

Mark J. Kallenbach, Esq., *pro hac vice*
Minnesota Attorney Reg. No. 146468
2260 Ridge Drive, Suite 13
Minneapolis, MN 55416
Telephone: 952-593-3858
Facsimile: 952-406-8881
Email: markkallenbach@comcast.net

Randy E. Thomas, Esq.
California Attorney Reg. No. 78411
18826 N Lower Sacramento Road
Acampo, CA 95220
Telephone: (209) 369-9255
Facsimile: (209) 369-9288
Email: Woodbridgelaw77@yahoo.com

*Attorneys for Nicolas Villa, Jr. and the
Historic Ione Band of Miwok Indians Tribe*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICOLAS VILLA, JR. and the
HISTORIC IONE BAND OF MIWOK
INDIANS TRIBE,

Plaintiffs,

v.

SALLY JEWELL in her capacity as the
Secretary of the DEPARTMENT of the
INTERIOR, the DEPARTMENT of the
INTERIOR, the BUREAU of INDIAN
AFFAIRS, AMY DUTCHSKE, in her capacity
as the Pacific Regional Director of the BUREAU
of INDIAN AFFAIRS, and JOHN DOE and
MARY ROE, unknown BUREAU of INDIAN
AFFAIRS employees in their official capacities,

Defendants.

Case No. 2:16-CV-00503-KJM-KJN

NICOLAS VILLA, JR.'S AND THE
HISTORIC IONE BAND OF MIWOK
INDIANS TRIBE'S MEMORANDUM OF
LAW IN RESPONSE TO DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
SECOND AMENDED COMPLAINT

DATE: September 9, 2016
TIME: 10:00 a.m.
COURTROOM: 3, 15th floor
JUDGE: Hon. Kimberly J. Mueller

INTRODUCTION

Nicolas Villa, Jr. ("Villa"), the leader of the Historic Ione Band of Miwok Indians Tribe
("Historic Ione Band of Miwok Indians" or "Tribe") and the Tribe have commenced this action to

1 compel Sally Jewell, the Secretary of the Department of the Interior (“Jewell”), the Department of
2 the Interior (“DOI”), the Bureau of Indian Affairs (“BIA”)¹, Amy Dutchske, the Pacific Regional
3 Director of the BIA (“Dutchske”), unknown BIA agents and employees, John Doe and Mary Roe,
4 (“Doe and Roe”) to acknowledge that the Historic Ione Band of Miwok Indians is a federally
5 recognized Indian tribe.
6

7 In 1996, the BIA inexplicably and illegally created what has been referred to in this
8 litigation as the “BIA Created Tribe” or “Mock Tribe.” The BIA sanctioned requirements to
9 become a Mock Tribe member are entirely different than the requirements for membership set out
10 in the Historic Ione Band of Miwok Indians’ Constitution and Ordinances.

11 The membership of the Historic Ione Band of Miwok Indians never opened its rolls nor
12 consented to the Mock Tribe’s members becoming members of its Tribe.

13 Since 1996, when the Mock Tribe was created, the BIA has illegally refused to
14 acknowledge the Historic Ione Band of Miwok Indians’ federal recognition.
15

16 For the last 20 years, the Tribe has begged and pleaded with the BIA to acknowledge it as
17 a federally recognized tribe as it had for 100 years, until 1996. The Tribe’s request has fallen on
18 deaf ears at the BIA.

19 Left with no other choice, the Tribe commenced the instant declaratory judgement or
20 mandamus case. It is the hope and prayer of the Historic Ione Band of Miwok Indians that this
21 Court will order the Department to acknowledge and honor the Tribe’s federal recognition as a
22 tribal entity independent of the Mock Tribe.
23

24
25
26
27 ¹ When the umbrella term “Department” is used throughout this memorandum; it is the author’s
28 intent to collectively refer to the DOI and its sub-agency, the BIA, with the understanding that
the relevant agency actions in this case are largely undertaken by the BIA.

FACTS²

Foundation for the Facts upon which the Plaintiffs' Claim is Based

The foundation for the facts and opinions upon which the Historic Ione Band of Miwok Indians' instant cause of action is constructed, is the work product of Stanford Law Professor Al Logan Slagle (1952-2002).

Prof. Slagle was a member of the United Keetoowa Band of Cherokee Indians of Oklahoma. He taught law at UC Berkeley and Stanford focusing on courses pertaining to public policy and governmental affairs. He was responsible for the development of the Privileges and Immunities Technical Amendment Act of 1994. Senator John McCain stated that the passage of that Act to be one of the most significant statutes for the protection of Native American tribal governments. Prof. Slagle was appointed to the Task Force for Intergovernmental Affairs for the purpose of reviewing the administrative process for Federal acknowledgment. The very law upon which the outcome of this case will be based is law that Prof. Slagle helped Congress to create. The reader is encouraged to review Prof. Slagle's Declaration in: *Harold E. Burris, et al. v. Nicolas Villa, Sr., et al.* No. CIV-S-97-0531(E.D. Cal.), which describes in significant detail his educational background, professional achievements and opinions about this case. [Kallenbach Decl., Ex A, Slagle Decl.]

