No. 22-15756

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH, DUEWARD W. CRANFORD II, ELIDA A. MALICK, JON COLBURN, DAVID LOGAN, WILLIAM BRAUN, and CATHERINE COULTER,
Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION, JONODEV CHAUDHURI, UNITED STATES DEPARTMENT OF THE INTERIOR, DEB HAALAND, Secretary, Department of the Interior, in her official capacity, DONALD E. LAVERDURE, and AMY DUTSCHKE,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California
No. 2:18-cv-01398-TNL-CKD (Hon. Troy L. Nunley)

ANSWERING BRIEF FOR THE FEDERAL DEFENDANTS

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Amador County .....County of Amador, California

APA ..... Administrative Procedure Act

Band or Ione Band.....Ione Band of Miwok Indians

EIS .....environmental impact statement

IGRA..... Indian Gaming Regulatory Act

Interior ..... United States Department of the Interior

IRA.....Indian Reorganization Act

NCIP ..... No Casino in Plymouth

Commission .....National Indian Gaming Commission

ROD ..... record of decision

INTRODUCTION

This appeal arises from a judgment dismissing the Plaintiffs/Appellants' second suit challenging a 2012 "record of decision" ("2012 ROD") by the United States Department of the Interior ("Interior") to take land into trust in Plymouth, California for the Ione Band of Miwok Indians ("Ione Band" or "Band"). Plaintiffs/Appellants No Casino in Plymouth et al. ("NCIP") first challenged the 2012 ROD shortly after it was issued. The County of Amador, California ("Amador County") filed a similar suit, which was heard alongside NCIP's suit. Amador County and NCIP both argued that Interior lacked authority to take the land into trust under the Indian Reorganization Act ("IRA") and to allow gaming on the land under the Indian Gaming Regulatory Act ("IGRA"). The district court granted summary judgment for Interior in both suits.

In 2017, this Court affirmed the district court's judgment in Amador County's suit, holding that the 2012 ROD complied with IRA and IGRA requirements. *County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012 (9th Cir. 2017) ("*Amador*"). On the same day, this Court dismissed NCIP's appeal, vacated the underlying judgment, and directed the district court to dismiss NCIP's complaint, on the grounds that NCIP had failed procedurally to demonstrate its standing to challenge the 2012 ROD.

In 2018, the National Indian Gaming Commission (the "Commission") issued an order approving a gaming ordinance submitted by the Ione Band. Thereafter, NCIP filed the present suit, this time with affidavits to demonstrate standing. NCIP alleged that the Commission's gaming-ordinance approval is "void" for the same reasons NCIP asserted in challenging the 2012 ROD: because the Ione Band (allegedly) is not a federally recognized Indian tribe and lacks gaming-eligible land. NCIP also reprised its challenges to the 2012 ROD, arguing that *Amador* does not control its new suit. The district court granted the Federal Defendants' motion for judgment on the pleadings, holding that NCIP's claims are foreclosed by *Amador* and otherwise lack merit. As explained herein, the district court's judgment should be affirmed. This Court's legal rulings in *Amador* are binding as "law of the Circuit." NCIP's efforts to collaterally attack or to plead around *Amador* are unavailing.

STATEMENT OF JURISDICTION

(a) Plaintiffs NCIP et al. invoked the district court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 1331, 2201-02, seeking review of specified final agency actions by Interior and by the Commission. 2-ER_18.

(b) The district court entered final judgment on NCIP's claims on May 11, 2022. 1-ER_4 (judgment); *see also* 1-ER_5-13 (opinion and order). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

(c) NCIP filed its notice of appeal on May 15, 2022. 1-ER_1-2. The appeal is timely under 28 U.S.C. § 2107(b)(1) and Federal Rule of Appellate Procedure 4(a)(1)(B)(i).

STATEMENT OF THE ISSUES

Whether the district court correctly granted the Federal Defendants' motion for a judgment of dismissal on the pleadings as to all pending claims, or, more particularly:

(1) whether NCIP failed to state a claim to challenge the Commission's 2018 approval of the Ione Band's gaming ordinance because the arguments raised by NCIP—regarding the Band's status and ability to conduct gaming on relevant parcels—go to decisions already made by Interior in the 2012 ROD, which the Commission did not revisit and had no obligation to review;

(2) whether NCIP's challenges to the 2012 ROD are foreclosed by *Amador* or otherwise fail to state a claim:

- because *Amador* specifically held that Defendant Donald Laverdure was duly authorized by statute to issue the 2012 ROD and because

there is no authority for NCIP's contention that the statutory delegation was contrary to the Appointments Clause;

- because *Amador* specifically affirmed Interior's determination, in the 2012 ROD, that the Ione Band is eligible for an IRA land-into-trust acquisition as a currently recognized tribe (whether or not the Band was federally recognized in 1934 upon the IRA's enactment), and because Interior has never repudiated that interpretation of the IRA in a final regulation or other ruling that carries the force or law; and
- because *Amador* specifically affirmed Interior's determination, in the 2012 ROD, that "Part 83 recognition" is not a requirement to taking land into trust under IGRA's restored-tribe exception, and because there is no authority for NCIP's broader claim the "Part 83 recognition" is a "prerequisite" to a tribe receiving any IRA or IGRA benefits; and

(3) whether NCIP failed to state valid constitutional or *Bivens* claims against any of the Federal Defendants, because NCIP seeks no relief that could be obtained by enjoining the individual defendants in their personal capacities, and because the constitutional violations asserted by NCIP depend on the erroneous claim (rejected in *Amador*) that Interior may not provide IRA and IGRA benefits to the Ione Band unless and until the Band receives "Part 83 recognition."

STATEMENT OF THE CASE

A. Factual and Legal Background

1. Ione Band

The Ione Band traces its origins to groups of Miwok Indians indigenous to lands in the foothills of the Sierra Nevada Mountains that are now (in part) in Amador County. *Amador*, 872 F.3d at 1015. In the late 1840s, conflicts developed between the Miwok Indians and miners and other settlers drawn to California by the discovery of gold. *Id.* To ameliorate these conflicts, federal officials negotiated a series of treaties with the native peoples. *Id.* These treaties included "Treaty J," which would have permanently set aside land in Amador County for the Ione Band. *Id.* But the Senate never ratified any of these treaties due to opposition from California lawmakers, and the Indians became destitute and landless. *Id.*

In 1905, Congress acknowledged the federal government's role in the plight of California Indians who continued to live in poverty and without land rights. *Id.* Congress authorized Interior to investigate the circumstances of such Indians and to purchase lands for identified groups. *Id.* at 1016. In 1915, Interior located a band of approximately 100 Indians near Ione, California, whom the investigating agent described as having "stronger claims to their ancient Village than [any] others" he had visited. *Id.* The agent promptly negotiated an agreement to

purchase a 40-acre tract of land for this band. *Id.* Despite nearly a decade of effort, however, Interior officials were unable to close the purchase. *Id.* at 1016-17.

In 1934, Congress enacted the IRA to "improve the economic status of Indians by ending the alienation of tribal land," "facilitating" the reacquisition of lands, and encouraging tribal organization and self-government. *Id.* at 1017 (quoting *Cohen's Handbook of Federal Indian Law* § 1.05, at 81 (Nell Jessup Newton ed., 2012)). Among other things, the IRA empowered the Secretary of the Interior to take land into trust for Indian tribes. *Id.* at 1017; *see also* 25 U.S.C. § 5108 (present codification).

In 1972, representatives of the Ione Band asked Interior to take into trust for the Band the same 40-acre tract that Interior had attempted to purchase for the Band beginning in 1915. *Amador*, 872 F.3d at 1017. Robert Bruce, then Commissioner of Indian Affairs, agreed to the trust acquisition, concluding that the Ione Band was "eligible" for such a trust acquisition under the IRA, because "Federal recognition" evidently had been "extended to the Ione Band of Indians" in the 1910s and 1920s, when purchase of the 40-acre tract was first contemplated. *Id.* (quoting letter from Commissioner Bruce). Other Interior officials, however, raised questions about the Ione Band's status as a federally recognized tribe, which postponed action on the proposed trust acquisition. *Id.*

In 1978, Interior adopted a set of regulations to "establish a departmental procedure and policy for acknowledging" the existence of Indian tribes. *Id.* (citing 43 Fed. Reg. 39,361, 39,362 (Aug. 24, 1979)). Prior to the promulgation of these regulations—which would become known as "Part 83"—Interior recognized Indian tribes on an ad hoc basis. *Amador*, 872 F.3d. at 1017-1018, 1028. The newly enacted regulations applied to groups that were "not [already] acknowledged as Indian tribes by the Department," 43 Fed. Reg. at 39,362 (quoting § 54.3(a)), and not already "receiving services from the Bureau of Indian Affairs," *id.* (quoting § 54.3(b)). When issuing these regulations, Interior took the position that the Ione Band was not federally recognized and needed to seek recognition through Part 83 to receive federal services available to Indians, including as related to trust acquisitions. *Amador*, 872 F.3d at 1018.

In 1994, Interior reversed course. Specifically, in March 1994, Ada Deer, then Assistant Secretary–Indian Affairs,[1] determined that Interior had improperly left the Band off its list of federally-recognized tribes, and Deer "reaffirm[ed]" Commissioner Bruce's 1972 determination that the Ione Band was already recognized as part of the pre-IRA efforts to acquire land for the Band. *Id.* Later

[1] In 1977, the office of the Commissioner of Indian Affairs was eliminated, and the duties of that office were transferred to the Assistant Secretary–Indian Affairs. 42 Fed. Reg. 53,682 (Oct. 3, 1977).

that year, Congress enacted the "Federally Recognized Indian Tribe List Act of 1994," directing Interior to publish annually "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." Pub. L. No. 103-454, § 104(a), 108 Stat. 4791 (1994) ("List Act"); *see also* 25 U.S.C. § 5131 (present codification). Interior included the Ione Band in its first list under the List Act (published in 1995). *Amador*, 872 F.3d at 1018. And Interior has included the Band on every annual list since that time. *See* 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022) (current list).

