872 F.3d 1012

United States Court of Appeals for the Ninth Circuit

COUNTY OF AMADOR, California,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN K. ZINKE, Secretary of the United States Department of Interior; KEVIN K. WASHBURN, Acting Assistant Secretary of Indian Affairs, United States Department of Interior,
Defendants-Appellees, IONE BAND OF MIWOK INDIANS, Intervenor-Defendant-Appellee.

No. 15-17253

July 14, 2017, Argued and Submitted,
San Francisco, California;

October 6, 2017, Filed

Rehearing denied by *County of Amador v. United States DOI*, 2018 U.S. App. LEXIS 845 (9th Cir. Cal., Jan. 11, 2018).

Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:12-cv-01710-TLN-CKD. Troy L. Nunley, District Judge, Presiding. *County of Amador v. United States DOI*, 136 F. Supp. 3d 1193, 2015 U.S. Dist. LEXIS 133482 (E.D. Cal., Sept. 29, 2015).

Christopher E. Skinnell (argued) and James R. Parrinello, Nielsen Merksamer Parrinello Gross & Leoni LLP, San Rafael, California; Cathy A. Christian,

Nielsen Merksamer Parrinello Gross & Leoni LLP, Sacramento, California; for Plaintiff-Appellant.

John L. Smeltzer (argued), Katherine J. Barton, and Judith Rabinowitz, Attorneys; John C. Cruden, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Matthew Kelly, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

Jerome L. Levine (argued) and Timothy Q. Evans, Holland & Knight LLP, Los Angeles, California, for Intervenor-Defendant-Appellee.

Before Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Jeremy D. Fogel,* District Judge. Opinion by Judge Graber.

OPINION

GRABER, Circuit Judge:

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

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

("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. Reviewing Interior's decision under the Administrative Procedure Act ("APA"), we conclude that the agency did not err. Accordingly, we affirm the district court's award of summary judgment to Interior and the Ione Band.

FACTUAL AND PROCEDURAL HISTORY

Amador County is located roughly 45 miles southeast of Sacramento in the foothills of the Sierra Nevada Mountains. The county is rural, with a population density well below the state average, and it contains just five incorporated cities.

The Ione Band's origins lie in the amalgamation of several "tribelets" indigenous to Amador County and the surrounding area. The tribelets, which included the Northern Sierra Miwok and the Wapumne, were independent, self-governing groups that maintained their own territories but regularly interacted with one another. The political and geographic lines separating the tribelets began to erode in the 18th and early 19th centuries, as Spanish and Mexican missionary efforts and the arrival of white settlers in the area decimated the Native American population and displaced many villages. The discovery of gold in the area in 1848 and the subsequent inpouring of miners and prospectors accelerated the process of amalgamation. For instance, the Foothill Nisenan living in the American River drainage were displaced by miners and were forced to

move south, where they joined with Plains Miwok and Northern Sierra Miwok.

Conflicts arose between the miners and settlers who flooded into California beginning in 1848, on the one hand, and the Native Americans already in the vicinity, on the other. The federal government tried to ameliorate the situation by convincing Native Americans to give up their lands and move to "safer" areas. In 1851, federal agents negotiated 18 treaties with Native Americans that required such resettlement. One of those treaties – Treaty J – was signed by members of some of the tribelets that would eventually blend together to form the Ione Band. Treaty J set aside land for those tribelets in what is now Amador County. The land, which included the site of the proposed casino, was to be "set apart forever for the sole use and occupancy of the tribes whose representatives signed the treaty." Neither Treaty J nor any of the other treaties ever went into effect, however. The California legislature, which opposed the assignment of the lands to Native Americans, successfully lobbied against the treaties and, in 1852, the United States Senate voted not to ratify the treaties. Larisa K. Miller, *The Secret Treaties With California's Indians*, Prologue Magazine, Fall/Winter 2013.

Throughout the latter half of the 19th century, Native Americans in the Amador County area continued to be displaced by white settlers. By 1900, most Native Americans lived either in remote settlements or on the edges of towns. They were largely destitute and often lacked permanent homes. Congress felt that California

was largely responsible for this state of affairs and would have to play a primary role in addressing the problem of the "landless Indians," but its position changed in 1905 when the 18 unratified treaties from the 1850s were brought to light. *Id.* The treaties had been printed "in confidence" in 1852 and could not be accessed by the public from the Senate archives, so they had been largely forgotten. *Id.* at 43. Two activists convinced Senator Thomas Bard of California to have the treaties printed. After he did, Congress was forced to acknowledge the role that it had played in creating the problem of landless Indians in California. *Id.* Capitalizing on the change in sentiment among his colleagues, Senator Bard proposed an amendment to the Indian Appropriations Act of 1905 that authorized the Secretary of the Interior ("Secretary") to "investigate . . . existing conditions of the California Indians and to report to Congress . . . some plan to improve the same." Pub. L. No. 58-212, 33 Stat. 1048, 1058 (1905).

The Secretary tasked C.E. Kelsey with conducting the investigation into the condition of Native Americans in California. In Kelsey's 1906 report to the Commissioner of Indian Affairs, he recommended that Native Americans in Northern California who were "landless through past acts [or] omissions of the National Government . . . receive land in lieu of any claims they may have against the Government, moral or otherwise; that the land . . . be of good quality with proper water supply, and . . . be located in the neighborhoods in which the Indians wish to live." *Indian Tribes of California: Hearings Before a Subcomm. of*

the H. Comm. on Indian Affairs, 66th Cong. 131, at 23-24 (1920) (Report of the Special Agent for California Indians to the Commissioner of Indian Affairs, Mar. 21, 1906). The Commissioner, in turn, recommended to Congress that it appropriate money to carry out Kelsey's plan. Congress responded by appropriating $100,000 in 1906 for the purchase of land in California for "Indians . . . now residing on reservations which do not contain land suitable for cultivation, and for Indians who are not now upon reservations." Pub. L. No. 59-258, 34 Stat. 325, 333 (1906). Congress continued to appropriate money for that purpose almost every year until the passage of the Indian Reorganization Act in 1934 made such annual appropriations unnecessary. William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 Tulsa L. Rev. 317, 357-58 (2008).

Kelsey also prepared a census of non-reservation Indians living in California. That census served as a guide for John Terrell, a Special Agent with Interior's Bureau of Indian Affairs who traveled to California in 1915. Terrell was to assess which groups of Indians were in need of land and was to negotiate purchases of land for their benefit. Terrell visited the Native Americans living near Ione and counted some 101 members of the Ione Band, including Charlie Maximo, the recently elected Chief of the Band. In a May 1915 letter to the Commissioner of Indian Affairs, Terrell wrote that, "[o]f all the Indians I have visited," the members of the Ione Band "have stronger claims to their ancient

Village than any others." After visiting the Band, Terrell almost immediately set about trying to buy some of the land on which the Band resided, for use as a permanent home for the Band.

In August 1915, Terrell reached an agreement for the purchase of 40 acres at a total price of $2,000. But the purchase stalled because of problems with the title to the property. For years, various officials with Interior tried to close the deal, but with no success. In a July 1923 letter, one Interior official wrote that the agency "ha[d] tried very hard for five years to get this sale through because . . . [the Ione Band], if dispossessed, would be placed in such shape as to call forth untold criticism by all people knowing the circumstances of their occupation of this land as homesites for years." A different Interior official wrote, in a January 1924 letter, that the deal was "all but closed." More than five years later, though, the transaction still had not been consummated. As one official wrote to a member of the Band in a May 1930 letter, "[w]e have for more than eight years been negotiating with owners of the [land] for the purpose of purchasing same, but because of our inability to get a clear title to the land, the deal has not been closed."

In 1934, Congress enacted the Indian Reorganization Act ("IRA").

> The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains. Native people

> were encouraged to organize or reorganize with tribal structures similar to modern business corporations. A federal financial credit system was created to help tribes reach their economic objective. Educational and technical training opportunities were offered, as were employment opportunities through federal Indian programs.

Cohen's Handbook of Federal Indian Law § 1.05, at 81 (Nell Jessup Newton ed., 2012) [hereinafter *Cohen's Handbook*]. Relevant to this case, the IRA gave the Secretary of the Interior the power to take land into trust for a tribe's use.

In 1972, the California Rural Indian Land Project, acting on behalf of the Band, asked the federal government to accept title to the same 40-acre tract that the government had tried to buy years earlier and to hold the land in trust for the Band. In October of that year, Robert Bruce, the Commissioner of Indian Affairs, agreed to do so. In his letter to the Band, Bruce wrote:

> Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. As stated earlier, they . . . are eligible for the purchase of land under [the IRA].

The federal government did not take the land into trust at that time, however, because several officials within Interior questioned Commissioner Bruce's conclusion that the Ione Band was eligible to have land taken into trust for its benefit under the IRA. In 1973, for instance, the Deputy Assistant Secretary of the

Interior wrote a letter stating that "[t]he former contemplated purchase of land for [the Ione Band] by the United States may indicate that they are a recognizable group entitled to benefits of the [IRA]. We have no correspondence, however, from the group requesting recognition or a desire to establish a reservation. . . . If the Band desires and merits Federal recognition, action should be taken to assist them to perfect an organization under the provisions of the [IRA]."

In 1978, Interior promulgated what are known as the "Part 83" regulations, 25 C.F.R. pt. 83[1] "The purpose of [the Part 83 regulations] [wa]s to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence . . . is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes," including the benefits of the IRA. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361-01, 39,362 (Aug. 24, 1978). "Prior to 1978, Federal acknowledgment was accomplished both by Congressional action and by various forms of administrative decision. . . . The [Part 83] regulations established the first detailed, systematic process for review of petitions from groups seeking Federal acknowledgment." Procedures for Establishing That an

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[1] The regulations were initially designated as 25 C.F.R. part 54, but they were later redesignated without textual change as 25 C.F.R. part 83. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280-01, 9280 (Feb. 25, 1994).

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Following the promulgation of the Part 83 regulations, Interior began to take the position that the Band had not yet been recognized by the federal government and that it had to proceed through the Part 83 regulations if it wished to be recognized. When the Band sued the federal government in 1990, for instance, the government took the position that the Band was *not* a recognized tribe.

But in 1994, the federal government changed its mind about the Band's "recognized" status. In a March 1994 letter to the Chief of the Band, Assistant Secretary of Indian Affairs Ada Deer "reaffirm[ed] the portion of Commissioner Bruce's [1972] letter" that stated that "Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated." Assistant Secretary Deer further ordered that the Ione Band be included on the official list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," which was published in the Federal Register. The Band was included on the list beginning in 1995.

Meanwhile, Congress passed the Indian Gaming Regulatory Act ("IGRA") in 1988. Section 20 of IGRA limits "gaming . . . on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of" the statute, allowing gaming in just a few circumstances. Pub. L. No. 100-497, § 20, 102 Stat.

2467, 2485-86 (1988), *codified at* 25 U.S.C. § 2719(a). One such circumstance exists when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii).[2] That exception is called the "restored tribe" or "restored lands of a restored tribe" exception.

In September 2004, the Band submitted a request to the National Indian Gaming Commission ("Gaming Commission")[3] for an Indian lands determination – a ruling as to the eligibility of land to be used for gaming – regarding some land known as the Plymouth Parcels. While that request was pending, the Band submitted a "fee-to-trust" application to Interior, asking that the Secretary accept trust title to the Plymouth Parcels. Under then-applicable Interior practice, a fee-to-trust application seeking to use the newly acquired lands for gaming under the "restored tribe" exception of IGRA required "[a] legal opinion from the Office of the Solicitor concluding that the proposed [land] acquisition" came within the exception, and the Indian lands determination would constitute such a legal opinion.

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[2] "Indian tribe" is defined in IGRA as "any Indian tribe, band, nation, or other organized group or community of Indians which (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government." 25 U.S.C. § 2703(5).

[3] The Gaming Commission "is a federal regulatory agency, created by IGRA, that oversees the business of Indian gaming in order to ensure its lasting integrity." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716 n.6 (9th Cir. 2003).

Pursuant to a memorandum of agreement between the Gaming Commission and Interior, the Associate Solicitor in Interior's Division of Indian Affairs prepared an Indian lands determination in September 2006 ("2006 Determination"). The Associate Solicitor concluded that "Assistant Secretary Deer's [1994] . . . reaffirmation of Commissioner Bruce's [1972] position amounts to a restoration of the Band's status as a recognized Band. Under the unique history of its relationship with the United States, the Band should be considered a restored tribe within the meaning of IGRA." The Associate Deputy Secretary for Indian Affairs concurred in that determination and notified the Band of his concurrence later in September 2006.[4] After receiving the 2006 Determination, the Band continued to pursue its fee-to-trust application.

Over the next few years, Interior engaged in an internal dispute about the correctness of the 2006

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[4] The County notes that, "[i]n January 2009, Department Solicitor David Bernhardt sent a memorandum to George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, withdrawing the [2006 Determination]." Bernhardt told Skibine that he was "withdraw[ing] and . . . reversing that opinion" and that the opinion "no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the Band is not a restored tribe within the meaning of IGRA." That is true but, as Interior points out, the "County does not challenge the 2006 Determination based on the purported 2009 withdrawal." That silence probably results from the fact that, "in 2011, Solicitor Hilary Tompkins reaffirmed the 2006 Determination[ ] after concluding that neither Bernhardt's circulation of his draft legal opinion nor his issuance of a memorandum regarding it to the Acting Deputy Assistant Secretary had the effect of withdrawing or reversing it."

Determination. While that was occurring, the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009), a case that concerned the meaning of the phrase "recognized Indian tribe now under Federal jurisdiction" in the IRA. The Court ruled that a tribe must have been "under Federal jurisdiction" at the time the IRA was enacted (1934) in order to qualify to have lands taken into trust for its benefit. *Id.* at 395.

In May 2012, Interior issued the relevant ROD, in which it announced its intention to take the Plymouth Parcels into trust for the Band and approved the Band's plan to build a gaming complex on the Plymouth Parcels. The agency concluded, in relevant part, that (1) the Ione Band was under federal jurisdiction in 1934 and was thus eligible to have land taken into trust under the statute, and that (2) the Plymouth Parcels could be used for gaming under the "restored tribe" exception of IGRA. The ROD was signed by Donald Laverdure, the Acting Assistant Secretary of Indian Affairs.[5]

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[5] 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.

In June 2012, the County sued Interior[6] in district court under the APA, challenging both the agency's decision to take the Plymouth Parcels into trust and its conclusion that the land could be used for gaming under the "restored tribe" exception of IGRA. The Ione Band intervened in each case, on the side of Interior. In 2015, the district court granted summary judgment to Interior and the Band and denied the County's motion for summary judgment. The County timely appeals.

STANDARD AND SCOPE OF REVIEW

We review de novo the district court's summary judgment rulings, "thus reviewing directly the agency's action under the [APA's] arbitrary and capricious standard." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (internal quotation marks omitted). "In general, a court reviewing agency action under the APA must limit its review to the administrative record." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014).

DISCUSSION

Interior's decision to take the Plymouth Parcels into trust for the Ione Band rested on two key

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Accordingly, Laverdure was empowered to take the Plymouth Parcels into trust.

[6] The County named Interior, the Secretary of the Interior, and the Acting Assistant Secretary of Indian Affairs as defendants. We refer to them collectively as "Interior."

determinations, each of which the County challenges. First, Interior determined that the Ione Band qualifies to have land taken into trust for its benefit under the IRA because the Band is now "recognized" and was "under Federal jurisdiction" in 1934 when the IRA took effect. Second, Interior determined that the Ione Band may conduct gaming on the Plymouth Parcels under the "restored lands of a restored tribe" provision of IGRA. We address those issues in turn.

A. *"Recognized Indian Tribe Now Under Federal Jurisdiction"*

The IRA provides that the Secretary of the Interior may take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. The statute defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 5129. In *Carcieri*, the Court held that the "temporal restrictions that apply to [the] definition of 'Indian' " in § 5129 limit the set of tribes that can have land taken into trust for their benefit under § 5108. 555 U.S. at 393. The Court also held that "the term 'now under Federal jurisdiction' . . . unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Id.* at 395. Accordingly, the Secretary may take land into trust for

the Ione Band only if it was "under Federal jurisdiction" at the time that the IRA was passed.[7]

Carcieri left several questions unanswered, two of which the parties dispute. First, need a tribe have been "recognized" in 1934, as well as "under Federal jurisdiction" in 1934, in order to benefit from the IRA, or can recognition occur at any time? We will call this the "timing-of-recognition issue." Second, what does it mean for a tribe to have been "under Federal jurisdiction" in 1934?[8]

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[7] Section 5129 contains two additional definitions of "Indian," but they are not relevant to this case.

[8] There is a third question left open by *Carcieri*: Are the "now under Federal jurisdiction" and "recognized" requirements even distinct, or do they comprise a single requirement? The Court in *Carcieri* did not explicitly hold that the two requirements are distinct but, as Justice Souter noted in his opinion, "[n]othing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content." *Carcieri*, 555 U.S. at 400 (Souter, J., concurring in part and dissenting in part). We think that the better reading of the statute is that "recognition" and being "under Federal jurisdiction" are distinct requirements, for two reasons. First, statutes should be construed so as to "give effect, if possible, to every clause and word." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 111, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)). Second, the phrase "now under Federal jurisdiction" was added to the statute during the drafting process. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings Before the Comm. on Indian Affairs on S. 2755 and 3645*, 73d Cong. 264 (1934). If "under Federal jurisdiction" meant the same thing as "recognized," then the only effect of the addition would have been to fix the recognition time at "now" – that is, 1934. But that goal could have

1. The Timing-of-Recognition Issue

The parties' first dispute is over the timing-of-recognition issue.[9] The County argues that the phrase "now under Federal jurisdiction" modifies the entire phrase "recognized Indian tribe," so that a tribe must have been recognized in 1934 in order to benefit from the statute.[10] Interior and the Band, on the other hand, argue that "recognized" and "now under Federal jurisdiction" separately modify "Indian tribe," so that recognition can occur at any time before land is taken into trust.

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been accomplished simply by adding the word "now" in front of "recognized." The fact that an entirely new phrase was added suggests that the change was intended to do more than fix the time of recognition at 1934 and that the added new phrase, "under Federal jurisdiction," was understood to mean something different than "recognized." *Cf. Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191, 1198-99 (9th Cir. 2016) (rejecting a statutory construction that reflected a policy choice that Congress could have made "in a far more straightforward manner").

[9] The County does not dispute that the Band is presently recognized.

[10] We reject the County's argument that the Supreme Court already resolved the timing-of-recognition issue in *Carcieri*. As the D.C. Circuit has observed, *Carcieri*'s "holding reaches only the temporal limits of the Federal-jurisdiction prong" of § 5129. *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell* (*Grand Ronde*), 830 F.3d 552, 559-60 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017). And to the extent that the Court said anything about the timing-of-recognition issue in *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978), its statements were unreasoned dicta that are entitled to little weight. *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) ("We do not treat *considered* dicta from the Supreme Court lightly." (emphasis added)).

Both arguments are plausible because, as one of our sister circuits has held, the IRA is ambiguous with respect to the timing-of-recognition issue. *Grand Ronde*, 830 F.3d at 560. That is, even after applying the usual tools of statutory construction, the statute does not yield a *clear* answer as to Congress' intent on the timing-of-recognition issue. The statute reasonably can be read to limit its benefits to tribes that were recognized in 1934, or it reasonably can be read to extend benefits to later-recognized tribes, provided that those tribes were "under Federal jurisdiction" in 1934.[11]

Interior is the agency that Congress designated to administer the IRA. *Grand Ronde*, 830 F.3d at 559; *United States v. Eberhardt*, 789 F.2d 1354, 1359-60 (9th Cir. 1986). Interior argues that its resolution of the timing-of-recognition issue is entitled to deference under *Chevron*.[12] But we need not decide whether *Chevron* deference (or any other level of deference) is appropriate, because we reach the same conclusion as

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[11] Of course, those two interpretations of the statute need not be equally plausible or reasonable to give rise to "ambiguity" within the meaning of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) ("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.").

[12] As Interior points out, the D.C. Circuit and several district courts have deferred to the agency under *Chevron* on the timing-of-recognition issue. *See, e.g.*, *Grand Ronde*, 830 F.3d at 559-63.

Interior when we review the timing-of-recognition issue de novo. The phrase "recognized Indian tribe now under Federal jurisdiction," when read most naturally, includes all tribes that are currently – that is, at the moment of the relevant decision – "recognized" and that were "under Federal jurisdiction" at the time the IRA was passed.

