

No. 25-4618

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

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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.

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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

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**PLAINTIFFS-APPELLANTS REPLY BRIEF**  
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DONALD CRAIG MITCHELL  
1335 F Street  
Anchorage, Alaska 99501  
Phone: (907) 276-1681  
Email: dcraigm@aol.com

*Counsel for Plaintiffs-Appellants*

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## INTRODUCTION

No area of federal law has been more influenced by history than federal Indian law. That is because the story of the lethiferous means the U.S. army employed during the nineteenth century to clear the public domain in the coterminous states of Native Americans today remains one of the most emotionally powerful narratives in American popular culture. The answering brief the Native Village of Eklutna (NVE) has filed validates that observation.

“Appellee Native Village of Eklutna is a federally recognized tribe of the Dena’ina people who have resided in the upper Cook Inlet region of Alaska since time immemorial.” NVE Answering Brief, at 2. “Revoking decades of federally-recognized tribal governmental status would entail, among many other severe impacts, the loss of sovereignty and loss of eligibility for federal Indian programs for all 229 tribal governments in Alaska.” Id. 7. “Holl’s attack on the Tribe’s federal recognition strikes at the heart of the Tribe’s identity, its existence, and its substantive rights under federal law.” Id. 27.

Such over-wrought hyperbole quite frequently appears in filings in Indian cases because quite frequently it works.

But that hyperbole has nothing to do with the questions of law this appeal presents for decision.

Before responding to the arguments of Sharon Avery, the chairwoman of the National Indian Gaming Commission (NIGC), and the NVE regarding those questions, several preliminary matters merit comment.

**A. Marnell Gaming Management Casino**

There is a line between advocacy and disingenuity that in its answering brief the NVE crossed.

The NVE represented to this court that appellants filed this action because they object to “the Tribe’s small, Class II gaming facility - an electronic bingo parlor - [that] has the potential to cause traffic problems for neighboring landowners.” NVE Answering Brief, at 2.

That statement is correct in that in December 2024 and January 2025 Marnell Gaming Management, the Las Vegas casino management company with which the NVE had contracted, finished clearing the Ondola allotment of timber and brought in a modular building in which it installed approximately one hundred video gaming machines. The company did so in order to open what the NVE calls the Chin’an Gaming Hall before the arrival of the Trump administration brought a

change of personnel inside the Department of the Interior. See "Native Village of Eklutna Opens Limited Gambling Operation at Site of Future Casino in Birchwood," *Anchorage Daily News* (Jan. 21, 2025), available at <https://www.adn.com/alaska-news/anchorage/2025/01/21/native-village-of-eklutna-opens-limited-gambling-operation-at-site-of-future-casino-in-birchwood/>.

But the NVE did not inform this court that if the court affirms the district court's dismissal of this action Marnell Gaming Management will construct, and then manage, "a 58,000 square foot casino on the Ondola allotment whose 33,000 square foot gaming floor will contain one thousand class II video gaming machines. The casino also will contain a two hundred-seat restaurant, a bar, and an asphalted parking lot for 443 automobiles." First Amended Complaint, at 4 ¶ 12; Excerpts of Record (ER), at 108.

**B. 28 U.S.C. § 2401(a)**

In its answering brief the NVE asserts that appellants did not file this action to obtain judicial review of the validity of the final agency action Chairwoman Avery took on July 18, 2024 when she approved the NVE's gaming ordinance, but rather to obtain judicial review of the validity of the

final agency action Assistant Secretary of the Interior for Indian Affairs Ada Deer took on October 21, 1993 when she tried to transform the members of the NVE into a “federally recognized tribe” by publishing a list of Native Entities and a preamble in the *Federal Register*, and that 28 U.S.C. § 2401(a) required appellants to have sought that review prior to October 21, 1999. NVE Answering Brief, at 22. And in her answering brief Chairwoman Avery argues the same. Avery Answering Brief, at 13 n. 2.

Because the NVE and Chairwoman Avery did not present their new argument regarding 28 U.S.C. § 2401(a) to the district court the argument was waived and cannot be considered here. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990) (“Our general rule is that we will not consider issues raised for the first time on appeal”). Accord *Ford v. Saul*, 950 F.3d 1141, 1158 n. 12 (9th Cir. 2020) (“Ford did not argue to the district court that the ALJ’s failure to obtain the vocational expert’s underlying data violated her due process rights; therefore she forfeited the issue”).