In late 1996, the Ione Band held tribal government elections that resulted in Interior acknowledging the Band's tribal government. *See Esther Burris, et al.; and Nicolas Villa, Jr. v. Sacramento Area Director*, BIA, 33 IBIA 66 (Nov. 25, 1998). In 2002, the Band adopted a tribal constitution, which was approved by Interior under the IRA. *See* 2-ER_217-230 (tribal constitution).

2. Ione Tribal Gaming

After organizing its government, the Ione Band renewed efforts to acquire land in Amador County. Instead of continuing to pursue acquisition of the 40-acre parcel (*supra*), the Band developed a new proposal to purchase approximately 200 acres of land in the city of Plymouth, California—collectively, the Plymouth Parcels—to be taken into trust by the United States and used in part for a casino

development. *See* 68 Fed. Reg. 63,127, 63,128 (Nov. 7, 2003). In November 2003, Interior published notice in the Federal Register of its intent, in consultation with the Ione Band and the Commission, to prepare an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") to consider the environmental effects of such a trust acquisition for the Band's casino proposal. *Id.*

Around the same time, the Ione Band initiated efforts to ensure that it could lawfully conduct casino gaming on the Plymouth Parcels upon a land-into-trust acquisition. *Id.* at 2018-19. Tribal gaming is regulated under IGRA, which Congress enacted in 1988 to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 966 (9th Cir. 2008) (quoting 25 U.S.C. § 2702(1)). IGRA permits Class III (casino-style) gaming so long as: (1) the gaming is conducted under a tribal ordinance that meets specified requirements and has been approved by the Commission, 25 U.S.C. §§ 2710(d)(1)(A), 2710(d)(2)(A), 2710(e); (2) the gaming is within a state that otherwise permits such gaming, *id*. § 2710(d)(1)(B); and (3) the gaming is conducted in "conformance" with a "Tribal-state compact" between the tribe and subject state. *Id*. § 2710(d)(1)(C).

In addition, IGRA prohibits gaming on lands "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988"—i.e., after IGRA's effective date—unless the land qualifies under any one of several specified exceptions, including exceptions for "lands . . . taken into trust as part of . . . (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B). Under departmental practice, when a tribe asks Interior to take land into trust for purposes of casino gaming, the tribe must obtain an "Indian lands determination," indicating that the lands are eligible for gaming under IGRA. *Amador*, 872 F.3d at 1018.

In 2004, the Ione Band sought such a determination from the Commission. *Id.* Interior and the Commission subsequently entered a memorandum of agreement that Interior's Office of the Solicitor would issue such determinations in conjunction with requests to take lands into trust for casino gaming. *Id.* In September 2006, the Solicitor's Office issued a determination (hereinafter, the "2006 Determination") that the Plymouth Parcels, if taken into trust, would be gaming-eligible under the exception for the restoration of lands for tribes "restored to Federal recognition." *Id.* at 1018; *see also* 25 U.S.C. § 2719(b)(1)(B)(iii) (hereinafter, the "restored tribe exception"). The Solicitor's Office reasoned that the Band had been recognized in the early 20th century, that Federal Recognition

had been withheld from the Band when it attempted to acquire lands in the years prior to IGRA's enactment, and that the Band was restored to recognition by Assistant Secretary Deer's decision in 1994 to reaffirm the Band's recognition, as confirmed by the Band's subsequent listing under the List Act. *Amador*, 872 F.3d at 1019.

In 2010, following an extensive public review process, Interior issued a Final EIS on the Band's casino proposal. *See* 75 Fed. Reg. 49,513 (Aug. 13, 2010) (notice of availability). In May 2012, Interior issued the 2012 ROD granting the Ione Band's request that Interior take the Plymouth Parcels into trust for the Band. *Amador*, 872 F.3d at 1019. The 2012 ROD was issued by Defendant Donald Laverdure, who was the Principal Deputy Assistant Secretary–Indian Affairs. *Id.* at 1019 & n.5. At that time, Laverdure was acting as the Assistant Secretary–Indian Affairs, due to the resignation of Assistant Secretary Larry Echohawk. *Id.*

3. Interior's IRA Determination in the 2012 ROD

The IRA gives Interior authority to take land into trust for Indians and Indian tribes. 25 U.S.C. § 5108. The act defines "Indian" to mean, in part, all "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. In 2009, the Supreme Court held that "now under Federal jurisdiction" refers to "those tribes that were under . . . federal jurisdiction . . . when the IRA was enacted in 1934." *Carcieri v. Salazar*, 555 U.S. 379, 395

(2009). In the 2012 ROD, Interior determined that the Ione Band was under federal jurisdiction in 1934 for purposes of the IRA, as evidenced by the extensive efforts by federal officials to acquire land for the Band in the decades prior to the IRA's enactment. *Amador*, 872 F.3d at 1019, 1024-28. Interior further determined that the Ione Band needed to be officially recognized at the time of the trust acquisition, and not necessarily in 1934 (at the time of the IRA's enactment). *Id.* at 1019, 1021-24. Because the Band is currently recognized and was under federal jurisdiction in 1934, Interior determined that it had authority under the IRA to take land into trust for the Ione Band. *Id.* at 1019.

4. Interior's IGRA Determination

In 2008—after the Solicitor's Office issued the 2006 Determination (that the Plymouth Parcels, if taken into trust, would qualify for casino gaming under the restored tribe exception, 25 U.S.C. § 2719(b)(1)(B)(iii))—Interior promulgated regulations for purposes of applying IGRA's exceptions for gaming on so-called after-acquired lands. *Id.* at 1029; *see also* 25 C.F.R. §§ 292.1-292.26 (current regulations). Under these regulations, a tribe qualifies for the "restored tribe" exception only if the tribe is "restored to recognition" by (1) an act of Congress, (2) the Part 83 process, or (3) a federal court order. *Amador*, 872 F.3d at 1029 (citing 25 C.F.R. § 292.10). As explained (pp. 7-8, *supra*), Interior restored the Ione band to recognition outside the Part 83 process. *Id.* Thus, the new

regulations, if applied retroactively, would have made the Ione Band ineligible to qualify for the restored tribe exception. *Id.*

However, when adopting the 2008 regulations, Interior included a special "grandfathering" provision to protect tribal reliance interests. *Id.* That provision stated that Interior would not apply the new regulations in any case where Interior or the Commission had already issued a written opinion finding lands to be gaming eligible, as long as Interior and the Commission retained "full discretion to qualify, withdraw, or modify such opinions." *Id.* (quoting 25 C.F.R. § 292.26(b)). In the 2012 ROD, Interior relied on this grandfathering provision. *Id.*

B. 2012 Suits by NCIP and Amador County

Following the issuance of the 2012 ROD, NCIP and Amador County filed separate suits to challenge the ROD. *See No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1171 (E.D. Cal. 2015). Although the suits were not consolidated, they raised overlapping claims and the district court considered them "in tandem." *Id.* The district court issued final decisions in both suits on the same date, rejecting all claims and upholding the ROD. *Id.* at 1171, 1192-93; *see also County of Amador v. U.S. Dept. of the Interior*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015). After NCIP and Amador County filed notices of appeal, this Court similarly considered the appeals together. The appeals were assigned to the same panel, argued on the same date (July 14, 2017), and decided on the same date (October 6, 2017). *See*

Amador, 872 F.3d at 1012; *No Casino in Plymouth v. Zinke*, 698 Fed. Appx. 531 (9th Cir. 2017) ("*No Casino*").

1. Opinion in Amador

In Amador County's appeal, this Court issued a comprehensive decision affirming the 2012 ROD as consistent with IRA and IGRA requirements. *See Amador*, 872 F.3d at 1020-31. Three of this Court's holdings are pertinent here.

First, this Court held that a "tribe qualifies to have land taken into trust for its benefit" under the IRA, 25 U.S.C. § 5108 "if it (1) was 'under Federal jurisdiction' as of June 18, 1934, and (2) is 'recognized' at the time the decision is made to take land into trust." *Amador*, 872 F.3d at 1024 (quoting 25 U.S.C. § 5129). This Court reasoned that when Congress defined "Indian" to include any member of "any recognized Indian tribe *now* under Federal jurisdiction," *see* 25 U.S.C. § 5129 (emphasis added), Congress used "now" (meaning the date of the IRA's enactment) only to modify "under Federal jurisdiction." *Amador*, 872 F.3d at 1021-24. This Court noted that there was no comprehensive list of recognized tribes in 1934, nor any formal process for tribal recognition. *Id.* at 1023. Accordingly, it was unlikely that Congress intended to exclude Indians who were then "under Federal jurisdiction" merely because federal officials had not then formally recognized the status of their tribe. *Id.* Rather, Congress intended tribal recognition to be a precondition for providing services to Indian tribes (or to

individual Indians based on tribal status) that must be met on or before the date the services are provided. *Id.* at 1023-24. Because the Ione Band was recognized in 1994 and subsequently included on the list of federally recognized tribes, *id.* at 1028, it was thereafter eligible for an IRA trust acquisition. *Id.* at 1024.

Second, this Court held that Acting Assistant Secretary Laverdure (who signed the 2012 ROD) was "empowered" to make the decision "to take the Plymouth Parcels into trust." *Id.* at 1019 n.5. This Court acknowledged that Laverdure was "acting" as the Assistant Secretary overseeing Indian affairs and had not been appointed to that office. *Id.* But this Court determined that he had "automatically" assumed the duties of the office in a temporary acting capacity upon Assistant Secretary Echohawk's resignation, *id.* (citing *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016)), and that such duties including taking lands into trust. *Amador*, 872 F.3d at 1019 n.5.

