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
sgertler@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 **[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING IONE BAND OF MIWOK INDIANS' MOTION TO DISMISS** **[Fed. R. Civ. P. 12(b)(7) and 19]**

INTRODUCTION

The Ione Band of Miwok Indians ("Tribe") moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(7) because the plaintiffs fail to join the Tribe pursuant Fed. R. Civ. P. 19. The plaintiffs' challenge threatens to impair the same fundamental tribal interests as those the Ninth Circuit found dispositive in *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83 (2021), *reh'g denied*, No. 20-1559, 2021 WL 5763396 (U.S. Dec. 6, 2021), including the Tribe's existence as a federally recognized tribe with gaming eligible trust

lands. Moreover, because the lands are in trust, complete relief is not available to the plaintiffs. Additionally, this action would subject the federal defendants to a substantial risk of incurring inconsistent obligations. The Tribe is therefore a required party pursuant to Rule 19. The Tribe, however, cannot be joined due to its sovereign immunity. "Equity and good conscience do not permit an action disputing the [Tribe's] status as a federally recognized tribe and its ownership of land in a suit in which the [Tribe] cannot be joined." *Jamul,* 974 F.3d at 998. The action therefore should be dismissed with prejudice for failure to join a required party pursuant to Rules 12(b)(7) and 19.

STATEMENT OF FACTS[1]

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,

[1] This Statement of Facts is identical to that in the Tribe's Memorandum of Points and Authorities in Support of its Motion to Intervene.

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. Legal Standard

"Rule 12(b)(7) allows a litigant to request dismissal for 'failure to join a party under Rule 19.'" *Jamul Action Comm. v. Chaudhuri*, 200 F. Supp. 3d 1042 (E.D. Cal. 2016) (op. by C.J. Mueller), *aff'd sub nom. Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83 (2021), *reh'g denied*, No. 20-1559, 2021 WL 5763396 (U.S. Dec. 6, 2021). "Federal Rule of Civil Procedure 19(a) requires joinder of parties whose presence is necessary to ensure complete and consistent relief among the existing parties or whose interest would be impeded were the action to proceed without them." *Jamul,* 974 F.3d at 996. Rule 19 establishes a three-step process for determining whether an action must be dismissed due to the absence of a party required for a just adjudication. *Id*. First, the court must determine whether the absent party is "required" for the litigation under Rule 19(a). *Id.* Second, the court must determine whether joinder of the required party is "feasible." *Id.* Third, if joinder is not feasible, the court examines whether the action can nevertheless proceed in "equity and good conscience" under Rule 19(b). *Id.*

The inquiry to determine dismissal under Rules 12(b)(7) and 19 is "a practical one and fact specific." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 851 (9th Cir. 2019), *cert. denied,* 141 S. Ct. 161 (2020). "For this reason, it may be necessary to review evidence beyond the pleadings." *Jamul*, 200 F. Supp. 3d at 1048 (internal citations omitted).

II. The Tribe is a required party.

A party is required pursuant to Fed. R. Civ. P. 19(a)(1) if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person 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: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double,

multiple, or otherwise inconsistent obligations because of the interest. While an absent party need only demonstrate one of these three circumstances, *see Yellowstone Cty. v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996), the Tribe demonstrates all three.

A. The Tribe claims an interest relating to the subject of the action and is so situated that disposing of the action in its absence may as a practical matter impair or impede its ability to protect the interest.[2]

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 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,

[2] This section is identical to Section IV from the Tribe's Memorandum of Points and Authorities in Support of its Motion to Intervene.

like in *Jamul*, the Tribe plainly has "existing sovereign and proprietary interests" in the property and transactions that are the subject of this action those interests "would be impeded were this action to proceed in the [its] absence." *Jamul*, 974 F.3d at 997.

B. The United States cannot adequately represent the Tribe's interests in this action.[3]

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 granting 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

[3] This section is identical to Section V from the Tribe's Memorandum of Points and Authorities in Support of its Motion to Intervene.

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.