But even if this court would consider it, the NVE’s and Chairwoman Avery’s new argument is demonstrably specious

because 28 U.S.C. § 2401(a) provides that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” “A cause of action against an administrative agency ‘first accrues’ within the meaning of § 2401(a) as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court.” *Spannaus v. U.S. Department of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987). Accord *Acri v. International Association of Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (9th Cir. 1986) (“Under federal law a cause of action first accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action”) (emphasis added).

But a plaintiff cannot “successfully bring a cause of action” in a district court unless and until the plaintiff has standing to do so. As Justice Barrett has instructed: “An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured”). *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799, 809

(2024).

Assuming *arguendo* that appellants filed this action to obtain judicial review of the validity of the final agency action Assistant Secretary Deer took on October 21, 1993, appellants did not suffer an injury in fact that gave them standing to obtain that judicial review until July 18, 2024 when Chairwoman Avery approved the NVE's gaming ordinance, and then on January 20, 2025 when Marnell Gaming Management opened the Chin'an Gaming Hall.

**C. The Indian Commerce Clause Grants Congress Authority to Enact a Statute That Designates a Group of Individuals as an "Indian tribe" for the Purposes of That Particular Statute. That Designation Does Not Transform the Members of the Group Into a "Federally Recognized Tribe."**

According to the NVE, "Revoking decades of federally-recognized tribal government status would entail, among many other severe impacts, the . . . loss of eligibility for federal Indian programs for all 229 tribal governments in the State of Alaska." NVE Answering Brief, at 7.

But that assertion is more specious hyperbole.

In 1975 the 93d Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 5301 et seq.) The ISDEAA authorizes an "Indian tribe" to contract with the Bureau of Indian Affairs (BIA)

and Indian Health Service (IHS) to administer programs and provide services that the BIA and IHS had been administering and providing. Section 4(b) of the ISDEAA (codified as 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<sup>1</sup> or regional or village corporation as defined in or establish pursuant to the Alaska Native Claims Settlement Act [ANCSA] 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).

The Indian Commerce Clause, U.S. CONST. Art I, § 8, cl. 3, granted the 93d Congress authority to designate the Native shareholders of a for-profit business corporation incorporated under state law as an "Indian tribe" for the purposes of the ISDEAA.<sup>2</sup> But it contravenes common sense to conclude that the 93d Congress intended corporate shareholders to be a "federally recognized tribe" that

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<sup>1</sup> Because in 1971 the 92d Congress designated Eklutna as a "Native village" for the purposes of the ANCSA, 16 U.S.C. § 1609(b)(1), the members of the NVE are an ISDEAA "Indian tribe" that if appellants prevail in this appeal will remain eligible to contract with the BIA and IHS.

<sup>2</sup> How and why the 93d Congress designated Native shareholders of ANCSA business corporations as "Indian tribes" for the purposes of the ISDEAA is described at Donald Craig Mitchell, *Yellen v. Confederated Tribes of the Chehalis Reservation: Why Legislative History Still Should Count*, 59 Willamette Law Review 215, 244-250 (2023).

possesses sovereign immunity.

In 1976 the 94th Congress enacted the Indian Health Care Improvement Act (IHCIA), Pub. L. 94-437, 90 Stat. 1400 (codified as amended at 25 U.S.C. § 1601 et seq.), which inter alia authorizes the IHS to make grants to an "Indian tribe." Like section 4(b) of the ISDEAA, section 4(d) of the IHCIA (codified at 25 U.S.C. § 1603(14)) 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 establish 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).

In 1996 the 104th Congress enacted the Native American Housing Assistance and Self-Determination Act (NAHASDA), Pub. L. 104-330, 110 Stat. 4016 (codified as amended at 25 U.S.C. § 4101 et seq.), to facilitate the construction of housing "on Indian reservations, in Indian communities, and in Native Alaskan villages." Section 4(12) of the NAHASDA (codified as 25 U.S.C. § 4103(13)) defines "Indian tribe" to mean a "federally recognized tribe or a State recognized tribe," and defines "federally recognized tribe" to mean

any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act. (emphasis added).

Those statutes are representative.

