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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIAN HOLL, et al., Plaintiffs, v. SHARON AVERY, in her official capacity as Acting Chairwoman of the National Indian Gaming Commission, and NATIVE VILLAGE OF EKLUTNA, Defendants.	)	Case No. 3:24-cv-00273 JLR

OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT ON THE GROUND OF TRIBAL SOVEREIGN IMMUNITY

Introduction

Sovereign immunity is a common law doctrine that prevents the United States and the State of Alaska from being sued without their consent. Because invoking the doctrine prevents individuals who have been harmed by the actions of federal officials and employees from having a judicial remedy is fundamentally unfair, Congress has enacted numerous statutes that waive the sovereign immunity of the United States. See e.g., 28 U.S.C. 2674 (Federal

Tort Claims Act). For the same reason, the Alaska Legislature has done the same. A.S. 9.50.250.

The Indian Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, grants Congress - not the Secretary of the Interior and not the federal courts - "plenary and exclusive power over Indian affairs." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Nevertheless, in 1940 the U.S. Supreme Court decided on its own that members of the Choctaw and Chickasaw tribes should have the same sovereign immunity that the United States has. *United States v. United States Fidelity & Guaranty Company*, 309 U.S. 506, 512. Over the decades that holding evolved into the Court-created rule that "federally recognized tribes" possess sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

By 1998 when in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, the U.S. Supreme Court considered whether the doctrine of tribal sovereign immunity should shield a tribe from suit regarding its commercial business dealings all nine justices agreed that the doctrine was unfair and its invention by the Court had been ill-advised. After noting that the doctrine had been invented "almost by accident," id. at 756, Justice Kennedy, explained why as follows:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our

> interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. (emphasis added, citation omitted).

Id. at 758.

While they conceded "it is now too late to repudiate the doctrine in its entirety," id. at 764, three justices would not have extended the doctrine to gaming and other commercial business dealings. But Justice Kennedy and the five justices who joined his majority opinion rejected that outcome because, even though the Court had invented the doctrine, they chose "to defer to Congress." Id. at 760.

Expecting Congress to correct a mistake the Court made more than half a century previous reflected a naive misunderstanding of the politics inside the Senate Committee on Indian Affairs and the House Committee on Natural Resources. Three months before the U.S. Supreme Court decided *Kiowa Tribe* Washington Senator Slade Gortion introduced S. 1691, 105th Cong. (Feb. 27, 1998), a bill whose enactment would have abrogated the doctrine of tribal sovereign immunity in a number of situations.

S. 1691 died when the 105th Congress adjourned. Since then no member of Congress has introduced legislation to reform the doctrine to reflect the realities of the modern commercial age.

Over those same years, while the Court's membership has changed, the Court's tribal sovereignty jurisprudence has not.

In 2010 in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), Justice Kagan and the four members of the Court who joined her majority opinion held that the Bay Mills Indian Community, which they described as a "federally recognized Indian Tribe," possessed sovereign immunity. In so holding, Justice Kagan rejected the State of Michigan's request that the Court revisit *Kiowa Tribe* "because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." Id. at 800. And most recently, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Couglin*, 599 U.S. 382 (2023), Justice Jackson and the six members of the Court who joined her majority opinion held that the Lac du Flambeau Band, which they described as a "federally recognized tribe" id. at 385, possessed sovereign immunity.

Given *Kiowa Tribe*, *Bay Mills Indian Community*, and *Lac du Flambeau Band*, if as defendant Native Village of Eklutna (NVE) asserts in its motion to dismiss on the ground of sovereign immunity its members have been lawfully designated as a "federally recognized tribe," then defendant NVE possesses

sovereign immunity and this court should grant its motion. But for the reasons set out below, the members of defendant NVE are no such thing. As the plaintiffs allege in paragraph no. 14 of the First Amended Complaint, they are members of an unincorporated association. They being such, defendant NVE does not possess sovereign immunity and the court should deny its motion to dismiss.

Argument

A. A "Federally Recognized Tribe" Must Be Created By a Formal Political Act

In 1941 Felix Cohen, who today remains an influential commentator on federal Indian law, cautioned that "The term 'tribe' is commonly used in two senses, an ethnological sense and a political sense" and "It is important to distinguish between these two meanings of the term."[1] In other words, if a group composed of individuals of Native American descent is a "tribe" in an ethnological sense[2] that does not mean that Congress (or

[1] HANDBOOK OF FEDERAL INDIAN LAW, at 268 (1941). Felix Cohen, the principal author of the *Handbook*, was the Indian law expert in the Office of the Solicitor in the Department of the Interior. The Department published the *Handbook* in August 1941. Four months later the U.S. Supreme Court began citing the *Handbook* as an authoritative treatise on federal Indian law. See *United States v. Santa Fe Railroad Company*, 314 U.S. 339, 349 n. 5 (1941).

[2] In *Montoya v. United States*, 180 U.S. 261, 266 (1901), the U.S. Supreme Court defined an ethnological tribe as a group of individuals "of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

the Secretary of the Interior acting pursuant to authority that Congress in a statute has delegated to the Secretary) has designated the members of the group as a "federally recognized tribe."

In that regard, the Committee on Natural Resources, which in the U.S. House of Representatives has jurisdiction over bills that involve Native American-related subject matters, has instructed:

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress' legislative powers. This federal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all powers accompanying that status . . . . (emphasis added).

H.R. Rep. No. 103-781, at 2-3 (1994). Accord COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, section 3.02[3], at 133-134 (2012); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, section 4.02[3], at 178 (2024) ("Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society").[3]

[3] In 1982 a group of law professors who specialized in federal Indian law published their own treatise on the subject. To capitalize on Felix Cohen's reputation as an authoritative

B. In 1884 Congress Decided That It Would Not Designate Any Group of Alaska Natives as a "Federally Recognized Tribe." Instead, Alaska Natives Would Be Subject to the Same Civil and Criminal Jurisdiction of, First the District, Then the Territory, and Now the State of Alaska as All Non-Natives in Alaska Are Subject.

