No. 17-16655

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, GLEN REVELL, and WILLIAM HENDRIX

Plaintiffs-Appellants

v.

TRACIE STEVENS, Former Chair of the NIGC; JONODEV CHAUDHURI, Chairman of the NIGC; DAWN HOULE, Chief of Staff for the NIGC; SALLY JEWELL, Secretary of the Interior; KEVIN WASHBURN, Assistant Secretary - Indian Affairs; PAULA HART, Director of the OIG; AMY DUTSCHKE, Regional Director BIA;JOHN RYZDIK, Chief, Environmental Division, BIA; U.S. DEPT. OF INTERIOR; NATIONAL INDIAN GAMING COMMISSION; RAYMOUND HUNTER; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; JULIA LOTTA;PENN NATIONAL, INC.; SAN DIEGO GAMING VENTURES, LLC.; and C.W, DRIVER INC.

Defendants-Appellees

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:13-cv-01920 KJM-KLN
Honorable Kimberly J. Mueller, District Judge

APPELLANTS' OPENING BRIEF

KENNETH R. WILLIAMS
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 449-9980
Attorney for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Plaintiffs-Appellants, the Jamul Action Committee, the Jamul Community Church, and individual Jamul residents, are not public corporations and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

Dated: December 20, 2017.

Respectfully submitted,

/s/Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES, REGULATIONS, STATUTES

United States Constitution, Codes, and Statutes

INTRODUCTION

Appellants, the Jamul Action Community, Jamul Community Church and several Jamul residents (collectively referred to as "JAC") are appealing from the final judgement of the United States District Court for the Eastern District of California, dated and entered in this case on July 31, 2017. (Excerpt of the Record (ER) 2.) JAC contends the district court's underlying decisions were erroneous as a matter of law and requests that the judgment be reversed and vacated.

This case involves an illegal Indian casino recently constructed in Jamul, a rural community near San Diego, California. The casino, known as the Hollywood Casino-Jamul, opened in August, 2016. It was built, and is managed, by Penn National on behalf of the Jamul Indian Village (JIV) – a half-blood Indian group.

The Jamul casino is illegal because it is being operated by JIV, a race-based half-blood Indian group, that is not a federally recognized tribe under 25 CFR Part 83 or the Indian Reorganization Act of 1934 (25 U.S.C. §§ 5101 et seq). The Jamul casino is also illegal because it was constructed on four parcels of land none of which is a "reservation" or "Indian land" eligible for Indian gaming under the Indian Gaming Regulatory Act. (25 U.S.C. §§ 2701 et seq.)

Consequently, in addition to reversing the judgment, JAC requests that the continued illegal gambling at the Jamul casino be permanently enjoined as a public nuisance and as a violation of the United States constitution and California law.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 2201-2202, 25 U.S.C. § 2714, and 18 U.S.C. § 1166. The district court filed an appealable final judgment on July 31, 2017. (ER 2.) JAC filed a timely Notice of Appeal on August 12, 2017. (ER 1.) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

This action is based, in part, on two Constitutional provisions:

(1) The Fifth Amendment and the Equal Protection clause of the Constitution. *Adarand Const. v. Pena,* 515 U.S. 200 (1995).

(2) The federalism protections inherent in the dual governmental system created by the Constitution. *Bond v. United States* 131 S.Ct. 2355 (2011)

This action also arises under several federal statutes:

(1) Indian Reorganization Act (IRA), 25 U.S.C. §§ 5101 *et seq.* (allows the Secretary of Interior to take land into trust and to proclaim reservations for tribes federally recognized in 1934); and

(2) Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2700 et seq. (requires the NIGC to confirm a casino is on Indian land eligible for gaming before approving gaming ordinances and contracts).

This action is also brought pursuant to 18 U.S.C. § 1166 which provides, in part, "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." At least three State laws apply:

(1) California's Constitution prohibits "casinos of the type currently operating in Nevada and New Jersey" from being authorized to operate in California. Cal. Const. Art. 4, Sec. 19(e);

(2) California's Constitution limits Indian gaming and casinos to "federally recognized tribes on Indian lands in California in accordance with federal law." Cal. Const. Art. 4, Sec. 19(f); and

(3) California's Penal Code provides "[e]very building or place used for the purpose of illegal gambling . . . is a nuisance which shall be enjoined, abated, and prevented." Cal. Penal Code § 11225.

JAC has standing to pursue the claims asserted in the SASC and this appeal. *Adarand Const. Inc. v. Pena*, 515 U.S. 200; *Bond v. U.S.* 131 S.Ct. 2355 and *Match-E-Be-Nash-She-Wish Band v. Patchak* 132 S.Ct. 2199 (2012).

Federal Appellees waived immunity from suit pursuant to the Administrative Procedure Act (APA). 5 U.S.C. §§701-706. See also 25 U.S.C. § 2714. Also, the individual federal Appellees are not immune from suit; they are being sued in their personal capacities for allowing and facilitating the construction of the illegal

casino on non-Indian land under the color of federal law and in excess of the federal limitations upon their power and authority. *Ex Parte Young*, 209 U.S. 123 (1908) and *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

JIV was created in 1982 and did not exist as an entity before then. Thus it does not have "inherent" sovereign immunity and it lacks "primeval" or "pre-existing" sovereignty that predated the United States. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1875 (2016) and *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). Also, even it applied, tribal immunity does not bar suits for declaratory and injunctive relief against tribal officials, responsible for unlawful conduct. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

Finally, the three corporate defendants are private companies and do not have immunity from suit. They are being sued for declaratory and injunctive relief for their role in constructing and managing the illegal casino as a public nuisance.

ISSUES PRESENTED FOR REVIEW

The major issues presented for review on this appeal are:

1. Whether JIV, as a group of half-blood Indians which did not exist in 1934 and did not seek federal recognition pursuant to 25 CFR Part 83, is entitled to a reservation under IRA or a casino under IGRA.

2. Whether, as first determined by the NIGC in 2013, the four parcels on which the Jamul Casino is located is an "Indian reservation" eligible for Indian gaming under IGRA and California's Constitution.
3. Whether the federal government's attempt to treat JIV as though it is a Part 83 tribe, with a reservation eligible for Indian gaming, violates equal protection by giving it preferences as a race-based, half-blood Indian group.
4. Whether the federal government's attempt to create a "reservation" for JIV outside the fee-to-trust process and to exempt four parcels from State law prohibiting gambling violates federalism under the Constitution.
5. Whether JIV, which was created as a half-blood Indian group in 1981, and which has been an active "litigating amicus" in this lawsuit, is a required, but not feasible, party to claims 1, 2, 3, 4, and 6 in the complaint.

HISTORICAL BACKGROUND

A. Prior to Spanish Contact – Pre-1769.

Indians lived in what is now called California at least five thousand years before it was "discovered" by the Spanish. In what is now Southern California and Northern Baja Mexico, the native people are sometimes called Ipai and Tipai both of which mean "people" in the native languages. The Spanish later called them "Diegueno" which is the name most used today. But the native peoples usually

called themselves by the place where they lived. Social Studies Fact Cards, "Digueno," http://online.toucanvalley.com/FactCards/(accessed 12/03/17).

The Diegueno were a migratory people who lived at different times of the year at temporary "campsites" on the coast, in the mountains, and in the desert. There were some, but very few, permanent Diegueno villages mostly along the coast. *Id.* Despite its current name (adopted in 1981), it likely the Jamul Indian Village was a temporary campsite not a permanent village. See Shipek, Florence Connolly, *Delfina Cuero, Her Autobiography,* Ballena Press (Menlo Park, 1991) pages 7-8 and Kroeber, A.L., *Handbook of the Indians of California,* Bureau of American Ethnology, Bulletin 78 (Washington, 1925) (republished by Dover Publications, Inc. (New York, 1976)) pages 724-725.

Finally, it is important to note none of the Diegueno groups was a tribe in the traditional sense. As was stated by Professor A.L. Kroeber in his 1922 monograph titled *Elements of Culture in Native California* (page 27):

> "Tribes did not exist in California in the sense in which that word is properly applicable to the greater part of the North American continent. When the term is used it must therefore be understood as synonymous with 'ethnic group' rather than denoting a political entity."
>
> (Quoted in *Acosta* 126 Cal.App.2d 455, 465 (1954).)

B. Spanish Empire – 1769 to 1823.

After they "discovered" California, the Spanish in conjunction with the Franciscans established the Mission system along the coast of California. The San Diego Mission was the first mission founded by Father Junipero Serra in 1769. It was first built on Presidio Hill, in Old Town San Diego, overlooking the Bay. But in 1774 the mission was moved six miles upriver to the San Diego Valley.

The Spanish and Franciscans usually managed the property around the Missions for the benefit of the Indians - "not as owners, but as tutors for their primitive charges." See Chauncy Shafter Goodrich, The Legal Status of the California Indian 14 Cal. Law Rev. 157 (1926). In many ways, the tutelage arrangement resembled a benevolent autocracy. But over time, at some missions, the relationship with the natives apparently devolved into an abusive "master-slave" type arrangement whereby the natives were required to live at the mission and used as an involuntary labor to farm the land around the mission. These "reduccion" missions were designed to reduce the Indians' territory by bringing them into a segregated community centered next to the church.