Pursuant to Federal Rule of Evidence 201(b)(2), this court may judicially notice that the United States Code - a source whose accuracy cannot reasonably be questioned - is riven with similar statutes that make the members of the NVE and other Alaska Native groups headquartered in other Native villages eligible for federal programs and services for which, if appellants prevail in this appeal, they will continue to be eligible.

#### **D. Violence Against Women Reauthorization Act**

According to the NVE, the 117th Congress “affirmed the sovereign status of Alaska tribes in the Violence Against Women Reauthorization Act of 2022 [VAWRA], which expressly recognizes Alaska tribes’ authority to exercise civil and criminal jurisdiction within their villages.” NVE Answering Brief, at 20. Like its new argument regarding 28 U.S.C. § 2401(a), because the NVE did not present its new argument

regarding the VAWRA to the district court, the argument was waived and cannot be considered here.

It also merits noting that, while she joined the NVE in making the NVE's new argument regarding 28 U.S.C. § 2401(a), Chairwoman Avery did not join the NVE in making the NVE's new argument regarding the VAWRA.

Perhaps because Chairwoman Avery was aware (while the NVE was not?) that in 2006 the 109th Congress amended the Violence Against Women Act (VAWA) by adding a Section 40002(a) to the VAWA that contained definitions that would apply throughout the act. Pub. L. No. 109-162, Section 3, 119 Stat. 2960, 2964-2969 (2006). Section 40002(a)(13) defined "Indian tribe" to mean

tribe, band, pueblo, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), that 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).

As the NVE informed this court, in 2022 the 117th Congress enacted the VAWARA. Pub. L. No. 117-103, Division W, 136 Stat. 49, 840-962. But what the NVE did not inform the court is that Section 2(b) of the VAWARA states that "Section 40002 of the Violence Against Women Act of 1994 shall apply to this Act . . . ." 136 Stat. 846. While Section 2(a) of the VAWRA made

myriad changes to the definitions in section 40002 - see 136 Stat. 840-846, Section 2(a) did not change the "Indian tribe" definition, which as it has since 2006 remains codified as 34 U.S.C. § 12291(a) (22).

So Chairwoman Avery's disinclination to join the NVE's new argument regarding the VAWRA is no surprise.<sup>3</sup>

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<sup>3</sup> Inexplicably, the NVE concluded that informing this court of the NVE's low opinion of appellants' counsel's professional competence was relevant to the court's consideration of the questions of law this appeal presents for decision. See NVE Answering Brief, at 7 n. 6. What the NVE did not inform the court of is that appellants' counsel is the author of four academically well-regarded books on the history of Alaska Native land claims, Indian gaming, and most recently the Alaska Native tribal sovereignty movement, see *Tribal Sovereignty in Alaska: How It Happened, What It Means* (Carolina Academic Press 2022), which the former staff director of the Subcommittee on Indian and Alaska Native Affairs of the House Committee on Natural Resources praised as "a primary reference for every lawmaker, judge, and historian who deals in federal and state relations with Alaska Natives." See <https://cap-press.com/books/isbn/9781531022242/Tribal-Sovereignty-in-Alaska>. In 2022 appellants' counsel was the recipient of the Alaska Historical Society's Evangeline Atwood Award for "significant long-term contributions to Alaska state or local history." See <https://alaskahistoricalsociety.org/about-ahs/awards/evangeline-atwood-award-for-excellence/>. Beginning in 1978, for more than forty years appellant's counsel has repeatedly been invited by Congress to testify as an expert witness regarding Alaska Native and Native American subject matters. See e.g., *Indian Child Welfare Act: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 90-98 (1978); *Supreme Court Decision, Carcieri v. Salazar, Ramifications to Indian Tribes: Oversight Hearing Before the H. Comm. on Natural Resources*, 111th Cong. 23-30 (2009); *Comparing 21st Century Trust Land Acquisition With the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Oversight Hearing Before the Subcomm. on Indian, Insular and Alaska Native Affairs of the H. Comm. on Natural Resources*, 115th Cong. 29-40 (2017). Finally, in 1997 appellants' counsel represented United States Senator Ted Stevens in *State of Alaska v. Native Village*

## ARGUMENT

- A. The Members of the Native Village of Eklutna Are Not a “Federally Recognized Tribe” That Has Sovereign Immunity.**
- 1. Between 1884 and 1993 Congress Repeatedly Decided That It Would Not Designate Any Group of Alaska Natives as a “Federally Recognized Tribe.”**

In her answering brief Chairwoman Avery did not contest the accuracy of appellants’ description of Congress’s Alaska Native-related enactments between 1884 and 1993. In its answering brief the NVE also did not contest the accuracy of appellants’ description. Instead, the NVE simply wished away what it disparaged as appellants’ “lengthy, quasi-historical exposition” by declaring it “immaterial.” NVE Answering Brief, at 19.

