

No. 25-4618

**In The United States Court Of Appeals
For The Ninth Circuit**

BRIAN HOLL, et al.,

Plaintiffs-Appellants,

v.

SHARON AVERY, in her official capacity
as Acting Chairwoman of the National
Indian Gaming Commission, and NATIVE
VILLAGE OF EKLUTNA,

Defendants-Appellees.

On Appeal From the United States District Court
for the District of Alaska
Case No. 3:24-cv-00273 JLR

The Honorable James L. Robart

PLAINTIFFS-APPELLANTS OPENING BRIEF

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| JURISDICTIONAL STATEMENT | 4 |
| ISSUES PRESENTED | 4 |
| STATEMENT OF THE CASE | 5 |
| SUMMARY OF ARGUMENT | 21 |
| STANDARD OF REVIEW | 24 |
| ARGUMENT | 25 |
| I.A. The Final Agency Action in Which Assistant Secretary of the Interior for Indian Affairs Ada Deer Attempted to Transform the Members of the Native Village of Eklutna Into a “Federally Recognized Tribe” by Including “Eklutna Native Village” on a List of Native Entities She Published in the <i>Federal Register</i> Was <i>Ultra Vires</i> | 25 |
| B. The 103d Congress Did Not Intend the Federally Recognized Indian Tribe List Act to Ratify Assistant Secretary Deer’s <i>Ultra Vires</i> Final Agency Action | 36 |
| II. The District Court Erred When It Assumed That the Native Village of Eklutna Was a FRCP 19(a) Required Party | 43 |
| III. The District Court’s Dismissal of the First Amended Complaint Pursuant to FRCP 19(b) Was an Abuse of Discretion..... | 49 |
| CONCLUSION | 52 |
| CERTIFICATE OF COMPLIANCE | 54 |

TABLE OF AUTHORITIES

| | Page |
|--|-------|
| CASES | |
| <i>Akiachak Native Community v. U.S. Department of the Interior</i> , 827 F.3d 100 (D.C. Cir. 2016) | 9 |
| <i>Alto v. Black</i> , 739 F.3d 1111 (9th Cir. 2013) | 46-47 |
| <i>American Ship Building Company v. NLRB</i> , 380 U.S. 300 (1965) | 26 |
| <i>Bakia v. Los Angeles County</i> , 687 F.2d 299 (9th Cir. 1982) | 44 |
| <i>Barber v. Thomas</i> , 560 U.S. 474 (2010) | 38-39 |
| <i>Barnett v. Norman</i> , 782 F.3d 417 (9th Cir. 2015) | 24 |
| <i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020) | 27-28 |
| <i>Cassidy v. United States</i> , 875 F. Supp. 1438 (E.D. Wash. 1994) | 45-46 |
| <i>Casun Invest, A.G. v. Ponder</i> , 119 F.4th 637 (9th Cir. 2024) | 24-25 |
| <i>Cedars-Sinai Medical Center v. National League of Postmasters</i> , 497 F.3d 972 (9th Cir. 2007) | 2 |
| <i>Central Machinery Company v. Arizona State Tax Commission</i> , 448 U.S. 160 (1980) | 28 |
| <i>Chrysler Corporation v. Brown</i> , 441 U.S. 281 (1979) | 26 |
| <i>Confederated Tribes v. Lujan</i> , 928 F.2d 1496 (9th Cir. 1991) | 47 |

| | Page |
|---|-------------------|
| <i>County of Yakima v. Confederated Tribes,</i> 502 U.S. 251 (1992) | 8 |
| <i>Dawavendewa v. Salt River Project</i> <i>Agricultural Improvement and Power</i> <i>District,</i> 276 F.3d 1150 (9th Cir. 2002) | 51 |
| <i>Dine Citizens Against Ruining Our</i> <i>Environment v. BIA,</i> 932 F.3d 843 (9th Cir. 2019) | 2, 47-48 |
| <i>Eagle Bear, Inc. v. Independence Bank,</i> 705 F. Supp.3d 1141 (D. Mont. 2023) | 7, 28, 30 |
| <i>FDA v. Brown & Williamson Tobacco</i> <i>Corporation,</i> 529 U.S. 120 (2000) | 32 |
| <i>Federated Indians of Graton Rancheria</i> <i>v. U.S. Department of the Interior,</i> No. 24-cv-08582, 2025 WL 2096171 (N.D. Calif. July 18, 2025) | 51 |
| <i>Groff v. DeJoy,</i> 600 U.S. 447 (2023) | 27 |
| <i>Henson v. Santander Consumer USA,</i> <i>Inc.,</i> 582 U.S. 79 (2017) | 28 |
| <i>Jamul Action Committee v. Simermeyer,</i> 974 F.3d 984 (9th Cir. 2020) | 23, 51 |
| <i>Kescoli v. Babbitt,</i> 101 F.3d 1304 (9th Cir. 1996) | 43-44 |
| <i>Klamath Irrigation District v. U.S.</i> <i>Bureau of Reclamation,</i> 48 F.4th 934 (9th Cir. 2022) | 24 |
| <i>Loper Bright Enterprises v. Raimondo,</i> 603 U.S. 369 (2024) | 21, 27-28, 31, 35 |
| <i>Makah Indian Tribe v. Verity,</i> 910 F.2d 555 (9th Cir. 1990) | 44, 46, 51 |

| | Page |
|---|-------------|
| <i>Maverick Gaming LLC v. United States</i> , 123 F.4th 960 (9th Cir. 2024) | 24 |
| <i>Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior</i> , 255 F.3d 342 (7th Cir. 2001) | 28-30 |
| <i>Michigan v. Bay Mills Indian Community</i> , 572 U.S. 782 (2014) | 7 |
| <i>Mims v. Arrow Financial Services LLC</i> , 565 U.S. 368 (2012) | 39 |
| <i>Native Village of Eklutna v. U.S. Department of the Interior</i> , No. 19-cv-2388, 2021 WL 4306110 (D.D.C. Sept. 22, 2021) | 17 |
| <i>Native Village of Stevens v. Alaska Management & Planning</i> , 757 P.2d 32 (1988) | 11 |
| <i>Pit River Home and Agricultural Cooperative Association v. United States</i> , 30 F.3d 1088 (9th Cir. 1994) | 24 |
| <i>Quileute Indian Tribe v. Babbitt</i> , 18 F.3d 1456 (9th Cir. 1994) | 51-52 |
| <i>Ramah Navajo School Board v. Babbitt</i> , 87 F.3d 1338 (9th Cir. 1996) | 44-45 |
| <i>Rapanos v. United States</i> , 547 U.S. 715 (2006) | 26 |
| <i>Republic of Hungary v. Simon</i> , 604 U.S. 115 (2025) | 27 |
| <i>Southwest Center for Biological Diversity v. Babbitt</i> , 150 F.3d 1152 (9th Cir. 1998) | 45 |

| | Page |
|--|-------------|
| <i>State of Alaska v. U.S. Department of the Interior</i> , D. Alaska No. 3:25-cv-00148 | 52 |
| <i>State of Alaska Department of Fish and Game v. Federal Subsistence Board</i> , 139 F.4th 773 | 22, 27 |
| <i>Trump v. Hawaii</i> , 585 U.S. 667 (2018) | 32 |
| <i>United States v. Santa Fe Railroad Company</i> , 314 U.S. 339 (1941) | 7 |
| <i>United States v. Wise</i> , 370 U.S. 405 (1962) | 28, 31 |
| <i>Warth v. Seldin</i> , 422 U.S. 490 (1975) | 2 |
| <i>Washington v. Yakima Indian Nation</i> , 439 U.S. 463 (1979) | 1 |
| UNITED STATES CONSTITUTION | |
| Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3 | 1 |
| FEDERAL STATUTES | |
| Alaska Indian Reorganization Act, Pub. L. No. 85-508, 49 Stat. 1250 (1936) | 10 |
| Section 1, 25 U.S.C. § 5119 | 10 |
| Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat 2371 (1980) | 10 |
| Alaska Native Allotment Act, Ch. 2469, 34 Stat. 197 (1906) (codified as amended at 43 U.S.C. §§ 270-1 to 270-3) (repealed 1971) | 2 |