In addition to exploring the text of the statute itself, we examine the relevant statutory context. When construing a statutory provision, we must "bear[ ] in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*134 S. Ct. 2427, 2441, 189 L. Ed. 2d 372 (2014) (internal quotation marks omitted). "The meaning . . . of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). Unfortunately, though, contextual clues are of little value in understanding the phrase at issue.

Section 5129 provides "three discrete definitions" of "Indian": "[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . [3] all other persons of one-half or more Indian blood." *Carcieri*, 555 U.S. at 391-92 (alterations in original) (quoting 25 U.S.C. § 5129). As the D.C. Circuit recognized in

Grande Ronde, the second and third definitions of "Indian" in § 5129 do not shed much light on the meaning of the first definition. *See* 830 F.3d at 561 ("Appellants do not believe a descendant of a tribe recognized in 2002 could have lived on a reservation in 1934. That assumption is incorrect, for . . . recognition that occurs after 1934 simply means, in retrospect, that any descendant of a Cowlitz Tribal member who was living on an Indian reservation in 1934 then met the IRA's second definition.").

Nor does the remainder of the IRA illuminate the timing-of-recognition issue. As noted, § 5129 is a definitional section, so the remainder of the statute simply uses the terms defined in § 5129 and is coherent whether or not those terms include later-recognized tribes.

We next examine the purpose and history of the IRA. *See Abramski v. United States*, 134 S. Ct. 2259, 2267, 189 L. Ed. 2d 262 (2014) ("[W]e must (as usual) interpret the relevant words [in a statute] not in a vacuum, but with reference to the statutory . . . history[] and purpose." (internal quotation marks omitted)). "Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country. . . ." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (citation omitted). And understanding the historical context in which a statute was passed can help to elucidate the statute's purpose and the meaning of statutory terms and phrases. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471, 121

S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("The text of [the provision], interpreted in its statutory and historical context and with appreciation for its importance to the [statute] as a whole, unambiguously bars cost considerations . . . , and thus ends the matter for us. . . .").

The IRA represented the culmination of a "marked change in attitude toward Indian policy" that began in the mid-1920s. *Cohen's Handbook* § 1.05, at 79. The "prior policy of allotment[13] sought 'to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.'" *Grand Ronde*, 830 F.3d at 556 (quoting *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992)). The new policy, by contrast, reflected "more tolerance and respect for traditional aspects of Indian culture," *Cohen's Handbook* § 1.05, at 79, and rested "on the assumption . . . that the tribes not only would be in existence for an indefinite period, but that they *should* be," William C. Canby, Jr., *American Indian Law in a Nutshell* 25 (6th ed. 2014). As the "crowning achievement" of the new policy, *Cohen's Handbook* § 1.05, at 81, the IRA was intended "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton v. Mancari*, 417

[13] Under the allotment policy, Native Americans "surrendered their undivided interest in the tribally owned common or trust estate for a personally assigned divided interest, generally held in trust for a limited number of years, but 'allotted' to them individually." *Cohen's Handbook* § 1.04, at 72.

U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). To a large extent, the IRA was intended to undo the damage wrought by prior policies – "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)).

In 1934, when Congress enacted the IRA, there was no comprehensive list of recognized tribes, nor was there a "formal policy or process for determining tribal status." William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. Kan. L. Rev. 415, 429-30 (2016); *accord Cohen's Handbook* § 3.02[7][a], at 153 (noting "the history of inconsistent, vague, and contradictory policies surrounding the recognition of tribes"). It seems unlikely that Congress meant for the statute's applicability to a particular tribe to turn on whether that tribe happened to have been recognized by a government that lacked a regular process for such recognition. It seems more likely that Congress intended the statute to benefit all tribes, whenever recognized, provided that those tribes were "under Federal jurisdiction" as of the date when the IRA was enacted.

Next, we consider the drafting history of the statute. As we have already noted, an earlier draft of the statute extended benefits to "all persons of Indian descent who are members of any recognized Indian tribe." The best reading of that version of the statute would have been that "recognition" could occur at any time. The phrase "now under Federal jurisdiction" was

a free-standing addition. Its apparent purpose was simply to exclude those tribes that were not at that time under federal jurisdiction.

Finally, we consider Interior's history of administering the IRA. We "give an agency's . . . practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Davis v. United States*, 495 U.S. 472, 484, 110 S. Ct. 2014, 109 L. Ed. 2d 457 (1990); *see also United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1097 (9th Cir. 2000) (stating that an agency's "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work as efficiently and smoothly while they are yet untried and new." (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315, 53 S. Ct. 350, 77 L. Ed. 796, Treas. Dec. 46331 (1933))). A court should hesitate before construing a statute in a way that renders years of consistent agency practice unlawful. *See, e.g.*, *Baur v. Mathews*, 578 F.2d 228, 233 (9th Cir. 1978) ("The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the . . . administration of a given statute or its predecessors.").

Pre-*Carcieri* "administrative practice . . . treated all federally recognized tribes as entitled to have land taken into trust under the IRA, so long as those tribes

were recognized as of the time the land was placed in trust." *Cohen's Handbook* § 3.02[6][d], at 149. Even in the early years of the administration of the statute, Interior's practice allowed for post-1934 recognition. In 1937, for instance, Interior recognized the Mole Lake Indians of Wisconsin as a tribe that was entitled to the IRA's benefits. 1 Dep't of Interior, *Opinions of the Solicitor Relating to Indian Affairs, 1917-1974*, at 725 (Feb. 8, 1937); *see also Carcieri*, 555 U.S. at 399 (Breyer, J., concurring) ("[T]he Department in the 1930's thought that an anthropological study showed that the Mole Lake Tribe no longer existed. But the Department later decided that the study was wrong, and it then recognized the Tribe."). Furthermore, none of the Solicitor's Opinions issued in the mid-to-late 1930s concerning whether a tribe qualified for the benefits of the IRA "contain[ed] any suggestion that it [was] improper to determine the status of a tribe after 1934." Memorandum from Assoc. Solicitor to the Assistant Sec'y of Indian Affairs 7 (Oct. 1, 1980) (Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe). In short, Interior's longstanding, consistent practice of allowing tribes recognized after the passage of the IRA to benefit from the statute supports its reading of the statute.

Given the IRA's text, structure, purpose, historical context, and drafting history – and Interior's administration of the statute over the years – the better reading of § 5129 is that recognition can occur at any time. We therefore hold that a tribe qualifies to have land taken into trust for its benefit under § 5108 if it (1) *was*

"under Federal jurisdiction" as of June 18, 1934, and (2) *is* "recognized" at the time the decision is made to take land into trust.

2. The Meaning of "Under Federal Jurisdiction"

The County next challenges Interior's determination that the Ione Band was "under Federal jurisdiction" at the time that the IRA became law. The County's first argument in support of that challenge is that Interior's interpretation of the phrase "under Federal jurisdiction" is incorrect.

In the ROD, Interior applied the following two-part test to determine whether the Band was "under Federal jurisdiction" in 1934:

> [W]e construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first part examines whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members – that are sufficient to establish or that generally reflect Federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some Federal actions may in and of themselves demonstrate that a tribe was

> under Federal jurisdiction or a variety of actions when viewed in concert may achieve the same result.
>
> . . . .
>
> Once having identified that the tribe was under Federal jurisdiction at or before 1934, the second part ascertains whether the tribe's jurisdictional status remained intact in 1934. . . . [T]he longer the period of time prior to 1934 in which the tribe's jurisdictional status is shown, and the smaller the gap between the date of the last evidence of being under Federal jurisdiction and 1934, the greater likelihood that the tribe retained its jurisdictional status in 1934.

Interior and the Band argue that this interpretation of "under Federal jurisdiction" is entitled to *Chevron* deference.

The County disagrees with Interior and the Band both about the meaning of "under Federal jurisdiction" and about the level of deference owed to the agency. According to the County, "in 1934[,] federal jurisdiction over Indians unambiguously went hand-in-hand with federally-supervised land reserved for those Indians, at least where there was no valid treaty in effect." Because the meaning of the phrase is clear, argues the County, Interior's contrary interpretation is not owed *Chevron* deference.

We need not decide whether *Chevron* deference is owed to the agency because, once again, we reach the same conclusion as the agency even without it. Even if

we do not owe *Chevron* deference to Interior's interpretation of "under Federal jurisdiction," that interpretation "certainly may influence" our analysis. *United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The proper amount of such influence "has been understood to vary with circumstances," *id.* at 228; it depends on "a variety of factors, such as the thoroughness and validity of the agency's reasoning, the consistency of the agency's interpretation, [and] the formality of the agency's action," *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 942 (9th Cir. 2008). We also consider the agency's "relative expertness." *Mead Corp.*, 533 U.S. at 228. Ultimately, the amount of deference – so-called *Skidmore*[14] deference – that we give to an agency's interpretation of a statute ranges "from great respect . . . to near indifference" depending on how those factors play out. *Id.* (citation omitted).

Here, those factors counsel in favor of giving Interior's interpretation "great respect." Interior's reasoning is thorough and careful,[15] and it includes an analysis of the IRA's historical context, legislative history, and purpose. Employing its institutional

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[14] *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

[15] Interior first announced its interpretation of "under Federal jurisdiction" in its record of decision for the fee-to-trust application of the Cowlitz Tribe in 2010. The agency then applied the interpretation to the Ione Band in the 2012 ROD. Accordingly, in deciding how much deference should be given to Interior's interpretation of "under Federal jurisdiction," we consider both records of decision.

expertise gleaned from years of administering the IRA, the agency situates the statute in the larger context of the history of Indian law and, in doing so, arrives at an interpretation of "under Federal jurisdiction" that fits with the rest of the statute and makes sense in historical context. Interior adopted its interpretation in a Solicitor's Opinion after issuing the Ione Band ROD, thus evincing its intent to be bound by the interpretation. For those reasons, we give Interior's interpretation of the phrase "under Federal jurisdiction" great respect.

The phrase "under Federal jurisdiction," considered on its own, does not have an obvious meaning. "Jurisdiction, it has been observed, is a word of many, too many, meanings." *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 774 (9th Cir. 2011) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). One possible meaning of "under Federal jurisdiction" is offered by the County: A tribe was "under Federal jurisdiction" in 1934 only if it lived on "a reservation set aside on its behalf (at least absent a specific treaty or legislation)." Under that interpretation, the IRA's benefits would be limited to tribes that, as of 1934, already had very consequential dealings with the federal government. Another possible meaning that has been suggested is that all tribes that were actually tribes in 1934 – that is, all tribes that "continue[d] to exist as . . . distinct Indian communit[ies], such that the [federal government's plenary] Indian affairs jurisdiction attache[d] to them" – were "under Federal jurisdiction" in 1934. Wood, 65 U. Kan.

L. Rev. at 422. Under that interpretation, the IRA's benefits would extend to all recognized tribes.

Each of those proposed interpretations has substantial flaws. The trouble with the County's interpretation is that it would effectively render the word "recognized" surplusage. A tribe that lived on a reservation in 1934 was almost certainly "recognized" within any meaning of that term. *See generally Cohen's Handbook* §§ 1.03, 3.02. And a tribe that had entered into a formal arrangement with the federal government of the type cited by the County would almost certainly count as "recognized." *See id.* If Congress had truly understood "now under Federal jurisdiction" to mean what the County claims that it means, it could have removed "recognized" from the statute with almost no effect.[16] As for the other interpretation, it gives too little meaning to the phrase "under Federal jurisdiction," because it would encompass nearly every tribe.

The shortcomings of those two interpretations suggest that "under Federal jurisdiction" must mean something more than mere continued existence, but something less than a relationship with the federal government that had already resulted in the setting aside of a reservation or the signing of a formal treaty. In other words, "under Federal jurisdiction" should be read to limit the set of "recognized Indian tribes" to

[16] The only effect of retaining the term "recognized" in that situation would be to exclude from the scope of the IRA those tribes that were "under Federal jurisdiction" as of 1934, but which lost federal recognition after that time.

those tribes that already had *some* sort of significant relationship with the federal government as of 1934, even if those tribes were not yet "recognized." Such an interpretation ensures that "under Federal jurisdiction" and "recognized" retain independent meaning. *See United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1134 (9th Cir. 2005) ("It is an accepted canon of statutory interpretation that we must interpret [a] statutory phrase as a whole, giving effect to each word and not interpreting the provision so as to make other provisions meaningless or superfluous.").

Interior's interpretation of "under Federal jurisdiction," which involves an inquiry into "whether the United States had . . . taken an action or series of actions . . . sufficient to establish or that generally reflect[ed] Federal obligations, duties, responsibility for or authority over the tribe by the Federal Government," fits the bill. Interior's interpretation also recognizes that there may be gaps in the history of a tribe's relationship with the United States, but that those gaps do not necessarily mean that a tribe was not "under Federal jurisdiction" at the time that the IRA became law. The interpretation is thus consistent with the observation in *United States v. John*, 437 U.S. 634, 652-53, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978), that "the fact that federal supervision over [a tribe] has not been continuous" does not "destroy[ ] the federal power to deal with" that tribe.

In summary, Interior's reading of the ambiguous phrase "under Federal jurisdiction" is the best interpretation. Interior did not err in adopting that

interpretation for purposes of deciding whether the Ione Band was "under Federal jurisdiction" as of 1934.

3. *Interior's Determination*

The County's second argument in support of its challenge to Interior's "under Federal jurisdiction" determination assumes that Interior's interpretation of the statute is correct. Even assuming that interpretation, the County argues, the agency acted arbitrarily and capriciously in concluding that the Ione Band was "under Federal jurisdiction" as of the effective date of the IRA. We disagree. "[W]here the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made, the decision is not arbitrary or capricious." *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (citation and internal quotation marks omitted).

In the ROD, Interior relied on "[t]he continuous efforts of the United States beginning in 1915 to acquire land for the Ione Band as a permanent reservation" to conclude that the Band had been "under Federal jurisdiction" in the years leading up to 1934. Interior also found that the government's post-1934 attempts to buy land for the Ione Band showed that the Band's "under Federal jurisdiction" status continued through 1934. The County argues that the government's *failed* attempts to buy land for the Band are insufficient to establish that the Band was "under Federal jurisdiction."

Interior did not act arbitrarily or capriciously in concluding that the federal government's efforts to

purchase land for the Band beginning in 1915 suffice to establish that the Band was "under Federal jurisdiction" at some time before 1934. The efforts failed not because of a lack of will on the part of the federal government, but because of problems securing valid title to the land and the stubbornness of the government's negotiating partners. As one Interior official wrote to the Band in 1930, "[w]e have for more than eight years been negotiating with owners of the [land] for the purpose of purchasing same, but because of our inability to get a clear title to the land, the deal has not been closed. . . . The negotiations are still pending and we hope at some reasonably early date to acquire the [land]." The federal government's continued attempts reflected "Federal obligations, duties, responsibility for or authority over" the Band. That the attempts were thwarted by forces outside the government's control is not relevant. The difference between being "under Federal jurisdiction" and not "under Federal jurisdiction" cannot turn on the actions of third-party landowners.

Nor did Interior act arbitrarily or capriciously in concluding that the Ione Band remained "under Federal jurisdiction" when the IRA became effective. A 1941 letter from an Interior official in California to the Commissioner of Indian Affairs states that efforts to purchase land for the Ione Band resumed in 1935, but that the efforts once again failed, this time because of "mineral rights and values." Given that efforts were made by the federal government on the Band's behalf a few years before and just one year after 1934, it was

reasonable for Interior to conclude that the Band's "jurisdictional status remained intact in 1934."

Interior's determination that the Band was "under Federal jurisdiction" as of 1934 was therefore not arbitrary or capricious. And the Band is now recognized. Accordingly, the Band is a recognized Indian tribe that was "under Federal jurisdiction" in 1934, and Interior did not err in concluding that the Band is eligible to have land taken into trust on its behalf under 25 U.S.C. § 5108.

B. *Grandfathering Under IGRA*

The County next challenges Interior's determination that the Plymouth Parcels qualify as "restored lands of a restored tribe" under IGRA. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). Interior ruled that the Plymouth Parcels qualify under the so-called "grandfather provision" in the IGRA's implementing regulations, 25 C.F.R. § 292.26(b). The County argues, in essence, that the grandfather provision is invalid, at least as applied to the facts of this case. In order to explain why we disagree with the County, we must place the grandfather provision in context.

As mentioned earlier, IGRA severely limits "gaming . . . on lands acquired by the Secretary in trust for the benefit of an Indian tribe after" the date of enactment of the statute. 25 U.S.C. § 2719. But gaming *is* allowed when the "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition," *id.* § 2719(b)(1)(B)(iii)

– the "restored lands of a restored tribe" or "restored tribe" exception.

IGRA does not define "restored to Federal recognition." But by the time the statute was passed, Interior had already established a mechanism – the Part 83 process – by which unrecognized Indian groups could petition for recognition. *See* 25 C.F.R. pt. 83 (1988) ("The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes."). That mechanism was put in place in order to "enable [Interior] to take a uniform approach in the[] evaluation" of requests for recognition. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. at 39,361. Previously, Interior had recognized tribes on a "case-by-case basis at the discretion of the Secretary," *id.*, which had resulted in a "history of inconsistent, vague, and contradictory policies surrounding the recognition of tribes," *Cohen's Handbook* § 3.02[7][a], at 153. Thus, when Congress enacted IGRA in 1988, there existed (1) a formal administrative recognition process *and* (2) some tribes that had been re-recognized outside that process both before and after the effective date of Part 83.

In 1994, when Assistant Secretary of Indian Affairs Ada Deer "reaffirmed" the Band's status as a recognized tribe and directed that the Band be included on the list of recognized tribes published by Interior,

the Band was effectively recognized without having to go through the Part 83 process. Later that year, Congress passed the Federally Recognized Indian Tribe List Act of 1994 ("Tribe List Act"), which required Interior to publish a definitive list of recognized tribes annually. Pub. L. No. 103-454, § 103(3), 108 Stat. 4791 (1994), *codified at* 25 U.S.C. §§ 5130, 5131. The "findings" section of the law – which was not codified in the United States Code – includes the following statement: "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in [P]art 83 . . . ; or by a decision of a United States court[.]" 108 Stat. 4791, 4791. In 1995, the Ione Band was included on the list of recognized tribes published by Interior. Indian Entities Recognized and Eligible To Receive Services From The United States Bureau of Indian Affairs, 60 Fed. Reg. 9250-01, 9252 (Feb. 16, 1995). In 1996, the Band held tribal government elections that resulted in Interior's acknowledging the Band's tribal government.

In 2008, Interior promulgated regulations implementing IGRA's provisions governing gaming on lands acquired after the statute went into effect. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354-01 (May 20, 2008). The regulations limit the "restored tribe" exception to those tribes that have been restored to recognition through (1) an act of Congress, (2) the Part 83 process, or (3) a federal court order. 25 C.F.R. § 292.10. In other words, the restored tribe exception, as interpreted by Interior, does *not* apply to tribes – such as the Ione Band – that were

administratively restored outside the Part 83 process either before or after that process was put into place in 1978. In the explanation of its final rules, Interior expressed its "belie[f] that in 1988 Congress did not intend to include within the restored tribe exception [any] pre-1979 ad hoc determination[s]." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,363. Interior relied, in part, on the fact that the Tribe List Act had not listed non-Part-83 administrative determinations as a possible route to recognition. *Id.*

The 2008 regulations "apply to final agency action taken after" June 19, 2008. 25 C.F.R. § 292.26(b). However, the regulations include a "grandfather" provision:

> These regulations . . . shall not apply to applicable agency actions when, before the effective date of these regulations, [Interior] or the . . . Gaming Commission . . . issued a written opinion regarding the applicability of 25 U.S.C. [§] 2719 for land to be used for a particular gaming establishment, provided that [Interior] or the [Gaming Commission] retains full discretion to qualify, withdraw or modify such opinions.

Id. The decision to include the grandfather provision reflected Interior's concern that some tribes "may have relied on . . . legal opinion[s]" issued by Interior or the Gaming Commission

> to make investments into . . . property or taken some other actions that were based on their understanding that . . . land was eligible

> for gaming. Therefore, [§] 292.26(b)states that these regulations . . . shall not apply to applicable agency actions taken after the effective date of these regulations when the Department or the [Gaming Commission] has issued a written opinion regarding the applicability of 25 U.S.C. [§] 2719 before the effective date of these regulations. In this way, the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if these regulations now have created a conflict.

Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,372.

It is this grandfather provision that Interior invoked in 2012 when it decided that the Band qualified as a "restored tribe." Specifically, Interior determined that the Indian lands determination that the Band had received in 2006 constituted "a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment," so that the 2008 regulations did not apply to the Band's application. Interior then relied on and adopted the 2006 Determination's conclusion that the Band is a "restored tribe" and that the Plymouth Parcels are "restored lands."