In what would become the coterminous states the initial objective of Congress's Indian policy was to, by negotiation if possible and force of arms when necessary, clear the public domain of the Native Americans who had been occupying it. Although military engagements would continue to 1890, by 1869 Congress's objective was well along on its way to being achieved.

As a consequence, Congress created a Board of Indian Commissioners to assist the Secretary of the Interior administer Indian policy. 16 Stat. 13, 40 (1869). Although Congress directed that the Board be composed of men "eminent for their intelligence and philanthropy," many members of the Board were Protestant clergymen who were interested in a new Indian policy, which was to prepare Native Americans who had survived the clearing of the public domain for citizenship. As Clinton Fisk, the chairman of the Board, informed Congress in 1884: "The solution to the Indian

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commentator, for marketing purposes they titled their book *Felix S. Cohen's Handbook of Federal Indian Law*. In 2012 and 2024 when two other groups of law professors published their own treatises, they did the same. The U.S. Supreme Court and the lower federal courts have repeatedly cited the 1982 and 2012 treatises as authoritative texts. See e.g., *Michigan v. Bay Mills Indian Community*, *supra* at 802-803 (2012 treatise cited twice).

problem is citizenship." H. Ex. Doc. 1, Part 5, 48th Cong., 2d Sess. 685 (1884).

While he was not a member of the Board of Indian Commissioners, the Presbyterian clergyman Sheldon Jackson was a member of the Board's cohort. In 1880 when the Senate Committee on Territories considered a bill to grant the District of Alaska a civil government, insofar as Alaska Natives were concerned, Jackson told the Committee: "It is not necessary that the United States should feed and clothe them, or make treaties with them. This enables us in our Indian policy to take a new departure; and treat them as American citizens." S. Rep. No. 47-457, at 12 (1880). Four years later when Congress enacted the Alaska Organic Act, 23 Stat. 24 (1884), it accepted Jackson's recommendation.

In 1932 Secretary of the Interior Ray Lyman Wilbur summarized Congress's Alaska Native policy to that date as follows:

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.[4]

[4] Letter from Secretary of the Interior Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), reprinted in *Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the S. Comm. on Indian Affairs*, 72d Cong., at 15-16 (1932).

Two years later, Congress enacted the Indian Reorganization Act (IRA). Pub. L. No. 73-383, 48 Stat. 984. Sections 16 and 17 of the IRA authorized an "Indian tribe" and a group of tribes "residing on the same reservation" to adopt a constitution, as well as obtain a corporate charter that would enable the tribe or group of tribes to obtain loans from a revolving loan fund that section 10 of the IRA created.

At the urging of Alaska Delegate Anthony Dimond - see H.R. 9866, 74th Cong. (Jan. 7, 1936), in 1936 Congress enacted Pub. L. 74-538, 49 Stat. 1250 (popularly known as the Alaska Indian Reorganization Act). Section 1 of the Act authorized "groups of Indians in Alaska not heretofore recognized as bands or tribes," (emphases added) to adopt constitutions, obtain corporate charters, and obtain loans from the revolving loan fund.

Between 1958 and 1980 Congress enacted the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971), and the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487 (1980). During the congressional hearings held on those enactments Alaska Natives, attorneys representing Alaska Native organizations, and Department of the Interior officials testified. No witness suggested that Congress had designated any group composed of individuals of Alaska Native descent as a

"federally recognized tribe."

Most particularly, between 1968 and 1971 the Senate and House Committees on Interior and Insular Affairs held six hearings on bills whose enactment would settle Alaska Native land claims. At the first of those hearings William Hensley, an Inupiat Eskimo leader of the land claims movement who later would serve as president of the Alaska Federation of Natives, explained to the Senate Committee that: "We have no administratively recognized tribal groups in the State [of Alaska], such as you have in Arizona and some of the other States." *Alaska Native Land Claims: Hearings on S. 2906, et al., Before the S. Comm. on Interior and Insular Affairs*, 90th Cong. 62 (1968).

Consistent with that history, after surveying Congress's Alaska Native-related enactments, in 1988 the Alaska Supreme Court concluded that

> In a series of enactments following the Treaty of Cession and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 41 (1988).

C. The Attempt in 1993 By Assistant Secretary of the Interior for Indian Affairs Ada Deer to, by Unilateral Executive Branch Agency Fiat, Designate the Members of Defendant Native Village of Eklutna and the Members Other Alaska Native Groups as "Federally Recognized Tribes" Was Ultra Vires

1. Bureau of Indian Affairs List of Alaska Native Entities

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203, which authorized the Bureau of Indian Affairs (BIA) to contract with "Indian tribes" to administer programs and services that the BIA had been administrating. Section 4(b) of the ISDEAA defined "Indian tribe" to mean

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Because the ISDEEA did not identify the specific entities that were section 4(b) "Indian tribes," in 1979 Assistant Secretary of the Interior for Indian Affairs Forrest Gerard published a list of "Indian Tribal Entities" eligible for programs and services administered by the BIA. 44 *Fed. Reg.* 7231-7233 (1979). No Alaska Native entities were on the list because, as Assistant Secretary Gerard explained, a "list of eligible Alaskan entities will be published at a later date." Id. at 7231.

In 1982 when Assistant Secretary of the Interior for Indian Affairs Kenneth Smith republished the 1979 list he published a separate list of two hundred "Alaska Native Entities" (one of which was "Eklutna Native Village"). 42 *Fed. Reg.* 53133-53135 (1982). Assistant Secretary Smith explained that he had included "Alaska Native Entities" on a list separate from the list of "Indian Tribal Entities" because:

> While eligibility for services administered by the Bureau of Indian Affairs is generally limited to historical tribes and communities of Indians residing on reservations, and their members, unique circumstances have made eligible additional entities in Alaska which are not historial tribes. Such circumstances have resulted in multiple, overlapping eligibility of native entities in Alaska. To alleviate any confusion which might arise from publication of a multiple eligibility listing, the following preliminary list shows those entities to which the Bureau of Indian Affairs gives priority for the purposes of funding and services. (emphasis added).

Id. at 53133-53134 (1982).

