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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
COMMISSION, JONODEV CHAUDHURI,
DEPARTMENT OF INTERIOR, RYAN
ZINKE, DAVID BERNHARDT, DONALD
E. LAVERDURE, AND AMY DUTSCHKE,

Defendants,

v.

IONE BAND OF MIWOK INDIANS,

Proposed Defendant
Intervenor.

No. 2:18-cv-01398-TLN-CKD

ORDER

This matter is before the Court on Defendants National Indian Gaming Commission (“NIGC”), E. Seqouyah Simermeyer, David Bernhardt, Kate MacGregor, and Tara Sweeney’s (collectively, “Defendants”) Motion for Judgment on the Pleadings pursuant to Federal Rule of

1 Civil Procedure (“Rule”) 12(c).¹ (ECF No. 41.) Plaintiffs No Casino in Plymouth, Deward W.
2 Cranford II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun, and Cathern Coulter
3 (collectively, “Plaintiffs”) oppose the motion. (ECF No. 44.) Defendants filed a reply. (ECF No.
4 52-1.) Also before the Court is the Ione Band of Miwok Indians’ (“Proposed Defendant
5 Intervenor”) Motion to Intervene pursuant to Rule 24(a)(2) and Request for Judicial Notice.
6 (ECF Nos. 62, 66.) Defendants filed a response. (ECF No. 63.) Plaintiffs filed an opposition to
7 both the motion and request. (ECF Nos. 63, 68.) Proposed Defendant Intervenor filed a reply.
8 (ECF No. 67.)

9 Having carefully considered the briefing filed by both parties, the Court hereby GRANTS
10 Defendants’ Motion for Judgment on the Pleadings without leave to amend and GRANTS
11 Proposed Defendant Intervenor’s Motion to Intervene and Request for Judicial Notice. (ECF
12 Nos. 41, 62, 66.)

13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 On May 22, 2018, Plaintiffs filed a Complaint for declaratory and injunctive relief. (ECF
15 No. 1.) Plaintiffs assert seven causes of action against Defendants.² (ECF No. 1 ¶¶ 1–7.) This
16 lawsuit primarily presents a challenge to the Department of the Interior’s (“DOI”) Record of
17 Decision (“ROD”)³ and approval of the Ione Band of Miwok Indians’ (“Tribe” or “Band”)
18 gaming ordinance.⁴ (*Id.* ¶¶ 1–2.) On May 24, 2012, then-Acting Assistant Secretary of Indian

19 ¹ Pursuant to Rule 25(d), Defendants replaced former NIGC Chairman Jonodev Chaudhuri
20 with current Chairman Seqouyah Simermeyer, former Secretary Ryan Zinke with Secretary
21 David Bernhardt, former Deputy Secretary David Bernhardt with Kate Macgregor, and former
22 Assistant Secretary-Indian Affairs Michael Black with Tara Sweeney. (ECF No. 41-1 at 2 n.1.)
23 Defendants state Amy Dutschke is not a “proper party” to the case because she has been recused
24 from the matter since 2001. (*Id.*)

25 ² The Court previously dismissed Plaintiffs’ seventh cause of action for violations of Cal.
26 Constitution, Art. 4, §§ 19(e), (f) and Cal. Penal Code § 11225 et seq. (ECF No. 38.)

27 ³ A ROD is a notice of a final agency determination. *See Fed. Reg., The Daily J. of the U.S.*
28 *Gov’t, Land Acquisitions; Ione Band of Miwok Indians of Cal., A Notice by the Indian Affairs*
Bureau on 05/30/2012, <https://www.federalregister.gov/d/2012-13084>.

⁴ Pursuant to the Indian Gaming Regulatory Act (“IGRA”), Indian tribes are required to
receive NIGC’s approval of a gaming ordinance before engaging in gaming. 25 U.S.C. §

1 Affairs Donald Laverdure (“Laverdure”) issued the ROD at issue that announced the DOI’s
2 taking of 228.04 acres of land in Amador County into trust for the Band. (*Id.*) The ROD also
3 allowed the Band to construct a casino complex and conduct gaming once the land was taken into
4 trust. (*Id.* at ¶ 1.) Pursuant to IGRA, 25 U.S.C. § 2702(1), NIGC Chairman Jonodev Chaudhuri
5 approved the Tribe’s gaming ordinance on March 6, 2018. (*Id.* at ¶¶ 1, 91.)

6 Plaintiffs’ claims challenge various determinations as follows: (1) the Tribe’s gaming
7 ordinance (*id.* at ¶ 107); (2) Laverdure’s authority to approve the ROD under the Appointment
8 Clause of the U.S. Constitution (*id.* at ¶ 118); (3) the Tribe’s federally recognized status under the
9 Indian Reorganization Act (“IRA”) (*id.* at ¶ 127); (4) the Tribe’s federal recognition under 25
10 C.F.R. Part 83 (*id.* at ¶ 136); (5) Defendants’ violation of Plaintiffs’ Equal Protection rights by
11 favoring the Tribe, a race-based group, through approval of the ROD and gaming ordinance (*id.*
12 at ¶¶ 141–43); and (6) Defendants’ violation of federalism protections (*id.* at ¶ 150–51).