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*of Venetie Tribal Government*, 522 U.S. 520 (1998). See Brief of the Honorable Theodore F. (Ted) Stevens as Amicus Curiae in Support of Petitioner, U.S. Supreme Court No. 96-1577 (1997). In that decision a unanimous Court agreed with appellants’ counsel that the 80th Congress did not intend public land that the Bureau of Land Management conveyed in fee title to an ANCSA village corporation to be 18 U.S.C. § 1151(b) “Indian country.” The Native Village of Venetie Tribal Government, whose position every member of the Court rejected, was represented by Lloyd Miller, an attorney in the Anchorage office of the Sonosky Chambers law firm, which represents the NVE in this appeal. See *State of Alaska v. Native Village of Venetie Tribal Government*, *supra* at 522 (“Heather R. Kendall argued the cause for respondents. With her on the brief was Lloyd Benton Miller”).

2. **At the Instigation of a Group of Attorneys Whose Most Influential Members Were Robert Anderson and Lloyd Miller, on October 21, 1993 Assistant Secretary of the Interior for Indian Affairs Ada Deer Attempted to Transform the Members of the NVE and the Members of More Than Two Hundred Other Groups Into "Federally Recognized Tribes" by Publishing a List of Native Entities and a Preamble in the *Federal Register*.**

In her answering brief Chairwoman Avery did not contest the accuracy of appellants' description of the events that resulted in Assistant Secretary Deer publishing her list of Native Entities and a preamble in the *Federal Register*. In its answering brief the NVE informed this court that it "disputes Holl's characterizations of events that led to creation of the 1993 List." NVE Answering Brief, at 5 n. 3. But the NVE did not identify any inaccuracy in appellants' description of those events. Instead, the NVE celebrated what its counsel and his colleagues accomplished behind the scene as "effective and vigorous advocacy." *Id.* 14.

3. **Assistant Secretary Deer's Attempt to Transform the Members of the NVE and the Members of More Than Two Hundred Other Groups Into "Federally Recognized Tribes" by Publishing a List of Native Entities and a Preamble in the *Federal Register* Was *Ultra Vires*.**

In her answering brief Chairwoman Avery did not contest the accuracy of appellants' description of the texts of

25 U.S.C. §§ 2 and 9 and the legislative history of 25 U.S.C. § 2. Instead, she simply baldly announced that the 22d and 23d Congresses intended 25 U.S.C. §§ 2 and 9 to delegate the Executive Branch “broad authority” that includes “the power to decide in the first instance whether groups have been federally recognized in the past or whether other circumstances support current recognition.” (quotation marks and citation omitted). Avery Answering Brief, at 12.

As authority for that conclusion regarding the intent of of the 22d and 23d Congresses Chairwoman Avery cited *Mackinac Tribe v. Jewell*, 829 F.3d 754 (D.C. Cir. 2016).

The question at issue in *Mackinac Tribe* was whether a group that had petitioned the Secretary of the Interior to conduct an election pursuant to 25 C.F.R. § 81.1 *et seq.* had exhausted its administrative remedies. The circuit court held that the group had not done so because the group had not complied with the 25 C.F.R. § 83.1 *et seq.* tribal acknowledgment process.

Because the group and the circuit court both assumed that Congress had delegated the Secretary authority to promulgate 25 C.F.R. § 83.1 et seq., the court’s conclusion, which it announced in passing, that the 22d Congress

intended 25 U.S.C. § 2 to delegate the Secretary that authority was a dictum. As authority for that dictum the circuit court cited *James v. U.S. Department of Health and Human Services*, 824 F.2d 1132 (D.C. Cir. 1987).

The question decided in *James* was whether the members of a group called the Gay Head Indians of Martha's Vineyard were a "federally recognized tribe," even though the group had not complied with the 25 C.F.R. § 83.1 *et seq.* tribal acknowledgment process. The circuit court held that the answer was no. Again in passing, the court announced that the 22d and 23d Congresses intended 25 U.S.C. §§ 2 and 9 to delegate the "Executive Branch [authority] to prescribe regulations concerning Indian affairs and relations." *James, supra* at 1137.

