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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

UNITED STATES CODES

INTRODUCTION

This Reply Brief is filed in response to the Answering Brief For the Federal Defendants (FAB) to Appellants' Opening Brief (AOB).[1]

Before this Court is Defendants' Motion for Judgement on the Pleadings (MJOP) which should be reviewed by this Court *de novo.* (Excerpts of the Record (ER) 134-146). The scope of this Court's *de novo* review is to determine whether, assuming the allegations stated in Plaintiffs' Complaint are true, Plaintiffs would be entitled to relief. This Court is not being asked to decide the merits of Plaintiffs' lawsuit. "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." FRCP 12 does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations. *Bell Atl Corp v. Twombly,* 550 U.S.544, 556 (2007).

FRCP 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," to give the defendant fair notice of what the claim is and the grounds upon which it rests. The Complaint does just that. (ER 14-83.) And all Defendants answered the Complaint. (ER 84-120.) So the MJOP did not challenge its allegations as required by FRCP 12(c). Instead, the MJOP is based on *Amador* which is inappropriate. *Chambers v. Nasco,* 501 U.S. 32, 66 (1991).

[1] Appellee, Ione Band, did not file an answering brief or advise the Court that it would not file an answering brief and could be subject to sanctions. FRAP 31-2.3.

ARGUMENT

A. The decision in *Amador* is an advisory opinion regarding future events that never happened and were not ripe for adjudication. This Court lacked jurisdiction to issue that decision and it is not circuit precedent.

The MJOP is not based on the pleadings. Instead it is based solely on the Court's decision in *Amador v. U.S. DOI*, 872 F.3d 1012 (9th Cir. 2017). But the *Amador* decision did not decide an actual case or controversy. This Court in its first paragraph of the *Amador* decision made it clear that its decision is based on the speculation that the subject property would eventually be taken into trust pursuant to the 2012 ROD. But that never happened. The 2012 ROD has never been implemented and the time for the Ione Band compel implementation expired in 2018. The *Amador* decision is an advisory decision at best. It is not binding precedent, much less circuit precedent that could govern this appeal or the MJOP.

Defendants do not seriously deny that this Court's *Amador* decision is an advisory opinion based on hypothetical facts that never emerged in reality. This is because they know that the subject property was never taken into trust **pursuant to**

the 2012 ROD. Instead, Defendants argue that Plaintiffs cannot challenge the status of *Amador* as circuit precedent for three reasons, none of which have merit. [2]

First, Defendants claim that Plaintiffs' argument that *Amador* is an advisory opinion is a "collateral attack" on the *Amador* decision. (FAB 2.) That is not true. Nor is it possible because Plaintiffs were not parties in the *Amador* case and never had an opportunity to raise this jurisdictional claim in the *Amador* case. See *U.S. v. $31,697.59 Cash,* 665 F.2d 903, 906 (9th Cir. 1982) A party must have had an "opportunity to litigate the question of subject-matter jurisdiction" before a "collateral attack" defense can be raised. *Insurance Corp. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n.9 (1982)*; U.S. v. Van Cauwenberghe,* 934 F.2d 1048, 1059-60 (9th Cir. 1991). This not a collateral attack on *Amador*. It is a challenge to an affirmative defense raised by Defendants in this case.

Second, Defendants claim that Plaintiffs tried to "plead around" their affirmative defenses based on the *Amador* decision. (FAB 2.) Again this is not true. Nor was it possible. Apparently, Defendants are concerned that Plaintiffs in their Complaint "pled around" and did not mention the *Amador* decision. Plaintiffs did not anticipate, or try to "plead around," Defendants' bogus affirmative defenses

[2] Defendants argue some parcels were conveyed in trust in 2020 pursuant to the 2012 ROD. (FAB 20) That is not correct. Defendants offer no evidence to support that claim. Instead they rely on their own conclusory statements in the MJOP.

of res judicata and collateral estoppel based on the *Amador* decision. This is not possible. Nor were Plaintiffs required to anticipate and "plead around" such affirmative defenses. *Jones v. Bock*, 549 U.S. 199, 216 (2007). In fact, when Plaintiffs drafted their Complaint in May 2018, they were not aware of any affirmative defense that Defendants might raise in their answer – filed three months after Plaintiffs' Complaint. Obviously, Plaintiffs did not "plead around" affirmative defenses that did not exist in May 2018. [3]