| | Page |
|---|-------------------|
| Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1601 <i>et seq.</i> | 10 |
| Section 3(b), 43 U.S.C. § 1602(b) | 11 |
| Section 7, 43 U.S.C. § 1606 | 37 |
| Section 8, 43 U.S.C. § 1607 | 37 |
| Section 11(b)(1), 43 U.S.C. § 1609(b)(1) | 11 |
| Section 11(b)(2) and (3), 43 U.S.C. § 1609(b)(2) and (3) | 11 |
| Alaska Organic Act, Chap. 53, 23 Stat. 24 (1884) | 7, 25 |
| Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) | 10 |
| Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified at 25 U.S.C. §§ 5130-5131) | 21, 24, 36-37, 39 |
| Section 102, 25 U.S.C. § 5130 | 36 |
| Section 104, 25 U.S.C. § 5131 | 36-37 |
| Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 <i>et seq.</i>) | 1 |
| Section 4(4), 25 U.S.C. § 2705(4) | 1, 16-18 |
| Section 4(5), 25 U.S.C. § 2703(5) | 1, 5, 16 |
| Section 6(a)(3), 25 U.S.C. § 2705(a)(3) | 1, 5 |
| Section 11, 25 U.S.C. § 2710 | 4 |

| | Page |
|---|-------------|
| Section 15, 25 U.S.C. § 2714 | 4 |
| Indian Removal Act, Chap. 168, 4 Stat. 411 (1830) | 8, 32-33 |
| Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) | 9-10 |
| Section 10, 25 U.S.C. § 5113 | 10 |
| Section 16, 25 U.S.C. § 5123 | 9-10 |
| Section 17, 25 U.S.C. § 5124 | 9-10 |
| Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 <i>et seq.</i>) | 37-38 |
| Section 4(b), 25 U.S.C. § 5304(e) | 38 |
| Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, Pub. L. No. 115-121, 132 Stat. 40 (2018) | 12 |
| Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, Title II, 108 Stat. 4792 (1994) | 41-42 |
| 18 U.S.C. § 1151 | 15, 19 |
| 28 U.S.C. § 1291 | 4 |
| 28 U.S.C. § 1331 | 4 |
| Chap. 48, 2 Stat. 402 (1806) | 33 |
| Chap. 58, 3 Stat. 682 (1822) | 33 |
| Chap. 108, § 5, 9 Stat. 395 (1849) | 32 |

| | Page |
|--|-------------------------|
| Chap. 162, 4 Stat. 738 (1834) (codified at 2 U.S.C. § 9) | 21-22, 24, 29-30 |
| Chap. 174, 4 Stat. 564 (1832) (codified at 25 U.S.C. § 2) | 21-22, 24, 29-32, 34-35 |
| CONGRESSIONAL DIRECTORY | |
| 1993-1994 Congressional Directory, 103d Cong. (1993) | 39, 41 |
| CONGRESSIONAL BILLS | |
| S. 125, 22d Cong. (as introduced, Feb. 27, 1832) | 34 |
| S. 1784, 103d Cong. (as referred to the House of Representatives, Feb. 1, 1994) | 42 |
| H.R. 2538, 107th Cong. (as passed by the House of Representatives, Dec. 5, 2001) | 39 |
| H.R. 4180, 103d Cong. (as introduced, April 12, 1994) | 36, 39 |
| H.R. 4180, 103d Cong. (as introduced on floor of House of Representatives, Oct. 3, 1994) | 41 |
| H.R. 9866, 74th Cong. (as introduced, Jan. 7, 1936) | 10 |
| CONGRESSIONAL REPORTS | |
| H.R. Rep. No. 103-781 (1994) | 6, 39 |

CONGRESSIONAL HEARINGS

| | |
|--|----|
| <i>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. (1932)</i> | 9 |
| <i>Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources, 103d Cong. (1994)</i> | 42 |
| <i>Nomination of Ada Deer: Hearing Before the S. Comm. on Indian Affairs, 103d Cong. (1993)</i> | 13 |

CONGRESSIONAL RECORD

| | |
|--|----|
| 123 <i>Cong. Rec.</i> 29338 (1977) | 31 |
| 123 <i>Cong. Rec.</i> 37338 (1977) | 31 |
| 139 <i>Cong. Rec.</i> 15999 (1993) | 13 |
| 140 <i>Cong. Rec.</i> 7191 (1994) | 39 |
| 140 <i>Cong. Rec.</i> 27244-27246 (1994) | 39 |
| 140 <i>Cong. Rec.</i> 29537 (1994) | 39 |
| 147 <i>Cong. Rec.</i> 24013-24016 (2001) | 39 |
| 147 <i>Cong. Rec.</i> 24016 (2001) | 41 |

REGISTER OF DEBATES

| | |
|------------------------------|----|
| 8 REG. DEB. 988 (1832) | 34 |
|------------------------------|----|

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19(a) 3, 5, 23-24, 43, 45, 49
 Rule 19(b) 3, 5, 23-24, 43, 46, 49-52

FEDERAL REGISTER

53 *Fed. Reg.* 52832-52855 (1988) 38
 58 *Fed. Reg.* 54364-54366 (1993) 14, 26
 58 *Fed. Reg.* 54368-54369 (1993) 14

DEPARTMENT OF THE INTERIOR SOLICITOR’S OPINIONS

Solicitor’s Opinion M-36975 (Governmental
 Jurisdiction of Alaska Native Villages
 Over Land and Nonmembers), Jan. 11, 1993..... 15, 18

 Solicitor’s Opinion M-37079 (Partial
 Withdrawal of Solicitor’s Opinion
 M-36975, Governmental Jurisdiction of
 Alaska Native Villages Over Land and
 Nonmembers, and Clarification of Tribal
 Jurisdiction Over Alaska Native
 Allotments), Feb. 1, 2024..... 18-19

OTHER AUTHORITIES

COHEN’S HANDBOOK OF FEDERAL INDIAN LAW
 (Nell Jessup Newton ed., 2005) 7

 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW
 (Nell Jessup Newton ed., 2012) 6-7

 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW
 (Nell Jessup Newton & Kevin K. Washburn
 eds., 2024) 6-7

| | Page |
|--|-------|
| Donald Craig Mitchell, <i>Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts</i> , 14 Alaska Law Review 353 (1997) | 9 |
| FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland ed., 1982) | 7 |
| FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS (1971) | 33-34 |
| FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984) | 8 |
| HANDBOOK OF FEDERAL INDIAN LAW (Felix S. Cohen ed., 1941) | 7 |
| HERMAN J. VIOLA, THOMAS L. MCKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY: 1816-1830 (1974) | 33 |
| Jill E. Martin, "A Year and a Spring of My Existence": Felix S. Cohen and the Handbook of Federal Indian Law, 8 Western Legal History 35 (1995) | 7 |
| ROBERT M. KVASNICKLA and HERMAN J. VIOLA (eds.), THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977 (1979) | 33 |

INTRODUCTION

The Indian Commerce Clause of the U.S. Constitution grants Congress “plenary and exclusive power over Indian affairs.” *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979). In 1988 Congress exercised that power by enacting the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, to create a framework for regulating commercial gambling on Indian reservations and other Indian lands.

Section 6(a)(3) of the IGRA, 25 U.S.C. § 2705(a)(3), authorizes the chair of the National Indian Gaming Commission (NIGC) to approve an ordinance submitted by the governing body of an “Indian tribe” (as section 4(5) of the IGRA, 25 U.S.C. § 2703(5), defines that term) that will authorize the tribe to conduct class II or class III commercial gambling on the tribe’s “Indian lands” (as section 4(4) of the IGRA, 25 U.S.C. § 2703(5), defines that term).

