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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF AMADOR COUNTY, BEA CRABTREE, JUNE GEARY,
Plaintiffs,

vs.

KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, United States Department of Interior, THE NATIONAL INDIAN GAMING COMMISSION, GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission, et al.,

Defendants

Case No. 2:10-cv-00348-WBS-KJM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECONSIDER, MODIFY, CORRECT AND/OR VACATE JUDGMENT AND ORDER OF DISMISSAL [F.R.C.P. RULES 59 & 60]

Date: 21 Nov. 2011
Time: 2:00 p.m.
Dept: 5

[Hon. William B. Shubb, Sr. Judge]

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1 I. INTRODUCTION

2 In it's order dismissing Plaintiffs' complaint, filed
3 on 4 October 2011 the court correctly concedes at the outset
4 that on any Motion to Dismiss the court must accept as true
5 all factual allegations in Plaintiffs' complaint and draw
6 all favorable inference in Plaintiffs' favor.

7 The court then proceeds in the course of the discussion
8 dismissing Plaintiffs' complaint to do the exact opposite.
9 Motions to dismiss including those based on a claim of
10 failure to join an absent person must be based on factual
11 analysis by the court and are heavily reliant upon the facts
12 and the law of each particular case as discussed infra.
13 [See Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th
14 Circ. 1982).] [See also Provident Tradesmen's Bank & Trust
15 Co. v. Patterson 390 U.S. 102, 119 [1968]. The gravaman of
16 Plaintiffs' present complaint and the remaining allegations
17 after the State defendant was dismissed earlier, is that the
18 Defendant United States and its applicable agencies
19 erroneously approved a tribal gaming ordinance, and an
20 amended gaming ordinance and then later a site specific
21 tribal-state compact on ineligible land at Buena Vista
22 [hereinafter simply B.V.] for an Indian entity which the
23 Defendants conceded several years after both those approvals
24 were granted, was not a lawfully organized tribe. Also that
25 the person executing those documents, one DonnaMarie Potts,
26

was not a lawful tribal member and not an authorized spokesperson entitled to execute and submit the approved documents. [See Declaration of Counsel herein. **[EXHIBIT "O"]**

In addition, Plaintiffs' complaint is one for **Declaratory Relief** not monetary damages and is seeking, in relevant part, the court's review of the actions of Defendants in approving a **SITE SPECIFIC** tribal gaming ordinance, and the approval of a class III tribal-state compact in 2000 for the B.V. land executed by DonnaMarie Potts and approved again on December 20, 2004. This review is brought pursuant to 5 U.S.C. 701(a), 702, 703, 704 and 706,[1] the Administrative Procedures Act (hereinafter APA).

Rather than seek to intervene in this pending case and using the extraordinary tactic of asking for a special appearance to make a Motion to Dismiss, the unnamed tribe comes before the court at the 11th hour seeking dismissal of Plaintiffs' case based on their non-joinder in the underlying case against the United States for violations of the APA and based on arbitrary and capricious acts and approvals and their failure to lawfully organize and

[1] Plaintiffs complaint herein was filed in February 2010, only 5 years and 2 months after this approval, not more than 6 years as asserted by the tribe on page 11 of their brief inferring Plaintiffs' action was "untimely and time barred" under the A.P.A. 28 U.S.C. 2401(a). In addition the erroneous advisory letter from Defendant's attorney Penny Coleman concerning the status of the B.V. land on which this "tribe" now relies, was dated 30 June 2005. Plaintiffs complaint herein was timely filed, less than 5 years after that erroneous opinion and during most of intervening period of time, Plaintiffs attempted to correct these erroneous actions and inactions through Administrative processes with Defendant agencies.

1 acknowledge an Indian tribe calling itself "the Buena Vista
2 Rancheria of Me-Wuk Indians" [hereinafter simply the tribe]
3 who is the entity seeking to build a site specific gaming
4 casino on the B.V. fee lands along with a non-Indian casino
5 developer.

6 Plaintiffs herein now move the court for relief from
7 its October 4, 2011 order of dismissal under rules 59 and 60
8 F.R.C.P. on the basis the court erred in dismissing
9 Plaintiffs complaint at the tribe's instance, the court
10 failed to examine and consider critical dispositive facts
11 that were before the court and further that many of the
12 court's errors were induced by misrepresentations of fact by
13 the moving party and their counsel. Furthermore the court's
14 order of dismissal is not proper and lawful under the facts
15 and law of this case because the tribe has no lawfully
16 protected interest to game on the B.V. land, that claim is
17 frivolous, and any interest they might have is fairly
18 protected by the government Defendants. Lastly, other
19 procedural actions short of dismissal exist. Where a tribe
20 claims to be indispensable and asserts they have tribal
21 immunity from lawsuit and cannot be joined, the court is
22 duty bound to seek alternatives to avoid dismissal of
23 Plaintiffs' meritorious action.
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II. HISTORICAL BACKGROUND

Because the facts and circumstances of each case must be reviewed and analyzed to evaluate whether an absent person is in fact either necessary or indispensable to a case under rule 19 FRCP and whether they have a lawfully protected interest or merely a frivolous remote claim, the court is obligated to consider all such facts and circumstances. This is particularly true where dismissal of Plaintiffs' case is sought, for the purported failure to join the unnamed tribe based on their claim to be indispensable to the resolution of Plaintiffs' APA action against the named federal defendants.

As set out in the declaration of counsel **EXHIBITS "A", "B"** and **"C"** in almost all cases rancheria lands were procured for the use and occupancy of any or all needy and homeless Indians in North Central California and ***were not reservations***. The 67.5 acre parcel at Buena Vista [hereinafter simply B.V.] was never a reservation. Rancherias created no permanent rights for the Indian users and occupants who were allowed to live on such lands and use them by applying for and obtaining "an assignment". Such an assignment was terminable by either the Indian occupants and assignees or by the United States essentially at Will and the occupants knew this. [**EXHIBIT "B"** to the Declaration of Plaintiffs' Counsel herein.]

Plaintiffs made a comprehensive Motion for Partial Summary Judgment in this case based on the fact the issues raised in their complaint are undisputed and can be determined as a matter of law by a review of the documentary evidence and chain of title, already submitted to the court, and establishing that the B.V. land is **not** eligible "Indian Lands" as required by law.

Contrary to the tribe's misrepresentation at the hearing, of the Motion page 44 lines 2 to 4 of the Reporters Transcript of the hearing lodged with the court herein, the B.V. land was not acquired for the tribe. [See **EXHIBITS "A", "B", "C" & "D"**]

The 67.5 acres of land at B.V. was acquired in fee in 1927 by the federal government in it's name alone and ***was not*** acquired either in trust or for the benefit of any particular tribe, band or community of Indians, was never deemed a "reservation" and there was no Presidential decree setting the land aside as would be required to create an Indian reservation.[2]

In fact there was no acknowledged or recognized "tribe," "band" or "community" of Indians at B.V. in existence at all in 1927. By the tribe's own admission, the

[2] See also the tribe's Memorandum of Points and Authorities in support of their Motion to Dismiss page 7 lines 18-20 where the tribe represented that land at B.V. was acquired in 1927 for a fictitious non-existent tribe called the Buena Vista Rancheria. "Rancherias" were parcels of land not Indian tribal entities. [See Declaration of U.S. Attorney Wirtz, EXHIBIT "D" to the Declaration of Counsel filed herein.]

first incidence of any official recognition of any "tribe" by Defendants, albeit erroneous, was the appearance of a purported tribal entity on a federal services list in 1985 [Page 8 lines 21-24 of the Tribes' Memorandum of Points an Authorities in Support of their Motion to Dismiss] That putative tribe called itself the "Buena Vista Rancheria of Me-Wuk Indians."