Third, Defendants claim that the district court's dismissal of the Seventh Claim, at the request of Defendants on the basis of ripeness, is not relevant to this Court's review of *Amador* because the Seventh Claim was not an APA claim. This is a nonsense argument. The same ripeness rules asserted by Defendants, and applied by the district court to dismiss the Seventh Claim, apply with equal force to this Court's APA based decision in *Amador*. See *Municipality of Anchorage v. U.S.*, 980 F.2d 1320, 1322 (9th Cir. 1992). Defendants in this very case successfully argued that Plaintiffs' Seventh Claim was not ripe for adjudication because the proposed casino was not constructed and the subject property was not in trust. *NCIP v. NIGC*, 2:18-cv-01398 (CD 15-1 at 6-7.) This is the very same

[3] Also, Defendants' assertion of these affirmative defenses in an MJOP was not appropriate. Affirmative defenses may not be raised on a motion to dismiss. *U.S. Commodity Futures v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019).

argument that Plaintiffs' make here with respect to the *Amador* case. And, as outlined in the AOB 21-25, this state of affairs was confirmed by the first paragraph of *Amador*; this Court acknowledged at the very beginning of *Amador* observed that the casino was not constructed and the land was not taken into trust. *Amador*, 872 F.3d at 1012. And that is the same situation today. The land is not in trust and the casino has not been constructed.[4] Furthermore, the 2012 ROD has expired. *Amador* is an advisory opinion that was not ripe for adjudication and, in any event, did not decide any claim in Plaintiffs' 2018 Complaint.

"[R]ipeness is 'peculiarly a question of timing' designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Com'n,* 220 F.3d 1134, 1138 (9th Cir. 1999) (citations omitted). This case is a classic example of that risk. For the last eleven years, the district court, this Court, and Plaintiffs have been engaged in many "abstract disagreements" with Defendants, including the random, nonsensical arguments raised in Defendants' answering brief. This Court's "role is neither to issue advisory opinions nor to declare rights in hypothetical

[4] Defendants' notice of the 2012 ROD did not claim that the property was taken into trust on May 30, 2012. (77 F.R. 31871). Instead, the FR notice notified the public that judicial review must be brought "**before transfer of title to the property occurs**." The property was never transferred pursuant to the 2012 ROD

cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Id.* This Court did not follow this admonition when it decided *Amador* – an obvious hypothetical case. As a result, the *Amador* decision is an advisory opinion; it is not "circuit precedent."[5]

B. By failing to oppose Plaintiffs' argument that the Ione Band does not have a "reservation," Defendants waived and forfeited any claim that the Ione Band has Indian Land eligible for gaming as defined by IGRA.

Defendants, in their Answering Brief, fail to address –much less oppose – the fact that the Ione Band does not have a "reservation" which is required for Indian land as defined by IGRA (25 U.S.C. 2703 (4)). This is the central and dipositive issue in this appeal as presented by Plaintiff's First Claim For Relief. Instead, Defendants concede, then ignore, the undeniable fact that the Ione Band does not have a "reservation," much less trust land "within the limits of any reservation," therefore could not have "Indian land" eligible for gaming as defined by the Indian Gaming Regulatory Act (IGRA). (25 U.S.C. 2703(4); AOB ad. c.) In fact, as outlined in AOB (p. 27), the Ione Band admit, in their Constitution, that they do not have a "reservation." This admission, coupled with Defendants' waiver and forfeiture of this issue, should be enough to resolve this case in favor of

[5] And, as discussed below, Defendants concede that the Amador case is **not** "circuit precedent" with respect to Plaintiffs' Third Claim for Relief based on IRA.

Plaintiffs. The Ione Band does not have a reservation and, therefore, could not have Indian land and, therefore, are not eligible for an Indian casino under IGRA.

The existence of Indian land and a reservation is not only a prerequisite for the approval of an Indian casino, it is also a jurisdictional requirement for the National India Gaming Commission (NIGC) to review and approve gaming ordinances. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (IGRA creates a framework for regulating gaming activity on Indian lands. See 2702(3)) The Supreme Court held that: "Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming **on Indian lands, and nowhere else.**" *Id.* (emphasis added.)

So that there would be no misunderstanding regarding the definition of Indian Lands for IGRA purposes, the Supreme Court also confirmed that:

> The Act [IGRA] defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the U.S. for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." §2703(4).

Mich. v. Bay Mills, 134 S. Ct. 2024, 2029 n.1 (2014) (emphasis added).

Thus having land "within the limits of any reservation" is first requirement for having "Indian land" eligible for gaming under IGRA. The Ione Band, in its Constitution, concedes that they do not have a reservation. And by failing to

address this issue in their answering brief, they forfeited any right to assert the contrary here. See *U.S. v. Streich*, 560 F.3d 926, 930 n.1 (9th Cir. 2009). "Failure to respond meaningfully in an answering brief to an appellee's argument waives any point to the contrary." *LN Mgmt. v. JPMorgan*, 957 F.3d 943, 950 (9th Cir. 2020) "Generally, an appellee waives any argument it fails to raise in its answering brief." *U.S. v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015).