In 1983, 1985, and 1986 the list of "Native Entities" was republished. 48 *Fed. Reg.* 56865-58866; 50 *Fed. Reg.* 6058-6059; 51 *Fed. Reg.* 25118-25119.

In 1988 when Assistant Secretary of the Interior for Indian Affairs Ross Swimmer again republished the list, rather than two hundred "Native entities," the list contained five hundred. 53 *Fed. Reg.* 52833-52835. In a preamble, id. at 52832-52833, Assistant Secretary Swimmer explained that the reason for the increase was that, rather than a list of "federally recognized

tribes," the list was a list of Native Entities eligible to receive programs and services from the BIA. Since in the ISDEAA Congress had included ANCSA regional and village corporations in the "Indian tribe" definition, Assistant Secretary Swimmer included the corporations on the list.

2. The Alaska Native Tribal Sovereignty Movement Recruits Assistant Secretary of the Interior for Indian Affairs Ada Deer

Paragraph no. 29 of the First Amended Complaint alleges:

> In 1982 a political movement began in the Alaska Native community whose organizing tenets were that Alaska Native residents of the community of Eklutna and all other ANCSA Native villages were, and had always been, members of federal (sic) recognized tribes, that the land within and surrounding each Native village was "Indian country" as 18 U.S.C. 1151 defines that term, and that within the boundaries of that Indian country each federally recognized tribe possessed powers of self-government. The leaders of that movement were represented by a small group of attorneys whose two most influential members were Robert Anderson, an attorney employed in the Anchorage office of the Native American Rights Fund (NARF), and Lloyd Miller, the head of the Anchorage office of the Sonosky Chambers law firm.[5]

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[5] When deciding a motion to dismiss the court must "accept all allegations of material fact in the complaint as true." *Cedars-Sinai Medical Center v. National League of Postmasters*, 497 F.3d 972, 975 (9th Cir. 2007). Accord *Dine Citizens Against Ruining Our Environment v. BIA*, 932 F.3d 843, 851 (9th Cir. 2019). In an attempt to persuade the court to disregard that rule defendant NVE asserts that the instant motion implicates the court's subject matter jurisdiction and cites *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015), for the proposition that when the court's subject matter jurisdiction is implicated "no presumptive truthfulness attaches to a plaintiff's allegations." But what the circuit court held in *Pistor* was that "when a

If they thought social and economic conditions in Eklutna and other communities in Alaska that in section 11(b)(1) of ANCSA, 43 U.S.C. 1609(b)(1), Congress had designated as "Native villages" would be improved if Alaska Natives in those communities were designated as members of "federally recognized tribes," Messrs. Anderson and Miller and the other attorneys who represented the leaders of the Alaska Native tribal sovereignty movement could have asked Alaska's senators and congressman to have Congress enact a statute that conferred that designation.[6]

Instead, they concocted a scheme to transform the list of Native Entities that since 1982 had been a list of Native Entities eligible to contract with the BIA pursuant to the ISDEAA into a list of "federally recognized tribes." To that end, paragraph no. 32 of the First Amended Complaint alleges that on March 20, 1993 Mr. Anderson sent Mr. Miller and other attorneys who represented leaders of the Alaska Native tribal sovereignty movement a memorandum in which he reported

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federal court lacks subject-matter jurisdiction, the court must dismiss the complaint, *sua sponte* if necessary. Sovereign immunity's quasi-jurisdictional nature by contrast, means that it may be forfeited where the sovereign fails to assert it and therefore may be viewed as an affirmative defense")(citations and internal punctuation omitted). Id. at 1111.

[6] In 2018 six groups in the State of Virginia whose memberships were composed of individuals of Native American descent successfully did exactly that. See *Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act,* Pub. L. No. 115-121, 132 Stat. 40.

> Please find for your review a draft letter to the Assistant Secretary, a draft 1993 *Federal Register* List of Federally Recognized Tribes in Alaska and a draft Explanation and Rationale for the new list. We have been in contact with Scott Keep [an Assistant Solicitor in the Division of Indian Affairs in the Office of the Solicitor at the Department of the Interior in Washington, D.C.] and he believes the time is right to follow up on our letter to Secretary [of the Interior Bruce] Babbitt. The plan is to get [Assistant Secretary of the Interior for Indian Affairs] Eddie Brown (who is still in office) to direct the Bureau [of Indian Affairs] to review the proposed new Federal Register list and come up with its own draft list, and to give this matter priority starting now! . . . We plan to have John Ecohawk [the executive director of NARF] ask Bruce Babbitt to direct Eddie Brown to take this action, if necessary . . . So now is the time to strike! (emphases in original).

And see Plaintiffs' Exhibit A.

While that effort initially was unavailing, on June 30, 1993 President Clinton nominated Ada Deer to replace Eddie Brown as Assistant Secretary of the Interior for Indian Affairs. 139 *Cong. Rec.* 14839. Prior to her nomination Ms. Deer had been a "client, a staff member, a board member, a board chair, and finally, chair of the National Support Committee of the Native American Rights Fund," the law firm that employed Mr. Anderson. *Nomination of Ada Deer: Hearing Before the S. Comm. on Indian Affairs*, 103d Cong. 9 (1993)(statement of Ada Deer).

When on July 16, 1993 the Senate confirmed Ms. Deer's nomination, 139 *Cong. Rec.* 15999 (1993), the scheme Messrs. Anderson and Miller had concocted in March proceeded. Paragraph no. 33 of the First Amended Complaint alleges that

> John Treise, the Deputy Associate Solicitor of the Department of the Interior for the Division of Indian Affairs, sent Messrs. Anderson and Miller a draft copy of a new list of Native Entities and accompanying preamble for their review and comment. On September 30, 1993 Mr. Miller sent Deputy Associate Solicitor Treise a fax in which he stated
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> > John, I think the redraft is excellent, and I am glad the NARF submission we all worked on was helpful. I have proposed a sentence for page 3, and made a comment on page 5, a correction on page 6, and joined in Bob [Anderson]'s correction on page 7.

And see Plaintiffs' Exhibit B.