Third, this Court affirmed Interior's decision to "allow[] the [Ione] Band to conduct gaming operations on the Plymouth Parcels under the 'restored tribe' exception of IGRA." *Id.* at 1031. Although the Ione Band does not qualify for the exception under Interior's 2008 regulations—which require administrative restoration of recognition to be through the Part 83 process, 25 C.F.R. § 292.10—this Court held that Interior reasonably relied on the "grandfather[ing] provision" of the regulations (25 C.F.R. § 292.26(b)), in light of the 2006 Determination from

the Solicitor's Office that the Plymouth Parcels would be gaming eligible, upon a land-into-trust acquisition, under the restored-tribe exception. *Amador*, 872 F.3d at 1028-1030. This Court further observed that IGRA does not clearly prohibit applying the restored-tribe exception to the Ione Band. *Id.* at 1030-31 (referencing 25 U.S.C. § 2719(b)(1)(B)(iii)). To the contrary, while specifically referencing Part 83 in the separate exception for lands taken into trust to be the "initial reservation of an Indian tribe acknowledged . . . *under the Federal acknowledgment process*," *id.* at 1030 (quoting 25 U.S.C. § 2719(b)(1)(B)(ii)) (emphasis in original), Congress did not reference Part 83 in the restored-tribe exception. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). This belies the argument that IGRA precludes Interior from taking lands into trust for casino gaming by tribes restored to recognition outside of the Part 83 process. *Amador*, 872 F.3d at 1030.

2. Decision in No Casino

In NCIP's appeal, this Court did not issue an opinion on the merits. *See No Casino*, 698 Fed. Appx. at 532. Instead, this Court determined that NCIP had failed to show Article III standing to challenge the 2012 ROD. *Id.* To demonstrate potential injury to its members, NCIP relied on comment letters submitted in the NEPA proceedings on the Band's casino proposal. *Id.* But to survive a motion for summary judgment, NCIP needed to submit affidavits on standing consistent with the requirements of Fed. R. Civ. P. 56. *Id.* Because NCIP failed to meet this

evidentiary burden, this Court vacated the district court's judgment and remanded with instruction that the court dismiss NCIP's suit for lack of subject-matter jurisdiction. *Id.*

C. Proceedings in this Case

1. Proceedings before the Commission

In February 2018, the Ione Band submitted a duly adopted tribal gaming ordinance for the Commission's review under IGRA, 25 U.S.C. § 2710. *See* 2-ER_215-16 (cover letter); 2-ER_231-57 (ordinance). The Band noted that the ordinance was not "site specific," but instead would apply to any Class II or Class III gaming on gaming-eligible lands. 2-ER_216. On March 6, 2018, Defendant Jonodev O. Chaudhuri, then chair of the Commission, advised the Band by letter that the ordinance was approved. 2-ER_270; *see also* 85 Fed. Reg. 12,806 (Mar. 4, 2020) (notice of approval). The Commission's record of approval consists of a completed checklist of regulatory requirements applicable to tribal gaming ordinances. 2-ER_262-68; *see also* 25 C.F.R. §§ 522.1-522.13 (regulations). In his letter, Chaudhuri advised the Band that before it could conduct any Class III gaming, it needed to have a "Tribal/State compact" approved under IGRA procedures. 2-ER_270 (citing 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(7)(B)(vii)).

2. Complaint

On May 22, 2018, NCIP filed its present complaint, stating (in relevant part) six claims for injunctive and declaratory relief. 2-ER_14-60.

NCIP's first claim asserted a cause of action under IGRA to set aside the Commission's 2018 approval of the Ione Band's gaming ordinance and to enjoin the Commission from "allowing the construction or operation of the proposed casino" on the Plymouth Parcels. 2-ER_45 (¶ 108). NCIP alleged that the 2018 approval decision is unlawful: (1) because the "Ione Indians are not a recognized tribe," and (2) because "they own no Indian land eligible for gaming under IGRA," 2-ER_44 (¶ 105). On the former point, NCIP alleged that the Ione Band was not recognized by Congress or by Interior pursuant to Part 83. 2-ER_43 (¶ 98). On the latter point, NCIP alleged that the Commission has "exclusive authority" to determine whether lands are eligible for gaming under IGRA, 2-ER_43 (¶ 97), that the Commission must make an Indian lands determination before it may lawfully approve a tribal gaming ordinance, 2-ER_44 (¶ 103), and that the Commission had made no final determination of land eligibility, 2-ER_43 (¶ 100).

NCIP's second claim asserted a cause of action to set aside Interior's 2012 ROD for alleged violations of the Appointments Clause of the United States Constitution. 2-ER_45-47. NCIP alleged that Defendant Laverdure lacked authority to sign the ROD because he was not appointed by the President subject to

Senate confirmation and because Congress did not authorize the Secretary of the Interior to delegate his trust-acquisition authority (pursuant to the IRA, 25 U.S.C. § 5108) to "inferior" federal officials. *Id.*

NCIP's third claim asserted a cause of action to set aside the 2012 ROD as contrary to the IRA. 2-ER_48-50. NCIP alleged that "Congress limited the application of the IRA to only those Indian tribes that were federally recognized in 1934" and that the "Ione Indians were not a federally recognized tribe in 1934." 2-ER_48 (¶ 122).

NCIP's fourth claim asserted a cause of action to preclude the Commission or Interior from "implementing the gaming ordinance" or "allowing" the Ione Band to construct or operate its proposed casino on the Plymouth Parcels on the grounds that the Ione Band was not recognized under the Part 83 Process. 2-ER_50-51. NCIP alleged that no benefits can be provided under the IRA or IGRA absent recognition through that process. 2-ER_51 (¶ 135).

Finally, NCIP's fifth and sixth claims asserted violations of the Equal Protection Clause and "federalism principles." 2-ER_52-56. NCIP alleged that providing such benefits to the Band would be "race-based" (and not based on a political designation), because (in NCIP's view) the Band is not a federally recognized tribe. *Id.*

In addition to naming the Commission and Interior and individual officers as defendants in their official capacities, NCIP purported to sue three federal officers in their *personal* capacities: (1) Donald Laverdure, who signed the 2012 ROD as "acting" Assistant Secretary; (2) Jonodev Chaudhuri, former chair of the Commission who approved the Band's gaming ordinance; and (3) Amy Dutschke, Director of the Bureau of Indian Affairs Pacific Region. 2-ER_25-27. But NCIP's prayer for injunctive relief relates only to official conduct. *See* 2-ER_46-47.

NCIP also asserted a seventh claim alleging a "nuisance" and other violations of California law, for which NCIP sought injunctive relief and "damages, if appropriate" for alleged injuries from casino construction and operation. 2-ER_56-59. But NCIP agreed to the dismissal of this claim, without prejudice, on the view that it was not "ripe" for adjudication. *See* NCIP Opening Brief at 12; *see also* 2-ER_126 (minute order granting dismissal).

3. Trust Acquisition and Tribal/State Compact

At the time of NCIP's complaint, Interior had not yet implemented the 2012 ROD. *See* 2-ER_42 (¶ 94). In March 2020, Interior formally took the Plymouth Parcels into trust. *See* 2-ER_168 & n.4. In October 2020, the State of California submitted to Interior a Tribal/State gaming compact that the State had entered with the Ione Band. *See* 85 Fed. Reg. 80,142 (Dec. 11, 2020). As allowed by IGRA, the compact took effect on December 11, 2020 by operation of law—to the extent

the Compact is consistent with IGRA—due to Interior's decision not to take formal action on the Compact within 45 days of its submission. *Id.* (citing 25 U.S.C. § 2710(d)(8)(C)).

4. District Court's Decision

In June 2020, the Federal Defendants moved for a judgment of dismissal on the pleadings. *See* 2-ER_134-146. Following briefing, the district court granted the Federal Defendants' motion through an opinion and order issued on May 11, 2022. 1-ER_5-13. The district court determined that NCIP's Claims One through Four are foreclosed by *Amador* and the "law of the Circuit" doctrine, 1-ER_9-11, and that Claims Five and Six fail to state a claim because they are incorrectly premised on the allegation that the Ione Band is not a "federally recognized tribe." 1-ER_10-12.[2]

SUMMARY OF ARGUMENT

A. Claim One

NCIP challenges the Commission's 2018 decision (approving the Ione Band's gaming ordinance) on the grounds that the Ione Band is not a federally

[2] In the same order, the district court summarily granted the Ione Band's motion to intervene. 1-ER_12-13. The Band moved to intervene for the purpose of filing a motion to dismiss under Federal Rules of Civil Procedure 12(b)(7) and 19, on the view that the Band is an indispensable party that cannot be joined due to tribal sovereign immunity. *See* 1-ER_7. The district court did not address the Band's motion on the merits. 1-ER_12-13.

recognized tribe and lacks trust lands eligible for gaming. But the Commission has no authority over tribal recognition. Interior is the agency with such authority and Interior has included the Ione Band on its list of federally recognized tribes since 1994. Nor was the Commission obligated under IGRA to make a land status determination in the circumstances of this case. The Band's ordinance was not site-specific, and Interior had already made a land status determination for the Plymouth Parcels in the 2012 ROD.

Thus, NCIP's IGRA claim is essentially a challenge to the 2012 ROD. This claim fails because it relies on legal assertions already rejected by this Court in *Amador*. NCIP may not collaterally attack "law of the Circuit" stated in *Amador* based on the assertion that the suit in *Amador* was not "ripe" for resolution. And, in any event, NCIP's ripeness argument is in error. Amador County's IRA and IGRA challenges to the 2012 ROD were ripe for judicial review when that decision issued. No further administrative determinations were required prior to Interior's taking the land into trust for gaming purposes.

