John A. Maier (SBN 191416)
Simon W. Gertler (SBN 326613)
MAIER PFEFFER KIM GEARY & COHEN LLP
1970 Broadway, Suite 825
Oakland, CA 94612
Telephone: (510) 835-3020
Facsimile: (510) 835-3040
jmaier@jmandmplaw.com

Attorneys for Specially Appearing Ione Band of Miwok Indians

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

REPLY IN SUPPORT OF SPECIALLY APPEARING IONE BAND OF MIWOK INDIANS' MOTION TO INTERVENE

INTRODUCTION

The Ione Band of Miwok Indians ("Tribe") has demonstrated that it meets the Rule 24(a) standard for intervention as of right, that its motion is timely, and that limited intervention is appropriate. In opposition, Plaintiffs ("NCIP") assert that the Tribe has not met any of the requirements for intervention as a matter of right, that the Tribe's motion is prejudicial to the extent the Court will consider it before the federal defendants' pending motion, that this Court lacks discretion to grant limited intervention, that the Tribe has already waived its immunity, and that the Tribe's attorneys and Chairwoman should be sanctioned under Rule 11. NCIP's

arguments in opposition are irrelevant, as well as based on misrepresentations of the law and fact, and as such, should be soundly rejected by the Court.

ARGUMENT

I. Limited intervention is proper.

NCIP instructs this Court that it lacks discretion to limit the scope of the Tribe's intervention. (Pls.' Opp'n to Tribe's Mot. for Limited Intervention, ECF No. 64 at 12-16.) No case supports NCIP's proposition. The only Ninth Circuit case NCIP cites is *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), but that citation is misplaced. In *Oregon*, the tribe intervened to litigate the merits of the case. *Id*. at 1014. Accordingly, the court held that the intervenor tribe was bound by a modification of the final decree in that case. *Id*. Here, however, the Tribe seeks to intervene to litigate the specific issue of whether NCIP has failed to join a necessary party and should be dismissed under Rule 12(b)(7).

The Tribe cited multiple cases from this circuit where courts have granted other tribes' motions for intervention for the limited purpose of moving to dismiss under Rule 12(b)(7). (Mem. in Supp. of Tribe's Mot. to Intervene, ECF No. 62-1 at 4); *see also Alto v. Black*, 738 F.3d 1111, 1119 (9th Cir. 2013). NCIP attempts to distinguish those cases by arguing that the Tribe does not claim the same interests as those intervenors. (ECF No. 64 at 14-15.) The sufficiency of an intervenor's interests for purposes of Rule 24(a)(2) is a separate question from the appropriateness of limited intervention. Nevertheless, NCIP's distinctions fail because, as explained further in Section III, below, the Tribe claims sufficient interests in the trust status of its land, its status as a federally recognized tribe, and the validity of its Gaming Ordinance.

Neither do the D.C. Circuit cases that NCIP cites support its argument against limited intervention. To the contrary, the court in *Wichita & Affiliated Tribes of Oklahoma v. Hodel* held that the tribes in that case waived their immunity with respect to the claims they had intervened

to defend on the merits, but dismissed, pursuant to Rule 19, counterclaims to which the tribes had not consented. 788 F.2d 765, 774 (D.C. Cir. 1986). Judge Randolph's concurrence in *Amador County v. DOI, 772* F.3d 901, 906 (D.C. Cir. 2014), addressed the separate question of whether sovereign immunity alone is a sufficient interest for purposes of Rule 24(a)(2), which is irrelevant here because the Tribe does not claim sovereign immunity as the only interest it seeks to protect. Indeed, a D.C. district court recently recognized that the D.C. Circuit has not explicitly addressed whether limited intervention in this context is appropriate, but, after citing a string of cases that allowed limited intervention, concluded that it is. *MGM Glob. Resorts Dev., LLC v. United States Dep't of the Interior*, No. CV 19-2377 (RC), 2020 WL 5545496, at *5-6 (D.D.C. Sept. 16, 2020).

NCIP offers no authority to support its assertion that limited intervention is inappropriate in this case or as a general matter. This court should follow precedent from the Ninth and D.C. Circuits and grant the Tribe's request for limited intervention.

II. NCIP raises no valid timeliness concerns.

NCIP argues that a Rule 24 intervention motion cannot be brought at any time, (ECF No. 64 at 16), but misapprehends the Tribe's argument. The Tribe explained that a Rule 12(b)(7) motion to dismiss can be brought at any time. (ECF No. 62-1 at 6 (citing Rule 12(h)(2)).) Because the Tribe intervenes for the limited purpose of moving to dismiss pursuant to 12(b)(7), its intervention cannot work any prejudice on the parties to the case. Indeed, the only potential for prejudice that NCIP raises is that the Tribe's motion could disrupt the Court's consideration of the federal defendants' motion for judgment on the pleadings. (ECF No. 64 at 18.) If the Court shares NCIP's concern, it can readily decide the federal defendants' motion prior to, or simultaneously with, the Tribe's.