As set out above the land at B.V. was purchased in fee title in the name of the United States for the use of **ANY** needy or homeless Indians. [See **EXHIBITS "A", "B" and "C"** to Declaration of Counsel herein.] The Defendants informed the occupants of the B.V. rancheria on July 19, 1935 that the B.V. land was not a reservation or trust land acquired for them. [**EXHIBIT "C"** to the Declaration of Counsel.]

The four members of the Oliver family living on that land after it was acquired by the United States were given an informal assignment on or about October 19, 1948, long after it was purchased in fee. [Declaration of Counsel, **EXHIBIT "C"**.]

The Oliver family sought to acquire a fee grant or patent from the United States, who owned the land at that time and, to reiterate, the United States reminded them that the land was a rancheria acquired for the use and occupation of ***any needy and homeless Indians, and was not acquired for them!*** [Declaration of Counsel, **EXHIBIT "C"**]

The Rancheria Act, Public Law 85-671 was enacted in 1958. [A copy of that Public Law is attached to the Declaration of Counsel as **EXHIBIT "E"**.] That Act was intended to dissolve and distribute these many small ***parcels of lands*** that had been acquired by the United States over the years as rancherias for needy and homeless Indians. The Rancheria Act ***was not intended to dissolve or dis-establish any Indian tribes, bands or communities*** which may have lawfully existed prior to 1958 and which had been lawfully and previously acknowledged and recognized by the United States.[3] This improper practice of referring to Indians, groups of Indians and families located on parcels of rancheria lands as if they had been a lawfully acknowledged "tribe" persisted within the Bureau of Indian Affairs (formerly the Indian Services Agency) and frequently Agency personnel would erroneously refer to Indians or groups of Indian occupants and assignees located on rancheria lands simply by reference to their location as if the name of that place was also the name of a recognized or acknowledged "tribe," "band" or "community" of Indians. Thus tiny "tribes," "bands" or "communities" of Indians were, in a sense, created and recognized out of thin air without ever

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[3] Much of the confusion arose over time because of references made to the physical location of groups of Indians assigned to or occupying parcels of rancheria lands, who began to be erroneously referred to as if the physical location of the rancheria land was the identity of a tribe or band of Indians by the same name. These mandatory criteria were later codified at 25 C.F.R. part 83. [See declaration of U.S. Attorney Wirtz, EXHIBIT "D" to the Declaration of Counsel herein.]

going through any of the mandatory processes to identify them as a unique historical tribe or band and without having verified the required criteria, that is, a long standing functioning tribal government which existed for years and without establishing the required government to government relationship with the United States, all of which were required by law as a condition of federal acknowledgement. [See U.S. attorney Wirtz's declaration **EXHIBIT "D"** to Declaration of Counsel herein, pages 6-14.]

The Rancheria Act only dissolved the B.V. **LAND** so that it was no longer a federally owned rancheria. The land was then conveyed in unrestricted fee simple to then current occupants Louie Oliver and Annie Oliver as joint tenants, and as husband and wife.[4] [See **EXHIBIT "F"** to Declaration of Counsel.]

On October 19, 1959 the United States confirmed to these two Olivers by letter that they owned the B.V. land in unrestricted fee status to do with it as they liked. [See **EXHIBIT "G"** to the Declaration of Counsel.]

Twenty years later after Louie Oliver and Annie Oliver had died and all the B.V. fee land had passed through Amador County Probate Court by intestate succession, and had been distributed to their son and daughter in equal shares,

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[4] In California that reference is considered an intention to hold title as community property also.

several resident occupants of three other rancherias the Pinoleville, Big Valley and Redwood Valley rancherias filed a lawsuit entitled Tillie-Hardwick v. United States. [USDC N.D. CA. 79-1710-SW] later certified as a class action.

The basis of that suit was that the United States had made promises to them to make repairs and improvements to their rancheria lands prior to distribution of that land and had breached those promises. Also that the United States had failed to provide educational services and training as promised and lastly that the Rancheria Act itself had provisions that automatically terminated their Indian status upon distribution of the rancheria land and that was unlawful. In the complaint they prayed that Plaintiff be given an option of deeding fee lands they had received back to the United States in trust for them.

As set out above the Rancheria Act did not terminate any Indian "tribes" unless the Indian **"Tribe"** existed prior to any land distribution ***and*** the "tribe" had received a distribution of rancheria assets and land.

Section 10 (b) of that Act provided that:

> "(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, ***the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians***, all

> statutes which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. …." [emphasis added here by bold italics]

No Indian tribe received any distribution of the land at B.V.; there was no tribe in existence at the time. The only distributees of that B.V. land were two individual Indians, Louie Oliver and Annie Oliver.

Therefore upon distribution of the Buena Vista fee land to Louie Oliver and Annie Oliver, only they and their children lost their status as Indians under the Act. In as much as there was no "tribe," "band" or "community" of Indians in existence at that time, there was none to be dissolved by asset distribution and therefore no "tribe" that could have been "restored" later on in 1983 by the stipulation entered in that Tillie-Hardwick case.

Plaintiffs Bea Crabtree and June Geary herein are the granddaughters of Johnnie Oliver one of the four adult residents and occupants of the Buena Vista Rancheria in 1934 who were certified as eligible to vote and did vote in favor of the Indian Reorganization Act [hereinafter the IRA]. [See Declaration of Counsel **EXHIBIT "H"**.] After that vote, however, the 4 adult Indians remained on the rancheria land but took no steps to petition for federal acknowledgement or to organize in any way as an Indian tribe, they submitted no

Constitution, no initial or base membership roll and they otherwise remained in what Defendants describe administratively as an "unorganized" tribe, band or community of Indians under the existing IRA law and the policies of the D.O.I., B.I.A.

DonnaMarie Potts was not ever, a descendent of any of the four adult Indian occupants and residents of the Buena Vista Rancheria who voted for the I.R.A. in 1934 and who became an unorganized band or community of Indians by virtue of that vote in favor of the IRA.

The 1983 stipulated settlement of the 1979 Tillie-Hardwick lawsuit, sections 2., 4., 7., only "restored" any group, band, tribe or community of Indians to whatever status and formal recognition or acknowledgement they had prior to the distribution of the rancheria lands and assets. [See Declaration of Counsel, **EXHIBIT "I"**.] In the case of Indian persons at Buena Vista any "restoration" of an entity could only have been to the status of an unnamed, unorganized group consisting of those 4 Indian persons and their descendents who voted for the I.R.A. in 1934 and thus became an unorganized band of Indians. Unless they had received a distribution of the land and assets of the rancheria under section 10(b) of the Act, their status as Indians or as an "unorganized band" of Indians was unchanged after the distribution of the rancheria land to the Olivers.

The status of Plaintiffs Bea Crabtree and June Geary as Indians, was also unaffected by the operation of section 10(b) of the Rancheria Act, because neither of them, their parents or grandparents received any distribution of B.V. rancheria assets or land and they remained Indians and a part of the, as yet, unorganized band of Indians who had voted for the IRA. [Wilson v. Sacramento Area Director, B.I.A., 30 IBIA 241 (04/01/1997)]

If a right to organize a tribe, band or community of Indians still existed over 20 years later following the Tillie-Hardwick stipulated judgment Plaintiffs Bea Crabtree and June Geary possessed that right.

