2008). Indeed, "[t]he cardinal principle of statutory construction is to save and not to destroy." *See United States v. Menasche*, 348 U.S. 528, 538-539 (1955) citing *National Labor Relations Board v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 30 (1937). Here, Plaintiffs suggest that the Restoration Act only permits former lands of the (improperly terminated) Graton Rancheria to be accepted into trust. In doing so, they ignore 25 U.S.C. § 1300n-3(a), which provides that the Secretary "shall accept into trust…***any property located in Marin or Sonoma County, California***." 25 U.S.C. § 1300n-3(a). Because "[i]t is the duty of the court to give significance to every word, phrase, sentence, and part of an act…and not render it partially or entirely void," Plaintiffs' interpretation of the Restoration must be rejected and its third claim for relief dismissed. *Bresgal v. Brock*, 843 F.2d 1163. 1166 (9th Cir. 1987) citing *Matter of Borba*, 736 F.2d 1317, 1320 (9th Cir. 1984).

[24] Moreover, even under Plaintiffs' interpretation of 25 U.S.C. § 1300n-3(b), the tribal ownership requirement would only apply "at the time of [] conveyance or transfer." It is undisputed that no conveyance or transfer has yet occurred. *See* Complaint at ¶¶ 59-94 (factual background).

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Moreover, as explained above, the Secretary's determination that the Property is eligible for trust acquisition must be upheld unless arbitrary, capricious, or manifestly contrary to statute. *Chevron*, 467 U.S. at 844. Here, Plaintiffs have failed to explain why—or even to allege that—the Secretary's interpretation of the relationship between 25 U.S.C. § 1300n-3(a) and 25 U.S.C. § 1300n-3(b) is arbitrary, capricious, or manifestly contrary to the Restoration Act. *See* Complaint at ¶ 104. Accordingly, their second claim for relief must be dismissed. *See Twombley*, 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitlement for relief requires more than labels and conclusions").

The Indian law canon of construction also mandates dismissal. As explained above, "statutes passed for the benefit of dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). In other words, any reasonable doubts regarding the relationship between 25 U.S.C. § 1300n-3(a) and 25 U.S.C. § 1300n-3(b) must be resolved in favor of the Tribe.

3. Plaintiffs' Third Cause of Action Fails to State a Claim for Relief

Plaintiffs' third cause of action alleges that the Secretary's decision violates the United States Constitution. These allegations have already been rejected by the courts, and should be dismissed in this case as well.

(i) Plaintiffs Fail to State a Claim Under the Equal Footing Doctrine

The Trust Acquisition does not violate the Equal Footing Doctrine of the Constitution. The Equal Footing Doctrine originates from the Statehood Clause of the Constitution—also referred to as the Admissions Clause—which provides that "no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl.1.

Plaintiffs suggest that the Trust Acquisition violates the Equal Footing Doctrine because the federal government is forbidden to "take[] any parcel of land into trust for Indians and thereby oust[] the state of jurisdiction." Complaint at ¶¶ 41-46, 109-10. They are mistaken.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

The Statehood Clause prohibits Congress from creating a new state that is not "on an equal footing with the original states in all respects whatsoever." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). In modern times, "the Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood." *United States v. Washington*, 157 F.3d 630, 645 (9th Cir. 1998) (citations omitted). The instant case involves no dispute over title to submerged lands or navigable waterways. *See* Complaint at ¶¶ 1-115. Nor do Plaintiffs allege any respect in which the Trust Acquisition renders the State of California unequal to the other states in the Union. *Id*. Moreover, it is undisputed that the Trust Acquisition would not create or admit to the Union any new state. *Id*. In short, the exercise of the federal government's plenary power with respect to Indian affairs "simply does not constitute a violation of the equal footing doctrine." *City of Roseville*, 219 F. Supp. 2d at 153. *See also Carcieri v. Kempthorne*, 497 F.3d 15, 40-41 (1st Cir. 2007) (en banc) *cert. granted on other grounds* 128 S. Ct.1443 (2008) (trust acquisition does not violate Equal Footing Doctrine).