On July 18, 2024 Sharon Avery, the Acting Chairwoman of the NIGC, approved an ordinance that had been submitted by the Native Village of Eklutna (NVE) to conduct class II commercial gambling on the Ondola allotment, an eight-acre

parcel of land in the sparsely populated, heavily wooded, rural Birchwood Spur Road neighborhood in the Municipality of Anchorage, Alaska. Excerpts of Record (ER) 95-104. In 1963 the Bureau of Land Management had issued a certificate of allotment for the parcel to a woman of Dena'ina Athabascan Indian descent named Olga Ondola pursuant to the Alaska Native Allotment Act (ANAA), 43 U.S.C. §§ 270-1 to 270-3 (repealed 1971). Olga Ondola died in 1965. In 2016 her heirs leased the Ondola allotment to the NVE. ER 123-124 (First Amended Complaint, ¶ 36).¹

On December 16, 2024 eight residents of the Birchwood Spur Road neighborhood whose homes border the Ondola allotment filed this civil action.² Their First Amended Complaint named two defendants: Chairwoman Avery and the

¹The facts regarding the Ondola allotment, the tribal sovereignty movement in Alaska, and other matters described in this brief are set out in the First Amended Complaint. The U.S. Supreme Court, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and more recently this court have instructed that when deciding a motion to dismiss the district court and this 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).

²At their request, on March 12, 2025 the district court dismissed two of the eight residents, Sean and Lori Barnett, as plaintiffs. ER 145 (Docket No. 31).

NVE. The prayer requested the district court *inter alia* to set aside Chairwoman Avery's approval of the ordinance the NVE had submitted because her approval was final agency action taken in excess of her statutory authority. ER 105-139.

On February 18, 2025 the NVE filed two motions: A motion to dismiss the NVE as a defendant because the members of the NVE had been lawfully designated as a "federally recognized tribe" and that as a consequence of that designation the NVE has sovereign immunity. And a motion to dismiss the First Amended Complaint pursuant to Federal Rule of Procedure (FRCP) 19(b). ER 70-94.

On June 27, 2025 the district court issued an order in which it granted both motions. ER 12-24. However, the district court erred, first when it concluded that the members of the NVE had been lawfully designated as a "federally recognized tribe" and as a consequence of that designation the NVE possesses sovereign immunity, and then that in this action the NVE was a FRCP 19(a) required party. The district court then abused its discretion by dismissing the First Amended Complaint without considering, much less balancing, each of the four factors set out in FRCP 19(b).

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331 (federal question) and 25 U.S.C. § 2714 (district court review of a final decision made by the chair of the NIGC pursuant to 25 U.S.C. § 2710) the district court had subject matter jurisdiction to adjudicate the claims for relief alleged in the First Amended Complaint. On June 27, 2025 the district court issued a Judgment in a Civil Action in which it dismissed the First Amended Complaint with prejudice. ER 11. On July 22, 2025 the plaintiffs timely filed a Notice of Appeal. ER 140. Pursuant to 28 U.S.C. § 1291 this court has jurisdiction to decide the appeal.

ISSUES PRESENTED

I. Did the district court err in holding that the members of the Native Village of Eklutna had been lawfully designated as a "federally recognized tribe" and that as a consequence of that designation the NVE possesses sovereign immunity.

II. If *arguendo* the members of the Native Village of Eklutna had been lawfully designated as a "federally recognized tribe" and that as a consequence of that designation the NVE possesses sovereign immunity, did the

district court err when it concluded that in this action the NVE was a FRCP 19(a) required party.

III. If *arguendo* in this action the Native Village of Eklutna was a FRCP 19(a) required party, did the district court abuse its discretion when it dismissed the First Amended Complaint without considering, much less balancing, each of the four factors set out in FRCP 19(b).

STATEMENT OF THE CASE

Section 6(a)(3) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2705(a)(3), authorizes the chair of the National Indian Gaming Commission to approve an ordinance submitted by the governing body of an "Indian tribe" that will authorize the tribe to conduct class II or class III commercial gambling on the tribe's "Indian lands."

Section 4(5) of the IGRA, 25 U.S.C. § 2703(5), defines the term "Indian tribe" to mean

any Indian tribe, band, nation, or other organized group or community of Indians which -

- (A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and
- (B) is recognized as possessing powers of self-government. (emphasis added).

It is a blackletter principle of federal Indian law that to “possess powers of self-government” a group of individuals of Native American descent must have been lawfully designated as a “federally recognized tribe.” Recognition is no minor matter. As the Committee on Natural Resources, which in the U.S. House of Representatives exercises 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. (emphasis added).

H.R. Rep. No. 103-781, at 2-3 (1994). Accord COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 3.02[3], at 133-134 (Nell Jessup Newton ed., 2012); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 4.02[3], at 178 (Nell Jessup Newton & Kevin K.

Washburn eds., 2024).³ And see also same *Eagle Bear, Inc. v. Independence Bank*, 705 F. Supp.3d 1141, 1144 (D. Mont. 2023). But between 1884 when the 48th Congress enacted the Alaska Organic Act, 23 Stat. 24, and October 21, 1993 no Native group in Alaska had been designated as a “federally recognized tribe.”

For an important reason.

From 1789 to 1880 the objective of Congress’s Indian policy had been to - by negotiation when possible and force of arms when necessary - clear the public domain of the Native Americans who had been occupying it. In 1830 the 21st Congress directed the President to relocate Native Americans who lived east of the Mississippi River to land west of the

³ Between 1933 and 1948 Felix Cohen was the federal Indian law expert in the Department of the Interior Office of the Solicitor, and in 1941 he was the principal author and editor of the HANDBOOK OF FEDERAL INDIAN LAW. See Jill E. Martin, “A Year and a Spring of My Existence”: *Felix S. Cohen and the Handbook of Federal Indian Law*, 8 *Western Legal History* 35 (1995). Four months after it was published, the U.S. Supreme Court began citing the HANDBOOK OF FEDERAL INDIAN LAW as an authoritative text. See *United States v. Santa Fe Railroad Company*, 314 U.S. 339, 349 n. 5 (1941). In 1982 law professors who specialized in federal Indian law published their own treatise. To capitalize on Felix Cohen’s reputation, they titled their book FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW. When in 2005, 2012, and 2024 other law professors published treatises, they did the same. They titled their books COHEN’S HANDBOOK OF FEDERAL INDIAN LAW. The U.S. Supreme Court and the lower federal courts have cited the 1982, 2005, and 2012 treatises as authoritative texts. See e.g., *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 802-803 (2014) (2012 treatise cited twice).

river. 4 Stat. 411. And by 1880 most (although not all) Native Americans west of the river had been confined on reservations.

At that point the new objective of Congress's Indian policy became preparing Native Americans who had survived the clearing for citizenship and assimilation into the national polity. See generally FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984). See also *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 253 (1992) (observing that late in the nineteenth century the "assimilation of Indians into the society at large" became the objective of Congress's Indian policy).

The Presbyterian missionary Sheldon Jackson was an influential member of the group of Protestant clergy who lobbied Congress to implement the assimilation policy. At Jackson's behest, in 1884 when it enacted the Alaska Organic Act, Congress decided that at all locations in the District of Alaska, Alaska Natives would be subject to the same civil and criminal laws as all other residents of the District

were subject.⁴ 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.

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. Sections 16 and 17 of the IRA, 25 U.S.C. §§ 5123 and 5124, authorized an "Indian tribe" and a group of tribes "residing on the same

⁴ For Sheldon Jackson's influence on Congress's Alaska Native policy and Congress's enactments implementing that policy between 1884 and 1932 see Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 Alaska Law Review 353, 355-362 (1997), cited in *Akiachak Native Community v. U.S. Department of the Interior*, 827 F.3d 100, 121(D.C. Cir. 2016) (Brown, J., dissenting).

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 loan fund that section 10 of the IRA, 25 U.S.C. § 5113, created. At the urging of Alaska Delegate Anthony Dimond - see H.R. 9866, 74th Cong. (as introduced, Jan. 7, 1936), in 1936 Congress enacted Pub. L. 74-538 (popularly known as the Alaska Indian Reorganization Act). Section 1 of the Act, 25 U.S.C. § 5119, authorized "groups of Indians in Alaska not heretofore recognized as bands or tribes," (emphasis added) to obtain constitutions and corporate charters.