C. The 2017 *Amador* decision did not, and could not, decide Plaintiffs' challenge of the NIGC's 2018 approval of the gaming ordinance. The gaming ordinance did not exist in 2017 when *Amador* was decided.

The *Amador* decision did not, and could not, decide Plaintiffs' first claim for relief. The first claim challenged the NIGC 2018 approval of a gaming ordinance for the Ione Band on the basis that NIGC did not have jurisdiction to approve that ordinance. Furthermore, this approval was apparently intended to be secret or, at least, below the public radar. It was first "announced" in 2018 in an online publication with limited circulation. The approval itself was not officially posted in the Federal Register until two years later in 2020. Thus, the challenged gaming ordinance was quietly approved a year after *Amador* and published in the federal register three years after *Amador*. It clearly did not exist when *Amador* was decided in 2017. Defendants claim that Plaintiffs' first claim for relief was decided by *Amador* is obviously and patently frivolous. See FRCP 11(b).

Furthermore, as outlined above, Defendants have conceded and admitted the central premise of Plaintiffs' first claim for relief, that the Ione Band does not have a "reservation" and, therefore, they did not and could not have Indian lands as defined by IGRA. 25 U.S. 2704(3). That admission should end Defendants' claims that NIGC had jurisdiction to approve the gaming ordinance and that the Ione Band has Indian land as defined by IGRA. But, although they admitted and ignored the "reservation" issue. Defendants raise other points which need to be addressed.

First, Defendants try recast Plaintiffs' 2018 case by reviving a 2012 complaint in an entirely different case that was dismissed on jurisdictional grounds and – at this point – is a "nullity" and should not be cited for any purpose. *NCIP/CERA v. Jewell*, 698 Fed. Appx. 531 (9th Cir. 2017.) (FAB 1-2; see also FAB 13, 14, 16, 35, and 39-42.) Specifically, Defendants claim the dismissed 2012 lawsuit is relevant to this appeal because the Appellants supposedly "reprised its challenges in to the 2012 ROD, arguing that *Amador* does not control its new [2018] suit." (FAB 2.) This statement is simply not true. It is Defendants, not the Plaintiffs, who are trying to "reprise" the 2012 lawsuit as a "strawman" that they apparently think is easier to defend. Also it is the Defendants who asked that the prior case be dismissed based on their contention that NCIP did not have standing. This Court granted Defendants request and dismissed the prior case based on the

lack of standing and subject matter jurisdiction. Defendants should be estopped from trying to revive and challenge the merits of the 2012 case here.

Also the 2018 case involves different parties and different claims than the 2012 case. In fact, even Defendants had to admit that *Amador* does not bar Plaintiffs' claims as a matter of res judicata. (FAB 35.) Furthermore, the 2012 lawsuit was dismissed, in a separate Ninth Circuit decision, for lack of subject matter jurisdiction. *NCIP/CERA v. Jewell*, 698 Fed. Appx. 531 (9th Cir. 2017). Thus, all of this courts' decisions, orders and rulings in that earlier case, were vacated and are "nullities." *Orff v. U.S.*, 358 F.3d 1137, 1149 (9th Cir. 2004). That case no longer exists in a legal sense. It was not appropriate for Defendants to cite *NCIP/CERA v. Jewell*, a nullity, in their answering brief, much less argue the merits of that non-existent case in this appeal. Plaintiffs object and request that the Court disregard those references. (See FAB 1-2, 13, 14, 16, 35, and 39-42.)

Defendants raise two additional meritless arguments in this regard. First, Defendants claim the NIGC is not required to make an "Indian lands determination when approving a 'non-site-specific' gaming ordinance." (FAB 30.) But Plaintiffs are not asking the Court to order the NIGC to make an Indian lands determination. Instead, Plaintiffs request a declaration that the NIGC lacked jurisdiction to approve the gaming ordinance because the Ione Band does not have a reservation or Indian land as defined by IGRA. 25 U.S.C. 2703(4)

Second, Defendants' reliance on this Court's decision in *North County Community Alliance v. Salazar*, 573 F.3d 738 (9th Cir. 2009) is misplaced for several reasons. The NIGC's jurisdiction was not in issue in that case; the tribe had a reservation and no party challenged the NIGC's jurisdiction. Also, this Court specifically held that the Indian lands question was not in issue there either. *Id.* p. 743. Instead, the Court held that question before them case was whether the NIGC had to prepare an "Indian lands determination" before approving a gaming ordinance. The opposite is true in case. Here, Plaintiffs are not seeking an "Indian lands determination" from the NIGC; Plaintiffs challenge NIGC's jurisdiction because the Ione Band does not have Indian land as defined in 25 U.S.C. 2703(4).