13 On June 25, 2020, Defendants filed the instant motion for judgment on the pleadings.
14 (ECF No. 41.) On July 23, 2020, Plaintiffs filed an opposition to the motion (ECF No. 44), and
15 on August 20, 2020, Defendants filed a reply (ECF No. 52-1).

16 On December 9, 2021, Proposed Defendant Intervenor, the Tribe, filed the motion to
17 intervene. (ECF No. 62.) Proposed Defendant Intervenor seeks to intervene for the purpose of
18 moving to dismiss pursuant to Rule 12(b)(7). (ECF No. 62-1 at 6.) The property and transactions
19 that are the subject of this litigation challenge the “Tribe’s land, the Tribe’s status as a federally
20 recognized tribe, and the validity of the Tribe’s Gaming Ordinance.” (*Id.* at 8.) On January 13,
21 2022, Defendants filed a response and Plaintiffs separately filed an opposition. (ECF Nos. 63,
22 64.) Proposed Defendant Intervenor filed a reply on January 20, 2022. (ECF No. 67.) On
23 January 20, 2022, Proposed Defendant Intervenor filed a Request for Judicial Notice. (ECF No.
24 66.) On January 25, 2022, Plaintiffs filed an opposition. (ECF No. 68.)

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28 2710(b), (d).

1 **II. RULE 12(C) MOTION**

2 A. Standard of Law

3 Rule 12(c) provides that, “[a]fter the pleadings are closed — but early enough not to delay
4 trial — a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). The issue
5 presented by a Rule 12(c) motion is substantially the same as that posed in a Rule 12(b)(6) motion
6 — whether the factual allegations of the complaint, together with all reasonable inferences, state a
7 plausible claim for relief. *See Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054–55 (9th
8 Cir. 2011). Thus, “[a] claim has facial plausibility when the plaintiff pleads factual content that
9 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
10 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
11 U.S. 544, 556 (2007)).

12 In analyzing a 12(c) motion, the district court “must accept all factual allegations in the
13 complaint as true and construe them in the light most favorable to the non-moving party.”
14 *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). However, a court “need not assume the
15 truth of legal conclusions cast in the form of factual allegations.” *U.S. ex rel. Chunie v. Ringrose*
16 (*Chunie*), 788 F.2d 638, 643 n.2 (9th Cir. 1986). “A judgment on the pleadings is properly
17 granted when, taking all the allegations in the non-moving party’s pleadings as true, the moving
18 party is entitled to judgment as a matter of law.” *Ventress v. Japan Airlines*, 603 F.3d 676, 681
19 (9th Cir. 2010) (citations omitted).

20 If the Court “goes beyond the pleadings to resolve an issue,” a judgment on the pleadings
21 is not appropriate and “such a proceeding must properly be treated as a motion for summary
22 judgment.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir.
23 1989); Fed. R. Civ. P. 12(d). A district court may, however, “consider certain materials —
24 documents attached to the complaint, documents incorporated by reference in the complaint, or
25 matters of judicial notice — without converting the motion to dismiss [or motion for judgment on
26 the pleadings] into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 908
27 (9th Cir. 2003).

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1 B. Analysis

2 Defendants move for judgment on the pleadings, arguing Plaintiffs cannot challenge the
3 federal agency action because: (1) the Ninth Circuit has affirmed both the Tribe’s status as
4 federally recognized and Laverdure’s authority to issue the 2012 ROD as Acting Assistant
5 Secretary of Indian Affairs; and (2) the Complaint fails to state claims for which relief can be
6 granted. (ECF No. 41-1 at 7–9, 11–13.) The Court will address each argument in turn.

7 *i. Whether Ninth Circuit Authority Disposes of Plaintiffs’ Claims*

8 Defendants argue the Ninth Circuit in *County of Amador* issued dispositive rulings on
9 Claims One through Four⁵ in the instant matter, including: (1) the Tribe’s gaming ordinance; (2)
10 Laverdure’s authority to issue the ROD; (3) the Tribe’s federally recognized status⁶. (ECF No.
11 41-1 at 8–9 (citing *Cnty. of Amador*, 872 F.3d at 1015–20).) In opposition, Plaintiffs argue the
12 2018 gaming ordinance was not at issue in *County of Amador*, and the court did not conclusively
13 decide Laverdure had authority to take land into trust for the Tribe. (ECF No. 44 at 8–11.)
14 Plaintiffs also contend the Tribe lacks Part 83⁷ recognition to be eligible for IRA and IGRA

15
16 ⁵ Plaintiffs’ first four claims present challenges to the following: (1) the Tribe’s gaming
17 ordinance (ECF No. 1 ¶ 107); (2) Laverdure’s authority to approve the ROD under the
18 Appointment Clause of the U.S. Constitution (*id.* at ¶ 118); (3) the Tribe’s federally recognized
19 status under the Indian Reorganization Act (“IRA”) (*id.* at ¶ 127); (4) the Tribe’s federal
20 recognition under 25 C.F.R. Part 83 (*id.* at ¶ 136).

21 ⁶ Plaintiffs’ Claims Three and Four both address the Tribe’s federally recognized status and
22 thus are combined into one issue.