Three weeks later, on October 21, 1993 Assistant Secretary Deer published in the *Federal Register* a new list of "Native Entities" that included "Eklutna Native Village" but none of the ANCSA village and regional corporations that Assistant Secretary Swimmer had included on the 1988 list. 58 *Fed. Reg.* 54368-54369. In a preamble, id. at 54364-54366, Assistant Secretary Deer announced that she intended her act of publication "to eliminate any doubt as to the Department [of the Interior]'s intention by expressly and unequivocally acknowledging that the Department has determined that the [listed] villages and regional tribes . . . are distinctly Native communities and have the same status as tribes in the contiguous 48 states." Id. at 54365. The preamble also announced that

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services [from the BIA], or recognized as tribes for certain narrow purposes. Rather, they have the same

> governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

Id. at 54366.

3. Assistant Secretary Deer's Attempt to Create Two Hundred "Federally Recognized Tribes" in Alaska Simply By Publishing a List of Native Entities in the Federal Register Was Ultra Vires

The authority of an executive branch official is "no greater than that delegated . . . by Congress," *Lyng v. Payne*, 476 U.S. 926, 937 (1986), because "[t]he legislative power of the United States is vested in Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Cf. *American Ship Building Company v. NLRB*, 380 U.S. 300, 318 (1965)(U.S. Supreme Court warning against "the unauthorized assumption by an agency of major policy decisions properly made by Congress").

What statute delegated Assistant Secretary Deer authority to abrogate 109 years of Congress's Alaska Native policy unilaterally by executive branch agency fiat? In her preamble

Assistant Secretary Deer announced that the administrative action she was taking was an "exercise of authority delegated to the Assistant Secretary - Indian Affairs under 25 U.S.C. 2 and 9 . . . ." 58 Fed. Reg. 54364 (1993). But neither statute delegated Assistant Secretary Deer the authority she purported to exercise.

The U.S. Supreme Court has instructed that the best evidence of the intent of Congress embodied in a statute is the statute's text. *Williams v. Taylor*, 529 U.S. 420, 431 (2000). The Court also has directed that, rather than focusing on a single word or sentence, it "look[s] to the provisions of the whole law, and to its object and policy," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), since "the meaning of statutory language, plain or not, depends on context," *King v. St. Vincent's Hospital*, 502 U.S. 212, 221 (1991). And when identifying that context, the Court construes the text of a statute "with reference to the circumstances existing at the time of the [statute's] passage." *United States v. Wise*, 370 U.S. 405, 411 (1962). Accord *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024) (a "statute's meaning is fixed at the time of enactment").

Applying those rules of statutory construction results in the conclusion, easily reached, that Congress did not intend 25 U.S.C. 2 and 9 to delegate Assistant Secretary Deer the authority she purported to exercise.

25 U.S.C. 2

Congress enacted 25 U.S.C. 2 in 1832, which was thirty-five years before the United States purchased Alaska in 1867. 4 Stat. 564 (1832). As now codified, the text reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

The U.S. Supreme Court has directed that "statutory interpretation must begin with, and ultimately heed, what a statute actually says." (internal punctuation and quotation marks omitted). *Groff v. DeJoy*, 600 U.S. 447, 468 (2023). Assuming so, nothing in the text of 25 U.S.C. 2 delegates the Commissioner of Indian Affairs (or the Assistant Secretary for Indian Affairs) authority to on his or her own designate a group of individuals of Native American descent as a "federally recognized tribe."

Consistent with that plain reading of the statutory text, the circumstances that motivated Congress to enact 25 U.S.C. 2 document that Congress enacted the statute in order to achieve a considerably more modest objective.

In 1806 Congress created the office of Superintendent of Indian Trade inside the War Department to administer the Indian trading posts, called factories, that Congress had authorized the President to operate on the frontier. 2 Stat. 402 (1806).

President James Madison appointed Thomas McKenney as superintendent. HERMAN J. VIOLA, THOMAS L. McKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY: 1816-1830, at 4-5 (1974); ROBERT M. KVASNICKLA and HERMAN J. VIOLA (eds.), THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977, 1-7 (1979).

In 1822 Congress closed the factories and abolished the office of Superintendent of Indian Trade. 3 Stat. 682. In response, in 1824 "Secretary of War [John C.] Calhoun, by his own order, and without special authorization from Congress, created in the War Department what he called the Bureau of Indian Affairs. To head the office Calhoun appointed McKenney." FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 57 (1971). Because Secretary Calhoun's action was *ultra vires*, with Secretary Calhoun's approval, in 1826 Thomas McKenney wrote and then submitted to Congress a bill whose enactment would create the BIA, id. at 58-59. In 1832 Congress enacted McKenney's bill. 4 Stat. 564.

Because by 1832 the Secretary of War was annually distributing more than $1 million in gratuities to Indians, operating fifty-four Indian schools, and issuing licenses to traders doing business in Indian country, when the bill that would be enacted as 25 U.S.C. 2 was called up for a vote on the Senate floor Senator Hugh White, chairman of the Committee on Indian Affairs, explained to his colleagues that "To all these

different branches the personal attention of the Secretary of War is now required. The creation, therefore, of such an officer [the Commissioner of Indian Affairs] as is provided by the bill, be deemed to be indispensably necessary." 8 Gales & Seaton's Register of Debates in Congress, at 988 (1832).

If Assistant Secretary Deer is to be believed, without the text of the statute explicitly saying so, in 1832 Congress intended its enactment of 25 U.S.C. 2 to delegate to a subordinate employee of the War Department unfettered authority to decide on his (and in 1993 her) own which groups of individuals of Native American descent should designated as "federally recognized tribes" and to then create that legal status unilaterally by executive branch agency fiat.

Not only does that interpretation of Congress's intent stretch credulity past breaking, but between 1832 and 1993 no Department of War or Department of the Interior official suggested that Congress intended 25 U.S.C. 2 to delegate to the Commissioner of Indian Affairs the authority that Assistant Secretary Deer purported to exercise. See *Loper Bright Enterprises v. Raimondo*, *supra* at 386 (Chief Justice Roberts noting that judicial respect for an executive branch interpretation of a congressional enactment is "especially warranted" when the interpretation had "remained consistent over time").

