ERIC GRANT
Deputy Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

JUDITH RABINOWITZ
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice
999 18th Street
South Terrace - Suite 370
Denver, CO 80202
Telephone: (303) 844-1349

*Attorneys for Defendants*

**IN THE UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

NO CASINO IN PLYMOUTH, DUEWARD W. CRANFORD II, DR. ELIDA A. MALICK, JON COLBURN, DAVID LOGAN, WILLIAM BRAUN AND CATHERINE COULTER,

Plaintiffs,

v.

NATIONAL INDIAN GAMING COMMISSION, et al.,

Defendants.

CASE NO. 2:18-cv-01398-TLN-CKD

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

DATE: August 6, 2020
TIME: 2 p.m.
COURTROOM: 2, 15th Floor
JUDGE: Honorable Troy L. Nunley

Pursuant to Fed. R. Civ. P. 12(c), the National Indian Gaming Commission ("NIGC"), E. Seqouyah Simermeyer, NIGC Chairman, David Bernhardt, Secretary of the United States Department of the Interior ("Secretary"), Kate MacGregor Deputy Secretary of the United States Department of the Interior, Tara Sweeney Assistant Secretary–Indian Affairs of the United States Department of the Interior,[1] (collectively "Federal Defendants"), respectfully submit this Memorandum in support of their Motion for Judgment on the Pleadings.

**INTRODUCTION**

No Casino in Plymouth and six individuals ("Plaintiffs") once again challenge federal agency action relating to the Ione Band of Miwok Indians' ("Tribe" or "Band"), claiming that the Tribe lacks federal recognition. The Ninth Circuit, however, ruled otherwise in a previous challenge to the same ROD. *See County of Amador v. United States Dep't of Interior* , 872 F.3d 1012, 1028 (9th Cir. 2017), *cert. denied* 139 S. Ct. 64 (2018) ("[T]he Band is a recognized Indian tribe that was 'under Federal jurisdiction' in 1934, and . . . is eligible to have land taken into trust on its behalf under 25 U.S.C. § 5108."). The Ninth Circuit also determined that the Department of Interior did not err in deciding that, once in trust, the Tribe may build a casino complex and conduct gaming on the land consistent with the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§ 2701 *et seq.* *Amador County*, at 1014-1015.

Plaintiffs seek to re-litigate these issues in the context of the NIGC's March 6, 2018 approval of the Tribe's Amended and Restated Tribal Gaming Ordinance ("Gaming Ordinance"), and the Interior Department's May 24, 2012 Record of Decision ("2012 ROD") approving the Tribe's application to have 228.04 acres of fee land (the "Plymouth Parcels") acquired in trust pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. § 5101 et seq. Ignoring *Amador County*, Plaintiffs allege that the Tribe is not a federally recognized tribe and therefore, Interior's 2012 ROD and the NIGC's 2018 decision approving the Tribe's gaming ordinance, are "without authority and void."

[1] Pursuant to Fed. R. Civ. P. 25(d), NIGC Chairman Seqouyah Simermeyer has been substituted for former Chairman Jonodev Chaudhuri, Secretary David Bernhardt for former Secretary Ryan Zinke, Kate MacGregor for former Deputy Secretary David Bernhardt, and Tara Sweeney for former Assistant Secretary–Indian Affairs Michael Black. Amy Dutschke, Bureau of Indian Affairs Pacific Regional Director, is not a proper party to this case as she has been recused from this matter since 2001.

*See* ECF No. 1 (Complaint, at Prayer for Relief). All seven claims (including the Seventh Claim, which has already been dismissed) rest upon a theory contrary to Ninth Circuit precedent. *See, e.g.*, ECF No. 18 at 10 (Pls.' Mem. in Opp. to Fed. Defs.' Mtn. to Dismiss Claim Seven) (stating that California's Constitution prohibits Indian casinos unless operated by "*federally recognized tribes* on Indian lands in California in accordance with federal law" described as the "same federal question" included in the first six claims of the Complaint such that "Plaintiffs make the same argument in all seven claims, namely that the land is not eligible to be taken into trust under the IRA….") (emphasis added). This Court, however, must follow circuit court precedent. *See Mohamed v. Uber Techs., Inc.* 848 F.3d 1201, 1211 (9th Cir. 2016) (stating that "[t]he district court does not have the authority to ignore circuit court precedent").