Prof. Slagle spent hundreds of hours reviewing "innumerable" documents pertaining to the Historic Ione Band of Miwok Indians' membership and history. The documents that Prof. Slagle reviewed included those within the Tribe's possession and those located at various national archive offices, including archive facilities in Oregon, California and Washington D.C. He conducted

² The facts which follow are affirmed by Prof. Al Logan Slagle in his declaration in: *Harold E. Burris, et al. v. Nicolas Villa, Sr., et al.* No. CIV-S-97-0531(E.D. Cal.) and/or Nicolas Villa Jr. in his declaration in: *No Casino in Plymouth and Citizens Equal Rights Alliance v. Sally Jewell, et al.*, No. 2:12-cv-01748 (E.D. Cal.). [Kallenbach Decl., Ex. A (Slagle Decl.) and Ex. B (Villa Decl.)]

1 personal interviews of Tribal members and leaders regarding the history and status of the Tribe.
2 [Kallenbach Decl., Ex A, (Slagle Decl.) ¶ 11.]

3 It is likely that virtually all of the facts necessary to resolve the issues raised in the instant
4 motion can be found within or are referenced in Prof. Slagle's Declaration [Kallenbach Decl., Ex.
5 A, (Slagle Decl.)].
6

7 **Facts Pertaining to the History of the Historic Ione Band of Miwok Indians**

8 The Historic Ione Band of Miwok Indians was spawned from the Locolumne and
9 Mokelumne bands, which united during the late prehistory era [Sec. Am. Compl. (Doc. 14) ¶ 15].

10 Since the early 1800's or before, the Historic Ione Band of Miwok Indians' have claimed a
11 40 acre parcel located in Ione, California as its land base ("Ione Rancheria"). Some of its members
12 presently reside on the Ione Rancheria [Sec. Am. Compl. (Doc. 14) ¶ 17].
13

14 The Ione Rancheria is geographically segregated from its non-Indian neighbors by a
15 boundary marked by U.S. government-paid barbed wire fencing dating to at least the turn of the
16 20th century [Sec. Am. Compl. (Doc. 14) ¶ 18].

17 John J. Terrell, *Census of Ione and Vicinity Indians* (May 17, 1915) wrote:

18 Of all the Indians I have visited these have stronger claims to their ancient Village than any
19 others. They have better and more extensive improvements, especially in the erection of
20 their large "Sweat House". ... As I see it, a crime would be committed in forcing these
Indians from this ancient village." [Sec. Am. Compl. (Doc. 14) ¶ 19].

21 Terrell's interview notes include the response of Chief Charley Maximo regarding the
22 Band's tenure at the Ione Rancheria site:

23 "My wife's people have been here since before the sun first come up over that hill." [File #
24 54777, in Record Group 75, Records of the Bureau of Indian Affairs, Central Classified
25 Files, 1907-1939, Roseburg, 310, file 108.465-14.] [Sec. Am. Compl. (Doc. 14) ¶ 20].

26 An August 16, 1923 letter from T. G. Negrich to Superintendent Miller reveals that:

27 "Concerning the length of time the Indians have lived on the disputed tract, the information
28 I can gather is that they have been there for as far back as the white settlers can remember.
Most people put it over 100 years. Whether this is so or not I cannot say and do not care to

1 be quoted, except as basing this information upon what has been told me. In view of the
2 fact that in the tract there is an Indian cemetery, that fact alone would justify the conclusion
3 that they have lived here for a great many years." [Sec. Am. Compl. (Doc. 14) ¶ 21].

4 From 1904 to 1931, the United States repeatedly attempted (but failed) to establish a trust
5 land base in Amador County for the Historic Ione Band of Miwok Indians [Sec. Am. Compl. (Doc.
6 14) ¶ 22].

7 In the 1920's and 1930's, Tribal members attended a school built by the federal government
8 which was located on the far north end of the reservation. The school was referred to as the Ione
9 Indian School [Sec. Am. Compl. (Doc. 14) ¶ 34].

10 **The Federal Government Reaffirms the Tribe's Federal Recognition**
11 **and Agrees to Take the Ione Rancheria into Trust for the Tribe**

12 In 1970-1972, the Historic Ione Band of Miwok Indians prosecuted an adverse possession
13 action in an effort to clear title so that the Ione Rancheria could be put into trust [Sec. Am. Compl.
14 (Doc. 14) ¶ 23].

15 Although the adverse possession action was successful, the Historic Ione Band of Miwok
16 Indians was unable to secure title insurance [Sec. Am. Compl. (Doc. 14) ¶ 24].

