No. 22-15756

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH, DUEWARD W. CRANFORD II, DR.ELIDA A. MALICK, JON COLBURN, DAVID LOGAN, WILLIAM BRAUN, AND CATHERINE COULTER,

Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION, JONODEV CHAUDHURI, DEPATMENT OF INTERIOR, RYAN ZINKE, DONALD BERNHART, DONALD E. LAVERDURE AND AMY DUTSCHKE,

Defendants-Appellees,

and

IONE BAND OF MIWOK INDIANS,

Defendant Intervener-Appellee.

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:18-cv-01398 TLN-CKD
Honorable Troy L. Nunley, District Judge

APPELLANTS' OPENING BRIEF

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

CORPORATE DISCLOSURE STATEMENT

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

Dated: September 22, 2022

Respectfully submitted,

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

UNITED STATES CODES

INTRODUCTION

Plaintiffs, No Casino in Plymouth, Dueward W. Cranford II, Dr. Elida A. Malick, Jon Colburn, David Logan, William Braun and Catherine Coulter (collectively referred to as the "Plaintiffs") are appealing a judgement entered by the United States District Court for the Eastern District of California on May 11, 2022. (Excerpts of the Record (ER) 4.) The judgement was based on a district court Order of the same date which granted the motion for judgment on the pleadings (MJOP) by some – but not all – of the named Defendants. (ER 5-13.) This disparity created an anomalous situation. Some of Plaintiffs' claims against some of the Defendants were decided by the Order while claims against the remaining Defendants were not decided. Regardless, the district court entered a judgment seemingly in favor of all Defendants.

According to the district court's Order, the MJOP was brought by five (5) Defendants: the National Indian Gaming Commission (NIGC), NIGC Chairman Simermeyer (substituted for Chairman Chaudhuri), Secretary Bernhardt (substituted for Secretary Zinke), and Deputy Secretary MacGregor (substituted for Deputy Secretary Bernhardt). The district court also said the MJOP was brought by Assistant Secretary Sweeny (substituted for Assistant Secretary Black) – which is not possible. Neither Ms. Sweeny nor Mr. Black was named as Defendant in this case. Nor have they sought leave to intervene or participate in this case.

The Order also reveals several named Defendants did not join the MJOP. An important Defendant who did not join is the MJOP is the Department of Interior (DOI). As outlined below, this is because, three months before the MJOP was filed, the DOI changed its legal position on the key issue raised in the MJOP. Also the three Defendants (Chaudhuri, Laverdure and Dutschke), federal employees named in their personal capacities, did not join the MJOP. Plaintiffs alleged these three Defendants violated the Constitution and Plaintiffs' rights when they abused their authority by approving benefits under the Indian Reorganization Act of 1934 (IRA; See ER 61-67) and the Indian Gaming Regulatory Act of 1989 (IGRA; 25 U.S.C. §§ 2700 et seq.) to a group of Indians who were not recognized in 1934 and who have not obtained recognition pursuant to 25 CFR Part 83.

Furthermore, although it ostensibly decided a MJOP, the Order did not discuss or resolve the pleadings in any meaningful way. Instead the district court first held four of the six remaining claims in Plaintiffs Complaint were resolved by this Court's decision in *Amador v. DOI*, 872 F.3d 1012 (9th Cir. 2017). As discussed below, this is not correct. The *Amador* case involved different pleadings filed by different parties and adjudicated different issues. None of Plaintiffs, were parties in *Amador*. Also Defendants named in this case were not named defendants in *Amador*. Also it is legally impossible for the 2017 *Amador* case to have decided the first claim in the Plaintiffs' complaint which challenges the 2018 NIGC

approval of the Ione Band's gaming ordinance. Finally, as discussed below, and perhaps most important, *Amador* did not involve a ripe case or controversy. Instead, it is merely an advisory opinion contingent on future events that never happened. It should not be considered precedent for any purpose.

The remaining two claims in Plaintiffs complaint involved Constitutional claims (Equal Protection and Federalism) against the three Defendants named in their personal capacities. See *Bivens v Six Unknown Named Agents*, 403 US 388 (1971). As stated above, these three individual Defendants did not join the MJOP. Nor were these Constitutional claims in issue, much less decided, by this Court in *Amador*. Despite these facts, the district court held the Plaintiffs somehow waived their Constitutional claims against three Defendants who did not join the MJOP – which is verifiably not true. In the alternative, the district court found it was not persuaded by Plaintiffs opposition or the allegations in the Complaint with respect to the two *Bivens/*Constitutional claims. Instead, the district court stated it was "persuaded" by Defendants' arguments. But at this stage, when reviewing a MJOP, it is not relevant if the district court is persuaded that either party will ultimately succeed with respect to a particular claim. The issue is whether, taking the factual allegations in the Complaint as true, Plaintiffs have stated a valid claim for recovery against these individual Defendants. As discussed below, Plaintiffs have done just that.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 2201, 25 U.S.C. § 2714, and 18 U.S.C. § 1166. The district court entered the judgment on May 11, 2022. (ER 4.) And Plaintiffs filed a timely Notice of Appeal on May 15, 2022. (ER 1-3.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This action arises under federal law, including the United States Constitution, the Indian Reorganization Act (IRA), 25 U.S.C. §§ 5101 *et seq.* Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166.

Plaintiffs have standing to pursue the claims asserted in this case. *Bond v. United States* 564 U.S. 211 (2011) and *Match-E-Be-Nash-She-Wish Band v. Patchak* 567 U.S. 209 (2012). (See Plaintiffs' declarations ER 189-212)

The United States waived its sovereign immunity from suit under 5 U.S.C. §§701-706, 28 U.S.C. §2201(a) and 25 U.S.C. § 2714.

ISSUES PRESENTED FOR REVEIW

A. Whether the material facts as alleged with respect to each Claim for Relief in the Plaintiffs' Complaint, **taken as true**, entitle Plaintiffs to a legal remedy under all or any of the six remaining Claims for Relief.

B. Whether a judgment on the pleadings on Claims One, Two, Three, and Four of Plaintiffs' Complaint is appropriate, **regardless of the allegations**, because they were supposedly decided by this Court in *Amador*.

C. Whether a judgement on the pleading on Claims Five and Six of Plaintiffs' Complaint is appropriate, **despite the allegations**, because the district court was not persuaded Plaintiffs will ultimately succeed.

STATEMENT OF FACTS

A. Chaudhuri's 2018 Approval of the Ione Band Gaming Ordinance.

This case was prompted on March 6, 2018, when Defendant Chaudhuri approved an "Amended and Restated Tribal Gaming Ordinance, Res. No. 2018-4" for the Ione Band of Miwok Indians which had no "Indian land" eligible for Indian gambling under IGRA. (See ER 82-83.)[1]

NIGC's jurisdiction to approve any gaming ordinance is contingent on whether the tribe has Indian land as defined by IGRA. 25 U.S.C § 2703(4). Neither Defendant Chaudhuri nor Defendant NIGC had the jurisdiction or authority to approve a gaming ordinance for the Ione Band of Indians which had no Indian land. *Michigan v. Bay Mills Indian Community* 572 U.S. 782 (2014).

[1] A notice of this decision was not initially published in the Federal Register as required by IGRA. Instead it was discovered by Plaintiffs in March 2018 in an online publication just before this lawsuit was filed. It was not published in the Federal Register until two years later. (85 Fed. Reg. 12806, March 4, 2020.)

Here, Defendants, in their answer to Plaintiffs' complaint – admit the Ione Band does not have Indian land eligible for gaming. (ER 84-120 ((CD 17 ¶¶ 68 & 100)). Furthermore, as discussed below, the Administrative Record submitted by Defendants on November 11, 2018 confirms the Ione Band does not have Indian land eligible for Indian gambling under IGRA. (ER 213-270).

B. **Laverdure's 2012 Approval of the Record of Decision (ROD).**

The ROD at issue here was approved by Defendant Laverdure on May 24, 2012, and was published on May 30, 2012 (77 Fed. Reg. 31871-31872). The ROD approved the acquisition of 12 parcels totaling 228.04 of privately owned property in trust for the Ione Band for gaming purposes. *Id.* But the land was never acquired in trust pursuant to the ROD. The property is not now, and never has been, owned by the Ione Band. Instead, at the time this lawsuit was filed on May 22, 2018 the 12 parcels were owned by private non-Indian owners.

And now it is too late for the land to be taken into trust pursuant to the 2012 ROD. The six year statute of limitations for the Ione Band or any party to compel compliance with, or implementation of, the ROD expired on May 24, 2018. 28 U.S.C. 2401(a). *Sisseton-Wahpeton Sioux Tribe v. U.S.,* 895 F.2d 588 (9th Cir. 1990). And, the jurisdiction of the DOI to implement the 2012 ROD also expired when "the time for judicial review has expired." *Pan Am. Petroleum Corp. v. F.P.C.,* 322 Fed. 2d 999, 1004 (D.C. Cir. 1963). The 2012 ROD was never

implemented within the allowed six year period; it is now void and defunct. *Patchak v. Zinke,* 138 S. Ct. 897, 916-17 (2018). See also *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015) ("Moreover, even if California had brought an APA claim, such an action would be time barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States.")

STATEMENT OF THE CASE

A. Plaintiffs' Complaint. (Court Document (CD) 1; ER 14-83.)

Plaintiffs filed their Complaint for Declaratory and Injunctive Relief in this case on May 22, 2018. Plaintiffs' initial Complaint included seven causes of action, including claims for:

(1) Violation of the Indian Gaming Regulatory Act. (CD 1 ¶¶ 96-108).