Finally, Defendants argue that the NIGC had authority to approve the Ione Band's gaming ordinance on an "anticipatory basis." (FAB 31.) There is no authority in administrative law or elsewhere for "anticipatory approvals" by the NIGC. Nor have Defendants cited any such authority. More importantly, nothing in IGRA – NIGC's only source of authority - allows such anticipatory approvals. An agency "has no power to act...unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The NIGC, therefore, cannot approve a gaming ordinance unless it has jurisdiction over a specific site. *Citizens Against Casino Gambling v. Kempthorne*, 471 F.Supp.2d 295 (W.D.N.Y. 2007) "Stated simply, the NIGC has no statutory authority to empower a regime

under which tribes could build casinos at any location, whether or not on Indian lands." See *N Coast Comm. Alliance*, 573 F.3d at 751.

D. Defendant Laverdure was not the Secretary of Interior or a Principal Officer of the United States, as defined by the Appointments Clause. He did not have delegated authority to approve the 2012 ROD.

As alleged in Plaintiffs' complaint, and admitted by Defendants in their answer, Defendant Laverdure was not the Secretary of Interior or the acting Secretary of Interior in 2012. He was not appointed by the President and not confirmed by the Senate under the Appointments Clause of the Constitution. U.S. Const. Art. II, § 2, cl. 2. (AOB 17-22.) He was not a Principal Officer of the U.S. and he had no authority to take land into trust pursuant to the IRA. 25 U.S.C. 465; *Buckley v. Vallejo,* 424 U.S. 1, 132 (1972). This is especially true here where, although Echohawk had resigned, Interior Secretary Jewell had not resigned and remained responsible for approving all fee-to-trust transfers in 2012.

Congress in Section 5 of the IRA (codified at 25 U.S.C. 5108) gave the "Secretary of Interior," and only the "Secretary of Interior," the authority to acquire "land for Indians." To get around this exclusive authority, Defendants in their answering brief try to rewrite the statute to exclude the term "Secretary of" before the word "Interior." Instead giving exclusive authority to the Secretary, Defendants – citing section 5108 - argue that "[t]he IRA gives **Interior** authority to

take land into trust for Indians and Indian tribes." (FAB 11.) This is incorrect and a misrepresentation of the plain language of IRA.

Defendants' substitution of the word "Interior" for the term "Secretary of Interior" was not a mistake. This misrepresentation is repeated throughout Defendants' answering brief. It is obviously designed to usurp and dilute the Secretary's exclusive authority and to create the misimpression that any employee in "Interior" has authority to acquire land for Indians and tribes. This not true and Defendants' attempt to mislead the Court should be rejected.

Defendants concede that this Court did not decide Appointments Clause or the related delegation issue in the *Amador* case. (FAB 41.) Instead, Defendants argue that, since this issue was raised in the dismissed and nullified 2012 case, the panel in *Amador* must have known about this issue. And, based on this assumption, Defendants apparently claim it was implicitly decided by this Court in *Amador*. This is pure speculation on Defendants' part. It has no basis in reality. Defendants also claim that this Court was not precluded from deciding this issue in *Amador*. This may be true, but the fact is that this Court did not decide the delegation issue in *Amador*. Plaintiffs are entitled to rely on what the Court actually said and did in *Amador*. And Defendants concede the Appointments Clause was not in issue or even mentioned in that case. (FAB 42.) Thus *Amador* cannot be a basis for Defendants' MJOP on Plaintiffs' Appointments Clause claim.

Also, because of their total reliance on the *Amador*, Defendants ignored the actual allegations in the complaint. For example, paragraph 67 (ER 35) alleged that on September 3, 2004, the DOI adopted Chapter 3 Part 302 of the Departmental Manual. Section 3.2 provides that **Solicitor of the DOI,** when directed by the Secretary, shall perform the duties of the Assistant Secretary in the event of the "death, resignation, absence or sickness" of the Assistant Secretary. 302 DM 3.2 did not provide that a deputy to the Assistant Secretary can perform the duties of the Assistant Secretary in the event of the resignation of the Assistant Secretary. Nor did it give the Assistant Secretary the authority to designate a DOI employee as his successor upon resignation. The Secretary has that responsibility.