17 Commissioner of Indian Affairs, Louis Bruce, addressed an October 18, 1972 letter to Chief
18 Nicolas Villa, Sr., [Villa's father] stating that the BIA had:

- 19
- 20 (a) Agreed that the Ione Band had been recognized previously, and that the Band had
21 not voted against organizing under the IRA (1934); and,
 - 22 (b) Directed the Acting Area Director in Sacramento to aid the Band in organizing its
23 constitution and roll for approval under 25 U. S. C. Sec. 476; and,
 - 24 (c) Agreed to take the Ione Rancheria in trust upon clearing title.

25 [Sec. Am. Compl. (Doc. 14) ¶ 25].

26 Pursuant to Commissioner Bruce's direction, the deed to the Ione Rancheria was sent to
27 Washington, D. C.; but, was never returned to the Tribe [Sec. Am. Compl. (Doc. 14) ¶ 26].

28 Thereafter, consistent with the written promises made in his October 18, 1972 to the Tribe,

Commissioner Bruce wrote to the Sacramento Area BIA Director dismissing the issue of clearing title of the land base for transference into trust as being unimportant to their entitlement to recognition. The letter states:

"It does appear from a review of the documents accompanying a recent request for the formal recognition of these Indians, however, that the questions raised by the Assistant Secretary in his memorandum of January 26, 1973, have been satisfactorily answered, and that these Indians merit the extension to them of Federal recognition.

Under authority delegated to me by 230 DM 1.1, I hereby extend Federal recognition to the Ione Band of Indians, and ask that assistance be extended to the band in its preparing to tender a clear title to a 40-acre tract in Amador County to be held in trust for it by the Secretary and that it also be assisted in drafting appropriate documents for its organization under the Indian Reorganization Act of 1934." ("emphasis added") [Sec. Am. Compl. (Doc. 14) ¶ 27.]

As of Dec. 4, 1974, Commissioner Bruce's October 18, 1972 letter was held in the Solicitor's Office, coded "Holdup/540:ZBarrow:md...11-26-74/Cass. B., Ref. 16" [Sec. Am. Compl. (Doc. 14) ¶ 28].

In a February 24, 1975 memorandum drafted by Assistant Solicitor Scott Keep³ to the Associate Solicitor of Indian Affairs, Mr. Keep wrote:

"The Ione Band of Indians is a small California group residing on a 40 acre tract of land in the central part of the State generally east of Sacramento. The Department has been trying to acquire land for this group for almost 60 years."

"The Bureau's memorandum which is in for review is framed in terms of extending Federal recognition to the Ione Band.... **[M]y review of the available materials convinces me that the Ione Band has previously been recognized by the Federal Government...**From the materials that I have it is not clear why the Area Director did not complete the action directed by the Commissioner." ("emphasis added") [Sec. Am. Compl. (Doc. 14) ¶ 29.]

In the early 1990's Villa worked with the BIA, members of Congress and brought suit to get the Ione Rancheria into trust for the Tribe.

On November 19, 1992 the Court in *Ione Band of Miwok Indians v. Burris*, CIV S-90-0993 (E.D. Cal.) ruled that the occupants of that property were holding it in trust for the other tribal members [Sec. Am. Compl. (Doc. 14) ¶ 30].

³ Upon information and belief, Mr. Keep is presently employed in the Solicitor General's Washington D.C. office.

On March 22, 1994, Assistant BIA Secretary Ada Deer addressed a letter to [Plaintiff] Chief Nicolas Villa, Jr. which reaffirms the BIA's federal recognition of the Tribe and contains a promise to take the Ione Rancheria into trust. Assistant BIA Secretary Ada Deer's March 22, 1994 letter states:

I am writing regarding our meeting on October 28, 1993 and subsequent discussions with Congressman Doolittle. In that meeting I agreed to clarify the United States' political relationship of the Ione Band of Miwok, as well as Mr. Louis Bruce's 1972 letter regarding the tribe's political status and its historic land base.

Upon review of the matter, I am now reaffirming the portion of Commissioner Bruce's letter which reads:

The Secretary also recognizes that obtaining a tribal community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification. *****Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. *** As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment of title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians.** (See Bruce letter attached)

As Assistant Secretary of Indian Affairs I hereby agree to accept the parcel of land designated in the Bruce letter to be held in trust as territory of the Tribe. **As I stated during the October meeting, the Tribe will henceforth be included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," last published in the Federal Register on October 21, 1993.**

I am hereby directing the Bureau of Indian Affairs and specifically the Sacramento Area Office to deal with the tribe accordingly. The Bureau will maintain contact with the tribe to address the relevant details.

[Kallenbach Decl. at Ex. D, Deer's March 22, 1994 letter.]

The Federal Government Engages in Intragovernmental Relations with the Tribe

The federal government has consistently treated the Historic Band of Ione Miwok Indians as a legal federally recognized tribe with respect to intragovernmental affairs [Sec. Am. Compl. (Doc. 14) ¶ 31].