In Claim One, Plaintiffs request the Court vacate Defendants' March 6, 2018 approval of a gaming ordinance for the Ione Band. Defendant Chaudhuri had no jurisdiction to approve a gaming ordinance for a group of Indians with no Indian land eligible for gaming as defined by IGRA and which has not been recognized pursuant to 25 CFR Part 83 (Part 83).

(2) Violation of the Const. Appointments Clause. (CD 1 ¶¶ 109-120).

In Claim Two, Plaintiffs request the Court vacate of the ROD issued by Defendant Laverdure, a former DOI employee, on May 24, 2012 which

purports to authorize the taking of 12 parcels of private fee land into trust for the Ione Band. Laverdure, was not the Secretary of Interior and lacked the authority to take land into trust under the IRA. His approval of the ROD, especially while Secretary Salazar was in office, was a clear violation the Appointments Clause of the Constitution.

(3) Violation of the Indian Reorganization Act. (CD 1 ¶¶ 121-129).

In Claim Three, Plaintiffs request a declaration the 2012 ROD is contrary to IRA and the decision in *Carcieri v. Salazar* 555 U.S. 379 (2009) because the Ione Band was not a recognized tribe in 1934 and is therefore not eligible to receive IRA fee-to-trust benefits. Plaintiffs also sought an injunction to prevent the implementation of the ROD.

(4) Violation of 25 CFR Part 83. (CD 1 ¶¶ 130-138).

In Claim Four, Plaintiffs seek declaratory relief that, because the Ione Band is not recognized under Part 83, it is not entitled to seek or receive benefits under IRA or IGRA. Plaintiffs allege, and request a declaration, that Part 83 recognition is a prerequisite that must be completed before a tribe can seek or receive benefits under IRA or IGRA.

(5) Violation of Equal Protection. (CD 1 ¶¶ 139-147).

In Claim Five, Plaintiffs seek damages and injunctive relief against Defendants Chaudhuri, Laverdure, and Dutschke, in their personal

capacities, for facilitating a trust transfer for a casino for the Ione Indians which were not recognized in 1934 and not recognized pursuant to Part 83, in violation of Equal Protection Clause and the Fifth Amendment which prohibits discrimination in favor of any group based on race or ethnicity.

(6) Violation of Constitutional Federalism. (CD 1 ¶¶ 148-155)

In Claim Six, Plaintiffs seek damages and declaratory relief against Defendants Chaudhuri, Laverdure, and Dutschke, in their personal capacities, because their actions in excess of their authority and self-dealing, violated Plaintiffs' Constitutional Federalism and Tenth Amendment right to protection from abusive government. The abuse was committed by the three individual Defendants who ignored and failed to comply with the law to give IRA and IGRA benefits to the Ione Band which was not a recognized tribe in 1934 and not recognized pursuant to Part 83.

(7) Violations of Calif.'s Constitution and Penal Code. (CD 1 ¶¶ 156-168)

In Claim Seven, Plaintiffs sought injunctive relief against Defendants to prevent the construction of an illegal casino on non-Indian land in violation of California's Constitution Article 4, Section 19(e)&(f) and in violation of Penal Code section 11225. The construction of an illegal casino on non-Indian land would be a public and private nuisance and cause significant harm to Plaintiffs and the public. (Plaintiffs Declarations ER 189-212.)

B. Defendants' Answer. (CD 17; ER 84-120.)

Defendants filed their Answer to the first six claims in Plaintiffs' Complaint on August 20, 2018. The Answer (unlike the MJOP) was filed on behalf of all the Defendants. In their Answer, Defendants make the following key admissions:

1. The 2012 approval of the ROD by Defendant Laverdure is a final agency action reviewable under the APA. (CD 17 ¶ 9).
2. The 2018 approval of the Ione Band gaming ordinance by Defendant Chaudhuri is a final agency action reviewable under the APA. (CD 17 ¶ 10).
3. Defendant Chaudhuri was (at the time the Answer was filed) the Chairman of the NIGC. (CD 17 ¶ 25).
4. Defendant DOI is the agency of the United States responsible for managing the affairs of Indians and Indian tribes through the BIA. (CD 17 ¶ 26)
5. Kenneth Salazar was the Secretary of Interior at the time the 2102 ROD was issued. (CD 17 ¶ 27, 84 & 115).
6. Defendant Dutschke is both the BIA Pacific Regional Director and "an enrolled member" of the Ione Band. (CD 17 ¶ 30).
7. Defendant Laverdure was an "acting" Assistant Secretary, and not the Secretary of Interior, in 2012 when he issued the ROD (CD 17 ¶ 30).
8. The Ione Band has not sought or obtained recognition pursuant to Part 83. (CD 17 ¶ 43).

9. In 1979, the DOI took the position that the Ione Band had to complete the Part 83 process to obtain recognition. (CD 17 ¶ 49).
10. In 1979, the DOI listed the Ione Band on a "register of petitioners" eligible to petition for recognition under Part 83. (CD 17 ¶ 51 & 54).
11. In 2004 the Ione Indians asked the NIGC for a determination that property they intend to take into trust would qualify as Indian land. (CD 17 ¶ 99).
12. Defendant NIGC has not issued an Indian Lands Opinion that the subject property is Indian land eligible for gaming under IGRA (CD 17 ¶ 68 & 100).
13. Defendant Chaudhuri, as Chairman of the NIGC, transmitted the approved gaming ordinance to the Ione Band on March 6, 2018. (CD 17 ¶ 91).
14. The Property that is the subject of the 2012 ROD has not been acquired in trust for the Ione Band (CD 17 ¶ 94).
15. "Federal Defendants admit the 1996 final judgment in *Ione Band v. Burris/DOI* was not appealed." (CD 17 ¶ 133).

These facts, like the facts alleged in the Complaint must be "taken as true" when evaluating Defendants' motion for judgment on the pleadings. See *Estom Yumeka Maidu Tribe v. California*, 163 F. Supp. 3d 769, 775 (E.D. Cal. 2016).

C. Defendants' Motion to Dismiss the Seventh Claim. (CD 15.)

On the same day they filed their Answer to the first six claims, Defendants, pursuant to Federal Rule of Civil Procedure (FRCP) Rule 12(b)(1), filed a Motion

to Dismiss the Seventh Claim. (MTD; CD 15; ER 302.) Defendants argued, inter alia, the Plaintiffs' Seventh Claim should be dismissed because it is not ripe for adjudication. The subject property had not been accepted into trust and the proposed casino was not yet constructed.

D. Plaintiffs' Request Court Grant the MTD. (CD 34; ER 121-125.)

On September 26, 2019, Plaintiffs asked the district court to grant Defendants MTD claim Seven – which had been filed over a year earlier - with leave to amend. Plaintiffs agreed claim Seven could be dismissed because it was very unlikely the property would ever be acquired in trust by the Secretary of Interior or a casino will ever be approved by the NIGC. Plaintiffs also asked the district court to direct the parties to file a joint status report within thirty (30) days and stressed there was no need for further delay in litigating this case.

E. Order Dismissing the Seventh Claim. (CD 38; ER 126-127.)

On March 10, 2020, the district court granted Defendants' motion to dismiss the Seventh Claim in Plaintiffs' complaint "without prejudice to Plaintiffs' refiling if and when the claim becomes ripe for adjudication." The court held that when the Seventh claim becomes ripe, Plaintiffs may either file a separate action or seek leave to amend the Complaint in this action pursuant FRCP Rule 15 or Rule 16.[2]

[2] The court's Minute Order dismissing claim Seven was consistent with Plaintiffs' request that the court grant the Defendants' MTD Claim Seven and proceed with the rest of the case. (CD 34; ER 121-125.) Plaintiffs are not appealing this Order.

F. Plaintiffs Notice of Additional Authority. (CD 40; ER 128-133.)

On April 29, 2020, Plaintiffs filed a Notice of Additional Authority and Request for Judicial Notice of DOI's opinion M-37055 which had been issued on March 9, 2020. (ER 132-133.) In that opinion, the DOI changed its position and withdrew its two part procedure for determining the meaning of "under federal jurisdiction" for the purposes of the IRA. That "two part procedure" was created by the DOI in 2010 in the "Cowlitz ROD," and adopted by Laverdure in the 2012 ROD. The two part procedure provided a tribe need not be recognized in 1934 to receive a trust transfer under the IRA if it was "under federal jurisdiction" in 1934. This interpretation was directly contrary to the Supreme Court decision in *Carcieri*, 555 U.S. at 391 which held the plain, unambiguous language of the IRA provides a tribe must be both recognized and under federal jurisdiction in 1934 to qualify for a trust transfer under the IRA. With the issuance of M-37055, the DOI's position is now consistent with *Carcieri.* Consequently, the DOI did not join the MJOP.

G. Defendants' MJOP. (CD 41; ER 134-146.)

On June 25, 2020, over two years after this lawsuit was filed, Defendants filed their MJOP pursuant to FRCP Rule 12(c). As indicated above, the MJOP was filed by some but not all of the Defendants. And, despite its label, Defendants' MJOP was not based on pleadings in this lawsuit. Instead it was based almost

entirely on this Court's decision in *Amador*. This is inconsistent with language and purpose of FRCP Rule 12(c).