Section 3.2 is attached to Complaint (ER 75). Although it was not discussed by Defendants in either the MJOP or the FAB, at this point, the allegations in Paragraph 67 must be assumed to be true. In fact, these allegations are based on regulatory documents prepared by the DOI. Section 3.2 should resolve the delegation issue in Plaintiffs' favor. It provides in part that **the Solicitor of the Department of Interior** (not an acting Assistant Secretary), when directed by the Secretary shall, **in the event of resignation of an Assistant Secretary**, perform the duties of the Assistant Secretary. Also, this rule of succession in Section 3.2 is consistent with the Appointments Clause. The Solicitor is a Principal Officer of the United States - appointed by the President and confirmed by the Senate.

Defendants claim that Plaintiffs' "concede" that "Laverdure was duly empowered, pursuant to the FVRA [Federal Vacancy Reform Act; 33 U.S.C. 3345-3349], to act on an interim basis as the Assistant Secretary." (FAB 42.) This is not true. Instead Plaintiffs merely noted that FVRA "is not in issue in this case." (AOB 33.) Furthermore, even if it were in issue, FVRA does not help Defendants. Consistent with the Appointment Clause, FVRA distinguishes between Principal and Inferior Officers. When an inferior officer of an Executive agency resigns then his or her first assistant is required to perform the duties of the office on a temporary basis for a maximum of 210 days. Sections 3345(a)(1) & 3346(a). But, if the officer who resigns is a Principal Officer, then "the President (and only the President) may direct a person" to perform these duties on a "temporarily in an acting capacity." Sections 3345(a)(2) & 3346(a). It is undisputed that, after Assistant Secretary Echohawk resigned in 2012, the President did not appoint Laverdure to be the "acting" Assistant Secretary.

Defendants also claim that Plaintiffs do not "seriously dispute that the Secretary's trust-acquisition authority under the IRA has been duly delegated to the Assistant Secretary." (FAB 42.) That is another misstatement. There is no evidence Secretary Jewel delegated her exclusive authority to take land in trust to Assistant Secretary Echohawk before he resigned in 2012. Thus it was not possible for Echohawk to re-delegate authority to Laverdure.

Defendants rely on a Reorganization Plan for the DOI, adopted by Congress in 1950, which it claims authorized the Secretary to "delegate 'any function' of the Department to 'any officer'." (FAB 43.) Even if this broad interpretation were true, there are two obvious problems with this assertion of unlimited power.

First, there is no evidence that the Secretary of Interior ever exercised this alleged power to delegate authority to the Assistant Secretary, much less to an "acting" Assistant Secretary, to take land into trust. Defendants' reference to the Interior Departmental Manuel (DM) is not helpful to their position. The DM requires a written delegation in specific cases, and there is no such document here. None of the DM provisions referenced, allow for the delegation Secretary's fee-to-trust authority to an Assistant Secretary or to an "acting" Assistant Secretary or to any other DOI "officer, agency or employee."

Second – and more importantly - the claim that there is "broad authority" to delegate the authority to take land into trust under the IRA to any DOI officer, agency or employee is directly contrary to the purpose and restrictions of the Appointments Clause. "The purpose of the Appointments Clause is to limit congressional discretion to disperse the power *to appoint,* and thereby preserve the Constitution's structural integrity." *U.S. v. Boeing Company,* 9 F.3d 743, 757 (9th Cir. 1993) "[P]ersons who are not appointed by a body with proper appointment authority, and who therefore cannot be considered 'Officers of the United States'

may not discharge functions that are properly discharged only by 'officers'." *Id.* citing *Buckley v. Vallejo,* 424 U.S. at 140. "The Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another branch, and preserves constitutional integrity by preventing the diffusion of appointment power." *Confederated Tribes v. U.S.,* 110 F.3d 688, 696 (9th Cir. 1997) (emphasis added; quoting *Freytag v. Commissioner of Internal Revenue,* 501 U.S.868, 878 (1991).) Appellees claim there is "broad authority" for any DOI "officer" "agency" or "employee" to take land into trust is precisely the abusive "diffusion of appointment power" that the Constitution prohibits.

E. The Supreme Court, in its 2009 decision in *Carcieri v. Salazar,* held that a tribe must have been both federally recognized and under federal jurisdiction in 1934 to be eligible for the fee-to-trust benefits of the IRA.

The IRA of 1934 authorized the Secretary to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. 5108. The IRA defines "Indian" to "include 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 interpreted and limited the scope of Section 5129. *Carcieri v. Salazar, supra.* Justice Thomas wrote the 6 to 3 majority opinion and held that the phrase "recognized tribe now under federal jurisdiction" was not ambiguous and the Secretary's broad interpretation was not entitled to deference. Instead, the majority concluded that the plain language of the IRA

provides that to qualify for the benefits of the IRA a tribe must have been both a federally recognized tribe and under federal jurisdiction in 1934.