But this "reduccion" pattern was not followed at the San Diego Mission. Instead, because of food and water shortages at the San Diego Mission, the surrounding Indians continued to live in their nearby villages, homesteads or campsites. Chauncy Shafter Goodrich, The Legal Status of the California Indian 14 Cal. Law Rev. 157 (1926). Thus, if any Diegueno Indians lived in the Jamul area they remained there and were not relocated to the Mission. In fact there is evidence some Indians near the Jamul campsite aggressively resisted any effort by the Mission to control them.

C. Mexican Republic – 1821 to 1846.

Although the revolution of Mexico against Spain began in 1810, independence was not achieved until 1823. One of the charter documents of the Mexican Republic was the Plan of Iguala enacted February 4, 1821. This remarkable document included the following emancipation proclamation:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with the right to be employed in any post, according to their merits and virtues."

(Quoted in *U.S. v. Ritchie,* 58 U.S. 525, 538 (1854); emphasis added.)

Thus all California Indians under the jurisdiction of Mexico, including any Diegueno Indians living near Jamul, became full citizens of Mexico in 1821.

Also, in 1833 the Missions were secularized by Mexico and the surrounding lands were to be conveyed to the resident Indians. But none of the Mission land was occupied by, or conveyed to, Jamul Indians. Furthermore, shortly after secularization, any Diegueno Indians living near the San Diego Mission "had abandoned the land" adjacent to the Mission and probably moved inland. *Barker v. Harvey,* 181 U.S. 481, 499 (1901).

In 1829, the Mexican Governor granted Rancho Jamul (8,926 acres) to Pio Pico. The grant, which was later confirmed pursuant California Land Claims Act (9 Stat. 631 (1851), extended from present day Jamul south east to Dulzura. Although subdivided many times, the land is still generally known as Rancho Jamul or sometimes the George R. Daley Ranch. Brackett, R.W., *This History of San Diego County Ranchos,* Union Title Insurance Company 5th Ed. (San Diego, Calif. 1960). Mr. Daley and his family owned Rancho Jamul into the 1970s.

D. United States Military Rule – 1846 to 1850.

In 1846, the United States Military occupied portions of the Mexican Republic, including the land that was to become the State of California. The U.S. military rulers ignored the Plan of Iguala, and tried to re-establish a paternalistic relationship with the Indians which was similar to the Spanish approach. For example, the first military Governor of California, Brigadier-General S.W. Kearny, instructed his new Indian agent, John Sutter, as follows:

> "I wish you to explain to the Indians the changes in the administration of public affairs in this territory; that they must now look to the President of the United States as their great father; [and] that he takes care of his children."

Letter from Kearny to Sutter, April 7, 1847 (emphasis added).

This paternalistic approach was consistent with Indians were treated in the United States at the time. But it was drastically different from the more respectful way Mexico treated Indians. See *U.S. v. Ritchie*, 58 U.S. 525, 538 (1854). The Jamul Indians resisted military forays into their area. They had no intention of being like "children" or treating the President as their "great father." Instead Diegueno Indians in the Jamul area maintained their independence and distance.

The Mexican-American War ended in 1848 with the signing of the Treaty of Guadalupe Hildago (9 Stat. 922 (1848)). Pursuant to that treaty, the United States vowed to recognize and protect the rights of all former Mexican citizens which, under the Plan of Iguala, included all of the Indians. Thus in 1848 California Indians, including any Diegueno Indians living in the Jamul area became American citizens with the same constitutional rights and protections of all other citizens. See *Acosta v. San Diego* 126 Cal. App. 2d 455, 465 (1954).

The U.S. Military Occupation of the territory of California continued until September 9, 1850 when California became a State. But the federal government still manages California Indians in the same paternalistic, guardian/ward way to this day - primarily via the federal reservation system.

E. Federal Reservation System in California.

The Indian reservation system was created by the federal government in the mid-nineteenth century shortly before California became a State. Its initial goal was to remove Indians from the east coast to reservations west of the Mississippi River. It began as a result of an 1832 land dispute between the Cherokee Nation and the State of Georgia. The Supreme Court resolved that dispute in favor of the Cherokees in one of the three early pivotal decisions in Indian law known as the "Marshall Trilogy." *Worchester v. Georgia,* 31 U.S. 515 (1832). But the decision was inconsistent with the federal government's earlier commitment to the Georgia to extinguish Indian title within Georgia. In exchange for this commitment, Georgia had given up its western land claims. Canby, William C. Jr., *American Indian Law in a Nutshell,* 5th Edition, Thomson Reuters (St. Paul Minn. 2009).

Based on their win in *Worchester v. Georgia,* the leaders of the Cherokee Nation refused to sign a removal treaty. Despite this fact, in 1835 the United States – in an attempt to meet its earlier obligation to Georgia - signed the Treaty of New Echota with several individual Cherokees. And, sadly, based on this unauthorized treaty, the federal government forced the Cherokees to walk the infamous Trail of Tears to the Oklahoma Territory. By 1850 the vast majority of eastern Indian tribes, through the use of similar tactics and removal treaties, were moved to lands and reservations west of the Mississippi River. Id.

The federal government tried to use the same play-book in California in the 1850s. In 1853, federal agents negotiated 18 "treaties" with unauthorized individual Indians. But because California Indians were U.S. citizens, and not subjects of a controlling tribe, it did not work. The treaties were never ratified by the U.S. Senate. These unauthorized, unratified treaties have "no legal effect" and are "legal nullit[ies]." *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015). They "granted no land rights, did not create any other enforceable rights, as [they were] never ratified and thus [are] a legal nullity." Id. Also, there is no evidence any Indians were forcibly relocated as a result of any of these treaties.

In 1864 Congress passed the Four Reservations Act which provided for no more than four Indian reservations in California. (13 Stat. 39 (1864).) The reservations were Round Valley, Hoopa Valley, Tule River, and the "Mission reservations." *Matz v. Arnett* 412 U.S. 481, 489-491 (1973). See also *Robinson v. Jewell*, 790 F.3d at 919 (A reservation claim by "a non-federally recognized Native American group" rejected as contrary to the Four Reservations Act.)

The 1891 Mission Indian Relief Act (MIRA; 26 Stat. 712) outlined a process for the creation of "Mission reservations" in Southern California. MIRA established the Smiley Commission, to determine which lands should be set aside for such reservations. And over 20 reservations were created for the Mission Indians. (ER 22-26) But a reservation was not created at Jamul.

"Many Southern California Indians opposed this reservation scheme because they did not want to leave their own homes and farms." The Indians living near Jamul were in this category. "Jamul in southern San Diego County, was not established [as a reservation] by the Smiley Commission because it considered the bands too small and scattered to visit and their landholdings too small to develop as reservations." Also, federal efforts to convince the Indians in the Jamul area to move to the Capitan Grande Reservation were not successful. Shipek, Florence Connolly, *Pushed into the Rocks, Southern California Indian Land Tenure 1769-1986,* University of Nebraska Press (Lincoln, Nebraska 1987) pages 35-40 and 102-103. Thereafter "[t]he history of these small remnant bands varied." Some assimilated, some went to Mexico, "some married into other reservations, and some joined Jamul." By 1972, Jamul was the only remaining "non-reservation village or band" of Diegueno Indians in Southern California. Id. at page 103.

STATEMENT OF FACTS

A. The creation of the half-blood Jamul Indian group.

The Jamul Indian group progress toward organizing itself as a half-blood Indian community is evident from the correspondence between the Regional Director and the BIA Office in Washington D.C. between 1972 and 1979. (ER 27-35.) It is apparent from this correspondence, the federal government did not, and

does not, consider Jamul Indians to be an historic or federally recognized tribe with inherent sovereignty. Instead it was created by the BIA with delegated powers.

In 1972 the Sacramento Regional Office of the Bureau of Indian Affairs (BIA) wrote to the Commissioner of Indian Affairs in Washington D.C. asking for "information as to the current policy of the Bureau of Indian Affairs in creating new reservations so that we can advise the Jamul Indian Community."

In June 1974 Raymond Butler, the Director of Indian Services, responded to the Regional Director. Mr. Butler said the BIA's request is based on the mistaken assumption the "Jamul Indian Community [is] a federally recognized entity." "Our records do not indicate that the Jamul Indians as having ever been formally recognized by the Bureau. Accordingly, we have no authority to acquire land for the community in order to create a reservation." But Mr. Butler also said "if it can be shown otherwise, we will be glad to pursue the matter further."

On June 10, 1974, the Regional Director sent a memo to the Southern California Agency asking for input in this regard. The Superintendent responded "[t]his Agency has no basis on which to indicate the Jamul Community as federally recognized." He concluded: "The Jamul Community is not federally recognized." But "[t]he community would like to be so recognized." And (despite their historic resistance) "[t]hey would like a reservation created for them."

In September 1974, the Regional Director reported back to back to the Commissioner. The Regional Director states "[t]here appears to have been no Federal recognition of the Jamul Indian Community." And the Regional Director went further concluding, based on the absence of evidence, "[w]e cannot recommend extending Federal recognition to the Jamul Indian Community."