Furthermore, in their MJOP, Defendants misrepresented several of the holdings in *Amador*. For example, Defendants claimed this Court determined the Ione Band "is a recognized tribe that was 'under federal jurisdiction' in 1934 and, thereby eligible to have land taken into trust pursuant to the IRA." (ER 134-146; CD 41-1, p. 2.) This is not accurate. Instead this Court acknowledged, although the Ione Band was "under federal jurisdiction" in 1934, it was not recognized in 1934. But this Court added, in its view, the Ione Band was not required to be a recognized tribe in 1934 to receive fee-to-trust benefits under the IRA.

In another misleading statement in the MJOP, Defendants claimed "the gravamen of Plaintiffs' Complaint [is] that the [Ione Band] is not a federally recognized tribe." This is simply not true. The three primary bases for Plaintiffs' Complaint are, regardless of the Ione Band's current tribal status, they: (1) were not a recognized tribe in 1934, (2) have not sought or obtained formal recognition under 25 CFR Part 83, and (3) do not have Indian land eligible for gaming under IGRA. Furthermore, despite Defendants' contentions, these basic facts are consistent with, and supported by, the findings of this Court in *Amador*.

H. Plaintiffs Opposition to the MJOP. (CD 44; ER 147-166.)

On July 23, 2020, Plaintiffs filed an opposition to the MJOP. (CD 44.) Plaintiffs argued, as alleged in the Complaint, the Ione Band was not recognized pursuant Part 83 and, consequently, was not eligible to receive IRA and IGRA benefits. And Plaintiffs pointed out the same district court found that the Ione Band had not obtained Part 83 recognition in 1992 in *Ione Band v. Burris* (USDC ED Cal. No. CIV S-90-993) (ER 271-297.) That finding was confirmed in a 1996 judgment which was not appealed and is binding on Defendants here.

As alleged in Plaintiffs' Complaint, Part 83 recognition is a prerequisite for the Ione Band to obtain benefits under IRA or IGRA. Defendants MJOP did not address these allegations in Plaintiffs' Complaint or the argument that Part 83 recognition is a prerequisite to seeking IRA and IGRA benefits. Plaintiffs also argued Defendants failed to address the fact this Court found in *Amador* that the Ione Band was not a recognized tribe in 1934. Instead, as noted above, Defendants "blurred" the two issues to create the opposite impression.

Plaintiffs also brought to the district court's attention that the MJOP was brought by some – but not all – of the Defendants. The MJOP failed to address the claims against the non-moving parties including the Fifth and Sixth Claims against Defendants Chaudhuri, Laverdure and Dutschke. The Plaintiffs also noted the DOI had not joined the MJOP because it had recently adopted M-37055. Plaintiffs also

argued that *Amador* involved different pleadings filed by different parties and adjudicated different issues. Finally, in their opposition to the MJOP, Plaintiffs reasserted all the factual allegations in support of all six claims in the Complaint

I. Defendants' Reply in Support of the MJOP. (CD 45; ER 167-177.)

On July 30, 2020, Defendants filed a reply brief in support of their MJOP. But, instead of replying to the allegations in Plaintiffs' complaint or the contentions in Plaintiffs' opposition, Defendants raise new arguments.

For example, instead of addressing the issue of whether Part 83 was a prerequisite to IRA and IGRA benefits, Defendants argued the Ione Band need not obtain Part 83 recognition because, since1995, they have been on the BIA list of "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." This was a new argument not raised in Plaintiffs' Complaint, the MJOP or Plaintiffs' opposition.

To bolster this new argument, Defendants falsely claimed the Plaintiffs' Complaint challenged the inclusion of the Ione Band on the BIA list of "Indian Entities" eligible to receive services from the BIA. (CD 45 at 6, n.9.) And Defendants take this lie a step further and contend Plaintiffs' purported challenge to the 1995 BIA list is "apparent on the face of the complaint" – specifically in paragraph 98 – and is, therefore, barred by the 6 year statute of limitations. This is a complete fabrication. Paragraph 98 does not mention the 1995 BIA list of Indian

Entities. Instead it alleges: "The NIGC has no jurisdiction to approve Indian gambling or an Indian casino on non-Indian land or to approve Indian gambling by a group of Indians that has not been recognized Congress, Part 83, or a federal court decision." Paragraph 98 does not mention the 1995 BIA list.

J. Plaintiffs Motion to file a Sur-Reply. (CD 49; ER 178-188.)

On August 10, 2020 Plaintiffs' filed a motion for permission to file a sur-reply to address the new arguments in Defendants' Reply. "It is inappropriate for a district court to consider arguments raised for the first time in a reply brief." *Assn of Irritated Residents v. C &R Vanderham Dairy*, 435 F. Supp. 2d 1078, 1089 (N.D. Cal. 2005). Plaintiffs also asked for an opportunity to respond to the new documents referenced in Defendants' Reply brief. Defendants did not ask the Court to take judicial notice of any of those documents. They included:

a. The Reorganization Plan No. 3 of 1950. (Reply p. 4.)

b. Select Department Manual provisions. (Reply pp. 4-5, fn. 6.)

c. The 2012 Press Release re Echohawk's departure. (Reply p. 5, fn. 7.)

d. The March 10, 2020 guidance called "Procedure for Determining Eligibility for Land-into-Trust under the First Definition of 'Indian' in Section 19 of the Indian Reorganization Act." (Reply pp. 5-6, fn. 8 and p. 7.)

e. The 2002 BIA list of "Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs." (Reply p. 6, fn. 10.)

f. The 2015 BIA list of "Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs." (Reply p. 6, fn. 10.)

Plaintiffs asked the district court to strike all references to these documents and all arguments based on these non-judicially noticed documents. Plaintiffs also asked for a fair opportunity to respond to these documents and Defendants' new arguments in a sur-reply. (See FRCP Rule 12(d).) On March 15, 2021, the court denied Plaintiffs' motion to file a sur-reply. (CD 57; ER 304.)

K. Order granting Defendants' MJOP. (CD 69; ER 5-13.)

On May 11, 2022, the district court finally issued its Order granting Defendants' MJOP – almost two years after it was filed.[3] The district court did not address the fact that the MJOP was not brought by all the Defendants. Nor did the court take the allegations in Plaintiffs Complaint as true. Instead, as discussed below, the district court found the arguments on the merits raised by Defendants in the MJOP and Reply as being "persuasive." In contrast, the court ignored the allegations in Plaintiffs' Complaint and the arguments raised in Plaintiffs'' Opposition. The district court dismissed Plaintiffs' Complaint without leave to amend and entered judgment in Defendants' favor on May 11, 2022.

L. Notice of Appeal. (CD 71; ER 1-3.)

Plaintiffs filed a notice of appeal on May 15, 2022. No other party has filed an appeal or cross-appeal of the May 11, 2022 Order or any other order.

[3] Plaintiffs are appealing the first half of the May 11, 2022 Order which granted the MJOP (CD 69: ER 5-13.)

SUMMARY OF ARGUMENT

Plaintiffs' primary argument is that the factual allegations offered to support the remaining six claims Plaintiffs' Complaint, if taken as true, are more than sufficient to establish the Plaintiffs are entitled to relief on each claim. This is especially true if all reasonable inferences drawn from those facts are, as they must be, construed in Plaintiffs' favor.

Instead of reviewing the factual allegations in the Complaint, much less construing those facts in Plaintiffs' favor, the district held that Claims One, Two, Three and Four were resolved by this Court in *Amador* in 2017. Plaintiffs argue this is not correct for two reasons. First, the *Amador* decision is a non-binding advisory opinion that did not decide a ripe case or controversy. Second, even if *Amador* was not advisory, it did not decide the first four Claims in the Complaint:

a. **Claim One** challenges the approval of a gaming ordinance by the NIGC in 2018 and, obviously, could not have been decided by *Amador* in 2017.

b. **Claim Two** challenges Laverdure's authority to approve the ROD based on the Appointments Clause which was not contested in *Amador.*

c. Claim Three seeks a declaration that Part 83 recognition is a prerequisite to receive IRA and IGRA benefits which was not in issue in *Amador*.

d. Claim Four seeks a declaration the Ione Band is not entitled to IRA benefits because it was not recognized in 1934. This Court's decision in

Amador in 2017 that a tribe need not be recognized in 1934 to receive IRA benefits is superseded by the DOI's 2020 interpretation in M-37055.

With respect to **Claim Five** and **Claim Six**, Plaintiffs argue the facts as alleged in those *Bivens* Constitutional claims, if taken as true, entitle Plaintiffs to relief against Defendants Chaudhuri, Laverdure and Dutschke. Although those three Defendants answered Plaintiffs' Complaint they did not join the MJOP. And the district court acknowledged that these issues were not decided in *Amador*.

STANDARD OF REVIEW

This court, regardless of the district court's decision, reviews a motion for judgment on the pleadings under Rule 12(c) *de novo*. *Goldstein v. Long Beach*, 715 F.3d 750, 753 (9th Cir.2013). Specifically, when deciding a motion for judgment on the pleadings *de novo*, this "court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir.2012).

De novo review is described as an "independent" "plenary" review. See *Agyeman v. I.N.S.*, 296 F.3d 871, 876 (9th Cir. 2002); *Stilwell v. Smith & Nephew. Inc.*, 482 F.3d 1187, 1193 (9th Cir. 2007); and *United States v. Waites*, 193 F.3d 1123, 1126 (9th Cir. 2000). This Court, when reviewing a decision *de novo*, is not constrained in any way by the district court's legal analysis and opinions. *Dubbs v.*

C.I.A., 866 F.2d 1114, 1118 (9th Cir. 1989). "When *de novo* is compelled, no form of appellate deference is acceptable." *Rabkin v. Oregon Health Sciences University*, 350 F.3d 967, 970 (9th Cir 2003). *De novo* review requires this Court to consider the matter as if no decision had been rendered below. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

When evaluating a motion for judgment on the pleadings, this court must assume the truthfulness of all the material facts alleged in the complaint. Moreover, all inferences reasonably drawn from those facts must be construed in favor of the responding party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Defendants are not entitled to a judgment on the pleadings if the complaint raises issues of fact which, if proved, would support recovery. See *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015).