25 U.S.C. 9

Congress enacted 25 U.S.C. 9 in 1834, which was thirty-three years before the United States purchased Alaska. 4 Stat. 738. As now codified, the text of the statute reads: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." That text delegated Assistant Secretary Deer no authority whatsoever.

4. Congress Did Not Intend Titles I and II of Public Law No. 103-454 to Ratify Assistant Secretary Deer's Ultra Vires Attempt to Designate the Members of Defendant Native Village of Eklutna and the Members of Two Hundred Other Alaska Native Groups as "Federally Recognized Tribes" Simply By Publishing a List of Native Entities in the Federal Register

It is no surprise that in its motion to dismiss on the ground of sovereign immunity defendant NVE first ignores and then disparages the history of Congress's Alaska Native-related enactments between 1884 and 1993. Instead, defendant NVE baldly asserts that in 1994 when it enacted Title I (Federally Recognized Indian Tribe List Act) and Title II (Tlingit and Haida Status Clarification Act) of Public Law No. 103-454 Congress took a "granular look at the 1993 list" and then "express[ly] ratifi[ed]" Assistant Secretary Deer's attempt to create more than two hundred "federally recognized tribes" in Alaska

unilaterally by executive branch agency fiat.

Federally Recognized Indian Tribe List Act

In 1994 New Mexico Democratic Representative Bill Richardson was chairman, Wyoming Representative Craig Thomas was ranking Republican member, and Alaska Representative Don Young was the second most senior Republican member of the Subcommittee on Native American Affairs of the House Committee on Natural Resources. Congressional Directory 103d Congress, at 456.

On behalf of himself and Representatives Richardson and Young, in April of that year Representative Thomas introduced H.R. 4180, 103d Cong. (April 12, 1994). The bill prohibited the withdrawal of "Federal recognition or acknowledgment of an Indian tribe or Alaska Native group" except by Act of Congress. Section 3 of the bill defined "Indian tribe" to mean

> any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Except for the addition of "pueblo" (undoubtedly at the behest of Representative Richardson), that definition was identical to the "Indian tribe" definition in section 4(b) of the ISDEAA, which included ANCSA regional and village corporations that in sections 7(d) and 8(a) of ANCSA, 43 U.S.C. 1606(d) and

1607(a), Congress had directed Alaska Natives to incorporate "under the laws of the State [of Alaska]." The inclusion of the section 4(b) definition in H.R. 4180 is evidence that Representatives Thomas, Richardson, and Young intended their bill to protect groups that had previously been recognized for the singular purpose of being eligible to receive programs and services from the BIA and to obtain ISDEAA contracts.

On October 3, 1994 the Committee on Natural Resources reported an amendment in the nature of a substitute for the original text of H.R. 4180. H.R. Rep. No. 103-781. The amendment had only two operable sections. Section 2 *inter alia* defined "Indian tribe" to mean "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." And section 4 directed the Secretary of the Interior to publish annually in the *Federal Register* "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Later that evening Representative Richardson combined the texts of two other bills the Committee had reported with the text of the version of H.R. 4180 the Committee had reported, went to the House floor and moved the Speaker to suspend the rules and the House to pass H.R. 4180.

With respect to the text of the version of H.R. 4180 that the Committee had reported, which had been designated as Title I, the Federally Recognized Indian Tribe List Act (FRITLA), Representative Richardson told the House only that the title "simply requires the Secretary to publish an annual list of all the recognized tribes." 140 *Cong. Rec.* 27246 (1994). During his cursory explanation Representative Thomas told the House that the findings in section 103 of Title I "are not legally binding." Id. Then with no further explanation, the House passed H.R. 4180 on an unrecorded voice vote. Id. Five days later, with no explanation whatsoever of the bill's content, on another unrecorded voice vote, the Senate did the same. Id. at 29537.

The directive to the Secretary of the Interior to annually publish a list, enacted as section 104(a) of the FRITLA, is further evidence that Representatives Thomas, Richardson, Young, and the other members of the Committee intended the list to be a list of groups that the Secretary of the Interior had recognized for the singular purpose of being eligible to receive programs and services from the BIA and to obtain ISDEAA contracts. Nothing in the texts of sections 102 and 104(a) mentions or in any way alludes to "federally recognized tribes" or to Assistant Secretary Deer's attempt six months earlier to use her publication of her list to create more than two hundred

"federally recognized tribes" in Alaska.[7] And contrary to defendant NVE's bald assertion in the instant motion, nothing in those texts is an "express ratification" of Assistant Secretary Deer's action.

Consistent with that interpretation of Congress's intent, in 2001 the House passed H.R. 2538, the Native American Small Business Development Act. 147 *Cong. Rec.* 24013-24016. The bill *inter alia* amended the Small Business Act to make grants available to facilitate economic development on "Indian lands" in the coterminous states. While the amendment defined "Indian tribe" to mean a "federally recognized tribe," the amendment also differentiated between "Indian tribe members, Alaska Natives, and Native Hawaiians."

To clarify the confusion, Representative Young, who seven years earlier had cosponsored H.R. 4180, which Congress had enacted as the FRITLA, explained to the House that

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[7] Section 103 of the FRITLA contains eight findings. See 140 *Cong. Rec.* 27244. Findings 6 and 8 describe the list that the FRITLA directed the Secretary of the Interior to publish as a list of "federally recognized tribes." Finding 3 explained that a group of individuals of Native American descent could be "recognized" in only one of three ways: by an Act of Congress, through the 25 C.F.R. 83.1 *et seq.* administrative procedure, and by a decision of a United States court. Assuming *arguendo* that Finding 3 is an accurate statement of the law of tribal recognition, in 1993 Assistant Secretary Deer did not employ any of those means when she purported to transform the members of defendant NVE into a "federally recognized tribe" simply by publishing a list of Native Entities in the *Federal Register*.