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

uncontroverted 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). However, six years earlier,

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 villages⁵ were, and had always been, members of federal (sic) recognized tribes, that the land within and surrounding each Native village was "Indian

⁵Section 11(b)(2) and (3) of ANCSA, 43 U.S.C. § 1609(b)(2) and (3), defines "Native village" as a community that on the 1970 census enumeration date was "not of a modern and urban character" and which had a population composed of twenty-five or more Alaska Natives who were a majority of the community's residents. Section 3(b) of ANCSA, 43 U.S.C. § 1602(b), defines "Native" *inter alia* as a citizen of the United States of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof. Section 11(b)(1) of ANCSA, 43 U.S.C. § 1609(b)(1), lists 205 communities that the 92d Congress believed met those definitions. Even though the small cluster of houses located adjacent to a freeway off-ramp of the Glenn Highway known as Eklutna was located within the Municipality of Anchorage, the 92d Congress included Eklutna on its list of Native villages. ER 114 (First Amended Complaint §§ 21 and 22).

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.

ER 117-118 (First Amended Complaint, ¶ 29).

Messrs. Anderson and Miller and the attorneys who were members of their group could have asked Alaska's congressional delegation to introduce a bill whose enactment by Congress would designate Alaska Native groups as "federally recognized tribes."⁶ Instead, they concocted a scheme to have the Assistant Secretary of the Interior for Indian Affairs create more than two hundred "federally recognized tribes" in Alaska simply by publishing a list of Native Entities in the *Federal Register*. On March 20, 1993 Mr. Anderson sent Mr. Miller and the other attorneys a memorandum in which he reported

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

⁶In 2018 six groups in Virginia whose members were individuals of Native American descent did exactly that. See Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act. Pub. L. No. 115-121.

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).

ER 67 (Plaintiffs' Exhibit A).

On July 16, 1993 the Senate confirmed President Clinton's nomination of Ada Deer to succeed Eddie Brown as Assistant Secretary of the Interior for Indian Affairs. 139 *Cong. Rec.* 15999 (1993). 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).

After Assistant Secretary Deer's confirmation Messrs. Anderson's and Miller's scheme proceeded. ER 69 (Plaintiffs' Exhibit B). On October 21, 1993 Assistant Secretary Deer

published a list of Native Entities in the *Federal Register*. 58 *Fed. Reg.* 54368-54369. In a preamble, id. 54364-54366, Assistant Secretary Deer announced that she intended her act of publication “to eliminate any doubt as to the Department’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. 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. 54366.⁷

⁷ For the history of the lists of Native Entities that Assistant Secretary Deer’s predecessors published in the *Federal Register* between 1982 and 1988 see ER 116-117 (First Amended Complaint ¶¶ 24-28).

"Eklutna Native Village" was one of the Native Entities on Assistant Secretary Deer's list.

Represented by Mr. Miller, in 1995 the Native Village of Eklutna submitted an ordinance to the chairman of the National Indian Gaming Commission that, had it been approved, would have authorized the NVE to operate a casino on the Ondola allotment that offered class II commercial gambling. ER 125 (First Amended Complaint ¶ 39).

On January 11, 1993 Solicitor of the Department of the Interior Thomas Sansonetti had issued Solicitor's Opinion M-36975.⁸ In that opinion he announced (but with no explanation of the legal analysis that had resulted in the conclusion) that in 1948 the 80th Congress had intended the undefined term "Indian allotments" in the 18 U.S.C. § 1151 definition of the term "Indian Country" to include Alaska Native allotments, but that "federally recognized tribes" in Alaska (which Solicitor Sansonetti simply assumed existed) did not exercise jurisdictional authority within the boundaries of Alaska Native allotments. Solicitor's Opinion M-36975, at 129.

⁸ Solicitor's Opinion M-36975 and Solicitor's Opinion M-37079 are available at: <https://www.doi.gov/solicitor/opinions>.

Because the "Indians lands" definition in section 4(4) of the IGRA, 25 U.S.C. § 2703(4), required an IGRA Section 4(5) "Indian tribe" to "exercise[] governmental power" over the land, the Associate Solicitor for the Division of Indian Affairs advised the NIGC General Counsel that the Ondola allotment was not "Indian lands" on which class II commercial gambling could be conducted. ER 124-127 (First Amended Complaint ¶¶ 38-40). However, the Associate Solicitor and the NIGC General Counsel both assumed that the members of the NVE were an IGRA section 4(5) "Indian tribe."⁹

In 2007 the NVE, again represented by Mr. Miller, submitted a new ordinance to the chairman of the NIGC; which the NVE withdrew after the President of the Alaska Senate and the Speaker of the Alaska House of Representatives submitted comments and exhibits which demonstrated that the members of the NVE were not an IGRA section 4(5) "Indian tribe" and the Ondola allotment did not qualify as IGRA section 4(4) "Indian lands." ER 127-128 (First Amended

⁹ The Associate Solicitor and NIGC General Counsel did so because on November 15, 1993 the Associate Solicitor had issued an opinion letter in which he had concluded that the members of another Native Entity on Assistant Secretary Deer's list, the Klawock Cooperative Association, were an IGRA section 4(5) "Indian tribe." ER 121-122 (First Amended Complaint ¶ 34).

Complaint ¶ 41).

In 2016 the NVE tried a third time by petitioning the Department of the Interior to make a determination that the Ondola allotment qualified as IGRA section 4(4) "Indian lands." When Principal Deputy Assistant Secretary of the Interior for Indian Affairs John Tahsuda "determined that the [Ondola allotment] does not constitute 'Indian lands'," ER 128-129 (First Amended Complaint ¶ 43), the NVE, represented by an attorney in the Anchorage office of the Sonosky Chambers law firm, filed a civil action in the U.S. District Court for the District of Columbia in which the NVE challenged that determination. In 2021 that court affirmed the determination Principal Deputy Assistant Secretary Tahsuda had made. *Native Village of Eklutna v. U.S. Department of the Interior*, No. 19-cv-2388, 2021 WL 4306110 (D.D.C. Sept. 22, 2021). The NVE did not appeal that decision.

In 2016 the NVE had also requested the Solicitor of the Department of the Interior to withdraw Solicitor's Opinion M-36975, which the Solicitor declined to do. ER 129 (First Amended Complaint ¶ 43). But on January 20, 2021 when President Joe Biden assumed the presidency there was a new

Solicitor. On February 1, 2024 - with no explanation as to why or who had requested him to do so - the new Solicitor issued Solicitor's Opinion M-37079.

Solicitor's Opinion M-37079 withdrew Solicitor's Opinion M-36975 insofar as that opinion had concluded that "federally recognized tribes" in Alaska did not exercise jurisdictional authority within the boundaries of Alaska Native allotments. Solicitor's Opinion M-37079 then announced that henceforth "tribes in Alaska can exercise tribal jurisdiction over ANAA Allotments where (a) their tribal members own the ANAA Allotment and continue to maintain a political relationship with the tribe and (b) the ANAA Allotment is in close geographic proximity to the tribal community." Solicitor's Opinion M-37079, at 22.

The new Solicitor who issued Solicitor's Opinion M-37079 was Robert Anderson, the attorney who in 1993 had been employed in the Anchorage office of NARF and who that year had been instrumental with the NVE's attorney, Lloyd Miller, in instigating Assistant Secretary Deer's attempt to create more than two hundred "federally recognized tribes" in Alaska simply by publishing a list of Native Entities in the *Federal Register*. ER 130-131 (First Amended Complaint §

46).

Represented by attorneys in the Sonosky Chambers law firm, on April 22, 2024 the NVE submitted to Chairwoman Avery a new ordinance whose approval by Chairwoman Avery would authorize the NVE to engage in class II commercial gambling on the Ondola allotment. The NVE also requested confirmation that the Ondola allotment now qualified as IGRA Section 4(4) "Indian lands."