But because the Gay Head Indians of Martha's Vineyard had not contested the authority of the Secretary of the Interior to have promulgated 25 U.S.C. § 83.1 *et seq.* that pronouncement was another dictum.

While a dictum based on a dictum is not a controlling authority, in her answering brief Chairwoman Avery at least attempted to address appellants' arguments regarding the intent of the 22d and 23d Congresses embodied in the texts

of 25 U.S.C. §§ 2 and 9. In its answering brief the NVE made no such effort.

**4. The District Court's Reliance on *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior* and *Eagle Bear, Inc. v. Independent Bank* Was Misplaced.**

In their answering briefs Chairwoman Avery and the NVE offered no response to appellants' arguments regarding *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior* and *Eagle Bear, Inc. v. Independent Bank*. Avery Answering Brief, at 12; NVE Answering Brief, at 18.

**5. Assuming *Arguendo* That the 22d Congress Intended 25 U.S.C. § 2 to Delegate Assistant Secretary Deer Authority to Create New "Federally Recognized Tribes" by Publishing a List of Native Entities and a Preamble in the *Federal Register*, That Delegation of Authority Was Unconstitutional.**

In *FCC v. Consumers' Research*, 606 U.S. 656 (2025), the U.S. Supreme Court reaffirmed that, while Congress can enact a statute that delegates legislative power to the Executive Branch, the text of the statute must contain "an 'intelligible principle' to guide what it has given the agency to do" by setting out "standards to enable both the courts and the public to ascertain whether the agency has followed the law." (internal quotation marks and punctuation omitted). *Id.* 673.

In *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior*, *supra*, Circuit Judge Posner, without explaining the analysis that had led him to the conclusion, announced that the 22d and 23d Congresses intended 25 U.S.C. §§ 2 and 9 to delegate the Secretary of the Interior authority to create new “federally recognized tribes,” but that the texts of 25 U.S.C. §§ 2 and 9 do not contain “any criteria to guide the exercise of that power.” *Miami Nation*, *supra* at 345.

In their opening brief appellants brought Judge Posner’s conclusion in that regard to the attention of this court. Appellants’ Opening Brief, at 29. In their answering briefs Chairwoman Avery and the NVE made no mention of Judge Posner’s conclusion.

**6. The 103d Congress Did Not Intend the Federally Recognized Indian Tribe List Act to Ratify Assistant Secretary Deer’s *Ultra Vires* Attempt to Transform the Members of the NVE Into a “Federally Recognized Tribe” by Publishing a List of Native Entities and a Preamble in the *Federal Register*.**

As a threshold matter, the text of the Federally Recognized Indian Tribe List Act (FRITLA), Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified at 25 U.S.C. §§ 5130-5131), makes no mention of Assistant

Secretary Deer's list of Native Entities and preamble.

In her answering brief Chairwoman Avery asserted that section 104 of the FRITLA, 25 U.S.C. § 5131, "directs the Secretary [of the Interior] to publish an annual list of federally recognized tribes." Avery Answering Brief, at 14. But that assertion misdescribed the text of section 104.

Section 102 of the FRITLA, 25 U.S.C. § 5130, defines "Indian tribe" to mean an "Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe [not a federally recognized tribe]" (emphasis added). Section 104 then directs the Secretary to publish annually a list of those "Indian tribes" he "recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

As above noted, those "Indian tribes" include Native shareholders of ANCSA village and regional corporations.

In its answering brief the NVE attempted to wish away the unambiguous meaning of the texts of sections 102 and 104 by asserting, based on no authority other than its own say-so, that the difference between a group of Alaska Natives that has been lawfully designated as a "federally recognized

tribe" and a group of Alaska Natives that the Secretary has recognized as an "Indian tribe" for the purpose of being "eligible for the special programs and services provided by the United States to Indians because of their status as Indians" is "a semantic distinction without a difference." NVE Answering Brief, at 18. But the NVE wanting that to be true does not make it so.<sup>4</sup>

**B. The NVE Is Not a FRCP 19(a) Required Party.**

Assuming *arguendo* that the members of the NVE have been lawfully designated as a "federally recognized tribe" that possesses sovereign immunity that prevents the NVE from being joined as a defendant in this action, this court has held - *see Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-1154 (9th Cir. 1998) - that the NVE is not a FRCP 19(a) required party if Chairwoman

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<sup>4</sup> The FRITLA also contains section 103, which contains eight findings, two of which reference "federally recognized tribes." But the U.S. Supreme Court has instructed that if a finding conflicts with an unambiguous statutory text the finding is "irrelevant." *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). But even if findings are not irrelevant, Finding 3 states that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . ; or by a decision of a United States court." The members of the NVE did not become "recognized" by any of those means.