According to the County, the 2008 regulations (minus the grandfather provision) carried into effect the *clear* intent of Congress to exclude from the "restored lands of a restored tribe" exception those tribes that

were administratively restored to recognition outside the Part 83 process. The County does not dispute that the Band falls within the scope of the grandfather provision, nor does the County challenge Interior's 2006 determinations – adopted and relied on in the ROD – that the Band is a "restored tribe" and that the Plymouth Parcels are "restored lands" under IGRA. But the County argues that, when an agency promulgates a new rule and the agency's pre-rule practice was "inconsistent with [Congress'] intent," the agency cannot "grandfather in" pending applications unless certain conditions are met. The County relies on *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1244, 267 U.S. App. D.C. 274 (D.C. Cir. 1988), and its test for determining when an agency has a "duty to apply a rule retroactively." Interior's decision to grandfather in the Band does not pass muster under that framework, argues the County, so the grandfather provision of 25 C.F.R. § 292.26(b), as applied by Interior to the band, is contrary to IGRA – that is, is "not in accordance with law." 5 U.S.C. § 706.

The premise of the County's argument is flawed: Congress did not clearly intend to exclude from the "restored tribe" exception those tribes administratively restored to recognition outside the Part 83 process. As Interior recognized in its 2008 rulemaking, "[n]either the express language of IGRA nor its legislative history defines restored tribe." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,363. "Restored to Federal recognition" certainly *could* mean "restored via the Part 83 process, legislation, or a court

order," as the 25 C.F.R. part 292 regulations reflect. But if Congress wanted to exclude those tribes that were administratively re-recognized outside the Part 83 process, it could have done so by explicitly referring to that process, as it did in the exception immediately preceding the restored lands exception. *See* 25 U.S.C. § 2719(b)(1)(B)(ii) ("Subsection (a) of this section will not apply when . . . lands are taken into trust as part of . . . the initial reservation of an Indian tribe acknowledged . . . *under the Federal acknowledgment process*[.]" (emphasis added)). Instead, Congress used the undefined term "restored." Furthermore, Congress used that undefined term knowing that some tribes had been re-recognized outside the Part 83 process. *See Interstate Commerce Comm'n v. Texas*, 479 U.S. 450, 458, 107 S. Ct. 787, 93 L. Ed. 2d 809 (1987) ("Presumably, in enacting [the statute], Congress was aware of the [implementing agency's] consistent practice of regulating railroads as 'rail carriers' even when they performed Plan II intermodal service."). Given those indicators of congressional intent, we conclude that Congress did not clearly intend for the "restored lands" exception to be unavailable to those tribes administratively re-recognized outside the Part 83 process. Rather, Congress left a statutory ambiguity for Interior to resolve, and Interior reasonably could have determined that a tribe could be "restored" to Federal recognition outside the Part 83 process, at least in certain circumstances.[17]

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[17] The Tribe List Act suggests that a non-Part-83 administrative "recognition" is not a recognition at all. *See* 108 Stat. 4791,

Because Congress did not clearly intend for the "restored lands" exception to be unavailable to those tribes administratively re-recognized outside the Part 83 process, grandfathering in those tribes would not frustrate congressional intent. Accordingly, even assuming that the principles of *Thomas* apply, Interior's decision to grandfather in the Ione Band under 25 C.F.R. § 292.26(b) was permissible. *See Sierra Club v. EPA*, 719 F.2d 436, 467-68, 231 U.S. App. D.C. 192 (D.C. Cir. 1983) ("The statutory interest in applying [a] new rule despite individual reliance is, of course, the crucial consideration in the context of requiring an agency to apply one of its rules retroactively."). In other words, 25 C.F.R. § 292.26(b), as applied by Interior in the ROD, is "in accordance with law."[18] 5 U.S.C. § 706.

In short, Interior permissibly grandfathered in the Band's application, and the County does not challenge Interior's determination that the Band falls within the scope of the grandfather provision. We therefore hold

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4791 (listing methods of recognition). Even if a non-Part-83 administrative recognition occurring after the effective date of that statute is invalid, the Band was re-recognized *before* the effective date of the Tribe List Act. Furthermore, Congress' intention in 1994 sheds no light on what Congress meant in 1988 when IGRA was passed. *Olive v. Comm'r*, 792 F.3d 1146, 1150 (9th Cir. 2015).

[18] To the extent that the County makes a facial challenge to the grandfather provision, that challenge necessarily fails. *See William Jefferson & Co. v. Bd. of Assessment & Appeals No. 3 ex rel. Orange County*, 695 F.3d 960, 963 (9th Cir. 2012) ("If [the plaintiff's] as-applied challenge fails, then [its] facial challenge necessarily fails as well because there is at least one set of circumstances where application of [the challenged statute] does not violate a taxpayer's procedural due process rights.").

that Interior did not err in allowing the Band to conduct gaming operations on the Plymouth Parcels under the "restored tribe" exception of IGRA.

AFFIRMED.

136 F. Supp. 3d 1193

United States Court District Court,
Eastern District of California

COUNTY OF AMADOR, California, Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; S.M.R. JEWELL, Secretary of the United States Department of Interior; KEVIN WASHBURN, Assistant Secretary of Indian Affairs, United States Department of Interior, Defendants-Appellees, Federal Defendants,

and IONE BAND OF MIWOK INDIANS, Defendant-Intervenors.

Case No. 2:12-cv-01710-TLN-CKD

September 29, 2015, Decided; September 30, 2015, Filed

For County of Amador, California, Plaintiff: James R. Parrinello, LEAD ATTORNEY, Christopher Elliott Skinnell, Nielsen Merksamer Parrinello Gross & Leoni LLP, San Rafael, CA; Cathy Ann Christian, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, Sacramento, CA.

For United States Department of the Interior, Sally Jewell, Secretary of the United States Department of Interior, Kevin K. Washburn, Acting Assistant Secretary of Indian Affairs, United States Department of Interior, Defendants: Judith Rabinowitz, LEAD ATTORNEY, United States Department of Justice, San Francisco, CA.

For Ione Band of Miwok Indians, Intervenor Defendant: Jerome L. Levine, LEAD ATTORNEY, Holland & Knight, Los Angeles, CA; Timothy Quinn Evans, LEAD ATTORNEY, Holland and Knight, LLP, Washington, DC; Zehava Zevit, LEAD ATTORNEY, Law Office Of Frank Lawrence, Grass Valley, CA.

Troy L. Nunley, United States District Judge.

MEMORANDUM AND ORDER

The matter is before the Court on Cross Motions for Summary Judgment filed by Plaintiff County of Amador ("Plaintiff"); Defendants the United States Department of the Interior (the "Department"), S.M.R. Jewell, and Kevin Washburn; and the Ione Band of Miwok Indians ("Defendant Intervenors"). (ECF Nos. 65, 82, and 84.) The Court has carefully considered the arguments raised in the parties filings, and has reviewed the attached exhibits and the relevant portions of the administrative record. For the reasons discussed below, Defendants' Motion for Summary Judgment and Defendant Intervenors' Motion for Summary Judgment are GRANTED. Plaintiff's Motion for Summary Judgment is DENIED.

INTRODUCTION

This lawsuit presents a challenge to the Record of Decision ("ROD"), issued on May 24, 2012, by Donald Laverdure, Acting Assistant Secretary of Indian Affairs,

Department of the Interior,[1] concerning the acquisition of the Plymouth Parcels property in trust for the Ione Band of Miwok Indians, in anticipation of the construction of a gaming-resort complex. In summary, Plaintiff challenges are as follows: the Department's determination to take the Plymouth Parcels into trust; the determination that the Ione Band is a "recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479; and the determination that the trust acquisition constitutes the "restoration of lands for an Indian tribe that is restored to Federal recognition," 25 U.S.C. § 2719(b)(1)(B), such that the property is gaming-eligible. Defendants and Defendant Intervenors respond that the ROD is procedurally and substantively valid.[2]

PROCEDURAL HISTORY

The complaint in this matter was filed on June 27, 2012. (ECF No. 1.) The complaint contains four causes

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[1] The Court uses the umbrella term "Department" throughout this Order, with the understanding that the relevant agency action in this case is largely undertaken by a sub-unit, the Bureau of Indian Affairs, or other agencies as noted.

[2] This case is related to Case No. 12-cv-1748-TLN-1748-CMK. A decision in that case, also considering the parties' motions for summary judgment on issues largely analogous to those here, will be filed concurrently with this decision. The instant decision has undertaken greater written analysis than in Case No. 1748, with the exception of the following issues: the *Carcieri* decision, collateral estoppel regarding the *Burris* litigation, and the pro hac vice application of a tribal attorney. The Court requests that the parties visit its decision in Case No. 1748 for additional analysis on those issues.

of action. Claims one and two seek declaratory and injunctive relief under the Indian Reorganization Act that the Department's determination – that the Ione Band was "under federal jurisdiction" in June 1934 – constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law. Claims three and four seek declaratory and injunctive relief under the Indian Gaming Regulatory Act that the Department's "Indians Lands" determination – including that the "restored lands for a restored tribe provision" is met – constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law.

Plaintiff's motion for summary judgment was filed on May 1, 2014. (ECF No. 65.) Defendant's motion for summary judgment was filed on July 10, 2014. (ECF No. 84.) Defendant Intervenors' motion for summary judgment was also filed on July 10, 2014. (ECF No. 82.) All parties submitted additional reply briefs, and Defendants submitted notices of supplemental authorities.[3] (ECF Nos. 85-87, 89, 93, 94.)

STANDARD OF REVIEW

The Court's review is governed by the Administrative Procedures Act ("APA"). Ordinarily, summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine dispute

[3] Plaintiff and Defendant Intervenors also submitted requests for judicial notice. (ECF Nos. 66 & 88.) The Court takes judicial notice of the exhibits attached therein to the extent they are true and accurate copies of what they purport to be.

as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However, in a case involving review of a final agency action under the [APA] . . . the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.' " *Id.* at 90 (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985)). In this context, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* at 90. Pursuant to the APA, a reviewing Court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or which have been taken "without observance of procedure required by law." 5 U.S.C. § 706(2).

STATUTORY AND REGULATORY FRAMEWORK

I. The Indian Reorganization Act of 1934

Congress enacted the Indian Reorganization Act ("IRA") in 1934. "The overriding purpose of that particular

Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). "[T]he Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Of particular relevance here, section 5 of the IRA authorizes the Secretary of the Interior to acquire in her discretion "any interest in lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 5 further provides that any such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." *Id.* The Secretary has also promulgated regulations governing the implementation of section 5. *See e.g.* 25 C.F.R. § 151.3(a)(3) (providing that trust acquisition may occur "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing").

The IRA also defines "Indians" in several ways, including as "all persons of Indian descent who are

members of any recognized Indian tribe now under Federal jurisdiction," and further defines "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. In 2009, in *Carcieri v. Salazar*, 555 U.S. 379, 382, 129 S. Ct. 1058, 172 L. Ed. 2d 791, the U.S. Supreme Court clarified that, "for purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

II. The Indian Gaming Regulatory Act

In 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") to regulate gaming operations owned by Indian tribes. The IGRA's purpose includes: "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1).

Section 20 of the IGRA generally prohibits tribal gaming on lands acquired by the Secretary in trust after October 17, 1988, unless the acquisition falls within one of the Act's exemptions or exceptions. 25 U.S.C. § 2719. For example, lands acquired after October 17, 1988, may still be eligible if they are part of: "(i) a settlement of a land claim, (ii) the initial reservation of an

Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B). Another exception involves a determination by the Secretary that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." § 2719(b)(1)(A).

The specific exception relied upon by the Department in the instant case is contained in section 2719(b)(1)(B)(iii): "the restoration of lands for an Indian tribe that is restored to Federal recognition" (hereinafter the "restored lands" exception).

In May, 2008, the Bureau of Indian Affairs ("BIA") published regulations implementing IGRA section 20, codified at 25 C.F.R. § 292 (the "Part 292 regulations"). The Part 292 regulations became effective in August, 2008. 73 Fed. Reg. 35,579. Of particular relevance to this action are sections 292.7, 292.10, and 292.26(b).

Sections 292.7 ("What must be demonstrated to meet the 'restored lands' exception"?) and 292.10 ("How does a tribe qualify as having been restored to Federal recognition?") provide criteria by which the restored lands exception can be met.

In the instant case, however, the ROD relies upon section 292.26(b), the "grandfathering" provision, to meet the restored lands exception. The grandfathering provision provides that the Part 292 regulations shall

not apply to agency actions when, prior to enactment of those regulations, the Department or the National Indian Gaming Commission ("NIGC") had already issued a written opinion regarding the restored landsexception and the property at issue. 25 C.F.R. § 292.26(b). Here, the Department relies upon an Indian Lands Determination issued in 2006, which found the Plymouth Parcels eligible for gaming. Thus, the Plymouth Parcels fall outside application of the Part 292 regulations as set out in the ROD where the Department determined that the restored lands exception is met.

BACKGROUND[4]

According to Defendant Intervenors, the Ione Band of Miwok Indians traces its ancestry to Miwok and Nisenan people, who historically have resided on lands that today make up Amador County. (AR3528-301.) In the early part of the 20th Century Congress established a land purchase program, which enabled the BIA to purchase land throughout California with the aim of alleviating Indian landlessness and homelessness. (AR499-502; 644-45.) As further explained in the *Ethnohistorical Overview of the Ione Band of Miwok Indians* (2005), prepared for the Ione Band (hereinafter the "*Ethnohistorical Overview*"), the BIA

[4] Here, the Court notes many of the relevant events and communications between the Ione Band and the Federal Government that are identified in the ROD and in the parties' moving papers. Specific items are addressed more fully in the "Analysis" section of this Order.

appointed special agent C.E. Kelsey in 1905-06 to investigate the conditions of dispossessed California tribal members, including in Amador County. (AR3543.) His investigation included taking a census of the number of surviving Indian people residing at specific localities, including "Buena Vista [Richey],"[5] "Ione," "Jackson Valley", and the "Jackson Reservation". (AR3543-44; *see also* "Census of Non-Reservation California Indians, 1905-1906" by C.E. Kelsey, AR3774.) In 1915, BIA special agent John Terrell revisited many of the Indian communities in California, using Kelsey's census as a guide. (AR3544.) According to Terrell's "Census of Ione and vicinity Indians," which included divisions for people living "At Jackson belonging to the Ione Band" and "At Richey belonging to the Ione band," there were 101 "Ione and vicinity" Indians. (AR3544-45; ECF No. 65 at 14.)

As further explained in the *Ethnohistorical Overview*, Terrell "located the Ione village, which consisted of three homes and a sweat house, at about three and one-half to four miles out of Ione." (AR3547.) "Terrell emphasized the importance of securing land for the Ione Band, and initiated negotiations for the purchase of forty acres, which included the Indian residences on the property . . . The purchase was approved, and attempts to finalize it were made between 1916 and 1930, but the transaction was never completed because the government was unable to obtain clear title to the

[5] The parties indicate that, in the early 20th century, the "Buena Vista" location or "Buena Vista" Indians were sometimes referred to as the location or Indians "at Richey".

land." (AR3547.) *See also* "Authority" form, May 18, 1916, for the "PURCHASE OF LANDS FOR LANDLESS INDIANS IN CALIFORNIA" and allotting $2000 for "the purchase of 40 acres of land in Amador County, California (described by metes and bounds) from the Ione Coal & Iron Company, for the use of 101 homeless California Indians, designated as the Ione Band, at not to exceed $50 per acre." (AR160.) *See* Letter from the Acting Assistant Commissioner of Indian Affairs to the Secretary of the Interior, "enclos[ing] herewith a partially executed deed, abstract of title in two volumes, and plat of survey in connection with the desired purchase of 40 acres in Amador County, at the price of $2,000 from the Ione Coal & Iron Company, for the use of 101 homeless California Indians, designated as the Ione Band. [¶] The tract in question is the ancient village site of these Indians and contains some rich valley land." (AR4634-35.) It appears that efforts to acquire the aforementioned 40 acre parcel, called the "Arroyo Seco Ranch," were ultimately abandoned around 1941.[6] (AR3549; 506; 3972; ECF No. 65 at 16.)

Apart from this 40 acre parcel, Plaintiff draws attention to a tribal history prepared by Ione Band member Glen Villa Sr., in 1996. Villa wrote: "Buena Vista Rancheria, a 70 acre parcel of land 4 miles south of

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[6] It appears that throughout the early twentieth century, and continuing until the Plymouth Parcels were substituted, the main parcel sought on behalf of the Ione Band was part of the "Arroyo Seco Ranch". The Court hereinafter refers to this parcel either as the "40 acre parcel" or the "Arroyo Seco parcel".

Ione, was purchased for the Ione Band. Some of the people identified in the 1915 census already lived at this site which was an old Indian village called Upusuni." (AR3972.) *See also Buena Vista Rancheria Miwok Indian Tribe Background Materials*, explaining: "The Buena Vista Rancheria was established as trust land for the Tribe's benefit by the Secretary of the Interior under the Authority of the Act of 1914 in 1928." (AR900; ECF No. 65 at 16.)

According to Plaintiff, there is no record of subsequent communication between the Ione-area Indians and the federal government until the 1970s. By the early 1970s, some members of the Ione Band had renewed their interest in securing BIA housing assistance and to secure control over the aforementioned 40 acre parcel. (ECF No. 65 at 18.) Accordingly, in 1972 the individuals filed an action in Amador County Superior Court to quiet title to the parcel. *See* Letter from the Acting Area Director to the Commissioner of Indian Affairs, dated July 20, 1972, stating: "[t]he California Rural Indian Land Project, a project of California Indian Legal Services, has filed an action in the Superior Court of the State of California for the County of Amador to quiet title on a 40-acre parcel for the benefit of members of the Ione Band of Indians. A copy of the complaint is enclosed." (AR531.) In 1972 the court awarded title to the parcel to Plaintiffs, which included individuals and "other members of the Ione Band of Indians." (AR535-36, *Villa v. Moffatt*, No. 8160, California Superior Court, Amador County.)

On October 18, 1972, Commissioner of Indian Affairs Louis Bruce sent a letter to the Ione Band, stating in relevant part: "[The BIA] has been informed that the Indians continue to desire that the land ultimately be taken by the United States and held in trust status . . . Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated . . . I therefore, hereby agree to accept by relinquishment of title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians: [40 acre parcel described]." (AR533-34.)

As Plaintiff points out, other members within the BIA questioned the conclusiveness of the Bruce determination. For example, the Assistant Secretary of the Interior wrote to the BIA Sacramento Area Director in 1973, stating "the former contemplated purchase of land for [the Ione Band] by the United States may indicate that they are a recognizable group entitled to benefits of the Indian Reorganization Act. We have no correspondence, however, from the group requesting recognition or a desire to establish a reservation. If the Band desires and merits Federal recognition, action should be taken to assist them to perfect an organization under the provisions of the Indian Reorganization Act." (AR537.) In January, 1975, the Department's Office of the Solicitor wrote to the Sacramento Area Director stating: "The Solicitor's Office is presently considering our proposal that the Ione Indians be extended Federal recognition." (AR560.) In January, 1976, the Director of the BIA's Office of Indian Services

requested additional information regarding the historical existence of the Band, and whether it met the necessary criteria for recognition. (AR574.) In April, 1976, a BIA Tribal Operations Officer wrote to California Indian Legal Services, explaining that it needed help in verifying "that the recent quiet title action instituted by named Ione Indians 'and others' was in fact a representative action, and that title to the subject tract is being held by the parties and on behalf of the Ione Band." (AR580.)

In 1978, the Department promulgated regulations outlining procedures whereby groups of Indians could attain federal recognition as Indian tribes (hereinafter referred to as the "Part 83 regulations"). 25 C.F.R. §§ 83.1-13. At that time, the BIA also issued a list of federally-recognized Indian tribes, and a list of groups whose petitions for recognition were on file at the BIA. The Ione Band appeared on the latter list. (ECF No. 65 at 21; AR597.)