ARGUMENT

A. This Court's 2017 decision in *Amador* was based on speculative and contingent future events that never happened; it did not involve an active case or controversy that was ripe for adjudication.

The first paragraph of this Court's decision in *Amador* reveals the case was contingent and not ripe for consideration or decision:

> "This case involves a dispute over a proposed casino in Amador County, California. Plaintiff, the County of Amador ("County"), challenges a 2012 record of decision ("ROD") issued by the United States Department of the Interior ("Interior") in which the agency announced its intention to take

> land into trust for the benefit of the Ione Band of Miwok Indians ("Ione Band" or "Band"). The ROD also allowed the Ione Band to build a casino complex and conduct gaming on the land once it is taken into trust. ”

Amador, 872 F.3d at 1012; (Emphasis added.)

Thus, this Court's decision in *Amador* did not decide an active or live controversy. Instead, it decided a potential future dispute contingent on the subject property being taken into trust pursuant to the 2012 ROD – which never happened. And the six-year statute of limitations to compel compliance with the 2012 ROD expired in 2018. Therefore, at best, *Amador* is an advisory decision based on hypothetical facts or speculative intentions that never materialized.

Ironically, the district court reached the same conclusion when it dismissed Plaintiffs' Seventh Claim, which sought an injunction to prevent the trust acquisition and the construction of the "proposed casino" approved in the ROD on the basis it would violate California's Constitution and Public Nuisance laws. Defendants moved to dismiss the Seventh Claim on the basis it was not ripe for adjudication because no land had been acquired into trust pursuant to the 2012 ROD and the proposed casino was never constructed. Defendants described Plaintiffs' Seventh Claim as follows:

> "Here, plaintiffs ask the Court to provide an advisory opinion on whether or not a casino that has not even been constructed on land that is not yet in trust would create a nuisance. . . . This fails to satisfy the case or controversy requirement." (CD 15-1 at 6-7; emphasis added (ER 301).)

Over a year later, on September 26, 2019, Plaintiffs filed a request that the district court grant Defendants' motion to dismiss claim Seven. (CD 34; ER 121-125.) The Plaintiffs made this request because the property had not been taken into trust and the six-year statute of limitations to compel compliance with the 2012 ROD had expired over a year earlier on May 24, 2018. Plaintiffs agreed with Defendants; the Seventh Claim was not ripe for adjudication

On March 10, 2020, the court agreed with the parties and dismissed claim Seven without prejudice, and with leave to amend, because it was not ripe for adjudication. (CD 38; ER 126-127.) The same analysis applies with equal force to the *Amador* decision which was not ripe for adjudication for the same reasons.

"Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution." *St. Clair v. City of Chico,* 880 F.2d 199, 201 (9th Cir. 1989). "The purpose of the ripeness doctrine is to avoid premature judicial review of administrative action." *Id* at 202. It is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs v. Gardner,* 387 U.S. 136, 148 (1967).

Furthermore, jurisdiction is always at issue in all stages of a case – even if the court of appeal has already filed a written opinion. *Televisa v. DTVLA,* 366 F.3d 981 (9th Cir. 2004) (Order withdrawing an opinion and asking for briefing on

the jurisdiction issue). A federal court is without power to give advisory opinions which cannot affect the rights of the litigants in the case before it. *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). Here, because the matter was not ripe for adjudication when this Court issued its decision in *Amador*, that decision is, at most, an advisory opinion. It could not, and should not, be considered precedent.

It does not appear any of the parties or the courts on their own raised the ripeness issue at any stage of the *Amador* case. But the fact Defendants and the district court now rely on reasoning in *Amador* does not convert it into binding precedent controlling the MJOP. This is especially true since, as outlined below, much of the reasoning in that case does not apply to the issues raised in Plaintiffs' case or has been superseded by a subsequent interpretation by the DOI.

Also, Defendants' obvious desire that *Amador* be treated as precedent should be disregarded when this Court reviews the MJOP *de novo*. "[B]ecause issues of ripeness involve, at least in part, the existence of a live `Case or Controversy,' [this court should not] rely upon concessions of the parties and must determine whether the issues are ripe for decision in the `Case or Controversy' sense. Further, to the extent questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg. Rail*

Reorg. Act Cases, 419 U.S. 102, 138 (1974). (Emphasis added.) See also *Kremens v. Bartley*, 431 U.S. 119, 136 (1977).

For the forgoing reasons, this Court should disregard and give no deference to the district court's opinion that its Order and judgment were required by the advisory *Amador* decision. Instead, Plaintiffs request this Court conduct a *de novo* review of the MJOP based on the pleadings in this case as mandated by Rule 12(c). And, as outlined below, based on the allegations in Plaintiffs' Complaint, which must be accepted as true, it is clear Defendants' MJOP should be denied.

B. Plaintiffs state a valid claim challenging Defendant Chaudhuri's approval of the Ione Band's non-site specific Gaming Ordinance.

In May 2018, when this lawsuit was filed, nothing had changed. The land had not been taken into trust and the casino was only "proposed." But, although the Ione Band did not have trust land eligible for gaming under IGRA, Defendant Chaudhuri approved the Ione Band's gaming ordinance on March 6, 2018. This final agency decision by Chaudhuri prompted the filing of this lawsuit in May 2018. And this type of APA challenge was specifically allowed by Congress when it enacted IGRA. 25 USC § 2714. It is ripe for adjudication.

Consequently, in their First claim for relief, Plaintiffs challenged the unauthorized approval of the Ione Band's non-site specific gaming ordinance by Defendant Chaudhuri on March 6, 2018. Chaudhuri lacked the authority to approve the gaming ordinance because the Ione Band does not have Indian land

eligible for gaming as defined by IGRA. The material facts alleged in the Complaint, which support this claim and which must be accepted as true, include:

1. In 2004, Ione Indians asked the NIGC for a determination that the property they did not own would qualify as Indian land eligible for gaming under IGRA if it were later taken into trust for their benefit.
2. The Ione Indians' 2004 request to the NIGC for an Indian lands determination is still pending.
3. There has been no final determination by the NIGC that the subject property would be Indian land eligible for gaming if put in trust.
4. The subject property, at the time of the filing of the Plaintiffs' Complaint had not been take into trust.
5. The subject property, at the time of the filing of the Plaintiffs' Complaint was privately owned by non-Indians.
6. The Ione Band does not have a reservation eligible for gaming as defined by IGRA.
7. Defendants concede the ordinance, as proposed by the Ione Band and approved by Chaudhuri, was non-site specific.
8. The March 6, 2018 approval of the gaming ordinance was not timely published in the Federal Register as required by IGRA.

The administrative record Defendants offered in support Defendant Chaudhuri's approval of the gaming ordinance confirms most of these undeniable facts. In fact, the Ione Band's February 9, 2018 letter to Defendant Chaudhuri asking for approval of the gaming ordinance admits it is non-site specific. (ER 215-216.) But, perhaps more importantly, the letter included a copy of the Ione Band's Constitution dated August 10, 2002. (ER 217-230.) Although no Indian lands are identified in the Constitution, Article II, Section 1 of the Constitution defines the "Territory of the Tribe" to include:

> "a) all land now held or previously held or hereafter acquired by the Tribe; b) all land held in trust by the United States for the benefit of the Tribe; and c) upon establishment of a reservation for the Tribe, all land within the exterior boundary of such reservation, whether or not owned by the tribe, and notwithstanding the issuance of any patent in fee, right-of-way or easement." (Emphasis added.)

Thus, the Ione Band, in its own Constitution, admits it does not have a reservation. And with that admission, it is impossible for the Ione Band to have Indian lands eligible for gaming under IGRA. Indian lands is specifically and unambiguously defined in IGRA, in 25 U.S.C. § 2703(4), as follows:

> 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.

Thus, to qualify as Indian land eligible for gaming under IGRA, the subject property must be **both** "within the limits of any reservation" **and** it must be land held in trust or subject to restriction against alienation "over which an Indian tribe exercises governmental power." The Ione Band, at this stage, is not able to meet either prong of this definition. And it is unlikely they will do so anytime soon.

The Supreme Court in *Michigan v. Bay Mills Indian Community,* 572 U.S. 782 (2014) held the NIGC had no authority to allow or regulate Indian gambling "outside Indian lands." Thus, because the Ione Band did not have any Indian land eligible for gaming under the IGRA, Defendant Chaudhuri had no authority or jurisdiction to approve the Ione Band gaming ordinance. It is void as a matter of law and should be vacated by this Court. Furthermore because the Ione Band, by its own admission, does not yet have a reservation, judgement on the pleadings should be entered in Plaintiffs' favor on the First Claim for Relief.

This Court did not address whether the Ione Band has Indian land – as defined by Section 2703(4) - eligible for gaming under IGRA in *Amador*. In fact, Section 2703(4), the definition of "Indian lands," is not mentioned in *Amador*.