B. Claims Two to Four

NCIP's further challenges to the 2012 ROD are also foreclosed by *Amador*. As to NCIP's second claim—that Principal Deputy Assistant Secretary Donald Laverdure lacked authority to issue the 2012 ROD—*Amador* specifically held otherwise, in evident response to the Appointments-Clause argument that NCIP

presented in its appeal heard alongside *Amador*. Even if that ruling is dicta because the panel ultimately dismissed NCIP's suit on standing grounds, the ruling is plainly correct. NCIP does not seriously dispute the statutory delegation of authority to Laverdure, and NCIP's claim that the statutory delegation violates the Appointments Clause is not supported by the text of that clause or any other authority.

As to NCIP's third claim—that the Ione Band does not qualify for a trust acquisition under the IRA—that claim was also specifically rejected by *Amador*. NCIP argues that *Amador*'s IRA ruling is not "law of the Circuit" because former Solicitor of the Interior Daniel Jorjani issued an opinion in 2020 withdrawing the legal interpretation adopted in the 2012 ROD and affirmed in *Amador*. But the 2020 opinion was prospective only, lacked the force of law, and was withdrawn by current Solicitor Robert Anderson in 2021, who reaffirmed the opinion referenced in the 2012 ROD. Interior has never withdrawn the 2012 ROD, and NCIP's challenge to the 2012 ROD must be evaluated based on the statutory interpretation contained therein. On that point, *Amador* controls.

Finally, as to NCIP's fourth claim—that the Ione Band is not eligible for IRA or IGRA benefits because it was never recognized under the Part 83 regulations—*Amador* again specifically held otherwise. *Amador* affirmed Interior's determination that the Plymouth Parcels qualify under IGRA for casino

gaming as the restored lands of a "restored tribe," notwithstanding Amador County's argument that this exception does not apply to tribes administratively recognized outside Part 83. Although Amador County did not make the broader argument that "part 83 recognition" is a prerequisite to all IRA or IGRA benefits, that argument is plainly irreconcilable with *Amador*'s ruling. And, in any event, NCIP identifies no authority for its claim. Congress gave Interior broad discretion over tribal recognition decisions without mandating how Interior must exercise that authority. No court has rejected an administrative recognition decision made by Interior merely because it was made outside the Part 83 process.

C. Claims Five and Six

The district court also correctly dismissed NCIP's constitutional claims against the individual defendants, which NCIP asserts (in its Brief) as *Bivens* claims against the individual defendants in their personal capacity. NCIP asked for an injunction to prevent the individual defendants from allowing the Ione Band to operate or construct and operate casino on the Plymouth Parcels. But the individual defendants have no ability in their personal capacities to rescind the final agency actions—the 2012 ROD and 2018 gaming-ordinance approval—that allow the Band's casino gaming. Moreover, NCIP's constitutional claims depend on the allegation that the Ione Band is not a recognized Indian tribe eligible for

IRA and IGRA benefits. That claim is entirely dependent on the NCIP's fourth cause of action and fails along with it.

STANDARD OF REVIEW

This Court reviews de novo any order granting judgment on the pleadings. *Unite Here Local 30 v. Sycuan Band of the Kumeyaay Nation*, 35 F.4th 695, 700 (9th Cir. 2022). A judgment on the pleadings is proper where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* All allegations of fact by the non-moving party are accepted as true and construed in the light most favorable to that party. *Id.*

ARGUMENT

I. NCIP failed to state a viable IGRA claim.

NCIP's first claim for relief purports to challenge the Commission's 2018 approval of the Ione Band's gaming ordinance for violations of IGRA. 2-ER_43-45; *see also* 2-ER_59 (¶ A) (prayer for relief). But NCIP does not allege that the Band's gaming ordinance is contrary to IGRA's statutory and regulatory requirements for gaming ordinances. *See* 25 U.S.C. §§ 2710(b)(2), 2710(d)(2); 25 C.F.R. §§ 522.1-522.13. Instead, NCIP alleges that the Commission lacked authority to approve the Band's gaming ordinance because the Ione Band (allegedly) is not a "federally recognized tribe," and because the Ione Band lacked

trust lands at the time of the Commission's ordinance-approval decision. 2-ER_43-45.

These allegations fail to state an IGRA claim for two reasons. *First*, the Commission did not address the Band's status (as a recognized tribe) or the status of the Plymouth Parcels (for purposes of IGRA gaming) as part of its ordinance approval decision and had no obligation to do so. Properly understood, NCIP's IGRA claim is a challenge to Interior's IGRA decisions in the 2012 ROD, not the Commission's ordinance approval. *Second*, Interior's IGRA determination was upheld in *Amador*. NCIP's challenges to the 2012 ROD are foreclosed by "law of the Circuit."

A. NCIP failed to state a claim against the Commission.

1. The Commission had no obligation to revisit Interior's IGRA determinations.

IGRA authorizes casino gaming subject to four restrictions: (1) the gaming must be by an "Indian tribe," *see* 25 U.S.C. §§ 2710(a), 2710(b)(1)(A), 2710(d)(2)(A); (2) the gaming must be on "Indian lands" that were acquired before the statute's enactment (in 1988) or that qualify under an exception for after-acquired lands, *id.* §§ 2710(b)(1), 2710(d)(2)(A), 2719; (3) the gaming must be conducted pursuant a duly adopted tribal ordinance approved by the Commission, *id.* §§ 2710(d)(1)(A), 2710(d)(2)(A), 2710(e); and (4) the gaming must be conducted in a State that generally "permits such gaming" and then only if the

gaming is in "conformance with a Tribal-State compact" between the Tribe and the State, which has been approved by Interior, *id.* § 2710(d)(1)(C).

IGRA gives Interior and the Commission different responsibilities with respect to enforcing these requirements. As pertinent here, IGRA authorizes and requires the Commission to approve a tribe's gaming ordinance before the tribe may commence gaming. *Id.* §§ 2710(d)(1)(A)(i), 2710(e). But IGRA does not authorize or require the Commission to pre-approve tribal gaming with respect to all relevant legal requirements. *See generally id*. §§ 2505-06 (setting out powers of Commission and chairperson); §§ 2710-12 (describing Commission review of management contracts and ordinances).

Under federal law, Interior (not the Commission) possesses the authority to recognize tribes for purposes of government-to-government relations. *See* 25 U.S.C. §§ 2, 5131; *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012). Accordingly, when enacting IGRA, Congress defined "Indian tribe" to mean a tribe so "recognized . . . by the Secretary [of the Interior]." 25 U.S.C. § 2703(5); *see also id.* § 2703(10) (defining "Secretary"). The Commission's regulations define "Indian tribe" in the same way. 25 C.F.R. § 512.13; *see also* 25 C.F.R. § 502.22(a). When exercising its IGRA authorities, the Commission properly relies on the list of federally recognized tribes maintained by Interior under the List Act. *See* 25 U.S.C. § 5131.

As for Indian lands determinations, Interior (not the Commission) possesses the discretionary authority to take land into trust for federally recognized Indian tribes. *Id.* § 5108. And IGRA's restrictions on tribal gaming, as to Indian lands acquired after the Act's enactment, specifically apply to "lands acquired by the *Secretary* [*of the Interior*] in trust for the benefit of an Indian tribe." *Id.* § 2719(a) (emphasis added). Although Interior's IRA authority to take lands into trust for Indian tribes is not limited to acquisitions for gaming purposes, *see* 25 U.S.C. § 5108, when a tribe asks Interior to take land into trust specifically for casino gaming, Interior reasonably will refuse to do so if it determines that the land does not meet one of the IGRA exceptions. *See Amador*, 872 F.3d at 1018.

Here, Interior agreed—in the 2012 ROD—to take the Plymouth Parcels into trust for tribal gaming after determining (1) that that the Ione Band was eligible for a trust acquisition under the IRA, and (2) that the Plymouth Parcels, if taken into trust, would be eligible for casino gaming under the IGRA exception applicable to the restored lands or a restored tribe. *Id*. at 1019. In *Amador*, this Court affirmed Interior's IRA and IGRA determinations. *Id.* at 1020-31. The Band submitted its gaming ordinance for the Commission's review only after *Amador* was issued. *See* 2-ER_215-16; 2-ER_231-57. Thus, the relevant question is whether the Commission had a duty under IGRA—as part of its review of the Band's gaming

ordinance—to *revisit* the tribal recognition and land status determinations that were already made by Interior and affirmed by this Court.

In its complaint, NCIP alleges, without any legal citation, that the Commission has "exclusive" authority to determine whether tribal trust lands are eligible for casino gaming under IGRA. *See* 2-ER_43 (¶¶ 97, 101). On this view, NCIP asserts (Brief at 26) that the Band's request for an IGRA "Indian lands determination" for the Plymouth Parcels—which was initially presented to the Commission in 2004, *see supra*, pp. 10-11—remains "pending" before the Commission, notwithstanding Interior's determinations in the 2012 ROD. And NCIP argues (Brief at 29) that there can be no tribal gaming on the Plymouth Parcels unless and until the *Commission* (as opposed to Interior) makes a final decision on IGRA eligibility.

But none of these allegations has any foundation in IGRA's text. While IGRA limits casino gaming to "Indian lands," *id.* §§ 2710(b)(1), (d)(2)(A), and prohibits gaming on after-acquired land except under specified circumstances, *id.* § 2719, IGRA does not specify that the Commission must make an Indian lands determination when reviewing a tribal gaming ordinance or as a precondition to tribal gaming, *see id.* § 2710. Moreover, this Court has specifically held that "IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the [Commission] under [IGRA] § 2710(b)," and that the

Commission need not make an Indian lands determination when approving a "non-site-specific" gaming ordinance. *North County Community Alliance v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009).