Defendants and Defendant Intervenors assert – as is stated in the ROD – that at some point in the 1970s, the federal government began consistently taking the position that the Ione Band was not a federally-recognized tribe, and therefore a de facto termination occurred. For example, a 1990 letter from Hazel Elbert, Deputy to Harold Burris, Sr. explained the position that the Bruce recognition was not in fact a recognition and that the Band was not federally recognized. (AR20808-12.) In litigation involving members of the Ione Band in the 1990s (the *Burris* litigation, discussed *supra*), the government initially argued that in order

for the Ione Band to be federally recognized, it had to follow the procedures outlined in the Part 83 regulations. The Interior Board of Indian Appeals, in 1992 in *Ione Band of Miwok Indians v. Sacramento Area Director*, decided that the Ione Band had not yet been recognized and that to become recognized it would need to follow the acknowledgement procedures stated in the Part 83 regulations. (AR812.) A 1992 letter from Assistant Secretary-Indian Affairs Brown also took the position that to achieve federal recognition the Ione Band would have to follow the procedures stated in the Part 83 regulations. (AR4779.) Further, as stated by Plaintiff, in an undated briefing paper, apparently issued by the Department to the "President of the United States," the Department reiterated that: "It is the Department's position that this group has never attained Federal tribal status and is not, therefore, eligible for restoration . . . It is our position that the Ione Band should continue to seek to establish Federal status through the BIA's acknowledgement process." (AR794-95.)

In 1994, the federal government reversed course. In a letter dated March 22, 1994, Assistant Secretary-Indian Affairs Deer stated she was reaffirming the portion of the 1972 Bruce letter which stated that "[f]ederal recognition was evidently extended to the Ione Band of Indians at the time the Ione land purchase was contemplated." The Deer letter further stated: "As Assistant Secretary of Indian Affairs I hereby agree to accept the land designated in the Bruce letter to be held in trust as territory of the

Tribe." The Deer letter further stated that the Band would henceforth be included on the list of Indian Entities recognized and eligible to receive services from the BIA. (AR4312.) The Ione Band was placed on the Federal Register's list of recognized tribes in 1995 and has been on that list since. (AR4826; ECF No. 82 at 15.)

In a July, 1994 follow-up letter to her March, 1994 letter, Deer clarified: "In my [previous letter], while I agreed in principle to accept that parcel of land referred to in the Bruce letter and which the Federal court in 1972 ruled belonged to various named members of the band, this does not mean that the Bureau will presently begin a process of taking this land into Federal trust." (AR1126.) That follow-up letter further explained that "The title to this land [i.e. the 40 acre Arroyo Seco parcel] is not clear and its ownership is currently the subject of litigation. This litigation must be resolved before the land could be considered for possible trust status. As an alternative, it may be more expedient if land elsewhere could be taken intro trust for the band." (AR1126.)

According to the *Ethnohistorical Overview*, in January, 1996, the Ione Band met in Plymouth to establish a joint Interim Council, and an enrollment committee was formed. The enrollment committee established the following criteria for enrollment in the Ione Band of Miwok Indians: 1) an individual must be a lineal descendant of the 1915 "Census of Ione and Vicinity Indians by J.J. Terrell; or must be a lineal descendent of the 1972 judgment of *Villa vs. Moffat*; 2) an individual

must possess Miwok blood; and 3) an individual must have had consistent interaction with the Tribe through cultural contacts with residents of the 40 acre tract that was the subject of the 1972 judgment. The BIA compiled a list of individuals who met these requirements, which was posted in the Amador Dispatch newspaper in May, 1996. (AR3550-51.)

In September, 2004, the Ione Band submitted a request to the Department for an Indian Lands Determination (hereinafter "ILD") regarding the Plymouth Parcels. (AR1401-13.) In November, 2005, with the ILD request pending, the Ione Band submitted its application to the Department to have the Plymouth Parcels taken into trust for gaming purposes. (AR2751-3482.) In September, 2006, Associate Solicitor, Division of Indian Affairs, Carl Artman issued a determination (hereinafter referred to as the "2006 ILD") that the Plymouth Parcels met the restored lands exception; the 2006 ILD references the Bruce and Deer letters, among other instances of interaction between the federal government and the Ione Band. (AR5550-54.)

Following issuance of the 2006 ILD, Amador County and the State of California appealed that determination to this Court. This Court dismissed that action as untimely on the basis that the trust application had not yet been approved. *See Cnty. of Amador, Cal. v. U.S. Dep.'t of Interior*, 2007 U.S. Dist. LEXIS 95715, 2007 WL 4390499, at *4 (E.D. Cal. Dec. 13, 2007).

In January, 2009, Solicitor David Bernhardt circulated a withdrawal memorandum and draft legal opinion to various members of the DOI, including the NIGC. The memorandum stated in relevant part: "We are now in the process of reviewing the preliminary draft Final Environmental Impact Statement for the Plymouth Parcel. As a result, I determined to review the Associate Solicitor's 2006 Indian lands opinion and have concluded that it was wrong. I have withdrawn and am reversing that opinion. It no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the Band is not a restored tribe within the meaning of the IGRA." (AR7112.)

However, in a memorandum issued in July, 2011, Solicitor Hilary Tompkins stated, with regard to the Bernhardt position: "The Draft Opinion was never issued and the Withdrawal Memorandum was not acted upon on behalf of the Department by any individual with delegated authority to make decisions under the IGRA." (AR8823.) The Tompkins memorandum further stated: "For these reasons, I hereby rescind the Withdrawal Memorandum and decline to issue the Draft Opinion. I also hereby reinstate the Restored Tribe Opinion regarding the Ione Band's eligibility to conduct gaming on the land in question." (AR8824.)

On February 24, 2009, the U.S. Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791, holding that section 19 of the IRA "limits the Secretary's authority to take land into trust for the purpose of providing land to members of a tribe

that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. Amador County sent comments to the Department thereafter, arguing that the Secretary lacked authority to take land into trust for the Ione Band, and the Ione Bond sent responsive comments and submitted evidence that the Ione Band had been under federal jurisdiction in 1934. (AR7757-97; 8000-210; 8872-9191.) In May, 2012, the ROD issued, concluding among things that the Ione Band was under federal jurisdiction within the meaning of the IRA and *Carcieri*.

ANALYSIS

I. Statute of limitations arguments

The parties dispute whether the six-year statute of limitations in 28 U.S.C. § 2401 bars Plaintiff from contesting various Departmental determinations that are referenced in the ROD. Under section 2401, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *See Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (section 2401 applies "to actions brought under the APA which challenge a regulation on the basis of a procedural irregularity").

Specifically, the Court construes the parties' moving papers to dispute whether the Plaintiff can challenge: 1) the validity of the grandfathering provision contained in 25 C.F.R. § 292.26(b); and 2) the validity of the 1994 Deer determination and the 1972 Bruce

determination insofar as they extend federal recognition to the Ione Band.

With respect to section 292.26(b), Plaintiff makes arguments that touch upon the facial validity of the grandfathering provision, though Plaintiff expressly challenges the application of this provision to the Ione Band's case. (Pl. Reply, ECF No. 85 at 28.) The statute of limitations argument raised by Defendants and Defendant Intervenors is essentially that the Part 292 regulations were promulgated in May, 2008, and Plaintiff's motion for summary judgment was filed more than six years later. Defendant Intervenors state that the complaint – which was filed in 2012 – does not raise the issue. However, paragraph 25, footnote 2 of the complaint states: " . . . the ROD's conclusion that the 2006 Artman determination is "grandfathered," and is not subject to the regulations adopted in 2008 (*see* 25 C.F.R., Part 292), is arbitrary, capricious, and contrary to law." The Complaint also makes numerous arguments regarding the ROD's determination that the Plymouth parcels qualified as restored lands for a restored Indian tribe under the IGRA; section 292.26(b) functions in the ROD to permit the Secretary to make the determination that the restored lands exception is met. Accordingly, Plaintiff questioned the validity of section 292.26(b) within six-years of the promulgation of the Part 292 regulations, and so the six-year statute of limitations does not bar Plaintiff's arguments.

With respect to the 1972 Bruce determination and the 1994 Deer determination, to be clear, this action is

not brought against those determinations; it is brought against the conclusions reached in the ROD. A tenet of Plaintiff's argument is that the ROD's conclusions are arbitrary and capricious because are they based upon decades of inconsistency regarding whether the Ione Band was federally recognized. Even if challenges to the Bruce and Deer determinations, per se, were precluded on statute of limitations grounds, the other arguments raised by the parties would require the Court to examine the reasoning behind the Bruce and Deer determinations.

The Court finds *Wind River Min. Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991) to be on point. *Wind River* held as follows:

> If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to be bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision . . . If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require a more "interested" person than generally will be found in the public at large."

Wind River, 946 F.2d at 715.

As a reference point, in *Shiny Rock Min. Corp. v. United States*, 825 F.2d 216, 218 (9th Cir. 1987), the procedural issue was whether the so-called "notation rule" had been complied with by the Bureau of Land Management in rejecting plaintiff's claim for a mineral patent; the notational rule required that the BLM make an initial determination regarding whether its records reflected that the land had been devoted to a particular use. *See also Shiny Rock*, 906 F.2d 1362, 1364-65 (related proceeding); *Penfold*, 857 F.2d at 1315 (the statute of limitations in section 2401 "should apply to actions brought under the APA which challenge a regulation on the basis of procedural irregularity").

Plaintiff's arguments are in part procedural and in part substantive. For example, Plaintiff argues that the Deer determination, and the Bruce determination upon which it relies, are wrong because they are based on a misunderstanding of the history of the Ione Band in Amador County. Plaintiff argues that the Ione Band has improperly received federal recognition because it lacks distinct status as a tribe apart from the Buena Vista and Jackson Rancheria tribes. These are not "purely procedural" arguments. (ECF No. 87 at 7.)

There is precedent for applying the *Wind River* analysis within the context of federal recognition of an Indian tribe. In *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003), plaintiffs challenged the Department's decision to grant federal recognition to the Lytton Rancheria of California as an Indian tribe, even though the challenge was brought more than six years after the

recognition occurred. Applying *Wind River*, the district court held that plaintiffs' challenge was not time-barred, while stating, in relevant part: "Plaintiffs' claim concerning recognition of Lytton as a tribe is a substantive challenge to the Secretary's recognition decision. Further, when the Secretary made the decision to . . . grant Lytton federal recognition in 1991, plaintiffs could have had no idea that Lytton's tribal status would affect them [by leading to tribal gaming nearby]." *Artichoke Joe's*, 278 F. Supp. 2d at 1183.

In *N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009), plaintiff claimed that the NIGC acted ultra vires in approving the Nooksacks' [a federally recognized Indian tribe] proposed ordinance in 1993 without first making an Indian lands determination for locations where gaming would be permitted under the ordinance.[7] The *Alliance* court found that "'[n]o one was likely to have discovered' that the NIGC's approval was 'beyond the agency's authority until someone actually took an interest in' it. *Wind River*, 946 F.2d at 715. The Alliance 'took an interest' in 2006 when construction of the Casino began near some of its members' properties. The Alliance 'could have had no idea' in 1993 that the NIGC's approval of the Nooksacks' Ordinance 'would affect them' in 2006

[7] "The IGRA requires Indian tribes to receive NIGC's approval of a gaming ordinance before engaging in 'class II' or 'class III' gaming. 25 U.S.C. § 2710(b), (d). Class II gaming includes bingo and card games except for 'banking' card games like baccarat, chemin de fer, and blackjack. *Id.* § 2703(7). Class III gaming includes banking card games and slot machines. *Id.* § 2703(8)." *Alliance*, 573 F.3d at 741.

by leading to construction of a casino thirty-three miles from the Nooksack reservation. *See Artichoke Joe's*, 278 F. Supp. 2d at 1183." Accordingly, the *Alliance* court concluded that the six-year statute of limitations in section 2401 did not bar plaintiff's claim. *Alliance*, 573 F.3d at 741.

Defendant Intervenors argue that, at the latest, the 1995 Federal Register listing of the Ione Band provided sufficient notice for Plaintiff to sue. *See e.g. Camp v. U.S. BLM*, 183 F.3d 1141, 1145 (9th Cir. 1999) ("[P]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"); *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008). Plaintiff knew the Deer determination had been made in 1994, because the issue arose in the course of the *Burris* litigation, and thus knew thereafter that the Ione Band had appeared on the Federal Register of recognized tribes. *See Wind River*, 946 F.2d at 715 (noting that its holding would apply where "no one was likely to have discovered that the [agency's action] was beyond the agency's authority until someone actually took an interest in that particular piece of property. . . ."); *Artichoke Joe*'s, 278 F. Supp. 2d at 1183(noting that when the Department granted the Lytton tribe federal recognition, "plaintiffs could have had no idea that Lytton's tribal statute would affect them" by leading to tribal gaming nearby).

However, as late as 2009, after many years of listings of the Ione Band within the Federal Register, Solicitor Bernhardt took the position that the Ione Band

was not federally recognized and therefore that trust acquisition was improper. With respect to the 1972 Bruce determination, shortly thereafter it was the federal government's position that the Bruce determination was wrong. The Court's primary consideration with respect to the instant statute of limitations argument is that Plaintiff now challenges the ROD's conclusions based upon, what appears to be, a pattern of inconsistency that has continued up to a point close-in-time with the ROD's issuance. Plaintiff does state its arguments within the vein of *Wind River*: that the Department has exceeded its constitutional or statutory authority by reaching the decisions stated in the ROD, resulting in an adverse application of those decisions to Plaintiff. *Wind River*, 946 F.2d at 715. This is the first action proceeding to the summary judgment phase, in which the issue is the validity of the government's acquisition of the Plymouth Parcels and their eligibility for gaming. Plaintiff's previous action in this Court making the aforementioned challenge, was dismissed on the basis that the trust application had not yet been approved.[8] *Cnty. of Amador, Cal. v. U.S. Dep't*

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[8] Defendant Intervenors attach a Petition for Writ of Mandate (2004), brought by Amador County against the City of Plymouth in Amador County Superior Court, seeking to invalidate a government-to-government agreement entered into between the Tribe and the City. Amador County argued in that petition that "the Tribe is a recognized Native American tribe not subject to state court jurisdiction." (Pl. RJN, ECF No. 88-1 at 5:5-7.) Defendant Intervenors argue in the instant matter that the Ione Band's federally recognized status thus was applied as far back as that litigation; it is not clear the extent to which the Bruce and Deer

of Interior, 2007 U.S. Dist. LEXIS 95715, 2007 WL 4390499, at *4 (E.D. Cal. Dec. 13, 2007). In this case, Plaintiff challenges the substance of the ROD's conclusions in part due to the ROD's reliance upon the Bruce and Deer determinations. Therefore, Plaintiff's challenge to the Bruce and Deer determinations is not precluded by the six-year statute of limitations in 28 U.S.C. § 2401.[9]

II. The Department's two-part inquiry for "under federal jurisdiction," 25 U.S.C. § 479

The IRA defines Indian to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," and further defines "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. Further, " § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar*, 555 U.S. at 382.

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determinations or the Ione Band's federally recognized status was at issue in that case.

[9] As a practical matter, it is somewhat unworkable to excise challenges to the Bruce and Deer determinations from the Court's analysis. For example, Plaintiff, in pointing out the inconsistency of federal recognition of the Ione Band, may raise the fact that Solicitor Bernhardt sought to reverse the Deer determination in 2009, which requires some analysis of the strength of the Deer determination in the first instance.

As explained in the ROD, the Department has considered section 479 ambiguous regarding the meaning of "under Federal jurisdiction," and so has constructed a two-part inquiry for determining whether a group was under federal jurisdiction.

> The first part examines whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had . . . taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members – that are sufficient to establish or that generally reflect Federal obligations, duties, responsibility for or authority over the tribe.
>
> . . .
>
> [T]he second part ascertains whether the tribe's jurisdictional status remained intact in 1934 . . . In general [ ] the longer the period of time prior to 1934 in which the tribe's jurisdictional status is shown, and the smaller the gap between the date of the last evidence of being under Federal jurisdiction and 1934, the greater likelihood that the tribe retained its jurisdictional status in 1934.

(AR10105-06.)

The Court agrees that the statutory term "under Federal jurisdiction" is ambiguous, and that the Department's two-party inquiry is reasonable. Thus, the Court affords the Department deference for its

promulgation of the two-part inquiry.[10] *See United States v. Mead Corp.*, 533 U.S. 218, 219, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001): "It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *See Confederated Tribes of the Grand Ronde Comm.'n of Ore. v. Sally Jewell, et al.*, 75 F. Supp. 3d 387, 2014 WL 7012707 at *9-11 (D.D.C. Dec. 12, 2014) (applying *Chevron* deference to the Department's promulgation of the two-part inquiry).

III. The two-part inquiry applied to the Ione Band

In the ROD, the Secretary's application of the two-part inquiry consists essentially of identifying many of the aforementioned items stated in the "Factual Background" section of this Order.

With respect to step one – whether the Ione Band was under federal jurisdiction in 1934 or before – the

[10] The Court takes Plaintiffs' arguments regarding the Department's two-part inquiry to be primarily directed at application of that inquiry to the Ione Band's case.

Secretary's justification includes: the Band's being a successor in interest to Treaty J in the mid-1800s; agent Kelsey's efforts to document members of the Band in the early 1900s; agent Terrell's efforts to acquire a 40-acre parcel for the Band; failed – but consistent – attempts to complete the acquisition of land for the Ione Band continuing into the 1930s; and a petition by the Ione Band again in 1941 to complete the acquisition. (AR10108-09.)

With respect to step two – whether the Band's jurisdictional status remained intact in 1934 – the Secretary's justification includes: beginning in the 1970s, efforts by the California Indian Legal Services to complete a trust acquisition for the Band; the 1972 Bruce determination; the 2006 ILD; and the fact that, in 2011, the U.S. District Court for the District of Columbia previously recognized the Ione Band's "longstanding and continuing governmental relationship with the United States," *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 198 (2011). (AR10109-10.)

Plaintiff makes a number of arguments that, notwithstanding the ROD's analysis, the Ione Band is not eligible to have lands taken into trust under the IRA because they do not qualify as a "recognized Indian tribe now under Federal jurisdiction," § 479. These arguments are stated below.

A. Section 16 and 18 elections

The IRA provides authority for the Secretary to take land into trust for tribes and individual Indians, 25 U.S.C. § 465, and further defines a tribe to be: "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," 25 U.S.C. § 479. Plaintiff contends that the Ione Band was not a distinct tribe in 1934, as evidenced by the fact that no special elections were held after enactment of the IRA, either to organize as a tribe (section 16) or to opt out of the IRA (section 18).

Section 16 of the IRA provides that a tribe "may adopt an appropriate constitution and bylaws" which shall become effective when "ratified by a majority vote of the adult members of the tribe." 25 U.S.C. § 476(a). In Amador County, the Jackson Rancheria and Buena Vista Rancheria voted to organize under section 16, but the Ione Band did not hold such an election. (AR20777.) Defendant Intervenors argue – and the wording of section 16 lends support to this interpretation – that these elections were permissive rather than mandatory. Without more, the absence of such a vote by the Ione Band is not persuasive that the Ione Band was not a tribe at the time of the IRA's enactment.[11]

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[11] *See Ten Years of Tribal Government under I.R.A.* (1947), Theordore H. Haas, Chief Counsel, U.S. Indian Service, stating a distinction between the mandatory opt-out section 18 elections and the permissive section 16 elections. (AR20764-65.) *But See Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 58 & n.10 (D.D.C. 2013) (stating section 16 elections were

In contrast, under section 18 of the IRA, the Act "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice." 25 U.S.C. § 478. The parties agree that the Ione Band did not vote, under section 18 of the IRA, in these mandatory elections called by the Secretary. However, the text of section 18 states that those elections pertain to "any reservation" wherein a majority of the adult Indian voted to opt out. It is a reasonable conclusion that the Ione Band did not have a reservation home base on or around 1934, thus this would explain the fact – this is Defendants and Defendant Intervenors' position – that the Ione Band was not subject to section 18 elections.

Plaintiff points to an August 15, 1934 letter from O.H. Lipps, then Superintendent of the Sacramento Indian Agency, to the Commissioner of Indian Affairs, listing the various Indian communities under the jurisdiction of the Sacramento Agency (which then included Amador County). The stated purpose of that letter was to respond to a request for information from the Commissioner about Indian communities within the Sacramento Agency's jurisdiction, for the purpose of facilitating the Secretarial elections described in 25 U.S.C. § 478. Lipps stated that as of the time of writing,

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"required"); 25 U.S.C. § 476(c) (the Secretary must hold an election if there is a tribal request for one).

there were only two groups "under this jurisdiction who have organized tribal or group councils – the Tule River and Fort Bidwell Indians. (AR20755.) The Lipps letter also enclosed a list of the "various rancherias under this Agency," which included the Buena Vista and Jackson Rancherias, but not the Ione Band. (AR20755-56.)