As a federally recognized tribe, the Historic Ione Band of Miwok Indians has engaged in inter-governmental relationships with no fewer than fifteen (15) federal agencies, including but not limited to the: U.S. Department of Interior/Bureau of Indian Affairs; U.S. Indian Health Services; U.S. Department of Transportation; U.S. Department of Education; Department of Health and

Human Services; Commission on Native American Graves Protection and Repatriation; National Indian Gaming Commission; Office of Tribal Justice; and U.S. Department of Justice [Sec. Am. Compl. (Doc. 14) ¶ 38].

The Tribe Receives Periodic Services from the Federal Government

The Tribe began receiving periodic Federal services pursuant to their status as a federally recognized tribe in 1980 [Sec. Am. Compl. (Doc. 14) ¶ 32].

The Tribe has received health services from the U.S. Indian Health Services (“IHS”) and education (Title IV: Indian Education), as well as Housing and Urban Development (“HUD”) and community services grants [Sec. Am. Compl. (Doc. 14) ¶ 33].

In 1981, the IHS constructed a well and connected the homes situated on the Ione Rancheria to a water system [Sec. Am. Compl. (Doc. 14) ¶ 35].

In 1986, the Tribe received Indian HUD housing assistance as an acknowledged tribe through the BIA’s Sacramento Agency [Sec. Am. Compl. (Doc. 14) ¶ 36].

In 1990, the IHS upgraded the water system [Sec. Am. Compl. (Doc. 14) ¶ 35].

The Tribe Maintains Membership Rolls

The Historic Ione Band of Miwok Indians is small tribe. The “family tree” of each of the Tribe’s members as of 1996 is depicted in the Plaintiffs’ Sec. Am. Compl. (Doc. 14) ¶¶ 44-45].

The Tribe maintains the membership roll contemplated by 25 C.F.R. § 83.7 (e) [Sec. Am. Compl. (Doc. 14) ¶ 46].

Updated membership lists are certified as "current" by periodic vote. Such certifications have included:

- (a) Certification under Article IV, Sec. 6 of their former Constitution;
- (b) Resolution No. 8910 (dated 6/18/89) certifying currency through 4/14/89;
- (c) Letter dated 8/22/89 from the Ione Band of Miwok Indians to Mr. Randy Willard of

1 the Indian Health Service in Sacramento;

2 (d) The General Council composed of adult members, who acted by popular vote and
3 in keeping with traditional practices adopted the new constitution and membership
4 ordinance;

5 (e) On August 27, 1991, by Ordinance # 91001 on Enrollment/Classification, the Tribe
6 again updated its roll and provided for periods of open enrollment, future enrollment
7 eligibility, and other matters relating to enrollment and membership; and,

8 (f) On August 27, 1991, the General Council approved the proof of eligibility submitted
9 for all current members based upon genealogical records and applications on file. [Sec.
10 Am. Compl. (Doc. 14) ¶ 47.]

11 To be eligible to be a Tribal member, the Historic Ione Band of Miwok Indians' Constitution
12 mandates that all applicants meet the criteria within the 1991 Tribal Enrollment Ordinance.
13

14 In 1995, in the hope of facilitating the process of establishing a functional government, Villa
15 and the Burris family ("Burris" or "Burris Family") agreed to pursue mediation over which the BIA
16 would have only a limited roll [Sec. Am. Compl. (Doc. 14) ¶ 50].
17

18 With the help of the federal mediator, it was determined that the family of Harold Burris
19 and that of his wife, Esther Blue were not eligible for membership in the tribe. The Burris family
20 walked out of the meeting.
21

22 The Tribe was always willing to work with the BIA as it had in the past. However, when it
23 became obvious that the BIA was hell bent on expanding its rolls to include Indian groups and
24 Indians from no fewer than ten (10) other reservations; tribes that were terminated or are from
25 tribes outside of California; and even Filipinos; in frustration, the Tribe refused to work with the
26 BIA.

27 At all times, the Tribe filed objections to each and every effort of the illegal BIA actions of
28

opening the tribal rolls and the illegal development of a constitution for the Mock tribe without the express written permission of the Tribe as required by law. Although the Historic Tribe maintained approved tribal rolls, tribal ordinances and has a tribal constitution, the BIA simply ignored and tossed aside the Tribe's Constitution and Ordinances. The BIA has never responded to any challenge by the Tribe to its illegal expansion of the Tribe's rolls. The expansion of the Tribe's rolls and the Mock Tribe election were never published in the Federal Register as required by law.

At the time of Assistant Secretary Deer's March 22, 1994 clarification and reaffirmation, the Historic Ione Band of Miwok Indians had 32 enrolled members [Sec. Am. Compl. (Doc. 14) ¶ 48].

The BIA's Mock Tribe which was non-existent in 1996 now claims 750 members [Sec. Am. Compl. (Doc. 14) ¶¶ 76 and 86].