On May 13, 2024 Rea Cisneros, the Acting General Counsel of the NIGC, asked Solicitor Anderson to revisit the decision Principal Deputy Assistant Secretary Tahsuda had made on June 18, 2018 in which he had concluded that the Ondola allotment did not qualify as "Indian lands."

On June 27, 2024 Eric Shepard, the Associate Solicitor of the Department of the Interior for the Division of Indian Affairs, advised Acting NIGC General Counsel Cisneros that "The Ondola Allotment is 'Indian country' within the meaning of 18 U.S.C. 1151(c)" and, based on the new legal standard that Solicitor Anderson had announced in Solicitor's Opinion M-37079, the Ondola allotment now "constitutes Indian lands eligible for gaming by the Tribe under IGRA." ER 131-132 (First Amended Complaint § 48).

On July 18, 2024 Chairwoman Avery informed Aaron Leggett, the President of the NVE, that Associate Solicitor Shepard had "found that the Ondola allotment as currently held by the members of the Tribe constitutes Indian lands eligible for gaming by the Tribe under IGRA," and "I agree with this analysis and have adopted the opinion into my approval of the Tribe's Gaming Ordinance." Chairwoman Avery then informed President Leggett: "The Ordinance is approved as it is consistent with IGRA and NIGC regulations." ER 131-132 (First Amended Complaint ¶ 48); ER 95-104.

In September 2024 the NVE began clearing the Ondola allotment of timber in order to begin construction of its casino. ER 132 (First Amended Complaint ¶ 49). On December 16, 2024 the plaintiffs filed this civil action. ER 143 (Docket No. 1). On June 27, 2025 the district court issued an order and a final judgment in which it dismissed this action with prejudice. ER 11-24. On July 2, 2025 the plaintiffs filed a motion for reconsideration. ER 6-10. On July 7, 2025 the district court denied the motion. ER 3-5. On July 22, 2025 the plaintiffs filed this appeal. ER 140.

SUMMARY OF ARGUMENT

I. In its June 27, 2025 order, ER 12-24, the district court held that the members of the Native Village of Eklutna had been lawfully designated as a “federally recognized tribe” because the 22d and 23d Congresses intended 25 U.S.C. §§ 2 and 9 to delegate Assistant Secretary of the Interior for Indian Affairs Ada Deer the authority to transform the members of the NVE into a “federally recognized tribe” by including “Eklutna Native Village” on the list of Native Entities she published in the *Federal Register*. ER 18. The district court also held that if *arguendo* Assistant Secretary Deer’s final agency action had been *ultra vires*, in 1994 the 103d Congress intended its enactment of the Federally Recognized Indian Tribe List Act (FRITLA), Pub. L. No. 103-454, to ratify Assistant Secretary Deer’s action. ER 19.

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the U.S. Supreme Court reaffirmed that discerning the intent of Congress embodied in a statute is one of the federal judiciary’s most “solemn dut[ies],” *id.* 385, and when they perform that duty district courts must “exercise independent judgment in determining the meaning of statutory

provisions.” *Id.* 394. And in *State of Alaska Department of Fish and Game v. Federal Subsistence Board*, 139 F.4th 773, 781 (9th Cir. 2025), this court directed that exercising independent judgment begins with a *de novo* investigation of the statutory text. But in this action the district court reasoned to its result regarding the intent of the 22d and 23d Congresses embodied in 25 U.S.C. §§ 2 and 9 and of the 103d Congress embodied in the FRITLA without conducting that investigation.

That was clear error.

Because had it conducted that investigation the district court would have concluded that the 22d and 23d Congresses did not intend 25 U.S.C. §§ 2 and 9 to delegate Assistant Secretary Deer authority to create new “federally recognized tribes” on her own by agency fiat, nor did the 103d Congress intend the FRITLA to ratify Assistant Secretary Deer’s *ultra vires* final agency action.

II. In its June 27, 2025 order the district court assumed that in this action the NVE was a FRCP 19(a) required party. But that also was clear error because if this action proceeds against Chairwoman Avery in the NVE’s absence the interest of the NVE will not, as a practical

matter, be impaired or impeded because Chairwoman Avery can adequately represent the interest of the NVE.

III. If *arguendo* in this action the NVE is a FRCP 19(a) required party, FRCP 19(b) directed the district court to consider, and then weigh, four factors set out in the rule and then determine whether "in equity and good conscience" the action should proceed against Chairwoman Avery in the NVE's absence. But rather than doing so, the district court announced that in determining whether it should allow this action to proceed against Chairwoman Avery in the NVE's absence "a detailed analysis of the [four] factors [set out in FRCP 19(b)] is not necessary" because in *Jamul Action Committee v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020), this court instructed that in a civil action in which a federally recognized tribe is a required party but the tribe invokes its sovereign immunity the action must be dismissed because in that situation no balancing of the respective equities is necessary because the tribe always wins. ER 23. That was an abuse of discretion because neither *Jamul Action Committee* nor any of the court's other decisions regarding FRCP 19(b) and federally recognized tribes that invoke their sovereign immunity hold that a district court should dispense with the

consideration of each of the four factors set out in FRCP 19(b) and the balancing of the respective equities that FRCP(19) (b) requires.

STANDARD OF REVIEW

This court reviews the district court's interpretation of the intent of Congress embodied in 25 U.S.C. §§ 2 and 9 and in the Federally Recognized Indian Tribe List Act *de novo*. *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4th 934, 943 (9th Cir. 2022). The court reviews *de novo* the district court's determination that in this action the Native Village of Eklutna was a FRCP 19(a) required party and a FRCP 19(b) indispensable party. *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994). The court reviews the district court's dismissal of this action pursuant to FRCP 19(b) for abuse of discretion. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 971 (9th Cir. 2024). "A district court abuses its discretion when it does not apply the correct law, or erroneously interprets the law." (citations omitted). *Barnett v. Norman*, 782 F.3d 417, 421 (9th Cir. 2015). Or if the district court bases its decision "on a clearly erroneous assessment of the

evidence." *Casun Invest, A.G. v. Ponder*, 119 F.4th 637, 642 (9th Cir. 2024).

ARGUMENT

I.A. The Final Agency Action in Which Assistant Secretary of the Interior for Indian Affairs Ada Deer Attempted to Transform the Members of the Native Village of Eklutna Into a "Federally Recognized Tribe" By Including "Eklutna Native Village" on a List of Native Entities She Published in the *Federal Register* Was *Ultra Vires*.

The factual record is uncontroverted.

Between 1884 when the 48th Congress enacted the Alaska Organic Act and October 21, 1993 neither Congress nor the Secretary of the Interior acting pursuant to authority that Congress had delegated to the Secretary in a statute had designated any group of individuals of Alaska Native descent as a "federally recognized tribe" that as a consequence of that designation would possess sovereign immunity. The factual record also is uncontroverted that on the latter date Assistant Secretary of the Interior for Indian Affairs Ada Deer attempted to create more than two hundred "federally recognized tribes" in Alaska simply by publishing a list of Native Entities and a preamble in the *Federal Register* and that "Eklutna Native Village" was one of the

listed Native Entities.

But “The legislative power of the United States is vested in the 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 Corporation 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”).

The Congress grants quasi-legislative authority to an executive branch department or agency by enacting a statute. *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (“Congress takes no governmental action except by legislation”).

What statute granted 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 final agency 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.

In the First Claim for Relief in their First Amended Complaint the plaintiffs alleged that the 22d and 23d Congresses did not intend their enactment of either statute to delegate Assistant Secretary Deer the authority she purported to exercise. ER 132-134 (First Amended Complaint ¶¶ 50-53). And in the memorandum they filed in opposition to the NVE's motion to dismiss the plaintiffs explained to the district court the basis for that conclusion. ER 43-46.

In *Loper Bright Enterprises v. Raimondo*, *supra* at 412, the U.S. Supreme Court directed the district court to exercise its "independent judgment in deciding whether an agency has acted within its statutory authority." And this court subsequently directed the district court to exercise its independent judgment after conducting a *de novo* review. *State of Alaska Department of Fish and Game v. Federal Subsistence Board*, *supra* at 781.