Defendants acknowledge that in certain instances section 18 elections were held for landless tribes. (*See* ECF No. 84-1, n. 15; *Shawano County, Wisc. v. Acting Midwest Reg'l Dir*, 53 IBIA 62, 72-73 (2011).) However, in the Lipps letter itself, it appears "rancherias" was used to refer specifically to "tracts of land". *See* Lipps letter, AR20755-58 (enclosing a "list of the various rancherias under this Agency, giving name of each, county in which located, size of tract, and population. . . . These [unintelligible number] tracts of land . . . were purchased several years ago in order that the Indians might have a place to live undisturbed . . . Many of the tracts remain unoccupied." Further, approximately eight months earlier, Superintendent Lipps had written to the Commissioner of Indian Affairs "in reference to the proposed Indian colony for the homeless Indians near Ione in Amador County, this jurisdiction." (AR20752.) It is a reasonable conclusion that the Ione Band had no "tract of land," or at least none considered to be a rancheria under the jurisdiction of the Sacramento Agency. Without more, the Court lacks a basis to find that if section 18 elections were not held with respect to a group of Indians, then

that group cannot be a distinct tribe under federal jurisdiction in 1934.

B. The Ione Band, Buena Vista Rancheria, and Jackson Rancheria

Plaintiff argues: "historically, the members of what is now the 'Ione Band of Miwok Indians' were actually part of the modern-day Buena Vista Rancheria and/or Jackson Valley Rancheria tribes, rather than a separate and distinct tribal entity in its own right."[12] (ECF No. 65 at 40.)

For example, with respect to the 1915 Terrell Census, Plaintiff points out that it is entitled a "Census of Ione and vicinity Indians," and lists Charlie Maximo as the "recently elected Chief of the band," but also lists ten Indians "[a]t Jackson belonging to the Ione Band" and another 29 Indians "At Richey belonging to the Ione Band." (AR3490.) According to Plaintiff, among this latter group "At Richey" are listed John Oliver, Casus Oliver, and Lucy and Joseph Oliver, from whom the Buena Vista Rancheria claim descent. (AR919; 878; 4093-94; 3966.) Plaintiff points out that much of the correspondence that Agent Terrell had with Indians regarding the attempted Arroyo Seco land purchase is with the Olivers. (AR132; 180; 186.)

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[12] It is not clear to the Court if the appropriate description is the "Jackson Valley" or "Jackson" tribe. The Federal Register, 1995, lists the "Jackson Rancheria of MeWuk Indians of California". (AR4826.) The 1905-06 Kelsey census identifies "Jackson Valley" and "Jackson Reservation". (AR3776.)

See also "Ethnohistoric *Notes* (1982), Glen Villa and Dwight Dutschke, Amador Tribal Council, stating: "Because of their power dating back to aboriginal times, the Maximos were accepted in the Ione area as new leaders. Chief Maximo and his brothers called themselves "Christian Indians" and stated that they had received their names in the missions . . . Political rivalry occurred between the Maximos and the Olivers that divided the factions in the Ione area. Separate villages were created, the Olivers living in Buena Vista and the Maximos living in the Jackson Valley, both near Ione. Both communities have survived. The Oliver village became the Buena Vista Rancheria, which was terminated in 1961. The Maximo village became the Ione Band of Miwok Indians, who are currently seeking federal recognition." (AR3966.) *See also* February, 1916 letter in response to Lena Oliver, stating in part: "[I]t now appears the pending purchase of 40 acres of land to include the present village location of the Ione Indians will be soon be consummated . . . It appears from the census of the Ione Indians compiled by me last [unintelligible] through the kind assistance of Charley Maximo and some few other Indians of the band that your name does not appear, unless you are the wife of either John or Casus Oliver, then reported as living up at Jackson, but belong properly to the Ione Band. [¶] This census indicates 101 Indians, of which 62 then resided at Ione and near there, 13 at Jackson and 29 at Richey. If you are not the wife of either John or Casus Oliver, but really belong to the Ione band of Indians, [sic] am sure the omission of your name has been an unintentional oversight." (AR137-38.)

Plaintiff also points out that in more recent correspondence – such as during the pendency of the *Burris* litigation in the 1990s – members of the Department referred to the Ione Band interchangeably with the Buena Vista Rancheria. *See e.g.* correspondence from Ada Deer, October 19, 1993, regarding "Publication of the Secretary's list of Federally Recognized Tribes," and stating the "proper name of the Tribe" is the "Buena Vista Rancheria/Ione Band of Miwok Indians" (AR843); correspondence from Ada Deer, October 24, 1993, regarding an "Internal Investigation and a Formal Hearing of the BIA Attempts of Termination of the Buena Vista Rancheria/Ione Band of Miwok Indians." (AR847).

Plaintiff points to the Glen Villa, Sr. Tribal History, which stated: "Buena Vista Rancheria, a 70 acre parcel of land 4 miles south of Ione, was purchased for the Ione Band. Some of the people identified on the 1915 census already lived at this site which was an old Indian village called Upusuni." (AR3972.) The Villa history further stated that it was common for the population of Miwok tribes to be "divided between several settlements consisting of a few households more or less connected by blood, but there was also a site that was regarded as the principal one inhabitated." (AR3974.) An analysis of the Terrell Census, also submitted by the Ione Band, shows that "Chief" Charlie Maximo was buried at the Buena Vista Rancheria. (AR4082.)

Plaintiff also points to a letter within the record, apparently written at some point between 1916 and 1920, from Agent Terrell to Commissioner of Indian

Affairs Cato Sells, which refers to the "Ione and Richey Band of Indians," and which also contains hand-written notes stating that the Ione Band and Buena Vista Tribes were "one tribe" and "Buena Vista is other name." (AR864-66.) The administrative record index shows the letter was submitted by Gerald Grazer, an attorney for the Ione Band in the mid-1990s. (ECF No. 85 at 33.)

Plaintiff also points to a letter from Harold Burris' lawyer to the Secretary of the Interior in 1994, summarizing the history of the Ione Band, and stating that: "Although the factions had never acted as a tribe, in 1970 they agreed to call themselves by this name and, in fact, elected Harold, Sr. the Chairman of the Ione Band of Indians for the purpose of leading the quiet title litigation and, later, executing ground leases with members of who occupied or desired to erect homes on either side of centerline fence." (AR1100-01)

In sum, Plaintiff argues that as of 1934, the Secretary treated the Indians on the two land bases that were under federal supervision – the Jackson Rancheria and the Buena Vista Rancheria – as the tribes in Amador County that were under federal jurisdiction at that time. Plaintiff argues that because the remaining Indians were not a distinct tribal entity from those that were organized under the IRA, they were not a separate tribe that was under federal jurisdiction.

The Court understands Defendant and Defendant Intervenors' position to be that the 40 acre parcel on Arroyo Seco Ranch was contemplated for purchase on

behalf of peoples led by Charlie Maximo. These people were also part of the early Terrell census of Indians living in "Ione and Vicinity". That group, their lineage, and others in the vicinity continued such efforts through the early 1930s, and reinvigorated those efforts briefly in 1941; then those efforts ceased, beginning again in the 1970s. (AR3972-73.) The 1972 Bruce and 1994 Ada Deer determination, now being used in efforts to acquire the Plymouth Parcels, referred to the same lineage of Indians that had sought in the early 1900s and the 1970s to complete acquisition of the 40 acre Arroyo Seco parcel.[13] (AR3550.)

More specifically, Defendant Intervenors explain that the Ione Band had a historical method of leadership ascension based on genealogical descent and location, but outside pressure caused changes in traditional village organization. (AR3974.) Thus, in 1915, Charlie Maximo was chosen by election, rather than by lineal descent or location, to be the Ione Band's leader and spokesman. Charlie Maximo served in this position until his death in 1943.

Defendant Intervenors point out that Agent Terrell wrote to the Commissioner of Indian Affairs in 1915 explaining that a high purchase price for the

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[13] The parties do not address current tribal membership, insofar as Defendant Intervenors purport to represent the Ione Band that accurately traces its lineage to the Ione Band indigenous to Amador County. *See* the Court's discussion in Case No. 1748, regarding the pro hac vice application of Mark Kallenbach. The parties also do not address whether the Ione Band would in fact meet the requirements under the Part 83 regulations.

property to be acquired was warranted because it was an opportunity to buy property where the Ione Band's "Indian Village" was located, "around which cluster so many sacred memories to this remnant band." (AR69.) A Departmental "Authority" form in 1916 granted funds for the "PURCHASE OF LAND FOR LANDLESS INDIANS IN CALIFORNIA" and states 40 acres in Amador County is to be purchased "for the use of 101 homeless California Indians, designated as the Ione Band". (AR160.) A governmental transmittal of a partially executed deed, abstract of title, and survey plat indicated a 40-acre parcel "to be purchased for the use of 101 homeless California Indians, designated as the Ione Band." (AR153-54.) Other documents list the Ione Band alongside both Buena Vista and Jackson. *See* Lipps – Micheals Survey of Landless Nonreservation Indians of California, 1919-1920, stating: "The Ione group consists of 5 families – 19 people; – Buena Vista, 2 families – 5 people; Jackson Valley, 7 families 27 people." (AR8129.) *See* data compiled by L.A. Berrington for the Department, in June, 1927, stating "Amador County has an Indian population of approximately 260, as shown by the following detailed bands: . . . Ione [46 members] . . . Jackson [53 members] . . . Buena Vista [20 members]. . . ." (AR8139.)

Defendant Intervenors also argue that, as of 1934, lands had been designated as the Buena Vista and Jackson Rancherias. *See* O.H. Lipps Letter, August 1934, identifying the Buena Vista and Jackson Valley Rancherias among the list of Rancherias under jurisdiction of the Sacramento Indian Agency. (AR20755.)

However, in 1941, attempts were still being made to acquire land on behalf of "the Indians living near Ione." (AR506-07.)

With respect to the aforementioned letter from Harold Burris Sr.'s lawyer, stating that the Ione Band had "never organized as a tribe," it appears the context for this letter was a leadership dispute during the 1990s among factions of the Ione Band, represented respectively by Harold Burris, Sr. and Nicholas Villa, Jr. Defendant Intervenors explain that the instant letter from Burris' lawyer was a response to the March, 1994 Ada Deer letter determining the Ione Band were federally recognized, and addressed to Mr. Villa as "Chief, Ione Band of Miwok." The letter from Burris' lawyer was concerned with establishing Mr. Burris as the tribal leader, and thus the lawyer proceeded to ask Assistant Secretary Deer to either to rescind the recognition decision sent to his client's rival or to separately recognize both factions as tribes. *See* Letter from Ada Deer, July 27, 1994, stating that previous correspondence to tribal letters had "been misconstrued to suggest that the Department has virtually anointed either Mr. Villa or Mr. Burris as the single leader of the Ione Band . . . The Department is cognizant that the Ione Band is deeply divided among political factions." (AR1129.) Further, in an earlier declaration by Harold Burris submitted during the *Burris* litigation, he explained he was born in 1924 and, except for the years 1942-45, lived his entire life on the aforementioned 40 acre parcel. That declaration further stated that "[d]uring my growing up years in Ione, I recall talk

among my elders, including our leader at that time, Captain Charlie, about getting title to the land where I was born and have lived my life." (AR20904-06.)

It is clearly beyond the scope of this Court's authority and expertise to conduct an independent investigation into the genealogy and political history supporting recognition of the Ione Band as a distinct tribe, and then to substitute that analysis for the BIA's. Rather, the Court's role is to ensure that the BIA made no "clear error of judgment" that would render its action arbitrary and capricious. *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (citing *Marsh v. Or. Natural Res. Counc.*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)). The Court's review includes, among other inquiries, reviewing "the evidence the [Department] has provided to support its conclusions, along with other materials in the record, to ensure that the [Department] has not, for instance, 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (citing *Motor Vehicle Mfrs. Assn., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Court views Plaintiffs' moving papers to identify ambiguity regarding the political and genealogical support for the Ione Band's status as a distinct tribe. To recite again some of the portions of the record: a

1916 Office of Indians Affairs' "Authority" form referred to the purchase of 40 acres for "101 homeless California Indians, designated as the Ione Band." (AR160.) The 1919-1920 Lipps – Micheals Survey found: "The Ione group consists of 5 families – 19 people; – Buena Vista, 2 families – 5 people; Jackson Valley, 7 families 27 people." (AR8129.) The 1927 L.A. Berrington data summary stated: "Amador County has an Indian population of approximately 260, as shown by the following detailed bands: . . . Ione [46 members] . . . Jackson [53 members] . . . Buena Vista [20 members]. . . ." (AR8139.) So it would appear that "Ione" or "Ione Band", as those terms were being used to refer to a distinct group of people, had some fluidity in the early 20th century. Furthermore, as Defendants and Defendant Intervenors would acknowledge, it appears there was genealogical and political overlap throughout the 20th century between different groups of Indians who, currently, now identify as the Buena Vista, Jackson Valley, or Ione groups.

However, the Court's role is to ensure the Department was not arbitrary and capricious in determining that the Ione Band is a unique tribe apart from the Buena Vista and Jackson Valley tribes. As the above referenced portions of the record reflect, the Department gave adequate consideration given to this determination, including the possibility of genealogical and political overlap between groups. The Court does not find the Department was arbitrary or capricious, or otherwise made a clear error in judgment, in so recognizing the Ione Band as a distinct Indian tribe.

C. Land acquisition as evidence of federal recognition

Plaintiff argues that land purchase efforts by the federal government do not, standing alone, establish that the Ione Band was under federal jurisdiction in 1934. Plaintiff also argues that the failure to acquire land on behalf of the Ione Band demonstrates a lack of federal jurisdiction.

With respect to the first argument, Plaintiff refers to Hazel E. Elbert's, Deputy to the Assistant Secretary, explanation to Senator Cranston in 1990: "The California land purchase program was aimed at buying acreage for miscellaneous, landless Indians, whether or not they then existed as part of a tribal entity or had previously been federally recognized. The purchase of lands for these Indians did not, in and of itself, prove or establish the existence of a government-to-government relationship between an Indian tribe and the United States." (AR645.) As another example, the 2006 ILD stated: "The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Band's recognized tribal status. Throughout California in the early part of the Twentieth Century, the Department attempted to purchase land wherever it could for landless California Indians without regard to the possible tribal affiliation of the members of the group." (AR5072.) However, the record indicates that many considerations went into the Department's current position that the Ione Band was under federal jurisdiction in June 1934. While the trust acquisition attempts have

perhaps the most obvious role in reaching that position, the Department also considered the genealogical and political history of the Ione Band.

With respect to the second argument, Plaintiff argues that federal courts have historically recognized the concept of federal jurisdiction as inseparable from ownership of the land. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010) ("Section 1151(a)[14] thus separates the concept of jurisdiction from the concept of ownership"); 1-15 *Cohen's Handbook of Federal Indian Law* § 15.07 (2012) ("Taking land into trust shields the land from involuntary loss, and, if the land is located outside an existing Indian reservation, establishes it as an Indian country with all the jurisdictional consequences attaching to that status.") (ECF No. 65 at 46.) *See Yankton Sioux*, 606 F.3d at 1011 (holding that land taken into trust by the federal government under section 5 of the IRA "is effectively removed from state jurisdiction"). Plaintiff argues that the Ione Band was not the subject of any pre-1934 congressional appropriation, because the appropriations under which the Arroyo Seco land was to

[14] *See* 18 U.S.C. § 1151: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

be purchased were statutes providing for the purchase of land for "landless" California Indians, rather than for the Ione Band as such. Plaintiff argues, with reference to the legislative history of the IRA, that then Commissioner of Indian Affairs Collier proposed the inclusion of the phrase "now under federal jurisdiction" in section 19, with the aim of leaving existing reservation Indians unaffected while limiting the ability of non-reservation Indians to bring themselves within the IRA.[15] Plaintiff also points out that the State of California and the County of Amador have, at all relevant times, exercised jurisdiction over the 40 acre Arroyo Seco parcel.

Regardless, Plaintiff does not identify any legal authority stating that a tribe under federal jurisdictional requires that a trust acquisition have been completed or that federal ownership of land in some other manner is required. Plaintiff's briefing cites, for example, *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 855-56, 369 U.S. App. D.C. 85 (D.C. Cir. 2006), for its discussion that:

> In 1935, the Pokagon Band petitioned for reorganization under the newly minted IRA, which terminated the federal government's allotment policy and restored to Indians the management of their assets. While tribal

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[15] *See e.g*. Hearings on S.2755 and S.3645: *A Bill to Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise*, Before the S. Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 263 (1934); ECF No. 85 at 47-50 (citing relevant portions).

> governments located in Michigan's upper peninsula were granted federal services under the IRA, those in its lower peninsula, such as the Pokagon Band, were denied services and benefits due to an administrative decision predicated on the 'misguided assumption that residence on trust lands held in common for the Band was required for reorganization and the fact that appropriations to purchase such lands had run out.' H.R. Rep. No. 103-620, at 5; *see also* S. Rep. No. 103-266, at 3-4. According to the Senate committee report leading to the passage of the Restoration Act authored nearly 60 years later, the Pokagon Band 'was unfairly terminated as a result of both faulty and inconsistent administrative decisions contrary to the intent of the Congress, federal Indian law and the trust responsibility of the United States.' S. Rep. No. 103-266, at 6.

But as the *TOMAC* decision makes clear, it was a "misguided assumption" to infer that "residence on trust lands held in common for the Band was required for reorganization." *Id.* at 856. The statute, 25 U.S.C. § 479, does not contain a requirement that a "recognized Indian tribe now under Federal jurisdiction" also have "land" under federal jurisdiction. Without more, there is no support for Plaintiff's argument that failures in land acquisition attempts by the Government require a finding that the Ione Band was not "under federal jurisdiction" in 1934.

D. The *Burris* litigation

The *Burris* litigation involved competing factions of the Ione Band and derives from the aforementioned state court quiet title action in the early 1970s, *Villa v. Moffatt*, No. 8160, California Superior Court, Amador County. *See* Order Granting Fed. Def. Mot. for Sum. Judg., *Ione Band of Miwok Indians, et al. v. Harold Burris, et al. No. Civ. S-90-993-LKK (E.D. Cal. April 22, 1992)*, AR7763-88. In that case, the Amador County Superior Court entered judgment in favor of plaintiffs – individuals who identified as members of the Ione Band – and declared them the owners in fee simple of the 40 acre Arroyo Seco parcel. Subsequently, in 1988, "Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen [who would be individual defendants in the *Burris* litigation now being discussed] . . . along with Frank Pinion and Frank Villa" filed a complaint, in Amador County Superior Court, for declaratory relief and partition of the 40 acre parcel. (AR7764-65.)

Yet again, on August 1, 1990, "some of the defendants in the state court quiet title action" filed the complaint initiating the *Burris* litigation in this Court, against the federal government and other individual defendants, seeking declaratory relief "as a federally-recognized Indian tribe and an order quieting title to the 40-acre parcel of land in the name of the Ione Band

of Miwok Indians, be held in trust by the federal government."[16]

In litigating that action, the government initially took the position that the Ione Band had never been recognized as a tribe within the meaning of the IRA; that the 1972 letter from Commissioner Bruce was not determinative of whether the Ione Band should receive tribal status; and that the only way for the Ione Band to gain federal recognition was to proceed through the Part 83 federal acknowledgment regulations adopted by the Secretary in 1978.

For example, the government asserted in a status report: "The government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (Pl. RJN, ECF No. 66, Ex. 5 at 4.) The Burris faction of the group stated, in a report: "Defendants deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (ECF No. 66, Ex. 6 at 3.)

In its motion for summary judgment in that litigation, the Government stated: "In 1972, the head of BIA Commissioner Louis Bruce, was not entirely convinced that the Ione Band was federally recognized." (AR697.) The Government further stated: "[t]he essence of plaintiffs' argument is that the Ione Band was a federally-recognized tribe as of 1972 and was subsequently 'unrecognized.' The government submits

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[16] The specific individuals constituting the opposing parties in the federal action and in the state court actions, is contained in the district court's order at AR7764-65.

that plaintiffs at least in 1977 [sic] that the United States did not recognize the Ione Band and certainly no later than 1979 when notice of the same was published in the Federal Register. To the extent that plaintiffs viewed this decision as a change from recognition status to nonrecognition status, which change the government disputes, plaintiffs were bound to bring suit no later than 1985 pursuant to the statute of limitations set forth at 28 U.S.C. § 2401(a)."[17] (AR703.)

