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IN THE UNITED STATES DISTRICT COURT
FOR THE 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; JONODEV CHAUDHURI former NIGC Chairman; DEPARTMENT OF INTERIOR; RYAN ZINKE, Secretary of Interior; DAVID BERNHARDT, Deputy Secretary of the Interior and former Solicitor; DONALD E. LAVERDURE former DOI employee; and AMY DUTSCHKE, BIA Pacific Regional Director and member of the Ione Band,

Defendants.

Case No. 2:18-cv-01398 MCE-CKD

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Date: August 6, 2020
Place: Courtroom 2, 15th Floor
Time: 2:00 p.m.
Judge: Hon. Troy L. Nunley

Plaintiffs, No Casino In Plymouth (NCIP), Dueward W. Cranford II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun and Catherine Coulter submit this memorandum in opposition to the Motion for Judgement on the Pleadings (Court Docket (CD) 41 & 41-1) which filed of some, but not all, of the named Federal Defendants.[1]

INTRODUCTION

Despite its label, Defendants' motion is not primarily based on pleadings in this lawsuit. Instead it is based, almost entirely, on the Ninth Circuit decision in *Amador v. DOI,* 872 F.3d 1012 (9th Cir. 2017) which involved different pleadings filed by different parties and adjudicated different issues. Neither NCIP, nor any of the individual Plaintiffs, were parties in *Amador v. DOI.* Also not all the Defendants named in this case were named defendants in *Amador v. DOI.*

Defendants claim that Plaintiffs are seeking to "re-litigate" issues that were decided against them in *Amador v. DOI.* That is a misrepresentation. Plaintiffs in this case were not parties to *Amador v. DOI* and were not involved in litigating the issues in that case. Thus Plaintiffs could not be "re-litigating" *Amador v. DOI* here.

[1] , The motion was filed on behalf of the following five Federal Defendants: (1) the National Indian Gaming Commission (NIGC); (2) E. Seqouyah Simermeyer, NIGC Chairman; (3) David Bernhardt, Secretary of Interior; (4) Kate MacGregor, Deputy Secretary of Interior; and (5) Tara Sweeny, Assistant Secretary of Interior.

Although named as a separate Defendant, the Department of Interior (DOI) itself did not join the motion. Also, although Defendants Jonodev Chaudhuri, Donald E. Laverdure, and Amy Dutschke were named and served in both their official and personal capacities, they but did not join the motion in either capacity.

The only plaintiff in *Amador v. DOI* was the County of Amador. And, unlike Plaintiffs here, the County did not name NIGC or challenge its claimed jurisdiction to allow Indian gaming on privately owned parcels. Unlike Plaintiffs here, the County did not challenge Defendant Laverdure's authority to take land into trust for the Ione Band. And, unlike Plaintiffs here, the County did not assert that the Ione Band must first obtain federal recognition under 25 CFR Part 83 before it can receive a trust transfer under the Indian Reorganization Act (IRA; 25 U.S.C. §§ 461 *et seq.* (1934).) or an Indian casino under the Indian Gaming Regulatory Act (IGRA; 25 U.S.C. §§ 2701 *et seq.*). None of these issues were litigated or necessary to the Ninth Circuit's decision in *Amador v. DOI.* Instead, these issues are being litigated by the Plaintiffs in this case.

Finally it should be noted that Defendants try to create the false impression that *Amador v. DOI* is the Ninth Circuit decision that resulted from the appeal this Court's 2015 decision in *NCIP/CERA v. Jewell*. But, as this Court knows, that is not correct. NCIP's and CERA's lawsuit was dismissed, in a separate Ninth Circuit decision, for lack of subject matter jurisdiction. *NCIP/CERA v. Jewell,* 698 Fed. Appx. 531 (9th Cir. 2017). Thus this Court's 2015 decision in that earlier case, and all the rulings in that case, were vacated and are "nullities." *Orff v. U.S.,* 358 F.3d 1137, 1149 (9th Cir. 2004). They no longer exist in a legal sense. It was not appropriate for Defendants to cite *NCIP/CERA v. Jewell,* a nullity, in their motion. Plaintiffs object and request that the Court disregard and strike those references.