23 ⁷ DOI promulgated what is now commonly referred to as the “Part 83” regulations in 1978.
24 *Cnty. of Amador*, 872 F.3d at 1017; 25 C.F.R. pt. 83. These regulations “establish[] procedures
25 and criteria for [DOI] to use to determine whether a petitioner is an Indian tribe eligible for the
26 special programs and services provided by the United States to Indians because of their status as
27 Indians.” 25 C.F.R. § 83.2. This recognition “is a prerequisite to the protection, services, and
28 benefits of the Federal Government available to those that qualify as Indian tribes and possess a
government-to-government relationship with the United States.” *Id.*

After the promulgation of Part 83 regulations, the Tribe faced some difficulty in achieving
federal recognition. *Cnty. of Amador*, 872 F.3d at 1018. However, in 1994, the government
considered the Tribe “recognized” and included it on the official list of “Indian Entities
Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs.”
Id.

1 benefits.⁸ (*Id.* at 12–14.) Plaintiffs argue the Tribe’s inclusion on the administrative list of
2 “Indian Entities” eligible to receive service for the Bureau of Indian Affairs does not mean the
3 Tribe is federally recognized. (*Id.* at 14–15.)

4 In *County of Amador*, the Ninth Circuit considered two challenges to the same 2012 ROD
5 at issue in the present case, based on whether: (1) the Tribe qualified to have land taken into trust
6 for its benefit under the IRA; and (2) the Tribe may conduct gaming on the parcels pursuant to
7 IGRA. 872 F.3d at 1020. As a preliminary matter, the court affirmed Laverdure “was
8 empowered to take the Plymouth Parcels into trust” and therefore had the authority to approve the
9 ROD. *Id.* at 1019 n.5. Then, the Ninth Circuit held “the Band is a recognized Indian tribe that
10 was ‘under Federal jurisdiction’ in 1934, and [DOI] did not err in concluding that the Band is
11 eligible to have land taken into trust on its behalf under 25 U.S.C. § 5108.” *Id.* at 1028. With
12 respect to recognition under 25 C.F.R. Part 83, the court stated, “the Band was effectively
13 recognized without having to go through the Part 83 process” because “a tribe could be ‘restored’
14 to Federal recognition outside the Part 83 process.” *Id.* at 1028–31. Thus, as a federally
15 recognized Tribe, the court held DOI “did not err in allowing the Band to conduct gaming
16 operations on the Plymouth Parcels” in accordance with IGRA. *Id.* at 1031.

17 The Ninth Circuit resolved issues identical to those in the present case. *Id.* at 1015–20.
18 The “law of the circuit doctrine” mandates that “a published decision of [a Ninth Circuit] court
19 constitutes binding authority which must be followed unless and until overruled by a body
20 competent to do so.” *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (quoting
21 *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2010) (en banc)) (internal quotation marks
22 omitted). Thus, the Ninth Circuit’s decision on the Tribe’s federally recognized status and the
23 Tribe’s status in 1934 under the IRA are binding on this Court. Further, the Ninth Circuit clearly
24 found Laverdure’s actions within his powers. *Cnty. of Amador*, 872 F.3d at 1019 n.5.

25
26 ⁸ Benefits of federal recognition under the IRA include “assistance for such purposes as
27 corrections, child welfare, education, and fish and wildlife and environmental programs.”
28 *Timbisha Shoshone Tribe v. U.S. Dep’t of Interior*, 824 F.3d 807, 809 (9th Cir. 2016)(quoting
American Indian Law Deskbook § 2:6). Further, “[o]nly federally recognized tribes may operate
gaming facilities under the IGRA.” *Id.*

1 Accordingly, the Court finds *County of Amador* disposes of Plaintiffs’ Claims One through Four
2 on the following issues: (1) the Tribe’s gaming ordinance; (2) Laverdure’s authority to issue the
3 ROD; and (3) the Tribe’s federally recognized status under the IRA and Part 83.

4 Accordingly, the Court GRANTS Defendants’ motion for judgment on the pleadings on
5 Claims One through Four.⁹

6 *ii. Whether the Complaint States Claims for Which Relief Can be*
7 *Granted*

8 Plaintiff’s remaining claims are Claim Five, Defendants’ violation of Plaintiffs’ Equal
9 Protection rights by favoring the Tribe, a race-based group, through approval of the ROD and
10 gaming ordinance (ECF No. 1 at ¶¶ 141–43) and Claim Six, Defendants’ violation of federalism
11 protections (*id.* at ¶ 150–51). Defendants argue Plaintiffs’ equal protection claim fails because
12 “[p]rovision of benefits to federally recognized tribes on the basis of their status as tribes does not
13 offend equal protection principles.” (*Id.*) Further, Defendants argue Plaintiffs’ federalism claim,
14 which alleges that the Tribe receives exemptions from state and local law, is inaccurate. (*Id.* at
15 12.) Plaintiffs do not respond to these arguments in any meaningful way. (*See* ECF No. 44.)