As NCIP concedes (Brief at 25-27), the Band's ordinance is not site specific. In approving the ordinance, the Commission did not expressly or impliedly authorize gaming on the Plymouth Parcels or at any other location. *See* 2-ER_262-70. Nor did the Commission determine that the Band had met all preconditions for gaming on the Plymouth Parcels. *Id*. Rather, the Commission simply determined that the Band's gaming ordinance meets the statutory and regulatory requirements for gaming ordinances. *Id.*; *see also* 25 U.S.C. § 2710(e) (requiring approval if statutory requirements are met). In such circumstances, the Commission has no obligation to make an Indian lands determination. *See North County Community Alliance*, 573 F.3d at 744-47.

Contrary to NCIP's suggestion (Brief at 25), the issue in this case is not whether the Commission's decision constitutes "final agency action" for purposes of judicial review under the APA, 5 U.S.C. §§ 704, 706(2). It does. But the Commission's decision plainly was limited to a determination of the sufficiency of the Band's gaming ordinance. NCIP does not challenge that limited determination. And IGRA did not require the Commission—when reviewing the legal sufficiency

of the Band's ordinance—to address land status issues not raised by the ordinance and already resolved by Interior in the 2012 ROD.

2. The Commission Properly Approved the Band's Ordinance on an Anticipatory Basis

Given the above, NCIP's IGRA claim is reduced to the argument (Brief at 27-29) that the Commission's ordinance-approval decision is "void" merely because it was made before Interior implemented the ROD—i.e., after Interior issued its decision to take the Plymouth Parcels into trust but before Interior implemented that decision—and thus at a time when the Tribe did not yet possess any trust lands. This argument is also unfounded.

As a threshold matter, although Interior had not completed the trust acquisition at the time of NCIP's complaint in this case, Interior has since taken the Plymouth Parcels into trust. *See* 2-ER_168 & n. 4. While NCIP contends (Brief at 6-7, 29) that the 2012 ROD "expired" under the statute of limitations before Interior completed the trust acquisition, this contention has no merit. The statute of limitations bars "civil action[s] commenced against the United States" that are not timely filed "within six years after the right of action first accrues." 28 U.S.C. § 2401. Contrary to NCIP's implication (Brief at 6), the present case does not involve a civil action against Interior "to compel compliance with, or implementation of, the [2012] ROD" and the Ione Band has never brought such an

action. Interior never repudiated the ROD.[3] And the statute of limitations places no time limit on an agency's implementation of its own decisions. *Id.*

In arguing otherwise, NCIP cites a D.C. Circuit decision for the proposition that Interior's "jurisdiction . . . to implement the 2012 ROD . . . expired when 'the time for judicial review . . . expired.' " *See* Brief at 6 (quoting *Pan Am. Petroleum Corp. v. Federal Power Commission*, 322 F.2d 999, 1004 (D.C. Cir. 1963)). But the D.C. Circuit held no such thing. The D.C. Circuit addressed the "jurisdiction" that agencies possess "*to reconsider and correct*" agency orders, holding that agencies generally "retain such jurisdiction until the time for judicial review has expired." *Pan Am.*, 322 F.2d at 1004 (emphasis added). The 2012 ROD is not an agency "order." Nor did Interior seek to reconsider or alter the 2012 ROD. Interior simply delayed in implementing the ROD on its original terms. The statute of limitations plainly has no relevance in this circumstance. *See* 28 U.S.C. § 2401.

In any event, even if the ROD did somehow expire on May 24, 2018, as NCIP alleges (Brief at 6), this expiration would not provide a basis for an IGRA

[3] Even if Interior had repudiated the ROD, the statute of limitations would have run from the date that Interior announced its intention not to implement the ROD—i.e., from the date a cause of action to compel compliance with the ROD "first accrued"—not from the date of the ROD's issuance. *See* 28 U.S.C. § 2401.

suit against the Commission.[4] The Commission approved the Band's gaming ordinance on March 6, 2018, *see* 2-ER_270, months *before* the alleged expiration of the 2012 ROD. The propriety of the Commission's decision must be evaluated on the record that existed at that time. *Corrigan v. Haaland*, 12 F.4th 901, 908 n.3 (9th Cir. 2021). Moreover, nothing in IGRA precluded the Commission from approving the Band's gaming ordinance in anticipation of Interior's trust acquisition of the Plymouth Parcels (or any other lands) for the Band. This is true even if Interior had not yet issued a final decision on the Plymouth Parcels, or even if the ROD had somehow expired and Interior was compelled to reconsider its decision.

NCIP relies on *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), for the proposition that the Commission lacks authority to regulate tribal gaming "outside Indian lands." But *Bay Mills* is inapposite. It involved a suit by the State of Michigan to enjoin tribal gaming on lands that Interior determined

[4] Any suggestion by NCIP that Interior acted contrary to law by taking the Plymouth Parcels into trust after the alleged expiration of the 2012 ROD is not presently before the Court. In July 2020, NCIP brought a separate action to challenge Interior's March 2020 actions to take the Plymouth Parcels into trust (as distinct from the 2012 decision to do so). *See No Casino in Plymouth v. Hunter*, Case No. 2:20-cv-01358 (E.D. Ca.), Doc. # 1 (complaint) (July 6, 2020). NCIP did not then allege that the 2020 trust acquisition was ultra vires because the 2012 ROD had expired. *See id.* NCIP has since voluntarily dismissed that action. *See id.* Minute Order, Doc. # 33 (Nov. 11, 2020).

were not "Indian lands." *Id.* at 786-87. The State invoked an IGRA provision that authorizes states and tribes to sue to "enjoin a class III gaming activity . . . conducted in violation of any Tribal–State compact," *id.* at 786 (quoting 25 U.S.C. § 2710(d)(7)(A)(ii)). But that provision is expressly limited to activities "located on Indian lands." *Id.* Accordingly, the Supreme Court held that IGRA did not waive the subject tribe's sovereign immunity with respect to the suit in question, which alleged that the subject lands were not Indian lands. *Id.* at 788-98. This holding does not speak to the scope of the Commission's regulatory power and in no way constrains the Commission's authority to approve, on an anticipatory basis, gaming ordinances that will apply to casino gaming "on Indian lands," if and when the Secretary acquires such lands in trust.

B. NCIP's IGRA claim against Interior is foreclosed by *Amador*.

For the above reasons, NCIP's allegations—that the Ione Band is not an "Indian tribe" for IGRA purposes and that the Plymouth Parcels are not qualifying "Indian lands" for purposes of casino gaming under IGRA, *see* 2-ER_43-45—are not grounds for setting aside the Commission's approval of the Band's gaming ordinance. Rather, to the extent NCIP states a claim for relief, it challenges Interior's decisions in the 2012 ROD, which were affirmed by *Amador*. *See* 872 F.3d at 1021-30; *see also County of Amador v. U.S. Dept. of the Interior*, 139 S. Ct. 64 (2018) (denying certiorari). Because NCIP's initial suit challenging the

2012 ROD was never formally consolidated with the suit in *Amador* and was separately dismissed for lack of subject-matter jurisdiction due to NCIP's procedural failure to demonstrate standing, *see No Casino*, 698 Fed. Appx. at 532, *Amador* does not bar NCIP's IGRA claims as a matter of res judicata. But as the district court correctly concluded (1-ER_10), NCIP's IGRA claims are foreclosed by "law of the Circuit" because they are based on legal arguments that *Amador* rejected. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

NCIP concedes (Brief at 28-29) that *Amador* affirmed Interior's interpretation and application of IGRA's restored-tribe exception. And—apart from its mistaken contention (Brief at 29) that the Commission (and not Interior) should have determined whether the Plymouth Parcels are gaming eligible under IGRA—NCIP raises no new IGRA claim not addressed in *Amador*. Instead, NCIP seeks to avoid the legal consequences of *Amador* by arguing (Brief at 21-25) that *Amador* must be disregarded because the subject IGRA dispute allegedly was not "ripe" for determination at the time of the panel's decision.

As NCIP observes (Brief at 23), the ripeness doctrine is based, in part, on Article III "limitations on judicial power." *See Twitter, Inc. v. Paxton*, --- F.4th ---, 2022 WL 17682769 *3 (9th Cir. 2022); *Association of Irritated Residents v. U.S. Environmental Protection Agency*, 10 F.4th 937, 944 (9th Cir. 2021). Accordingly, NCIP's ripeness argument implicates the deciding courts' "subject matter

jurisdiction." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Nonetheless, it does not follow that a litigant may avoid published "law of the Circuit" (and the rule of stare decisis) by bringing a collateral attack on the deciding panel's jurisdiction. Under this Court's precedent, a prior panel decision may be disregarded by a subsequent panel only if "overruled by a body competent to do so." *Gonzalez*, 677 F.3d at 389 n.4. Indeed, this is so even if the prior precedent is "clearly wrong." *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021). NCIP cites no authority to the contrary.

Moreover, even if "law of the Circuit" could be avoided through a collateral jurisdictional attack, NCIP's ripeness argument is plainly without merit. "[T]he constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry." *Twitter,* 2022 WL 17682769 *3 (quoting *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)); *see also Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). To assert a constitutionally "ripe" claim, a litigant must only demonstrate an injury suitable for standing; i.e., "an invasion of a legally protected interest that is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical." *Twitter,* 2022 WL 17682769 *3 (quoting *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560, (1992)).

NCIP contends (Brief at 21-25) that the suit in *Amador* was not ripe for decision solely because Interior had not, at that time of the suit, taken the Plymouth Parcels into trust. But contrary to NCIP's argument, this particular "contingency" does not show that that the County's suit was based on "hypothetical facts" or "speculative intentions." In the 2012 ROD, Interior unequivocally committed to taking the Plymouth Parcels into trust for the Band's proposed casino development, after specifically determining that the trust acquisition and proposed gaming were (or would be) permissible under the IRA and IGRA. No further regulatory determinations were required to enable Interior to take the Plymouth Parcels into trust. Although Interior delayed in taking such action,[5] that delay was due in significant part to the lawsuits brought by Amador County and NCIP. If an agency's voluntary delay in implementing an otherwise final decision renders the decision unripe for review, an agency could never postpone a challenged action until after a court rules on its legality. There is no precedent or reasonable basis for such an anomalous rule. *Cf. Sackett v. EPA*, 566 U.S. 120, 127 (2012) (possibility of reconsideration does render "otherwise final agency action nonfinal").