The Mock Tribe's 1996 Election is of No Meaning to the Historic Ione Band of Miwok Indians

Dutchske's family and friends, few, if any, of whom qualify to be Historic Ione Band of Miwok Indians members rigged the 1996 elections [Sec. Am. Compl. (Doc. 14) ¶¶ 61-72]. Yet, how Dutchske and her family and friends run the Mock Tribe is of no meaning to the Historic Ione Band of Miwok Indians because the Mock Tribe and Historic Ione Band of Miwok Indians are separate and distinct entities.

The primary purpose for the extensive discussion in the Sec. Am. Compl. concerning the 1996 election was to conclusively demonstrate that virtually all of the voters were not members of the Historic Ione Band of Miwok Indians [Sec. Am. Compl. (Doc. 14) ¶¶ 51-72].

The lack of participation by the Historic Ione Band of Miwok Indians' members in the 1996 election is evidence of the Mock Tribe and the Historic Ione Band of Miwok Indians being separate entities.

Additional Evidence that the Tribe and Mock Tribe are Distinct Entities

The Mock Tribe maintains that it is a terminated tribe and was restored to federal recognition. Mock Tribe Answer in *No Casino in Plymouth and Citizens Equal Rights Alliance v. Sally Jewell, et al.*, No. 2:12-cv-01748 (E.D. Cal.) [Docket 57, ¶ 84].

The Historic Ione Band of Miwok Indians' federal recognition was never terminated.

The Mock Tribe maintains that the parcels of land, which were taken in trust for it upon which a casino is proposed to be built, are restored lands within the meaning of IGRA, (Pub.L. 100–497, 25 U.S.C. § 2701 *et seq.*). Mock Tribe Answer in *No Casino in Plymouth and Citizens Equal Rights Alliance v. Sally Jewell, et al.*, No. 2:12-cv-01748 (E.D. Cal.) [Docket 57, ¶ 85].

On November 19, 1992, the Court in *Ione Band of Miwok Indians v. Burris*, CIV S-90-0993 (E.D. Cal.) ruled that the occupants of that property [Ione Rancheria] were holding it in trust for the other tribal members [Sec. Am. Compl. (Doc. 14) ¶ 30].

The BIA has repeatedly promised that it would formally take the Ione Rancheria into trust for the Tribe almost 100 years before the Mock Tribe was formed.

LAW AND ARGUMENT

The BIA has filed a pleading entitled: *Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Dismiss Second Amended Complaint* (Def. Mem.). The Defendants make various arguments for dismissing the Tribe's Second Amended Complaint. Def. Mem. [Docket 16-1].

The Tribe will address each of the Defendant's points and arguments *seriatim*.

A. The Court has jurisdiction over this case.

Defendants make two arguments claiming that the Court lacks jurisdiction over this case [Docket 16-1, pp. 3-4].

Defendants' first argument is that Plaintiffs' Sec. Am. Compl. fails to allege facts sufficient

1 to establish subject matter jurisdiction [Def. Mem. (Doc. 16-1) pp. 3-4].

2 Plaintiff's Sec. Am. Compl. sets out in significant detail the factual bases, a summary of
3 which is set out above, that implores the Court to declare that the Historic Ione Band of Miwok
4 Indians is a federally recognized Indian Tribe. The accuracy and veracity of the facts as alleged in
5 the Sec. Am. Compl. are affirmed by Prof. Slagle in his declaration in: *Harold E. Burris, et al. v.*
6 *Nicolas Villa, Sr., et al.* No. CIV-S-97-0531(E.D. Cal.) and/or by Nicolas Villa in his declaration
7 in: *No Casino in Plymouth and Citizens Equal Rights Alliance v. Sally Jewell, et al.*, No. 2:12-cv-
8 01748 (E.D. Cal.). [Kallenbach Decl., Exs. A and B].

9
10 Defendants' argument that Plaintiffs' Sec. Am. Compl. fails to allege facts sufficient to
11 establish subject matter jurisdiction is must be rejected given the extensive facts pled in Plaintiff's
12 Sec. Am. Compl.

13
14 Defendants' second argument is that as a sovereign, the United States "is immune from suit
15 save as it consents to be sued," with the terms of its express consent defining the court's jurisdiction
16 [Def. Mem. (Doc. 16-1) pp. 3-4].

17 The relief that the Plaintiffs seek is an order that the BIA treat the Tribe as the federally
18 recognized tribe that it is, entitling it to the same services and governmental deference that the BIA
19 affords all other federally recognized tribes. This nature and substance of this case may be best
20 characterized as a Writ of Mandamus styled action. 28 U.S.C. § 1361 provides that:

21
22 The district courts shall have original jurisdiction of any action in the nature of
23 mandamus to compel an officer or employee of the United States or any agency
thereof to perform a duty owed to the plaintiff.

24 Unfortunately, the Tribe's counsel failed to identify 28 U.S.C. § 1361 as a basis for this
25 Court's jurisdiction in the Sec. Am. Compl. The Tribe should be permitted to amend its Sec. Am.
26 Compl. to incorporate the jurisdictional provision of 28 U.S.C. ¶ 1361.

