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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, **v.** SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.* Defendants.	Case No. 2:12-cv-01748-TLN-CKD **PLAINTIFFS' OPPOSITION TO THE IONE BAND OF MIWOK INDIANS' MOTION FOR PERMISSIVE INTERVENTION** Date: July 25, 2013 Time: 9:30 a.m. Place: Courtroom No. 2 Judge: Honorable Troy L. Nunley

INTRODUCTION

Plaintiffs NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE oppose the IONE BAND OF MIWOK INDIANS' MOTION FOR PERMISSIVE INTERVENTION (Court Documents (CD) 35 & 36) for the following reasons:

1. The Ione Band's motion to intervene was not timely. The Ione Band waited over year to seek leave to intervene in this case. Furthermore, as is outlined below the Ione Band's intervention in this case at this stage would be prejudicial to the Plaintiffs' case.

2. There are no common issues of fact and law between the Ione Band's claims, as presented in its motion, and the issues in this case. Contrary to statements by the Ione Band, this case does not challenge its existence or its relationship with the United States.
3. The Ione Band is estopped from intervening as a defendant in this case because it initiated similar litigation, as a plaintiff, against the Secretary of Interior in July 2012. In that case the Ione Band admits that the Secretary's actions were arbitrary and capricious.[1]
4. The Ione Band's intervention is not necessary. Its interests are adequately protected and represented by the United States Department of Justice. And, the BIA Regional Director is a member of the Ione Band and already a Defendant in this case.

BACKGROUND

The focus of this lawsuit is a final Record of Decision (ROD) of the Bureau of Indian Affairs (BIA) dated May 24, 2012 and published May 30, 2012 (77 Fed. Reg. 31871-31872, May 30, 2012.)[2] The ROD purports to place 228.04 acres of privately owned land into trust for gaming purposes. The land is located in and near the City of Plymouth, Amador County. This lawsuit was filed on June 29, 2012, (CD 1) and an Amended Complaint was filed on October 1, 2012 (CD 10). All the Federal Defendants responded on December 10, 2012.

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[1] The Ione Band's lawsuit was filed in the United States District Court for the District of Columbia. *Villa v. Kenneth Salazar, Secretary of the Interior et al.* D.C. Dist. Ct. No. 12-1086 RMC. That case was brought by "Nicolas Villa Jr., Chief, Ione Band of Miwok Indians of California." It was later transferred to the US District Court for the Eastern District of California and then voluntarily dismissed. (ED Cal. No. 13-cv-0700 TLN CKD.) *See* DECLARATION OF KENNETH R. WILLIAMS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE IONE BAND'S MOTION FOR PERMISSIVE INTERVENTION (Wms.Dec. Exh. B). Plaintiffs request that the Court take judicial notice of the documents in District Court, Eastern District No. 13-cv-0700 TLN CKD. Fed. Rules Evid., rule 201.

[2] The ROD is also the focus of a related lawsuit, *County of Amador v. Department of Interior et al.*, Case No, 2:12-cv-01710. (CD 7.) The *County of Amador* case is similar but not identical to Plaintiffs' lawsuit. It has fewer claims and fewer defendants than this lawsuit.

Plaintiffs' Amended Complaint names several federal officials and employees with the Department of Interior (DOI) and the National Indian Gaming Commission (NIGC) who were involved in preparing and/or approving the ROD. This lawsuit is primarily an Administrative Procedure Act case coupled with related Declaratory Relief Claims. It will be litigated based largely on the Administrative Record which was lodged with the Court on May 3, 2013. (CD 31.) The Amended Complaint includes five causes of action:

1. **First Claim for Relief** - The Federal Defendants do not have authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act (25 U.S.C. §§ 461-479; IRA) was enacted per the Supreme Court. *Carcieri v. Salazar*, 555 U.S. 379 (2009).[3]
2. **Second Claim for Relief** - The Federal Defendants failed to comply with its own regulations when they reviewed and approved the ROD and their approval of the ROD was arbitrary, capricious and an abuse of discretion. 25 C.F.R. §§ 151.10 & 151.11.
3. **Third Claim for Relief** – The Federal Defendants do not have the authority take privately owned lands into trust free of State and local regulation. To do so, would violate the principles of federalism recently confirmed by the Supreme Court. *Hawaii v. Office of Hawaiian Affairs* 129 S.Ct 1436 (2009).
4. **Fourth Claim for Relief** - The Federal Defendants incorrectly decided that, assuming the lands are taken into trust, the subject property would qualify as "restored land for a restored tribe" under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2719.