(ii) Plaintiffs Fail to State a Claim Under the Tenth Amendment

Plaintiffs also suggest that the Trust Acquisition violates the Tenth Amendment. *See* Complaint at ¶ 109. The Tenth Amendment reserves to the states those powers not expressly delegated to the federal government. U.S. Const. amend. X. The powers delegated to the federal government and those reserved to the states by the Tenth Amendment are "mutually exclusive." *Carcieri*, 497 F.3d at 39. Therefore, "if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power that the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Thus, where Congress acts pursuant to an enumerated power, the Tenth Amendment may not be used as a "sword allowing states and localities to engage in

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

passive resistance that frustrates federal programs." *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

Here, Congress and the Secretary have acted pursuant to just such an enumerated power. The authority to regulate Indian affairs is within the federal powers enumerated in the Constitution. *See* U.S. Const. art. I, § 8, cl. 3. *See also County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law"). The Constitution confers upon Congress plenary authority to regulate Indian affairs, including the power to set aside lands in trust on behalf of Indian tribes. *Id*. Indeed, "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out." *United States v. McGowan*, 302 U.S. 535, 535 (1938). The Supreme Court has determined that legislation providing land "for needy Indians" is well within Congress' plenary authority, even where such acts occur after surrounding states have been admitted to the Union. *See United States v. McGowan*, 302 U.S. at 537, 539 (1938) (upholding establishment of Reno Colony after Nevada statehood). *See also United States v. John*, 437 U.S. 634 (1978) (Indian reservation established in Mississippi after statehood "validly set apart for use of the Indians"); *Roseville*, 219 F. Supp. 2d at 154-56 (upholding Auburn Indian Restoration Act). Congress has exercised this prerogative on several occasions. *See* Cohen's Handbook of Federal Indian Law, § 15.04(3)(b) (2005 ed.) (collecting statutes). Where, as here, it is clear that the Secretary was merely carrying forth clearly exercised plenary power clearly committed to Congress (and, therefore, not that reserved to the States), the Tenth Amendment provides no cause of action. *See United States v. Wilson*, 159 F.3d 280, 287 (7th Cir. 1998).

4. Plaintiffs' Fourth Cause of Action Fails to State a Claim on Which Relief Can Be Granted

Finally, Plaintiffs request a declaratory judgment that the Property does not qualify for gaming under IGRA. As noted above, however, declaratory relief is a remedy, not a cause of action. *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 671 (1950); *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983). The operation of the Declaratory Judgment Act is procedural only and it

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

does not create an independent basis for federal jurisdiction. *Skelly Oil*, 339 U.S. at 671; *Levin Metals Corp*, 799 F.2d at 1315. Here, Plaintiffs' fourth cause of action—like its first—simply requests declaratory relief without stating or identifying any underlying cause of action. Complaint at ¶¶ 113-15. For that reason, they have not stated a claim on which declaratory relief can be granted. *Skelly Oil*, 339 U.S. at 671; *Fiedler*, 714 F.2d at 79.[25]

V. CONCLUSION

For the foregoing reasons, Intervenor Tribe respectfully requests that its Motion to Dismiss Plaintiffs' First Amended Complaint be granted.

Dated: February 20, 2009

SONNENSCHEIN NATH & ROSENTHAL LLP

By /S/
NICHOLAS C. YOST
MATTHEW G. ADAMS

Attorneys for Intervenor
Federated Indians of Graton Rancheria

Dated: February 20, 2009

MAIER PFEFFER & KIM LLP

By /S/
MICHAEL S. PFEFFER
JOHN A. MAIER

Attorneys for Intervenor
Federated Indians of Graton Rancheria

[25] That conclusion applies with particular force where, as here, "[a] determination on whether the property to be acquired will be eligible for gaming under [IGRA] has not been made." Artman Letter at 6.

SONNENSCHEIN NATH & ROSENTHAL LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000