16 “Where a party fails to address arguments against a claim raised in a motion . . . , the
17 claims are abandoned and dismissal is appropriate.” *Shull v. Ocwen Loan Servicing, LLC*, No.
18 13-CV-2999-BEN (WVG), 2014 WL 1404877, at *2 (S.D. Cal. Apr. 10, 2014); *see, e.g.,*
19 *Women’s Recovery Ctr., LLC, v. Anthem Blue Cross Life & Health Ins. Co.*, No. 8:20-cv-00102-
20 JWH-ADSx, 2022 WL 757315, at *7 (C.D. Cal. Feb. 2, 2022) (“Courts in this district, as well as
21 many other districts, have found that a failure to address an argument in opposition briefing
22 constitutes a concession of that argument.”); *Yarkin v. Starbucks Corp.*, No. C 07-01969 CRB,
23 2008 WL 895688, at *1 (N.D. Cal. Mar. 31, 2008). Thus, Plaintiffs’ failure to respond to

24
25 ⁹ If a complaint fails to state a plausible claim, “a district court should grant leave to amend
26 even if no request to amend the pleading was made, unless it determines that the pleading could
27 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
28 Cir. 2000) (en banc) (quoting *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995)). For reasons
discussed further below, the Court will not grant leave to amend as the pleadings cannot be cured
by the allegation of other facts.

1 Defendants' arguments is a concession of those arguments.

2 Even if Plaintiffs had opposed, the Court finds Defendants' arguments persuasive. With
3 respect to Plaintiffs' Equal Protection argument, Claim Five, the Supreme Court has held that any
4 "preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as
5 members of quasi-sovereign tribal entities" *U.S. v. Antelope*, 430 U.S. 641, 646 (1997)
6 (quoting *Morton*, 417 U.S. at 554). As such, Plaintiffs' argument for Equal Protection fails
7 because the tribe is not a distinct racial group but a separate, "quasi-sovereign entity[]." *Id.* With
8 respect to Plaintiffs' federalism argument, Claim Six, Congress has "plenary power" to "enact
9 legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."
10 *U.S. v. Lara*, 541 U.S. 193, 200, 202 (2004). Thus, Congress is not exempting the Tribe from
11 state and local law (ECF No. 1 ¶ 150) but using its authority to grant IRA and IGRA benefits to
12 the federally recognized Tribe.

13 Accordingly, the Court need not consider the arguments and GRANTS Defendants'
14 motion for judgment on the pleadings on Claims Five and Six.

15 **III. RULE 24(A)(2) MOTION**

16 **A. Standard of Law**

17 Pursuant to Rule 24(a)(2), a party may intervene as a matter of right when:

- 18 (1) The application is timely;
- 19 (2) The party has a significant protectable interest relating to the property or transaction
20 that is the subject of the action;
- 21 (3) The disposition of the action may, as a practical matter, impair or impede the
22 applicant's ability to protect its interest; and
- 23 (4) the existing parties may not adequately represent the applicant's interest.

24 Fed. R. Civ. P. 24(a)(2); *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (quoting *U.S.*
25 *v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)).

26 "Each of these four requirements must be satisfied to support a right to intervene."
27 *Chamness*, 722 F.3d at 1121 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003)).
28 In evaluating whether these requirements are met, courts "are guided primarily by practical and

1 equitable considerations.” *Alisal Water Corp.*, 370 F.3d at 919. Further, courts generally
2 “construe [the Rule] broadly in favor of proposed intervenors.” *United States v. City of L.A.,*
3 *Cal.*, 288 F.3d 391, 397 (9th Cir. 2002) (alteration in original).

4 B. Analysis

5 Proposed Defendant Intervenor is the Tribe whose federal recognition and gaming
6 ordinance is at issue. (ECF No. 1 ¶¶ 1–2.) Proposed Defendant Intervenor argues, pursuant to
7 Rule 19, this action cannot proceed in its absence. (ECF No. 62-1 at 1; *see* ECF No. 1 ¶¶ 1–2.)
8 Proposed Defendant Intervenor seeks limited intervention to dismiss the complaint pursuant to
9 Rule 12(b)(7). (ECF No. 62-1 at 4.) Plaintiffs oppose the motion and argue Proposed Defendant
10 Intervenor has no property interest in the case and the motion is untimely. (ECF No. 64 at 10,
11 17.) Defendants take no position on the Proposed Defendant Intervenor’s motion for
12 intervention. (ECF No. 63.)

13 Additionally, Proposed Defendant Intervenor filed a request for judicial notice. (ECF No.
14 66.) Plaintiffs oppose the request. (ECF No. 68.) The Court will first address the request for
15 judicial notice. Then, the Court will address each of the four Rule 24(a)(2) factors in turn.

16 i. *Request for Judicial Notice*

17 The Court may judicially notice a fact that is not subject to reasonable dispute, either
18 because it is generally known within the court’s jurisdiction or because it can be accurately and
19 readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid.
20 201. “The court may take judicial notice at any stage of the proceeding.” *Id.*

21 Proposed Defendant Intervenor requests the Court take judicial notice of Exhibits One and
22 Two.¹⁰ (ECF No. 66 at 1.) Plaintiffs oppose the motion and argue the following: (1) the grant
23 deeds were recorded in 2020 and are irrelevant to the case (ECF No. 68 at 5); (2) the land
24 described in the deeds is not the land described in the 2012 ROD (*id.* at 7); (3) the request
25 concerns a disputed fact of whether the DOI approved the land to be taken into trust for the Tribe

26 ¹⁰ Exhibits One and Two contain “copies of the grant deeds transferring said land to the
27 United States in trust for the Tribe, and acceptances of conveyance by the Bureau of Indian
28 Affairs, recorded in Amador County as DOC 2020-0002270-00 and DOC-2020-000271-00.”
(ECF No. 66 at 1.)