STATEMENT OF THE CASE

A. Plaintiffs' Complaint.

Plaintiffs filed their Complaint for Declaratory and Injunctive Relief in this case on May 22, 2018. (CD 1) Plaintiffs' initial complaint included seven causes of action. But, on March 10, 2020, Claim Seven was dismissed by the Court without prejudice. (CD 38). The six remaining claims include:

(1) Violation of the Indian Gaming Regulatory Act. (CD 1 ¶¶ 96-108).

In Claim One, Plaintiffs request that the Court vacate Defendants' March 6, 2018 approval of a gaming ordinance for the Ione Band. Defendants NIGC and Chaudhuri had no jurisdiction to issue a gaming ordinance for a group of Indians with no Indian land eligible for gaming as defined by IGRA and which has not been federally recognized pursuant to 25 CFR Part 83.

(2) Violation of the Constitution's Appointments Clause. (CD 1 ¶¶ 109-120).

In Claim Two, Plaintiffs request that the Court vacate of the Record of Decision (ROD) issued by Defendant Laverdure, a former DOI employee, on May 24, 2012 which purports to take 12 parcels of privately owned fee land into trust for the Ione Band. Laverdure, was not the Secretary of Interior and lacked the authority to take land into trust under the IRA. His purported approval of the ROD violates the Appointments Clause of the Constitution.

(3) Violation of the Indian Reorganization Act. (CD 1 ¶¶ 121-129).

In Claim Three Plaintiffs request a declaration that the ROD is contrary to

IRA and the United States Supreme Court decision in *Carcieri v. Salazar* 555 U.S. 379 (2009) because the Ione Band was not a federally recognized tribe in 1934 and has not been federally recognized pursuant to 25 CFR Part 83. Plaintiffs seek an injunction to prevent the implementation of the ROD.

(4) Violation of 25 CFR Part 83. (CD 1 ¶¶ 130-138).

In Claim Four, Plaintiffs also seek declaratory relief that, because the Ione Band is not federally recognized under 25 C.F.R. Part 83, it is not entitled to trust benefits under IRA or a casino under IGRA. Plaintiffs seek an injunction to prevent the Ione Band from receiving the benefits allowed only to Part 83 federally recognized tribes under IRA and IGRA.

(5) Violation of Equal Protection. (CD 1 ¶¶ 139-147).

In Claim Five, Plaintiffs seek declaratory and injunctive relief against Defendants, and each of them, because by approving and allowing a fee-to-trust transfer for a casino for a group of Indians that has not been recognized pursuant to 25 CFR Part 83, they violated the Equal Protection Clause which prohibits discrimination in favor of any group based on race.

(6) Violation of Constitutional Federalism. (CD 1 ¶¶ 148-155)

In Claim Six, Plaintiffs seek declaratory and injunctive relief against Defendants, and each of them, because their actions and self-dealing, violated Plaintiffs' Constitutional right to protection from abusive government under the principles of Federalism. The abuse was committed by

the individual Defendants who ignored the law to give IRA and IGRA benefits to the Ione Band which has not obtained Part 83 recognition.

B. Federal Defendants' Answer

Federal Defendants filed their Answer to Plaintiffs' Complaint on August 20, 2018 (CD 17).[2] In their Answer, Defendants make the following key admissions:

1. The 2012 approval of the ROD by Defendant Laverdure is a final agency action reviewable under the APA. (CD 17 ¶ 9).
2. The 2018 approval of the Ione Band gaming ordinance by Defendant Chaudhuri is a final agency action reviewable under the APA. (CD 17 ¶ 10).
3. Defendant Dutschke is both the BIA Pacific Regional Director and an enrolled member of the Ione Band. (CD 17 ¶ 30).
4. Defendant Laverdure was not the Secretary of Interior in 2012 when he issued the ROD (CD 17 ¶ 30).
5. The Ione Band has not sought or obtained federal recognition pursuant to 25 CFR Part 83. (CD 17 ¶ 43).
6. Defendant NIGC has not issued an Indian Lands Opinion that the subject property is Indian land eligible for gaming under IGRA (CD 17 ¶ 68).
7. Defendant Chaudhuri, as Chairman of the NIGC, transmitted the approved Gaming Ordinance to the Ione Band (CD 17 ¶ 91).