Thus, for the reasons set forth below Federal Defendants move for judgment on the pleadings.

**BACKGROUND**

No Casino in Plymouth ("NCIP"), together with another citizen group, previously challenged Interior's 2012 ROD. This Court considered that challenge in tandem with Amador County's challenge to the same ROD, and in both cases affirmed Interior's decision making. *NCIP v. Jewell (NCIP)*, 136 F. Supp. 3d 1166, 1171 (E.D. Cal. 2015); *County of Amador v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015). On appeal, the Ninth Circuit affirmed this Court's decision in *Amador County*. In *NCIP*, however, the Ninth Circuit found that neither citizen group had met its burden of demonstrating organizational standing below, and thus vacated this Court's judgment in favor of Federal Defendants and the Tribe with instructions that the case be dismissed for lack of subject matter jurisdiction. *NCIP v. Zinke*, 698 Fed. App'x 531 (9th Cir. 2017).

In *Amador County*, the Ninth Circuit undertook a detailed review of the factual and procedural history behind Interior's 2012 ROD, including careful scrutiny of the Department's analysis underpinning the agency determinations that: (1) the Tribe is a recognized tribe that was "under Federal jurisdiction" in 1934 and thereby eligible to have land acquired into trust pursuant to the IRA; and (2) once in trust, such land (the Plymouth Parcels) would be eligible for gaming

pursuant to IGRA. In so doing the Ninth Circuit considered, and fully answered, the gravamen of Plaintiffs' Complaint– that the Tribe is not a federally recognized tribe.

The Ninth Circuit set forth the Tribe's early history, including its forbears' entry into a treaty with the United States in 1851. That treaty, Treaty J, was intended to ameliorate the displacement of the Bands' predecessors by the influx of non-Native settlers and miners into northern California. Opposition by the California legislature prevented ratification of the Treaty, but by the early 1900's Congress was forced to reckon with the dramatic dislocation of California Indians. To that end, Congress appropriated money and authorized the Interior Secretary to investigate the conditions of California Indians and recommend means for improvement. C.E. Kelsey was tapped by the Secretary for the undertaking. In 1906, he reported on the land loss of northern California Indians due to acts or omissions by the national government. Kelsey recommended a federal land acquisition program to remedy the dispossession, and the Commissioner of Indian Affairs[2] took that proposal to Congress. From 1906 up to the enactment of the IRA in 1934, Congress appropriated money for Kelsey's land acquisition program.

In 1915, Bureau of Indian Affairs Special Agent John Terrell traveled to northern California and reported to the Commissioner that the members of the Ione Band had the strongest claims to their ancient village of all the claims he had investigated. Terrell immediately attempted to purchase a portion of that land, then in private hands, as a permanent homeland for the Band. That attempt and subsequent attempts failed due to title complications. After enactment of the IRA, Commissioner Robert Bruce deemed these prior federal land acquisition efforts conclusive evidence of the Band's federally recognized status. In 1972, Bruce directed that the BIA purchase pursuant to the IRA the 40-acre tract the government had previously attempted to acquire for the Band (with congressional appropriations) in the early part of the century. That instruction met with internal disagreement about the Tribe's eligibility under the IRA, and Commissioner Bruce's directive was not carried out. Ultimately, however, in 1994 Assistant Secretary–Indian Affairs Ada Deer, reaffirmed the Band's

[2] The Assistant Secretary–Indian Affairs is the present analogue to the Commissioner of Indian Affairs.

prior federal recognition, and the Band has appeared on every *Federal Register* list of recognized tribes since 1995. *See Amador County*, 872 F.3d at 1015-1018.[3]

Subsequent to the Supreme Court's denial of Amador County's Petition for a Writ of Certiorari in *Amador County*, on February 14, 2018, the NIGC received the Tribe's request for review and approval of its Gaming Ordinance. The NIGC determined that the Ordinance included all provisions required by IGRA and NIGC regulations and that all NIGC submission requirements had been met. The Gaming Ordinance was not site-specific and therefore did not require the NIGC to undertake an IGRA "Indian lands" analysis. The NIGC Chair therefore approved the Gaming Ordinance on March 6, 2019.