Avery can adequately represent the NVE's interest in defending the final agency action whose validity is the subject of this action.

In its decision in which it granted the NVE's motion to dismiss the district court concluded that Chairwoman Avery could not adequately represent the NVE's interest. However, in reasoning to its result the district court conflated its analysis of whether the NVE was a FRCP 19(a) required party with its analysis of whether, if *arguendo* the NVE was a required party, the district court should exercise its discretion and dismiss this action pursuant to FRCP 19(b). ER 20-23.

After doing so, the district court announced that "The Government 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." *Id.* 22-23. But the district court offered no explanation as to why those two seemingly identical interests differed. Instead, the district court simply cited *Dine Citizens Against Ruining Our Environment v. BIA*,

932 F.3d 843 (9th Cir. 2019, and let it go at that.

For the reasons appellants set out in their opening brief - Appellants Opening Brief, at 47-48, the district court erred when it did so. Nevertheless, in its answering brief the NVE ignored appellants' argument and continued to rotely argue that Chairwoman Avery cannot adequately represent the NVE's interest because she "can[not] be counted on" to make all of the NVE's arguments "defending the NIGC approval of the Tribe's Gaming Ordinance and the accompanying Indian Lands Opinion." NVE Answering Brief, at 38.

But in her answering brief appellee Avery demonstrated that she can be counted on. She continued to defend the final agency action whose validity is the subject of this action. And she did not identify any argument relevant to the validity of her final agency action that the NVE would make but she will not.

Instead, as she did when the NVE's motion to dismiss was before the district court, Chairwoman Avery continued to argue that the members of the NVE are a "federally recognized tribe." Avery Answering Brief, at 15 ("Because the Tribe [i.e., the members of the NVE] has been included

in the Secretary's annual list since 1982 and was included on the 1993 list of Alaska native villages recognized by the Department of the Interior, the Tribe is indisputedly federally recognized").

Chairwoman Avery also has not changed her position that the Ondola allotment is "Indian lands" as section 4(4)(B) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2703(4)(B), defines that term.

That said, Chairwoman Avery approved the NVE's gaming ordinance because she accepted, and in her final agency action adopted, Solicitor of the Department of the Interior Robert Anderson's legal analysis in Solicitor Opinion M-37079<sup>5</sup> in which he announced that "federally recognized tribes" in Alaska have always exercised governmental power within the boundaries of Alaska Native allotments. See ER 103 ("the SOL 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. I agree with this analysis and have adopted the opinion into my approval of the Tribe's Gaming Ordinance").

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<sup>5</sup> Available at <https://www.doi.gov/sites/default/files/documents/2024-02/m37079-partial-wd-m36975-and-clarification-trbl-jurisdiction-over-ak-native-allotments-2124.pdf>.

As Chairwoman Avery has informed the court - Avery Answering Brief, at 7 n. 1, on September 25, 2025 Deputy Secretary of the Interior Kate MacGregor issued a memorandum<sup>6</sup> in which she withdrew Solicitor Opinion M-37079 because the legal analysis contained therein was "contrary to law and judicial precedent." Deputy Secretary MacGregor then directed Chairwoman Avery to reevaluate "any action by the National Indian Gaming Commission, taken in reliance on Solicitor Opinion M-37079 . . . ."

While Congress established the NIGC as an entity "within the Department of the Interior" - see section 5(a) of the IGRA, 25 U.S.C. § 2704(a), unlike the Assistant Secretary of the Interior for Indian Affairs and the heads of other Department of the Interior agencies, Deputy Secretary MacGregor does not supervise Chairwoman Avery, who is advised by her own general counsel, rather than by the Solicitor of the Department of the Interior. See <https://www.nigc.gov/office-of-general-counsel/> ("The Office of General Counsel serves as the legal staff of the National Indian Gaming Commission. It represents the Chair and the

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<sup>6</sup> Available at <https://www.doi.gov/sites/default/files/documents/2025-09/withdrawal-solicitor-opinion--37079-signed-20250925.pdf>.