27 The Defendants' sovereign immunity argument that the Court has jurisdiction over this
28

1 matter pursuant to 28 U.S.C. §1346(b) is misplaced. 28 U.S.C. §1346(b) states in relevant part:

2 (1) Subject to the provisions of chapter 171 of this title, the district courts,
3 together with the United States District Court for the District of the Canal Zone and
4 the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil
5 actions on claims against the United States, for money damages, accruing on and
6 after January 1, 1945, for injury or loss of property, or personal injury or death
7 caused by the negligent or wrongful act or omission of any employee of the
Government while acting within the scope of his office or employment, under
circumstances where the United States, if a private person, would be liable to the
claimant in accordance with the law of the place where the act or omission occurred.

8 28 U.S.C. §1346(b) speaks to money damages. The Plaintiffs' action is not in tort. The Plaintiffs
9 are not seeking money damages. Nothing in 28 U.S.C. §1346(b) precludes the Plaintiffs from
10 seeking equitable mandamus type remedies; namely that the Tribe be recognized as a federally
11 recognized tribe and that the BIA not illegally meddle in its affairs.

12 This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361.

13 **B. The Court has jurisdiction to hear Plaintiffs' declaratory judgment action.**

14 Defendants argue that Plaintiffs cannot plead 25 U.S.C. § 476 (f), (g), and (h) as a private
15 cause of action [Docket 16-1, pp. 4-5].

16 Plaintiffs have not pled 25 U.S.C. § 476 (f), (g), and (h) as a private cause of action. Rather,
17 Plaintiffs' pleadings only ask the Court to order the BIA to be law abiding and not to violate 25
18 U.S.C. § 476 (f), (g), and (h). Sec. Am. Compl., Count II (i).

19 Defendants argue that Plaintiffs' claims for declaratory and injunctive relief are not causes
20 of action but requests for specific remedies over which this Court cannot exercise jurisdiction over
21 the United States and federal officials [Docket 16-1, pp. 4-5].

22 This argument is a reconfiguration of and is essentially the same argument that was
23 discussed under the caption: "The Court has jurisdiction over this case." Nothing further needs to
24 be argued that was not previously argued wherein the Plaintiffs argue the Court's jurisdiction
25 pursuant to 28 U.S.C. §§ 1331 and 1361.
26
27
28

1 **C. This matter does not concern an internal tribal leadership dispute.**

2 The Defendants characterize or label the instant matter as an internal tribal leadership so
3 as to deprive the Court of jurisdiction [Docket 16-1, pp. 5-6].

4 The Plaintiffs do not challenge the constituency of the Mock Tribe's membership its
5 government or internal affairs.

6 This case is neither an "intra" nor "inter" tribal matter. Rather, it is a dispute between the
7 BIA and the Tribe over federal recognition.

8 The Historic Ione Band of Miwok Indians has a land base and been continuously federally
9 recognized for 100 years. The Mock Tribe claims to be landless and was restored, although it is
10 unclear when it was restored. The Mock Tribe's members do not meet the Historic Ione Band of
11 Miwok Indians' membership requirements under its Constitution and 1991 Tribal Enrollment
12 Ordinance.

13 The Tribe insists that those who want to become members meet Indian blood genealogical
14 and ancestral thresholds. The Tribe's belief and hope is that Tribal members who meet the Tribes'
15 Indian blood genealogical and ancestral thresholds are more likely than those who do not have
16 such a nexus to the Tribe to have the pride to appreciate, share and preserve the heritage, traditions,
17 customs, language and history specific to the Historic Ione Band of Miwok Indians.

18 In *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1178-81 (E.D. Cal. 2015), the
19 only reason for the Tribe's appearance was to ensure that the Court was aware that the Historic
20 Ione Band of Miwok Indians and the Mock Tribe are distinct and separate entities.

21 Plaintiffs have brought this case not for the purpose of interfering or contesting the
22 constituency of the Mock Tribe or to question its affairs. Rather, all the Historic Ione Band of
23 Miwok Indians seeks is the BIA's recognition of it as a federally recognized tribe that it is.

24 This matter pertains to a dispute between the BIA and the Tribe which is completely
25
26
27
28

1 unrelated to the internal affairs of the Mock Tribe.

2 Thus, the BIA's argument that the Court lacks the jurisdiction to hear this matter because it
3 pertains to a dispute over tribal leadership must be rejected because this lawsuit has nothing to with
4 the Mock Tribe's internal tribal affairs.

5 **D. Tribal sovereign immunity is not at issue in this case.**

6 This argument is a permutation of the Defendants' argument discussed under the caption:
7 "This matter does not concern an internal tribal leadership dispute". No additional argument is
8 required.

9 The internal issues concerning the Mock Tribe's membership and governance, which would
10 deny the Court of jurisdiction, are not the issues raised in this matter.