Because Annie Oliver died in 1970, Louie Oliver became the sole owner of the Buena Vista fee land as surviving joint tenant. He died intestate in 1973. The B.V. land was then distributed to his son Enos Oliver and his daughter Lucille Lucero [nee Oliver] by order of the Amador County Superior Court. The D.O.I. or B.I.A. was not party to and did not participate in any of these probate proceedings.

Enos Oliver then died intestate in 1977 two years before the Tillie-Hardwick case was filed, and his one half interest in the B.V. fee lands came under the control and jurisdiction of the Amador County Superior Court Probate Division.

The 1983 Tillie-Hardwick stipulated judgment sections 6., 8. and 9. [**EXHIBIT "I"** to the Declaration of Counsel herein] provided that any individual Indians who received a fee distribution of rancheria lands had the option to retain that land in unrestricted fee or, within a two year period, could elect to deed that land back to the United States in trust. That right was communicated to those Indians who received deeds to rancheria lands. [See Declaration of Counsel **EXHIBIT "J"**.]

As of the date of the Stipulation in the Tillie-Hardwick case, July 1983,[5] the only surviving descendent of the rancheria distributees, Louie and Annie Oliver, was Lucille Lucero, who owned only a one-half interest in the fee land at B.V. The other half was under the control and jurisdiction of the Amador County Probate Court in the Estate of Enos Oliver.

Lucille Lucero did not elect to convey her ½ interest in the B.V. lands back to the United States nor did the Estate of Enos Oliver or his Administrator and personal representative, elect to convey the one-half (1/2) interest in the B.V. lands held in probate, back to the United States in trust.

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[5] Judgment was officially entered in December 1983.

Because the possibility existed after 1983, that some of the occupant assignees of rancherias who received rancheria fee lands, might convey them back to the United States in trust, as permitted by the 1983 Tillie-Hardwick stipulation, instead of keeping them in unrestricted fee, the court retained jurisdiction in the case to determine the boundaries or any need to align future boundaries of lands that were restored to trust viz a viz lands that were retained in fee by the distributees. [**EXHIBIT "I"** section 5]

Not only did Lucille Lucero not deed her one half (1/2) interest in the B.V. fee lands to the United States in trust, she deeded her one-half (1/2) interest in that land to DonnaMarie Potts on July 14, 1986 for valuable consideration. [See **EXHIBIT "K"** to the Declaration of Counsel herein.]

In 1987 Amador County, who was still a party Defendant in the Tillie-Hardwick case, entered into a second stipulation with the lead class Plaintiffs in Tillie-Hardwick and their attorneys. That stipulation was to resolve issues of property tax liability due the County and also regulatory jurisdiction over the former B.V. rancheria land now owned in fee.

At the time of that second 1987 stipulation Lucille Lucero, the only surviving descendent of Louis Oliver and Annie Oliver, no longer owned any interest whatsoever in the

Buena Vista fee lands and the two (2) year election period to deed the land back to the United States in trust had expired.[6] The new owner of that ½ fee interest, DonnaMarie Potts did not join in the 1987 stipulation nor did she ever substitute into the Tillie-Hardwick case as a party and she had no right to do so. The other one-half (1/2) of the B.V. fee lands remained under the jurisdiction and control of the Amador County Probate Court in the pending Estate of Enos Oliver for 9 more years until 1996 awaiting a final order of distribution. Neither the Probate Court or the Administrator and personal representative of the Estate of Enos Oliver ever joined in that 1987 stipulation between the lead class Plaintiffs and Amador County nor did either the Estate of Enos Oliver or the Administrator or personal representative seek to substitute into the Tillie-Hardwick case as a party if they could have done so.

On or about May 1996, the final order of distribution of the Estate of Enos Oliver was entered and the remaining one-half (1/2) parcel of B.V. fee land was distributed to DonnaMarie Potts in two parts (i.e., 1/4ths) one as the devisee of the 1976 Will of Lucille Lucero whose one-fourth (1/4) interest passed to Potts through the pending estate of Lucille Lucero according to provisions in Lucille Lucero's

[6] At best she had some future expectancy to an additional fractional interest in part of the B.V. land held in Amador County probate court awaiting final distribution of her brother Enos' estate.

1976 Will. The other one-fourth (1/4) interest in the B.V. land was subject to court disposition in a third probate case, the Estate of Lydia Oliver. It was purchased from John Fielder by DonnaMarie Potts, through that probate proceeding. Lydia Oliver was the deceased wife of Enos Oliver, and John Fielder was his stepson. Lydia Oliver died testate leaving her ¼ interest in the B.V. land to her son John Oliver. Those 1/4 interests of John Fielder and Lucille Lucero (deceased) along with the other one-half (1/2) interest DonnaMarie Potts had already obtained by Deed in 1986 made her the sole owner of the entire 67.5 acre parcel of Buena Vista lands in fee, as of May 1996. See **EXHIBIT "P"** to the Declaration of Counsel.

Shortly after acquiring the unified fee title to the B.V. land DonnaMarie Potts conveyed that land to a putative Indian tribe. A tribe she had been trying to organize and to obtain formal federal acknowledgement and recognition for over a period of several years. A tribe, which consisted in 1996, of herself and her two children. She called this tribe "The Buena Vista Rancheria of Me-Wuk Indians." [See **EXHIBIT "L"** to the Declaration of Counsel.] DonnaMarie Potts then deeded her B.V. fee land to this putative tribe and immediately tried to deed the land to the Secretary of Interior in trust. [**EXHIBIT "M"** to the Declaration of

Counsel.] That attempt was rejected. [See Declaration of Counsel herein, **EXHIBIT "N"**.]

A dispute between DonnaMarie Potts and Rhonda Morningstar Pope then arose in 2000 during which it was later established, that DonnaMarie Potts was not a descendant of Louis Oliver and Annie Oliver, the distributees of the B.V. land, nor was she a descendant of any of the original occupants and assignees of the B.V. lands, [i.e., the 4 adults who had voted for the IRA in 1934 thus becoming an unorganized band]. Because DonnaMarie Potts was not a party to the Tillie-Hardwick case she was not entitled to any of the benefits that might inure to any of the stipulating parties or their descendants as provided for in section 2 of the 1983 Tillie-Hardwick stipulated judgment [**EXHIBIT "I"** to Declaration of Counsel herein] nor was she even entitled to any tax benefit that might result from the second 1987 stipulation between Amador County and the lead class Plaintiffs.[7]

During the pendancy of that dispute between Pope and Potts, which lasted for over 4 years, the Defendant U.S. Department of Interior determined inter alia, on or about 27 December 2001, the following:

[7] Neither the United States nor any of the federal agencies participated in the second 1987 Tillie-Hardwick stipulation.