The test outlined in the *Carcieri* decision for determining which tribes are entitled to a fee-to-trust transfer under the IRA is not complicated. It is an unambiguous and straight forward test based on the plain language of the IRA. But Laverdure did not abide by the simple rule established by the Supreme Court in *Carcieri* that the IRA was not ambiguous that a tribe must have been both "under federal jurisdiction" and a "federally recognized tribe" in 1934 to qualify for the fee-to-trust benefits of the IRA. Instead, Laverdure claimed it was ambiguous and he (not the Secretary of Interior), had the power to interpret this IRA provision in a way that was contrary to *Carcieri.* Relying on an earlier DOI interpretation in the 2010 Cowlitz ROD, Laverdure held that it is sufficient that the Ione Indians were "recognized" at the time they filed their fee-to-trust application.

This Court in *Amador* agreed with Laverdure's interpretation. *Amador,* 872 F.3d at 1025. This Court also agreed with Laverdure that the statute was ambiguous and subject to agency or court interpretation. *Id* at 1026.

This all changed when, on March 9, 2020, the Department of Interior Solicitor issued an opinion (M-37055) which withdrew the Cowlitz' and Laverdure's interpretation of the IRA that was relied on by this Court in *Amador*. The DOI Solicitor found that this interpretation "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'." The district court took judicial notice of M 37055. (ER 178-133). Although this was a reversal of Interior's previous interpretations, it was in conformance with the Supreme Court's decision in *Carcieri*, as urged by Plaintiffs.

Defendants concede in their answering brief that "[b]y finding statutory ambiguity, *Amador* left open the possibility that the DOI might permissibly adopt a different IRA interpretation in" the future. (FAB 50). Defendants then admit that "[i]n such a context, the **'law or the Circuit' doctrine would not apply** if Interior's new interpretation" is entitled to *Chevron* deference. (FAB 50-51; emphasis added.) Incredibly, Defendants then claim their own M-Opinion is not entitled to deference on three grounds – none of which have merit.

First Defendants claim that M-37055 was permanently withdrawn by the Solicitor in 2021 in M-Opinion 37070. (FAB 49-50.) This is not true. M-37070 temporarily withdrew M-37055 for 90 days to allow time for more tribal consultation. The 90 day temporary suspension of M-37055, and any tribal consultation opportunity, expired on July 26, 2021. Plaintiffs were not privy to the tribal consultation that supposedly occurred during that 90-day period. Regardless of any tribal consultation, no changes were made to M-37055; it is still in effect.

Second, using circular logic, Defendants state that because "Interior never withdrew the 2012 ROD to review the " the district court was obligated to review the 2012 ROD on the grounds that it was decided in *Amador*. (FAB 49.) This is just another misleading, confusing way for Defendants to argue that Plaintiffs' case is barred by res judicata. But earlier in their brief, Defendants clearly concede that Plaintiffs' case is not barred by res judicata. (FAB 35.) Also Defendants rely on footnote 3 in this Court's decision in *Corrigan v. Haaland*, 12 F.4th 901, 908 n,3 (9th Cir. 2021). But that footnote does not help Defendants. That footnote merely states that 2014 amendments to the Federal Land Management Policy Act (FLMPA) will not be retroactively applied to a 2013 BLM decision based on FLMPA. This argument has no relevance to this case. Plaintiffs are not claiming an amendment to the IRA applies to the 2012 ROD.

Third, Defendants claim that M-37055 does not have the "force of law." An agency's interpretation warrants *Chevron* deference when it was "intended to have general applicability and the force of law." *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012). Defendants rely on *Hall v. U.S.D.A.*, 984 F.3d 825 (9th Cir. 2020) for their claim that M-37055 does not have the force of law and not entitled to deference. But that case does not support Defendants' claim.

Hall involved an "informal interpretation" by the USDA regarding the distribution of emergency funds for covid relief under the Family First Act. This

Court held that such informal "interpretations contained in policy statements, agency manuals, and enforcement guidelines" are "beyond the *Chevron* pale." *Id* at 835. Furthermore, the guidance at issue in *Hall* included the following disclaimer: "The contents of this document do not have the force and effect of law and are not meant to bind the public in any way." Id. at 836. There is no such disclaimer in 37055; it remains in full force and effect and, assuming – as Defendants claim - this IRA provision is ambiguous, is entitled to *Chevron* deference.