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[3] The evidence in this case will demonstrate that Ione Band was not a federally recognized tribe in 1934. Instead, for example, the BIA has acknowledged that the Ione Band did not adopt a constitution under the IRA until 1990 and was not informally "recognized" by the BIA until 1994 – 60 years after the enactment of the IRA. (*See* Wms.Dec. Exh. C.) The Plaintiffs request that the Court take judicial notice of Exhibit C. Fed. Rules Evid., rule 201.

5. Fifth Claim for Relief – The Federal Defendants failed to comply with the National Environmental Policy Act when they reviewed and approved the fee-to-trust transfer and the casino project. 42 U.S.C. §§ 4321 et.seq. And 40 C.F.R. §§ 1500 et.seq.

STANDARD OF REVIEW

It is important to note at the outset that the Ione Band is not seeking leave to intervene as a matter of right. *See* Fed.R.Civ.Proc. 24(a). Thus, the Ione Band is not claiming that it has an unconditional statutory right to intervene. Nor is it claiming that it has an interest in the subject matter of this case which is not adequately represented by the existing parties. *Id.*

Instead, the Ione Band is seeking permissive intervention. Fed.R.Civ.Proc. 24(b). Permissive intervention may be allowed, in the Court's discretion, when the applicant's claim and the main action involve common questions of law or fact and allowing intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." *Id.* Furthermore the application for intervention must be timely.[4]

Although the requirements for intervention are usually construed broadly, intervention is not always automatic. *Westlands Water District v. United States of America*, 700 F.2d 561 (9th Cir. 1983). The motion must be timely and the applicant must have an interest in the matter. *Id.*

Also the distinction between seeking intervention as a matter of right and seeking permissive intervention is important when evaluating the timeliness of the motion. The Courts are required to be more lenient when intervention is sought as a matter of right than where permissive intervention is sought. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984).

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[4] The Ione Band, in its NOTICE OF PARTIALLY UNOPPOSED MOTION FOR PREMISSIVE INTERVENTION BY THE IONE BAND OF MIWOK INDIANS, Fed.R.Civ.P. 24(b) (CD 35-1) claims that the current Defendants have represented "through their counsel" that they would not oppose their application for permissive intervention. But the implication is that the federal Defendants were not willing to agree that the Ione Band has a right to intervene.

ARGUMENT

A. The Ione Band's Motion to Intervene was not Timely Filed.

In determining the timeliness of a motion to intervene, three factors are weighed: (1) the stage of the proceedings at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *United States v. Oregon, supra.*

1. Stage of the Proceedings.

The Ione Band's contention that "this case is in the very earliest stages" is not correct. Over the last year, this lawsuit has moved forward through a long and complex process. It is now set up to move on to the next stage of litigation. The parties are currently considering whether dispositive motions are appropriate to resolve this case or whether it should proceed to trial.

This case was brought under the Administrative Procedure Act (APA) against two federal agencies, the DOI and the NIGC, and their officials and employees. It took almost a year for the Federal Defendants to prepare the Administrative Record (AR). The same AR was to be used in the related *Amador County v. DOI* case. And the finalization of the AR was delayed while the parties in that case litigated a Freedom of Information Act (FOIA) issue. The resolution of the FOIA claim then led to the negotiation of stipulated protective orders in this case and the *Amador County* case. Although the two stipulated protective orders are different in some respects, they both had to be finalized before the Federal Defendants would agree to lodge the AR.

Furthermore, the parties have filed several Joint Status Conference Reports and, in that context, have resolved several procedural issues over the last year. These issues were discussed and resolved with the understanding that all the Federal Defendants are public agencies or officials with certain unique limitations and responsibilities. The Ione Band is not a federal public agency. If the Ione Band had been a party when the Joint Status Reports were due, Plaintiffs believe these issues would have been negotiated and resolved in a different fashion.

2. Prejudice to the Parties.

The Ione Band is not a federal or public agency governed by the APA. Its intervention as a defendant will require that the parties revisit the scope of the AR – especially if the Ione Band wants to include its federal recognition claims as part of this lawsuit. The scope of the protective order will also need to be reexamined. It should not apply to documents already in possession of the Ione Band. Specifically the protective order was negotiated and finalized before the AR was filed. And the AR revealed that some of the documents ostensibly protected by the protective order were transmitted from the BIA to the Ione Band before the ROD was issued and before this lawsuit was initiated.