The district court explained that during the *Burris* litigation, it afforded plaintiffs the opportunity to determine whether there were mechanisms other than the Part 83 regulations, by which plaintiffs could be "recognized" by the federal government. Finding plaintiffs' argument unavailing, the district court held:

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[17] Plaintiff also points to the federal government's submission in that litigation of a February, 1991 declaration from Dr, Michael Lawson, an historian in the BIA's Branch of Acknowledgement and Research. Lawson stated: "According to BAR records, the United States has never extended federal recognition to the Ione Band of Miwok Indians as an Indian tribe." (AR20824.) However, Lawson prepared a later report, dated February 6, 1992, in which he discusses the recent discovery of 115 documents "which [he] had not previously seen," concerning the efforts to acquire the 40 acre parcel between 1915-1935 for the Ione Band. (AR784.) The later report further stated, regarding the Bruce letter: "Bureau personnel who were then on staff and have considerable knowledge regarding comparable cases related to us that they considered the Ione situation to be an administrative anomaly. [¶] Distinct because handled by Real Estate Services rather than Tribal Relations. Unlike other cases during that era where recognition was actualized – no evaluation of history and ancestry." (AR784.)

> Plaintiffs' argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that "the Secretary may acknowledge tribal entities outside the regulatory process," [citation], and that the court, therefore, should accept jurisdiction over plaintiffs' 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's acknowledgement process, the United States' motion for summary judgment on these claims must be GRANTED.

(AR7779.)

In the instant matter, Plaintiff now seeks to estop Defendants and Defendant Intervenors – via judicial estoppel, collateral estoppel, and res judicata – from arguing contrary positions from those they took in the *Burris* litigation. (ECF No. 65 at 36.)

Collateral estoppel, or issue preclusion, provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *U.S. v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008). Res judicata applies when "the earlier suit . . . (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir. 2002). Judicial

estoppel functions to "prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process . . . Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts . . . Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

As an initial matter, Plaintiff's point must be acknowledged that at the beginning of the *Burris* litigation, the federal government took exactly the opposite position as it does now. Defendant Intervenors point out that the district court's holding regarding federal recognition was made in the course of upholding the government's claim of sovereign immunity; they argue that the court's order did not concern whether Ione Band faced limitations on how it could become recognized. (ECF No. 82 at 48.) That is not an entirely accurate summary of the district's ruling. As is evident from the portion cited, *supra*, the district court accepted the position that plaintiffs had not demonstrated they were entitled to federal recognition by those alternative "non-regulatory mechanisms for tribal recognition" that the parties had proposed.

Defendants respond that the *Burris* litigation concluded in 1996. Prior to that point, the government identified its previous position as erroneous, and took its current position that there were alternative methods by which a tribe could receive federal recognition,

outside of the Part 83 process. The 1994 Ada Deer determination reflects this correction. The Ione Band was also included on the Secretary's list of federally recognized tribes in 1995. The Government explains it presented the Department's corrected position concerning the Band's status to the district court, in 1995 at the district court's request. (AR1133.) The remaining portion of the litigation then concerned whether there was an authorized governmental spokesperson for the Ione Band with standing to present litigation. (ECF No. 84-1 at 52-53.)

The Court notes three points. First, the inconsistent positions taken by the federal government in the *Burris* litigation is not an anomaly, insofar as it reflects a pattern of inconsistency by the federal government in its dealings with the Ione Band for the last several decades. That inconsistency includes the 1972 Bruce determination; the de facto period of termination of the Ione Band's recognition and continuing into the *Burris* litigation; the 1994 Deer determination; the 2009 draft opinion circulated by Solicitor Bernhardt; and the 2011 clarification by Solicitor Tompkins, all of which reversed previous positions on the recognition status of the Ione Band. Point being, the ROD acknowledges this long pattern of inconsistency and concludes that the Ione Band is federally recognized; the *Burris* litigation does not by itself establish such egregious inconsistency.

Second, for the purposes of res judicata and collateral estoppel, it appears that the Government's ultimate position in the *Burris* litigation was that in fact

the Ione Band was federally recognized; apparently the *Burris* court did not preclude the federal government or the Ione Band from taking this new position based on either res judicata or collateral estoppel. Further, the relevant portion of the district court's order, cited above, concerned the government's claim that it had not waived its sovereign immunity from suit. To the extent the district court disavowed alternative means – outside of the Part 83 process – by which plaintiffs could seek federal recognition, the district court considered those specific means proposed by the parties, including: Congressional recognition and/or via treaty, the government's resolution of tribal acknowledgment petitions, the "wholesale listing of Alaska native entities" in the 1988 Federal Register, and recognition arising out of government settlement of litigation in the 1950s and 1960s. (AR7778.) But the means by which the Ione Band is recognized in this case – namely, "administrative restoration" via the Bruce or Deer letters – did not appear to be within that court's consideration. Of primary importance before this Court are the 1994 Deer determination and the ROD, which were not at issue in the *Burris* litigation. Thus, Plaintiff does not establish there is an identity of issues or identity of causes of action, so as to invoke collateral estoppel or res judicata.

Third, given that the Department changed its position prior to the conclusion of the *Burris* lawsuit – and that position is in fact what Defendants put forth in this matter – there is no apparent "playing fast and

loose" with this Court.[18] Defendants and Defendant Intervenors argue tenably that it is factually accurate to consider those members of the present day Ione Band as members of a distinct Indian group, with genealogical and political ties to land in Amador County, and were in fact under federal jurisdiction in 1934. Equitable concerns do not favor precluding what appears to be a factually correct argument, in a summary judgment lawsuit involving trust acquisition of gaming-eligible property. Therefore, for those reasons, the Court declines to apply judicial estoppel.

E. The 1972 Bruce and 1994 Deer determinations

Plaintiff argues that the administrative record demonstrates that both the Bruce letter and the Deer letter departed from well-established agency procedures and ignored the criteria relevant to their determinations.

Plaintiff points out that in the case of Louis Bruce, he had his determination processed through Real Estate Services rather than Tribal Services. However, Plaintiff does not elaborate on this distinction; the

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[18] The Court notes that Plaintiff has itself argued that the Ione Band had achieved federally recognized status and that such status had not been terminated, although this inconsistency is not as pronounced as the exact opposite positions the government takes in the *Burris* litigation relative to the instant matter. (AR4212-16; 4851.)

Court does not find adequate grounds to overturn the ROD's conclusions based on this observation.

Plaintiff also argues Commissioner Bruce failed to consider the Cohen criteria, which according to Plaintiff were applied by the BIA to requests for tribal recognition from the time the IRA was enacted until the Part 83 regulations were adopted in 1978. (*See* AR678.) Defendants clarify that, according to former Associate Solicitor for Indian Affairs Cohen, various factors were considered singly or jointly in making tribal status determinations, including "treaty relations with the United States;" whether "the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;" and whether "the group has exercised political authority over its members, through a tribal council or other governmental forms." (ECF No. 86 at 12, n. 16, quoting F. Cohen, *Handbook of Fed. Indian Law* at 271 (1941)). It appears that, considering application of these criteria now, such as the election of Charlie Maximo as tribal leader and the attempted purchase of the Arroyo Seco parcel, some of these criteria would be met.

Defendants also respond that the so-called Cohen criteria were not uniformly applied, as demonstrated by the Department's rationale in promulgating the Part 83 procedures: "Heretofore, the limited number of such requests [for formal acknowledgment] permitted an acknowledgment of the group's status on a case-by-case basis of the Secretary. The recent increase in the number of such requests before the Department necessitates the development of procedures to enable the

Department to take a uniform approach in their evaluation." (ECF No. 86 at 13, n. 17, quoting 43 Fed. Reg. 39,361 (Sept. 5, 1978)). This appears to be a reasonable position. Therefore, for the foregoing reasons, the Court does not find the Department was arbitrary and capricious in relying in part upon the 1972 Bruce determination in the ROD.

Plaintiff argues that in the case of Ada Deer, due to political pressure she ignored the Part 83 process for a tribe's attainment of federal recognition. Plaintiff argues that her failure to comply with these regulations, standing alone, was an abuse of discretion, because "[a]n agency is bound by its regulations so long as they remain operative. . . ." *Romeiro De Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985).[19]

As stated above, in 1978 at the time the Department promulgated the Part 83 regulations, the BIA also issued: 1) a list of federally-recognized Indian tribes; and 2) a list of groups whose petitions for recognition were on file at the BIA. The Ione Band appeared on the latter list. (ECF No. 65 at 21; AR597.) It appears – this is Defendant's position in this litigation – that in the 1990s Assistant Secretary Deer made the determination that it was error not to include the Ione Band on the initial list of federally recognized tribes. The Deer determination was essentially a re-affirmation of the Bruce determination, which in turn was based

[19] Plaintiff also points to a document in the record stating the March, 1994 Deer determination was "hand delivered to the Assistant Secretary – Indian Affairs for signature, without program review and surname." (AR1057.)

upon much of the aforementioned political and land-acquisition history of the Ione Band in the early 20th century. It is reasonable that a legitimate route for Ione Band recognition after 1978 was for them to proceed through some Part 83 mechanism. However, the main issue here is whether the Department may assert it mistakenly failed to extend federal recognition to a tribe (the period following the Bruce letter), subsequently implement regulations for determining federal recognition (the Part 83 regulations), and then be barred from correcting that mistake except by proceeding through such regulations. Plaintiff does not identify any controlling precedent holding that the Secretary must be barred in all cases from making a correction as to federal tribal recognition in this way.

Even if the Deer determination were invalid, the instant action challenges the ROD, which is based on multiple determinations by the Department throughout the history of the Ione Band's relationship with the federal government. Even to accept Plaintiff's position that the Deer determination, specifically, is unsubstantiated, this does not automate a finding that the ROD's extension of federal recognition to the Ione Band was arbitrary, capricious, unlawful, or an abuse of discretion.

For the foregoing reasons, the Court finds the ROD's determination that the Ione Band was a "recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479, was not arbitrary, capricious, unlawful, or an abuse of discretion.

IV. The section 292.26(b) grandfathering provision

Section 20 of the IGRA, 25 U.S.C. § 2719, prohibits gaming on land acquired in trust after October 17, 1988, but provides several exceptions to this prohibition. The exception relied upon by the Department for the Plymouth parcels is section 2719(b)(1)(B)(iii): "the restoration of lands for an Indian tribe that is restored to Federal recognition," i.e. the "restored lands" exception.[20]

In 2008, the Department of the Interior promulgated the Part 292 regulations, including sections 292.7 and 292.10, which provide criteria by which the restored lands exception may be met. Section 292.7 provides that the exception may be met if: a) at one time the tribe was federally recognized; b) thereafter the tribe lost its government-to-government relationship; c) thereafter the tribe was restored to federal recognition by one of the means specified in section 292.10; and d) the newly acquired lands meet certain criteria (specified in section 292.11).

Section 292.10 then provides that section 292.7 subsection (c) may be met if at least one of the following is demonstrated: congressional affirmation of the government's relationship with the tribal government; recognition through the Part 83 procedures; or a

[20] The Court stresses again that its use of the shorthand "restored lands" throughout this Order is meant to refer to the full provision, "[t]he restoration of lands for an Indian tribe that is restored to Federal recognition," and not just the "restoration of lands" part of that provision.

federal court determination or court-approved settlement in which the federal government is a party.

Plaintiff argues that the Ione Band does not fit within any of the provisions listed in section 292.10. The argument would be, therefore, that the Ione Band cannot show it was restored to federal recognition for the purposes of section 292.7, which means it does not meet the criteria for the restored lands exception stated in 25 U.S.C. 2719(b)(1)(B)(iii).

In this case, the Department relies upon the "grandfathering" provision contained in 25 section 292.26(b), and thus takes the position that the restored lands exception may be met notwithstanding the criteria set forth elsewhere in the Part 292 regulations, such as section 292.10.

Section 292.26(b), the grandfathering provision, provides, in relevant part:

> These regulations [i.e. the Part 292 regulations] apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

25 C.F.R. § 292.26(b).

In applying section 292.26(b) to the Plymouth Parcels the ROD states:

> In 2004, prior to submitting its fee-to-trust application, the Band requested a legal opinion from the Department as to whether the Plymouth Parcels would be eligible for gaming under IGRA's Restored Lands exception at 25 U.S.C. § 2719(b)(1)(B)(iii). In 2006, the Department determined that the Band is a "restored tribe" and that the Plymouth Parcels would qualify as restored lands under IGRA if they were acquired in trust for the benefit of the Band.
>
> The Department's 2006 determination constitutes a written opinion regarding the applicability of 25 U.S.C. § 2719 to be used for a particular gaming establishment under the Part 292 grandfathering provision. Therefore, the particular criteria in the Part 292 regulations governing Restored Lands determinations do not apply to this particular trust application. I have relied upon, and adopted, the conclusions in the 2006 opinion pursuant to 25 C.F.R. § 292.26(b). The Plymouth Parcels thus constitute "[restored] lands for an Indian tribe that is restored to Federal recognition" within the meaning of IGRA.

In summary, the 2006 ILD is that "written opinion", issued prior to the Part 292 regulations, which established that the Plymouth Parcels would qualify as restored lands.

Plaintiff argues that section 292.10 represents the Department's "reasonable interpretation" of Congress's intent in enacting the restored lands exception, while section 292.26(b) merely serves to evade Congress's purpose. *See e.g. United States Dept. of the Treas. IRS Office of Chief Counsel Wash., D.C. v. Fed. Lab. Rel. Auth.*, 739 F.3d 13, 21, 408 U.S. App. D.C. 13 (D.C. Cir. Jan. 3, 2014) (holding that an agency acts arbitrarily and capriciously when it "set[s] forth two inconsistent interpretations of the very same statutory term"). Plaintiff directs the Court to portions of the section 292 rulemaking in which the Department rejected proposals that section 292.10 include tribes that were "restored" to agency action outside the Part 83 regulations. The Department's final rulemaking, describing section 292.10, stated:

> We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.
>
> In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. The regulations were adopted because prior to their adoption

> the Department had made ad hoc determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979 ad hoc determinations.

73 Fed. Reg. 29354, 29363 (May 20, 2008).

The clear point to draw from this explanation is that if section 292.10 is invoked, then the Department and the Ione Band must conform to its express requirements, i.e. one of the three enumerated ways of showing Federal recognition of the tribe. Those enumerated ways include proceeding through the Part 83 procedures, but do not include "administrative" restoration such as the Deer determination.

However, the same May, 2008 rulemaking also explained the motivation for section 292.26(b) as follows:

> During the course of implementing IGRA section 20, the Department and the NIGC have issued a number of legal opinions to address the ambiguities left by Congress and provide legal advice for agency decisionmakers, or in some cases, for the interested parties facing an unresolved legal issue. These legal opinions typically have been issued by the Department's Office of the Solicitor or the NIGC's Office of General Counsel. In some cases, the Department or the NIGC subsequently relied on the legal opinion to take some final agency action. In those cases, section 292.26(a) makes clear that these regulations will have no

> retroactive effect to alter any final agency decision made prior to the effective date of these regulations. In other cases, however, the Department or the NIGC may have issued a legal opinion without any subsequent final agency action. It is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming . . . In this way, the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if these regulations now have created a conflict.

73 Fed. Reg. 29354, 29372.

Here, the restored lands exception, 25 U.S.C. § 2719(b)(1)(B)(iii), is not further explained in that statute and it is ambiguous. The Part 292 regulations, e.g. section 292.7 and 292.10, appear to propose reasonable criteria by which the restored lands exception can be met. The grandfathering regulation, section 292.26(b), also reasonably safeguards against conflict with agency actions in which attempts to seek gaming eligibility were underway. There is some inconsistency between the Department's position in the final rule that administrative restoration of tribes – at least prior to promulgation of the Part 83 regulations – be foreclosed as a route to being a "restored tribe"; and the Department's position that administrative restoration is permitted in the Ione Band's case. Nonetheless, the

Department did in fact promulgate the grandfathering provision, its justification is reasonable, and its application to the Ione Band also does not appear arbitrary or capricious. Accordingly, the Court affords deference to the Department in its decision to promulgate the grandfathering provision as part of the Part 292 regulations. *See Mead Corp.*, 533 U.S. at 219 ("It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fills in a space in the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.")

V. Section 292.26(b) applied to the Ione Band

A. The 2006 ILD

The Department's reliance on the 2006 ILD as the written opinion for the purposes of the grandfathering provision is consistent with the aforementioned May, 2008 rulemaking, which expressed the concern that a tribe "may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming." 73 Fed. Reg. 29354, 29372.

According to Defendant Intervenors, the Ione Band began preparation of the instant fee to trust application around 2003. *See* AR1382 (indicating that by April, 2003, the Tribe had identified land and begun planning its project); AR1404 (stating a development agreement was entered into in April, 2003); AR2808 (apparently showing land options purchased in March, 2003); AR5094 (stating that in September, 2004, the Ione Band submitted a request to the NIGC for an opinion on the eligibility of the Plymouth Parcels for gaming). The 2006 ILD confirmed that "the lands that are the subject of the fee-to-trust application would qualify as 'Indian lands' within the meaning of the [IGRA] on which the Band could conduct gaming if the lands were acquired in trust by the Department of Interior." (AR5071.) The 2006 ILD was expressly premised on the Plymouth Parcels being able to meet the restored lands exception, 25 U.S. § 2719(b)(1)(B)(iii). (AR5072.)

By May 20, 2008, when the final section 292 regulations were published, the Ione Band had been working on its instant fee to trust regulations for over 5 years. It is thus reasonable to infer that the Ione Band had relied on the aforementioned communications with the Department – including the 1994 Deer affirmation, and the 2006 ILD which stated the Plymouth Parcels would qualify for gaming under the IGRA – in taking action to have such parcels qualify for gaming.

The Court also notes the 2006 ILD's statement that: "the Department is still in the process of developing regulations to govern the conduct of gaming on

lands acquired after October 17, 1988. Those regulations will refine what lands will be considered restored lands for purposes of IGRA. . . .” The regulations referred to in the statement would be the Part 292 regulations. The 2006 ILD was issued in September, 2006. In October, 2006, the BIA published its proposed rule containing the section 292 requirements, including essentially the same section 292.10 requirements as are stated in the final section 292.10. *See* 71 Fed. Reg. 58769, 58774. *See also* Letter from the Ione Band to the Office of Indian Gaming Management, April 26, 2006, responding to draft Part 292 regulations which apparently had been circulated to tribal leaders on March 15, 2006. (AR4857.) The 2006 ILD was issued closely in time with the Department’s contemplation of the current Part 292 regulations, and it appears that the 2006 ILD was issued notwithstanding the Department’s awareness of the proposed changes.

Plaintiff argues that because the 2006 ILD was purportedly withdrawn in 2009 by Solicitor Bernhardt, it was improperly relied upon in the ROD. Defendants respond, however, that neither the withdrawal memorandum nor the draft opinion circulated by Bernhardt, were adopted by the Secretary of the Interior, and that the NIGC did not concur in the draft opinion. (AR8817-25; 7754-56.) The July 26, 2011 Memorandum from Solicitor Tompkins to the Assistant Secretary, which considered the effect of Bernhardt’s withdrawal and draft opinion, stated among other things: “The grandfather provisions in the Part 292 regulations were intended for situations such as the Band’s – to avoid

upsetting settled expectations of tribes based on previous legal opinions and land determinations for purposes of the IGRA . . . For these reasons, the Withdrawal Memorandum is rescinded and the Draft Opinion is of no legal effect. As a result, the Restored Tribe Opinion is reinstated." (AR8824.)

Plaintiff also directs the Court to a January 2009 Memorandum of Understanding ("MOU"), governing the NIGC and the Department's collaboration regarding giving legal opinions on lands eligible for gaming. Per that MOU, the "[Department] and the NIGC agree that whether a tribe meets one of the exceptions in 25 U.S.C. § 2719 . . . is a decision made by the Secretary when he or she decides to take land into trust or restricted fee for gaming." Further, per the MOU, the Solicitor is required to concur in any opinion that provides legal advice relating to the restored land exception in 25 U.S.C. § 2719. (AR7088-89.) As stated above, Solicitor Tompkins, in her July 26, 2011 memorandum, expressed the opinion that the 2009 Bernhardt withdrawal memorandum and draft opinion were not effective, and that the "Restored Tribe Opinion," i.e. the 2006 ILD, was reinstated. Plaintiff argues, however, that from the time of the Bernhardt withdrawal in 2009, until the issuance of the Tompkins memorandum in 2011, there was no operative ILD with regard to the Ione Band. The point appears to be that during this interim period, the Department continued to evaluate the viability of the Plymouth Parcels for trust acquisition as if the Ione Band were a restored tribe. This evaluation would have relied upon

the section 292.26(b) grandfathering provision, which in turn would have to rely upon a prior "written opinion" regarding the restored lands exception. But no such written opinion could be relied upon because the ILD had been withdrawn but not yet reinstated.

Regardless, when the ROD was issued in May, 2012, the Solicitor had agreed to reinstate the 2006 ILD. Therefore, both the Assistant Secretary and the Solicitor had agreed upon the validity of the 2006 ILD at that time. It is not apparent that evaluation of the instant trust application had to be stopped, in the interim between Bernhardt's and Tompkins' memoranda, such that failure to do so would now serve to invalidate the ROD.