C. Disposition without the Tribe would leave the federal defendants subject to a substantial risk of incurring inconsistent obligations.

Because of the Tribe's important interests in this action, disposition in the Tribe's absence may also leave the federal defendants "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations[.]" Fed. R. Civ. P. 19(a)(1)(B)(ii). The federal defendants can be sure that, if this Court agrees with NCIP and finds the Tribe is not a federally recognized Tribe and is not entitled to gaming on its Property pursuant to IGRA, they will soon be defendants in another action brought by the Tribe. Moreover, in light of Ninth Circuit authority deciding the same issues that NCIP raises against another plaintiff in *Cty. of Amador v. United States Dep't of the Interior*, 872 F.3d 1012, 1015 (9th Cir. 2017), there is a "substantial risk" that such litigation would result in inconsistent obligations for the federal defendants. *See Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1188 (W.D. Wash. 2014) (citing *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346–47 (6th Cir. 1993) (finding absent Tribes to be required parties based on "[t]he likelihood that they would seek legal recourse in the event that the judgment deprived them of [treaty] rights to which they believe they are entitled")). The Tribe is a required party to this action.

D. Complete relief to enjoin activities on the Tribe's land is not possible in the Tribe's absence.

The aim of NCIP's lawsuit is to prevent construction of the casino. Dkt. No. 1 ¶ 18 ("NCIP requests a favorable decision in this case to prevent and redress the injuries that will be caused if the proposed casino is constructed in Plymouth."). The harm NCIP seeks to avoid by preventing construction of the casino includes "increased pollution, increased traffic, increased

crime, and decrease in property values irreversible change in the rural character of Plymouth, and other adverse aesthetic, socioeconomic, and environmental impacts." *Id.* ¶ 13. That relief will not be possible in the Tribe's absence, however.

NCIP seeks declaratory and injunctive relief against the United States. But the United States is not the entity that will construct a casino or conduct gaming on the Property. The Tribe is. *See, e.g.*, 25 U.S.C. § 2702 (IGRA's purpose is 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) (emphasis added); *id.* § 2710(d)(1)(A)(1) (providing for tribal gaming ordinances that are "adopted by the government body of the ***Indian Tribe*** having jurisdiction over such lands"); *id.* § 2710(d)(3)(A) (right to compact with a State to regulate gaming belongs to the "***Indian tribe*** having jurisdiction over the Indian lands" on which such activity is to be conducted) (emphasis added). Thus, even if this Court grants NCIP's requested relief, such a judgment would not bind the Tribe, who could continue constructing the casino that is the basis of NCIP's alleged injury. *See Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994) (recognizing that a tribe could continue to assert rights that were the subject of a challenge to which it was absent because "judgment against the government would not bind the [tribe]").

While NCIP seeks a declaration that the Secretary lacks authority to acquire the Property in trust for the Tribe, and without the Property in trust the Tribe would lack authority to operate certain kinds of gaming on it, the Secretary has already acquired the Property in trust and the IRA does not give the Secretary authority to remove the land from trust status. *See Mashpee Wampanoag Tribe v. Bernhardt*, No. CV 18-2242 (PLF), 2020 WL 3034854, at *4 (D.D.C. June 5, 2020), *appeal dismissed,* No. 20-5237, 2021 WL 1049822 (D.C. Cir. Feb. 19, 2021)

(enjoining the Secretary from taking land out of trust in part because it was not "entirely clear that the Secretary even has the authority to do so at this stage."). Further, while the NIGC has authority to regulate tribal gaming for noncompliance with IGRA, the Tribe could contest any such attempts and relitigate any of the issues decided in this case in which it was not a party. This Court cannot accord complete relief to NCIP without the Tribe's joinder.

III. The Tribe's sovereign immunity prevents joinder.

Federally recognized Indian tribes, including the Tribe, possess sovereign immunity from suit. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Such federal recognition "may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." *Jamul*, 974 F.3d at 992 (quoting *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004)). Waivers of tribal sovereign immunity may not be implied and must be expressed unequivocally. *See McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir. 1989).