1 (*id.* at 8); and (4) the grant deed and acceptances are not verified for authenticity (*id.* at 9).

2 Pursuant to Federal Rule of Evidence (“Rule”) 201(e), Plaintiffs request an evidentiary hearing
3 “on the propriety of taking judicial notice and the nature of the fact to be noticed.” (*Id.* at 4.)

4 The Court will address each of Plaintiffs’ arguments in turn, and then address the request
5 for an evidentiary hearing.

6 a. Whether the Grant Deeds are Relevant

7 Plaintiffs argue the grant deeds are irrelevant to the present case because “the grant deeds
8 do not mention, or claim to be issued pursuant to, the 2012 ROD.”¹¹ (ECF No. 68 at 6.)
9 Plaintiffs contend a court may only take judicial notice of matters which have a “direct relation to
10 the matters at issue.” (*Id.* (quoting *Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 248 (9th
11 Cir. 1992).)

12 Plaintiff has not presented evidence or cited to authority which states a grant deed must
13 mention or claim to be issued pursuant to a relevant ROD. Both exhibits note the recording was
14 requested by the “Bureau of Indian Affairs, U.S. Dept. of the Interior” and should be mailed to
15 the Bureau’s office when the parcels are recorded. (ECF No. 66-1 at 1; ECF No. 66-2 at 1.)
16 Further, the description of the grant deed declares to give the land “to the United States of
17 America in Trust for the Ione Band of Miwok Indians of California.” (ECF No. 66-1 at 1; ECF
18 No. 66-2 at 1.) The language of the grant deeds is sufficient to determine the grant deeds are
19 relevant as both pertain to the taking of land in trust for the Tribe. Accordingly, the Court finds
20 Plaintiffs’ arguments unpersuasive, and further finds the grant deeds relevant to the instant action.

21 b. Whether the Land Described Pertains to the ROD

22 Plaintiffs argue the grant deeds do not cover the same land parcels described in the 2012
23 ROD. (ECF No. 68 at 7.) Plaintiffs contend the grant deeds only transferred trust title for ten out

24
25 ¹¹ Plaintiffs also argue the grant deeds were recorded in 2020, two years after the ROD
26 expired and was withdrawn. (ECF No. 68 at 5.) Plaintiffs cite to 28 U.S.C. § 2401(a) to support
27 this assertion. (*Id.*) However, that section only states that “civil actions commenced against the
28 United States shall be barred unless the complaint is filed within six years after the right of action
first accrues.” 28 U.S.C. § 2401(a). As discussed further below in footnote 13, Plaintiffs have
not provided any authority to support the assertion that the ROD is expired and the Solicitor
withdrew the ROD. As such, the Court will not address this argument further.

1 of the twelve parcels specified in the ROD. (*Id.*) Proposed Defendant Intervenor requested the
2 Court judicially notice the grant deeds as “the land that the [DOI] approved to take into trust for
3 the benefit of the Tribe in 2012 . . . was conveyed to the United States in trust for the Tribe.”
4 (ECF No. 66 at 1.) Proposed Defendant Intervenor does not claim DOI approved all the parcels,
5 and the quoted language does not suggest that. The DOI approved ten parcels to take into trust
6 for the Tribe pertaining to the 2012 ROD. Accordingly, the Court finds the land described
7 pertains to the ROD, even if not all twelve parcels were taken into trust.

8 c. Whether the Request Concerns a Disputed Fact

9 Plaintiffs argue the Court cannot take judicial notice of this matter because it is a disputed
10 fact whether, in 2012, the DOI approved the transfer of land to the Tribe. (ECF No. 68 at 8.)

11 “A court may take judicial notice of the undisputed matters of public record, e.g., the fact
12 that a hearing took place, but it may not take judicial notice of disputed facts stated in public
13 records.” *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1057 (quoting *Lee v. City of*
14 *L.A.*, 250 F.3d 668, 690 (9th Cir. 2001)).

15 The Ninth Circuit ruled on this issue, finding that the DOI “did not err in concluding that
16 the Band is eligible to have land taken into trust on its behalf.” *Cnty. of Amador*, 872 F.3d at
17 1028. A fact is indisputable and subject to judicial notice if it is “capable of accurate and ready
18 determination by resort to sources whose accuracy cannot be reasonably questioned under Rule
19 201(b)(2).” *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983 (S.D. Cal. 2005) (quoting
20 *U.S. v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003)). Thus, despite Plaintiffs contention to the
21 contrary, it is not a reasonably disputed fact whether the DOI approved the transfer of land as the
22 Ninth Circuit and the grant deeds filed with the Amador County Recorder are sources whose
23 accuracy cannot be reasonably questioned. Accordingly, the Court holds the request for judicial
24 notice does not concern a disputed fact.