[5] NCIP errs in asserting (Brief at 22) that the trust acquisition "never happened." As NCIP is aware, the trust acquisition occurred in 2020. *See* 2-ER_168, n. 4.

Significantly, NCIP alleges in its complaint (2-ER_18) and concedes in its brief (Brief at 10) that the 2012 ROD is "final" for purposes of APA review. *See* 5 U.S.C. § 704. The 2012 ROD undisputedly marked the "consummation" of Interior's decision-making process on the Ione Band's land-into-trust application for the Plymouth Parcels and was a decision from which "legal consequences" would flow. *See Advanced Integrative Medical Science Institute, PLLC v. Garland*, 24 F.4th 1249, 1256 (9th Cir. 2022) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Specifically, upon implementation, the trust acquisition would (and did) alter the legal status of the parcels, including with respect to local taxation, *see* 25 U.S.C. § 5108, and would (and did) clear the way for a casino development with additional impacts on the County's interests. *See generally Amador*, 872 F.3d at 1019.

To be sure, the 2012 ROD did not satisfy all legal preconditions for the casino development. As explained (pp. 9, 26-27, *supra*), the Band also needed to complete a tribal-State compact subject to Interior approval, and to adopt a tribal gaming ordinance subject to the Commission's approval. But NCIP does not contend that these remaining tasks rendered the ROD nonfinal for purposes of APA review, *see* 2-ER_18 (¶ 9), or that significant obstacles to the casino development remained once Interior agreed to take the Plymouth Parcels into trust.

Although NCIP does argue (Brief at 29) that the Commission "never adopted" Interior's determination that the Plymouth Parcels qualify for casino gaming under IGRA, that observation is of no moment. As already explained (pp. 26-31, *sura*), IGRA does not give the *Commission* "exclusive" or "final" authority to make IGRA land-status decisions. As the agency with authority to take the Plymouth Parcels into trust for the Ione Band's proposed casino development, Interior properly determined whether such lands would qualify for casino gaming under IGRA as part of its land-into-trust decision. This Court never questioned Amador County's standing to challenge that decision or the ripeness of the parties' dispute over IGRA's application. *See Amador*, 872 F.3d at 1028-31; *cf. No Casino*, 698 Fed. Appx. at 532 (rejecting NCIP's standing on different grounds). And NCIP identifies no grounds for second-guessing this Court's exercise of jurisdiction over the IGRA dispute.

Contrary to NCIP's argument (Brief at 22-23), the district court's decision in the present case to dismiss NCIP's seventh claim says nothing about the ripeness of the suit in *Amador*. NCIP's seventh claim was not an APA claim; it was a state-law claim sounding in nuisance seeking damages from individual defendants. *See* 2-ER_56-59; *see also* pp. 20, *supra*. The Federal Defendants moved to dismiss that claim on ripeness grounds—and NCIP consented to dismissal without prejudice—on the view that any alleged damages from casino operation would be

speculative in the absence of any casino construction or operation. *See* 2-ER_126 (minute order granting dismissal). This argument does not apply to the injuries alleged by Amador County with respect to Interior's final decision to take the Plymouth Parcels into trust.

* * *

For all the above reasons, NCIP fails to state a viable IGRA claim with respect to either the Commission's 2018 ordinance-approval decision or Interior's 2012 ROD.

II. NCIP's challenges to the 2012 ROD are foreclosed by *Amador*.

NCIP's second, third, and fourth claims are also contrary to *Amador* and otherwise without merit.

A. As determined in *Amador*, Defendant Laverdure was authorized to execute the 2012 ROD.

1. *Amador* affirmed Laverdure's authority.

In its second claim for relief, NCIP seeks to set aside the ROD on the grounds that the Interior official who signed the ROD—Principal Deputy Secretary Donald Laverdure—allegedly lacked authority to take land into trust (or to execute a binding decision to do so), because he was not the Secretary of the Interior or an officer appointed by the President and confirmed by the Senate under the "Appointments Clause," U.S. Const., Art. II, § 2, cl. 2. *See* 2-ER_45-47.

But this Court specifically held in *Amador* that Laverdure was duly authorized to issue the 2012 ROD. *See Amador*, 872 F.3d at 1019 n.5. This Court explained that Laverdure was the "first assistant" to Larry Echohawk, then Assistant Secretary–Indian Affairs (hereinafter, the "Assistant Secretary"). *Id.* Pursuant to the Federal Vacancies Reform Act ("FVRA"), when Echohawk resigned, Laverdure "automatically" assumed the duties of Assistant Secretary on a temporary basis. *Id.* (citing *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 446 (9th Cir. 2016)); *see also* 5 U.S.C. § 3345(a) (relevant FVRA provision). This Court further explained that Laverdure's temporary duties included "taking land into trust under the IRA," because the Secretary of the Interior had permanently delegated those duties to the Assistant Secretary. *Amador*, 872 F.3d at 1019 n.5.

NCIP urges this Court (Brief at 34) to disregard the above determinations as "dicta" because the issue of Laverdure's authority was not litigated in *Amador* (by the County of Amador) and because the *Amador* court did not specifically address the Appointments Clause. In so arguing, however, NCIP fails to note its own participation in the prior proceedings. NCIP asserted its present Appointments Clause claim in its prior (2012) suit, and NCIP fully briefed the claim in its prior appeal, which was argued simultaneously with *Amador* before the same panel. *See* Appellants' Opening Brief, *No Casino in Plymouth v. Jewell*, 9th Cir. No. 15-17189, Dkt. 13 at 17-22.

The *Amador* court evidently reached the issue of Laverdure's authority precisely because NCIP raised it. It is true that the *Amador* court ultimately dismissed NCIP's appeal and ordered the dismissal of NCIP's suit, given NCIP's procedural failure to demonstrate standing. *No Casino*, 698 Fed. Appx. at 532. But that dismissal did not preclude the *Amador* court from reaching the lack-of-authority claim on the view that it had been adopted by fellow Plaintiff Amador County, whose standing was not in dispute. *Cf. Airline Service Providers Association v. Los Angeles World Airports*, 873 F.3d 1074, 1078 n.3 (9th Cir. 2017) (standing for one plaintiff is sufficient for all plaintiffs).

2. NCIP's claim is erroneous as a matter of law.

Regardless, NCIP's claim is patently without legal foundation. As NCIP observes (Brief at 30), the IRA gives the "Secretary" the authority to take land into trust for Indian tribes. 25 U.S.C. § 5108. But as NCIP concedes (Brief at 33), Laverdure was duly empowered, pursuant to the FVRA, to act on an interim basis as the Assistant Secretary. And NCIP does not seriously dispute that the Secretary's trust-acquisition authority under the IRA had been duly delegated to the Assistant Secretary. It is true that NCIP faults the *Amador* court (Brief at 33-34) for failing to provide a legal citation for this delegation. And NCIP notes (Brief at 34, n.5) that there is no record "evidence" in this case to show that then

Secretary Kenneth Salazar delegated his IRA trust-acquisition authority to former Assistant Secretary Echohawk. But these observations are merely a smokescreen.

In the proceedings below, the Federal Defendants demonstrated through legal citations that the Secretary's trust-acquisition authority had been duly delegated to the Assistant Secretary. *See* 2-ER_170-71. Specifically, in 1946, Congress enacted legislation empowering the Secretary to delegate "his powers and duties" over Indian affairs to the "Commissioner of Indian Affairs." *See* 25 U.S.C. § 1a (codifying Act of Aug. 8, 1946, c. 907, 60 Stat. 939). And in 1950 Congress approved a reorganization plan for the Department of the Interior authorizing the Secretary to delegate "any function" of the Department to "any officer." 5 U.S.C. App. 1, §§ 1-2 (Reorganization Plan No. 3 of 1950).[6] Consistent with that plan, in 1977 the Secretary eliminated the office of the Commissioner of Indian Affairs and assigned all duties of that office to the Assistant Secretary. 42 Fed. Reg. 53,682 (Sept. 26, 1977); *see also* 43 U.S.C. §§ 1453 & 1453a (providing for assistant secretaries). Through Interior's "Departmental Manual" and pursuant to the above authorities, the Secretary

[6] This reorganization plan was adopted by the President and approved by resolution of Congress pursuant to the Reorganization Act of 1949, which is codified, in relevant part, at 5 U.S.C. §§ 903, 906.

subseqently delegated all functions concerning Indian Affairs to the Assistant Secretary.[7]

Considering the above, there is and can be no dispute: (1) that Congress authorized the Secretary to transfer the IRA's trust-acquisition duties to the Assistant Secretary, *see* 5 U.S.C. App. 1, § 2; 25 U.S.C. § 1a; (2) that the Secretary duly delegated such authority to the Assistant Secretary, *see* 109 DM 8, 209 DM 8; and (3) that Congress authorized the Principal Deputy Assistant Secretary (Laverdure), as "first assistant" to the Assistant Secretary, to carry out the duties of that office on an temporary basis upon the Assistant Secretary's resignation, *see* 5 U.S.C. § 3345(a).

This leaves only NCIP's claim that Laverdure's execution of the 2012 ROD was contrary to the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2. NCIP asserts (Brief at 31-32) that the authority to take land into trust is a "significant" power under federal law, and that the Appointment Clause limits the exercise of "significant" authorities to "principal" officers appointed by the President and confirmed by the Senate. Because the Assistant Secretary is also a principal officer, *see* 43 U.S.C. §§ 1453, 1453a, NCIP's claim does not impugn the

[7] *See* 109 DM 8, (https://www.doi.gov/sites/doi.gov/files/elips/documents/109-dm-8.pdf) (general authorities); 209 DM 8 (https://www.doi.gov/sites/doi.gov/files/elips/documents/209-dm-8.pdf (delegation).