> "In conclusion, I find that Mrs. Pope, but none of the persons comprising the present leadership recognized by the B.I.A., has the right to participate in the organization of an initial tribal government for the tribe. Further I conclude that neither of Mrs. Pope's requests for a Secretarial election conform to the statutory or regulatory requirements for such requests, and are denied."
>
> *[Note: The present leadership referred to in this Risling letter is DonnaMarie Potts and her two children Frank Vega and Renee Selvey.]*

[See **EXHIBIT "O"** to the Declaration of Counsel herein.] Rhonda Morningstar Pope had also falsely claimed she was the sole surviving descendent of the original occupants of the B.V. rancheria lands. The Defendants and their agencies made no effort to locate any of the true descendents of original rancheria occupants which included Plaintiffs Bea Crabtree and June Geary. In December 2001 Mr. Risling issued a determination that provided the following on page 8, third paragraph [Declaration of Counsel herein, **EXHIBIT "O"**]:

> "Ms. Pope claims that the agency failed to fulfill this responsibility to identify and notify all persons eligible to participate in the organization of an initial tribal government for the tribe. In light of Ms. Pope's claim, we would be remiss in accepting Ms. Pope's assertion that she is the last surviving lineal descendent. At this time, the Agency has not completed research

of its records to determine there were other potential eligible persons. Further, the Agency has not yet worked with Ms. Pope to identify other potential eligible persons. Thus, until the Agency, in cooperation with Ms. Pope, can complete further research and publish a notice regarding the pending organization of the Tribe, I deny her November 4, 2010 request because the number of adults is not yet known."

Neither the federal Defendants nor Ms. Pope made any effort to locate and notify Plaintiffs Bea Crabtree and June Geary who are eligible members of the unorganized tribe of Indians and who are entitled to participate in any lawful tribal organizations and establish a tribal government. Notwithstanding the serious deficiencies in establishing a lawful tribal government, Defendants proceeded to approve the location of a site specific class III gaming facility on the fee lands at B.V. in December 2004, and approved an amended tribal-state compact in 2007 for this unlawfully organized "Buena Vista Rancheria of Me-Wuk Indians."

III. DISCUSSION

A. GENERAL PRINCIPLES OF ANALYSIS

Faced with determining whether an absent person or entity is either a necessary party or is indispensable to the complete resolution of a case under rule 19 FRCP, a court must make a systematic analysis, weigh potential risks and balance important rights of the present parties to the

lawsuit and those claiming they must be joined on pain of dismissal of a present party's case. This is particularly true when those same absent persons refuse to intervene, claim they cannot be joined because they are immune from suit making their joinder infeasible and then, that absent non-party seeks dismissal of the entire action of a Plaintiff such as F.O.A.C. herein even though it is brought against someone else like the federal Defendants in this case and brought under the provisions of the Administrative Procedures Act 5 USC 701 and 702.

Such an analysis must take into account three classes of interest. (1) the interest of the present parties; (2) the interests of potential but absent parties, plaintiff or defendant; and (2) society's interest in the orderly expeditious administration of justice.

The advisory committee to the 1966 amendment to rule 19 found that, when determining whether to dismiss a case for nonjoinder, a court must base its decision "on factors varying with different cases, some such factors being substantive, some procedural, some compelling by themselves and some subject to balancing against opposing interests." [See Provident Tradesmens Band & Trust v. Patterson (1968) 390 U.S. 102, 119. The facts and circumstances of each case must be thoroughly examined and considered. Bakia v. County of Los Angeles 687 F.2d 299, 301 supra. As a result of

these principles requiring a thorough factual analysis, Plaintiffs had previously submitted and have once again submitted herein extensive and undisputed factual materials to demonstrate that the tribe, claiming they are either necessary or indispensable to the case, has **no** legally protected right to conduct gaming at B.V. in violation of federal law. The approval of any gaming ordinance and tribal-state compact and the federal determination of the legality of Indian gaming activities are matters within the excusive jurisdiction and control of Defendants (not the tribe) and are subject to review under the A.P.A. 5 U.S.C. 701 and 702 et.seq.

Most courts apply a three step process in such an analysis, first to determine if the absent person is "necessary" to determine the issues being litigated and if not, the motion to dismiss under rule 19 should be denied. If an absent person is determined to be a necessary party then the next step is to determine if their joinder is feasible. [See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. 276 F.3d 1150, 1155 [9th Circ. 2002].

Lastly if joinder is not feasible for any reason then the court must determine if the absent person is an indispensable party, that is, there is no way the case can be resolved without their participation and they cannot be

joined in the action because joinder is infeasible and thus dismissal is required. Any tribal party refusing to voluntarily join an action and whose compulsory joinder is unfeasible has the burden of demonstrating that they are in fact an ***indispensable party*** and also that their joinder is so necessary and indispensable that the case cannot be resolved between the existing parties without the tribe's presence and participation.

In making the first determination as to whether an absent person is even necessary to resolve the pending lawsuit the court must initially determine whether (1) in that person's absence complete relief cannot be accorded between and among the current parties in the lawsuit. (2) The absent person claims an interest relating to the subject to the action and disposition of the action in the person's absence may impair or impede the person's ability to protect that interest, or (3) the person claims an interest relating to the subject of the action and disposition of the action in the person's absence may leave the current and present parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

As set out above it is important to note that all these necessary determinations are heavily influenced by the facts

1 and circumstances of each particular case. [See Bakia v.
2 County of Los Angeles 687 F.2d 299, 301 supra.]
3 Applying this analysis to the facts and law of the
4 present case reveals that the tribe is neither a necessary
5 or indispensable party that is needed to determine ***the legal***
6 ***issues being litigated in the pending lawsuit***.
7 In Makah Indian Tribe v. Verity 910 F.2d 555, [9th Circ.
8 1990] the court distinguished a public rights exception
9 discussing at length the balancing that must occur when
10 Administrative regulations enacted in the public interest
11 might have an indirect impact on an absent Indian tribe such
12 as the tribe in this case. In the present case the tribe
13 cannot evade the federal requirements that either class II
14 or class III gaming may only be conducted on verified
15 eligible "Indian Lands" through the tactic of claiming they
16 are necessary and indispensable and cannot be joined thus
17 the case must be dismissed. See also Manygoats v. Klepp 558
18 F.2d 556, 558-559, where it was held that dismissal was not
19 imperative because of the non-joinder of a necessary party
20 event in a contract based case. This public interest
21 doctrine had its origin in National Licorice Co. v. Labor
22 Board 309 U.S. 350 [1940] in which federal regulations will
23 not and cannot be defeated by claims that there is a
24 necessary or indispensable party who is not or cannot be
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joined (unfeasible joinder). See also National Wildlife Federation v. Burford 835 F.2d 305, 333 [D.C. Circ. 1987].

B. INDIAN TRIBES HAVE NO INHERENT RIGHT TO BUILD AND OPERATE GAMBLING CASINOS ON THEIR LANDS.

Ever since Worcester v. Georgia 31 U.S. (6 Pet.) 515 the sovereignty of Indian tribes has been limited and subject to federal law, as the United States is the Superior Sovereign. See also Cherokee Nation v. Georgia 30 U.S. [5 Pet.] 1, 17 (1831). It is well settled that to satisfy the requirement that an absent potential party is necessary it must be shown they have a legally protected interest. See for example N.D.; A.V.; C.J.; M.D.; B.A.; G.S.; T.F.; J.K.; disabled minors, through their parents as guardians pro tem v. State of Hawaii Dept. of Education 600 F.3d 1104 (9th Circ. 2010).

See also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (9th Circ. 2002) 276 F.3d 1150, 1155.