25 d. Whether the Deeds and Acceptances are Authentic

26 Plaintiffs argue the accuracy of the grant deeds and “acceptances” are questionable. (ECF
27 No. 68 at 9.) Plaintiff contends the documents are not authenticated or certified by the custodian
28 of records for the Amador County Recorder’s Office. (*Id.*) Further, Plaintiffs argue the

1 signatures present on the documents may not be credible. (*Id.*)

2 “Under Rule 201, a court may take judicial notice of matters of public record.” *Sears,*
3 *Roebuck & Co. v. Metro. Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956). Courts often take
4 judicial notice of grant deeds and similar documents of public record. *See Sunbelt Rentals v.*
5 *Hawks Truck Stop*, 2010 WL 1729165, at *1 (E.D. Cal. Apr. 27, 2010) (granting judicial notice of
6 deed of trust and assignment of property); *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142,
7 1146 (E.D. Cal. 2010) (taking judicial notice of a deed of trust and assignment of deed of trust
8 because both are publicly recorded documents).

9 The grant deeds and acceptances are both matters of public record. To the extent
10 Plaintiffs are concerned about the credibility of the documents, the grant deeds were both signed
11 under certification of a notary public. (ECF No. 66-1 at 1; ECF No. 66-2 at 1.) Furthermore, the
12 Amador County Recorder’s Official Records Index website displays both grant deeds. Amador
13 County Clerk/Recorder’s Official Records Index (search under “Documents Number” tab),
14 <https://mint.amadorgov.org/RecorderWorksInternet/>. Accordingly, the Court finds the Amador
15 County Clerk and Recorder’s Official Records Index and notary verification provide sufficient
16 proof that both deeds are accurate matters of public record.

17 e. Request for Evidentiary Hearing

18 Plaintiffs’ opportunity to be heard has been satisfied as Plaintiffs reply brief addressed all
19 concerns relating to Proposed Defendant Intervenor’s request for judicial notice. *See Papai v.*
20 *Harbor Tug and Bargo Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995) (holding plaintiff’s reply brief,
21 which addressed his concerns with the request for judicial notice, was a sufficient opportunity to
22 be heard). Accordingly, the Court finds Plaintiffs have had an adequate opportunity to be heard,
23 and as such, Proposed Defendant Intervenor’s request for judicial notice is GRANTED.

24 ii. Rule 24(a)(2) Factors

25 a. Timeliness of Application

26 In determining whether a motion is timely, the Court considers: (1) the stage of the
27 proceeding; (2) any prejudice to the other parties; and (3) the reason for and length of any delay.
28 *Orange Cnty. v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986). A motion is generally considered

1 timely when “made at an early stage of the proceedings, the parties would not have suffered
2 prejudice from the grant of intervention at that early stage, and intervention would not cause
3 disruption or delay in the proceedings.” *Citizens for Balanced Use v. Mont. Wilderness Ass’n*,
4 647 F.3d 893, 897 (9th Cir. 2011).

5 Plaintiffs filed the Complaint on May 22, 2018. (ECF No. 1.) Proposed Defendant
6 Intervenors filed the present motion to intervene on December 9, 2021. (ECF No. 62.)
7 Defendants filed the currently pending motion for judgment on the pleadings on June 25, 2020.
8 (ECF No. 41.) Proposed Defendant Intervenor contends the motion is timely because of the
9 nascent stage of the proceeding, as evinced by the lack of a set hearing date. (ECF No. 62-1 at 6.)
10 Proposed Defendant Intervenor waited to file this motion due to a pending action before the
11 Supreme Court. (*Id.*) In that matter, the Supreme Court declined to overturn a dismissal of a
12 similar action for failure to join the absent tribe on December 6, 2021. (*Id.* (citing *Jamul Action*
13 *Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83 (2021), *reh’g*
14 *denied*, No. 20-1559, 2021 WL 5763396 (U.S. Dec. 6, 2021)).)

15 In opposition, Plaintiffs argue the motion is untimely because the lawsuit was filed almost
16 four years ago, and the Court’s Initial Pretrial Scheduling Order requires any requests to add
17 parties to be brought within 60 days of service. (ECF No. 64 at 17.) Plaintiffs contend disrupting
18 the Court’s pending consideration of the motion for judgment on the pleadings at the final stage
19 would be prejudicial. (*Id.* at 19.) In reply, Proposed Defendant Intervenor argues the limited
20 purpose of moving to dismiss pursuant to 12(b)(7) cannot prejudice the parties in this case. (ECF
21 No.67 at 3.) Proposed Defendant Intervenor also contends the Court could consider this motion
22 prior to or simultaneously with the pending motion for judgment on the pleadings. (*Id.*)

23 *1. Stage in the Proceeding*

24 The length of time since a suit was filed does not alone determine timeliness. *United*
25 *States v. State of Oregon (Oregon I)*, 913 F.2d 576, 588 (9th Cir. 1990). “Where a change of
26 circumstances occurs, and that change is the ‘major reason’ for the motion to intervene, the stage
27 of proceedings factor should be analyzed by reference to the change in circumstances, and not the
28 commencement of the litigation.” *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir.

