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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIAN HOLL, et al., *Plaintiffs*, v. SHARON AVERY, et al., *Defendants*.	Case No. 3:24-cv-00273-JLR

DEFENDANT AVERY'S RESPONSE TO NATIVE VILLAGE OF EKLUTNA'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Sharon Avery ("Defendant Avery"), in her official capacity as Acting Chairwoman of the National Indian Gaming Commission ("NIGC"), responds to the Defendant Native Village of Eklutna's ("Tribe") *Motion to Dismiss Plaintiffs' First Amended Complaint* ("Motion"). Dkt. No. 13.

INTRODUCTION

This case involves Plaintiffs' challenge of Defendant Avery's July 18, 2024, approval of the Tribe's gaming ordinance under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). On February 18, 2025, the Tribe filed its Motion to Dismiss, arguing that the Tribe has not waived its sovereign immunity from suit, and further seeking to have the entire case dismissed as the Tribe is a necessary party under Fed. R. Civ. P. 19 ("Rule 19") that cannot be joined. Dkt. No. 13. The general position of the United States is that in most contexts the United States is the only required and indispensable party in litigation challenging a final agency action under the APA. The United States acknowledges, however, that the Ninth Circuit's opinion in *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.,* 932 F.3d 843 (2019), *cert. denied*, 141 S. Ct. 161 (2020) ("*Dine Citizens*"), controls in this case and supports dismissal pursuant to Rule 19, as does subsequent Ninth Circuit case law. *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F. 4th 934 (9th Cir. 2022) ("Klamath"); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020) ("*Jamul Action Comm.*"); *Maverick Gaming LLC v. United States*, 123 F.4th 960 (9th Cir. 2024) ("*Maverick*").

BACKGROUND

The Indian Gaming Regulatory Act ("IGRA") "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). Congress passed IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and

strong tribal governments." 25 U.S.C. § 2702(1); *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 557 (D.C. Cir. 2016) ("[T]he whole point of the IGRA is to 'provide a statutory basis for the operation of gaming by Indian tribes as means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'") (quoting *Diamond Game Enters., Inc. v. Reno*, 230 F.3d 365, 366-67 (D.C. Cir. 2000)).

IGRA divides gaming into three classes. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996). The second of these—Class II gaming—is implicated here and includes "the game of chance commonly known as bingo" as well as certain card games. 25 U.S.C. § 2703(7)(A). The NIGC and tribes regulate Class II gaming. 25 U.S.C. § 2710(a)(2). For a tribe to conduct Class II gaming, they must, *inter alia*, submit a tribal gaming ordinance to NIGC for approval. The NIGC must approve tribal ordinances when they adhere to certain requirements articulated in IGRA. 25 U.S.C. § 2710(b)(2). Class II gaming must also occur on "Indian lands" as defined by IGRA. *See* 25 U.S.C. § 2703(4). At issue in this case is Defendant Avery's July 18, 2024, approval of the Tribe's gaming ordinance after concluding that the lands at issue are "Indian lands" under IGRA. *See* Dkt. No. 7 ¶ 1.

THE NINTH CIRCUIT'S *DINE CITIZENS* OPINION

In *Dine Citizens*, plaintiff Dine Citizens Against Ruining Our Environment brought claims under the APA challenging the Department of the Interior's approval of lease amendments, based on alleged violations of the National Environmental Policy Act and the Endangered Species Act. 932 F.3d at 847. The plaintiffs challenged, *inter alia*, the Bureau

of Indian Affairs' approval of a lease amendment the Navajo Nation had entered into governing coal-mining operations on the Navajo Reservation. *Id*. at 848-49.