On May 22, 2018, two days before the running of the six-year statute of limitations to challenge Interior's May 2012 ROD, Plaintiffs filed this Complaint challenging NIGC's approval of the Tribe's Gaming Ordinance and re-challenging Interior's 2012 ROD.[4]

## STANDARDS OF REVIEW

### I. The Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action" subject to review under the APA "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §

[3] The Secretary's publication of this list has been required by Congress since 1994. *See* Federally Recognized Indian Tribe List Act of 1994 ("List Act"), 25 U.S.C. §§ 5130-31, 5131(a).

[4] This Court previously considered and rejected many of the claims reprised in the current Complaint. Plaintiffs in the first case challenged Interior's authority to acquire land in trust for the Ione Band on the alleged ground that the Tribe was not a "recognized tribe now under federal jurisdiction" when the IRA was enacted in 1934, and that trust acquisition of land for the Tribe would violate various federalism principles including the Tenth Amendment. *NCIP*, 136 F. Supp. 3d at 1171. Plaintiffs in the earlier litigation also challenged the authority of then Acting Assistant Secretary–Indian Affairs Del Laverdure to approve the Tribe's request that the Plymouth Parcels be acquired in trust, *id.* at 1182, and argued that the *Ione Band of Miwok Indians v. Burris*, (E.D. Cal. No. Civ-S-90-0993, closed Sept. 4, 1996) litigation precluded the Tribe's federal recognition. *Id.* at 1185-87. Given that the *NCIP* decision was vacated, identification of the Court's previous analysis of certain claims is solely for the Court's convenience.

551(13). Section 706 grants a court the power to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency decision making is accorded a presumption of administrative good faith and regularity, which presumption requires a strong showing to overcome. *See United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("[t]he presumption of regularity supports the official acts of public officers, and in absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) ("the agency's decision is 'entitled to a presumption of regularity,' and we may not substitute our judgment for that of the agency") (citing *Citizens to Preserve Overton Park, Inc. v .Volpe*, 401 U.S. 402, 415-16 (1971).

**II. Federal Rule of Civil Procedure 12(h)(3)**

"Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (internal citations omitted); *Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d. 1189, 1197 (9th Cir. 2008); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations and quotations omitted). According to Rule 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

**III. Federal Rule of Civil Procedure 12(c)**

Fed. R. Civ. P. 12(c) provides that, "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Heliotrope Gen. v. Ford Motor Co.*, 189 F.3d 971, 978-79 (9th Cir. 1999) (citation omitted). In such circumstances, the standard for judgment on the pleadings is the

same as that for either a motion to dismiss pursuant to Rule 12(b)(1) challenging subject matter jurisdiction, *id.*, or 12(b)(6) testing the legal sufficiency of the claims asserted in a complaint.

However, the pleading requirements in Rule 8(a)(2) "require[] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Courts need not accept "'naked assertion[s]' devoid of 'further factual enhancement,"' *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557). And "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft, at* 1949. A claim upon which the court can grant relief must have facial plausibility. *Twombly*, 550 U.S. at 570. In resolving a motion to dismiss under Rule 12(b)(6), the scope of review is limited to the allegations in the Complaint, materials referenced in the Complaint, and matters that are subject to judicial notice, including public press releases and filings in prior litigation. *See United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). In addition, a court must grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) when "the running of the statute [of limitations] is apparent on the face of the complaint." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006).

## ARGUMENT

### I. The *Amador County* Decision Disposes of Plaintiffs' Claims

#### A. The Ninth Circuit has confirmed the Tribe's status

Plaintiffs' Complaint depends on the previously litigated, false legal proposition that the Tribe is not a federally recognized tribe entitled to the benefits of the IRA and IGRA.[5] The Ninth

[5] *See, e.g.*, Compl. ¶ 97 (First Claim for Relief); Compl. ¶¶ 109, 117 (Second Claim for Relief); Compl. ¶ 126 (Third Claim for Relief); Compl. ¶ 131 (Fourth Claim for Relief); Compl. ¶ 142 (Fifth Claim for Relief); Compl. ¶ 153 (Sixth Claim for Relief); and Compl. ¶ 161 (Seventh Claim for Relief).

Circuit has already ruled on this issue in considering the very ROD Plaintiffs seek to re-challenge here:

> Interior's determination that the Band was "under Federal jurisdiction" as of 1934 was [ ] not arbitrary or capricious. And the Band is now recognized. Accordingly, *the Band is a recognized Indian tribe* that was "under Federal jurisdiction in 1934, and Interior did not err in concluding that the Band is eligible to have land taken into trust on its behalf under 25 U.S.C. § 5108.