1 2016) (quoting *Oregon I*, 913 F.2d at 588). “[A] change of circumstance, which suggests that
2 litigation is entering a new stage, indicates that the stage of the proceeding and reason for delay
3 are factors which militate in favor of granting the application [to intervene].” *United States v.*
4 *State of Oregon (Oregon II)*, 745 F.2d 550, 552 (9th Cir. 1984) (motion to intervene due to a
5 change in circumstances was timely even when sought fourteen years after the action was
6 initiated).

7 The parties have engaged in substantial litigation, including a motion to dismiss and
8 motion for judgment on the pleadings, over the course of four years. (See ECF Nos. 15, 41.)
9 However, Proposed Defendant Intervenor argues the Supreme Court’s denial to rehear *Jamul*
10 constitutes a major change in circumstances and justifies the motion to intervene at this time.
11 (ECF No. 62-1 at 6–7.) As such, the Court will analyze this factor by reference to the change in
12 circumstances. *Smith*, 830 F.3d at 854. This issue is discussed further below in tandem with the
13 third factor.

14 2. Prejudice to Other Parties

15 Prejudice is only relevant to the extent that it “flows from a prospective intervenor’s
16 failure to intervene after he knew, or reasonably should have known, that his interests were not
17 being adequately represented.” *Kalbers v. U.S. Dep’t of Just.*, 22 F.4th 816, 825 (9th Cir. 2021)
18 (quoting *Smith*, 830 F.3d at 857). “Prejudice must be connected in some way to the timing of the
19 intervention motion” and simply because adding another party may “make resolution more
20 difficult does not constitute prejudice.” 22 F.4th at 825 (quoting *Oregon II*, 745 F.2d at 552–53
21 (alteration in original) (internal quotation marks omitted).

22 Proposed Defendant Intervenor is seeking intervention only to request dismissal under
23 Rule 12(b)(7) and contends this limited action will not prejudice other parties. (ECF No. 62-1 at
24 1.) Proposed Defendant Intervenor is not seeking to litigate new issues or otherwise delay the
25 litigation. *Cf. United States v. Wash.*, 86 F.3d 1499, 1504 (9th Cir. 1996) (proposed defendant
26 intervenor’s motion was prejudicial to other parties as it would “complicate the issues and
27 prolong the litigation”). Further, Proposed Defendant Intervenor is not causing undue prejudice
28 as it intervened as soon as it knew its interests would not be adequately represented per the

1 decision in *Jamul* discussed further below. *See Smith*, 830 F.3d at 859 (“When our inquiry is
2 properly narrowed to the prejudice attributable to Appellants’ delay in moving to intervene after
3 the time Appellants knew, or reasonably should have known, that their interests were not being
4 adequately represented by existing parties, the prejudice to existing parties becomes nominal at
5 best.”). Accordingly, the Court holds this factor supports finding the motion is timely.

6 3. Reason for and Length of Delay

7 “Delay is measured from the date the proposed intervenor should have been aware that its
8 interests would no longer be protected adequately by the parties, not the date it learned of the
9 litigation.” *Kalbers*, 22 F.4th at 823 (quoting *United States v. Wash.*, 86 F.3d 1499, 1503 (9th
10 Cir. 1996)) (internal quotation marks omitted).

11 Proposed Defendant Intervenor delayed its motion in anticipation of the Supreme Court
12 rehearing *Jamul*. (ECF No. 62-1 at 6.) Proposed Defendant Intervenor contends it realized its
13 interests would not be adequately represented when the Supreme Court denied the rehearing of
14 *Jamul* on December 6, 2021. (ECF No. 62-1 at 6–7.) This motion was filed only three days after,
15 on December 9, 2021. The Court accepts this reasonable explanation for delay, as *Jamul* is
16 applicable to the present case. *See Officers for Just. v. Civ. Serv. Comm’n of S.F.*, 934 F.2d
17 1092, 1095 (9th Cir. 1991) (finding a motion to intervene timely when the party who formerly
18 represented the intervenor’s interests changed its position). Accordingly, the Court finds the
19 motion to intervene was timely filed and will not prejudice the existing parties or cause delay
20 within the meaning of Rule 24.

21 b. Significant Protectable Interest

22 Proposed Defendant Intervenor argues it has strong protectable interests in the outcome of
23 this litigation. (ECF No. 62-1 at 7.) Proposed Defendant Intervenor points to the recent Ninth
24 Circuit case, *Jamul*, in which the plaintiff challenged the tribe’s federal recognition and gaming
25 ordinance. (*Id.* at 7–8.) The Ninth Circuit held the plaintiff’s challenges “would have far-
26 reaching retroactive effects on the [tribe’s] existing sovereign and proprietary interests.” (*Id.* at 8
27 (quoting *Jamul*, 974 F.3d at 984).) Thus, the action could only proceed with the tribe as a party.
28 *Jamul*, 974 F.3d at 984. Plaintiffs do not make an argument against this factor in their

1 opposition.¹² (See ECF No. 64.)

2 “A proposed intervenor ‘has a significant protectable interest in an action if (1) it asserts
3 an interest that is protected under some law, and (2) there is a relationship between its legally
4 protected interest and the plaintiff’s claims.” *Kalbers*, 22 F.4th at 827 (quoting *Donnelly v.*
5 *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)) (internal quotation marks and citation omitted).