As set out in the declaration of counsel and the Requests for Judicial Notice submitted previously herein both in opposition to the State of California's earlier Motion to Dismiss and also Plaintiffs' pending Motion for Partial Summary Judgment on file herein, the 67.5 acres of fee land at Buena Vista is not and never was an Indian

reservation.[8] Similarly it is undisputed that the fee land at Buena Vista is not now in trust, never was in trust and is land ultimately deeded to DonnaMarie Potts in fee simple. She turned around in 1996 and deeded that land, also in fee simple, to the "tribe" consisting of her and her two children as the so-called "Buena Vista Rancheria of Me-Wuk Indians". [**EXHIBIT "L"** to the Declaration of Counsel herein] Her attempts to immediately deed that fee land to the United States in trust were rejected. (See Declaration of Counsel herein, **EXHIBITS "M"** and **"N"**.) An examination of these undisputed documents and chain of title records reflect that the B.V. land was not ever a reservation, was not ever "restored" to a reservation status by the Tillie-Hardwick judgment and was not deeded back to the U.S. in trust. To the contrary, it was always fee simple land owned first by the United States since 1927 and then deeded in unrestricted fee to Louie Oliver and Annie Oliver in 1959 and finally to DonnaMarie Potts and her putative "tribe." As a result it is not now and never has been eligible "Indian Lands" on which either class II or class III gaming is lawful. Any claim by the tribe to the contrary is frivolous. As set out earlier the Olivers and their descendents were given the election by the provisions of the 1983 Tillie-Hardwick stipulated

[8] Opinion of U.S. Solicitor EXHIBIT "B" to Declaration of Counsel herein. Letter from Department of Interior EXHIBIT "C" to the Declaration of Counsel herein.

judgment, to deed the land back to the United States in trust which could have created eligible lands for gaming but neither they or their descendents ever did so.

As set out earlier in the Historical recitation, not only did Lucille Lucero not deed her one-half fee back to the United States in trust, she deeded her ½ interest in the fee to DonnaMarie Potts for valuable consideration in July 1986. [Declaration of Counsel **EXHIBIT "K"**]

As set out earlier and as evidenced by the documents and Exhibits on file herein, the second 1987 stipulation between Amador County and the lead class Plaintiffs in Tillie-Hardwick and their attorneys could not change the fee status of the B.V. land to "Indian Country." First of all because the owners of the land, DonnaMarie Potts and the Estate of Enos Oliver did not consent or participate in that 1987 stipulation in any way. Secondly the United States did not participate in the 1987 stipulation and Amador County and the other class Plaintiffs had no power or authority on their own to change any fee land into any form of Indian Country. See the holding in City of Sherrill New York, v. Oneida Indian Tribe of New York 544 U.S. 197 [2005].

Indian gaming is strictly a creature of statute created entirely by federal law. The Indian Gaming and Regulatory Act [IGRA 25 U.S.C. 2701 et.seq.] provides that no tribe can operate either class III or class II gaming without the

approval of the federal government and the proper governmental agencies. 25 U.S.C. 2710(b). Such class II or class III gaming must be conducted only on Indian lands as defined by 25 U.S.C. 2703 or any exception for lands acquired by a tribe after 1988 as set out in 25 U.S.C. 2719.

Federal or National Indian policy considerations discussed in the court's decision page 9 lines 6 to page 10 line 3 and with citation to the case of Citizen Potawatomi Nation v. Norton 248 F.3d 993, 1000 [later modified] 257 F.3d 1158 [10th Circ. 2001] create no conflict in this case as alluded to. The applicable federal Indian policy here is synonymous with the I.G.R.A. requiring all Indian gaming to be lawful, including that it be only offered on eligible "Indian Lands."

The history of Indian gaming, particularly in California, is instructive.

In 1987 the United States Supreme Court decided the case of Cabazon Indian Tribe v. California (Gov. Wilson) 480 U.S. 202, [1987].

In relevant part that case provided that Indian tribes could own and operate gaming activities on their lands but only those games of the same type already allowed, offered and conducted by other non-Indians within the borders of the state in which their trust or reservation lands were situated. The court defined these gambling games as

1 "permissible games". An Indian tribe could not, however,
2 own, operate and offer gambling games that were not allowed
3 to other non-Indians within the state, which gambling games
4 were described by the court as "prohibited" to all others by
5 strong public policy and the criminal and civil enforcement
6 laws against such gambling activity within that state.

7 With respect to permitted games, the court concluded
8 that because Indian tribal governments exercised
9 governmental powers over their own lands then they, not the
10 state, could establish the rules, regulations, hours of
11 operation and the limits to be applied to those permissive
12 games which the Cabazon tribe could lawfully conduct on
13 their land.

14 This decision prompted Congress to enact the Indian
15 Gaming and Regulatory Act [IGRA] 25 USC 2701 supra in
16 October 1988. These holdings in Cabazon were incorporated
17 into that federal statute at 25 USC 2710 d (3).

18 As set out above neither class II or class III gaming
19 by any Indian tribe is allowed on lands that are not the
20 eligible "Indian Lands" defined by 25 U.S.C. 2703. See also
21 25 U.S.C. 2710(b)(1) (class II) and 25 U.S.C. 2710(d)(3)
22 (class III). [See also 73 Fed.Reg. 6022.] Indian lands are
23 described and defined in 25 USC 2703 or one of the specific
24 exceptions in 25 USC 2719 for lands acquired after October
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1988.[9] See also Hotel Employees and Restaurant Workers Union Intl. v. Gray Davis [1999] 21 Cal.4th 585.

Only the United States, through its Department of Interior and the National Indian Gaming Commission can authorize class II or class III gaming on Indian lands and no tribe has the power and authority to engage in such class III gaming without the approval of the United States and the Secretary of Interior and National Indian Gaming Commission [NIGC].

As discussed infra in Section D., if the federal defendants in this case felt the absent tribe was either necessary or indispensable to determining the eligibility of the B.V. land they could simply have interpled them into the case.

The tribe has no immunity defense available to actions brought by the United States. See United States v. Red Lake Band of Chippewa Indians 827 F.2d 380, 382 (8th Circ. 1987) and also United States v. White Mountain Apache Tribe 784 F.2d 917, 920 (9th Circ. 1986).

By Memorandum of Understanding between these the Department of Interior and the National Indian Gaming Commission the Department of Interior is assigned responsibility to determine the eligibility of the land

[9] The 67.5 acres of fee land at B.V. were acquired by the putative Buena Vista Rancheria of Me-Wuk Indians in May 1996, 8 years after 1988, by a deed from DonnaMarie Potts and thus at the very least were subject to the prohibition for gaming on lands acquired by any Indian tribe after October 1988.

either as a reservation or trust parcel and the NIGC determines other factors such as the existence of the exercise of required tribal government power, authority and control over any such trust lands and facilities and the many rules for personnel and facility licensing, etc. [See EXHIBIT "P" to the Declaration of Counsel.] As set out above Indian tribes have no unilateral power and authority to simply declare their lands to be reservations, trust lands or sovereign lands or declare them to be eligible for gaming without complying with federal law, [City of Sherrill New York v. Oneida Indian Tribe of New York 544 U.S. 197 supra.] Moreover class II and class III gaming that is approved by Defendants is heavily regulated by them and any approvals given a tribe can be unilaterally withdrawn by the federal government, even after initially authorizing them.

As set out above the Moving party seeking dismissal has the burden of proof to establish that they have a legally protected **RIGHT** to have class III gaming on the 67.5 acres of fee land at B.V. If they have no such legal right they are not necessary parties and are not indispensable parties either. The tribe did not meet their burden in the Motion to Dismiss that they have a legally protected, non-frivolous "right" or if they had any rights, that the federal defendants could not or would not adequately protect it.