Furthermore, the implication by the district court that this Court in *Amador* found the Ione Band had Indian land eligible for gaming is not correct. Instead this Court, in the last part of the *Amador* decision, discussed the "grandfather provision" in the regulations applicable to the "restored lands of a restored tribe"

exception to the rule that gaming is not allowed on land acquired in trust after October 17, 1988. See *Amador*, 872 F.3d at 1028-1031. This Court agreed the grandfather provision **could** apply to the Ione Band. Thus the Court concluded that a 2006 opinion by an Associate Solicitor that the Ione Band was a "restored tribe with restored lands" **could** be adopted by the NIGC. But this "grandfathered" opinion was never adopted by the NIGC and the land was never taken into trust pursuant to the 2012 ROD before it expired on May 24, 2018.

The restored lands exception only applies "**when lands are taken into trust**." 25 USC § 2719(b)(1)(B)(iii). Here the lands were never take into trust and this Court's opinion about the grandfather regulations – even if correct - is another unimplemented advisory opinion. This is confirmed by the admission in Defendants' Answer conceding the NIGC has not issued an opinion that the property is Indian land" eligible for gaming under IGRA (CD 17 ¶ 68; ER 100).[4]

C. Plaintiffs state a valid claim challenging the ROD signed by Defendant Laverdure on the basis he had no authority to take land into trust.

In their Second claim for relief, Plaintiffs challenge the unauthorized approval of the 2012 ROD by Defendant Laverdure. Under the IRA, Congress gave authority to acquire land into trust exclusively to the Secretary of Interior and

[4] Also, the district court's finding that the First Claim was resolved in *Amador* is impossible on its face. Chaudhuri's illicit approval of the Ione Band's gaming ordinance occurred in 2018 a year **after** this Court decided *Amador* in 2017.

no other federal official or employee. Defendant Laverdure was not the Secretary of Interior and lacked the authority to acquire land in trust. And his attempt to do so usurped the authority of the Secretary of Interior in violation of the Appointments Clause of the U.S. Constitution. The material facts alleged in the complaint in support of this claim and which must be accepted as true, include:

1. Congress, in the IRA, gave the Secretary of Interior exclusive authority to acquire land in trust for Indians.
2. Defendant Laverdure was not the Secretary of Interior, nor the acting Secretary of Interior, when he signed and issued the ROD.
3. Defendant Laverdure was a federal civil service employee; he was not appointed by the President and was not confirmed by the Senate.
4. Kenneth Salazar was the Secretary of Interior and was still in office on May 24, 2012 when Laverdure issued the ROD.

Section 5 of the IRA (ER 63; Codified at 25 U.S.C. § 5108) unambiguously gave the Secretary of Interior, and only the Secretary of Interior, the authority to acquire "land for Indians." It provides in pertinent part:

> 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. (Emphasis added.)

The Secretary of Interior was obviously given this important and exclusive authority by Congress because he is a Cabinet level "Principal Officer" – and not just another civil service employee (aka "inferior Officer") of the government

The Appointments Clause of the United States Constitution provides:

> "[The President] 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."

US Const. Art. II, § 2, cl. 2.

"The Constitution, for purposes of appointment . . . divides all its officers into two classes." *United States* v. *Germaine,* 99 U. S. 508, 509 (1879). "Principal Officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Vallejo,* 424 U.S. 1, 132 (1972). A principal officer is an appointee who exercises "significant authority pursuant to the laws of the United States" or "perform[s] a significant governmental duty exercised pursuant to a public law." *Id.*

The Secretary of Interior is a "principal officer" of the United States which requires a Presidential appointment and a Senatorial confirmation. And when deciding whether to take land into trust, and out of State jurisdiction, the Secretary

is obviously exercising "significant authority pursuant to the laws of the United States." In fact, in our Federal system, it is hard to imagine a more important power granted to the Secretary of Interior.

Chief Justice Roberts, during the Supreme Court hearing in *Carcieri*, emphasized the magnitude of this important obligation:

> "[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it whole different jurisdictional status apart from State law and all - - wouldn't you normally regard these types of definitions in restrictive way to limit that power instead of saying whenever he wants to recognize it, then he gets the authority to say this is no longer under Rhode Island jurisdiction; it is now under my jurisdiction?" (SC Tr. at 36.)

This "extraordinary assertion of power" can only be exercised by the Secretary of Interior who has been appointed by the President and confirmed by the Senate. Civil service employee, and interim "acting" Assistant Secretary, Laverdure was not the Secretary and was clearly not appointed by the President or confirmed by the Senate as a principal official. Thus he lacked the "significant authority" necessary to acquire the property into trust for the benefit of Ione Indians. Only Secretary of Interior Kenneth Salazar, who was still in office in 2012, had that authority. It is clear beyond any doubt Laverdure lacked the authority to approve the 2012 ROD. It is therefore void and should be vacated.

The district court's conclusion that this issue was resolved in *Amador* is wrong. Although the County named Laverdure as a defendant, it did not challenge Laverdure's authority or lack thereof to take the land into trust based on the

Appointments Clause. So, unlike this case, Laverdure's authority was not in issue in *Amador* and, consequently, the Appointments Clause is not discussed anywhere in *Amador*. The district court indirectly referenced footnote 5 in *Amador* to support its conclusion. But that does not work either. Footnote 5 provides:

> Laverdure was serving as the Principal Deputy Assistant Secretary of Indian Affairs before Assistant Secretary Larry Echo Hawk's resignation. Laverdure was thus "the first assistant to the office" of the Assistant Secretary of Indian Affairs. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam). Accordingly, Laverdure assumed the duties of the Assistant Secretary *automatically* upon Echo Hawk's resignation. *Hooks v. Kitsap Tenant Support Servs. Inc.*, 816 F.3d 550, 557 (9th Cir. 2016). Those duties included taking land into trust under the IRA, a duty that had been delegated to the Assistant Secretary. Accordingly, Laverdure was empowered to take the Plymouth Parcels into trust. (*Amador*, 872 F.3d at 1019 n. 5.)

This footnote does not mention the Appointments Clause. Instead, it is supported with case citations connected to the Federal Vacancies Reform Act of 1998 (5 U.S.C. §§ 3345 et seq.; (FVRA).) which is not in issue in this case. Plaintiffs are not challenging the fact Laverdure was designated as Echohawk's interim successor under FVRA. Instead, Plaintiffs claim Laverdure's attempt to take land into trust for Ione Indians when he was temporarily acting as Assistant Secretary is a violation of the Appointment Clause and an attempt to usurp the exclusive authority delegated by Congress to the Secretary.

The last two sentences of the footnote, regarding the duties that were supposedly transferred from Echo Hawk to Laverdure was not supported by any

other citations or the facts.[5] Nor do they mention or discuss the Appointments Clause. Nor was this issue raised or litigated or necessary to the decision in *Amador*. So, these two sentences are at best dicta unrelated to the Appointments Clause issue presented by this case. A statement is dictum when it is "made during the course of delivering a judicial opinion, but . . . is unnecessary to the decision in the case and [is] therefore not precedential." *Best Life Assur. Co. v. Comm'r,* 281 F.3d 828,834 (9th Cir. 2002)). See also *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("Rhetorical flourishes" are dictum and not binding statements of the law.) This Court's discussion in footnote 5 in *Amador* did not resolve the allegations in Plaintiffs' Second Claim that Laverdure's attempt to take land into trust exceeded his authority in violation of the Appointments Clause.

D. Plaintiffs state a valid claim that the Ione Band was not a federally recognized tribe in 1934 and not eligible for an IRA trust transfer.

In their Third claim for relief, Plaintiffs challenge the proposed fee-to-trust transfer in the 2012 ROD on the basis that the Ione Band was not a federally recognized tribe in 1934. As stated above, Section 5 of the IRA of 1934 authorized the Secretary to acquire land in trust "for the purpose of providing land for

[5] There is no evidence in the record in this case or *Amador* to support the statement that Secretary Salazar delegated his exclusive authority to take land into trust to Assistant Secretary Echohawk much less the right to re-delegate it to Defendant Laverdure -who was not appointed by the President or confirmed by the Senate.

Indians." 25 U.S.C. §5108. Section 19 of the IRA includes three definitions of the "term 'Indian' as used in this Act." 25 U.S.C. §5129. The first definition applies here and includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." In 2009, the Supreme Court interpreted this definition and concluded the plain and unambiguous language of this provision of the IRA provides that, to qualify for the fee-to-trust benefits of the IRA, a tribe must have been both a federally recognized tribe and under federal jurisdiction in 1934. *Carcieri v. Salazar, supra*. The material facts alleged in the complaint in support of this claim and which must be accepted as true, include the following:

1. The Ione Band was not federally recognized tribe in 1934 and, therefore, it was not eligible for a fee-to-trust transfer of the under the IRA.
2. In 1933, the Department of Interior, Office of Indian Affairs, specifically determined the Ione Indians:

> "are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria, and none of them have allotments in their own right held in trust by the Government." (ER 69.)

3. The Ione Indians did not contest or challenge the 1933 determination by the DOI that they were not members of any recognized tribe.

4. Because the Ione Indians were "non-ward Indians," not members of any tribe in 1934, and not on a reservation, they were not invited by the Secretary to participate, and did not participate, in the IRA.
5. Also, the Ione Indians were not included on the DOI's 1934 list of federally recognized tribes covered by the IRA.