On November 7, 1975, the "Acting" Deputy Commissioner Krenske responded by noting there are 20 Jamul Indians who "possess one-half or more degree Indian blood." Krenske states pursuant to Section 19 of the IRA "certain benefits . . . are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe." Krenske urged the Director to assist the Jamul Indians with "one-half or more" Indian blood "to secure, in trust status, the tract of land on which they now reside."

"Acting" Commissioner Krenske claimed "[i]f a land base materializes, the adult Indians residing on such trust land would then be entitled to organize pursuant to Section 16 of the IRA." Krenske misstated the scope of Section 16. It applies to "tribes residing on the same reservation" not to individual half-blood Indians on a recently acquired "land base." Federal recognition is a pre-requisite to receiving Section 16 benefits. *California Valley Miwok v. United States,* 515 F.3d 1262, 1264 (9th Cir. 2008) ("Once recognized, a tribe" may organize under Section 16 of the IRA (quoting *Kerr-McGee v. Navajo,* 471 U.S. 195, 198 (1985).)

On April 10, 1979, the Superintendent of the Southern California Agency sent a memorandum to Krenske notifying him that, in 1978, the "Acting Regional Director" accepted a gift of land from the Daleys "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary may designate." But this donation was never accepted into trust by the Secretary of Interior under Section 5 of the IRA and therefore was not validly in trust status. 25 USC § 5108; see also 25 CFR § 151.3 ("No acquisition of land in trust status, including land already held in trust or restricted status, shall be valid unless is approved by the Secretary").

After obtaining the Daley property as a "land base" the Jamul Indians organized itself as a half-blood Indian community and adopted a "constitution" in 1981. (ER 36-47.) (Despite Krenske's misguided suggestion the constitution does mention Section 16 of the IRA.) Article I states "The name of this organization shall be the Jamul Indian Village." JIV called itself a "community government" (not a federally recognized or historic tribe). Article II describes the territory of the group as "all lands within the confines of the Jamul Indian Village" (not a reservation). And, significantly, Article II did not reference the Daley parcel or claim it was a reservation. Article III restricted membership to "Persons of ½ or more degree of California Indian Blood" connected in some way to JIV. "No person shall be a member of the Jamul Indian Village if he: (d) is less than one half (1/2) degree Indian blood." Art. III Sec. 2(d).

The nature of this newly created half-blood Indian community was finally explained in 1993 when JIV asked the BIA for permission to change the membership requirement from one-half to one-quarter Indian blood. (ER 48-55.) Carol A. Bacon, Director of the Office of Tribal Services, in a detailed 7 page letter informed JIV that lowering the blood-quantum requirement jeopardize the "very basis and foundation" of their organization. Ms. Bacon states they are "forever" precluded from lowering the half-blood quantum requirement. "In other words once a half-blood Indian community, always a half-blood community."

Director Bacon clarified the "origin of the Jamul Indian Village is different than that of an historic tribe." An historic tribe is "a community of people who have a continued as a body politic without interruption since time immemorial and retain powers of inherent authority." *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). She reminded JIV they were not an historic tribe and they chose not to seek recognition under Part 83. Therefore, according to Director Bacon, JIV is, at most, "a created tribe exercising delegated powers of self-government" – not an historic tribe with inherent and retained sovereignty.

B. JIV's 2002 fee-to-trust application.

In 2002 the BIA published a notice in the federal register it intended to prepare an Environmental Impact Statement for a proposed JIV 101 acre fee-to-

trust transfer and casino project. The casino was to be constructed on "existing trust land" which, was not specifically identified. The parking lot and other facilities were to be constructed on the proposed trust acquisition. The word "reservation" is not used in BIA's 2002 notice.

JIV's 101 acre fee-to-trust application stalled in 2009 after the Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009). The Supreme Court held the Secretary of Interior's authority to take lands into trust is limited to "recognized tribes . . . under federal jurisdiction" in 1934. The Court confirmed federal recognition under Part 83 "is needed before an Indian tribe may seek 'the protection, services, and benefits of the federal government'." *Carcieri v. Salazar,* 555 U.S. at 385 (quoting 25 CFR § 83.2). Thus, under *Carcieri,* the BIA lacked authority under the IRA to take land into trust for a half-blood Indian group created in 1981 outside the Part 83 process. JIV's application was put on hold.

Thereafter most of the 101 acres was transferred to the California Department of Fish and Wildlife as part of the Rancho Jamul Ecological Reserve. California's constitution and public nuisance laws prohibited the construction of any portion of the JIV casino on any portion of the Rancho Jamul Ecological Reserve. Cal. Const. Art. 4, Sec. 19(e)&(f); Cal. Penal Code § 11225. Despite this fact, as is outlined below, the bearing wall for the JIV casino was later built on the Rancho Jamul Ecological Reserve. (ER 65-70.)

One parcel involved in JIV's 2002 proposed fee-to-trust application, known as the Daisy parcel, was not transferred to the Rancho Jamul Ecological Reserve and is owned by JIV in fee. In 2016 JIV's submitted a fee-to-trust application to the BIA to have this parcel taken into trust. That application is pending. (ER 80-87.) The Daisy parcel has not been taken into trust and is still owned by JIV in fee. It is clearly not part of the reservation depicted in aerial photo attached JIV's 2016 Compact. (ER 79.) Despite this fact, the Hollywood Casino elevated driveway and walkway, propane storage tank and septic retention pond, as depicted on the picture attached JIV's application (ER 87), were constructed, with federal funding, on the fee-owned Daisy parcel in violation of California's constitution and public nuisance laws. Cal. Const. Art. 4, Sec. 19(e)&(f); Cal. Penal Code § 11225.

C. NIGC's 2013 Indian "reservation" Public Notice.

In April 2013, the NIGC issued a "Public Notice" announcing they have "approved" a gaming facility and they intended to prepare a SEIS for a proposed gaming management contract between JIV and San Diego Gaming Ventures (SDGV; a Penn National affiliate). (ER 56-58.) The NIGC states the management contract "would allow SDGV to manage the approved 203,000 square foot tribal gaming facility to be located on the Tribe's Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. § 2703." The NIGC notice does not include a map or further description of this claimed "reservation."

In response to NIGC's request for comments, on June 30, 2013, JAC provided a detailed letter to NIGC Chairwoman Stevens and BIA Regional Director Dutschke outlining why, based on *Carcieri*, JIV was not a recognized tribe entitled to a fee-to-trust transfer under IRA of 1934. Nor did JIV have Indian land or a reservation eligible for gaming under IGRA. (ER 162-184.)

In July 2013, NIGC approved JIV's Gaming Ordinance. 25 U.S.C. §2710. (ER 203-208.)And, on October 3, 2013 gaming management contract was deemed approved by NIGC by its inaction within the allowed ninety days. 25 U.S.C. §§ 1331 & 2711(d). Also the construction of the elevated casino driveway was funded by the BIA pursuant to "an approved 'Transportation Improvement Program' or 'TIP'." (ER 141-146.) All of those approvals are "final agency decisions" subject to APA review. 5 U.S.C. §§ 701-706; 25 U.S.C. §2714.

NIGC's 2013 conclusion that JIV has a reservation eligible for gaming has no support in the record. And as outlined above, it is directly contrary to the BIA's determinations that the JIV is not recognized and does not have a reservation and that a reservation was not created in Jamul by the Smiley Commission under MIRA. The fact JIV did not have a reservation was confirmed by the BIA itself several times during the 1970s (ER 27-35) and by Director Bacon in a letter to JIV Chairman Hunter in 1993 (ER 48-55). NIGC's conclusion that the JIV has a reservation eligible for Indian gaming is arbitrary, capricious and contrary to law.

D. Four Casino "Reservation" Parcels

The boundaries of the "reservation" were not described in NIGC's notice. Instead, NIGC merely states the casino was "reconfigured to fit on the reservation." So the boundary of the casino defines the claimed "reservation." (ER 341-344.) And after casino construction started, it was discovered the casino was actually being built on four separate parcels – none of which is a "reservation" eligible for gaming under IGRA. The four properties include:

1. Daley Parcel – Much of the casino is constructed on this 4.66 acre parcel. It was donated to the U.S. by the Daleys in 1978 for the benefit of individual half-blood Jamul Indians. (JIV did not exist in 1978.) And this donated parcel was never taken into trust by the Secretary of Interior pursuant to 25 CFR Part 151.3 Nor was it ever proclaimed by the Secretary to be a new Indian reservation pursuant to 25 U.S.C. § 5110.
2. Daisy Parcel – The elevated casino walkway and driveway and related support structures were constructed on this 4 acre parcel owned by JIV in fee. It was included in the JIV's 2002 fee-to-trust application which was abandoned in 2009. But the JIV recently submitted a separate fee-to-trust application for this property which is still pending. (ER 80-87.) Also the casino driveway has been funded by the BIA since 2014 pursuant to "an approved" Transportation Improvement Program. (ER 141-146.)