Furthermore, the intervention of the Ione Band will affect the scope of available discovery in this case. The Federal Defendants claim that discovery is not available because this is an APA case. Plaintiffs contend that discovery is available in an APA case upon a proper showing and it is not precluded with respect to Plaintiffs' Declaratory Relief claims. If the Ione Band is allowed to intervene discovery would be wide open and the resolution of this case will be delayed. This is a focused lawsuit against the Federal Defendants and their approval of the ROD. If the Ione Band wants to litigate its federal recognition issues against the DOI, it should do so in a separate lawsuit. *See Westlands Water District v. United States of America*, 700 F.2d 561(9th Cir. 1983).

3. Reason for the Delay.

The first Joint Status Report was filed in this case on December 10, 2012 (CD 15). Subparagraph (c), which covers Possible Joinder of Additional Parties, provides:

> Federal Defendants anticipate that the Ione Band may move to intervene permissively in this suit pursuant to Federal Rule of Civil Procedure 24(b). Plaintiffs reserve and request an opportunity to oppose that motion.

Thus, long before the AR was lodged and the stipulated Protective Order was negotiated, the Federal Defendants knew that the Ione Band was going to seek permissive intervention.

The Declaration filed by Chairperson Yvonne Miller in support Ione Band's motion to intervene, states that: "This lawsuit will have a very direct and dramatic impact on the Tribe's government, social and economic interests." Chairperson Miller's declaration contains several other similar over-statements. But Chairperson Miller does not try to explain why, given the importance of this case, and its potential disastrous impact on the Ione Band's government, they waited almost a year before filing their motion to intervene in this case.[5]

But the reason that the Ione Band did not seek leave to intervene in this case is obvious. Instead, they filed their own lawsuit challenging the ROD as arbitrary and capricious. *Villa v. Salazar*, *supra.* That lawsuit was filed on June 29, 2012 in the District of Columbia – two weeks before Ms. Miller claims that she became aware of the *Amador* case. The lawsuit was transferred to this Court at (Case No. 13-cv-0700 TLN CKD) at the request of the Federal Defendants. It was voluntarily dismissed by the Ione Band on April 24, 2013. And on May 3, 2013 Counsel for the Ione Band contacted Plaintiffs' counsel about the proposed intervention. (Wms.Dec. Exh.A.)

The Ione Band's motion for permissive intervention in this case should be denied as untimely. If the Ione Band wanted to litigate their federal recognition claims against the DOI, and challenge the ROD, they should not have voluntarily dismissed their lawsuit.

B. There are no Common Questions of Law or Fact.

As summarized above, this lawsuit is about several parcels of land in and near the City of Plymouth. The primary issue in this case is whether the subject property is suitable under IRA to be taken into trust. Although the Federal Defendants claim to have the authority to take these privately owned lands into trust and outside State and local regulation for the benefit of the Ione

[5] It is interesting to compare the Declaration filed by Ms. Miller in this case on June 6, 2013 (CD 35-2) with the Declaration she filed in the *County of Amador* case. (CD 47-2). They are almost identical with one significant difference. In paragraph 4 of her Declaration dated April 24, 2013, Ms. Miller admits that she learned about these cases from the website Turtle Talk on July 12, 2012. But in her May 6, 2013 Declaration filed in this case Ms. Miller did not include the same paragraph 4. Nor did she reveal when first she heard about this lawsuit.

Band, the Ione Band does not claim to own any of the subject parcels to be taken into trust. Thus, although the Ione Band obviously is interested in the outcome of this case, it lacks the requisite interest in the subject matter of this lawsuit to support its request for intervention. *See Westlands Water District v. United States of America*, 700 F.2d 561 (9th Cir. 1983).

Furthermore, in an apparent effort to create an interest in this case or common question of law of fact, the Ione Band mischaracterizes the nature and scope of this case. Specifically, the Ione Band claims that this case challenges the existence and nature of the relationship between the United States and the Ione Band. And the Ione Band claims that its status as a federally recognized tribe is the focus of this lawsuit. These claims are incorrect. Instead, as summarized above, this case includes five causes of action none of which challenge the Ione Band's existence. Plaintiffs do allege, in the first cause of action, that the Ione Band was not a federally recognized tribe in 1934 eligible for fee-to-trust benefits under the IRA. *Carcieri v. Salazar supra.* But the Ione Band does not claim to have been a federally recognized tribe in 1934. Instead, Ione Band adopted and ratified an IRA constitution in 1990 and to have received informal administrative federal recognition informally in 1994. (Wms.Dec. Exh. C.)