B. The "*NRDC* factors"

Plaintiff also argues that the Secretary erred in adopting section 292.26(b) in the ROD, without considering the factors set forth in *Natural Resource Defense Council, Inc. v. Thomas*, 838 F.2d 1224, 1244 (9th Cir. 1988) (citing *Sierra Club v. E.P.A.* 719 F.2d 436, 467, 231 U.S. App. D.C. 192 (D.C. Cir. 1983); *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390, 151 U.S. App. D.C. 209 (D.C. Cir. 1972)). The NRDC factors include: "[1] whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, [2] the extent to which the party against whom the new rule is applied relied on the formed rule, [3] the degree of the burden which a retroactive order imposes on a party, and [4] the statutory interest in applying a

new rule despite the reliance of a party on the old standard." *NRDC*, 838 F.2d at 1244.

Those factors are not relevant to this case, because the grandfathering provision – which Plaintiff argues is invalid facially and as applied – *protects* against the retroactive application of the part 292 regulations. The operative part of section 292.26(b) is that the Part 292 regulations "shall not apply to applicable agency actions when, before the effective date of these regulations, the Department [] issued a written opinion" regarding the restored lands exception. Hence, the Department determined that the section 292.10 requirements need not be met because there has been at least one written opinion regarding the restored lands exception, the 2006 ILD. (AR10101.) In contrast, the concern in *NRDC* was the mandatory retroactivity of Clear Air Act restrictions on certain stacks designed to disperse pollutants. The Environmental Protection Agency *refused* to provide any grandfathering for certain plants that had justified their use of the stacks prior to implementation of the restriction, thus making its restriction on those plants retroactive.[21] In contrast,

[21] *See NRDC*, 838 F.2d at 1244 ("EPA has refused to provide any grandfathering for plants that prior to the Final Rule conducted demonstrations to justify above-formula stacks . . . Retroactivity is involved here simply because enforcement of the demonstration requirement might impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings . . . Clearly the issue entails a balancing of the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice.")

here the grandfathering provision is applied to protect against concerns regarding retroactivity. Section 292.26(b) calls for a consideration of "the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice." *NRDC*, 838 F.2d at 1244. Accordingly, the Court does not find the Secretary was arbitrary or capricious in applying the grandfathering provision to the Ione Band's case without expressly considering the *NRDC* factors.

C. Other applications of section 292.26(b)

The Court notes one other instance in which the NIGC has determined Indian lands to be eligible for gaming pursuant to the restored lands exception, after first applying the section 292.26(b) grandfathering provision. In 2003, the Karuk Tribe of California requested that the NIGC issue an opinion on whether the designated trust property would be eligible for gaming under the restored lands provision. (*See* Def. Int. RJN, ECF No. 82, Ex. 5.) In a 2004 opinion, the NIGC found that the submitted materials did not demonstrate the Karuk was a restored tribe, but the Karuk tribe subsequently provided additional information in 2007. The NIGC did not complete analysis of the 2007 information prior to the Department's publication of the section 292 regulations in 2008. Therefore, in its analysis in 2012, the NIGC considered the new 2007 information in tandem with its prior 2004 opinion. The 2012 NIGC analysis concluded that section 292.26(b) applied to the Karuk Tribe's application,

and concluded that "the 2004 Opinion is a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment." (ECF No. 82, Ex. 5 at 5.) The NIGC conducted its analysis of gaming eligibility pursuant to "the IGRA and the case law developed prior to [the Department's] promulgation of the Part 292 regulations," notwithstanding that its analysis was occurring after the Part 292 regulations had been implemented. (ECF No. 82, Ex. at 9.)

The NIGC determined that the Karuk tribe had shown a history of government recognition, a period of non-recognition, and reinstatement of recognition. With respect to the latter, the NIGC discussed that "[i]n 1978, Interior undertook a comprehensive review of the Tribe's situation and concluded that its earlier internal determination that the Tribe and its members should not receive services because the Tribe or its sub-communities were not Federal [sic] recognized 'was not entirely accurate.' In 1979, Interior re-established a government-to-government relationship with the Tribe, and the Karuk Tribe was added to the list of federally recognized tribes." (ECF No. 82, Ex. 5 at 9.) The NIGC found the Karuk trust lands gaming eligible, with concurrence by the Department's Office of the Solicitor. (ECF No. 82, Ex. 5 at 14.) In the instant case, this is essentially the analysis conducted in the 2006 ILD and restated in the ROD relative to the Ione Band.

For the foregoing reasons, the Court does not find the Department's application of section 292.26(b) to

the Ione Band's case was arbitrary, capricious, unlawful, or an abuse of discretion.

VI. Termination and restoration

The 2006 ILD explains that, "[t]o be a restored tribe, the Band must establish that it was once recognized by the Federal government, that Federal government subsequently did not recognize it and that, ultimately, the Federal government restored its recognition of the Band." (AR5072.) *See e.g. Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Michigan*, 369 F.3d 960 (6th Cir. 2004).

The ROD, with reference to the 2006 ILD, discusses the Band's land acquisition attempts and the Bruce determination that the Ione Band was federally recognized, the contrary position taken by the Department thereafter which it now calls "termination," and the subsequent Deer restoration – thus the ROD finds the Ione Band to be a "restored tribe".[22] (AR10101.)

With regards to this "restored tribe" finding, Plaintiff argues that, even if federal recognition had been

[22] The ROD also discusses the historical significance of the Plymouth Parcels to the Ione Band, the Band's modern connection to the Plymouth Parcels, and the closeness in time between restoration of the tribe and attempts to acquire the Parcels, thus establishing them as the "restoration of lands". The "ROD thus records the Department's determination that the Plymouth County Parcels are eligible for gaming under the 'restored lands' exception in IGRA Section 20, 25 U.S.C. § 2719(b)(1)(B)(iii)." (AR10102.)

extended to the Ione Band via the Bruce Determination (or before), such recognition was never terminated and then restored. Plaintiff points to the dissimilarities between this case and those cited by Defendants: *Tomac*, 433 F.3d 852, 369 U.S. App. D.C. 85; *Grand Traverse*, 369 F.3d 960; and *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699 (W.D. Mich. 1999). Plaintiff argues: "[A]ll the tribes in these cases were treaty tribes; all were entitled, pursuant to those treaties, to receive compensation from the government in exchange for ceding their claims to certain lands; all but one of the tribes had actual reservations (and the fact that it did not precluded it from reorganizing under the IRA), and all were deprived of these existing benefits and their land by the administrative actions of the Department. In this case, by contrast, the Ione Band received the same exact benefits at all points-which is none. Thus, the Michigan tribes addressed by *Grand Traverse, TOMAC* and *Sault Ste. Marie* can be said to have experienced a 'termination' of their prior position that could be restored. The Ione Band experienced no such thing." (ECF No. 85 at 60.)

Plaintiff points out that in *Sault St. Marie* and *TOMAC*, the tribes were deemed to have been restored pursuant to formal acts of Congress, while the tribe at issue in *Grand Traverse* was re-recognized through the Part 83 regulations. Plaintiff also points to the May, 2008 Part 292 final rule, which stated: "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through

the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations." 73 Fed. Reg. 29354, 29363. (ECF No. 85 at 61.)

With respect to termination, Defendant Intervenors' response is that termination of treaty benefits is not equivalent to termination of recognition, the latter of which is at issue here. (ECF No. 82 at 29-30.) The record demonstrates that at some point in the 1970s until the 1994 Deer determination, the Department consistently took the position that the Ione Band was not a federally recognized tribe, hence meeting the termination element. *See TOMAC*, 433 F.3d at 855-856 (stating that a tribe may be administratively terminated).

With respect to restoration of recognition, strictly speaking, this case involves administrative restoration *after* promulgation of the part 83 regulations. Moreover, the section 292.26(b) grandfathering provision provides that the Part 292 regulations "shall not apply to applicable agency actions when, before the effective date of these regulations" a written opinion regarding the restored lands provision had issued. While proceeding through the Part 83 regulations for restoration of recognition is required if section 292.10 is invoked, the Department's position is that the Part 83 process is not necessarily invoked when the grandfathering provision applies. The Court has found the grandfathering provision was validly applied.

Plaintiff does not produce authority for the proposition that an administrative restoration, such as the Deer determination, is per se prohibited from serving to meet the "restored tribe" part of the restored lands provision. *See Grand Traverse*, 369 F.3d at 969 ("The result of this administrative acknowledgment was a restoration of federal recognition, a necessary component of which includes the resumption of the government's political relationship with the Band . . . On the facts of this case, a tribe like the Band, which was administratively 'acknowledged,' also is a 'restored' tribe.) It appears that in other cases, the Department has found a tribe to be restored in a manner similar to here. *See e.g.* ECF No. 82, Ex. 3 at 21 (2008 NIGC determination that the Poarch Band, because the Department had re-recognized the Band in June, 1984, was a restored tribe; the NIGC further interpreted *Grand Traverse* to mean "reinstatement of recognition [may be] achieved through Congressional action, the administrative federal acknowledgement process, or administrative recognition"). The general elements – recognition, followed by termination, followed by recognition again – which had been identified by the Department prior to the Part 292 regulations, are present in this case. The ROD demonstrates consideration was given to the applicable statutory and regulatory framework, and to the Ione Band's relationship with the federal government throughout the 20th century, in reaching the determination that the restored lands provision is met.

For the foregoing reasons, the Court does not find the Department's conclusion – that the acquisition constitutes the "restoration of lands for an Indian tribe that is restored to Federal recognition," 25 U.S.C. § 2719(b)(1)(B)(iii) – was arbitrary, capricious, unlawful, or an abuse of discretion.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (ECF No. 65) is DENIED; Defendants' Motion for Summary Judgment (ECF No. 84) is GRANTED; and Defendant Intervenors' Motion for Summary Judgment (ECF No. 82) is GRANTED.

Dated: September 29, 2015

/s/ Troy L. Nunley
Troy L. Nunley
United States District Judge

136 F. Supp. 3d 1166

United States Court District Court,
Eastern District of California

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs,

v.

S.M.R JEWELL, in her official capacity as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and

IONE BAND OF MIWOK INDIANS,
Defendant Intervenors.

Case No. 2:12-cv-01748-TLN-CMK

September 30, 2015, Decided; September 30, 2015, Filed

For No Casino in Plymouth, Citizens Equal Rights Alliance, Plaintiffs: Kenneth Robert Williams, LEAD ATTORNEY, Kenneth R. Williams, Attorney At Law, Sacramento, CA.

For John Rydzik, Chief, Division of Environmental, Cultural Resources Management and Safety/ Bureau of Indian Affairs, U. S. Department of Interior, Amy Dutschke, BIA Director, Kevin Washburn, Assistant Secretary for Indian Affairs, National Indian Gaming Commission, Paula L. Hart, Chairwoman of the Office of Indian Gaming, Sally Jewell, Secretary, U.S. Department of the Interior, Defendants: Judith Rabinowitz, LEAD ATTORNEY, United States Department of Justice, San Francisco, CA; Ty Bair, GOVT,

LEAD ATTORNEY, USDOJ ENRD NRS, Washington, DC.

For Tracie Stevens, NIGC Chairperson, Defendant: Judith Rabinowitz, LEAD ATTORNEY, United States Department of Justice, San Francisco, CA.

For Ione Band of Miwok Indians, Intervenor Defendant: Jerome L. Levine, LEAD ATTORNEY, Holland & Knight, Los Angeles, CA; Mark J. Kallenbach, PHV, LEAD ATTORNEY, Mark J. Kallenbach, Attorney at Law, Minneapolis, MN; Randy E. Thomas, LEAD ATTORNEY, Law Office of Randy E. Thomas, Woodbridge, CA; Timothy Quinn Evans, LEAD ATTORNEY, Holland and Knight, LLP, Washington, DC; Zehava Zevit, LEAD ATTORNEY, Law Office Of Frank Lawrence, Grass Valley, CA.

Nicolas Villa, Historic Ione Band of Miwok Indians, Intervenor Defendants: Mark J. Kallenbach, PHV, Mark J. Kallenbach, Attorney at Law, Minneapolis, MN.

Troy L. Nunley, United States District Judge.

MEMORANDUM AND ORDER

The matter is before the Court on cross motions for summary judgment brought by Plaintiffs No Casino in Plymouth and Citizens Equal Rights Alliance's ("Plaintiffs"); Federal Defendants John Rydzik, the U.S. Department of Interior, Amy Dutschke, Tracie Stevens, Kevin Washburn, the National Indian Gaming Commission, Paula Hart, and Sally Jewell ("Defendants");

and Defendant Intervenors the Ione Band of Miwok Indians ("Defendant Intervenors"). For the reasons discussed below, Plaintiffs' Motion for Summary Judgment (ECF No. 72) is DENIED. Defendants' Motion for Summary Judgment (ECF No. 90) is GRANTED. Defendant Intervenors' Motion for Summary Judgment (ECF No. 91) is GRANTED.[1]

INTRODUCTION

This lawsuit presents a challenge to the Record of Decision ("ROD"), issued on May 24, 2012, by Donald Laverdure, Acting Assistant Secretary of Indian Affairs, Department of the Interior,[2] concerning the acquisition of the Plymouth Parcels property in trust for the Ione Band of Miwok Indians, in anticipation of the construction of a gaming-resort complex. Plaintiffs' First Amended Complaint in this action states five causes of action, which are:

- The Department lacks the authority to take land into trust for the Ione Band because it was not a "recognized tribe now under Federal jurisdiction" in 1934 when the Indian Reorganization Act was enacted. 25 U.S.C. § 479.

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[1] Also addressed below: the Court GRANTS Defendant Intervenors' Motion to Strike (ECF No. 77), but provides further analysis on the issues presented by that motion.

[2] The Court uses the umbrella term "Department" throughout this Order, with the understanding that the relevant agency actions in this case are largely undertaken by sub-unit the Bureau of Indian Affairs, or other agencies as noted.

- The Department failed to comply with its regulations, 25 C.F.R. § 151.10-13 when it reviewed and approved the ROD.

- The trust acquisition violates various federalist principles, including the Equal Footing Doctrine and the Tenth Amendment to the U.S. Constitution.

- The Department incorrectly determined that the trust acquisition constitutes the "restoration of lands for an Indian tribe that is restored to Federal recognition," 25 U.S.C. § 2719(b)(1)(B).

- The Department's environmental analysis, necessary before the Department approved the trust acquisition, was inadequate under the National Environmental Policy Act ("NEPA").

This case is related to Case No. 12-cv-1710-TLN-CKD (hereinafter "Case No. 1710"), also before this Court. In that case, Plaintiff Amador County also challenged the ROD. The parties moved for summary judgment, and an Order from this Court – Case No. 1710, ECF No. 95 – will be filed concurrently with its Order in this lawsuit. The Court has considered the issues and arguments presented by the parties in Case No. 1710, in tandem with the issues and arguments presented in the instant case.

STATUTORY AND REGULATORY FRAMEWORK

I. The Indian Reorganization Act of 1934

Congress enacted the Indian Reorganization Act ("IRA") in 1934. "The overriding purpose of that

particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). "[T]he Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Of particular relevance here, section 5 of the IRA authorizes the Secretary of the Interior to acquire in her discretion "any interest in lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 5 further provides that any such lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian," and "shall be exempt from State and local taxation." *Id.* The Secretary has also promulgated regulations governing the implementation of section 5. *See e.g.* 25 C.F.R. § 151.3(a)(3) (providing that trust acquisition may occur "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing").

The IRA also defines "Indians" in several ways, including as "all persons of Indian descent who are

members of any recognized Indian tribe now under Federal jurisdiction," and further defines "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. In 2009, in *Carcieri v. Salazar*, 555 U.S. 379, 382, 129 S. Ct. 1058, 172 L. Ed. 2d 791, the U.S. Supreme Court clarified that, "for purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934."

II. The Indian Gaming Regulatory Act

In 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") to regulate gaming operations owned by Indian tribes. The IGRA's purpose includes: "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1).

Section 20 of the IGRA generally prohibits tribal gaming on lands acquired by the Secretary in trust after October 17, 1988, unless the acquisition falls within one of the Act's exemptions or exceptions. 25 U.S.C. § 2719. For example, lands acquired after October 17, 1988, may still be eligible if they are part of: "(i) a settlement of a land claim, (ii) the initial reservation of an

Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B). Another exception involves a determination by the Secretary that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." § 2719(b)(1)(A).

The specific exception relied upon by the Department in the instant case is contained in section 2719(b)(1)(B)(iii): "the restoration of lands for an Indian tribe that is restored to Federal recognition" (hereinafter the "restored lands" exception).

In May, 2008, the Bureau of Indian Affairs ("BIA") published regulations implementing IGRA section 20, codified at 25 C.F.R. § 292 (the "Part 292 regulations"). The Part 292 regulations became effective in August, 2008. 73 Fed. Reg. 35,579. Of particular relevance to this action are sections 292.7, 292.10, and 292.26(b).

Sections 292.7 ("What must be demonstrated to meet the 'restored lands' exception"?) and 292.10 ("How does a tribe qualify as having been restored to Federal recognition?") provide criteria by which the restored lands exception can be met.

In the instant case, however, the ROD relies upon section 292.26(b), the "grandfathering" provision, to meet the restored lands exception. The grandfathering provision provides that the Part 292 regulations shall not apply to agency actions when, prior to enactment

of those regulations, the Department or the National Indian Gaming Commission ("NIGC") had already issued a written opinion regarding the restored lands exception and the property at issue. 25 C.F.R. § 292.26(b). Here, the Department relies upon an Indian Lands Determination issued in 2006, which found the Plymouth Parcels eligible for gaming. Thus, the Plymouth Parcels fall outside application of the Part 292 regulations as set out in the ROD where the Department determined that the restored lands exception is met.

PROCEDURAL HISTORY

Plaintiffs brought the first amended complaint ("FAC") in this action, on October 1, 2012. (ECF No. 1.) Plaintiffs filed their motion for summary judgment on Claim 1 in the FAC, on October 14, 2014. (ECF No. 72.) Defendants and Defendant Intervenors filed their respective motions for summary judgment, with respect to the FAC in full (Claims 1 through 5), on December 15, 2014. (ECF Nos. 90, 91.) All parties have filed responsive briefs; for Plaintiff, this has included responding to Defendants and Defendant Intervenors' motions for summary judgment on Claims 1 through 5 in the FAC.[3] (ECF Nos. 93, 94, 96.)

Accordingly, before the Court now are all parties' cross motions for summary judgment on Claim 1 in the FAC, and Defendant and Defendant Intervenors'

[3] Plaintiffs' response (ECF No. 93) largely restates the allegations in the FAC.

additional motions for summary judgment on Claims 2 through 5 in the FAC.

Earlier in this litigation, Plaintiff submitted a request for judicial notice of numerous court filings and other judicial and/or authoritative decisions, notably those that were part of litigation involving the Ione Band and the Department in the 1990s, *Ione Band of Miwok Indians et al. v. Harold Burris et al.*, No. CIV-S-90-0993 (E.D. Cal.). (ECF NO. 62.) No party has objected to the fact that the statements contained in these exhibits were made; accordingly, the Court takes judicial notice of these exhibits and the statements therein.

STANDARD OF REVIEW

This Court's review is governed by the Administrative Procedures Act ("APA"). Ordinarily, summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). However, in a case involving review of a final agency action under the [APA] . . . the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a

matter of law the evidence in the administrative record permitted the agency to make the decision it did.' " *Id.* at 90 (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985)). In this context, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* at 90. Pursuant to the APA, the reviewing Court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or which have been taken "without observance of procedure required by law." 5 U.S.C. § 706(2).

BACKGROUND[4]

According to Defendant Intervenors, the Ione Band of Miwok Indians traces its ancestry to Miwok and Nisenan people, who historically have resided on lands that today make up Amador County. (AR3528-301.) In the early part of the 20th Century Congress established a land purchase program, which enabled the BIA to purchase land throughout California with the aim of alleviating Indian landlessness and homelessness. (AR499-502; 644-45.) As further explained in the *Ethnohistorical Overview of the Ione Band of Miwok Indians* (2005), prepared for the Ione Band

[4] Here, the Court notes many of the relevant events and communications between the Ione Band and the Federal Government that are identified in the ROD, and others that are documented within the administrative record.