> the measure under consideration today simply recognizes the unique Native American policies that Congress has implemented in the State of Alaska, and clarifies how the grant program the bill authorizes will be implemented in that State.
>
> In the 48 contiguous States, Congress's policy on Native Americans has focused on recognizing groups of Native Americans as "federally recognized tribes" that are distinct political entities and a majority of whose members reside on reservations and other land that is owned by the United States in trust.
>
> However, while Congress has routinely designated groups of Alaska Natives as "tribes," it has done so for the sole purpose of ensuring that Alaska Natives are eligible for programs and services that the United States provides to Native Americans because of their status as Native Americans.
>
> Congress has not recognized any group of Alaska Natives as a "federally recognized tribe" that is a distinct political entity.
>
> Instead, since 1884 Congress has required Alaska Natives to be, at all locations in Alaska, subject to the same criminal and civil state laws that non-Native Alaskans are required to observe.
>
> Consistent with that policy, in 1971 when it extinguished Alaska Native aboriginal title by enacting the Alaska Native Claims Settlement Act, Congress required Alaska Natives to organize business corporations under the laws of the state of Alaska and then directed the Secretary of the Interior to convey the corporations fee title to 44 million acres of Federal land.
>
> The amendments made to H.R. 2538 as reported by the Committee on Small Business simply acknowledge that Congress' Alaska Native policy is quite different from the Native American policy that Congress has implemented in the 48 contiguous States. It will also ensure that the intent of H.R. 2538 can be effectively met in Alaska for the benefit of Alaska Natives.

Id. at 24016.

Tlingit and Haida Status Clarification Act

In 1994 Congress enacted S. 1784, 103d Cong. (as reported by the House Committee on Natural Resources, Oct. 3, 1994), the Tlingit and Haida Status Clarification Act (THSCA), as Title II of Pub. Law No. 103-454, 108 Stat. 4792-4793. Section 203 of Title II states: "The Congress reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized tribe."

Defendant NVE suggests that Congress's designation of the members of the Central Council as a "federally recognized tribe" validates its assertion that the members of defendant NVE are a "federally recognized tribe." See Motion to Dismiss, at 10-11.

But the blackletter rule of federal Indian law that section 203 illustrates is that the Indian Commerce Clause grants Congress plenary authority to, for any reason or no reason, designate as a "federally recognized tribe" any group composed of individuals of Native American descent that it wishes to so designate. In 1994 Congress did that regarding members of the Central Council. And in 2018 Congress did that regarding six groups in the State of Virginia. But Congress has not done that regarding the members of defendant NVE.

While unrelated to the legal issues the instant motion presents for decision, the circumstances that led Congress to enact the THSCA illustrate that blackletter rule of tribal

recognition.

In 1935 Congress enacted a statute that authorized the Tlingit and Haida Indians of southeast Alaska to file a lawsuit in the Court of Claims to obtain compensation for the extinguishment of their aboriginal title, and referenced a Central Council that in 1935 did not exist. Pub. L. No. 74-152, 49 Stat. 388. In 1965 Congress enacted a statute that recognized the Central Council as "the official Central Council of Tlingit and Haida Indians for the purposes of [the 1935] Act." Pub. L. No. 89-130, 79 Stat. 543. While that was the Central Council's only purpose, in 1971 Congress listed the "Tlingit-Haida Central Council" as one of the regional associations in section 7(a)(10) of ANCSA, 43 U.S.C. 1606(a)(10).

In 1975 Congress enacted the ISDEAA.

Four years later when he resolved a dispute between the Central Council and several of its members regarding the eligibility of the members' grandchildren to receive payments from the judgment fund the Council was administering, District Judge James von der Heydt dismissed the civil action the members had filed because "The Central Council is the recognized governing body of the Tlingit and Haida Tribes for the purpose of planning and managing the utilization of the judgment fund and is therefore immune from suits relating to the disposition of the fund." *Cogo v. Central Council*, 465 F. Supp. 1286, 1290 (D.C. Ak.

1979). The plaintiff members did not appeal that decision.

In 1982 when Assistant Secretary of the Interior for Indian Affairs Kenneth Smith published in the *Federal Register* the first list of "Alaska Native Entities" he decided to include the "Tlingit & Haida Indians of Alaska" on the list. As a consequence, the Central Council was eligible to obtain contracts from the BIA. See e.g., *Department of the Interior and Related Agencies Appropriations for 1988: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 100th Cong. Part 5, 288-303 (1987)(Central Council President Edward Thomas testifying regarding inadequate indirect reimbursement to the Central Council in BIA contracts).

The Central Council continued to be listed on the lists of Native Entities that Assistant Secretary Smith's successors published in 1983, 1985, 1986, and 1988.

Then in 1993 at the instigation of Messrs. Anderson and Miller Assistant Secretary Deer agreed to transform the list from a list of Native Entities the BIA recognized as eligible to receive programs and services from the BIA and contract with the BIA into a list of "federally recognized tribes." When she crossed that Rubicon, Assistant Secretary Deer decided that, rather than members of the Central Council, the Tlingit and Haida Indian residents of ANCSA Native villages in southeast Alaska were the "federally recognized tribes" in southeast Alaska. So

she did not include the Central Council on her list.

Central Council President Thomas complained to Alaska Senator Frank Murkowski. The month after Assistant Secretary Deer published her list, Senator Murkowski introduced and on the same day arranged for the Senate to pass S. 1784, a bill that consisted of a single sentence that simply directed the Secretary of the Interior to include the Central Council on the 1993 list. When he did so the senator explained to the Senate that

> The bill does not do anything new. The bill makes a technical correction to BIA's list and should not be viewed as setting any precedent for Federal recognition of a tribe. My bill simply restores the status quo of October 20, 1993, by placing the Central Council of Tlingit and Haida Indian Tribes of Alaska back on the list and restores central council (sic) to the same position it was in before it was deleted from the republished list.

139 *Cong. Rec.* 32428.

When S. 1784 arrived in the House the Subcommittee on Native American Affairs of the Committee on Natural Resources held a hearing on the bill at which Edward Thomas and Debra Maddox, the Acting Director of the BIA Office of Tribal Services, testified. Director Maddox told the Subcommittee that the Department of the Interior opposed the bill because

> The Central Council of the Tlingit and Haida Indian Tribes is not a federally recognized tribe but is a regional organization created for a very specific purpose . . . the Central Council is recognized by statute for the limited purpose of distributing judgment funds; not as a tribal government exercising general governmental powers over its members and member

> villages as contemplated by the [1993] *Federal Register* list.

Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 Before the Sub. Comm. on Native American Affairs of the H. Comm. on Natural Resources, 103d Cong. 5-6 (1994).

Disregarding Director Maddox's testimony, eight months later on October 3, 1994, the same day the Committee on Natural Resources reported H.R. 4180 as the FRITLA, the Committee reported a five section amendment in the nature of a substitute to replace the one section text of the version of S. 1784 that the Senate had passed the year earlier. In its report on its amendment the Committee explained that

> In clarifying the status of the Central Council and ensuring that the tribe will be returned to the list of Federally-recognized Tribes, the Committee intends to reaffirm and acknowledge the prior actions of Congress to recognize Central Council as a Tribe with the same rights, privileges and immunities as have all other Federally recognized Tribes. In so doing, the Subcommittee wishes to make clear that Central Council possesses all the inherent attributes, authorities, and powers not inconsistent with such tribal status, and which have not been specifically taken away by Act of Congress.

H.R. 103-800, at 3 (1994).

Later that evening, Representative Richardson combined the text of the amended version of S. 1784 with the text of H.R. 4180 and the text of another bill the Committee had reported into a three title version of H.R. 4180, went to the floor, and moved the Speaker to suspend the House rules and, after only a cursory

explanation of its content, the House passed the bill on an unrecorded voice vote.

Whether Congress designating the members of the Central Council as a "federally recognized tribe" was a good idea or, as the Department of the Interior believed, a bad one, that was a decision the Indian Commerce Clause granted Congress the exclusive authority to make. But the decision Congress made has nothing to do with defendant NVE.

5. Additional Cited Judicial Decisions

In its motion to dismiss on the ground of sovereign immunity defendant NVE cites a multitudinous number of judicial decisions that it believes are relevant to the questions of law that its motion presents for decision. Only two merit comment.

Jamul Action Committee v. Simermeyer

Jamul is an unincorporated sparsely populated community located twenty miles east of San Diego, California. In the late 1970s the Jamul Indian Village (JIV), a group of individuals who resided in or around Jamul who alleged they were of Kumeyaay Indian descent, petitioned the Secretary of the Interior to approve a constitution for the JIV pursuant to section 16 of the IRA, which authorized an "Indian tribe" to "organize for its common welfare" and "adopt an appropriate constitution." While section 16 did not define the term "Indian tribe," section 19 of the IRA defined "Indian" to mean *inter alia* "all persons of

Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." (emphases added).

No act of Congress had designated the members of the JIV as a "federally recognized tribe," nor had the members complied with the procedure for recognition set out in 25 C.F.R. 85.1 *et seq*. Nevertheless, in 1981 Assistant Secretary of the Interior for Indian Affairs Kenneth Smith approved a constitution for the JIV, and in 1982 added "Jamul Indian Village of California" to the list of Indian Tribal Entities that he published in the *Federal Register*. 47 *Fed. Reg*. 53130, 53132.

In 2013 Tracie Stevens, the chairwoman of the National Indian Gaming Commission (NIGC) approved a gaming ordinance the JIV had submitted. The approval authorized the JIV to operate a class III casino on a 4.66 acre parcel of land in Jamul whose title the Secretary had taken into trust for the JIV pursuant to section 5 of the IRA.

In response, two community organizations and four Jamul residents filed a civil action in the U.S. District Court against Chairwoman Stevens and seven other NIGC and Department of the Interior officials in which they alleged that Chairwoman Stevens's approval of the ordinance had been *ultra vires*.

The District Court dismissed the plaintiffs' complaint pursuant to FRCP 19(b). In *Jamul Action Committee v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), *cert. denied* 142 S.Ct. 83 (2021),

the circuit court affirmed the dismissal. The circuit court explained its reasoning as follows:

> The Jamul Indian Village was recognized by the BIA in 1981, which authorized and oversaw its constitutional election. The Village has appeared on every list of federally recognized tribes that the agency has published since then. The Village maintains a government-to-government relationship with the United States, which has dealt with the Village as a political entity and provided it services reserved for federally recognized tribes.

Id. at 992.

> Today, the Village enjoys the same privileges and immunities as other federally recognized Indian tribes, including tribal sovereign immunity.

Id. at 993.

Assuming *arguendo* that *Jamul Action Committee* was correctly decided,[8] unlike the members of the JIV, the members of defendant NVE are, as paragraph no. 14 of the First Amended Complaint alleges, members of an unicorporated association that was organized in 1988 when the members decided among themselves to write a constitution. Unlike the JIV, the association does not have a constitution that the Secretary of the Interior has approved pursuant to section 16 of the IRA. And the members of

[8] Eleven years before the circuit court decided *Jamul Action Committee* in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the U.S. Supreme Court held that, to be an "Indian tribe" for the purposes of section 19 of the IRA, Congress intended a group of individuals of Native American descent to have been "recognized" as such on the date of enactment of the IRA in 1934 and on that same date to also have been "under Federal jurisdiction") But the Secretary did not "recognize" the JIV until 1981.

defendant NVE purport to be a "federally recognized tribe" only because in 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer said they were.

John v. Baker

Northway is a community in the Alaska interior. As it did Eklutna, in 1971 in section 11(b)(1) of ANCSA, 43 U.S.C. 1609(b)(1), Congress designated Northway as a Native village.

In *John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied* 528 U.S. 1182 (2000), the Alaska Supreme Court held that the Athabascan Indian residents of Northway were members of a "federally recognized tribe" and that as a consequence of that designation the village council in Northway had authority to create a court that had jurisdiction to involve itself in a child custody dispute involving John Baker, an Athabascan Indian resident of Northway, over Mr. Baker's protestation.

