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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 COMMISSIONER, et al., Defendants.	CASE NO. 2:18-CV-01398-TLN-CKD **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING IONE BAND OF MIWOK INDIANS' MOTION TO INTERVENE** **[Fed. R. Civ. P. 24]** DATE: January 27, 2022 TIME: 2:00 PM COURTROOM: 2, 15th Floor JUDGE: Honorable Troy L. Nunley

INTRODUCTION

The Ione Band of Miwok Indians ("Tribe") moves to intervene pursuant to Fed. R. Civ. P. 24 for the sole and limited purpose of filing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(7) to establish that this action cannot proceed in the Tribe's absence pursuant to Fed. R. Civ. P. 19.

STATEMENT OF FACTS

The Tribe is a federally recognized Indian tribe, eligible for the federal programs and benefits set forth in the Indian Reorganization Act, ("IRA"), 25 U.S.C. §§ 5101 *et seq.*, Indian

Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, and other federal law. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 5463 (Jan. 29, 2021).

Pursuant to its rights as a federally recognized Indian tribe, in 2005 the Tribe petitioned the Department of the Interior to acquire certain trust land ("the Property") on its behalf for the purpose of developing a gaming-resort complex. On May 24, 2012, Acting Assistant Secretary of Indian Affairs Donald Laverdure, upon properly delegated authority from the Secretary, issued a decision to approve the trust acquisition pursuant to the IRA ("2012 ROD"). The 2012 ROD further determined that, once in trust, these parcels would qualify as "Indian lands" for purposes of IGRA. Due to delays caused by litigation filed by plaintiffs in this case and others, the 2012 ROD was not fully effectuated by agency staff until March 20, 2020. At that time, the Pacific Region Office of the Bureau of Indian Affairs ("BIA") transferred trust title to 10 of the 12 parcels governed by the 2012 ROD by executing the acceptance of conveyance for the grant of real property described in each grant deed from IMG Plymouth Land Holdings, LLC, to the United States of America in trust for the Tribe.

Apart from the BIA land-in-trust process, but as a necessary pre-requisite to conduct future gaming on the Tribe's gaming eligible trust parcels, the Tribe submitted an Amended and Restated Tribal Gaming Ordinance ("Gaming Ordinance") to the National Indian Gaming Commission ("NIGC") for its approval. The Gaming Ordinance is not specific to any particular site. On March 6, 2018, the NIGC issued a decision to approve the Tribe's Gaming Ordinance.

On May 22, 2018, No Casino in Plymouth and several of its members (collectively, "NCIP") filed the complaint in this action, requesting vacature of both the NIGC's 2018 approval of the Tribe's Gaming Ordinance and the Department of the Interior's 2012 approval of the trust acquisition, as well as more broadly, and ambiguously, requesting vacature of "all decisions by

Defendants which allow Indian gambling or the proposed casino under the IRA or IGRA." Dkt. No. 1 Prayer for Relief. NCIP originally brought seven claims for relief but on March 10, 2020; this Court dismissed Claim Seven as not ripe. Dkt. No. 38. NCIP's remaining claims for relief allege the following:

1. The NIGC lacked authority under IGRA to approve the Gaming Ordinance because the Tribe is not recognized and the Property is not Indian land. *Id*. ¶¶ 96-108.
2. Assistant Secretary Laverdure was not authorized under the Appointments Clause of the Constitution to issue the 2012 ROD. *Id*. ¶¶ 109-120.
3. The 2012 ROD violated the IRA because the Tribe was not a federally recognized tribe in 1934. *Id*. ¶¶ 121-129.
4. The Tribe is not entitled to benefits under the IRA and IGRA because it was not recognized pursuant to 25 CFR Part 83. *Id*. ¶¶ 130-138.
5. Defendants' approval of the ROD and Gaming Ordinance violated the Equal Protection Clause of the Constitution because it was based on the Tribe's racial classification as opposed to its political status as a federally recognized Tribe. *Id*. ¶¶ 139-147.
6. Defendants violated principles of federalism by recognizing the Tribe as a tribe. ¶¶ 148-154.

NCIP requests relief declaring that (i) NIGC's approval of the Gaming Ordinance violates IGRA because the Tribe is not federally recognized and does not have gaming eligible Indian lands, (ii) Department of Interior officials lacked authority to take land into trust for the Tribe under the IRA, IGRA, or any other provision of law because the Tribe was comprised of "non-ward Indians" and not federally recognized in 1934, (iii) none of the 12 parcels referenced

in the 2012 ROD are gaming-eligible lands, (iv) the Tribe is not a federally recognized Indian tribe under 25 C.F.R. Part 83 and therefore not entitled to apply or receive the benefits of the IRA or IGRA, and (v) Indian gambling and the proposed casino on the Property would violate California's Constitution and public nuisance laws. This Court is presently considering federal defendants' motion for judgment on the pleadings, filed more than a year ago, on August 6, 2020.