3. Indian Graveyard Access – This parcel is used for casino access. It is a 1.372 acre parcel that was conveyed to the U.S. in 1982 for the benefit of the JIV "for an Indian graveyard and approach thereto." There is no evidence this donation was ever taken into trust pursuant to Part 151.3.
4. Soil Nail Wall Easement – This 80 foot easement is on adjacent Rancho Jamul Ecological Reserve owned by the State. It was acquired by Penn National in 2014 for a "soil nail wall" or bearing wall necessary to support the casino and underground parking lot. It is not a reservation.

STATEMENT OF THE CASE

A. Second Amended and Supplemental Complaint.

The Second Amended and Supplemental Complaint (SASC) was filed by JAC on August 26, 2014. (ER 209-239.) The SASC includes six claims:

1. Violation of the Indian Gaming Regulatory Act. (¶¶ 74-85.)

This is an APA claim against NIGC, JAC seeks a declaration that, as a matter of law the property on which the casino is located is not a "reservation" eligible for gaming under IGRA. The facts alleged in support of this claim, which at this stage, must be accepted as true, include: (1) Congress limited the number of reservations in California and they do not include the property NIGC claimed to be a reservation (¶¶ 25-28); (2) the first time NIGC claimed the property was a reservation was in 2013 (¶ 2); (3) NIGC approved the JIV gaming

ordinance and management contract based on this "reservation" determination. (¶¶ 3-4); (4); and (4) the JIV did not have the authority to create a reservation for its own benefit (¶ 73.)

2. Violation of the Indian Reorganization Act of 1934. (¶¶ 86-99.)

This is an APA claim against the DOI and BIA that, as a matter of law, they lacked the authority to take land into trust for the JIV under the IRA of 1934 because the JIV is a half-blood Indian community that was not in existence, much less a federally recognized tribe, in 1934. The facts alleged in support of this claim, and which must be accepted as true, include: (1) IRA's fee-to-trust benefits are limited by its terms to federally recognized tribes in 1934 (¶ 30); (2) JIV was not a federally recognized tribe in 1934 (Id); (3) JIV organized itself in 1981 as a "half-blood Indian" community (¶ 43); (4) the Jamul half-blood Indian community never petitioned for federal recognition under Part 83 (¶¶ 32, 43-44) and (5) property owned by JIV has never been taken into trust or proclaimed to be a reservation by the Secretary of Interior pursuant to the IRA (¶ 35, 46, 90 & 93).

3. Violation of U.S. Constitution - Equal Protection. (¶¶ 100-114).

In their third claim for relief, JAC allege two constitutional violations by the Defendants. First, Plaintiffs allege it is a violation of JAC's Equal Protection rights to give the JIV, a race-based, half-blood Indian group, preferences and benefits because of its racial makeup. Second, Plaintiffs allege it is a violation of

the principals of federalism embodied in the Constitution to exempt the JIV and the subject property from State and local laws and to allow the JIV to create a continuing public nuisance in their community. The facts alleged in support of this claim, and which must be accepted as true, include: (1) JIV organized itself in 1981 as a half-blood Indian group and has not applied to be a federally recognized tribe under Part 83 (¶¶ 43-44); (2) each federal Defendant acted under the color of federal law to give unequal preferences to members of the JIV based on race (¶112); and (3) each Defendant has acted under color of federal law to unfairly exempt the claimed reservation from State and local law and regulation. (¶ 107-108.)

4. Violation of Cal.'s Constitution and Nuisance laws. (¶¶ 115-125).

This claim is for declaratory and injunctive relief against all Defendants for allowing and facilitating the construction of an illegal gambling facility on the four parcels in violation of California's Constitution and public nuisance laws. Plaintiffs are seeking injunctive relief to enjoin, abate and prevent this public nuisance. Plaintiffs are also seeking damages. (¶¶ 116 & 120-121.) The facts alleged in support of this claim, and which must be accepted as true, include: (1) the property on which the casino is being constructed is not Indian lands eligible for gaming under IGRA (¶ 46); (2) California's Constitution prohibits the construction of a casino on non-Indian lands by a group of half-blood Indians

which is not a federally recognize tribe (¶117); (3) California law provides that every place or building for the purpose of illegal gambling is public nuisance which should be abated (¶¶ 120-121); and (4) the construction of the JIV casino in Jamul will have long-term adverse environmental consequences that will directly affect JAC and its members including: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family conducive atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with gambling. (¶ 123)

5. Violation of NEPA – Injunction and Mandate. (¶¶ 126-142)

This is a claim for declaratory relief and a writ of mandate to compel compliance with NEPA. The facts alleged in support of this claim, and which must be accepted as true, include: (1) NIGC published a public notice in April 2013 that they would prepare an EIS for the "approved" casino and proposed gaming ordinance and management contract (¶ 2); (2) NIGC's determination the casino land is a "reservation" and approval of the gaming ordinance and

management and development contracts violate NEPA (¶ 127); (3) NIGC and BIA did not comply with NEPA and failed to take a proper "hard look" at the environmental impact of the proposed casino in rural Jamul before it was constructed (¶¶ 129-139); (4) NIGC and BIA also failed to fully consider or adequately assess the impact the casino will have on local communities, as required by 25 C.F.R. § 151.10(e); and (5) NIGC and BIA failed to consider whether the JIV could legally build a casino on the Parcel (¶ 133).

6. Violation of federal Compact – as federal law. (¶¶ 143-151).

JAC also sought to enforce the environmental review provisions (Section 10.8) of the Compact as a matter of federal law. The facts alleged in support of this claim, and which must be accepted as true, include: (1) The Compact between the State and JIV was approved in 2000 (¶ 144); (2) once approved a compact becomes federal law and is enforceable as such (Id.); (3) the DOI approval of the terms of the Compact was "only to the extent they authorize gaming on 'Indian lands' as defined by IGRA" (¶ 146); and (4) the Compact incorporated the policies of NEPA that requires study and mitigation of adverse environmental impacts before any casino was constructed and which did not happen (¶¶ 148-149).

The named defendants include two federal agencies: DOI and NIGC. (¶¶ 11-12.) Defendants also include federal employees and officials of the DOI and NIGC who were sued in their official capacity "for actions and decisions for

which they bear responsibility" and in their personal capacities "for allowing and facilitating the construction of an illegal casino . . . in violation of federal and State law including constitutional violations." (¶ 10.) Several JIV officials were also sued as individuals "for allowing and facilitating the construction of an illegal casino . . . in violation of federal and State law including constitutional violations." (¶ 13.) And three private corporations were sued for their roles in constructing the casino in violation of federal and State law. (¶¶ 15-17.) Finally, although not a defendant, JIV's voluntary and extensive participation in this case "as though it was a party" was described in the SASC. (¶ 14.)

B. Motion for Writ of Mandate and Related Appeal.

On January 6, 2015, Plaintiffs filed a motion for preliminary injunction and for a writ of mandate to protect the status quo and compel compliance with NEPA before the Hollywood Casino was constructed as outlined in the fifth (NEPA) claim and sixth (compact) for relief in the SASC. (ECF No. 60.)

On May 15, 2015, the district court denied JAC's motion for an injunction and for a writ of mandate. (ECF No. 93.) The district court held NIGC need not comply with NEPA and prepare and circulate the promised SEIS before the "approved" casino was constructed and opened. The district court also held early preparation of the SEIS was not necessary because, until the casino is opened any adverse environmental impacts "remain at most speculative." (ER 12, ll. 12-14.)

The district court's conclusion that the SEIS need not be completed, if at all, until after the management contract was approved and casino is opened was "exactly backwards." *National Parks Conservation Association v, Babbitt,* 241 F.3d 722 (9th Cir. 2001). NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon NRDC,* 490 U.S. 360, 370-374 (1989).

On May 19, 2015, JAC filed a Notice of Interlocutory Appeal to this Court. (ECF No. 94.) And fourteen months later, on July 15, 2016, this Court upheld the district court's denial of JAC's request for injunctive relief in a published decision coupled with an unpublished memorandum. This Court held there was a "clear and unavoidable" statutory conflict between the environmental review procedures mandated by NEPA and the timelines in the IGRA for NIGC to approve gaming ordinances and for NIGC's determination the property is a "reservation" eligible for gaming under IGRA. *Jamul Action Committee v. Chauduri,* 837 F.3d 958 (9th Cir. 2016). Finally the panel in the unpublished memorandum decision upheld the district court's conclusion that an EIS need not be completed until **after** the proposed gaming management contract is signed and the casino is opened. And,

unfortunately that is what happened. The EIS was completed after the casino opened and the environmental damage was done and beyond mitigation.[1]

C. Defendants' Motion to Dismiss the Complaint.

Defendants filed motions to dismiss the SASC in its entirety. (ECF Nos. 125 & 127.) Defendants did not address the specific factual allegations in the SASC summarized above. Nor do they try explain why, assuming the factual allegations in the SASC are true, they are insufficient to state a claim for relief. Instead, Defendants argued the court lacked jurisdiction, JAC lacked standing and JIV was a necessary party who could not be joined because of sovereign immunity.

JAC filed oppositions to Defendants' motions to dismiss which incorporated and included its motion for summary judgment (discussed in the next section). (ECF Nos. 143 & 144.) JAC argued the allegations in its SASC were sufficient to establish standing to pursue its APA claims, its Constitutional claims and its public nuisance claims. JAC also demonstrated the court had jurisdiction over the final agency actions by NIGC approving the reservation, gaming ordinance and management contract. And JAC demonstrated that JIV, as a half-blood Indian community created in 1981, is not necessary or entitled to sovereign immunity.