[2] In contrast to Defendants' motion for judgment on the pleadings, Federal Defendants' Answer was filed on behalf of <u>all</u> the named Defendants.

8. The Property that is the subject of the ROD has not been acquired in trust for the Ione Band (CD 17 ¶ 94).
9. Statutory benefits under the IRA and the IGRA are available to "only to federally recognized tribes." (CD 17 ¶ 144).

STANDARDS OF REVIEW

A. Federal Rule of Civil Procedure 12(c).

Federal Rule of Civil Procedure 12(c) permits a party to seek judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." "Analysis under Rule 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. BLM*, 793 F.3d 1147, 1155 (9th Cir.2015). A motion for judgment on the pleadings in favor of a defendant is only appropriate when, even if all the allegations in the complaint are taken as true, the defendant is entitled to judgment as a matter of law. *Westlands v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir.1993).

B. Administrative Procedures Act.

"Final agency decisions" are subject to review under the Administrative Procedures Act (APA; 5 U.S.C. §§ 701-706). Under the APA, a court will set aside an agency action if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) contrary to a constitutional right, power, privilege or immunity, (3) in excess of statutory jurisdiction, authority or

limitations, (4) without observance of procedures required by law, (5) unsupported by substantial evidence or (6) unwarranted by the facts. 5 U.S.C. § 706(2).

C. Equal Protection.

"[A]ll racial classifications imposed by whatever federal, state or local actor, must be analyzed by a reviewing under strict scrutiny." *Adarand Const. Inc. v. Pena,* 515 U.S. 200, 227 (1995). "[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* The strict scrutiny standard applies to any "racial group consisting of Indians," which has not been federally recognized pursuant to Part 83. *Morton v. Mancari,* 417 U.S. 535, 543 n. 24 (1974). It violates Equal Protection to give Indians, who do not have Part 83 federal recognition, IRA and IGRA benefits.

D. Other Constitutional Issues.

Plaintiffs raise two other Constitutional claims for violations of Federalism and the Appointments Clause. The appropriate standard of review when determining Constitutional issues is *de novo* and not the "less demanding" abuse-of-discretion standard. *Cooper Ind. v. Leatherman Tool,* 532 U.S. 424, 431 (2001).

ARGUMENT

A. Plaintiffs challenge to the 2018 approval of the gaming ordinance by Defendants NIGC and Chaudhuri was not in issue in *Amador v. DOI.*

Plaintiffs first challenge the Defendants' Chaudhuri's and NIGC's jurisdiction to approve the Ione Band gaming ordinance in 2018 – a year after

Amador v. DOI was decided. Furthermore Defendants NIGC and Chaudhuri were not defendants in *Amador v. DOI.* Plaintiffs' challenge to the approval of the gaming ordinance is obviously not governed by *Amador v. DOI*

Plaintiffs allege Defendants Chaudhuri and NIGC had no authority to approve a gaming ordinance for a group of Ione Indians which is not recognized pursuant to 25 CFR Part 83 and which has no Indian land eligible for gaming under IGRA. (CD 1, §§ 24-25). As alleged in Plaintiffs' Complaint, if the underlying lands are not Indian land eligible for gaming under IGRA, then the NIGC and Chaudhuri have absolutely no jurisdiction or authority to approve the Ione Band gaming ordinance. (CD 1 ¶¶ 91-93 & 96-108.) This jurisdictional axiom was affirmed by the United States Supreme Court in *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014).This undeniable jurisdictional rule makes it all the more surprising that the Defendants' claim that Chaudhuri could approve the Ione Band gaming ordinance despite the fact that they also admit that the Ione Band does not have Indian land eligible for gaming. (CD 17 ¶ 92.)

Defendants contend that the Ione Band need not own Indian land, as defined in IGRA, before the NIGC can issue a non-site-specific gaming ordinance. This is not correct and is contrary to the Supreme Court's *Bay Mills* decision that NIGC's jurisdiction is dependent on the existence of Indian land eligible for gaming under IGRA. In *Bay Mills* the Supreme Court held that the NIGC lacked jurisdiction to enforce a compact with respect to an Indian casino built on non-Indian land.