6 As in *Jamul*, the invalidation of Proposed Defendant Intervenor’s gaming ordinance or its
7 status as a recognized tribe will affect its land and rights. As such, it has an interest in the
8 outcome of the litigation. See *Dine Citizens v. Bureau of Indian Affs.*, 932 F.3d 843, 853 (9th Cir.
9 2019) (holding a challenge to the coal mining activities conducted by a tribal-owned corporation
10 warranted intervention because it had a legally protectable interest which could be impacted by
11 the litigation). Accordingly, the Court finds Proposed Defendant Intervenor has satisfied the
12 requisite showing of a protectable interest.

13 c. Disposition of Action May Impair or Impede Ability to Protect
14 Interest

15 “If an absentee would be substantially affected in a practical sense by the determination
16 made in an action, [the absentee] should, as a general rule, be entitled to intervene.” *Sw. Ctr. for*
17 *Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Rule 24 advisory
18 committee’s notes). Here, the pending litigation could directly impair or impede Proposed
19 Defendant Intervenor. If the Court found Proposed Defendant Intervenor was not a federally
20 recognized tribe, the government would not be able to hold its land in trust and the gaming
21 ordinance would be invalid. (ECF No. 62-1 at 8 (quoting *Jamul*, 974 F.3d at 997).) Accordingly,

22 ¹² Although Plaintiffs do not make a direct argument against this factor, Plaintiffs argue
23 Proposed Defendant Intervenor does not have Article III standing to intervene. (ECF No. 64 at
24 10.) Plaintiffs argue this case does not involve any property claimed by Proposed Defendant
25 Intervenor because the 2012 ROD expired on May 30, 2018, and none of the parcels were taken
26 into trust. (ECF No. 64 at 10.) Plaintiffs admit “in the Ninth Circuit the requirement of Article
27 III standing is incorporated into the four-part intervention test as part of the requirement that the
28 applicant for intervention must ‘assert an interest relating to the property or transaction which is
the subject of the action.’” (*Id.* at 3 (quoting *Portland Audubon So. v. Hodel*, 866 F.2d 302, 308
n.1 (9th Cir. 1989).) Plaintiffs’ assertion that the 2012 ROD expired is unfounded and
unsupported by their complaint or other filings before the Court. (See ECF Nos. 1, 44.)
Therefore, the Court need not address this argument.

1 this factor is satisfied.

2 d. No Existing Adequate Representation

3 Proposed Defendant Intervenor argues “the United States cannot adequately represent a
4 tribe where the relief sought would create a conflict between the United States and the [T]ribe.”
5 (ECF No. 62-1 at 8.) Further, “[i]f the Court were to agree [with Plaintiffs], the federal
6 defendants’ interest in complying with federal law would force them to take a position that is in
7 direct conflict with [Proposed Defendant Intervenor’s] fundamental interest to uphold its status as
8 a federally recognized Indian tribe with gaming-eligible trust land.” (*Id.* at 9.)

9 In opposition, Plaintiffs argue Defendants and Proposed Defendant Intervenor have
10 identical interests in the litigation, thus Defendants can adequately represent such interests. (ECF
11 No. 64 at 19.) Plaintiffs contend Proposed Defendant Intervenor is admitting that “if [Plaintiffs]
12 prevail[], and the Federal Defendants were required to comply with federal laws, that would
13 diverge from [Proposed Defendant Intervenor’s] interest in continuing to violate federal law.”
14 (*Id.* at 20.)

15 A proposed intervenor is adequately represented when “(1) the interests of the existing
16 parties are such that they would undoubtedly make all of the non-party’s arguments; (2) the
17 existing parties are capable of and willing to make such arguments; and (3) the non-party would
18 offer no necessary element to the proceeding that existing parties would neglect.” *Sw. Ctr. for*
19 *Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153–54 (9th Cir. 1998).

20 The Court finds Proposed Defendant Intervenor’s arguments to be persuasive. “Federal
21 defendants would not adequately represent an absent tribe where their obligations to follow
22 relevant [] laws were in tension with tribal interests” *Jamul*, 974 F.3d at 997 (citing *Dine*
23 *Citizens*, 932 F.3d at 855). Further, the burden of showing inadequate representation is
24 “minimal” and Proposed Defendant Intervenor need only demonstrate “that representation of its
25 interests ‘may be’ inadequate.” *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki*, 324
26 F.3d at 1086). Accordingly, the Court finds this factor has been met, and as such, the Court finds
27 intervention appropriate.

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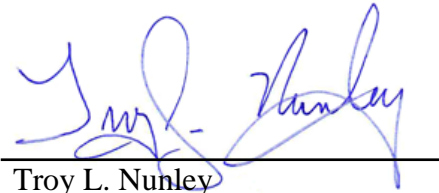
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IV. CONCLUSION

For the reasons set forth above, the Defendants' Motion for Judgment on the Pleadings (ECF No. 41) is GRANTED and Plaintiffs' claims are DISMISSED without leave to amend. Proposed Defendant Intervenor's Motion to Intervene (ECF No. 62) and Request for Judicial Notice (ECF No. 66) are GRANTED. The Clerk of the Court is ordered to close this case.

IT IS SO ORDERED.

DATED: May 10, 2022



Troy L. Nunley
United States District Judge