The Tribe is federally recognized and maintains sovereign immunity from suit. The Tribe has been federally recognized since 1995 when it was first included on the official list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs" published each year in the Federal Register. *Cty. of Amador*, 872 F.3d at 1018; *see also Jamul*, 974 F.3d at 988 (citing every published listing of Jamul Indian Village in Federal Register since 1982 for emphasis of that tribe's federally recognized status). Although NCIP argues that the Tribe is not federally recognized, both this Court and the Ninth Circuit have affirmed the Tribe's federal recognition. *Cty. of Amador*, 136 F. Supp. 3d at 1213–20; 872 F.3d at 1028. The Tribe is therefore entitled to sovereign immunity, which it has not waived.

Accordingly, it is neither feasible nor possible to join the Tribe in this suit. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975).

IV. Equity and good conscience demand dismissal of this action.

When it is infeasible to join a required party, Rule 19(b) requires consideration of four factors to determine whether equity and good conscience require dismissal. Fed. R. Civ. P. 19(b). "The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." *Jamul*, 974 F.3d at 998 (citing *Dine Citizens*, 932 F.3d at 857 ("[T]here is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.' " (alteration in original) (quoting *White*, 765 F.3d at 1028)).

This case is no exception. The Rule 19 factors weigh heavily in favor of dismissal. Regarding the first and second factors, NCIP's claims implicate the Tribe's most fundamental interests, as articulated above. NCIP seeks reversal of federal decisions that are essential to the Tribe's ability to establish Tribal lands, develop and regulate those lands as the Tribe deems appropriate, and to generally be recognized and treated as a sovereign entity. *Jamul*, 200 F. Supp. 3d at 1050 ("the Tribe's interests in its status, its sovereignty, its beneficial interests in real property, and its contractual interests cannot be adjudicated without its formal presence"). There is simply no way to grant NCIP the judgment requested, or modify the nature of the relief, to avoid serious prejudice to the Tribe's interests. *Id*. ("the court cannot lessen prejudice to the Tribe by customizing relief").

Regarding the third factor, and as discussed *infra*, NCIP cannot obtain full and adequate judgment in the Tribe's absence. The purpose of NCIP's suit is to prevent the construction of a casino and operation of gaming activities on the Tribe's lands and NCIP seeks injunctive and declaratory relief to this effect. The Tribe exerts both proprietary and sovereign control over its land, and any commercial developments thereon; therefore any judgment rendered in the Tribe's absence would be incomplete at best and not binding on the Tribe. Moreover, "[w]hatever this court were to order, given the Tribe's likely continued assertions of immunity in any future litigation or actions to enforce, the conflict would be unchanged, if not more chaotic." *Jamul*, 200 F. Supp. 3d at 1050.

Regarding the fourth factor, the Ninth Circuit has said that "the lack of an alternative forum does not automatically prevent dismissal." *Makah Indian Tribe*, 910 F.2d at 560. "Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500 (citations omitted). The Tribe's interest in maintaining sovereign immunity certainly outweighs NCIP's interest here, where NCIP has already availed itself of other forums to litigate essentially the same claims. *See No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1170 (E.D. Cal. 2015), *vacated and remanded sub nom. No Casino in Plymouth v. Zinke*, 698 F. App'x 531 (9th Cir. 2017). Further, the issues NCIP seeks to litigate have already been fully litigated and rejected. *See* Dkt. No. 41 (Defendants' Motion for Judgment on the Pleadings) (citing *Cty. of Amador*, 872 F.3d at 1015).

None of the four factors weigh in favor of allowing NCIP's claims to proceed and this action should be dismissed with prejudice pursuant to Rules 19 and 12(b)(7).

CONCLUSION

The Tribe is a required party. The Tribe's sovereign immunity makes joinder infeasible, however, and the case cannot proceed without the Tribe in equity and good conscience. The court should grant the Tribe's motion to dismiss and dismiss this case in its entirety with prejudice.

Dated: December 9, 2021

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