1 The tribe had the burden of demonstrating that the
2 federal Defendants charged with licensing and regulating all
3 class II and class III Indian gaming, cannot do so in their
4 case and would fail to do so if the tribe were not a party
5 to this case. The tribe has also failed to demonstrate they
6 could do anything differently than the federal Defendants
7 would do, in order to better protect any right they claim to
8 have to conduct class III or class II gaming at B.V. If
9 such approval of gaming were withdrawn or a Declaratory
10 judgment entered in this case that the approvals previously
11 given were contrary to law, subsequent litigation would be
12 unlikely. However even if the tribe brought a subsequent
13 action that does not make the absent tribe a necessary or
14 indispensable party in this case. [See Angst v. Royal
15 Maccabees Life Ins. Co. 77 F.3d 701, 705 (3d Circ. 1996)].
16 As the court pointed out during the hearing [Transcript
17 page 23 lines 2 to 14] whether or not there is a subsequent
18 action is irrelevant to the questions raised in Plaintiffs
19 A.P.A. action. See for example the discussion in Manygoats
20 v. Klepp 558 F.2d 558-559. In this case there can be no
21 inconsistent obligations rendered as the court found in Pit
22 River Home & Agricultural Cooperative Assn. v. United States
23 30 F.3d 1088, 1099 and also Dawavendewa v. Salt River
24 Project Agricultural Improvement & Power Dist. 276 F.3d
25 1150, 1158 because of the contracts involved there.
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The interest of the absent tribe and the federal defendants, that is to insure class II or class III gaming on the B.V. land is lawful, are identical an co-extensive interests. [See Sac & Fox Nation v. Norton 240 F.3d 1250, 1259 [10th Circ. 2001] and also Kansas v. United States 249 F.3d 1213, 1227 [10th Circ. 2001].

To use a popular colloquialism, the land "is what it is" irrespective of anything the tribe may do or say short of properly bringing the land into trust as discussed in section D. infra. Further, the tribe must demonstrate that the United States and the affected agencies and their legal counsel, who are the exclusive arbiter of gaming eligibility, cannot effectively represent the tribe's interests in reviewing and determining or re-examining the land status. The tribe has not demonstrated that the Defendant federal agencies before the court in this case could not or would not defend the agency's prior decisions to approve a site specific gaming ordinance and a tribal-state compact for the B.V. site. Once again the interest of the tribe and the federal government in this case are one and the same.

The United States, and its agencies, The Department of Interior, Bureau of Indian Affairs and NIGC are perfectly capable of representing the absent tribe's right or lack thereof to conduct class III gaming on the site specific

1 B.V. fee lands as that land now stands which they must do.
2 See North County Alliance v. Salazar 593 F.3d 738 [9th Circ.
3 2009]. In as much as it is Defendant's decision being
4 challenged in this case by Plaintiffs as being contrary to
5 law under the APA, it is in the federal government's
6 interest and the tribe's interest together, to defend and
7 justify those approvals on behalf of the tribe and the tribe
8 is neither necessary or indispensable to that legal
9 determination.
10 Similarly the United States also has the exclusive
11 power and right to officially acknowledge who is or is not a
12 lawfully organized and recognized Indian tribe under 25
13 C.F.R. part 83. It was their decision in the first place in
14 this case to do so, albeit incorrectly, which they later
15 admitted was erroneous. [See 25 C.F.R. part 83.] [See
16 Declaration of Counsel herein **EXHIBIT "O"**] The tribe must
17 apply to Defendants for such acknowledgement and
18 recognition. It is that same federal approval and
19 acknowledgement as a tribe that is also necessary to
20 lawfully conduct any class II or class III gaming in
21 California and which are limited to "Indian Lands." [See
22 **EXHIBIT "Q"** to the Declaration of Counsel herein.] [See also
23 California Constitution Art. 4 sec. 19.]
24 As a matter of fact operating any class II or class III
25 gaming ***on non-Indian lands*** subjects the tribe to fines and
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closure under 25 C.F.R. 473.6 (a)(13) and to criminal prosecution under California state law 330.1 to 330.5 of the California Penal Code, and under federal law and title 18 U.S.C. and 15 U.S.C. 1084, 1953-1955, 1172, 1175, 1176, 1177 (the Johnson Act).

The tribe, in it's special appearance here, has demonstrated absolutely no reason why the United States cannot protect any interest or claim of right to conduct class III gaming on the B.V. land the tribe says it has. That is a determination that must be made exclusively by the United States in all cases. Nor has it demonstrated any ostensible "conflict of interest." In fact as set out above the United States and the other federal defendants are duty bound under both regulatory powers and their Indian trust relationship to insure an Indian tribe does not conduct gaming illegally.

Obviously the government's ability to protect any lawful interest of the tribe is dependent on what that interest or issue is. If it turned out that the land at B.V. was not eligible "Indian Lands" as required by law the Defendant government agencies had no duty under general Indian trust responsibility or by statute to defend the proposed illegal activity. So as part of a factual analysis raised by the allegations in Plaintiffs' complaint, and deemed to be true, the United States and its agencies would

re-examine the approvals already made and if they were correct they would no doubt vigorously defend them on behalf of the tribe and the affected agencies rendering approvals.

Counsel for the United States pointed out in colloquy with the court at the hearing that it would indeed represent the tribe's interest depending upon what the issue was. [See hearing transcript page 38, line 22 to page 41 line 15. See also this court's Memorandum and Order re: Motion to dismiss page 9 lines 3-18 where the court perceives a non-existent conflict in policies, where as here, the balancing referred to by counsel for the United States is balancing their general trust duty to advocate on behalf of Indian tribes in general with being in a position for advocating in support of approvals for gaming on B.V. land which is clearly illegal and contrary to law. In the earlier hearing on the State's Dismissal motion when asked whether she can represent the tribe's interest she rightly explained it depends on what claims are being asserted. [Hearing transcript page 16 lines 12-24]

Similarly if it turned out that the B.V. land was not eligible Indian Lands as alleged in Plaintiffs' complaint and the proposed class III casino was erroneously approved by Defendants then, presumably the Defendant government regulators would inform the tribe and advise them to make the land eligible for gaming by the simple expedient of

1 applying to bring the B.V. land into trust pursuant to 25
2 USC 465, (the IRA)[10] and the proposed casino would then
3 become lawful. Instead, the tribe purported to simply make
4 a deed to the Secretary of Interior in 1996 "in trust" which
5 deed was rejected. [See Declaration of Counsel, **EXHIBIT**
6 **"N"**.] There is a clear articulated method of bringing
7 Indian owned land into trust. 25 CFR 151.110-151.111. City
8 of Sherrill New York v. Oneida Indian Tribe of New York, 544
9 U.S. 197 supra.
10
11 **C. THE EXISTING GROUND FOR RELIEF UNDER RULES 59 AND**
12 **60 FRCP.**
13 One of the equitable grounds for a new trial under rule
14 59 (a) 1 (B) and 59 a (2) is mistake of fact and law and the
15 Court therefore has the power and authority to open any
16 judgment entered, take additional testimony, amend findings
17 of fact and conclusions of law or make new ones and direct
18 the entry of a new judgment.
19
20 Rule 60(b) provides for relief from a judgment or
order to a party if there was (1) mistake of fact
21 or law, (2) newly discovered evidence that with
reasonable diligence could not have been
22 discovered in time to move for a new trial, (3)
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24 [10] This could have been done long ago, for example when DonnaMarie Potts attempted to simply
deed the land to the United States Secretary of Interior instead of following the well-established fee to trust
25 processes under 25 USC 465 process in 25 C.F.R. part 151.110, 151.111, 1996. [See Declaration of Counsel,
EXHIBIT "N".]
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fraud, misrepresentation or misconduct by the opposing party … [and] (6) any other reason that justifies relief.