ARGUMENT

I. Limited intervention is appropriate.

Federal courts may grant a motion to intervene for the limited purpose of moving to dismiss a complaint under Rules 19 and 12(b)(7). *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377, (1987) (upholding district court's grant of limited intervention); Fed. R. Civ. P. 24, advisory committee's note, 1966 amendments ("Intervention of right ... may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.")); *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 850 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 161 (2020) (recognizing district court granted tribe's motion to intervene for limited purpose of filing motion to dismiss under Rules 19 and 12(b)(7)); *Backcountry Against Dumps v. United States Bureau of Indian Affs.*, No. 20-CV-2343 JLS (DEB), 2021 WL 3611049, at *2 (S.D. Cal. Aug. 6, 2021) (same). Because the Tribe moves for the sole and limited purpose of moving to dismiss the complaint in this action, limited intervention is appropriate.

II. Legal Standard

Rule 24 provides for intervention as of right to anyone who, by timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to

protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

Courts construe this rule "liberally in favor of potential intervenors" and their review is "'guided primarily by practical considerations,' not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quoting *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir.1986), *vacated on other grounds sub nom. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987)). Courts are to apply the timeliness requirement leniently to intervenors, and even more leniently for intervenors as of right "because of the likelihood of more serious harm." *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984).

The Rule 24(a)(2) criteria is identical to the required party criteria under Fed. R. Civ. P. 19(a)(1)(B)(i) (a person must be joined who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest."). Accordingly, the analysis from Rule 19(a)(1)(B)(i) cases is equally instructive in the Rule 24(a)(2) context. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) ("These rules are intended to mirror each other.") (citing 4 James Wm. Moore et al., *Moore's Federal Practice—Civil,* § 19.03(3)(f)(i) (3d ed. 2006) ("Indeed, the operative language of the two Rules is identical")).[1]

III. The Tribe's motion is timely.

Generally, courts "consider three criteria in determining whether a motion to intervene is timely: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the

[1] While, as *Liberty Mut. Ins. Co. v. Treesdale, Inc.* notes, Rule 24(a)(2) "contains an additional element, i.e., the adequacy of representation," 419 F.3d 216, 230 (3d Cir. 2005), the Ninth Circuit imports that element into the Rule 19 analysis. *See Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (quoting *Washington v. Daley,* 173 F.3d 1158, 1167 (9th Cir.1999) ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.")).

reason for any delay in moving to intervene." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996), *as amended on denial of reh'g* (May 30, 1996) (citing *United States v. State of Or.*, 913 F.2d 576, 588 (9th Cir. 1990)).

In analyzing the "stage of the proceedings" factor, the "[m]ere lapse of time alone is not determinative." *United States v. State of Or.*, 745 F.2d at 552. Instead, courts look to whether the court has "substantively—and substantially—engaged the issues in [the] case." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997). Where a change of circumstances occurs, and that change is the "major reason" for the motion to intervene, a court should analyze the stage of proceedings factor by reference to the change in circumstances, and not the commencement of the litigation. *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quoting *United States v. State of Or.*, 745 F.2d at 552.).

The Tribe moves to intervene here when the proceeding remains nascent. Since NCIP filed its complaint in May 2018, the Court has not engaged the issues in this case substantively or substantially. The Court dismissed Claim Seven on ripeness grounds, Dkt. No. 38, and the federal defendants' motion for judgment on all other claims remains pending with no hearing date. *See* Dkt. No. 46. Because of the nascent stage of this proceeding, the Tribe's intervention will cause no prejudice to NCIP. This is especially so because the Tribe intervenes for the limited purpose of moving to dismiss pursuant to Fed. R. Civ. P. 12(b)(7), which a party is entitled to do at *any* time in the litigation. Fed. R. Civ. P. 12(h)(2).

Moreover, the impetus for the Tribe's motion is a change in circumstances that occurred on December 6, 2021, when the United States Supreme Court rejected a final plea to overturn dismissal of a nearly identical action for failure to join the absent tribe. *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020) (*Jamul*), *cert. denied*, 142 S. Ct. 83 (2021), *reh'g denied*, No. 20-1559, 2021 WL 5763396 (U.S. Dec. 6, 2021).

In *Jamul*, the plaintiff challenged the federal defendants' approval of a gaming ordinance and the status of trust land for the Jamul Indian Village (Village), based on its argument that the Village was not a federally recognized tribe. *Id*. The Ninth Circuit concluded that the plaintiff's "claims go directly to the Village's most important interests," and affirmed dismissal because "[e]quity and good conscience do not permit an action disputing the Village's status as a federally recognized tribe and its ownership of land in a suit in which the Village cannot be joined." *Id*. at 998.

NCIP here brings nearly identical claims to those in *Jamul*, implicating the same important interests and necessitating dismissal for failure to join the Tribe.[2] The Tribe preferred to conserve the Court's and its own resources by waiting to bring the motion either until the Supreme Court resolved the petition for rehearing in *Jamul*, or this court disposed of the federal defendants' motion for judgment on the pleadings. The prior happened first, and the Tribe immediately brings the present motion. The Tribe's motion is timely.