*Amador County*, 872 F.3d at 1028 (emphasis added). Plaintiffs disregard the Ninth Circuit's previous consideration and acceptance of the Tribe's federally recognized status. *Id.* at 1028-29. The Band appeared on the 1995 Federal Register list of recognized tribes. 60 Fed. Reg. 9250-01, 9252 (Feb. 16, 1995).[6] It is this official *Federal Register* list to which federal agencies, including the NIGC, refer in order to verify whether an Indian entity is a federally recognized tribe.

Plaintiffs' claim that the Band is not federally recognized is barred by controlling Ninth Circuit precedent. Thus their assertion that the NIGC lacked authority to approve the Tribe's Gaming Ordinance for an unrecognized "group of Indians," Compl. ¶ 98, lacks facial plausibility. *Twombly*, 550 U.S. at 570. Plaintiffs' claims based on 25 C.F.R. Part 83, the Equal Protection Clause, Federalism and the California Constitution and Penal Code are likewise implausible on their face, as they too wholly depend on the rejected premise that the Band is not a federally recognized tribe. *See* Compl. ¶¶ 131, 142, 153, 161.

**B. The Ninth Circuit has confirmed Laverdure's authority to issue the 2012 ROD**

Relying on the Appointments Clause of the Constitution, U.S. Const. Art. II, § 2, cl. 2, Plaintiffs also seek to reargue the claim that former Acting Assistant Secretary–Indian Affairs Del Laverdure lacked authority to decide that the Plymouth Parcels could be acquired in trust for the Tribe. Plaintiffs contend that only the Secretary, as a "principal officer" selected by the President with the advice and consent of the Senate, can determine to acquire land into trust pursuant to the

[6] The preamble to this 1995 list states that, "[s]ubsequent to the publication of the October 1993 list, Congress enacted two significant pieces of legislation. First, in the Act of May 31, 1994 (P.L. 103-263; 108 Stat. 707), Congress confirmed that the Secretary can make no distinctions among tribes as a general matter of Federal law. Second, in the Act of November 2, 1994 (P.L. 103-454; 108 Stat. 4791), Congress confirmed the Secretary's authority and responsibility to establish a list of Indian tribes and mandated that he publish such a list annually. The following list is published in response to that mandate."

IRA. Compl. ¶ 110-113. Plaintiffs are wrong. The Ninth Circuit has already found that Laverdure was empowered to determine that the Plymouth Parcels be taken into trust. *See Amador County*, 872 F.3d at 1019 n.5.[7] As the Ninth Circuit explained, Laverdure was serving as the Principal Deputy Assistant Secretary of Indian Affairs before Assistant Secretary Larry Echo Hawk's resignation, and was thus "the first assistant to the office" of the Assistant Secretary of Indian Affairs. *Id.* (citing *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam)). Accordingly, Laverdure "assumed the duties of the Assistant Secretary automatically upon Echo Hawk's resignation." *Amador County*, 872 F.3d at 1019 n.5. (citing *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016)). The Ninth Circuit emphasized that those duties included decision making pertaining to the acquisition of land into trust under the IRA, as that duty had been delegated to the Assistant Secretary. *Id.*

**C. The Ninth Circuit has ruled on Plaintiffs' IRA timing-of-recognition claim**

Plaintiffs' claim that "Congress limited the application of the IRA to only those Indian tribes that were federally recognized in 1934," and that "[t]he Ione Indians were not a federally recognized tribe in 1934." Compl. ¶ 122. The Ninth Circuit, interpreting *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), found that a tribe need only have been "under federal jurisdiction" in 1934 in order to qualify to have lands acquired in trust pursuant to the IRA, 5 U.S.C. § 5108, and did not address the need for federal recognition.[8] *Amador County*, 872 F.3d at 1020.

Thus, in the aftermath of *Carcieri*, Interior was left to apply its administrative expertise and authority to interpret both what "under federal recognition" meant in 1934, and whether Congress intended any temporal limitation on a tribe's "recognized" status. Interior interpreted "recognized" in the first IRA definition as requiring only that a tribe be federally recognized at the time of pursuing a trust acquisition request under the Act. *Amador County*, 872 F.3d at 1021. The Ninth

[7] This Court too previously considered and rejected the claim that Laverdure lacked authority to approve the Tribe's proposed trust acquisition. *See NCIP*, 136 F. Supp. 3d at 1182.