Not only does M-37055 have the force of law, it was issued by Defendants themselves. Also, it was not an "informal internal guidance" as claimed by Defendants. (FAB 50.). Instead, it was obviously "intended to have general applicability and the force of law." *Fox v. Clinton* at 78. Unlike the Laverdure and Cowlitz interpretation, M-37055 is not an informal or casual interpretation of the IRA. M-37055 supported by a 31 page May 5, 2020 memo by three Deputy Solicitors and followed by a 10 page memo outlining guidelines for implementing the new and correct interpretation of the IRA in M-37055. It meets the criteria that entitle it to *Chevron* deference. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). M 37055 is clearly entitled to *Chevron* deference

Also again assuming, as this Court held in *Amador*, there is an ambiguity in the IRA, then M 37055 is not only entitled to *Chevron* deference. M-37055 trumps this Court's interpretation in *Amador* and the interpretations by Laverdure and

Cowlitz. Defendants should be estopped from arguing against their own M-Opinion especially since, as Defendants concede, the *Amador* decision and its IRA interpretation are not "circuit precedent" with respect to M-37055. (FAB 50.)

F. Part 83 recognition is a prerequisite for the Ione Indians to apply for IRA and IGRA benefits. The Ione Band has not obtained part 83 recognition. This Court in *Amador* acknowledged this undeniable fact.

Defendants admit that, in 1996, the same district court that issued the judgement here, issued a final judgement confirming that the Ione Band had not exhausted its remedies by completing the Part 83 process and that it had not demonstrated that it is entitled to recognition "outside" the Part 83 process. *Ione Band v. Burris* (SDC ED Cal. No. CIV S-90-993; judgement filed 9/4/96.) In that case the Ione Indians sued the U.S. for federal recognition. The U.S. defended by arguing that the Ione Indians is not and has never been a "federally recognized tribe under federal jurisdiction." Judge Karlton ruled in the U.S.' favor. (ER Vol. 2, 271-296). Judge Karlton reviewed all the non-Part 83 processes proffered by the Ione Indians and held that:

> "Plaintiffs' [Ione Band's] argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that 'the Secretary may acknowledge tribal entities outside the regulatory process,' . . . and that the court, therefore, should accept jurisdiction over plaintiff' claims compelling such recognition. **I cannot agree.** Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA acknowledgement process, the United States motion for summary judgment on these claims must be GRANTED." (ER 287; emphasis added.)

Defendants confirmed that they did not appeal the 1996 judgment. Thus the 1996 judgement, including Judge Karlton's Order, is binding on Defendants. But, Defendants would have this Court ignore the decision and judgement in *Ione Band v. Burris*. For example, they argue that: "No Court has rejected an administrative recognition decision made by Interior merely because it was made outside the Part 83 process." (FAB 4.) That statement is obviously false; Judge Karlton did just that in 1994 in the *Burris* case – which Defendants ignore.

Defendants claim that "Congress gave Interior broad authority over Indian affairs" including the authority to "recognize the Ione Band outside the Part 83 process." (FAB 52.) Again Defendants ignore the fact that the Ione Indians made the same argument in *Burris* and, after careful consideration, the Judge Karlton rejected that argument. Instead, Judge Karlton held that the Ione Indians needed to exhaust their administrative remedies and complete the Part 83 process. Thus, even if "Interior" has the broad authority that Defendants claim, it is limited by the *Burris* judgment which binds – and cannot be ignored by - Defendants.

Furthermore, the authorities cited by Defendants do not support their claim. Defendants rely on 25 U.S.C. § 2 which is a statute initially enacted in 1832 and gave the Commissioner of Indian Affairs (a position that no longer exists), under the direction of the Secretary of War, "management of all Indian affairs and of all

matters arising out of Indian relations." It is true that, in 1832, the Commissioner was given broad authority over Indians and Indian affairs. But this ancient statute does not apply to "Interior" which did not exist in 1832. It is not relevant here.

Defendants also rely on one section of the List Act of 1994. 25 U.S.C. 5131. But they ignore the List Act section that defines and limited the tribes to be listed to tribes federally recognized by:

> [1]Act of Congress, [2] **by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated: 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,**' or [3] by a decision of a United States court." PL 103-454 (1994), Sec. 103(3) (emphasis added).

Congress was very clear that Part 83 recognition is the only administrative way for tribe to make it on the list. The List Act does not authorize the listing of tribes administratively recognized "outside" the Part 83 process.

Defendants also rely on the fact that Ione Indians of were placed on the BIA 1995 list "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs." 60 FR 9250-9255; Feb. 16, 1995. But the origin of the BIA list predates the Part 83 process established in1978 and the 1994 List Act. And Defendants admit that this BIA list was historically created by "an ad hoc" case-by-case basis. (FAB 53.) As a result, as recently found by the Supreme Court, many "entities" on the BIA list are not "federally recognized

tribes." *Yellen v. Confederated Tribes*, 141 S. Ct. 2434, 2447 (2021) (ANC's, although once on the BIA list, were not "federally recognized tribes.")