Defendants' reliance on the *North County Community Alliance* case is misplaced because it involved a proposal for a second casino at a yet-to-be determined location. The tribe already had one casino on Indian land. Therefore, the NIGC already had jurisdiction. *North County Community Alliance v. Salazar,* 573 F.3d738 (9th Cir. 2009). The NIGC does not have jurisdiction to approve a non-site-specific gaming ordinance for an unrecognized group of Indians, like the Ione Band, that has no Indian land eligible for gaming under IGRA. The NIGC's approval of the gaming ordinance for the Ione Band was void *ab initio.*

B. The Ninth Circuit's footnote 5 in *Amador v. DOI* regarding Defendant Laverdure's authority is dictum and did not decide the issue

A major focus of this lawsuit is to challenge the illicit actions of Defendant Laverdure in approving the underlying fee-to-trust transfer in violation of the IRA and the Appointments Clause of the Constitution. (CD 1 ¶¶ 6, 15, 82-90 and 109-120.) "By issuing the ROD Laverdure tried to usurp the authority that Congress gave exclusively to" the Secretary of Interior." (CD 1 § 85.) And in their Answer, Defendants admit – albeit obliquely - that Defendant Laverdure is not the Secretary of Interior. (CD 17 ¶ 30; "Federal Defendants admit the allegations in the fifth sentence of Paragraph 30" of the complaint.)

Furthermore, Defendant Laverdure failed to follow the majority opinion in *Carcieri v. Salazar,* 555 U.S. 379 (2009). (CD 1, ¶ 89.) Instead, he relied on a misinterpretation of *Carcieri,* included in the Cowlitz ROD, which was withdrawn

by the Solicitor. (See CD 40 incorporated here by this reference) Defendant Laverdure also relied on a 2006 Associate Solicitor opinion that was withdrawn by the Solicitor, Defendant Bernhardt, in 2009. (CD 1, ¶ 90.) In summary, Laverdure "intentionally ignored and evaded the rules and the laws, including the mandates and requirements of the IRA and IGRA, to give benefits and preferences to an unrecognized group of Ione Indians with no Indian land." (CD 1, ¶ 6.)

Although Laverdure was named as a defendant in *Amador v. DOI,* the County did not challenge his authority to take land into trust for the Ione Band. Consequently any discussion of these issues in *Amador v. DOI* is, at best, mere dictum and, contrary to Defendants' assertion, it cannot be precedential. A statement is dictum when it is "made during the course of delivering a judicial opinion, but . . . is unnecessary to the decision in the case and [is] therefore not precedential." *Best Life Assur. Co. v. Comm'r,* 281 F.3d 828,834 (9th Cir. 2002)). See also *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("Rhetorical flourishes" are dictum and not binding statements of the law.) *v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("Rhetorical flourishes" are dictum and not binding statements of the law.)

Despite these facts, Defendants claim that Laverdure's authority to take land into trust for the Ione Band was confirm by the Ninth Circuit in footnote 5 of the *Amador v. DOI* decision, which provides:

> Laverdure was serving as the Principal Deputy Assistant Secretary of Indian Affairs before Assistant Secretary Larry Echo Hawk's resignation. Laverdure was thus "the first assistant to the office" of the Assistant Secretary of Indian Affairs. *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. *Hooks v. Kitsap Tenant Support Servs. Inc.*, 816 F.3d 550, 557 (9th Cir. 2016). Those duties included taking land into trust under the IRA, a duty that had been delegated to the Assistant Secretary. Accordingly, Laverdure was empowered to take the Plymouth Parcels into trust.