[1] Although the NEPA issues will not be re-briefed here, JAC is not waiving their arguments in this regard and, if necessary, reserves the right to seek further review.

D. JAC's Motion for Partial Summary Judgment.

On February 12, 2016, in response to the Defendants' motions to dismiss, JAC filed a cross-motion seeking partial summary judgment on their First Claim for Relief in their SASC. (ER 216-350.) JAC requested a determination that none of the four properties on which the Hollywood Casino is located a "reservation" as that term is defined and used in IGRA. 25 U.S.C. §§ 2701-2721. Therefore NIGC lacked jurisdiction to approve the gaming ordinance or management contract. Also, because the casino was constructed on non-Indian land, it is a public nuisance under California law and should be immediately abated. Cal. Penal Code § 11225. *Michigan v. Bay Mills Indian Community* 134 S.Ct. 2024 (2014)

In support of its motion, JAC filed a statement of undisputed facts. (ER 230-231.) JAC also submitted a Request for Judicial Notice of all the pertinent title documents with respect to each of the four casino properties. (ER 253-350.) JAC also submitted seven documents from the JIV website that depict and confirm the casino, the casino parking lot, soil nail support wall and several other related structures are being constructed on the four separate properties. (ER 232-233.)

E. Orders Dismissing SASC.

On August 8, 2016, the court granted the Defendants' motions to dismiss five of the six claims for relief without leave to amend the SASC. (ER 8-21.) The

court held "[t]he JAC's first, second, third, fourth, and sixth claims must be dismissed because the Tribe is a necessary party and has not been joined." The court held JIV, a half-blood Indian community created in 1981, had sovereign immunity and could not be feasibly joined. Thus the district court dismissed those five claims "without leave to amend." But it was "without prejudice" and was not an adjudication on the merits. Fed. R. Civ. P. 41. (See also ER 209-215.)

In contrast, with respect to the fifth claim, the court found the JIV was "not a necessary party" holding "it [JIV] had no legally protectable interest in the federal defendants' execution of a NEPA review." This conclusion is correct. In fact, as is outlined below, the same rule should apply to federal Defendants' execution of their IGRA and IRA reviews under the APA.

The court also held "[t]he JAC's fifth claim must be restricted to its allegation that the federal defendants approved the Tribe's gaming ordinance without conducting the review procedure required by NEPA." The court then concluded "the Ninth Circuit's decision on the interlocutory appeal, issued since the hearing in this court, requires dismissal."

With this dismissal of the fifth claim, it appeared that all the issues as to all the claims and all the parties in the SASC were finally decided by the district court. This was especially true because, as is outlined above, this Court previously held

that the federal appellees need not comply with NEPA before approving the reservation, gaming ordinance or management contract. *Jamul Action Committee v. Chauduri*, 837 F.3d 958. Consequently on August 15, 2016, JAC filed a notice of appeal of the district court's August 8, 2016 Order. (9th Cir. Case No. 16-16442.)

While appeal was pending, the district court issued another Order on December 13, 2016, dismissing any remaining issues in the fifth claim for relief but on different grounds. (ER 3-7.) The district court held it lacked subject-matter jurisdiction over part of the fifth (NEPA) claim because the management contract was not signed and approved until September 30, 2016 and supposedly did not exist at the time the SASC was filed on August 26, 2014. The district court ignored the fact that the gaming management and development contracts had been "deemed approved" almost three years earlier, on October 13, 2013 – 90 days after it was submitted to NIGC for approval and 10 months before the SASC was filed. 25 U.S.C. §§ 1331 & 2711(d). Also, the district court's December 13, 2016 Order is arguably void because it lacked jurisdiction to dismiss the fifth claim while JAC's appeal of the August 8, 2016 Order dismissing the fifth claim was pending. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).[2]

[2] On the other hand, if this Order is valid and the Court lacked subject matter jurisdiction over the NEPA issues, then all prior orders involving NEPA issues, including this Court's published decision and related memorandum, are retroactively null and void. *Orff v. U.S.*, 358 F.3d 1137, 1149 (9th Cir. 2004)

F. Final Judgment and Appeal.

On June 15, 2017, at the request of the Defendants, this Court dismissed JAC's appeal of the August 8, 2016 Order. (9th Cir. Case No. 16-16442; Docket Entry 27.) The next day, on June 16, 2017, the district court directed the Clerk "to enter judgment and close this case" based on its August 8, 2016 and December 13, 2016 Orders. The district court filed the final judgment on July 31, 2017. (ER 2.) And JAC filed a Notice of Appeal on August 12, 2017. (ER 1.)

SUMMARY OF ARGUMENT

The JIV is a race-based, half-blood Indian group and not a federally recognized tribe under Part 83. Consequently JIV is not entitled to the benefits of the IRA and IGRA. NIGC's treatment of JIV as though it were a federally recognized tribe on a reservation by giving it the right to own and operate a casino in rural Jamul violates the Constitutional principles of equal protection and federalism. NIGC's designation of the casino land as a reservation and its approval of the gaming ordinance and management contract are legally void.

The land on which the casino is constructed is not a "reservation" eligible for gaming under IGRA. And NIGC did not have the authority to declare the land is a "reservation" or to allow gaming on any of the four separate parcels claimed

by NIGC to be a reservation. Therefore the casino is a public nuisance under California law which should be immediately enjoined and abated.

The JIV is not a necessary party to JAC's NEPA, IRA, or IGRA claims. Only the federal agencies and officials involved are necessary parties to those APA claims. Nor is the JIV necessary to JAC's constitutional and public nuisance claims. Furthermore, even if the JIV were a necessary, it is feasible to join it as a party to this lawsuit. The JIV is a racial half-blood Indian association organized in 1981. It did not predate the United States and does not have retained or inherent sovereign immunity which precludes their participation in this case.

STANDARDS OF REVIEW

A. Equal Protection

"[A]ll racial classifications imposed by whatever federal, state or local actor, must be analyzed by a reviewing under strict scrutiny." *Adarand Const. Inc. v. Pena,* 515 U.S. at 227. "[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* This strict scrutiny standard applies to any "racial group consisting of Indians," including a half-blood Indian community, which is not a federally recognized tribe. *Morton v. Mancari*, 417 U.S. 535, 543 n. 24 (1974).

B. Failure to state a claim – Rule 12(b)(6).

A grant of motion to dismiss is reviewed de novo. *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013). "[T]he court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. Bureau of Land Management*, 793 F.3d 1147, 1155 (9th Cir. 2015). A court may also consider matters subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

C. Failure to join a necessary party – Rule 12(b)(7).

A motion to dismiss for failure to join a necessary party is allowed under Rule 12(b)(7). *Schnabel v. Lui*, 302 F.3d 323, 1029-1030 (9th Cir. 2002). Rule 19, which addresses the Required Joinder of Parties, "imposes a three step inquiry: (1.) Is the absent party necessary (i.e. required to be joined if feasible) under Rule 19(a)? (2.) If so, is it feasible to order that the absent party be joined? (3.) If joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed?" *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1172, 1179 (9TH Cir. 2012). The party making the Rule 12(b)(7) motion to dismiss has the burden of demonstrating joinder is required or dismissal is appropriate. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1980).

D. Motion for Summary Judgment - Rule 56.

A grant or denial of a motion for summary judgment is reviewed de novo. *Jones v. Blanas,* 393 F.3d 918, 926 (9th Cir. 2004). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157 (1970). And a Court may grant summary judgment on its own and on grounds not initially raised by the movant. Fed. R. Civ. Proc. 56(f). A refusal to decide a valid motion is an abuse of discretion.

E. Administrative Procedure Act

"Final agency decisions" and other actions and inactions of NIGC are subject to APA review. 25 U.S.C. § 2714. Under the APA, a reviewing court will set aside agency actions if: (1) it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority or limitations, (4) without observance of procedures required by law; (5) unsupported by substantial evidence or (6) unwarranted by the facts. 5 U.S.C. § 706 (2). The court decides questions of law, interprets constitutional and statutory provisions, and determines the meaning of the terms of an agency action. 5 U.S.C. § 706

.

ARGUMENT

A. JIV is not a Part 83 federally recognized tribe entitled to a reservation under the IRA or a casino under IGRA.

1. Part 83 recognition is required to receive IRA and IGRA benefits.

Federal recognition under Part 83 is needed before an Indian tribe may seek "the protection, services and benefits of the Federal government." *Carcieri v. Salazar* 555 U.S. at 385. Acknowledgement under Part 83 is also a pre-requisite for a tribe to be entitled "to immunities and privileges to other federally acknowledged tribes by virtue of their government-to-government relationship with the United States." *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273-1274 (9th Cir. 2004) (quoting 25 CFR § 83.2). Thus, without Part 83 recognition, the JIV could not have sovereign immunity. See also *Thomas v. Williams,* 115 F.3d 657 (9th Cir. 1997).