[8] Both *Carcieri* and *Amador County* solely addressed the IRA's first definition of "Indian" ("all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction") 25 U.S.C. § 5108.

Circuit reviewed this so called "timing-of-recognition" issue de novo. *Id.* at 1022-24. Upon its own searching inquiry the Ninth Circuit concluded that:

> Given the IRA's text, structure, purpose, historical context, and drafting history—and Interior's administration of the statute over the years—the better reading of § 5129 is that recognition can occur at any time. We therefore hold that a tribe qualifies to have land taken into trust for its benefit under § 5108 if it (1) was "under Federal jurisdiction" as of June 18, 1934, and (2) is "recognized" at the time the decision *is* made to take land into trust.

*Id.* at 1024. Plaintiffs brazenly ignore this controlling Ninth Circuit precedent, which as a matter of law disposes of their timing-of-recognition claim.

Plaintiffs' assertion in their Notice of Additional Authority and Request for Judicial Notice of Sol. Op. M-37055, ECF No. 40, that the March 5, 2020 Solicitor's Opinion means that Interior's 2012 fee-to-trust ROD has been rendered a legal "nullity" is plainly wrong. For this proposition Plaintiffs cite an inapposite decision, *Pac. Gas and Elec. Co. v. United States*, 664 F.2d 1133 (9th Cir. 1981), rather than anything actually expressed in the Opinion itself. Nowhere does the Opinion suggest that decisions made in accordance with the prior Solicitor's Opinion M-37029 (Mar. 12, 2014) are rescinded. Indeed, the March 10, 2020 guidance accompanying the Opinion, "Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act," expresses the opposite intent. *See* https://www.bia.gov/bia/ots/fee-to-trust.[9]

[9] *Pacific Gas* merely sets forth the oft-state proposition that an agency regulation should not conflict with the express language of a statute. That principle has nothing to do with whether a prior agency determination made through a Solicitor's Opinion is somehow rendered a "nullity" merely by the issuance of a new Opinion. The governing principle is instead that an agency position is not deemed to have retroactive effect. In this context, an M-Opinion should be viewed akin to a regulation, which like statutes, are presumed not to have retroactive effect absent explicitly retroactive language. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 263, 264, 272-73, 280, 286 (1994) (describing language necessary to override the presumption against retroactive application in terms of "express commands," "unambiguous directive[s]," "language [which] requires this result," and "clear evidence of congressional intent"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This longstanding principle is fatal to Plaintiffs' reading of the Solicitor's Opinion M-37055. *See also Ass'n of Pac.Fisheries v. Envtl. Prot. Agency*, 615 F.2d 794, 811-12 (9th Cir. 1980) (holding that it is inappropriate "for either party to use post decision information as a new rationalization either for sustaining or attacking the [a]gency's decision").

## II. The Complaint Fails to State Claims for Which Relief Can Be Granted

In addition to being a settled matter of Ninth Circuit precedent, Plaintiffs' challenge to the Tribe's federally recognized status, including through their assertion that the Band's sole path to federal recognition was through 25 C.F.R. Part 83, fails to state a claim for which relief can be granted. The List Act rests on Congressional findings that the United States maintains a government-to-government relationship with recognized Indian tribes and recognizes the sovereignty of those tribes. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(4), 108 Stat. 4791. Those findings also expressly reserve to Congress the exclusive authority to terminate the federally recognized status of listed tribes. *Id*. Congress has not disturbed the Tribe's inclusion on the list for 25 years.

If this were not enough, given the Tribe's inclusion on the *Federal Register* list of recognized tribes since 1995, the running of the applicable six-year statute of limitations, 28 U.S.C. 2401(a), on Plaintiffs' challenge to the Tribe's status, Compl. ¶ 98, is "apparent on the face of the complaint." *Chase Bank*, 465 F.3d at 997. *See, e.g., Camp v. U.S. BLM*, 183 F.3d 1141, 1145 (9th Cir. 1999) ("[P]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance")(citation omitted)); *Shiny Rock Corp. v. United States*, 906 F.2d 1362, 1364–65 (9th Cir. 1990).