The List Act required the BIA to create a new list of "federally recognized tribes" and update it annually. (Sec. 103.) In fact, there are indications that Congress wanted the BIA to purge its old list of any "entity" that is not a federally recognized tribe. (The title of the "List Act" is actually not the "List Act." Instead Congress called it the "Withdrawal of Acknowledgement or Recognition" Act.) But, instead of purging their old list, the BIA has maintained, since the enactment of the List Act, that it is actually the new list of "federally recognized tribes" required by Congress when it enacted the List Act in 1994.[6] This not true.

In any event, the BIA list is not an issue in this case despite Defendants' efforts to make it an issue throughout the FAB. Plaintiffs' Complaint, which needs to be the focus here, does not mention the 1995 BIA list of Indian Entities or challenge the Ione Band's inclusion on that list. Defendants seem to be arguing a different case than the one that is presented in Plaintiffs' 2018 Complaint.

Regardless of the BIA list, this Court, the district court and the parties all agree that the Ione Indians are not a Part 83 tribe. The Ione Indians lack of Part 83

[6] To avoid continuing misunderstandings, this deception must end and a true list of "federally recognized tribes," per the List Act, must be prepared by the BIA.

recognition is not in issue in this case. Nor is the BIA list or the Ione Indians inclusion on the 1995 list. Instead, the issue here is, given their lack Part 83 recognition, whether Part 83 recognition is prerequisite for the Ione Indians to receive IGRA and IRA benefits. This is not seriously disputed by Defendants in the FAB. The Supreme Court has 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). And this Court has confirmed that Part 83 recognition is a prerequisite to receive Federal benefits.

> "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.)

Defendants agree that this issue was not decided in *Amador,* but they argue that "the County made a similar (narrow) allegation as part of its IGRA claim" regarding IGRA's "'restored tribe' exception." (FAB 52.) The County apparently argued that the "restored tribe" exception should not apply to non-Part 83 tribes. The County in *Amador* did not argue that Part 83 is a prerequisite for all IRA and IGRA benefits. The Court held Part 83 recognition was not required for the Ione Indians to apply for "restored tribe" status. But this Court also said its decision

was very narrow and did not apply to other provisions of IGRA which require Part 83 recognition as a prerequisite. *Amador,* 872 F.3d at 1030.

G. Plaintiffs state viable Equal Protection and Federalism claims against the three Defendants named in their personal capacities. They did not appeal. They forfeited their right to oppose the arguments in the AOB.

Defendants' MJOP does not apply to the Fifth and Sixth claims in Plaintiffs' Complaint which were brought against three federal employees in their personal capacities. Those employees did not join the MJOP or the answering brief. They are not participants in this appeal. Defendants admit that the *Amador* decision did not decide these two claims.

First, Defendants do not have authority to represent the individual Defendants named in their personal capacities unless and until the Attorney General certifies that they were acting in the scope of their employment at the time of the incident. In that event, the claim will be deemed to be against the U.S. and the U.S. would be substituted as a defendant. 28 U.S.C. 2679(d)(1). The Attorney General did not certify that these three federal employees acted in the scope of their employment with respect to the Fifth and Sixth claims. Until there is a certification, approved by the Court, Defendants have no authority to represent these individual Defendants or argue on their behalf in this appeal.

Even if Defendants had the authority to represent these individuals, their one argument is without merit and misrepresents Plaintiffs claims. Defendants contend the relief sought by Plaintiffs is "not available against the individual defendants in their personal capacity." (FAB 56.) They then mischaracterize what is being sought by Plaintiffs; Plaintiffs are not asking that the individual Defendants "set aside official agency action" or "rescind official actions."

Instead, Plaintiffs are seeking damages and injunctive relief against these three individual Defendants. And, assuming the allegations in the Complaint are true, Plaintiff are entitled to such relief. Damages are available against all three individual Defendants. It is true that injunctive relief may be limited against Chadhuri and Laverdure because they may have left federal employment. But injunctive relief is clearly available against Amy Dutschke as the BIA Regional Director. The MJOP should be denied with respect to the Fifth and Sixth claim.

CONCLUSION

The district court's May 11, 2022 Order and Judgment be reversed and vacated and judgment should be entered in Plaintiffs' favor.

Dated: March 15, 2023.

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 March 15, 2023.

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: March 15, 2023.

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 the Defendants answering briefs and, consequently, per Circuit Rule 32-1(b) is limited to a maximum of 7,000 words. This brief uses a proportional typeface and a 14-point font and contains 6978 words (excluding the signature block) and 6989 (including the signature block).

Dated: March 15, 2023.

Respectfully submitted,

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