11 The issue before the Court is that of compelling the BIA to recognize that the Historic Ione
12 Band of Miwok Indians is a federally recognized tribe.

13 **E. The Mock Tribe is a not an indispensable party because this lawsuit does not challenge
14 its federal recognition.**

15 Defendants seek dismissal of Plaintiffs' Sec. Am. Compl for failure to join an indispensable
16 party, the Mock Tribe, under Fed. R. Civ. P. 19 [Docket 16-1, pp. 6-8].

17 Under Rule 19, the Court must first determine whether the Tribe is a necessary party to the
18 lawsuit. The Tribe is a necessary party if, "(1) in [its] absence complete relief cannot be accorded
19 among those already parties, or (2) [it] claims an interest relating to the subject of the action and is
20 so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or
21 impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to
22 a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of
23 the claimed interest." Fed. R. Civ. P. 19(a).

24 While the Mock Tribe may not be deserving of or legally qualify to be a federally
25 recognized tribe; the Plaintiffs are not contesting its federal recognition, its governance or any of
26

1 its internal affairs in this suit. As such, the Mock Tribe is not an indispensable party.

2 However, for the sake of argument, let's assume that the Court concludes that the Mock
3 Tribe is a necessary party under Rule 19(a), but joinder is nonetheless not feasible.

4 The next step in the analysis is for the Court determine whether "in equity and good
5 conscience the action should proceed among the parties before it, or should be dismissed"
6 notwithstanding the absence of the Mock Tribe. [Fed. R. Civ. P. 19(b)].

7
8 In making the indispensability determination, the Court considers the following factors:
9 "first, to what extent a judgment rendered in the Mock Tribe's absence might be prejudicial to it or
10 those already parties; second, the extent to which, by protective provisions in the judgment, by the
11 shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a
12 judgment rendered in the Mock Tribe's absence will be adequate; fourth, whether the plaintiff will
13 have an adequate remedy if the action is dismissed for nonjoinder." Id.

14
15 If the Plaintiffs' case is dismissed for nonjoinder, it has no remedy.

16 Factors one, two and three are rendered moot if the Court were to order the relief sought by
17 the Plaintiffs; namely that the BIA recognize the Historic Ione Band of Miwok Indians as a federally
18 recognized tribe without otherwise disturbing the federal recognition of the Mock Tribe, its
19 government or anything else relative to the Mock Tribe.

20
21 Ordering the Department to acknowledge the existence, validity, and legality the BIA's
22 federal recognition of the Historic Ione Band of Miwok Indians fulfills the Department's legal
23 promises to the Tribe as it has done for over 100 years without impairing or impeding the Mock
24 Tribe's ability to protect its interest. The Mock Tribe will continue to receive the same benefits that
25 it is entitled to receive from the federal government regardless of whether the Historic Ione Band
26 of Miwok Indians is federally recognized or not.

27 The Defendant's argument that Plaintiffs' case be dismissed because the Mock Tribe is an
28

1 indispensable party must be rejected.

2 **F. Plaintiffs' federal recognition claim is not barred because administrative remedies**
3 **have been exhausted.**

4 Defendants argue that Plaintiffs' Sec. Am. Compl. should be dismissed because the
5 Plaintiffs have failed to exhaust their administrative remedies [Docket 16-1, pp. 8-9].

6 The Defendants cite *James v. U. S. Dep't. of Health and Human Servs.*, 824 F.2d 1132,
7 1136 (D.C. Cir. 1987) (citing 25 C.F.R. § 83.2) as authority for its argument that if the Villa faction
8 seeks federal recognition, it must first do so through the 25 C.F.R. § 83.2 administrative process.
9 The Defendants claim that the facts in *James* are similar to those in this case [Docket 16-1, p. 8].

10 The facts in *James* and not at all similar to the facts in the instant case.

11 In *James*, the *James* plaintiff argued that it was not required to exhaust administrative
12 channels because the Tribe had already been recognized by the Executive Branch. The *James* Court
13 opined that pursuant to 25 U.S.C. Secs. 2 and 9 that the purpose of the regulatory scheme was for
14 the Secretary of the Department of the Interior to determine which Indian groups exist as tribes
15 under 25 C.F.R. § 83.2.

16 Unlike *James*, in the instant case, the Department has repeatedly expressed and identified
17 the Historic Ione Band of Miwok Indians as a federally recognized tribe for over 100 years. *See*,
18 discussion at pp. 5-8.

19 As an aside, the Obama Administration apparently recognizes that the Historic Ione Band
20 of Miwok Indians is a federally recognized tribe. The White House has invited Villa to attend the
21 annual White House Tribal Nations Conferences. [See, for example, Kallenbach Decl., Ex. B, Villa
22 Decl., and Exs. C and D, Invitation to 2014 White House Tribal Nations Conference.]