On the other hand, federal recognition seems to have been the central issue in the lawsuit filed by the Ione Band against Secretary Salazar that was eventually transferred to this Court. *Villa v. Kenneth Salazar, Secretary of the Interior et al* (E.D. Cal. No. 13-cv-0700 TLN CKD.) Specifically the claim in that lawsuit involved two groups that claimed to be the Ione Band. The Ione Band, represented by Chief Villa, alleged that: "The group purporting to be the Ione Band of Miwok Indians has never achieved "[r]ecognition through the Federal Acknowledgment Process under [25 C.F.R.] § 83.6". (*See* Complaint in *Villa v. Kenneth Salazar,* CD 1, ¶ 21.) Mr. Villa, on behalf of the Ione Band, challenged the approval of the ROD as arbitrary and capricious because it purports to take lands into trust for another group which calls itself the Ione Band. The

dispute over federal recognition between these two groups claiming to be the Ione Band is not pertinent to this lawsuit.[6] It would be prejudicial to inject this dispute between the Ione Indians into this lawsuit. This is especially true after the Ione Band voluntarily dismissed its own lawsuit.

C. The Ione Band is Estopped from Intervening in this case as a Defendant.

As summarized above, the Ione Band on June 29, 2012 filed a separate lawsuit challenging the ROD in the United States District Court for the District of Columbia. *Villa v. Kenneth Salazar, Secretary of the Interior et al.* Case No. 12-1086 RMC. Specifically that lawsuit was brought by Nicolas Villa Jr., as "Chief, Ione Band of Miwok Indians of California." In Paragraphs 30 and 31 of the Complaint, the Ione Band states that that decision in the ROD to take the subject property into trust for gaming purposes was "arbitrary and capricious, an abuse of discretion and otherwise in violation of law." (CD 1.) This judicial admission is not erased by the Ione Band's voluntary dismissal of its lawsuit (CD 21). *American Title Ins. Co. v. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988). And given this judicial admission, the Ione Band should be precluded and estoppped from intervening in this case as a defendant or from defending the ROD.

D. The Ione Band's Intervention in not Necessary.

Any interest that the Ione Band may have in this case is adequately represented the United States Department of Justice. In fact, assuming the Ione Band seeking leave to intervene in this case as a federally recognized tribe, then the United States has a fiduciary responsibility to represent the interest of the Ione Band. Basically, if it is a recognized tribe, then it is considered a "domestic dependent sovereign" which must rely on the federal government to defend its interests in this process. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The Ione Band is not an independent, separate entity. Instead, the United States has a fiduciary and trust relationship

[6] It should be noted that the Administrative Record includes documents from Chief Villa, Chairperson Miller, and both of the Ione Bands.

with tribes. *See United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313. (2011). It is true that, in some circumstances, a tribe may retain private counsel. But, in that event, the tribe's "choice of counsel and the fixing of fees are subject under 25 U.S.C 476 to the approval of the Secretary of Interior or his authorized representative." 25 C.F.R. § 88.1. Thus, the Secretary of Interior (SOI), the lead federal Defendant, has a fiduciary obligation to either represent the Ione Band, or supervise the representation of the Ione Band, in this case.[7]

Furthermore, the BIA Pacific Regional Director, Amy Dutschke, is a member of the Ione Band of Miwok Indians. (Wms.Dec. Exh. D.) And, in the past, she has been in several high level positions at the Sacramento Regional Office of the BIA where she facilitated reorganizing the Ione Band and expanding the membership of the Ione Band by ten-fold including many of her relatives, She also helped initiate this fee-to-trust application on behalf of the Ione Band. And after it was submitted to the BIA, Ms. Dutschke facilitated its processing and the approval of the ROD by the Acting Assistant Secretary in 2012. As a result of her roles in the process, Ms. Dutschke was named as a Defendant in action. And, as a member of the Ione Band and as Regional Director of the BIA, Ms. Dutschke's involvement as a party in this lawsuit is more than sufficient to represent and protect any interest of the Ione Band may have in this case.

CONCLUSION

For the forgoing reasons Plaintiffs respectfully request that the Ione Band's motion for permissive intervention be denied.

Respectfully Submitted,

Dated: July 11, 2013

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

[7] The SOI must also approve any waiver of sovereign immunity by a tribe. The Ione Band did not confirm that it will waive its sovereign immunity and fully participate as a party in this case. Nor has it confirmed that the SOI has approved the waiver of sovereign immunity.