The Navajo Transitional Energy Company, a corporation wholly owned by the Navajo Nation that owned the mine in question, moved to dismiss the action under Rule 19 and Fed. R. Civ. P. 12(b)(7), arguing "that it was a required party but that it could not be joined due to tribal sovereign immunity, and that the lawsuit could not proceed without it." *Id.* at 847-48. The federal government opposed the motion, taking the position that the United States is generally the only required and indispensable defendant in such APA challenges. *Id.* at 850. However, the district court disagreed and granted the motion, concluding that (1) "the 'relief Plaintiffs seek could directly affect the Navajo Nation . . . by disrupting its 'interests in [its] lease agreements and the ability to obtain the bargained-for royalties and jobs;'" and (2) the United States did not adequately represent Navajo's interests due to Navajo's greater interests in the outcome of the litigation and potential divergence of interest between the Navajo and the United States. *Id.* Dine Citizens appealed, and the federal government filed an *amicus* brief in which it again took the position that the United States is generally the only indispensable defendant in such APA litigation. *Id.* at 858 n.8. The Ninth Circuit rejected the United States' argument and affirmed the district court. *Id.* at 858-61.

UNITED STATES' STATEMENT OF POSITION

The Ninth Circuit's ruling in *Dine Citizens* is controlling authority in this case under the current state of the law in the Ninth Circuit and therefore supports the granting of the

Tribe's Motion to Dismiss. *See United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995); *see also Klamath*, 48 F.4th at 943-48 (Indian tribes required parties and case could not proceed in their absence); *Jamul Action Comm.*, 974 F.3d at 996-98 (Indian tribe required and indispensable party in suit challenging "the trust status of its land and . . . its status as a federally recognized tribe"); *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (holding that, under Rule 19, "[t]he Tribe's sovereign immunity requires dismissal of this suit, in which [plaintiff] challenges the operation of a large hydroelectric project co-owned and co- operated by the Tribe, and located partly on the Tribe's reservation"); *Maverick*, 123 F.4th at 981-82 (finding the tribe was a necessary party that could not be joined and dismissing the case).

In this suit, Plaintiffs challenge agency action that, if successful, would impair the Tribe's sovereign and economic interests. Dkt. No. 13 at 15-18.[1] The Tribe is listed among Interior's list of *Indian Entities Recognized by and Eligible to Receive Services From the U.S. Bureau of Indian Affairs*, 89 Fed. Reg. 99,899, 99,902 (Dec. 11, 2024), published pursuant to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791, 4792. Plaintiffs acknowledge that the Tribe has appeared on Interior's official *Federal Register* list of federally recognized Indian tribes since at least 1983. Dkt. No. 7 ¶¶ 26-27, 34. "[B]y definition, … a '[f]ederally recognized Indian tribe' is '*an entity listed*

[1] One or more claims in Plaintiffs' First Amended Complaint are barred by the applicable statute of limitations. Defendant Avery reserves the right to raise all affirmative defenses, including statute of limitations, in subsequent briefing as needed.

on the Department of the Interior's list under the Federally Recognized Indian Tribe List Act of 1994, which the Secretary currently acknowledges as an Indian tribe and with which the United States maintains a government-to-government relationship.'" *Agua Caliente Tribe of Cupeno Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1217 (9th Cir. 2019) (emphasis in original) (quoting 25 C.F.R. § 83.1); *see also Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs*, 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993) (list's purpose in including Alaska Native Villages, including the Tribe, was "to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that [Alaska Native Villages, including the Tribe] are distinctly Native communities and have the same status as tribes in the contiguous 48 states").

Under *Dine Citizens* and other Ninth Circuit precedent, the Tribe appears to satisfy the other criteria for granting dismissal under Rule 19. *See Klamath*, 48 F.4th at 943-48; *Jamul Action Comm.*, 974 F.3d at 996-98; *Dine Citizens*, 932 F.3d at 855-56; *Maverick*, 123 F.4th at 980-82. The United States therefore does not dispute that the Tribe's Motion, Dkt. No. 13, should be granted under the current state of the law in the Ninth Circuit. For the reasons stated in the government's amicus brief filed in *Dine Citizens*, the United States disagrees with the ruling in *Dine Citizens* and reserves the right to assert in future proceedings that the United States is generally the only required and indispensable defendant in APA litigation challenging federal agency action.

Defendant Avery also supports the Tribe's Motion to Dismiss on sovereign

immunity grounds. As a federally recognized Indian tribe, the Tribe possesses "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills Indian Cmty.*, 572 U.S. at 788 (internal quotations omitted).

DATED: March 11, 2025.

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 11, 2025, a copy of foregoing document was served electronically via ECF on:

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