23 The Historic Ione Band of Miwok Indians need not submit to a "re-recognition process"
24 because the Department unilaterally and arbitrarily and without any due process of law decided
25 that it was no longer a federally recognized tribe.

1 The BIA's position is well known and is cemented to its alchemy of changing or
2 identifying the Historic Ione Band of Miwok Indians' sovereign governmental entity with that of
3 the Mock Tribe. In any event, it would be futile for the Tribe to seek an administrative
4 determination from the BIA that it is a tribe separate and distinct from the Mock Tribe.

5 **G. The 1996 election and membership decisions are irrelevant to the instant matter.**

6 Defendants seek dismissal of Plaintiffs' Sec. Am. Compl. because Plaintiffs failed to
7 challenge the 1996 election and tribal membership decisions within 6 years as required by 28 U.S.C.
8 § 2401(a) [Docket 16-1, p. 9].

9 Disputes concerning the Mock Tribe's 1996 election and tribal membership decisions do
10 not pertain to the subject matter of the instant litigation and are not at issue.

11 Again, the issue before the Court is the matter of the federal government's recognition of
12 the Tribe.

13 The Defendants' argument that the Plaintiffs' Sec. Am. Compl. be dismissed because
14 Plaintiffs did not challenge the 1996 election and tribal membership decisions within 6 years as
15 required by 28 U.S.C. must be rejected.

16
17
18
19
20 **CONCLUSION**

21 The Court has jurisdiction to hear this matter. The sovereign immunity defenses that the
22 Defendants argue, whether at the federal or Tribal levels, are not available for lack of facts to
23 support such a defense. The facts of this case do not lead to the infringement upon the sovereignty
24 of either the Mock Tribe or the federal government. The Mock Tribe is not an indispensable party.
25 And even if the Mock Tribe is an indispensable party, a remedy can be fashioned that does not
26 intrude upon or jeopardize its rights or federal recognition. The Tribe is already federally
27
28

1 recognized, it is not required to go through the 25 C.F.R. § 83 process. The 1996 election and
2 membership decisions do not pertain to and are irrelevant to the instant matter. The Defendant's
3 Motion to Dismiss must be denied in its entirety.

4 If necessary, the Tribe should be permitted to amend its Complaint to incorporate 28 U.S.C.
5 § 1361.
6

7 There is no doubt that the Historic Band of Ione Miwok Indians, the tribe that has resided
8 on the Ione Rancheria throughout the ninetieth and twentieth century, the tribe that had 32 members
9 on its rolls on March 24, 1994 when Secretary Deer reaffirmed its recognition and were identified
10 in the BIA's 1995 published recognition list, is distinct from the Mock Tribe which claimed to be
11 a landless restored tribe and boosts some 750 members.

12 It is illegal for the BIA to add members to the Historic Ione Band of Miwok Indians' rolls
13 if the applicant does not meet the Tribe's constitutional requirements.
14

15 It is a travesty that the BIA has broken the promises that it made to the Tribe and to the
16 Native American community as a whole by its wanton reckless disregard of the legal rights of the
17 Tribe and its members. The BIA cannot unilaterally scrap a 100 year relationship that it had and
18 has with the Historic Ione Band of Miwok Indians as a federally recognized tribe.

19 In truth and in fact, the Tribe and Mock Tribe are undisputedly separate and distinct from
20 one another in that their members do not share the same Indian blood, genealogy, ancestry, traits
21 or characteristics associated with tribal attributes, such as custom, language or any other tribal
22 tradition.
23

24 What is disturbing to the Historic Ione Band of Miwok Indians is the BIA's unilateral
25 decision, which was strenuously objected to by the Tribe's lawful government, to create a new tribe
26 usurped the Tribe's federal recognition.
27

28 There is no doubt that the Historic Ione Band of Miwok Indians still exists today as a

1 federally recognized tribe. As a matter of law and comity, the BIA must respect and honor the
2 Tribe's status as a federally recognized tribe.

3 In the final analysis, it may well be that the only legal way for the BIA to form the Mock
4 Tribe is for the Department to acknowledge both the Mock Tribe and the Historic Ione Band of
5 Miwok Indians as individual federally recognized Tribes.
6

7 Respectfully submitted by:

8 Dated: August 26, 2016

/s/Mark J. Kallenbach

Mark J. Kallenbach, Esq.,
Attorney Registration No.: 146468
2260 Ridge Drive, Suite 13
Minneapolis, MN 55416
Telephone: 952-593-3858
Facsimile: 952-406-8881
Email: markkallenbach@comcast.net

/s/Randy E. Thomas.

Randy E. Thomas, Esq.
Attorney Registration No.: 78411
18826 N Lower Sacramento Road
Acampo, CA 95220
Telephone: (209) 369-9255
Facsimile: (209) 369-9288
Email: Woodbridgelaw77@yahoo.com

*Attorneys for Nicolas Villa, Jr. and the
Historic Ione Band of Miwok Indians*