Among the federal benefits a Part 83 recognized tribe may claim are is "the right to operate gaming facilities under the Indian Gaming Regulatory Act." *California Valley Miwok v. United States,* 515 F.3d at 1264. IGRA "has no application to tribes that do not seek and attain formal federal recognition." *Passamaquoddy Tribe v. State of Maine,* 75 F.3d 784, 792 n.4 (1st Cir. 1996) See also 25 USC § 2703(4). Thus, without obtaining federal recognition under Part 83, the JIV does not have the authority under IGRA to own or operate the casino.

Likewise, to receive benefits under the IRA, a tribe must first seek and obtain Part 83 recognition. *Mackinac Tribe v. Jewell,* 829 F.3d 754 (D.C. Cir. 2016). In the *Mackinac Tribe* case, a group of Indians – which had not obtained Part 83 recognition - brought an action against the Secretary of Interior to convene an election allowing them to organize under Section 16 of the IRA. The Court held the Mackinac tribe must first seek federal recognition under Part 83 obtaining the benefits of the IRA. See also *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209, 211-212 (D.C. Cir. 2013) and *James v. US Dept. of Health and Human Services,* 824 F.2d 1132, 1136-1138 (D.C. Cir. 1987). Thus, without Part 83 recognition as a tribe, the JIV was not eligible to organize under Section 16 of the IRA.

To be recognized under Part 83, a group of Indians "must satisfy" seven criteria by submitting "thorough explanations and supporting documentation." *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d at 211-212 (quoting and listing the seven criteria in 25 CFR § 83.6). It can be a long and difficult process. But basically a tribe must establish it is "an historical Indian tribe." It must establish it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." *Id.*

The JIV has never petitioned for federal recognition under Part 83. And given the history outlined above it could not meet the strict Part 83 criteria summarized and discussed in detail in the *Muwekma Ohlone* case. And according

to Director Bacon's 1993 letter, after the difficulty of obtaining Part 83 recognition was explained to members of the Jamul half-blood Indian community, the JIV decided not to seek Part 83 recognition. (ER 48-55.) Specifically Director Bacon continues: "Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as half-blood Indian community." (ER 49.)

2. JIV is not a Part 83 tribe entitled to IRA or IGRA benefits.

Section 19 of the IRA includes three definitions of "Indian" to include:

(a) "all persons of Indian descent who are members of any recognized tribe now [1934] under Federal jurisdiction," and

(b) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any reservation," and

(c) "shall further include all other persons of one-half or more Indian blood."

25 USC § 5129 (emphasis added),

Thus, under the third definition, even if an Indian is not a member of a tribe recognized in 1934, or a descendant of a member of a recognized tribe on a reservation in 1934, such person may qualify for some IRA benefits if that individual possess "one-half or more Indian blood." And after the IRA was enacted in 1934, the BIA developed for individual half-blood Indians to apply for IRA

benefits. *Maynor v. Morton,* 510 F.2d 1254 (D.C. Cir. 1975)(In 1938, 208 Lumbee Indians applied to the Secretary of Interior as individuals claiming "on-half or more Indian blood" for IRA benefits; only 22 applications were approved).

Although individual Indians with "one-half or more Indian blood" are not precluded from forming an association, such a group is not a recognized tribe and is not entitled to federal recognition. *Pit River Home and Agricultural Cooperative v. United States,* 30 F.3d 1088, 1095-1096 (9th Cir. 1994) (A "tentative association" of "individual Indians" of "one-half or more Indian blood" "is not a federally recognized tribe.") Nor could such an association of half-blood Indians organize itself pursuant to Section 16 of the IRA. *Mackinac Tribe v. Jewell, supra.*

JIV may be a race-based association of half-blood Indians but it is not a federally recognized tribe under Part 83 or a Section 16 IRA tribal entity. Nor is it entitled to fee-to-trust or other benefits of the IRA or the gaming and casino benefits of IGRA. Nor is JIV entitled to the "privileges and immunities" including sovereign immunity enjoyed by tribes that obtained federal recognition under Part 83. Despite these facts, NIGC and BIA employees and officials claim JIV had a reservation and it was entitled to own and operate a casino under IGRA. Federal Defendants' actions were arbitrary, capricious and contrary to law. Their casino related approvals of JIV's gaming ordinance, gaming management contract, and reservation are illegal and void.

3. It violates Equal Protection to give JIV benefits based on race.

"[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under strictest judicial scrutiny." *Adarand Const. Inc. v. Pena*, 515 U.S. at 220. And discrimination in favor of a racial group of half-blood Indians that is not a federally recognized tribe violates the Equal Protection. *Morton v. Mancari,* 417 U.S. at 543 n. 24. See also *Rice v. Cayetano,* 528 U.S. 495, 519-520 (2000) (holding unconstitutional a statute that limited voting to "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778").

Discrimination based on a percentage of blood quantum of any race is especially pernicious and suspect. *Id.* The serious equal protection problems involved in using the degree of Indian blood as a means of defining and classifying Indians was recently discussed by Ninth Circuit Judges Kozinski and Ikuta in their concurring opinions in *United States v. Zepeda*, 792 F.3d 1103, 1116-1120 (9th Cir. 2015)(en banc). That case involved a definition of Indian in the Indian Major Crimes Act which requires a criminal defendant (1) have "a quantum of Indian blood" traceable to a federally recognized tribe and (2) be a member of, or affiliated with, a federally recognized tribe. The Court upheld the conviction based on evidence Zepeda was an Indian because he had "one-half Indian blood." Judges

Kozinski and Ikuta concurred in the decision but criticized using the Indian blood-quantum rule to define a defendant as an Indian. Judge Kozinski considered it to be a clear violation of the principle of equal protection to use blood quantum rules that should not survive strict scrutiny. Judge Ikuta agreed and went further in criticizing the blood quantum rules and urged the Court to "avoid perpetuating the sorry history of this method of establishing a race-based distinction." *Id.* at 1119. Judge Ikuta reviewed the shameful use of "blood quantum tests" in our history and concluded blood quantum classification systems should be rejected.

Here federal Defendants played the pivotal role in creating the JIV as an illicit race-based half-blood Indian community in 1981. The federal government's campaign to create and give preferential treatment and benefits to a group of mixed-blood Jamul Indians started in 1975 with Acting Deputy Commissioner Krenzke's suggestion that individual adult Indians are "entitled to organize pursuant to Section 16 of the IRA." (ER 34.) Mr. Krenzke made this claim despite the fact Section 16, on its face and as a matter of law, applies only to "tribes on a reservation" and not to a race-based group of half-blood Indians on a recently acquired "land base." *Mackinac Tribe v. Jewell,* 829 F.3d 754.There is no provision in the IRA, under Section 16 or otherwise, for an unrecognized group of half-blood Indian to organize as a quasi-tribal entity.

After JIV organized itself in 1981, the federal Defendants, under the color of federal governmental authority, started to give preferences to the JIV as though it was a federally recognized tribe that had completed the Part 83 process. It was clear violation of Equal Protection, for federal Defendants to give such preferences, including IRA and IGRA benefits, to a racial group of half-blood Indians as though it was a federally recognized tribe under Part 83. No other citizen in the Jamul community, especially those who cannot claim to be one-half blood Indian, can operate a casino exempt from State public nuisance laws. The continuing unequal preferential treatment the federal Defendants are affording to JIV cannot withstand the strict scrutiny. NIGC's determination that casino land is a "reservation" eligible for Indian gaming and its approvals of the gaming ordinance and management contract are void. They should be rescinded and the casino should be immediately abated as a public nuisance under California law. Cal. Const. Art. 4, Sec. 19(e)&(f); Cal. Penal Code § 11225. *Michigan v. Bay Mills Indian Community* 134 S.Ct. at 2035.

4. It violates Federalism to exempt JIV from State and local laws.

Federalism preserves the "integrity, dignity, and residual sovereignty" of the States through the allocation and balance of power between the States and federal government. *Bond v. United States* 131 S.Ct. 2355. But this federal structure and "[t]he Constitution does not protect the sovereignty of the States or state

governments . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992)(emphasis added). And "[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State." *Bond v. United States* 131 S.Ct. at 2363-2364.

"Perhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft, Governor of Missouri*, 501 U.S. 452, 458 (1991). The abuse of power in this case is being exercised by officials and employees of the BIA and NIGC who intentionally ignored and evaded the rules, including those in NEPA, IRA, and IGRA, to given unwarranted benefits and preferences to the JIV solely because it is a racial group of Indians. These federal officials have a great deal of power which they are willing to abuse with the apparent justification that, although they may be causing damage to others in the community, at least they are benefitting some of the half-blood Jamul Indians.

Justice Scalia recently noted: "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Arlington v. FCC*, 133 S.Ct. 1863, 1879 (2013). The danger caused by the BIA's abuse of its "growing power" is evident in this case. They created the JIV as a racial group and are trying to give it all the

benefits of a recognized tribe including the right to build a casino in rural Jamul. This is a clear abuse of power in violation of California's Constitution and public nuisance laws. Cal. Const. Art. 4, Sec. 19(e)&(f); Cal. Penal Code § 11225.