Amador v. U.S. Dep't of the Interior, 872 F.3d 1012, 1019 n. 5 (9th Cir. 2017)

The first three sentences of this footnote are supported with case citations connected to the Federal Vacancies Reform Act of 1998. (5 U.S.C. §§ 3345 et seq. (FVRA).) But the last two sentences, not supported by citations, are wrong as a matter of law. Specifically they state that the duty to take land into trust had been delegated to the Assistant Secretary and, supposedly, those duties "automatically" transferred to Defendant Laverdure when Assistant Secretary Echohawk resigned. But FVRA applies only to "exclusive" functions or duties. *Crawford-Hall v. United States,* 394 F. Supp. 1122, 1133 (C.D. Cal 2019.) Thus even if it is assumed that the duty to take land into trust had been delegated to the Assistant Secretary, that authority was not "exclusive" to the Assistant Secretary. The Secretary, who was still in office in 2012, retained the "exclusive" duty to take land into trust.

C. Federal recognition pursuant 25 CFR Part 83 is required before the Ione Band could be eligible to seek or receive IRA and IGRA benefits.

The Ninth Circuit recently stressed the importance of Part 83 federal recognition as a prerequisite for any tribe to receive trust land or operate a casino:

> "For many tribes, federal recognition is of great importance because '[s]uch status is a prerequisite to the protection, services and benefits of the Federal government available to Indian tribes by virtue of their statues as tribes.'. . . (quoting 25 C.F.R. § 83.2 (1994)) . . . Moreover, only federally recognized tribes may operate gambling facilities under [IGRA]."

Timbisha Shoshone v. DOI, 824 F.3d 807, 809 (9th Cir. 2016) (emphasis added.)

The Supreme Court has held and confirmed that federal recognition under 25 CFR Part 83 is required before an Indian tribe may seek "the protection, services and benefits of the Federal government." *Carcieri v. Salazar* 555 U.S. 379, 385 (2009). Recognition under Part 83 is also a pre-requisite for a tribe to be entitled "to immunities and privileges to other federally acknowledged tribes by virtue of their government-to-government relationship with the United States." *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273-1274 (9th Cir. 2004) (quoting 25 CFR § 83.2).

The federal benefits that a Part 83 recognized tribe may claim include "the right to operate gaming facilities under the Indian Gaming Regulatory Act." *California Valley Miwok v. United States,* 515 F.3d 1262, 1264 (DC Cir. 2008). IGRA "has no application to tribes that do not seek and attain formal federal recognition." *Passamaquoddy Tribe v. State of Maine,* 75 F.3d 784, 792 n.4 (1st Cir. 1996) See also 25 USC § 2703(4). Thus, unless and until it seeks and obtains federal recognition under 25 CFR Part 83, the Ione Band does not have the authority under IGRA to own or operate the casino.

Also, to receive IRA benefits, a tribe must first obtain Part 83 recognition. *Mackinac Tribe v. Jewell,* 829 F.3d 754 (D.C. Cir. 2016). In *Mackinac*, a tribe

without Part 83 recognition, sued the Secretary of Interior for the right to organize under the IRA. The D.C. Circuit held the Mackinac tribe must first obtain Part 83 recognition before they can obtain the benefits of the IRA. See also *Muwekma Ohlone v. Salazar,* 708 F.3d 209, 211-212 (D.C. Cir. 2013) and *James v. US Dept. of HHS,* 824 F.2d 1132, 1136-138 (D.C. Cir. 1987). Thus, without Part 83 recognition, the Ione Band is not eligible for trust land under the IRA or a casino under IGRA.

D. The inclusion of the Ione Band the BIA list of Indian entities entitled to receive services from the BIA did not make it a Part 83 tribe.

As outlined above, Defendants candidly admit in their Answer (CD 17) that the Ione Band has not been federally recognized pursuant to 25 CFR Part 83. Instead Defendants claim that the Ione Band need not obtain Part 83 federal recognition as prerequisite to receiving IRA and IGRA benefits, because the BIA included them on their administrative list of "Indian Entities" eligible to receive service from the BIA. Defendants claim that all the Indian Entities on the BIA list are federally recognized tribe regardless of whether they obtained federal recognition pursuant to 25 CFR Part 83. This is not correct for several reasons.

First, the BIA list itself does not claim to be a list of federally recognized tribes. The title of the BIA list, which Defendants did not reveal, is: "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." The BIA list is not a list of federally recognized tribes.