In his analysis in the 2012 ROD, Defendant Laverdure ignores the majority decision in *Carcieri* and dropped the requirement that a tribe must have been **both** "federally recognized" and "under federal jurisdiction" in 1934 to qualify for a fee-to-trust transfer under the IRA.[6] Instead, Laverdure splits the IRA phrase "recognized tribe now under federal jurisdiction" in two as though there were two separate tests with two separates meanings. Laverdure ignores the "recognized tribe" half of the test and implicitly concedes the Ione Band was not a recognized tribe in 1934. Laverdure then focuses on the "under federal jurisdiction" half of the test - which he claims is ambiguous and subject to his interpretation as the "acting" Assistant Secretary. Finally Laverdure creates a confusing two part test to "interpret" the phrase "under federal jurisdiction" and he contends his two part test was entitled to deference, citing *Chevron v. NRDC,* 467 U.S. 837 (1984).

[6] Instead of relying on the majority opinion in *Carcieri*, Laverdure conflates Justice Breyer's non-binding concurrence with Justice Souter's dissent to create his strained "two separate tests" interpretation.

This Court in *Amador* agreed with Defendant Laverdure that, to qualify for IRA fee-to-trust benefits, a tribe did not need to be federally recognized in 1934. Instead this Court held it is sufficient the tribe was federally "'recognized' at the time the decision is made to take land into trust." *Amador,* 872 F.3d at 1025. This Court also agreed with Laverdure's claim that the statute was ambiguous. But the Court reached this conclusion in *Amador* on its own accord and without giving Laverdure's interpretation of the statute any *Chevron* deference. *Id* at 1026.

The district court apparently found this aspect of the *Amador* decision to be binding precedent. But that is not correct. Instead, even if *Amador* was more than an advisory opinion, it was superseded by a subsequent construction by the DOI. As outlined above, on March 9, 2020, three years after the *Amador* decision, the DOI issued a Memorandum Opinion (M-37055) withdrawing the analysis in the Cowlitz ROD, adopted by Laverdure in the 2012 ROD. Specifically the DOI determined the analysis developed in the Cowlitz ROD, and which was endorsed by this Court in *Amador,* "is not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase 'recognized Indian tribe now under federal jurisdiction'." (ER 132-133.)

A Court is generally required to accept an agency's interpretation of an ambiguous statute which the agency has the authority to construe, even if it conflicts with prior circuit precedent. See *Silva v. Garland,* 993 F.3d 705, 717 (9th

Cir. 2021). "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable Telecom. Assn. v. Brand X Internet S*, 545 U.S. 967, 982 (2005). (Emphasis added.)

This Court, in its *Amador* decision, determined the IRA first definition of Indian was "ambiguous." (*Amador,* 872 F.3d at 1021.) But, instead of deferring to Laverdure's interpretation, it "reached the same conclusion as" Laverdure without *Chevron* deference. (*Id* at p. 1025) But now the DOI has issued M-37055, and despite the fact this Court had a different interpretation in *Amador* in 2017, this Court is required defer to the DOI's formal interpretation made in 2020 with M-37055. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." .*Nat'l Cable & Telecomm. Assn v. Brand X Internet Serves.* 545 U.S. 967, 980, (2005)

Furthermore, M-37055 was a major reversal of the prior position of the federal government which should have had a direct impact on this case. In fact, after it was brought to the district court's attention on April 29, 2020, it should have resolved this case in Plaintiffs' favor. (CD 40; ER 128-133.) Simply put, M-

37055 confirmed that Laverdure's reliance on the 2010 Cowlitz ROD was wrong as a matter of law. Thus the expired 2012 ROD is also void as a matter of law.

On June 25, 2020, two months after Plaintiffs brought M-37055 to the district court's attention, some of the federal Defendants filed the MJOP. (ER 134-146; CD 41.) And it is more than significant that Defendant DOI, who had just issued M-37055, did not join the MJOP. Plaintiffs brought these facts the district court's attention in their opposition to the MJOP. (CD 44; ER 147-166.) But the district court in its Order ignored the fact that the DOI (and other Defendants) did not join the MJOP. And, although Plaintiffs also brought M-37055 to the district court's attention, the court did not mention or discuss M-37055 in its Order.

E. Plaintiffs state a valid claim that Part 83 recognition is required before the Ione Band could be eligible to receive IRA and IGRA benefits.

In their Fourth claim for relief, Plaintiffs seek declaratory relief that recognition pursuant to 25 CFR Part 83 is a necessary **prerequisite** for a tribe to seek or receive the preferences or benefits pursuant to IRA or IGRA. Specifically, Plaintiffs seek a declaration that, to receive fee-to-trust benefits under the IRA or gambling benefits under IGRA, the Ione Indians must first petition for, and obtain, recognition under Part 83. 25 CFR 83.2. Plaintiffs also seek injunctive relief against the federal Defendants to preclude them from approving any IRA trust transfer benefits or IGRA casino benefits to the Ione Indians unless and until they

successfully complete the Part 83 process for recognition. The facts alleged in the complaint, which support this claim and must be accepted as true, include:

1. The Ione Band has not sought or obtained Part 83 recognition.
2. In 1992, the district court held in *Ione Band v. Burris/DOI* (Case No. CIV S-90-993) that the Ione Indians failed to exhaust their remedies under Part 83 and, unless and until they do so, they were not entitled to benefits and preferences given to federally recognized tribes. (ER 271-297).[7]
3. The decision in *Ione Band v. Burris/DOI* was confirmed by a final judgment in 1996 which was not appealed by the federal Defendants. (ER 84-120; CD 17 ¶ 133.) It is binding on Defendants here.
4. The position of the Defendants, accepted by the district court in *Ione Band v. Burris/DOI*, was the Ione Band had never been recognized and the only administrative way to obtain recognition was through the Part 83 process.
5. No group of Ione Indians since the 1992 decision and 1996 final judgment in *Ione Band v. Burris/DOI* has sought or obtained recognition under Part 83.
6. In 1994, Congress enacted the "Federally Recognized Indian Tribe List Act" which specifically identifies Part 83 as the only administrative way for a tribe to be recognized. (Pub. Law. 103-454 (Nov. 2 1994) 108 Stat. 4791,)

[7] Plaintiffs request this Court take judicial notice of the 1992 Order.

This Court has recently stressed the importance of Part 83 recognition as a prerequisite for any tribe to receive trust land or operate a casino:

> "For many tribes, federal recognition is of great importance because '[s]uch status is a prerequisite to the protection, services and benefits of the Federal government available to Indian tribes by virtue of their statues as tribes.'. . . (quoting 25 C.F.R. § 83.2 (1994)) . . . Moreover, only federally recognized tribes may operate gambling facilities under [IGRA]."

Timbisha Shoshone v. DOI, 824 F.3d 807, 809 (9th Cir. 2016) (emphasis added.)

The Supreme Court has held and confirmed that Part 83 recognition is required before a tribe may seek "the protection, services and benefits of the Federal government." *Carcieri* 555 U.S. at 385 (citing 25 CFR § 83.2). Likewise, this Court has held Part 83 recognition is required for a tribe to be entitled "to immunities and privileges to other federally acknowledged tribes by virtue of their government-to-government relationship with the United States." *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273-1274 (9th Cir. 2004) (quoting 25 CFR § 83.2).

The federal benefits a Part 83 recognized tribe may claim include "the right to operate gaming facilities under the Indian Gaming Regulatory Act." *California Valley Miwok v. United States,* 515 F.3d 1262, 1264 (DC Cir. 2008). IGRA "has no application to tribes that do not seek and attain formal federal recognition." *Passamaquoddy Tribe v. State of Maine,* 75 F.3d 784, 792 n.4 (1st Cir. 1996). See also *Pit River Home & Agric. Coop. Assn v. United States,* 30 F.3d 1088, 1094–96 (9th Cir. 1994) (an unrecognized Indian association is not a recognized tribe unless

it obtains recognition pursuant to Part 83 regulations) and *Frank's Landing Indian Cmty. v. NIGC,* 918 F.3d 610, 617-16 (9th Cir. 2019)(formal recognition pursuant to Part 83 is a prerequisite to obtaining gambling benefits under IGRA.) Thus, as a matter of law, and until the Ione Band obtains recognition under 25 CFR Part 83, it does not have the ability to seek or obtain benefits and preferences under IGRA.

Likewise, to seek or receive IRA benefits, a tribe must first obtain Part 83 recognition. *Mackinac Tribe v. Jewell,* 829 F.3d 754 (D.C. Cir. 2016). In *Mackinac*, a tribe without Part 83 recognition sued the Secretary of Interior for the right to organize under the IRA. The D.C. Circuit held the Mackinac tribe must first obtain Part 83 recognition before they can obtain the benefits of the IRA. See also *James v. US Dept. of HHS,* 824 F.2d 1132, 1136 -1138 (D.C. Cir. 1987) (An Indian group may apply for federal recognition pursuant to Part 83, "thereby, qualifying for federal protection, services and benefits. 25 C.F.R. § 83.2. A petition for Part 83 federal recognition is required as a prerequisite to acknowledgment.") Thus, without Part 83 recognition, the Ione Band is not eligible to apply for a trust transfer under IRA or a casino under IGRA.

The issue of whether Part 83 recognition is a prerequisite for a tribe to seek or obtain benefits under IRA or IGRA was not in issue or addressed by this Court in *Amador.* It is true this Court in *Amador* confirmed that the Ione Band has not obtained Part 83 recognition. But Amador County did not contest the approval of

the 2012 ROD on the basis that the Ione Band was not eligible to apply for fee-to-trust benefits because it has not yet obtained Part 83 recognition as a prerequisite. So this issue of whether Part 83 recognition was a prerequisite for IRA and IGRA benefits was not adjudicated or resolved in *Amador*.