The U.S. Supreme Court repeatedly has instructed that "statutory construction must begin with, and ultimately heed, what a statute actually says," *Groff v. DeJoy*, 600 U.S. 447, 468 (2023), because the statutory text "best represents Congress's intent." *Republic of Hungary v. Simon*, 604 U.S. 115, 137 (2025). Accord *Bostock v. Clayton County*,

590 U.S. 644, 654 (2020) (“only the words on the page constitute the law adopted by Congress and approved by the President”).

As a consequence, the district court’s *de novo* review of the intent of the 22d and 23 Congresses embodied in 25 U.S.C. §§ 2 and 9 should have begun “with a careful examination of the statutory text.” *Henson v. Santander Consumer USA, Inc.*, 582 U.S. 79, 83 (2017). And if that examination was unavailing, by an investigation of the “circumstances existing at the time of passage.” *United States v. Wise*, 370 U.S. 405, 411 (1962); *Loper Bright Enterprises, supra* at 400 (“every statute’s meaning is fixed at the time of enactment”). Accord *Central Machinery Company v. Arizona State Tax Commission*, 448 U.S. 160, 166 (1980) (intent of Congress embodied in Indian statutes interpreted “in light of the Congress that enacted them”).

But instead of conducting that examination and investigation the district court simply announced that in *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001), and *Eagle Bear, Inc. v. Independent Bank, supra* at 1147, two other courts had concluded that the 22d and 23d Congresses

intended 25 U.S.C. §§ 2 and 9 to delegate Assistant Secretary Deer the authority that on October 21, 1993 she purported to exercise. ER 18.

In *Miami Nation of Indians*, Circuit Judge Posner noted, correctly, that "Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe," and that Congress is naturally and legitimately "concerned which groups of Indians are given the status of tribes." But then - with no examination of the texts or investigation of the circumstances existing at the time each statute was enacted - Judge Posner announced that the 22d and 23d Congresses intended 25 U.S.C. §§ 2 and 9 to "delegate[] to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power." (emphasis added). 255 F.3d at 345.¹⁰

¹⁰In the Second Claim for Relief in their First Amended Complaint the plaintiffs agreed with Judge Posner that the texts of 25 U.S.C. §§ 2 and 9 do not contain any criteria to guide the exercise of and to enable judicial review of the authority to create new "federally recognized tribes" that Judge Posner had concluded that the 22d and 23d Congresses had intended each statute to delegate. ER 135 (First Amended Complaint ¶ 56). However, unlike the plaintiffs, Judge Posner was untroubled by that obvious constitutional defect.

In *Eagle Bear, Inc.* the status of the members of the Blackfeet Indian Nation as a "federally recognized tribe" was not at issue. Rather, in a cursory dictum District Judge Morris simply noted, correctly, that 25 U.S.C. § 2 was one of a number of statutes whose content related to Indian affairs in which Congress had delegated to the Secretary of the Interior authority to administer the statute. 705 F. Supp.3d at 1147. Judge Morris said nothing about tribal recognition. And he made no mention of 25 U.S.C. § 9.

If rather than rotely relying on *Miami Nation of Indians* and *Eagle Bear, Inc.* the district court had carefully examined the text of 25 U.S.C. § 9 it would have concluded - as the plaintiffs had pointed out to the court, ER 46 - that section 9 *inter alia* delegated the President authority to promulgate regulations to implement statutes "relating to Indian affairs." Assuming *arguendo* that President Bill Clinton had delegated that authority to Secretary of the Interior Bruce Babbitt who then had delegated that authority to Assistant Secretary Deer, the list of Native Entities and the preamble she published in the *Federal Register* were not a regulation.

The 22d Congress enacted 25 U.S.C. § 2 in 1832. 4 Stat. 564. As now codified, the text reads: "The Commissioner of Indian Affairs¹¹ 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."

Had the district court carefully examined the text of 25 U.S.C. § 2 it would have concluded that the text did not explicitly delegate Assistant Secretary Deer authority to - on her own simply by publishing a list of Native Entities and a preamble in the *Federal Register* - create new "federally recognized tribes" in Alaska or at any other location.

Since the text provides no guidance, as *United States v. Wise* and *Loper Bright Enterprises* instruct, the district court then should have investigated the circumstances that existed at the time the 22d Congress enacted 25 U.S.C. § 2. Had the district court done so, as the plaintiffs had

¹¹In 1977 Secretary of the Interior Cecil Andrus elevated the status of the Commissioner of Indian Affairs inside the Department of the Interior bureaucracy by renaming the position the Assistant Secretary of the Interior for Indian Affairs. See 123 *Cong. Rec.* 29338 (1977) (President Carter nominating Forrest Gerard as Assistant Secretary). Id. 37338 (statement of Senator Lee Metcalf explaining the reason for the name change). Congress has not amended 25 U.S.C. § 2 to reflect the change.

documented, ER 43-45, it would have concluded that the 22d Congress did not intend section 2 to delegate a subordinate employee in the War Department¹² unfettered authority to create "federally recognized tribes" unilaterally on his own say-so.

The U.S. Supreme Court has instructed that "common sense" should be employed when interpreting the intent of Congress embodied in a statute. *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 133 (2000) (when interpreting a statute the Court would be "guided to a degree by common sense"). Accord *Trump v. Hawaii*, 585 U.S. 667, 696 (2018).

Two years before the 22d Congress enacted 25 U.S.C. § 2 the 21st Congress enacted the Indian Removal Act, 4 Stat. 411, whose objective was to solve the "Indian problem" east of the Mississippi River by directing the President to relocate Native Americans who were residing east of the river to land west of the river. It contravenes common sense

¹² In 1849 when it created the Department of the Interior the 30th Congress transferred to the Secretary of the Interior "the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all acts of the Commissioner of Indian Affairs." Section 5, 9 Stat. 395. As described below, prior to the transfer the Commissioner of Indian Affairs was a subordinate employee of the War Department.

to conclude that only two years after the 21st Congress enacted the Indian Removal Act the 22d Congress would delegate a subordinate employee of the War Department authority to add to the "Indian problem" on his own by creating new "federally recognized tribes."

And the 22d Congress did nothing of the sort.

As the plaintiffs explained to the district court, ER 43-45, in 1806 the 9th Congress created the office of Superintendent of Indian Trade inside the War Department to administer the Indian trading posts, called factories, that the War Department was operating on the frontier. 2 Stat. 402. In 1816 President James Madison appointed Thomas McKenney as Superintendent. HERMAN J. VIOLA, THOMAS L. MCKENNEY: ARCHITECT OF AMERICA'S EARLY INDIAN POLICY: 1816-1830, at 5 (1974); ROBERT M. KVASNICKLA and HERMAN J. VIOLA (eds.), THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977, at 1-2 (1979).

In 1822 the 17th 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 [BIA]. To head the office Calhoun appointed McKenney." FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, at 57 (1971). Because Secretary Calhoun's action had been *ultra vires*, with Secretary Calhoun's approval, Thomas McKenney wrote a bill whose enactment would create the BIA, which in 1826 he sent to the 19th Congress. *Id.* 58-59. In 1832 Senator Hugh White, the Chairman of the Committee on Indian Affairs, reintroduced McKenny's bill. S. 125, 22d Cong. (as introduced, Feb. 27, 1832).

Because by the latter date Secretary of War Lewis Cass 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 S. 125, which would be enacted as 25 U.S.C. § 2, was called up for a vote on the Senate floor, Senator White explained to the Senate 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 REG. DEB. 988

(1832).

If Assistant Secretary Deer and the district court are to be believed, without the text of the statute saying so, in 1832 the 22d Congress intended 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 be designated as new "federally recognized tribes" and to then create that legal status unilaterally by executive branch agency fiat.

Not only does that interpretation of the intent of the 22d Congress contravene common sense, but between 1832 and October 21, 1993 no Department of War or Department of the Interior official suggested that the 22d Congress intended 25 U.S.C. § 2 to delegate 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").

The district court's holding to the contrary was clear error.

B. The 103d Congress Did Not Intend the Federally Recognized Indian Tribe List Act to Ratify Assistant Secretary Deer's *Ultra Vires* Final Agency Action.