Neither the BIA nor the NIGC, nor their employees and officials, can make the JIV a federally recognized tribe exempt from State and local "by arbitrarily calling them an Indian tribe." *United States v. Sandoval,* 231 U.S. 28, 46 (1913). Nor do they have the power to give the right of sovereign immunity, enjoyed only by historic tribes, to the JIV – a race-based, half-blood Indian group that did not exist prior to 1981. The principles of federalism should check this abuse and preclude the continued operation of the Jamul casino in violation of State law. Instead it should be enjoined as a continuing public nuisance. Penal Code § 11225.

B. The four parcels of property on which the Hollywood Casino is located is not an Indian reservation eligible for Indian gaming under IGRA

When it enacted IGRA, Congress created NIGC and vested it with regulatory oversight over gaming activities on "Indian lands" which includes "Indian reservations." 25 U.S.C. § 2703(4)(A). In 2013 NIGC announced the property where the Jamul casino was constructed is a "Reservation, which qualifies as 'Indian lands' pursuant to 25 U.S.C. 2703 [IGRA]." (ER 56-58.)

When it was enacted, IGRA did not include a definition of "reservation." And, given the many varied definitions of "reservation" in other – non-IGRA contexts – it was not clear which definition, if any, should or could be used for

IGRA purposes. See *Sault Ste. Marie Tribe of Chippewa Indians v. United States,* 576 F.Supp.2d 838 (USDC W.D.Mich. 2008) (Although the definition of reservation under IGRA is ambiguous, the Secretary of Interior's new narrow interpretation of "reservation" was not entitled to deference.) Also it was not clear in IGRA whether the NIGC Chairman or the Secretary of Interior had the authority to determine whether or not a property is a "reservation" for IGRA purposes. NIGC, as part of its regulatory authority over Indian gaming, has the obligation to determine whether a parcel which a tribe claims is a reservation eligible for an Indian casino under IGRA. But only the Secretary has the authority to "proclaim" a new reservation after a property has been taken into trust. 25 U.S.C. § 5110. These competing responsibilities created another ambiguity in IGRA.

The Tenth Circuit addressed these issues in *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001). The court considered whether a tribal burial ground was a "reservation" for IGRA purposes. The Secretary had decided it was a reservation and, therefore, the tribe could conduct gaming on a contiguous parcel. But the court held the Secretary had not been "charged with administering IGRA" and, therefore, the "Secretary lacked the authority to interpret the term 'reservation,' as used in IGRA." *Id.* at 1265. The court rejected the Secretary's broad interpretation that a "reservation" includes "any parcel of land set aside by the federal government for Indian use." *Id.* at 1266-1267.

In 2001, almost immediately after the *Sac and Fox Nation of Missouri v. Norton Sac* case, Congress "clarified" the Secretary of Interior, not the NIGC Chairman, had been delegated "the authority to determine whether a specific area of land is a 'reservation' for the purposes" of IGRA. Pub. L. No. 107-63, § 134 (2001). Thus, contrary to her announcement in the 2013 Public Notice, NIGC Chairwoman Stevens lacked the authority to declare the property on which Jamul casino is being construct is a "Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703 [IGRA]" eligible for gaming under IGRA.

And, in 2008, the DOI clarified any previous ambiguity by issuing regulations specifically defining the term "reservation" in IGRA as:

> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
>
> (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of Indians as its homeland;
>
> (3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or
>
> (4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.
>
> 25 C.F.R. § 292.2

Thus, to qualify as a reservation for IGRA purposes, the Secretary of Interior [not the NIGC Chairwoman] must find the subject property meets one of these four criteria. None of the four parcels on which the Jamul casino is currently being operated meet any of these four regulatory definitions or classifications of "reservation" for IGRA purposes.

1. The Daley Parcel is not a reservation under IGRA.

The 4.66 acre parcel granted in 1978 by the Daleys to the U.S. for the benefit of Jamul Indians is not a reservation eligible for Indian gaming under IGRA. On December 27, 1978, Donald L. Daley and Lawrence A. Daley granted 4.66 acres to the United States "in trust for such Jamul Indians of one-half degree or more blood as the Secretary of Interior may designate." (ER 255-258.) But the "Acting" Area Director of the BIA accepted the conveyance without any such qualification. And there is no recorded evidence this donated parcel was ever accepted into trust by the Secretary pursuant to 25 CFR Part 151.3. Nor had it ever been proclaimed by the Secretary of Interior to be a reservation. 25 U.S.C. § 5110.

Furthermore, this parcel does not meet any of the four regulatory criteria to be a reservation. 25 C.F.R. § 292.2. It was not created by treaty, executive order or any other federal statute. The NIGC Chairwoman lacked the authority in an SEIS Public Notice to unilaterally proclaim this parcel to be a reservation. That authority

rests solely with the Secretary of Interior. JAC is entitled to a summary judgment that this 4.66 acre parcel is not a reservation eligible for gaming under IGRA.

2. The Daisy Parcel is not a reservation under IGRA.

The Daisy Parcel, which is used for the casino access and entrance, is owned by the JIV in fee and is not a reservation eligible for Indian gaming under IGRA. This parcel has always been part of the casino project and was always going to be used for the casino entrance and driveway. As summarized above, it was first included in the 2002 fee-to-trust proposal for the earlier casino project. But, after the Supreme Court decision in *Carcieri,* the casino project was no longer viable. The JIV was a half-blood Indian community created in 1981 not a federally recognized tribe in 1934 when IRA was enacted by Congress.

In February 2012, unbeknownst to the public and contrary to the provisions of the 25 C.F.R. Part 151, Defendants JIV Chairman Hunter and BIA Regional Director Amy Dutschke, entered into an agreement to take this property into trust. To achieve this objective, an Easement Deed, signed by Hunter and Dutschke, was recorded February 23, 2012, conveying the property from the JIV to the United States "in trust for the benefit of the Jamul Indian Village of California." (ER 273-291.) This was well over a year before NIGC issued its Public Notice in April 2013 that the JIV was going to construct a casino on a claimed "reservation."

This lawsuit was filed by JAC in September 2013. And on April 21, 2015, Defendants Dutschke and Hunter, after their covert effort to put this parcel in trust was discovered, took action to try to "correct" their misstep, by signing and recording a "Correction Deed" which took the adjacent property out of trust. (ER 292-314.) Specifically, they "corrected" the earlier easement deed by removing the words "in trust for the benefit of the Jamul Indian Village of California." The Correction Deed also removed the following phrase: "Grantee shall hold such Easement in trust for the benefit of the Jamul Indian Village." (Id.)

As outlined above, JAC's efforts to enjoin the construction of the casino were not successful. The elevated walkway and driveway and casino entrance were built on the Daisy parcel with federal funds from the BIA Tribal Transportation Program. (ER 141-146.) The walkway, driveway, retaining walls, parking lot, propane storage tank and septic retention basin are all part of the JIV "Gaming Facility" as defined by Section 2.8 of JIV's compact with the State. (ER 75.) And like the casino itself they must all be built on Indian land as defined by IGRA or they are a public nuisance under State law. *Michigan v. Bay Mills Indian Community* 134 S.Ct. at 2035 (suit seeking an injunction can be brought under State law "designating illegal gambling facilities as public nuisances").

The casino was completed and opened in October 2016. And a month later, on November 30, 2016, the JIV again applied to the BIA to have the Daisy

property taken into trust. (ER 80-87.) Despite the fact casino access and other casino support structures are already built on this parcel, Director Dutschke claimed the application was for "non-gaming" purposes. Id. Regardless, the Daisy parcel is clearly not a "reservation" under IGRA. Nor does it come close to meeting any of the regulatory criteria listed above to qualify as a reservation under IGRA. 25 C.F.R. § 292.2. Although the 2016 application to transfer the Daisy parcel into trust is pending, JIV still owns the property in fee. JAC is entitled to a summary adjudication that this 4 acre parcel is not a reservation eligible for gaming under IGRA. Instead the casino support structures on JIV fee-owned land are a continuing public nuisance under State law which should be abated.

3. The Indian Graveyard Access is not a reservation under IGRA.

On July 11, 1912, the Coronado Beach Company transferred 2.21 acres to the Roman Catholic Bishop "for an Indian graveyard and approach thereto". (ER 315-318.) Seventy years later, on July 27, 1982, of the Roman Catholic Bishop transferred a portion of this property to the United States "in trust for the Jamul Indian Village." The Church reserved an easement for utility service lines and for "ingress and egress over the existing well-traveled road." (ER 319-321.)

This property is still being used for an Indian cemetery and, as such, it should not be considered a reservation for IGRA purposes. See *Sac and Fox Nation of Missouri v. Norton, supra.* Furthermore, it does not meet any of the regulatory criteria to be a reservation under IGRA. 25 C.F.R. § 292.2. Despite this fact, the current access road to the Indian graveyard property is also being used as alternate access road to the new casino. JAC is entitled to a summary adjudication that the Indian graveyard and related access are not a reservation under IGRA.

4. The Soil Nail Wall easement is not a reservation under IGRA.

October 23, 2014, the Wildlife Conservation Board transferred to the JIV an 80 foot easement on the Rancho Jamul Ecological Reserve for an underground "Soil Nail System" and bearing wall necessary to support the JIV casino and related parking lot. (ER 322-340.) As a part of the arrangement, the casino developers, Penn National and SDGV agreed to indemnify the State for any litigation costs that may be generated if this easement is challenged. (Id.)