The district court's misunderstanding of this issue is revealed by footnote 3 in the Order which provides: "Plaintiffs Claims Three and Four both address the Tribe's federally recognized status and thus are combined into one issue." (ER 5-13; CD 69 p. 5.) But these two Claims are not the same. Claim Three alleges the Ione Band was not a recognized tribe in 1934 and therefore was not eligible for fee-to-trust benefits under IRA. This Court in *Amador* agreed the Ione Band was not a recognized tribe in 1934 but did not need to have been recognized in 1934 to be entitled to a trust transfer under IRA. In contrast, Claim Four alleges that Part 83 recognition is a prerequisite for a tribe to apply for IRA and IGRA benefits. The Part 83 prerequisite issue is not addressed or decided in *Amador*.

The difference between these two issues is best evidenced by the Supreme Court's decision in *Carcieri*. In that case the Narragansett tribe had obtained Part 83 recognition in 1983 and was therefore eligible to apply for a fee-to-trust transfer under IRA. But the Supreme Court held they were not eligible to receive IRA benefits because they were not a federally recognized tribe in 1934. In sum, a tribe must have Part 83 recognition to apply for IRA benefits and must have been a

recognized tribe in 1934 to receive IRA fee-to-trust benefits. The Narragansett had Part 83 recognition but were not a recognized tribe in 1934. In contrast, the Ione Band has neither Part 83 recognition nor 1934 recognition. Thus they are not eligible to apply for, or receive, IRA fee-to-trust benefits.

F. Plaintiffs state valid claims against the three federal employees named in their personal capacities for violating Plaintiffs' constitutional rights.

1. Preliminary Statement.

Federal employees may be sued in their personal capacities for violating an individual's constitutional rights. See *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 389 (1971). If a federal employee is sued in his personal capacity, as opposed to his official capacity, the suit is not against the United States and sovereign immunity is not applicable. Id at 395.

Plaintiffs named three federal employees in their personal capacities as Defendants and has *Bivens* claims against each of them, including:

- **Jonadev Chaudhuri –** Mr. Chaudhuri was the Chairman of the NIGC when – without any jurisdiction or authority – he approved the Ione Band gaming ordinance on March 6, 2018 in violation of IGRA.
- **Donald Laverdure –** Mr. Laverdure was "acting" Assistant Secretary when – without any jurisdiction or authority – he approved the 2012 ROD in violation of the Appointments Clause of the Constitution.

- **Amy Dutschke –** Ms. Dutschke is the BIA Regional for the Pacific Region. She is also a member of the Ione Band. She has been abusing her office to benefit herself, her family and the Ione Band for years.

It is important to note at the outset that, although all three of these individuals answered Plaintiffs' Complaint (CD 17; ER 84-120), none joined the MJOP as Defendants in their personal capacities (CD 41-1; ER 134-146).

2. Plaintiffs stated a valid *Bivens* claim against the three individual Defendants for violation of their Equal Protection rights.

In their Fifth claim for relief, Plaintiffs alleged Defendants Chaudhuri. Laverdure and Dutschke abused their authority and violated Plaintiffs' Equal Protection rights. The material facts alleged in the complaint, which support this claim and which must be accepted as true, include:

1. The individual Plaintiffs in this case each have a Constitutional right to Equal Protection under the Fifth Amendment.

2. Defendant Chaudhuri violated Plaintiffs' Equal Protection rights and abused his authority as the NIGC Chairman by approving a gaming ordinance for a group of Indians which has no Indian land, and which has not obtained Part 83 recognition in violation of IGRA.

3. Defendant Laverdure violated Plaintiffs' Equal Protection rights and abused his authority as an "acting" Assistant Secretary by usurping the authority of

Secretary Salazar and trying to take land into trust for a group of Ione Indians which has not obtained Part 83 recognition and was not recognized in 1934.

4. Defendant Dutschke, a member of the Ione Band, violated Plaintiffs' Equal Protection rights and abused her position as the BIA Regional Director to benefit herself and her family, through years of unethical and illegal actions.

5. Each of these Defendants acted under the color of federal authority to approve a fee-to-trust transfer and facilitate the construction of a proposed casino by a group of Ione Indians which has not obtained Part 83 federal recognition and has no lands eligible for gaming under the IRA or IGRA.

6. Defendants attempt to give the fee-to-trust and benefits in the IRA and the Indian gambling/casino benefits in IGRA to a group of Ione Indians, which is not a Part 83 recognized tribe, is based on a racial classification in violation of the Fifth Amendment and Plaintiffs' Equal Protection rights.

7. Plaintiffs and other members of the Plymouth community were not given the same opportunities and benefits and preferences given to the Ione Indians by Defendants Chaudhuri, Laverdure and Dutschke.

"[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under strictest judicial scrutiny." *Adarand Const. Inc. v. Pena*, 515 U.S. 200, 220 (1995). And discrimination in

favor of a group of Ione Indians which has not obtained Part 83 recognition and which has no Indian land violates the Equal Protection rights of the Plaintiffs. *Morton v. Mancari*, 417 U.S. 535, 554 n. 24 (1974). A *Bivens* claim is the appropriate remedy for violation of the Equal Protection Clause of the Fifth Amendment of the Constitution. *Davis v. Passman*, 442 U.S. 228, 248-249 (1979).

3. Plaintiffs stated a valid *Bivens* claim against the three individual Defendants for violation of their Constitutional Federalism rights.

In their Sixth claim for relief, Plaintiffs alleged, inter alia, Defendants Chaudhuri. Laverdure and Dutschke abused their authority and violated Plaintiffs' Constitutional Federalism protection rights. The material facts alleged in the complaint, which support this claim and which must be accepted as true, include:

1. The individual Plaintiffs in this case have a right, under Constitutional Federalism embodied in the Tenth Amendment, to be free from abuse of power and illegal acts by federal employees
2. Defendant Chaudhuri violated Plaintiffs' Constitutional Federalism rights and abused his authority as the NIGC Chairman by approving a gaming ordinance for a group of Indians which has no Indian land eligible for gaming as defined by IGRA and which has not obtained Part 83 recognition.
3. Defendant Laverdure violated Plaintiffs' Constitutional Federalism rights and abused his authority as an acting Assistant Secretary by usurping the exclusive authority of then Secretary Salazar and taking action to take land

into trust for a group of Ione Indians which was not recognized in 1934 and has not obtained Part 83 recognition.

4. Defendant Dutschke, a member of the Ione Band, violated Plaintiffs' Constitutional Federalism rights and abused her position as the BIA Regional Director to benefit the Ione Band, herself and her family through corrupt, unethical and illegal actions.

5. Each of these Defendants acted under the color of governmental authority to approve a fee-to-trust transfer and facilitate the construction of a casino by an Indian group which was not recognized in 1934, has not obtained Part 83 recognition and has no lands eligible for gaming under IGRA.

6. Defendants attempt to give the fee-to-trust benefits in IRA and casino benefits in IGRA to a group of Ione Indians, and to exempt those Ione Indians from the application of State and local law, which is not a Part 83 recognized tribe, is an abuse of their authority and a violation of the federalism protections afforded to the Plaintiffs and all citizens.

7. Defendants lack the authority to unilaterally declare the Ione Band, which is not a Part 83 recognized tribe, and was not recognized in 1934, and has no Indian land, is entitled to all the benefits of the IRA and IGRA.

8. The approval of the ROD by Laverdure and the approval of gaming ordinance by Chaudhuri for a group of Indians created by the BIA Pacific

Regional Office, with the assistance of Defendant Dutschke, and which has no Indian land and is not recognized under Part 83 and was not recognized in 1934, violates the principle of federalism designed to protect Plaintiffs and all citizens from such governmental abuses by federal employees.

9. Defendants Chaudhuri, Laverdure and Dutschke have a great deal of unchecked bureaucratic power which they were willing to abuse to benefit the Ione Band to the detriment of Plaintiffs and others in the community.

Federalism preserves the "integrity, dignity, and residual sovereignty" of the States through the allocation and balance of power between the States and federal government. See *Bond v. United States* 564 U.S. at 222. But this federal structure and "[t]he Constitution does not protect the sovereignty of the States or state governments . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992) (emphasis added). And "[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State." *Bond v. United States* 564 U.S. at 220.

"Perhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The abuse of power in this case was exercised by Defendants Chaudhuri, Laverdure and

Dutschke who ignored the federal law and regulations, including IRA and IGRA, to give benefits to a group of Ione Indians without Indian land or Part 83 recognition and which was not recognized in 1934.

As recently noted by Chief Justice Roberts: "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Arlington v. FCC*, 569 U.S. 290, 315 (Roberts dissent) (2013). As outlined above, the danger caused by Defendants' abuse of its "growing power" is evident in this case. The illicit actions by Defendants Chaudhuri, Laverdure and Dutschke to benefit the Ione Band were a clear abuse of power. In addition to invalidating and voiding the past approvals made by these Defendants, a *Bivens* claim against these federal employees in their personal capacities is an appropriate remedy to prevent these abuses in the future.

4. The district court's grant of the MJOP on Plaintiffs' Fifth and Sixth claims is not supported by the facts or law and should be reversed.

The district court acknowledged the Fifth and Sixth claims were not addressed or decided by this Court in *Amador.* On the other hand the district court did not address the fact that the three Defendants named in their personal capacities in this lawsuit, and the focus of the Constitutional claims, did not join the MJOP. Thus the allegations against those three Defendants remain unresolved.