The Band's recognized status disposes of Plaintiffs' facially flawed equal protection claim for which relief cannot be granted. Provision of benefits to federally recognized tribes on the basis of their status as tribes does not offend equal protection principles. *See United States v. Antelope*, 430 U.S. 641 (1977) (Legislation with respect to Indian tribes is based on the unique government to government status between tribes and the federal government and such legislation has repeatedly been sustained by this Court against claims of unlawful racial discrimination); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) ("Literally every piece of legislation dealing with Indian tribes and reservations . . . single(s) out for special treatment a constituency of tribal Indians living on or near reservations"); *see also Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1091 (E.D. Cal. 2002), *aff'd sub nom., Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003). The Band's right to avail itself of benefits under the IRA and IGRA does not depend on a racial

classification because it is a federally recognized tribe, and not, as Plaintiffs claim, an unrecognized group of Indians. Compl. ¶ 143.

The Band's federal recognition is likewise fatal to Plaintiffs' "federalism" claim in which they again falsely characterize the Band as an unrecognized group of Indians. Compl. ¶ 150. Because the Band is a federally recognized tribe, Plaintiffs' allegation that Defendants seek to give IRA benefits to "Ione Indians, and to exempt those Ione Indians from application of State and local law," is facially inaccurate, and cannot support the assertion of a "violation of federalism protections afforded to the Plaintiffs." *Id.* Instead, the IRA and IGRA were enacted pursuant to the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3. (Congress shall have power "[t]o regulate Commerce with . . . the Indian tribes"), and the "central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *United States v. Lara*, 541 U.S. 193, 194, 200 (2004) (citations omitted). Plaintiffs themselves concede that the benefits of the IRA and IGRA are available to federally recognized tribes, "including the right to have trust land held in its favor under the IRA and the right to conduct Indian gambling or construct a casino under IGRA." Compl. ¶ 152. *See also Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California*, 163 F. Supp. 3d 769, 778 (E.D. Cal. 2016), (The IGRA "'is intended to expressly preempt the field in the governance of gaming activities on Indian lands,'" (citing S. REP. 100-446, 6, 1988 U.S.C.C.A.N. 3071, 3075–76), and such "preemptive effect is consistent with the plenary power afforded to the federal government over Indian affairs")).

Finally, Plaintiffs' legal conclusions regarding the NIGC, Compl. First Claim for Relief, find no support in IGRA or NIGC's implementing regulations. They need not be accepted as true. The assertion that only the NIGC may determine whether land qualifies as IGRA eligible "Indian lands", Compl. ¶ 97, is also contradicted by the Ninth Circuit's *Amador County* precedent. In affirming Interior's determination that the Plymouth Parcels would qualify as Indian lands under IGRA's restored lands exception, 25 U.S.C. 2719(b)(1)(B)(iii), the Ninth Circuit expressed no concern with Interior, rather than the NIGC, having made the Indian lands determination. *Id.* at 1029-31. Relatedly, the contention that the NIGC has not undertaken an Indian lands determination for the Plymouth Parcels, Compl. ¶ 100, is irrelevant and fails to state a claim for which relief can be

granted. The Tribe's Gaming Ordinance, which is not site-specific, did not require such determination. *See N. Cty. Cmy. All., Inc. v. Salazar*, 573 F.3d 738, 746-47 (9th Cir. 2009). And, assuming arguendo, Plaintiffs' contention that an approved gaming ordinance must be published in the *Federal Register* in order to be effective, Compl. ¶ 104, were correct, which the NIGC does not concede, the Ordinance has been published. *See* Notice of Approved Class III Tribal Gaming Ordinance, 85 Fed. Reg. 12,806-01 (Mar. 4, 2020). Plaintiffs' contention that the Tribe lacks Indian lands eligible for gaming, Compl. ¶ 105, likewise fails to state a claim, as the Plymouth Parcels have been acquired into federal trust.

**CONCLUSION**

For the foregoing reasons, Federal Defendants respectfully request that this Court grant their motion for judgment on the pleadings and dismiss claims one through six of Plaintiffs' Complaint.

Dated: June 25, 2020

Respectfully submitted,

ERIC GRANT
Deputy Assistant Attorney General

By: /s/ Judith Rabinowitz
JUDITH RABINOWITZ
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
Counsel for Federal Defendants