The soil nails and related casino support structures were necessary, and reasonably foreseeable by any competent structural engineer, because the casino and parking lot were to be built right on the Daley Parcel boundary line. In fact, this boundary line wall is called a "soil nail wall" and consists of hundreds of soil nails that penetrate the property up to 36 feet and was described by the engineer as

a major earth retention project built on the Rancho Jamul Ecological Reserve. (ER 65-70.) And a perpetual 80 foot easement on the reserve was needed to maintain and monitor these soil nails because the soil nail wall is critical to the integrity of the entire casino structure. The easement and soil nail wall is part of the casino. But it is on the reserve and not on a reservation eligible for gaming under IGRA.

JIV's 80 foot soil nail easement on the Rancho Jamul Ecological Reserve does not come close to meeting any of the regulatory criteria for a reservation under IGRA. 25 C.F.R. § 292.2. Instead it is a public nuisance that continues to damage one of the most environmentally sensitive areas in San Diego County. JAC is entitled to summary adjudication that this casino soil nail wall easement is not a reservation under IGRA.

C. The JIV is not a required or necessary party that needs to be joined; it does not have retained or inherent sovereign immunity.

The first step in the compulsory joinder analysis, is to determine whether the JIV is a required party under Rule 19. *Alto v. Black,* 738 F.3d 1111, 1126 (9th Cir. 2013). Joinder of the JIV is "required" if either: (1) the court cannot accord complete relief among the existing parties in the JIV's absence, or (2) proceeding with the suit in its absence will impair or impede the JIV's ability to protect its legal interests related to this litigation. Fed. R. Civ. P. 19(a)(1)(A)-(B).

Only if it is determined the JIV is a required party does the Court proceed to the second Rule 19 inquiry: whether joinder is feasible or barred by sovereign immunity. *Alto v. Black,* 783 F.3d at 1126. If joinder is not possible, then the Court must decide in equity and good conscience if the suit should be dismissed because it cannot proceed without the required party. Id.

1. JIV is not a required party to this litigation.

The district court held JAC's first, second, third, fourth, and sixth claims[3] in the SASC because JIV is a necessary party that has not been joined. (ER 8.) In contrast, the court held the JIV is not a necessary party to the fifth claim because "it has no protectable interest in the federal defendants' execution of a NEPA review." (ER 14.)

a. First and Second Claims for Relief – APA Review.

The Court's reasoning with respect to the fifth (NEPA) claim is equally applicable to the first and second APA claims that challenge the final agency actions that were being studied as part of the NEPA process. JIV "has no protectable interest in the federal defendants execution of [an IGRA or IRA] review." It would be anomalous for the JIV to be a necessary party to an APA challenge to NIGC approvals of the ordinance and management contract but not

[3] For the purpose of this appeal, without conceding the issue, JAC is not contesting district court's dismissal of the sixth claim in the SASC.

be necessary to the NEPA review of those same final agency approvals.

Furthermore, not only is JIV not a required, it could not participate as a Defendant in the APA claims. A suit brought under the APA to require compliance with federal statutes, "the governmental bodies charged with compliance can be the only defendants. . . . all other entities have no right to intervene as defendants." *Portland Audubon Society v. Hodel,* 866 F.2d 302, 309 (9th Cir. 1989) (emphasis added; quoting *Wade v. Goldsmith,* 673 F.2d 182, 185 (7th Cir. 1982).) *Kootenai Tribe v. Veneman,* 313 F.3d 1094, 1108 (9th Cir. 2002).

Contrary to the district court's conclusion, the absence of JIV does not preclude an APA action from proceeding. *Ramah Navajo School Board v. Babbitt,* 87 F.3d 1338, 1351 (D.C. Cir 1996) (APA action involving interest of absent tribe may proceed; the United States can adequately represent the absent tribe's interest.)[4] The APA waives federal sovereign immunity and "establishes a strong presumption in favor of reviewability of agency action and that the court will not deny review unless there is persuasive reason to believe that such was the purpose of Congress." *Ramah,* 87 F.3d at 1343-1344 (citations omitted) quoting *Abbot Laboratories v. Gardner,* 387 U.S. 136, 140 (1967). Defendants cannot use JIV's claimed sovereign immunity to preclude what the APA allows. The JIV is

[4] Likewise in this case the U.S. federal agencies have adequately represented JIV's interests. In fact, with permission of the district court, the JIV has represented its own interests by participating an active litigating amicus in this lawsuit.

not a required or necessary party to the first and second APA claims in the SASC.

b. Third Claim For Relief – U.S. Constitutional Violations.

In the third claim, JAC asserts the federal defendants violated the equal protection and federalism provisions of the Constitution by giving benefits and preferences to the Jamul a racial half-blood Indian community. As outlined above, these constitutional claims are brought against the federal Defendants not the JIV or the other Defendants. JAC does not have an equal protection or federalism claim against the JIV. Nor is the JIV a necessary party to these claims. *Adarand Const. v. Pena,* 515 U.S. 200; *Bond v. United States* 131 S.Ct. 2355.

c. Fourth Claim For Relief – California Nuisance Law Violations

JAC is also seeking declaratory relief that the casino property is not a reservation eligible for gaming under IGRA. And if it is not a reservation, JAC seeks to enjoin the operation of the casino by Defendants Penn National and San Diego Gaming Venture, private corporations, as a continuing public nuisance per se under State law. Cal. Const. Art. 4, Sec. 19(e)&(f); Cal. Penal Code § 11225. The JIV's claim of immunity, is not relevant and cannot be used by these corporations, to shield a nuisance claim under California law or to allow their illegal gambling operation on non-Indian land in violation of California's Penal Code. *Michigan v. Bay Mills Indian Community* 134 S.Ct. at 2035.

2. JIV's joinder is feasible and not barred by sovereign immunity.

"The powers of Indian tribes are, in general, inherent powers of a limited sovereign which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978) quoting F. Cohen, Handbook of Federal Indian Law 122 (1945). "Before the coming of the Europeans, the tribes were self-governing sovereign political communities." Id. The "ultimate source" of a tribe's power lies in its "primeval" or "pre-existing" sovereignty and "in no way to any delegation of federal authority." *Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1872 (2016) (quoting *United States v. Wheeler*).

"Foremost among the attributes of sovereignty retained by the Indian tribes is immunity from suit." *State of Montana v. Gilham*, 133 F.3d 1133, 1136 (9th Cir. 1998). "Indian tribes enjoy immunity because they are sovereigns predating the constitution, and immunity is thought necessary to preserve autonomous tribal existence." *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). But immunity is limited to tribes who were "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills*, 134 S.Ct. at 2030.

In contrast, half-blood Indian groups created after the constitution did not predate the United States and could not have retained or inherent sovereign immunity. Instead, the "ultimate source" of authority for such after-the-fact race-based groups is limited by the authority "delegated" by the federal government.

Commonwealth of Puerto Rico v. Sanchez Valle, 136 S.Ct. at 1872.

The JIV did not predate the United States. Instead, in 1981 the JIV organized itself into a "half-blood Indian" community group. The fact the JIV was created in 1981 and did not exist as a separate tribal entity before then is not subject to dispute. As outlined in detail in the 1993 letter from Director Bacon the JIV is, at most, "a created tribe exercising delegated powers of self-government." It is not an historic tribe with inherent and retained sovereignty. Thus the JIV does not have "inherent" sovereign immunity and it lacks "primeval" or "pre-existing" sovereignty that predated the United States. Therefore, it is feasible that JIV be joined as a party to this action, if necessary. Their joinder would not be barred.

3. Sovereign immunity does not bar suit against federal and JIV officials.

Also, even if it was relevant, tribal sovereign immunity does not bar suits against federal and tribal officials responsible for unlawful conduct. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978) JAC named eight federal officials and five JIV council members in their personal capacity for allowing the illegal casino on the non-Indian land in violation of federal and State law. Each of these individual Defendants acted under the color of governmental authority in violation of federal law and in excess of federal limitations upon their power and authority by giving benefits and preference to the JIV as a race-based group of half-blood Indians. They are all subject to suit as individual defendants. *Ex*

Parte Young, 209 U.S. 123 (1908); *Michigan v. Bay Mills Indian Community* 134 S.Ct. 2024 and *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

CONCLUSION

For the forgoing reasons, JAC respectfully requests that this Court reverse and vacate the district court's Orders dismissing the SASC. JAC also that the casino be permanently enjoined and abated as a continuing illegal public nuisance.

Dated: December 20, 2017.

Respectfully submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

There is no known related cases pending before this Court. But this case is related to the two previous interlocutory appeals in this matter *Jamul Action Committee et al. v. Stevens, et al.* (9th Circuit No. 15-16021), and *Jamul Action Committee et al. v. Stevens, et al.* (9th Circuit No. 16-16442).

Dated: December 20, 2017.

Respectfully submitted,

/s/Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on December 20, 2017.

I certify that Counsel for all the parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 20, 2017.

Respectfully submitted,

/s/Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Appellants