NCIP also accuses the Tribe's counsel and its Chairwoman of withholding information from the court while observing a hearing on the federal defendants' motion to dismiss NCIP's

seventh claim for nuisance while the Tribe was not a party to the case. (ECF No. 64 at 17.) The Tribe fails to see the relevance of that accusation to the question of timeliness and objects to the factual assertions as unsupported by evidence in declaration or otherwise.[1] Moreover, NCIP's assertion of a failure to disclose the Solicitor's March 29, 2020 withdrawal of the two-part *Carcieri* procedures is a thinly veiled attempt to argue the merits in its procedural brief, while also, in true fashion, cherry picking facts and conveniently ignoring that the Solicitor has since re-instated the two-part *Carcieri* test.[2]

III. The Tribe satisfies Article III Standing.

NCIP admits that the Ninth Circuit does not require an independent Article III Standing inquiry for intervention, but simply asks whether the applicant "assert[s] an interest relating to the property or transaction which is the subject of the action." (ECF No. 64 at 2 (quoting *Portland Audubon So. v. Hodel,* 866 F. 2d 302, 308 n. 1 (9th Cir. 1989)).) The Tribe certainly does.

Contrary to NCIP's assertion, the United States currently holds the subject Property in trust for the Tribe. *See* (Defs.' Mem. in Support of Mot. for J. on the Pleadings, ECF No. 41-1 at 12 ("the Plymouth Parcels have been acquired into federal trust."); Tribe's Req. for Judicial Notice, ECF No. 66)[3] NCIP argues that the Tribe cannot assert an interest in the Property because it was acquired without authority. (ECF No. 64 at 9.) NCIP's challenge to the trust acquisition is at the heart of NCIP's complaint in this case, and NCIP cannot presuppose success on the merits to vitiate the Tribe's claim of an interest in the resolution of its complaint. The Ninth Circuit has

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[1] *See Daniel F. v. Blue Shield of California*, 305 F.R.D. 115, 122–23 (N.D. Cal. 2014) ("motions in federal court are generally decided on the basis of declarations or affidavits or other written evidence. . . The court does not consider any arguments based on factual assertions that are unsupported by evidence) (citing Fed.R.Civ.P. 43(c)).

[2] *See* (Defs.' Notice of Recent Authority, ECF No. 58.)

[3] NCIP has elsewhere acknowledged that the BIA executed and recorded an acceptance of conveyance of the subject Property in 2020. *See* First Amended Complaint ¶¶ 33-34, *NCIP v. Hunter*, No. 2:20-cv-01358 (E.D. Cal. Sept. 21, 2020) (ECF No. 8).

"rejected this kind of circularity in determining whether a party is necessary" and made clear that "[i]t is the party's *claim* of a protectible interest that makes its presence necessary." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (emphasis original). The Tribe *claims* a protectible interest in land that the United States holds in trust for the Tribe's benefit, and that is sufficient for purposes of Rule 24(a)(2). *See Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020).

Moreover, while the Tribe does not wish to engage in NCIP's attempts to argue the merits in this procedural setting, it is important to note that NCIP repeatedly refers to the 2012 ROD as having "expired" prior to the trust acquisition—yet NCIP's only legal authority for this assertion is the federal six-year statute of limitations for filing a claim against the United States. (ECF No. 64 at 5 (citing 28 U.S.C. 2401(a)).) It goes without saying that a statute of limitations for bringing litigation is not the same as an "expiration date" for a federal decision, nor does NCIP offer any legal basis for concluding as much.

Similar to its approach concerning the Tribe's property interest, NCIP simply repeats its challenges to the approval of the Tribe's gaming ordinance and the Tribe's status as a federally recognized tribe (ECF No. 64 at 10-11), which only underscores how its complaint implicates the Tribe's *claim* of interests in both. NCIP's circular argument that the Tribe lacks a claim of interest because NCIP believes the Tribe's claims invalid, hence prompting NCIP's litigation in this case, must fail.

IV. The United States cannot adequately represent the Tribe.

NCIP captures the Tribe's argument accurately: the Tribe's interests and the interests of the federal defendants are aligned now but may not be aligned later. The Ninth Circuit has repeatedly explained why such a situation makes the United States an inadequate representative for a tribal intervenor. *See* (ECF No. 62-1 at 8 (citing *Jamul*, 974 F.3d at 997-8; *Dine Citizens*

Against Ruining Our Env't v. Bureau of Indian Affairs, 932 F.3d 843, 855 (9th Cir. 2019))); *White v. Univ. of California*, 765 F.3d 1010 at 1027 (9th Cir. 2014)). Indeed, the United States agrees that "the current state of the law in the Ninth Circuit" necessitates the conclusion that it cannot adequately represent the Tribe on these facts. (United States' Consolidated Resp. to Tribes' Mot. for Limited Intervention and Proposed Mot. to Dismiss, ECF No. 63 at 7.) NCIP offers no case law to the contrary, and its speculation about the Tribe's motivations, and presupposing success on the merits, do not support an opposite conclusion.