IV. Tribe has significantly protectable interests relating to the property or transaction that is the subject of the action, which NCIP's action may, as a practical matter, impair or impede the Tribe's ability to protect.

A tribe "has a protected interest in the trust status of its land and in its status as a federally recognized tribe," *Jamul*, 974 F.3d at 997, and "in a lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices." *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010).

In *Jamul*, the "gravamen" of the plaintiff's claims was that the "parcel on which the casino sits does not qualify as Indian land eligible for gaming under [IGRA] because the Village is only a community of adult Indians and not a federally recognized Indian tribe." 974 F.3d at 984. The

[2] The similarity between NCIP's claims here and the plaintiff's in *Jamul* is unsurprising considering that NCIP's counsel also represented the plaintiff in *Jamul*.

complaint also challenged approval of the Village's gaming ordinance. *Id*. Recognizing that the basis of plaintiff's claims was its "contention that the Village is not a recognized tribe and that its land therefore is not Indian land held in trust on its behalf by the federal government," the Ninth Circuit concluded that the claims "would have far-reaching retroactive effects on the Village's existing sovereign and proprietary interests." *Id*. Accordingly, the Court held that "these interests would be impeded were this action to proceed in the Village's absence." *Id*. at 997.

Just like in *Jamul*, NCIP challenges the trust status of the Tribe's land, the Tribe's status as a federally recognized tribe, and the validity of the Tribe's Gaming Ordinance. Accordingly, like in *Jamul*, the Tribe plainly has "existing sovereign and proprietary interests" in the property and transactions that are the subject of this action and those interests "would be impeded were this action to proceed in the [its] absence." *Jamul*, 974 F.3d at 997.

V. The United States cannot adequately represent the Tribe's interests in this action.

Despite the United States' trust relationship with Indian tribes and the fact that it may be aligned with a tribal intervenor at the time of a motion to dismiss, the United States cannot adequately represent a tribe where the relief sought would create a conflict between the United States and the tribe. *Jamul*, 974 F.3d at 997–98 (citing *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 855 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 161 (2020)); *White v. Univ. of California*, 765 F.3d 1010, 1027 (9th Cir. 2014) ("At present, their interests are aligned. There is some reason to believe that they will not necessarily remain aligned.").

In *Dine Citizens*, for example, the plaintiffs challenged the federal government's compliance with environmental laws in their approval of mining permits for a tribal entity (NTEC). 932 F.3d at 855. Although the federal defendants then defended the approvals, the Court recognized that the federal agencies' "overriding interest" in the action was in "complying with environmental laws" while NTEC's interest was in the continued operation of the mine that it

owns. *Id*. Accordingly, the Court concluded that the federal defendants could not adequately represent NTEC because, "[i]f the district court were to hold that NEPA or the ESA required more analysis that would delay mining activities, or that one of the federal agencies' analyses underlying the approval was flawed, federal defendants' interest might diverge from that of NTEC." *Id*.

In *Jamul*, the plaintiff challenged the federal defendants' recognition of the Village as a tribe and acceptance of the Village's land into trust. 974 F.3d at 998. Although the federal defendants defended those actions at the time of the motion to dismiss, the Ninth Circuit reasoned that, by challenging the very source of the federal defendants' obligation to defend the Village's interests, the complaint "call[s] into question the government's ability to adequately represent the Village's interests were the case to proceed." *Id*. The Ninth Circuit concluded that the federal defendants could not adequately represent the Tribe.

Here, while the Tribe and the federal defendants are, at present, in agreement that NCIP's complaint should be dismissed for the reasons set forth in the federal defendants' pending motion for judgment on the pleadings, NCIP's complaint creates the same risk of divergence in positions between the Tribe and the federal defendants as was present in *Dine Citizens* and *Jamul*. The federal defendants' interest is in complying with the various federal laws that NCIP contends the federal defendants violated by recognizing the Tribe, acquiring land into trust for it, and approving its Gaming Ordinance. Currently, that interest is aligned with the Tribe's interest in preserving its sovereign status and trust lands. However, NCIP asks this Court to hold that the Tribe in fact is not entitled to federal recognition or that its land is not eligible for gaming. If the Court were to agree, the federal defendants' interest in complying with federal law would force them to take a position that is in direct conflict with the Tribe's fundamental interest to uphold its status as a federally recognized Indian tribe with gaming-eligible trust land. NCIP thus "call[s] into question

the government's ability to adequately represent the [Tribe]'s interests were the case to proceed." *Id*. Like in *Dine Citizens* and *Jamul*, the federal defendants cannot adequately represent the Tribe's interests in this action based on the nature of NCIP's claims.

CONCLUSION

For the foregoing reasons, Rule 24(a) entitles the Tribe to intervene in this action as of right, for the limited purpose of moving to dismiss NCIP's complaint for failing to join a necessary party.

Dated: December 9, 2021

Respectfully submitted,

By: /s/ John A. Maier

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