Secretary's delegation of the IRA's trust-acquisition authority (25 U.S.C. § 5108) to the Assistant Secretary. Rather, NCIP's argument is limited to the temporary delegation provided for in the FVRA, 5 U.S.C. § 3345(a).

That statute directs that, upon the resignation of any officer required to be appointed by the President and confirmed by the Senate, the "first assistant" to such officer "*shall* perform the functions and duties of the office temporarily in an acting capacity." *Id.* (emphasis added). According to NCIP (Brief at 31-32), no acting officer may follow this command as to any "significant" governmental function without violating the Appointments Clause. In other words, NCIP invites this Court to hold that any federal action by any "acting" officer under the FVRA (who was not confirmed by the Senate) may be set aside as ultra vires if the Court deems the action to be "significant."

There is no precedent for this novel and extraordinary claim. To be sure, the Appointments Clause specifies that "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" (excluding officials for whom different appointment procedures are specified in the Constitution) shall be appointed by the President through Presidential nomination with the "Advice and Consent of the Senate." U.S. Const., Art. II, § 2, cl. 2. But that rule is subject to a significant proviso, namely: that Congress may provide for the appointment of "inferior Officers" "in the President alone, in the Courts of

Law, or in the Heads of Departments." *Id.* Moreover, the Appointments Clause places no limitation either on the assignment or delegation of authorities to such "inferior Officers." *Id.*

Nor has any Court interpreted the Appointments Clause as imposing such a limitation. The two cases cited by NCIP (Brief at 31)—*Buckley v. Valeo*, 424 U.S. 1 (1976), and *United States v. Germaine*, 99 U.S. 508 (1879)—do not establish such a rule. In *Buckley*, the Supreme Court held that the Federal Election Commission could not exercise certain executive functions that Congress had assigned to it, because Congress provided for the appointment of its members in a manner that did not satisfy *either* of the methods specified in the Appointments Clause. *Buckley*, 424 U.S. at 120-143. In so holding, the Supreme Court determined that each of the subject functions constituted "the performance of a significant governmental duty exercised pursuant to a public law" and "therefore [could] be exercised only by persons who are 'Officers of the United States.' " *Id.* at 141. But contrary to NCIP's representation (Brief at 31), the Supreme Court did *not* hold the "exercise of significant authority" was reserved to "principal officers." *See Buckley*, 424 U.S. at 126-141. Rather, the Supreme Court emphasized that persons "exercising significant authority pursuant to the laws of the United States" must be appointed as *either* a principal or inferior officer in accordance with the terms of the Appointments Clause. *Id.* at 126-132.

Similarly, in *Germaine*, the Supreme Court held that a surgeon appointed by the Commissioner of Pensions could not be prosecuted as an "Officer of the United States" under a statute prohibiting certain acts by such persons, because the surgeon had not been appointed in either of the two ways prescribed by the Appointments Clause. *See* 99 U.S. at 509-512. In so holding, the Supreme Court did *not* address whether the surgeon could exercise the authority of his post, only that he could not be considered an "Officer of the United States" under the relevant criminal statute. *Id.* The Court reasoned that the statutory term should be construed the same as the constitutional term, given that the constitution is the "supreme law of the land." *Id.* at 510.

In short, neither *Buckley* nor *Germaine* come close to construing the Appointments Clause in the manner NCIP would have this Court construe it. And NCIP's argument finds no support in the relevant text. Thus, if *Amador* does not foreclose NCIP's claim, this Court may and should readily reject it.

B. *Amador* forecloses NCIP's claim that Interior lacked IRA authority to take the Plymouth Parcels into trust.

NCIP's third claim for relief alleges that Interior lacked authority under the IRA, 25 U.S.C. § 5108, to take the Plymouth Parcels into trust for the Ione Band because the Band allegedly is not a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934, as those terms are used in the IRA's first definition of "Indian," 25 U.S.C. § 5129, and construed by the Supreme Court in *Carcieri*.

See 2-ER_48-50. Specifically, NCIP contends (Brief at 36-37), that Interior was compelled to deny the Band's request for a trust acquisition—even though the Band is on the list of federally recognized Indians and was determined to be "under Federal jurisdiction" at the time of the IRA's enactment—because the Band (allegedly) was not officially recognized at that time (in 1934).[8] NCIP concedes (*Brief* at 37) that *Amador* rejected this argument and all similar arguments relating to the IRA's first definition of "Indian." *See Amador*, 872 F.3d at 1021-1030. But according to NCIP (Brief at 37-39), the district court was not obligated to follow *Amador*—and erred as a matter of law in doing so—because the Solicitor of the Interior subsequently altered the agencies' opinion on the proper interpretation of the IRA and because the district court was bound to follow that new opinion. This argument is constructed on a flawed premise.

Although the Solicitor issued a new interpretative opinion, Interior did not change its position on the trust acquisition of the Plymouth Parcels. Specifically, in March 2020, then Solicitor Daniel Jorjani issued an opinion (M-37055) summarily withdrawing a 2014 opinion (M-37029) that adopted, for purposes of

[8] Because Interior interpreted the statute as requiring official recognition at the time of the trust acquisition (as opposed to when the IRA was enacted), Interior never determined whether the Band was officially recognized in 1934. Contrary to NCIP's allegation (Brief at 36), there was no official list of federally recognized tribes in 1934. *See Amador*, 872 F.3d at 1023.

IRA trust acquisitions, the interpretation of "under Federal jurisdiction" employed in the 2012 ROD. *See* 2-ER_132-33; *see also* https://www.doi.gov/sites/doi.gov/files/m-37055.pdf. And Solicitor Jorjani issued separate "procedures" to "guide" future trust acquisitions. 2-ER_133. But the new procedures specified that "[e]ligibility determinations rendered under" the withdrawn opinion "remain[ed] in effect and need not be revisited." *See* Procedure for Determining Eligibility for Land-Into-Trust Under the First Definition of "Indian" in Section l9 of the Indian Reorganization Act at 2 (Mar. 10, 2020) (available at https://www.indianz.com/News/2020/03/11/doisol031020.pdf). Around the same time, Interior completed the trust-acquisition of the Plymouth Parcels in accordance with the 2012 ROD. See 2-ER_168, n. 4.

Because *Amador* found the IRA to be ambiguous with respect to the "timing-of-recognition" issue, 872 F.3d at 1021, NCIP contends that the district court was required—in reviewing its third claim for relief—to defer to Interior's interpretation in the 2020 Solicitor's opinion. But the opposite is true. Because Interior never withdrew the 2012 ROD, the district court was obligated to review the challenged final agency action on the grounds on which the 2012 ROD was decided. *See Corrigan*, 12 F.4th at 908 n.3. *Amador* had already affirmed Interior's interpretation of the IRA, as adopted in the 2012 ROD, as the "better" interpretation. 872 F.3d at 1024. Moreover, in March 2021, current Solicitor of

the Interior Robert Anderson withdrew the 2020 opinion, restoring the 2014 opinion that had adopted the IRA statutory interpretation affirmed in *Amador*. *See* https://www.doi.gov/sites/doi.gov/files/m-37070.pdf (M-37070); *see also* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (M-37029) (2014 opinion).

NCIP relies on the rule that courts must defer to an agency's permissible construction of an ambiguous statute, even if that construction conflicts with an earlier interpretation by the court. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-86 (2005) (applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). But contrary to NCIP's argument (Brief at 37-38), this rule only applies where an agency interprets a statute in a regulation or when exercising authority carrying the "force of law." *Hall v. U.S. Department of Agriculture*, 984 F.3d 825, 835 (9th Cir. 2020). The Solicitor's opinion on which NCIP relies constituted informal internal guidance that did not have the force of law and that has since been withdrawn. *See id.*

By finding statutory ambiguity, *Amador* leaves open the possibility that Interior might permissibly adopt a different IRA interpretation in some future decision to take some other land into trust. In such a context, the "law of the Circuit" doctrine would not apply if Interior's new interpretation is determined to

be entitled to *Chevron* deference. *See Silva*, 993 F.3d at 717 (doctrine does not apply when "an agency construction [is] entitled to *Chevron* deference" under *Brand X*); *see also Amador*, 872 F.3d at 1021 (noting that IRA interpretation in land-into-trust decision might be entitled to *Chevron* deference); *see also Confederated Tribes of Grand Ronde Community of Or. v. Jewell*, 830 F.3d 552, 559–63 (D.C. Cir. 2016) (affording *Chevron* deference in such context).

But that is not the circumstance here. In the present case, NCIP contends that this Court is compelled to apply the 2020 Solicitor's opinion retroactively—in disregard of *Amador*—even though the 2020 opinion lacks the force of law (standing alone), was adopted to provide prospective guidance only, and has since been withdrawn. There is no such exception to the law-of-the-Circuit rule.

C. *Amador* forecloses NCIP's claim regarding Part 83.

NCIP's fourth claim for relief alleges that Interior lacked authority to take the Plymouth Parcels into trust for the Ione Band for casino gaming or for any other purpose because Interior included the Band on the list of federally recognized tribes without requiring the Band to obtain federal recognition through the Part 83 process. 2-ER_50-51; *see also* pp. 7-8, *supra*. This claim is also irreconcilable with *Amador*. *Amador* specifically affirmed Interior's decision and authority to take land into trust for the Ione Band for the purpose of casino gaming under

IGRA, notwithstanding the Band's status as a tribe that was recognized outside of Part 83. *See* 872 F.3d at 1017-1018, 1028-30.