Commission in all agency matters . . . .").

As a consequence, Chairwoman Avery has no legal obligation to conduct the reevaluation Deputy Secretary MacGregor directed. Nevertheless, Chairwoman Avery has informed the court that "The NIGC is reviewing the Deputy Secretary of the Interior's memorandum withdrawing Solicitor Opinion M-37079, but no formal decision has been made regarding the Tribe's gaming ordinance." (emphasis added). Avery Answering Brief, at 7 n. 1.

Deputy Secretary MacGregor issued her memorandum more than three and a half months before Chairwoman Avery filed her answering brief. As a consequence, it is reasonable to assume that Chairwoman Avery and her general counsel have made an informal decision to ignore Deputy Secretary MacGregor's withdrawal of Solicitor Opinion M-37079. For that reason, until Chairwoman Avery informs the court that she has changed her position that the Ondola allotment is "Indian lands" this court should assume that she has not changed her position.

Finally, according to Chairwoman Avery, whether she is willing or unwilling to represent the interests of the NVE in this action is irrelevant because "the district court's

ruling that the Tribe [i.e., the NVE] has protected interests in litigation that cannot adequately be represented by Chairwoman Avery is dictated by this Court's precedent." Avery Answering Brief, at 26.

According to Chairwoman Avery, that precedent is *Dine Citizens Against Ruining Our Environment v. BIA, supra*; *Jamul Action Committee v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020); *Klamath Irrigation District v. U.S. Bureau of Reclamation*, 48 F.4th 934 (9th Cir. 2022; and *Maverick Gaming LLC v. United States*, 123 F.4th 960 (9th Cir. 2024).

But those decisions do not establish a precedential rule regarding FRCP 19(a) applicable in all civil actions no matter what the facts are in each particular action. Because as the U.S. Supreme Court long ago noted, neither it, this court, nor the district court has the power "to rewrite the [Federal] Rules [of Civil Procedure] by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

For that reason, the precedent those decisions actually establish is that in a civil action a district court's determination as to whether an absent entity is a FRCP 19(a) required party depends on the district court's fact specific

analysis in that particular action. And this court will affirm whatever after that analysis the district court decided, unless this court determines that in reasoning to its result the district court abused its discretion.

That reading of those decisions is far different from the blackletter rule that in its decision the district court implied and in their answering briefs Chairwoman Avery and the NVE embrace, which is that in a civil action to obtain judicial review of the validity of a final agency action no matter what the facts are a federal defendant can never adequately represent the interests of an absent "federally recognized tribe."

In that regard, in *Dine Citizens, supra*, the principal decision on which the district court, Chairwoman Avery, and the NVE rely, this court recognized that in a civil action to obtain judicial review of the validity of a final agency action, if the particular facts support the conclusion, a federal defendant can adequately represent the interest of an absent "federally recognized tribe." See *Dine Citizens, supra* at 854-855 (citing *Southwest Center for Biological Diversity v. Babbitt, supra* at 1153, and *Alto v. Black*, 738 F.3d 1111, 1127-1128 (9th Cir. 2013)).

**C. Assuming Arguendo That the NVE Is a FRCP 19(a) Required Party, the District Court Abused Its Discretion When It Dismissed This Action Pursuant to FRCP 19(b).**

After the district court concluded that the NVE was a FRCP 19(a) required party that could not be joined, FRCP 19(b) required the district court to consider each of the factors set out in FRCP 19(b) and after doing so to then decide in "equity and good conscience" whether this action should proceed in the NVE's absence.

As appellants pointed out in their opening brief, the district court did not do so. Instead, after concluding that its consideration of the first of the four factors listed in FRCP 19(b) favored dismissal the district court announced that "a detailed analysis of the [three other] factors is not necessary," ER 23, because in *Jamul Action Committee v. Simermeyer, supra* at 998, this court instructed that a "federally recognized tribe" always wins.

The district court reasoned to that result without mentioning the fourth FRCP 19(b) factor, which was: if the district court dismissed this action would appellants have an alternative remedy to alleviate the injury in fact that Chairwoman Avery's *ultra vires* final agency action is inflicting on appellants?