In so holding the Alaska Supreme Court first noted that prior to 1993 "the federal government had never recognized Alaska villages as sovereign tribes." But it then concluded that in 1993 "the Department of the Interior issued a list of federally recognized tribes that included Northway Village and most of the other Native villages in Alaska," and that the preamble that preceded the list stated that the list was intended "to reaffirm the sovereign status of the recognized tribes." Id. at 749. The Court also concluded that "The text and legislative history

of the [Federally Recognized Indian] Tribe List Act demonstrate that Congress also views the recognized tribes as sovereign bodies." Id. at 750.

While the Alaska Supreme Court could express its view regarding Assistant Secretary Deer's list and about the intent of Congress embodied in the FRITLA, in this court a state court decision regarding questions of federal law is not a precedent, much less a binding precedent. *United States v. Miami University*, 294 F.3d 797, 861 (6th Cir. 2002)("federal courts owe no deference to a state court's interpretation of a federal statute"). Accord *Pueblo of Santa Ana v. Nash*, 972 F. Supp.2d 1254, 1262 (D.C. New Mexico 2013).

Of even more importance, the U.S. Supreme Court has instructed that it is important for disputed questions of law to be "presented in an adversary context," *Flast v. Cohen*, 392 U.S. 83, 101 (1968), in order "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions," *Baker v. Carr*, 369 U.S. 186, 204 (1962). But the Alaska Supreme Court's conclusions regarding Assistant Secretary Deer's list and the intent of Congress embodied in the FRITLA that the Court announced in *John v. Baker* were arrived at without the benefit of adversarial briefing and argument.

While Mr. Baker ostensibly was represented by the Office of Public Advocacy (OPA), a state agency, the OPA hired Deborah Niedermeyer, a private attorney, to represent him in the *John v. Baker* appeal. See *John v. Baker*, *supra* at 742 ("J. John Franich, Assistant Public Advocate, Fairbanks, Brant McGee, Public Advocate, Anchorage, and Deborah Niedermeyer, Fairbanks, for Appellee"). In the briefs she filed on behalf of Mr. Baker Ms. Niedermeyer repeatedly agreed with her opposing counsel that the Athabascan Indian residents of Northway were a "federally recognized tribe." See e.g., Plaintiffs' Exhibit C.

Article II, Section 11, of the Alaska Constitution created the Legislative Council to conduct legislative business between legislative sessions. Because the Alaska Supreme Court had decided *John v. Baker* without the benefit of adversarial briefing and argument, in *Runyon v. AVCP*, 84 P.3d 437 (Alaska 2004), the Legislative Council appeared as *amicus curie* to request the Court to revisit *John v. Baker*. The Court declined the invitation. Id. at 439 n. 3. Seven years later in *McCrary v. Ivanof Bay Village*, 265 P.3d 337 (Alaska 2011), appellant Michael McCrary for the same reason made the same request and received the same answer. To wit,

> McCrary argues that *John v. Baker* should not be considered binding precedent because no party in that appeal argued against recognition of the sovereign status of Alaska Native tribes. He contends this legal issue was not tested by the adversarial process. But

> our conclusion regarding the Executive Branch's tribal recognition and Congress's approval through the Tribe List Act was carefully considered and adopted by the entire court.

Id. at 340.

Conclusion

For the reasons set out above the plaintiffs request the court to deny defendant NVE's motion to dismiss on the ground of sovereign immunity.

Federal Rule of Civil Procedure 19

As of the filing of this memorandum the court has not decided the plaintiffs' Motion to Strike (Docket 14).

If *arguendo* the court denies that motion and then grants defendant NVE's motion to dismiss on the ground of sovereign immunity, as a practical matter the court doing so will have decided the First and Second Claims for Relief alleged in the First Amended Complaint in defendant Avery's favor. Whether in defendant NVE's absence the court should then allow this action to proceed to a decision on the merits of the Third and Fourth Claims for Relief will be a matter of judicial discretion that the court will decide how to exercise after weighing the respective equities of the parties.

The plaintiffs have described the harm to which they are being subjected daily as a consequence of defendant Avery's final agency action on July 18, 2024 in which she decided that the

Ondola allotment is "Indian lands" as section 4(4)(B) of the Indian Gaming Regulatory Act, 25 U.S.C. 2703(4)(B), defines that term. See Docket 14, Attachment 1 (Affidavit of Brian Holl).

On the other side of the equity ledger, defendant NVE does not contest that the circuit court has instructed that defendant NVE's interest in continuing to operate its construction trailer "casino" on the Ondola allotment will be neither prejudiced nor impaired if defendant Avery will adequately represent defendant NVE by presenting the legal arguments regarding the Third and Fourth Claims for Relief that defendant NVE would have presented had it continued to participate. See *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013).

Instead, defendant NVE simply self-servingly asserts that defendant Avery "cannot adequately represent the Tribe's interests." Motion to Dismiss, at 19. But defendant NVE has not identified the legal arguments defendant Avery will not or may not make.

That omission is easily explained by the fact that the court will determine whether the Third and Fourth Claims for Relief are (or are not) meritorious by deciding questions of first impression regarding the intent of Congress embodied in the phrase "Indian allotments, the Indian titles to which have not been extinguished" in 18 U.S.C. 1151 and determining whether in Sol. Op. M-37079 (Feb. 1, 2024) now former Solicitor of the

Department of the Interior Robert Anderson was correct when he announced that, contrary to more than thirty years of prior Office of the Solicitor precedent, "tribes in Alaska [now] are presumed to have jurisdiction over [Alaska] Native allotments," unless a particular allotment is owned by a "non-tribal member" or is "geographically removed from the tribal community." Sol. Op. M-37079, at 2.

What are the legal arguments regarding the intent of Congress and defending Solicitor Anderson's legal reasoning in Sol. Op. M-37079 that defendant NVE would make that defendant Avery will not or may not make? Common sense suggests that there are no such arguments. Because who better to defend the validity of final agency action taken by defendant Avery than defendant Avery?

Since there is no one better, the court should deny defendant NVE's motion to dismiss the Third and Fourth Claims for Relief pursuant to Federal Rule of Civil Procedure 19.

DATED: March 10, 2025

Respectfully Submitted,

s/ Donald Craig Mitchell

_____

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