Furthermore, instead of evaluating the allegations in the Complaint listed above, as required by FRCP Rule 12(c), the district court granted the MJOP with

respect to the Fifth and Sixth claims based on two contradictory reasons. But neither of the reasons given by the district court merit a judgment in favor of either the moving Defendants or the non-moving Defendants.

a. Plaintiffs did not abandon their Fifth and Sixth Claims; they were reaffirmed and reasserted in Plaintiffs opposition to the MJOP.

First, the district court found the Plaintiffs did not respond to the arguments made by Defendants with respect to the Fifth and Sixth claims "in any meaningful way" and, consequently, the court concluded Plaintiffs "abandoned" those claims. This conclusion is verifiably incorrect.

According to the district court, Defendants made only one argument in opposition to the Fifth claim. They argued, because the Ione Band was a recognized tribe, it was not possible that providing them with services could offend Equal Protection principles. With respect to the Sixth claim, as described by the district court, Defendants argued the allegations in the Sixth claim – which must be accepted as true - were "inaccurate." (ER 5-13; CD 69 p. 7)

Contrary to the statement by the district court Plaintiffs opposed both of these arguments in their Complaint (CD 1; ER 14-83), opposition to the MJOP (CD 44; 147-166) and motion to file a sur-reply (CD 49-1; ER 178-188). In fact, Defendants in their Reply acknowledged Plaintiffs' opposition reasserted the allegation in the Complaint with respect to the Fifth and Sixth claims. Their only odd claim was, although Plaintiffs' Equal Protection and Federalism claims are

briefed in the first part of Plaintiffs' Opposition, they are "not briefed in the body of Plaintiffs' Opposition, hence are waived." (CD 45 p.2, n.2; ER 167-177.) This argument is nonsensical. Plaintiffs Opposition is one brief. Plaintiffs could not waive an argument by putting it in the brief in one location or the other. Also, Plaintiffs Opposition is in addition to the allegations in the Complaint which must be taken as true for the purpose of Defendants' MJOP.

Defendants "location-in-the-brief" argument was an attempt to distract the district court from the fact they did not reply to the Equal Protection and Federalism arguments raised in Plaintiffs' Opposition. Specifically Plaintiffs argued it violates Equal Protection to give Indians, who do not have Part 83 federal recognition, IRA and IGRA benefits. (CD 44 at p. 8; ER 147-166.) See also *Morton v. Mancari,* 417 U.S. at 554 n. 24 and *Adrand v. Pena,* 515 U.S. 200.

With respect to the Federalism claim, Plaintiffs argued the illegal actions by Defendants Chaudhuri, Laverdure, and Dutschke, violated Plaintiffs' Constitutional right to protection from abusive government. Plaintiffs alleged in the illegal abuse was committed by these individual Defendants who ignored the law to give IRA and IGRA benefits to the Ione Band which has not obtained Part 83 recognition, was not recognized in 1934 and has no Indian lands. Defendants did not discuss, or try to defend, the unconstitutional actions of these Defendants in

their Reply. This may explain why Defendants Chaudhuri, Laverdure and Dutchke did not join the MJOP. Their illegal actions are not defensible.

When evaluating a motion for judgment on the pleadings and whether an argument was waived, a district court must take into consideration both the complaint and the brief in opposition. See *Pacific West Group v. Real Time Solutions,* 321 F. App'x 566 (9th Cir. 2008). Here the district court did not discuss either the complaint or the opposition other than to say, in its view, Plaintiffs arguments in the opposition were not "meaningful." The court's claim that Plaintiffs waived their constitutional claims is not supported by the facts or the pleadings filed in this case. See *Pit River Tribe v. BLM,* 793 F.3d at 1158(the district court's conclusion the Pit River Tribe "abandoned" their claims was in error and, consequently, the grant of a judgement on the pleadings in favor of the BLM was reversed.)

b. The fact that the district court found Defendants' arguments "persuasive" is not relevant at this stage of the proceedings.

The district court also said, despite Plaintiffs' opposition, "the Court finds the Defendants' arguments persuasive." (Order p. 8.) But whether or not the district court is persuaded by Defendants arguments is not relevant at the judgement on the pleadings stage of the litigation. Instead the issue is whether,

taking the allegations in the complaint as true, Plaintiffs have stated a valid claim showing they are entitled to relief.

A judgment on the pleadings is not proper where the complaint alleges facts which, if proved, would permit recovery. *General Conference v. Seventh-Day Adventist,* 882 F.2d 228, 230 (9th Cir. 1989). It is immaterial whether the district court believes the plaintiff will succeed at trial. *Wager v. Pro,* 575 F.2d 882, 884 (D.C. Cir. 1976.) The "court's task is to assess the legal feasibility of the complaint; it is not to assess the weight of the evidence that might be offered on either side." *Lynch v. City of New York,* 952 F.3d 67, 75 (2nd Cir. 2020).

Furthermore, the reasons offered by the district court explaining why it found Defendants' arguments "persuasive" reveal the court misunderstood Plaintiffs' allegations in the Fifth and Sixth claims. The district court found Congress had plenary authority to enact IRA and IGRA and, consequently, those statutes could not possibly violate Equal Protection or Federalism. Whether or not that conclusion is correct, it is not applicable here. Plaintiffs are not challenging the constitutionality of the IRA or IGRA. Instead, Plaintiffs are challenging the unconstitutional abuse of those statutes by Chaudhuri, Laverdure and Dutschke.

c. Contrary to statements made by the district court, an amendment is not needed to "cure" the allegations in the Complaint.

The district court determined it would not grant leave to amend because, in its view, "the pleadings cannot be cured by the allegation of other facts." (CD 69 n

9; ER 5-13.) But that determination misses the point. The issue is not whether the factual allegations in the Complaint can be "cured." Instead, the issue is whether, taking the facts alleged in the complaint as true, Plaintiffs have stated a claim for relief. "In passing upon the motion, the court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Diem v. City and County of San Francisco*, 686 F. Supp. 806, 808 (N.D. Cal. 1988).

Here the district court did not come close to viewing the facts alleged in the Fifth and Sixth claims for relief in the light most favorable to the Plaintiffs. In fact the district court did not even discuss the factual allegations in the Fifth and Sixth claims of Plaintiffs' Complaint, much less find they did not state a cause of action. Nor did the district court come close to assuming the factual allegations are true. Instead, the court found Defendants' arguments to be more "persuasive" than the factual allegations in the Plaintiffs Complaint. But, as stated above, it is immaterial whether the district court believes the plaintiff will succeed at trial or the defendant stated the more persuasive argument. *Wager v. Pro,* 575 F.2d at 884. The issue is whether the Plaintiffs Complaint alleges facts which, if proved, would permit recovery. *Id.* It is not relevant the district court thinks the Plaintiffs have a weak or a strong case. *Lynch v. City of New York,* 952 F.3d at 75.

Finally it is worth noting the cases cited by the district court do not support its decision not to give Plaintiffs leave to amend as appropriate; just the opposite is the case. In *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) this Court reversed the dismissal of plaintiffs' claim "[b]ecause the district court failed to grant Lopez leave to amend." In *Shull v. Ocwen Loan Servicing LLC*, 2014 WL 1404877 at *5 (S.D. Cal. 2014) the court held the "claims will be dismissed without prejudice and the Plaintiff will be given leave to amend." In *Women's Recovery Center LLC. Anthem Blue Cross,* 2022 WL 757315, at *15 (2022) the district court held "[a]ccordingly, the claim . . . is dismissed with leave to amend."

FRCP Rule 15(a) provides the court shall grant leave to amend freely "when justice so requires." And the Supreme Court has stated "this mandate is to be heeded." *Forman v. Davis.* 371 U.S.178, 182 (1962). The factual allegations in Plaintiffs' Complaint, if accepted as true, are more than sufficient to support all six claims. But, if this Court upon its *de novo* review of the MJOP finds any of the allegations in the Complaint inadequate in any way, then Plaintiffs respectfully request leave to amend the Complaint to supplement or clarify such allegations.[8]

[8] The only case cited by the district court that did not appear to grant leave to amend was *Yarkin v. Starbucks Corporation,* 2008 WL 895688 (ND Cal. 2008). But that case involved a summary judgment motion not a motion for judgment on the pleadings. A different standard of review was applied.

CONCLUSION

For the reasons stated above, the district court's May 11, 2022 Order and judgment should be reversed and vacated.

Dated: September 20, 2022.

Respectfully submitted,

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

STATEMENT OF RELATED CASES

The undersigned attorney for the Plaintiffs, pursuant to Circuit Rule 28-2.6, declares that he is unaware of any related cases currently pending in this Court.

Dated: September 22, 2022.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on September 22, 2022.

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

Dated: September 22, 2022.

Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure Rule 32 and Ninth Circuit Rule 32-1. This brief responds to both answering briefs and, consequently, per Circuit Rule 32-1(a) is limited to a maximum of 14,000 words. This brief uses a proportional typeface and a 14-point font and contains 13,966 words (excluding the signature block) and 13,981 (including the signature block).

Dated: September 22, 2022.

Respectfully submitted,

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

ADDENDUM

APPOINTMENTS CLAUSE OF THE CONSTITUTION

> "[The President] 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."

US Const. Art. II, § 2, cl. 2.

INDIAN GAMING REGULATORY ACT

DEFINITION OF INDIAN LANDS

25 U.S.C. § 2703(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.

INDIAN REORGANIZTION ACT OF 1934

SECRETARY OF INTERIOR'S AUTHROTITY TO ACQUIRE LAND

25 U.S.C. § 5108

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. § 5108

INDIAN REORGANIZTION ACT OF 1934

DEFINITION OF "INDIAN"

25 U.S.C. § 5129

> 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.

25 U.S.C. § 5129