A year after Assistant Secretary of the Interior for Indian Affairs Ada Deer published her list of Native Entities and preamble in the *Federal Register*, in 1994 the 103d Congress enacted H.R. 4180 as the Federally Recognized Indian Tribe List Act. Title I, Pub. L. No. 103-454.

The FRITLA has only one operable provision, section 104, 25 U.S.C. § 5131, which directs the Secretary of the Interior to annually publish 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." Section 102 of the FRITLA, 25 U.S.C. § 5130, defines the term "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."

In its June 27, 2025 order the district court announced that the 103d Congress intended its enactment of the FRITLA

to "ratify" Assistant Secretary Deer's attempt to create more than two hundred "federally recognized tribes" in Alaska by publishing her list of Native Entities and preamble in the *Federal Register*. ER 19. But as the plaintiffs had explained to the district court, ER 47-51, the 103d Congress intended no such result.

As a threshold matter, the list section 104 directs the Secretary of the Interior to publish is not a list of "federally recognized tribes," but a list of "Indian tribes" the Secretary recognizes for the singular purpose of being "eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

In that regard, in 1971 in sections 7 and 8 of ANCSA, 43 U.S.C. §§ 1606 and 1607, the 92d Congress directed Alaska Natives in each region of Alaska and in each of more than two hundred Native villages, including Eklutna, to incorporate a business corporation under the laws of the State of Alaska. In 1975 the 93d Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, which authorizes the BIA to contract with "Indian tribes" to administer programs and services the

BIA was providing on behalf of the United States to Indians because of their status as Indians. Section 4(b) of the ISDEAA, 25 U.S.C. § 5304(e), defines "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. (emphasis added)

It has never been suggested that Alaska Native shareholders of an ANCSA regional and village corporation are a "federally recognized tribe" and that as a consequence of that designation the corporation possesses sovereign immunity. But while since 1994 the Secretary of the Interior has not done so, a plain meaning reading of the text of section 104 of the FRITLA directs the Secretary to include ANCSA regional and village corporations on the list of "Indian tribes" he publishes annually.¹³

Finally, "little weight" should be given to a statement made by a member of Congress after a bill has been enacted,

¹³ In 1988 Assistant Secretary of the Interior for Indian Affairs Ross Swimmer did that. See 53 *Fed. Reg.* 52832-52835. Five years later when, at the instigation of Messrs. Anderson and Miller, Assistant Secretary Ada Deer tried to use the list as a means to transform the Native residents of Eklutna and other Native villages into "federally recognized tribes," she removed the ANCSA regional and village corporations from her list.

Barber v. Thomas, 560 U.S. 474, 486 (2010), even if that member was a sponsor of the bill, *Mims v. Arrow Financial Services LLC*, 565 U.S. 368, 385 (2012). But that does not mean that such a statement should be given no weight, particularly when it is consistent with a plain meaning reading of the text of the bill. For that reason, the post-enactment statement of Alaska Representative Don Young merits consideration.

In 1994 Representative Young was a cosponsor of H.R. 4180, the bill the 103d Congress enacted as the FRITLA. See H.R. 4180, 103d Cong. (as introduced, April 12, 1994); 140 *Cong. Rec.* 7191. He also was the Ranking Republican member of the Committee on Natural Resources - see 1993-1994 *Congressional Directory*, at 455, which wrote and then reported, H. Rep. No. 103-781, the amendment in the nature of a substitute for the original text of H.R. 4180 that, with only a cursory explanation on the House floor - see 140 *Cong. Rec.* 27244-27246 - and no explanation on the Senate floor - see id. 29537 - first the House, and then the Senate, passed on unrecorded voice votes.

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 explained to the House that

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. 24016.

Finally, in its June 27, 2025 order the district court announced that the Tlingit and Haida Status Clarification Act (THSCA), Title II, Pub. L. No. 103-454, which Representative Bill Richardson, the Chairman of the Subcommittee on Native American Affairs of the Committee on Natural Resources - see 1993-1994 Congressional Directory, at 456 - added as Title II to the version of H.R. 4180 that he brought to the House floor on the suspension calendar confirmed the district court's conclusion regarding the intent of the 103d Congress embodied in the FRITLA.

Prior to the district court reasoning to its conclusion, the plaintiffs explained to the court the

circumstances that had resulted in the text of the THSCA that the 103d Congress enacted. See ER 52-57. However, in reasoning to its result the district court made no mention of those circumstances. Without describing the legislative history of the THSCA again here, what can be said here is that, as the plaintiffs explained to the district court:

“Whether Congress designating the members of the Central Council [of Tlingit and Haida Indian Tribes of Alaska] as a ‘federally recognized tribe’ was a good idea, or as the Department of the Interior believed a bad one,¹⁴ that was a decision the Indian Commerce Clause granted Congress the exclusive authority to make.” ER 52.

But the decision the 103d Congress made regarding the status of members of the Central Council had nothing to do with whether the members of the NVE have been lawfully designated as a “federally recognized tribe” and that as a consequence of that designation the NVE possesses sovereign

¹⁴See *Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 Before the Subcomm. on Native American Affairs of the H. Comm. on Natural Resources*, 103d Cong. 5 (1994) (Debra Maddox, Acting Director of the BIA Office of Tribal Services, informing the Subcommittee that the Department of the Interior opposed S. 1784 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”).

immunity.

II. The District Court Erred When It Assumed That the Native Village of Eklutna Was a FRCP 19(a) Required Party.

In its June 27, 2025 order the district court held that the members of the Native Village of Eklutna had been lawfully designated as a “federally recognized tribe,” as a consequence of that designation the NVE possesses sovereign immunity, and that because the NVE had invoked its sovereign immunity it could not be joined as a defendant in this action. ER 20.

Assuming *arguendo* that those holdings were correct, to decide whether to grant or deny the NVE’s motion to dismiss this action pursuant to FRCP 19(b), this court instructed the district court that “Whether an action should be dismissed under Rule 19 involves a two-part analysis. First, the district court must determine whether the absent party is a ‘necessary’ [i.e., a required] party.” (citation omitted). *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

Pursuant to FRCP 19(a)(1)(B), the NVE is a required party if 1) the NVE “claims an interest relating to the subject of th[is] action,” and 2) the district court

disposing of the action in the NVE's absence "as a practical matter may impair or impede" the NVE's ability to protect its interest.

Deciding whether the NVE is a required party requires a "fact specific" analysis, *Kescoli, supra* at 1309, that is "heavily influenced by the facts and circumstances of [this particular] case," *Bakia v. Los Angeles County*, 687 F.2d 299, 301 (9th Cir. 1982). And most consequentially, this court has instructed that in a civil action in which the United States is a party and an absent entity is an Indian tribe, the tribe is not a required party whose interest may be impeded because the United States can represent the tribe's interest as long as there is "no conflict" between the interest of the United States and the interest of the tribe. *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1351 (9th Cir. 1996).

As this court explained in *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990): "Impairment may be minimized if the absent party is adequately represented in the suit. The United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe." (citations omitted and emphasis

added). Accord *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-1154 (9th Cir. 1998) (Salt River Pima-Maricopa Indian Community not a required party because “The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe”). And in *Ramah, supra* at 1351, this court cited with approval *Cassidy v. United States*, 875 F. Supp. 1438, 1443-1444 (E.D. Wash. 1994), in which the district court held:

[U]nder Rule 19(a), a party is necessary if complete relief cannot be granted among the existing parties or the absent party has a legally protected interest that might be impeded if the case proceeds in its absence. If a legally protected interest is found to exist, the issue becomes whether that interest would be impaired or impeded if the case were to proceed without the absentee party. Impairment may be minimized if the absent party is adequately represented in the suit. The United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe. (citation and internal quotation marks omitted, first emphasis in original, second emphasis added).

Disregarding those admonitions regarding the need for a conflict of interest, in this action the district court first erred by conflating its analysis of whether the NVE was an FRCP 19(a) required party with its analysis of whether, assuming *arguendo* that it was a required party, for

the purposes of FRCP 19(b) the NVE would be prejudiced if the district court allowed this action to proceed against Chairwoman Avery in the NVE's absence. ER 22-23.