Rather than conceding that obvious fact of the matter, in her answering brief Chairwoman Avery asserted that the district court did not abuse its discretion because before it decided to dismiss this action the district court "discussed the Rule 19(b) factors." Avery Answering Brief, at 28. But that is not true. Because at the beginning of the FRCP 19(b) section of its decision, ER 20-23, the district court listed each of the four FRCP 19(b) factors. But it then discussed only the first.

In its answering brief the NVE conceded that even though in its view in *Jamul Action Committee v. Simermeyer*, *supra* at 998, this court instructed that a civil action in which an absent "federally recognized tribe" asserts its sovereign immunity must always be dismissed, "the Rule 19(b) factors still must be considered." NVE Answering Brief, at 41. The NVE then further conceded that the district court did not do that because in the district court's view "a detailed analysis of the factors [wa]s not necessary." *Id.* 42. The NVE then gratuitously provided this court with its own analysis of each of the FRCP 19(b) factors. *Id.* 44-46.

But that attempt at obfuscation is unavailing.

Because the question before this court is not what the NVE believes the district court might have decided had it properly analyzed each of the FRCP 19(b) factors. Rather, the question is: did the district court conduct any analysis other than an analysis only of the first factor?

As appellants demonstrated in their opening brief, Appellants Opening Brief, at 50-52, the answer to that question is no and the district court's dismissal of this action pursuant to FRCP 19(b) was an abuse of discretion.

#### **CONCLUSION**

The Indian Commerce Clause grants Congress, not the Secretary of the Interior, and certainly not a middle-ranking Department of the Interior employee, "plenary and exclusive power over Indian affairs." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979).

For more than fifty years, when they determined that doing so was appropriate, various Congresses have enacted statutes that designate groups of individuals of Native American descent as "federally recognized tribes" that as a consequence of that designation possess sovereign immunity. See e.g., Pub. L. No. 92-470, 86 Stat. 783 (1972) (Payson

Community of Yavapai-Apache Indians); Pub. L. No. 103-454, Title II, 108 Stat. 4791, 4792 (1994) (Tlingit and Haida Indian Tribes of Alaska); Pub. L. No. 106-568, Title XIV, 114 Stat. 2868, 2939 (2000) (Indians of the Graton Rancheria of California); Pub. L. No. 115-121, 132 Stat. 40 (2018) (Chickahominy Indian Tribe, Chickahominy Indian Tribe - Eastern Division, Upper Maltaponi Tribe, Rappahannok Tribe, Inc., Monacan Indian Nation, Nansemond Indian Tribe); Pub. L. 119-60, Section 8803, 139 Stat. \_\_\_\_ (2025) (Lumbee Tribe of North Carolina).

The Indian Commerce Clause also grants Congress the power to delegate its authority to create new “federally recognized tribes” to the Secretary of the Interior if the text of statute in which Congress does so contains criteria to guide the Secretary’s exercise of the authority he is delegated.

But as appellants demonstrated in their opening brief, Congress has not designated the members of the NVE as a “federally recognized tribe,” nor has Congress enacted a statute that delegated the Secretary of the Interior authority to do so in Congress’s stead. Appellants also demonstrated that if *arguendo* the members of the NVE have

been lawfully designated as a "federally recognized tribe" that possesses sovereign immunity, in this action the NVE is not a FRCP 19(a) required party, and that the district court abused its discretion when it dismissed this action pursuant to FRCP 19(b).

For those reasons, appellants request this court to reverse the district court, vacate the Order and Judgment the district court entered on June 27, 2025, and remand this action to the district court to adjudicate the merits of the claims for relief alleged in the First Amended Complaint.

Dated: February 1, 2026

Respectfully Submitted,

s/ Donald Craig Mitchell

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DONALD CRAIG MITCHELL  
1335 F Street  
Anchorage, Alaska 99501  
(907) 276-1681  
dcraigm@aol.com

*Counsel for Plaintiffs-Appellants*

**CERTIFICATE OF COMPLIANCE**

This reply brief contains 6,423 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 6,500 reply brief word limit in Circuit Rule 32-1(a)(7)(B)(2).

Dated: February 1, 2026

s/ Donald Craig Mitchell

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DONALD CRAIG MITCHELL

*Counsel for Plaintiffs-Appellants*