Second, the BIA list of Indian entities entitled to receive BIA services is not

meant to be an exclusive list of federally recognized tribes. Although all federally recognized tribes are entitled to services from the BIA and should be on the BIA list, all Indian entities on the BIA list are not federally recognized tribes.

Third, the BIA list and its criteria change every year and, by their terms, they are not meant to be a list of only federally recognized tribes. For example, in the 1995 BIA list referenced by Defendants, the BIA states that it included Alaska Native Claims Settlement Act (ANCSA) corporations despite the fact that they "are formally state-chartered corporations rather than tribes in the conventional, legal or political sense." In other words, although they are not federally recognized tribes, ANCSA corporations were included on the 1995 BIA list. Likewise the inclusion of the Ione Band on the 1995 BIA list did not make it a federally recognized tribe.

E. The 1994 Federally Recognized Indian Tribe List Act limited administrative recognition to 25 CFR Part 83.

The Defendants claim that BIA list process, which was initiated by the BIA in 1979, is intended to implement the mandates of the Tribe List Act enacted in 1994 – enacted 15 years after the BIA began publishing its annual list of Indian entities eligible to receive services from the BIA. That is not correct. In fact just the opposite is true. The 1994 Tribe List Act was enacted, in part, to correct the abuses caused by misuse of the BIA list including efforts by officials in the BIA to use its list to confer recognition on tribes or Indian groups outside the Part 83 process.

To be recognized under Part 83, a group of Indians "must satisfy" seven criteria

by submitting "thorough explanations and supporting documentation." *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d at 211-212 (listing the seven criteria in 25 CFR § 83.6). It can be a long and difficult process and success is not certain. So, to avoid this difficult process, some "tribes" try to end-run the Part 83 process by being put on the BIA list and then claiming that is sufficient to be a federally recognized tribe.

Congress tried to curtail the BIA's overreach by enacting the "Federally Recognized Indian Tribe List Act of 1994" which is also known as the "Withdrawal of Acknowledgement or Recognition Act." (Pub. Law 103-454; 108 Stat. 4791). Congress determined that tribes can only be recognized "by Act of Congress, by the administrative procedures as set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,' or by a decision of a United States court. (Id. Sec. 103(3).) The Secretary of Interior is required to keep, and publish annually, the list of federally recognized tribes and insure it is accurate. (Id. Sec. 103(6)(7).)

Despite this Congressional mandate, the DOI did not create a new list using the Act's three criteria for federal recognition. Instead, the DOI used the old BIA list without first purging the tribal entities included on the list that do not meet one of the three criteria. Until the BIA list is updated in accordance with the Tribal List Act, it remains a less than a reliable source, or at least not conclusive evidence for, determining whether or not a listed entity is a federally recognized tribe or not.

The continued inconclusive nature of the list is reflected in the Ninth Circuit

cases that have addressed the issue. The Ninth Circuit has confirmed that inclusion on the BIA list, although relevant, is not conclusive evidence of federal recognition. See *LaPier v. McCormick,* 986 F.2d 303, 305 (9th Cir. 1993) ("Absent evidence of its incompleteness, the BIA appears to be the best source to identify federally acknowledged Indian tribes"; emphasis added); and *United States v. Zepeda,* 792 F.3d 1103, 1114 (9th Cir. 2015)("If necessary to decide whether the BIA list omits a federally recognized tribe or includes an unrecognized tribe, the court may consult other evidence that is judicially noticeable or otherwise appropriate for consideration."; emphasis added.).

The Ione Band does not meet any of the three criteria in the 1994 Tribe List Act. It has not been recognized by Congress. It is not a Part 83 federally recognized tribe. And, as summarized below, there is a 1992 decision confirmed by a 1996 judgment in this Court that the Ione Band is not a Part 83 federally recognized tribe.

F. In 1996, this Court rejected Defendants' claim that the Ione Band was or could be recognized outside the Part 83 process.