The district court then compounded that error by concluding that "The Government [Chairwoman Avery] cannot adequately represent the Tribe's [the NVE's] interests because the Government's interests in determining whether a tribe is federally recognized and whether to approve a gaming ordinance differ from the Tribe's interests in preserving federal recognition and its approved gaming ordinance." (emphasis added). ER 22-23.

As a threshold matter it is difficult to understand how the respective interests of Chairwoman Avery and the NVE differ since Chairwoman Avery and the NVE have the same interest in defending the validity of the final agency action Chairwoman Avery took on July 18, 2024 when she approved the NVE's ordinance to conduct class II commercial gambling on the Ondola allotment. But if *arguendo* their respective interests do differ, the test this court announced in *Makah Indian Tribe* and cited with approval the district court's description of the rule in *Cassidy* is not whether the interests differ, but whether they conflict. And

in this action they do not conflict.

In that regard, it is informative to compare *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), with *Alto v. Black*, 739 F.3d 1111 (9th Cir. 2013). In *Confederated Tribes*, *supra* at 1500, this court held that Secretary of the Interior Manuel Luhan had a conflict of interest that prevented him from adequately representing the interest of the Quinault Nation. But in *Alto*, *supra* at 1128, the court held that the San Pasqual Band was not a FRCP 19(a) required party because Secretary of the Interior Sally Jewell did not have a conflict and as a consequence could adequately represent the interests of the Band. The court reasoned to that result because Secretary Jewel and the Band shared the same objective, which was defending the final agency action that was the subject of the dispute between the parties and the Band had "not presented any arguments that it would offer in defense of [the final agency action] which the BIA has not or would not make."

That is the situation here.

In its June 27, 2025 order the district court cited *Dine Citizens*, *supra* at 855, as a decision of this court that supported the district court's determination that

Chairwoman Avery could not adequately represent the interest of the NVE. But the district court's reliance on *Dine Citizens* was misplaced because a careful reading of that decision indicates that its outcome was fact-specific regarding the dispute at issue.

To wit, in *Dine Citizens* this court concluded that Secretary of the Interior David Bernhardt and the other Department of the Interior defendants "could not be counted on" to adequately represent the interest of a corporation owned by the Navajo Nation because while Secretary Bernhardt and the other Department of the Interior defendants and the corporation had the same interest in defending the validity of the lease, rights-of way, and permits whose issuance were the final agency actions that were the subject of the dispute between the parties, Secretary Bernhardt and the other Department of the Interior defendants also had an "overriding interest" in ensuring that they complied with all applicable environmental laws. As a consequence, Secretary Bernhardt and the other Department of the Interior defendants had a conflict of interest that prevented them from representing the corporation.

That is not the situation here.

In this action Chairwoman Avery can adequately represent the interests of the NVE and the district court's determination to the contrary was clear error.

III. The District Court's Dismissal of the First Amended Complaint Pursuant to FRCP 19(b) Was an Abuse of Discretion.

If *arguendo* the NVE was a FRCP 19(a) required party that because of its sovereign immunity could not be joined, in FRCP 19(b) the U.S. Supreme Court directed the district court, first to consider, and then balance, four factors set out in the rule, as well as other relevant factors, and then decide whether "in equity and good conscience" the district court should allow the action to proceed against Chairwoman Avery in the NVE's absence.

The first factor FRCP 19(b) required the district court to consider was whether a judgment in the plaintiffs' favor might prejudice the NVE. In that regard, in *Dine Citizens*, *supra* at 852, this court instructed that the NVE would not be prejudiced if as this action proceeds Chairwoman Avery "undoubtedly" will make all of the arguments the NVE would have made had it continued to participate as a defendant. Since who better than the trial attorney in the Tribal Resources Section of the Environment & Natural Resources

Division of the U.S. Department of Justice who represents Chairwoman Avery to defend the validity of Chairwoman Avery's final agency action, it is no surprise that in its motion to dismiss this action pursuant to FRCP 19(b), ER 83-93, the NVE did not identify a single legal or other argument that it would make but that Chairwoman Avery and her attorney will not make.

Nevertheless, in its June 27, 2025 order the district court announced that Chairwoman Avery "cannot adequately represent the Tribe's interests because the Government's interests in determining whether a tribe is federally recognized and whether to approve a gaming ordinance differ from the Tribe's interest in preserving federal recognition and its approved gaming ordinance." ER 23. As above noted, in reasoning to that result the district court confused interests that differ with interests that conflict.

After erroneously deciding that the first FRCP 19(b) factor favored dismissal, the district court then refused to consider, much less balance, the three other FRCP 19(b) factors - and most particularly the fourth factor, which required the district court to consider whether if the district court dismissed this action the plaintiffs would

have an adequate alternative remedy.¹⁵

The district court's rationale for its disinclination was that "a detailed analysis of the factors is not necessary," ER 23, because in *Jamul Action Committee v. Simermeyer*, *supra* at 998, this court instructed that "The balancing of equitable factors almost always favors dismissal when a tribe cannot be joined due to sovereign immunity."

But "almost always" does not mean "always."

Because it does not - see most recently *Federated Indians of Graton Rancheria v. U.S. Department of the Interior*, No. 24-cv-08582, 2025 WL 2096171 (N.D. Calif. July 18, 2025),¹⁶ in *Quileute Indian Tribe v. Babbitt*, 18 F.3d

¹⁵ In that regard, this court has repeatedly instructed that if the plaintiff would not have an adequate alternative forum to obtain a remedy district courts should be "extra cautious" before they dismiss an action pursuant to FRCP 19(b). *Makah Indian Tribe v. Verity*, *supra* at 560; *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1162 (9th Cir. 2002).

¹⁶ In *Federated Indians of Graton Rancheria* the district court held that because the Koi Nation possessed sovereign immunity it could not be joined as a party. But the court allowed the action to proceed without the Koi Nation because a lawsuit that otherwise might be dismissed pursuant to Rule 19(b) may proceed "where it seeks to vindicate public rights." *Federated Indians of Graton Rancheria*, *supra* at 9. In this action the plaintiffs did not assert the public rights exception to FRCP 19(b) because their interest is parochial: they are trying to protect the rural neighborhood in which several plaintiffs have lived for more than twenty years, ER 107-110 (First Amended

1456, 1460 (9th Cir. 1994), this court directed the district court as follows:

Rule 19(b) provides a four-part test to determine whether a party is indispensable to an action. The district court is directed to balance the following factors: 1) prejudice to any party or to the absent party; 2) whether relief can be shaped to lessen prejudice; 3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and 4) whether there exists an alternative forum. We have noted, however, that when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor. Nevertheless, we have directed district courts to apply the four-part test to determine whether Indian tribes are indispensable parties. (citations and internal punctuation marks omitted, emphases added)

The district court's failure to consider, much less balance, all of the FRCP 19(b) factors was an abuse of discretion.

CONCLUSION

For the reasons set forth above, this court should reverse the district court, vacate the Order and Judgment in a Civil Action the district court entered on June 27, 2025,

Complaint §§ 6-12), from being unlawfully transformed by the NVE and the Marnell Gaming Management Company, ER 128 (First Amended Complaint § 42), into a commercial gambling Mecca. However, six weeks after the plaintiffs filed this action the State of Alaska, representing the public interest, filed its own civil action in which it is challenging the validity of the final agency action whose validity is the subject of this action. See *State of Alaska v. U.S. Department of the Interior*, D. Alaska No. 3:25-cv-00148.

and remand this action to the district court to adjudicate the merits of the claims for relief alleged in the First Amended Complaint.

Dated: September 1, 2025

Respectfully submitted,

s/ Donald Craig Mitchell

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CERTIFICATE OF COMPLIANCE

This brief contains 11,160 words, excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6). I certify that the brief complies with the word limit of Circuit Rule 32-1(a).

Dated: September 1, 2025

s/ Donald Craig Mitchell

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