NCIP contends (Brief at 43) that its Part 83 claim was not before the Court in *Amador* because Amador County did not argue that Part 83 recognition was a "prerequisite" to all IRA or IGRA benefits. But the County made a similar (narrower) allegation as part of its IGRA claim. The County argued that IGRA's "restored tribe" exception did not apply to tribes administratively recognized outside of Part 83. *See Amador*, 872 F.3d at 1030. In rejecting that claim, this Court determined that Congress did not "clearly intend to exclude" such tribes from the IGRA exception, despite "knowing that some tribes had been re-recognized outside the Part 83 process." *Id.* And this Court affirmed Interior's decision to take land into trust for the Ione Band for Indian gaming. *Id.* at 1031. In so doing, this Court necessarily affirmed Interior's longstanding decision (since 1994) to recognize the Ione Band as "eligible for the special programs and services provided by the United States to Indians" without requiring the Band to go through the Part 83 process. *See* 25 U.S.C. § 5131 (List Act); *see also* 87 Fed. Reg. at 4638 (current list).

Interior's recognition of the Ione Band outside the Part 83 process is also clearly within Interior's discretion. Congress gave Interior broad authority over Indian affairs, including matters of tribal recognition. *See* 25 U.S.C. §§ 2, 5131;

Timbisha Shoshone Tribe, 678 F.3d at 938. Although the 1994 List Act acknowledged Interior's Part 83 regulations, *see* Pub. L. No. 103-454, § 103(3), 108 Stat. 4791, Congress has never mandated a particular acknowledgment process. *Cf.* 25 U.S.C. § 5131 (listing requirement). Over most of its history, Interior exercised its tribal-recognition authority on an ad hoc basis. *See Amador*, 872 F.3d at 1018 (citing 59 Fed. Reg. 9280 (Feb. 25, 1994)); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004).

Interior did not adopt a formal acknowledgment process—now the Part 83 regulations—until 1978. *Amador*, 872 F.3d at 1017 (citing 43 Fed. Reg. 39,361). Those regulations were designed for tribes not already recognized, 43 Fed. Reg. at 39,362, which Interior identified through its first list of recognized tribes. *Id.* (adopting 25 C.F.R. § 54.6(b) (list requirement)); *see also* 44 Fed. Reg. 7235 (Jan. 31, 1979) (first list). But Interior did not initially treat the acknowledgment regulations as the exclusive means for administrative recognition. 80 Fed. Reg. 37,538, 37,539 (July 1, 2015). Rather, in "limited circumstances" after the adoption of Part 83—including in the case of the Ione Band—Interior added tribes to the list of federally-recognized tribes through administrative processes other than Part 83, including on the view that such tribes should have been included on the original (1979) list of already acknowledged tribes. *Id.* Interior did not announce until 2015, in conjunction with a revision of the Part 83 regulations, that

Part 83 would be the "sole administrative avenue for [official] acknowledgment" of Indian tribes, and Interior then made such determination only on a prospective basis. *Id.*; *see also* 80 Fed. Reg. 37,861 (July 1, 2015) (Part 83 revisions).

Contrary to NCIP's argument (Brief at 39-44), there is no authority for the proposition that "Part 83 recognition" is a prerequisite for the receipt of federal tribal benefits under the IRA, IGRA, or any other statute concerning Indians. As observed by this Court—and in the Part 83 regulations themselves—official "federal recognition" is a prerequisite for such benefits. *See Timbisha Shoshone Tribe v. Department of the Interior*, 824 F.3d 807, 809 (9th Cir. 2016); *Kahawaiolaa*, 386 F.3d at 1273; 25 C.F.R. § 83.2(a); *see also Carcieri*, 555 U.S. at 385 (citing § 83.2(a)). In addition, given the rule requiring exhaustion of administrative remedies, Interior cannot be compelled to officially recognize a tribe that has not sought recognition through Part 83. *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016); *James v. U.S. Dept. of Health & Human Services*, 824 F.2d 1132, 1137-38 (D.C. Cir. 1987); *see also Ione Band of Miwok Indians v. Burris*, Slip Op., No. Civ. S-90-993 at 17 (E.D. Cal. 1992) (2-ER_287). But these cases do not stand for the proposition that "Part 83 recognition" is the *only* path to official recognition. Indeed, most federally recognized tribes have not gone through the Part 83 process. *See generally* 44 Fed. Reg. 7235 (list of tribes recognized before Part 83); *see also Amador*, 872 F.3d at

1028 (noting that tribes have been administratively recognized outside of Part 83 before and after its adoption).

To be sure, in *Kahawaiolaa*, this Court referenced Part 83 as *the* administrative path to recognition without acknowledging other options. *See* 386 F.3d at 1274. But the issue before the Court was whether Interior had violated the Equal Protection Clause by excluding native Hawaiians from the Part 83 process, consistent with statutory limitations in the IRA. *Id.* at 1274-75, 1280. In finding no Equal Protection violation, this Court was not called upon to determine—and certainly did not hold—that Part 83 is the only path to administrative recognition for tribes within the continental United States. *Id.* at 1277-1283.

Nor is NCIP correct in asserting (Brief at 40) that the List Act identifies Part 83 as the "only administrative way for a tribe to be recognized." As this Court noted in *Amador*, 872 F.3d at 1030 n.17, the List Act includes a non-codified congressional "finding" that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 . . .; or by a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791. This "finding" is not a legal mandate, *id.*, and it postdates Interior's March 1994 decision to "reaffirm" the Department's earlier administrative recognition of the Ione Band, *see Amador*, 872 F.3d at 1018.

In short, there is no basis for NCIP's claim that Interior acted contrary to law when it determined, in the 2012 ROD, that the Ione Band was and remained eligible for benefits under the IRA and IGRA.

III. NCIP did not state viable constitutional claims.

Nor is there any legal basis for NCIP's fifth and sixth claims. In its complaint, NCIP asserts these claims against all "Defendants." *See* ER-2_52-56. In its brief, however, NCIP invokes *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and asserts that its constitutional claims are against the three individual defendants—Chaudhuri, Laverdure, and Dutschke—in their *personal* capacities. *See* Brief at 44-54. Regardless, no matter how they are framed, Claims Five and Six fail to state grounds for relief. [9]

To begin with, the relief sought by NCIP is not available against the individual defendants in their *personal* capacities. NCIP asked the court to vacate

[9] There is no merit to NCIP's argument (Brief at 50) that Claims Five and Six "remain unresolved" against the three individual defendants. As NCIP notes (Brief at 45), federal counsel filed the motion for judgment on the pleadings on behalf of the Federal Defendants in their *official* capacities, and not specifically for the three individual defendants in their *personal* capacities. *See* 2-ER_135 & n.1. But this is so because Claims Five and Six did not specifically seek specific relief against the individual defendants in their personal capacities. *See* 2-ER_52-56. In any event, there is no dispute that the district court entered final judgment on all claims as to all parties. 1-ER_4, 12-13. NCIP's suggestion that the district court granted judgment not sought by the individual defendants in their personal capacities is not grounds for an appeal by NCIP.

the relevant final agency actions, 2-ER_53 (¶ 145); 2-ER_55 (¶ 153), and to enjoin the individual defendants from "allowing the construction or operation of the proposed casino," 2-ER_54 (¶ 147); 2-ER_56 (¶ 155). These are claims to set aside official agency action under the APA. *See* 5 U.S.C. § 706(2). To the extent the individual defendants are allowing the Band to proceed with its casino development, it is only through the completed final agency actions that NCIP challenges (as official actions) in its first four claims. The court cannot order the individual defendants to *personally* rescind those *official* actions. Indeed, the individual defendants who signed the 2018 gaming-ordinance approval (Chaudhuri) and the ROD (Laverdure) no longer serve in the offices in which they served when making those decisions. And the third individual defendant (Dutschke) has been recused from the relevant administrative proceedings since their inception, *see* 2-ER_91-92 (¶ 29) (Defendants' Answer), and would have no authority to rescind the final agency actions (assuming they are subject to rescission), even if she were not recused.

Regardless, the constitutional violations asserted by NCIP all depend on the allegation that the Ione Band is an "unrecognized group of Indians" and therefore that its members were improperly afforded benefits based on their "race." *See* 2-ER_52-56. This allegation is the gravamen of NCIP's fourth claim for relief and fails for the same reason that the fourth claim fails. As this Court has already held,

Interior properly recognized the Ione Band as an Indian tribe eligible for IRA and IGRA benefits. *Amador*, 872 F.3d at 1020-1031.

Contrary to NCIP's argument (Brief at 53-55), in dismissing Claims Five and Six on this ground, the district court did not fail to accept NCIP's *factual* allegations as true. There are no relevant factual disputes. As NCIP acknowledges (Brief at 51), the Federal Defendants argued below that the Ione Band is a properly recognized tribe because the Ione Band did not need to seek recognition through Part 83, a determination that *Amador* has already affirmed. In finding this *legal* argument to be "persuasive" (1-ER_12), the district court did not misapply the standard for granting judgment on the pleadings.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Date January 23, 2023

ADDENDUM

United States Constitution, Article II
Section 2, Clause 2. Treaty Making Power; Appointing Power

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

5 U.S.C.A. § 3345 – Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if--

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

25 U.S. Code § 2 – Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Indian Gaming Regulatory Act ("IGRA")

25 U.S.C. § 2703 – Definitions

For purposes of this chapter—

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary 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.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

25 U.S. Code § 2710 – Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section 1

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such

compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall

order the State and the Indian Tribe 2 to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

25 U.S.C. § 2719
Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of title 26

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in

the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

Indian Reorganization Act ("IRA")

25 U.S.C. § 5108 – Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 1 shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5129 – Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal

jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Federally Recognized Indian Tribe List Act of 1994

25 U.S.C. § 5130 – Definitions

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means 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.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 5131 of this title.

25 U.S.C. § 5131 – Publication of list of recognized tribes

(a) Publication of list

The Secretary shall 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.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.