V. The Tribe has not waived its immunity in this action and NCIP's request for Rule 11 sanctions is baseless.

The Tribe's immunity from suit is germane to the Tribe's proposed motion to dismiss, not the present motion for intervention as of right. *See* (ECF No. 64 at 1 (setting out Ninth Circuit standard for intervention as of right).) Nevertheless, the Tribe responds to NCIP's unsupported argument that the Tribe's intervention in prior actions involving the same issues waives its immunity for the present action.[4]

Sovereign immunity protects tribes from suits against them in the absence of only two circumstances: "a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Thus, the Ninth Circuit "demand[s] clarity that the tribe gave up its immunity." *Quinault Indian Nation v. Pearson for Est. of Comenout*, 868 F.3d 1093, 1098 (9th Cir. 2017).

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[4] NCIP's position regarding the mutuality of issues between this and previous cases is apparently at odds with the position it took in opposition to the federal defendants' motion for judgment on the pleadings. *See* (ECF No. 44 at 3 (arguing that the Secretary's authority to take land into trust for the Tribe and the Tribe's status as a federally recognized tribe were issues not "litigated or necessary to the Ninth Circuit's decision in *Amador v. DOI.*").)

While "[i]n rare instances, a tribe's participation in a lawsuit can 'effect a waiver for limited purposes[,]'" *id*. at 1097 (quoting Cohen's Handbook of Federal Indian Law § 7.05[1][c], at 645 (Nell Jessup Newton ed., 2012)), the Ninth Circuit has refused to find a waiver based on a tribe's litigation of the same issues in a prior action. In *White v. Univ. of California*, the Ninth Circuit affirmed dismissal of a case for failure to join the absent tribal entity, rejecting the plaintiff's argument that the tribal entity's initiation of a prior lawsuit on the same issues effected a waiver of its immunity in the subsequent action. 765 F.3d at 1026. Here too, the Tribe's intervention in prior actions involving the same issues that NCIP raises here does not waive its immunity for purposes of the present action.

The only Ninth Circuit case that NCIP cites to support its waiver theory is *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). However, as the district court in *White v. Univ. of California* soundly explained, that case is inapposite:

> Plaintiffs invoke *United States v. Oregon,* 657 F.2d 1009, 1014–16 (9th Cir.1981), but misconstrue the facts of the case to suggest that the tribe waived its immunity by "intervening in a prior action." Pls.' Opp'n at 10:11. Actually, in *Oregon,* the tribe successfully intervened in the litigation under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and also entered into a consent decree that required any disputes between the parties to be settled by the District Court in Oregon. Both of those actions provided a basis for jurisdiction, according to the Ninth Circuit. 657 F.2d at 1014–16. Here, by contrast, there is no independent agreement by the [tribal groups] to submit to jurisdiction, and neither group has intervened in this action. *Oregon* therefore does not support the proposition that a suit over the same subject matters renders a tribe amenable to suit in a different forum, and plaintiffs are unable to locate any other case that so holds.

No. C 12-01978 RS, 2012 WL 12335354, at *8 (N.D. Cal. Oct. 9, 2012), *aff'd*, 765 F.3d 1010 (9th Cir. 2014) (emphasis added). Here too, the Plaintiff is unable to locate any case that holds that a suit over the same subject matters renders a tribe amenable to suit in a separate action. There is no such case. NCIP's argument that the Tribe has previously waived its sovereign immunity is without merit.

Because a tribe's waiver in a separate lawsuit does not waive immunity in the present lawsuit, the Tribe had no duty to disclose its litigation conduct in separate lawsuits for purposes of this motion. Failing to raise irrelevant facts is quite different than concealing relevant facts for purposes of Rule 11 sanctions. Moreover, it is a far cry to allege the Tribe and its legal counsel attempted to "hide" or "conceal" their actions when the conduct at issue occurred in separate litigation before this very Court and the same presiding judge. NCIP's request for sanctions is bombastic and baseless.

CONCLUSION

This Court should grant the Tribe's request for intervention as of right for the limited purpose of moving to dismiss NCIP's claims under Rule 12(b)(7).

Dated: January 20, 2022

Respectfully submitted,

By: /s/ John A. Maier

JOHN A. MAIER (SBN 191416)
SIMON W. GERTLER (SBN 326613)
MAIER PFEFFER KIM GEARY & COHEN LLP
1970 Broadway, Suite 825
Oakland, CA 94612
Telephone: (510) 835-3020
Facsimile: (510) 835-3040
jmaier@jmandmplaw.com