On August 1, 1990, the Ione Band sued the DOI seeking a declaration that it was a federally recognized tribe. *Ione Band et al. v. Department of Interior et al.* (ED Cal. No. CIV-S-90-0993)(*Ione Band v. DOI*). The DOI responded by arguing that Ione Indians were not a federally recognized tribe because they failed to petition for federal recognition under 25 CFR Part 83. The DOI argued that Part 83 was the only administrative way for a tribe to obtain federal recognition. The Ione

Band replied by arguing that they were recognized "outside" the Part 83 process.

The DOI prevailed. On April 2, 1992 this Court in in *Ione Band v. DOI* ruled in favor of the DOI. After summarizing all the alternative recognition mechanisms proposed by the Ione Band, Judge Karlton of this Court held that:

> "Plaintiffs' [Ione Band's] argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that 'the Secretary may acknowledge tribal entities outside the regulatory process,' . . . and that the court, therefore, should accept jurisdiction over plaintiff' claims compelling such recognition. **I cannot agree.** Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA [Part 83] acknowledgement process, the United States motion for summary judgment on these claims must be GRANTED." (Emphasis added.)

A final judgment was entered in *Ione Band v. DOI* in September 1996 confirming the 1992 Order that the Ione Indians was not a Part 83 federally recognized tribe and that they had failed to exhaust their administrative remedies under Part 83. This 1996 final judgement was not appealed by the DOI or the Ione Band and it is binding on the Defendants here.

G. The Ione Band's lack of Part 83 federal recognition was not raised by the County or decided by the Ninth Circuit in *Amador v. DOI*

Defendants claim that the Ninth Circuit rejected Plaintiff's claim that the Ione Band is not a federally recognized tribe in *Amador v. DOI.* That is not correct.

The County of Amador conceded in that case that the Ione Band was a federally recognized tribe and did not raise the fact that the Ione Band had failed to obtain recognition under 25 CFR Part 83. In fact, in their 2012 Complaint, Amador

County admits that: "Since 1995, the [Ione] Band has been included on all subsequent BIA lists of federally-recognized tribes." The Ione Band's recognition status and Part 83 compliance were simply not contested by the County in that case.

As a consequence, the Ninth Circuit was not required to decide, and did not decide, the federal recognition and Part 83 issues. On the other hand, the Court made the following comment apparently taken from the County's complaint:

> Following the promulgation of the Part 83 regulations, Interior began to take the position that the Band had not yet been recognized by the federal government and that it had to proceed through the Part 83 regulations if it wished to be recognized. When the Band sued the federal government in 1990, for instance, the government took the position that the Band was *not* a recognized tribe.
>
> But in 1994, the federal government changed its mind about the Band's "recognized" status. . . . Assistant Secretary Deer further ordered that the Ione Band be included on the official list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," which was published in the Federal Register. The Band was included on the list beginning in 1995.

Amador v. DOI, 872 F.3d 1012, 1018 (9th Cir. 2017).

The Ninth Circuit's reference to the Ione Band's 1990 lawsuit is obviously a reference to the *Ione Band v. DOI* case discussed above. But the Court did not cite or discuss the *Ione Band v. DOI* case because, unlike the Plaintiffs in this case, the County did not argue that Judge Karlton's decisions were binding on the DOI or Ione Band. Also apparently the Court was not made aware of the fact that Ada Deer had sent a letter to Judge Nowinski in 1994 unilaterally proclaiming, without any substantiation, that the Ione Band is a federally recognized tribe. If Ada Deer's goal

was to convince Judge Karlton to change his decision, it did not work. Judge Karlton's decision that the Ione Band was not a recognized was confirmed by a final judgement in 1996. Ada Deer and the DOI did not appeal that judgment.

The bottom-line is that the Defendants' claim that the Ione Band is a federally recognized tribe, and is entitled to recognition "outside" the Part 83 process, were not challenged in *Amador v. DOI.* The Ninth Circuit's discussion about these issues was not necessary to their decision and is, at most, non-binding dictum. *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)

CONCLUSION

For the forgoing reasons, Plaintiffs request that the Court deny Defendants motion for judgment on the pleadings and enter judgment for the Plaintiffs.

Dated: July 23, 2020

Respectfully submitted,

s/ *Kenneth R. Williams*

KENNETH R. WILLIAMS
Attorney for Plaintiffs