Besides failing to include and furnish Plaintiff with their **EXHIBITS 2** and **3** to their Memorandum, the tribe and its counsel, in support of its Motion to appear specially and dismiss Plaintiffs' case without intervening, made the following misrepresentations of important facts and law significantly relating to their claim that they have a legally protected right entitling them to a dismissal of Plaintiffs' complaint for failure to join a necessary and indispensable party that cannot be joined because of tribal immunity.

1. That the 67.5 acre parcel commonly called the Buena Vista Rancheria was acquired expressly for their [non-existent tribe, band or community of Indians, in 1927]. Page 7 lines 19-21 of their Memorandum of Support of Motion to Dismiss. Reporters transcript of the 9/26/2011 hearing page 44, line 2 to line 3. This representation was false.

[See Declaration of Counsel **EXHIBITS "A", "B", "C"** establishing the land was purchased in fee as a Rancheria for the use and occupancy of any needy or homeless Indians, not for this putative tribe which did not exist. [See also Declaration of Counsel **EXHIBIT "O"**] establishing that there

was no tribe, band or community of Indians by either the name "Buena Vista Rancheria" or "Buena Vista Rancheria of Me-Wuk Indians" until DonnaMarie Potts attempted to organize and have such a tribe acknowledged and recognized after 1985, long after the Rancheria land was acquired in 1927 and long after it was deeded in unrestricted fee to Louie and Annie Oliver individually in 1959.

2. That the 1983 stipulation and judgment in the Tillie-Hardwick case "restored" Indian tribes or created tribes that did not exist. In their moving papers page 8 lines 1-3 the tribe misrepresents the facts. The United States did not terminate Indian tribes by the Rancheria Act. Rancherias were parcels of land not Indian tribes lawfully recognized and acknowledged. There was no tribe to restore as claimed on page 8 lines 16-23 of the hearing transcripts at Buena Vista. [See Declaration of Counsel herein **EXHIBIT "D"** and **"I"** stipulated judgment sections 2., 3., 6., 7., 8. and 9.]

Moreover by its terms the 1983 Tillie-Hardwick stipulated judgment did not and could not "restore" any tribe or band of Indians that did not already exist before the lands of the rancheria were distributed.[11] Nor did any such "tribe" exist in July 1983 at the time of the

[11] Sections 4 and 7 of that stipulated judgment EXHIBIT "I" to the Declaration of Counsel.

stipulated judgment. The interpretation of that stipulated judgment is a matter of pure law and is capable of being resolved by summary adjudication.

3. Counsel for the tribe represented to the court, [Transcript of the hearing page 41 line 18 to page 42 line 4] that there was no licensing issue raised in Plaintiffs' complaint for violations of the A.P.A.

See Declaration of Counsel **EXHIBIT "R"** establishing example of the extensive regulatory and licensing laws and rules that apply and the required mandatory approvals needed from the federal defendants. See also Colorado River Indians v. Phillip Hogen, The N.I.G.C., et.al., 466 F.3d 134 [D.C. Circ. 2006] discussing federal regulation of Indian gaming by the NIGC where it was held that the N.I.G.C. has primary regulatory and supervisory authority including licensing over class II gaming and that the regulation of class III gaming was to be regulated and supervised by the federal Defendants in accordance with terms and conditions set out in the tribal-state compact required by 25 USC 2710(d) and required to be approved by the Secretary.

4. That Plaintiffs Bea Crabtree and June Geary were claiming to be **THE** tribe. Hearing transcript page 14 lines 22-24. The complaint clearly articulates the allegations of these Plaintiffs not that they are a tribe or **THE** tribe but rather the Defendant federal agencies unlawfully organized a

tribe without them and without even notifying them between 1985 and the present. A fact admitted by Defendants themselves. [See Declaration of Counsel **EXHIBIT "O"**]

5. The tribe further misrepresented that the IGRA does not require any "Indian Lands" determination. Page 10 of the tribe's Memorandum of Points and Authorities in Support of their Dismissal Motion. See **EXHIBIT "S"** to the Declaration of Counsel herein. See also North County Alliance v. Salazar 573 F.3d 738 [9th Circ. 2009] and the opinion of the Agency itself. [See also Citizens Against Casino Gambling In Erie County v. Kempthorne 471 F.Supp.2d 295 [W.D.N.Y. 2007] fit this order.

6. On page 10 of the tribe's Memorandum of Points and Authorities lines 13-14 the tribe misrepresented that it was ***"re-listed"*** on the list of eligible tribes entitled to federal benefits and services. Prior to the 1985 erroneous listing no tribe by that name or anything like that name ever appeared on a list for eligible services since 1979 when the list act created such an annual practice of publishing a list under 25 CFR part 83.

Also any tribal-state compact that is approved by the Secretary must be lawfully in effect under the state laws of the state with whom the tribe enters into a compact. See Pueblo of Santa Ana v. Kelly 104 F.3d 1546 [10th Circ. 1997] and Jacarillo Apache Tribe v. Kelly 129 F.3d 535 [10th Circ.

1997], California Constitution Art. 4 section 19(f) requires any Indian gaming activity to be one, by a federally acknowledged or recognized Indian tribe, and two, only conducted on "Indian Lands" in California **according to federal law**. See also the actual approvals by Defendants stating they are only good for Indian Lands as defined in the I.G.R.A. [**EXHIBIT "Q"** to the Declaration of Counsel.]

At the hearing on the tribe's Motion their counsel stated [page 24 lines 23-25] that "Plaintiffs are asking the court to invalidate our compact." That is incorrect and a mistake. Plaintiffs are asking the court to determine if the opinion letter of defendant Penny Coleman and the N.I.G.C. is arbitrary, capricious and contrary to law.

Similarly Plaintiffs are not asking the court to adjudicate the tribe is not a tribe. That representation of the tribe's counsel is also incorrect and mistaken. Plaintiffs Crabtree and Geary are asking the court to require a proper organization of the tribal government including them, an organization Defendants officially admitted was improper. [See Declaration of Counsel **EXHIBIT "O"**]

D. SOME OTHER PROCEDURAL MECHANISMS THAT WERE AVAILABLE TO AVOID THE OUTRIGHT DISMISSAL OF PLAINTIFFS'

MERITORIOUS ACTION AGAINST THE GOVERNMENT AGENCIES BROUGHT UNDER THE APA 5 USC 701 AND 702

Dismissal of a case is always the harshest result possible. There were numerous other procedural mechanisms that the court could have employed without dismissing Plaintiffs' complaint, for example:

1. The government Defendants in this case could have been ordered to simply interplead the absent tribe and thus avoid any exposure to any inconsistency claimed. Moreover if the case were allowed to proceed, say to hear the partial summary judgment Motion of Plaintiffs regarding the gaming illegibility of B.V. lands then the United States would have incentive to interplead the absent tribe planning on building and operating a casino there.

2. The tribal organization issues could have been ordered bifurcated and the issue of the eligibility of the land allowed to be resolved by Plaintiffs' pending Motion for partial summary judgment reserving tribal organization issues to a later hearing.

3. The court could have ordered the cause of action brought by Bea Crabtree and June Geary to be returned to the Defendant agencies for further Exhaustion of Administrative remedies, that is, to take the steps to lawfully organize a tribe that they said they would do to properly and lawfully

include Plaintiffs. [See **EXIBIT "O"** to the Declaration of Plaintiffs' Counsel]

4. Deny the Motion to Dismiss brought by special appearance as the court indicated and, as a preferred alternative, if the tribe refused to intervene deny the dismissal Motion. Transcript of hearing page 3 time line 12 to page 11 line 7 and also page 20 lines 16-20.

5. The court could retain jurisdiction over the merits of Plaintiffs' APA action after making an initial determination, for example in this case as to the eligibility of B.V. land for any gaming then allow the tribe to join the action later to insure there are no inconsistent obligations arising in any subsequent and separate FRCP action involving the absent tribe.

6. By allowing intervention under rule 24 at a later date for example after the court had litigated Plaintiffs' Motion for Partial Summary Judgment concerning the gaming eligibility of the B.V. lands. The test to be applied at a later date should an absent tribe seek intervention under FRCP rule 24(a) is virtually the same as the analysis of what constitutes necessary and indispensable parties under FRCP Rule 19. Such a procedure would better suit the dual purposes of Rule 19, that is full resolution of all the parties interests, without dismissing a meritorious action because an immune Indian tribe claims an interest, refuses

to intervene at the outset and cannot be compelled to join because of tribal immunity.

Besides this rather simple illustration the court could have employed a number of procedural mechanisms to avoid dismissing Plaintiffs' meritorious complaint based on the tribe's claim it was not only a necessary party but that it was or is an indispensable and absent party who refuses to intervene or join the action and then tries to defeat Plaintiffs' meritorious case through the use of Rule 19 FRCP based on common law tribal immunity.[12]

IV. CONCLUSION

The court's Memorandum and dismissal order did not consider the underlying facts of this case which facts and allegations are well plead and specifically set out in the complaint and must be deemed to be true. In order to determine if the absent tribe has any legally protected right or any interest to have gaming on the fee lands at B.V. The court must look to those facts and where, as in this case, any claim that the land at B.V. is eligible for

[12] The prior dismissal granted to the State Defendant was not based upon any claim of mis-joinder or non-joinder of a necessary or indispensable party. Rather it was based on the court's opinion that Plaintiffs could not challenge the state in federal court for an action that sounded in federal law [i.e., the APA and the IGRA] which federal law provided no action in federal court against a state that executes a tribal-state compact because of the 11th Amendment and also that the federal defendants have to approve such a compact for it to be effective.

gaming is frivolous and unsupported by any evidence the Motion to dismiss should have been denied. Quite obviously the tribe has no legally protected right to build and operate an illegal gambling casino at B.V. and the government cannot be expected to protect an illegal gaming operation on the tribe's behalf.

After reciting a series of contract and lease cases, in its decision such as the Pit River Home & Agricultural Cooperative Assn. v. United States 30 F.3d 1088 [9th Circ. 1994] supra holding that an absent Indian tribe was indispensable or necessary because of the existence of a contract in which they had a rationally connected interest, the court reached the remarkable conclusion on page 11 lines 17-19 of its Memorandum and Order Re: Dismissal that ***"Any adjudication of the Federal Defendants' review of the compact or the tribe's federal status would prejudice the tribe's interest."***

Approval for Indian gaming at a particular site, by a particular Indian tribe is a matter of exclusive federal statutory law and not a creature of contract. The tribal-state compact is only a requirement of 25 USC 2710(d) and presupposes that the site specific land on which gaming is sought, has been properly determined to be eligible Indian Lands and that the tribe seeking approval has been lawfully organized and acknowledged in accordance with 25 CFR part

1 83. [See also North County Alliance v. Salazar 573 F.3d 738
2 [9th Circ. 2009] and Citizens Against Casino Gambling in Erie
3 County v. Kempthorne 471 F.Supp.2d 295 supra.]
4 As set out supra the tribe has no right or "protected
5 interest" to conduct class III gaming on the B.V. land
6 except as allowed by federal law and upon approval from
7 defendants. Contrary to the tribe's representation at page
8 41 lines 19 to 25 of the hearing transcript that "The IGRA
9 didn't give us that right." (to have gambling). As set out
10 supra no such right exists without the IGRA.
11 Even the tribe's attorney conceded at the hearing on
12 their dismissal Motion [pages 43-44] that Plaintiffs most
13 likely had a proper challenge under the APA on the issue of
14 the unlawful organization and acknowledgement of the tribe.
15 [Hearing transcript, [page 43 line 22 to page 44 line 1. An
16 unlawful organization the Defendants previously admitted
17 to.] [See Declaration of Counsel **EXHIBIT "O"**]
18 Since the State Defendants were dismissed from this case
19 it is not a compact or contract case. It is based entirely on
20 federal gaming statutes over which the federal Defendants have
21 an exclusive duty to insure are correctly and lawfully applied.
22 Simply because these applicable statutory laws might relate in
23 some way to any compact is not enough to render the absent
24 tribe indispensable to resolving the questions of statutory
25 compliance. The federal Defendants are the exclusive arbiter
26
27
28

of interpretations of the applicable federal laws and when they do so incorrectly, capriciously, arbitrarily and contrary to law the affected citizens or municipal governments have a right to challenge these agencies under the Administrative Procedures Act 5 USC 701 and 702. See respectively Patchak v. Salazar 632 F.3d 702 [D.C. Circ. 2011], Amador County v. Salazar 640 F.3d 370, [D.C. Circ. 2011]. This is true even if an absent Indian tribe may be affected by the APA challenge or some contract they might have is impacted by unwinding an unlawful or capricious governmental action.

The order of Dismissal in this case smacks of the conundrum discussed in the landmark tort case of Palsgraf v. Long Island Railroad [N.Y. 1928] 248 N.Y. 339, 162 N.E. 99. The learned and respected Justice Benjamin Cardoza wrote the decision in that case in which it became clear one can always make a "but for" connection between cause and effect. Hence the concept in tort law arose defining "proximate cause" or legal connection between the act and the ultimate result.

It was error to conclude, as the court did in it's dismissal order, that simply because the tribe claimed "some interest in having gaming" or some connection in the subject matter of Defendants' erroneous, arbitrary and capricious approvals of both a tribal ordinance, and a tribal-state compact and also what Defendants admitted was an unlawful

tribal organization, that means that Plaintiffs' present action under the APA must be dismissed.

Were that the true state of the law there would never be any way the arbitrary, capricious and illegal decisions of an administrative agency could be challenged if any Indian tribe claimed to have some kind of a remote and even a frivolous interest in those erroneous decisions because they could refuse to intervene, claim they were necessary and/or indispensable to whatever issue was being litigated in the underlying case and then appear specially and move to dismiss the underlying case on the basis they could not be joined because of common law tribal immunity doctrines.[13]

The Order or Judgment dismissing Plaintiffs' complaint should be vacated, amended or modified accordingly.

Respectfully submitted,

James E. Marino

[13] The now disfavored common law doctrine created (in the worlds of the Supreme Court) "almost by accident" still persists because the Supreme Court ducked the issue and punted to Congress to eliminate what has clearly become an unjustified legal anachronism. See the discussion in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 [1998].