(hereinafter the "*Ethnohistorical Overview*"), the BIA appointed special agent C.E. Kelsey in 1905-06 to investigate the conditions of dispossessed California tribal members, including in Amador County. (AR3543.) His investigation included taking a census of the number of surviving Indian people residing at specific localities, including "Buena Vista [Richey],"[5] "Ione," "Jackson Valley", and the "Jackson Reservation". (AR3543-44; *see also* "Census of Non-Reservation California Indians, 1905-1906" by C.E. Kelsey, AR3774.) In 1915, BIA special agent John Terrell revisited many of the Indian communities in California, using Kelsey's census as a guide. (AR3544.) According to Terrell's "Census of Ione and vicinity Indians," which included divisions for people living "At Jackson belonging to the Ione Band" and "At Richey belonging to the Ione band," there were 101 "Ione and vicinity" Indians. (AR3544-45.)

As further explained in the *Ethnohistorical Overview*, Terrell "located the Ione village, which consisted of three homes and a sweat house, at about three and one-half to four miles out of Ione." (AR3547.) "Terrell emphasized the importance of securing land for the Ione Band, and initiated negotiations for the purchase of forty acres, which included the Indian residences on the property . . . The purchase was approved, and attempts to finalize it were made between 1916 and 1930, but the transaction was never completed because the government was unable to obtain clear title to the

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[5] The Court understands that, in the early 20th century, the "Buena Vista" location or "Buena Vista" Indians were sometimes referred to as the location or Indians "at Richey".

land." (AR3547.) *See also* "Authority" form, May 18, 1916, for the "PURCHASE OF LANDS FOR LANDLESS INDIANS IN CALIFORNIA" and allotting $2000 for "the purchase of 40 acres of land in Amador County, California (described by metes and bounds) from the Ione Coal & Iron Company, for the use of 101 homeless California Indians, designated as the Ione Band, at not to exceed $50 per acre." (AR160.) *See* Letter from the Acting Assistant Commissioner of Indian Affairs to the Secretary of the Interior, "enclos[ing] herewith a partially executed deed, abstract of title in two volumes, and plat of survey in connection with the desired purchase of 40 acres in Amador County, at the price of $2,000 from the Ione Coal & Iron Company, for the use of 101 homeless California Indians, designated as the Ione Band. [P] The tract in question is the ancient village site of these Indians and contains some rich valley land." (AR4634-35.) It appears that efforts to acquire the aforementioned 40 acre parcel, called the

"Arroyo Seco Ranch," were ultimately abandoned around 1941.[6] (AR3549; 506; 3972.)

According to a tribal history prepared by Ione Band member Glen Villa Sr., in 1996: "Buena Vista Rancheria, a 70 acre parcel of land 4 miles south of Ione, was purchased for the Ione Band. Some of the

[6] It appears that throughout the early twentieth century, and continuing until the Plymouth Parcels were substituted, the main parcel sought on behalf of the Ione Band was part of the "Arroyo Seco Ranch". The Court hereinafter refers to this parcel either as the "40 acre parcel" or the "Arroyo Seco parcel".

people identified in the 1915 census already lived at this site which was an old Indian village called Upusuni." (AR3972.) *See also Buena Vista Rancheria Miwok Indian Tribe Background Materials*, explaining: "The Buena Vista Rancheria was established as trust land for the Tribe's benefit by the Secretary of the Interior under the Authority of the Act of 1914 in 1928." (AR900.)

It appears there was minimal subsequent communication, or none, between the Ione-area Indians and the federal government until the 1970s. By the early 1970s, some members of the Ione Band had renewed their interest in securing BIA housing assistance and to secure control over the aforementioned 40 acre parcel. Accordingly, in 1972 the individuals filed an action in Amador County Superior Court to quiet title to the parcel. *See* Letter from the Acting Area Director to the Commissioner of Indian Affairs, dated July 20, 1972, stating: "[t]he California Rural Indian Land Project, a project of California Indian Legal Services, has filed an action in the Superior Court of the State of California for the County of Amador to quiet title on a 40-acre parcel for the benefit of members of the Ione Band of Indians. A copy of the complaint is enclosed." (AR531.) In 1972 the court awarded title to the parcel to plaintiffs, which included individuals and "other members of the Ione Band of Indians." (AR535-36, *Villa v. Moffatt*, No. 8160, California Superior Court, Amador County.)

On October 18, 1972, Commissioner of Indian Affairs Louis Bruce sent a letter to the Ione Band, stating

in relevant part: "[The BIA] has been informed that the Indians continue to desire that the land ultimately be taken by the United States and held in trust status . . . Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated . . . I therefore, hereby agree to accept by relinquishment of title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians: [40 acre parcel described]." (AR533-34.)

Others within the BIA questioned the conclusiveness of the Bruce determination. For example, the Assistant Secretary of the Interior wrote to the BIA Sacramento Area Director in 1973, stating "the former contemplated purchase of land for [the Ione Band] by the United States may indicate that they are a recognizable group entitled to benefits of the Indian Reorganization Act. We have no correspondence, however, from the group requesting recognition or a desire to establish a reservation. If the Band desires and merits Federal recognition, action should be taken to assist them to perfect an organization under the provisions of the Indian Reorganization Act." (AR537.) In January, 1975, the Department's Office of the Solicitor wrote to the Sacramento Area Director stating: "The Solicitor's Office is presently considering our proposal that the Ione Indians be extended Federal recognition." (AR560.) In January, 1976, the Director of the BIA's Office of Indian Services requested additional information regarding the historical existence of the Band, and whether it met the necessary criteria for

recognition. (AR574.) In April, 1976, a BIA Tribal Operations Officer wrote to California Indian Legal Services, explaining that it needed help in verifying "that the recent quiet title action instituted by named Ione Indians 'and others' was in fact a representative action, and that title to the subject tract is being held by the parties and on behalf of the Ione Band." (AR580.)

In 1978, the Department promulgated regulations outlining procedures whereby groups of Indians could attain federal recognition as Indian tribes (hereinafter referred to as the "Part 83 regulations"). 25 C.F.R. §§ 83.1-13. At that time, the BIA also issued a list of federally-recognized Indian tribes, and a list of groups whose petitions for recognition were on file at the BIA. The Ione Band appeared on the latter list. (AR597.)

Defendants and Defendant Intervenors assert – as is stated in the ROD – that at some point in the 1970s, the federal government began consistently taking the position that the Ione Band was not a federally-recognized tribe, and therefore a de facto termination occurred. For example, a 1990 letter from Hazel Elbert, Deputy to Harold Burris, Sr. explained the position that the Bruce recognition was not in fact a recognition and that the Band was not federally recognized. (AR20808-12.) In litigation involving members of the Ione Band in the 1990s (the *Burris* litigation, discussed *infra*), the government initially argued that in order for the Ione Band to be federally recognized, it had to follow the procedures outlined in the Part 83

regulations. The Interior Board of Indian Appeals, in 1992 in *Ione Band of Miwok Indians v. Sacramento Area Director*, decided that the Ione Band had not yet been recognized and that to become recognized it would need to follow the acknowledgement procedures stated in the Part 83 regulations. (AR812.) A 1992 letter from Assistant Secretary-Indian Affairs Brown also took the position that to achieve federal recognition the Ione Band would have to follow the procedures stated in the Part 83 regulations. (AR4779.) In an undated briefing paper, apparently issued by the Department to the "President of the United States," the Department reiterated that: "It is the Department's position that this group has never attained Federal tribal status and is not, therefore, eligible for restoration . . . It is our position that the Ione Band should continue to seek to establish Federal status through the BIA's acknowledgement process." (AR794-95.)

In 1994, the federal government reversed course. In a letter dated March 22, 1994, Assistant Secretary-Indian Affairs Deer stated she was reaffirming the portion of the 1972 Bruce letter which stated that "[f]ederal recognition was evidently extended to the Ione Band of Indians at the time the Ione land purchase was contemplated." The Deer letter further stated: "As Assistant Secretary of Indian Affairs I hereby agree to accept the land designated in the Bruce letter to be held in trust as territory of the Tribe." The Deer letter further stated that the Band would henceforth be included on the list of Indian Entities recognized and eligible to receive services from

the BIA. (AR4312.) The Ione Band was placed on the Federal Register's list of recognized tribes in 1995, and Defendants represent that it has been on the Federal Register's list since then. (AR4826.)

In a July, 1994 follow-up letter to her March, 1994 letter, Deer clarified: "In my [previous letter], while I agreed in principle to accept that parcel of land referred to in the Bruce letter and which the Federal court in 1972 ruled belonged to various named members of the band, this does not mean that the Bureau will presently begin a process of taking this land into Federal trust." (AR1126.) That follow-up letter further explained that "The title to this land [i.e. the 40 acre Arroyo Seco parcel] is not clear and its ownership is currently the subject of litigation. This litigation must be resolved before the land could be considered for possible trust status. As an alternative, it may be more expedient if land elsewhere could be taken intro trust for the band." (AR1126.)

According to the *Ethnohistorical Overview*, in January, 1996, the Ione Band met in Plymouth to establish a joint Interim Council, and an enrollment committee was formed. The enrollment committee established the following criteria for enrollment in the Ione Band of Miwok Indians: 1) an individual must be a lineal descendant of the 1915 "Census of Ione and Vicinity Indians by J.J. Terrell; or must be a lineal descendent of the 1972 judgment of *Villa vs. Moffat;* 2) an individual must possess Miwok blood; and 3) an individual must have had consistent interaction with the Tribe through cultural contacts with residents of the 40 acre tract

that was the subject of the 1972 judgment. The BIA compiled a list of individuals who met these requirements, which was posted in the Amador Dispatch newspaper in May, 1996. (AR3550-51.)

In September, 2004, the Ione Band submitted a request to the Department for an Indian Lands Determination (hereinafter "ILD") regarding the Plymouth Parcels. (AR1401-13.) In November, 2005, with the ILD request pending, the Ione Band submitted its application to the Department to have the Plymouth Parcels taken into trust for gaming purposes. (AR2751-3482.) In September, 2006, Associate Solicitor, Division of Indian Affairs, Carl Artman issued a determination (hereinafter referred to as the "2006 ILD") that the Plymouth Parcels met the restored lands exception; the 2006 ILD references the Bruce and Deer letters, among other instances of interaction between the federal government and the Ione Band. (AR5550-54.)

Following issuance of the 2006 ILD, Amador County and the State of California appealed that determination to this Court. This Court dismissed that action as untimely on the basis that the trust application had not yet been approved. *See Cnty. of Amador, Cal. v. U.S. Dep.'t of Interior*, 2007 U.S. Dist. LEXIS 95715, 2007 WL 4390499, at *4 (E.D. Cal. Dec. 13, 2007).

In January, 2009, Solicitor David Bernhardt circulated a withdrawal memorandum and draft legal opinion to various members of the DOI, including the NIGC. The memorandum stated in relevant part: "We

are now in the process of reviewing the preliminary draft Final Environmental Impact Statement for the Plymouth Parcel. As a result, I determined to review the Associate Solicitor's 2006 Indian lands opinion and have concluded that it was wrong. I have withdrawn and am reversing that opinion. It no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the Band is not a restored tribe within the meaning of the IGRA." (AR7112.)

However, in a memorandum issued in July, 2011, Solicitor Hilary Tompkins stated, with regard to the Bernhardt position: "The Draft Opinion was never issued and the Withdrawal Memorandum was not acted upon on behalf of the Department by any individual with delegated authority to make decisions under the IGRA." (AR8823.) The Tompkins memorandum further stated: "For these reasons, I hereby rescind the Withdrawal Memorandum and decline to issue the Draft Opinion. I also hereby reinstate the Restored Tribe Opinion regarding the Ione Band's eligibility to conduct gaming on the land in question." (AR8824.)

On February 24, 2009, the U.S. Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791, holding that section 19 of the IRA "limits the Secretary's authority to take land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. Amador County sent comments to the Department thereafter, arguing that the Secretary lacked authority to take land into trust

for the Ione Band, and the Ione Bond sent responsive comments and submitted evidence that the Ione Band had been under federal jurisdiction in 1934. (AR7757-97; 8000-210; 8872-9191.) In May, 2012, the ROD issued, concluding among things that the Ione Band was under federal jurisdiction within the meaning of the IRA and *Carcieri*.

ANALYSIS[7]

I. Defendant Intervenors' motion to strike

On October 21, 2014, after Plaintiffs filed their motion for summary judgment in this case, attorney Mark Kallenbach applied for and was granted pro hac vice status. (ECF Nos. 75 & 76.) To be clear, that application signed by this Court stated that Mr. Kallenbach represented tribal member Nicholas Villa, Jr. and the "Historic Band of Miwok Indians," although this Court's docket incorrectly indicated that Mr. Kallenbach was afforded pro hac vice status on behalf of Intervenor Defendants. (ECF Nos. 75 at 1; 76.) On October 29, 2014, Defendant Intervenors moved to strike that pro hac vice application and to set aside the Court's order. (ECF Nos. 77.) Subsequent filings have explained the inconsistent positions taken by Mr. Villa versus Intervenor Defendants.

According to Mr. Villa the Ione Band that has intervened in this lawsuit, on whose behalf trust

[7] In consideration of the arguments made by the parties, the Court finds Plaintiffs have standing to sue. (ECF No. 93 at 23; ECF No. 90-1 at 5-7.)

acquisition will occur, have sought to increase their membership rolls in order to wrest control from those in the Ione Band who have actual genealogical ties to the Indians living in Amador County in the early part of the 20th century. It appears Mr. Villa is in fact listed as a member of the Ione Band (Intervenor Defendants) on its membership rolls,[8] but he states the group in this lawsuit no longer represents the proper genealogical descendants of the Ione Band. Hence, Mr. Villa assigns the term "Historic Band of Miwok Indians" to refer to his lineage and others who represent the more historically accurate group, to be distinguished from Defendant Intervenors the Ione Band of Miwok Indians.

Mr. Villa states that private investors have funded the Ione Band's efforts to construct a casino, which has included giving money or gifts to buy membership involvement. (ECF No. 81 ¶ 3.) *See* ECF No. 81-6 (Flier for "Ione Band of Miwok Indians 2014 Distribution," stating: "Starting November 25th, the tribe will be distributing $400 to adult tribal members who turn 18 on or before November 24, 2014.") Mr. Villa states that few of the members constituting the 750-plus member Ione Band bear true affiliation to the Historic Band. (ECF No. 81 ¶ 4.) Mr. Villa states: "[t]he Historic Ione Band of Miwok Indians resides on approximately 40 acres of land located at 2919 Jackson Valley Road, Ione, California. The monuments memorializing the properties boundaries are still intact . . . The present community

[8] *See* ECF No. 77-1 ¶ 8.

of the Historic Ione Band of Miwok Indians considers the aforementioned 40 acre parcel to be their reservation. One water supply services all of its residents' dwellings. No one pays real estate taxes on the reservation land to Amador County or to the State of California." (ECF No. 81 ¶¶ 9, 10.)

Mr. Villa also submits a supporting declaration from Professor Al Slagle.[9] (*See* ECF No. 82 at 4-8.) Of note are Mr. Slagle's observations regarding the Ione Band's tribal elections that took place in the 1990s. Mr. Slagle states that in 1989 Mr. Villa was elected as the Ione Band's chairman and led the efforts to obtain federal acknowledgement of the tribe. (ECF No. 82 ¶ 27.) Mr. Slagle states: "In 1994, at the request of Chief Villa, I completed a 90 page 'Petition for Status-Reaffirmation of the Ione Band of Miwok Indians.' The petition was augmented with narratives and supporting documents submitted by me to the Department of the Interior (in cooperation with the Tribe) on previous occasions. I presented the petition and supporting documentation to the staff of Assistant Secretary of the Interior Ada E. Deer in Washington, D.C." (ECF No. 82 ¶ 50.) Mr. Slagle further states that in that petition, he offered his opinion that the Ione Band – as it existed in 1994 – met the requirements of 25 C.F.R. §§ 83.1-11, i.e. the Part 83 regulations which provide procedures for establishing federal recognition. (ECF No. 82 ¶¶ 51-52.) Hence, in March, 1994, Assistant Secretary Deer issued her determination that the Ione Band was

[9] This declaration was apparently offered in *Burris v. Villa*, No. CIV-S-97-531 (E.D. Cal.).

recognized, and addressed her determination to Mr. Villa as the tribe's leader. (ECF No. 82 ¶ 52.)[10]

Mr. Slagle further states that after the 1994 Deer affirmation, the Ione Band requested a secretarially-supervised IRA election to approve a tribal constitution, but subsequently, in October 1994, unanimously withdrew its request for IRA reorganization. (ECF No. 82 ¶ 28.) After the BIA accepted the Ione Band's request to withdraw from IRA reorganization, various factions of the Ione Band formed, including the Villa and Burris groups. (ECF No. 82 ¶¶ 43-54.) The tribal elections that occurred with BIA assistance, which apparently concluded in September of 1996, were done without the Villa group's participation. Mr. Slagle further states:

- "Neither the Villa nor the Burris groups, which represent more than two-thirds of the members of the land base tribe, have recognized the validity of the election." (ECF No. 82 ¶ 60-3.)

- "A careful examination of the Enrollment Committee's record shows that virtually all persons the Enrollment Committee listed as their

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[10] However, *see* Secretary Deer's July, 1994 follow-up letter to her March, 1994 letter: "[I]t should be made clear that the intent of my letter was to recognize the entire group of Miwok Indians associated with the land in Amador County. It was not my intent to recognize one or the other factions currently existing under separate leaders, nor do we believe there are in fact two separate groups." (AR1126.) "It was not my intent to displace Mr. Harold E. Burris as the Tribal Chairman of the Ione Band of Indians . . . I recommend that an interim council be formed incorporating leaders from both sides." (AR1127.)

> 'members' never had any degree of social or political affiliation with the Ione Band prior to April 1996 – when their names suddenly began appearing on 'potential member lists' before they even had applied for membership." (ECF No. 82 ¶ 60-5.)
>
> • "Fewer than half of those persons qualified as adult voting members of the Tribe at the time of its recognition were on the list of potential voters in the 1996 election, or permitted to participate in the election." (ECF No. 82 ¶ 60-11.)
>
> • "92% of the names on the 'potential voters' lists in September 1996 never participated in the Tribe, never lived on the land base, or had ancestry residency or age information available to the Tribe confirming their qualification to vote in this election." (ECF No. 82 ¶ 60-12.)

Thus, Mr. Villa's position would be that the current party that represents itself to the Court as Defendant Intervenors – in terms of its membership and its tribal government – does not accurately represent the genealogically accurate, or historically correct, Ione Band.

Defendant Intervenors offer little in the way of substantive response to Mr. Villa's or Mr. Slagle's allegations that Defendant Intervenors, on whose behalf trust acquisition will occur, has seen its membership expansion balloon to a capacity such that it no longer represents the Ione Band in any historically accurate way.[11] Nonetheless, Defendant Intervenors respond that the Court should disregard all of Mr. Villa's

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[11] Or in a way that would meet the Part 83 criteria.

additional briefing on the basis that Mr. Villa or his purported party, the Historic Band of Miwok Indians, is not actually a party before this Court. (ECF No. 85.) Defendant Intervenors are correct that neither Mr. Villa nor a party named the "Historic Band of Miwok Indians" has sought to intervene in this case. Clearly, Mr. Villa takes a position that Defendant Intervenors do not take. Defendant Intervenors, represented by the law firm Holland & Knight, LLP, expressly state they have not hired Mr. Villa's attorney, Mr. Kallenbach, to represent them. (ECF No. 77-1.) The Court also notes that Mr. Villa apparently sought to overturn the ROD on the grounds he states herein, in *Villa v. Salazar*, No. 13-cv-700-TLN-CKD. *See* Complaint, Case No. 13-cv-700-TLN-CKD, ECF No. 1 ¶ 12 ("The group calling itself the Ione Band of Miwok Indians, for which the Acting Assistant Secretary for Indian Affairs has authorized the trust acquisition of the Plymouth Tracts for gaming purposes, includes as purported members persons with little or no ancestral or other connection to the historic Tribe head by Mr. Villa and his father.") Mr. Villa filed a complaint in that case, in June, 2012 in the District Court for the D.C. Circuit; after transfer to this District, he voluntarily dismissed that lawsuit on April 23, 2013. (Case No. 13-cv-700-TLN-CKD, ECF No. 21.)

Defendants support Defendant Intervenors' motion to strike. (ECF No. 78.) In their attached exhibits, Defendants explain that the Department recognizes the current chairwoman of the Ione Band, Ms. Yvonne Miller, and that they do not recognize Mr. Villa as

authorized to speak on behalf of the Band. They explain the BIA Pacific Regional Office has in the past advised Mr. Villa to work with the Ione Band to resolve tribal leadership concerns he may have. (ECF No. 78-1 at 3.) Defendants also point out that subsequent memorandum from the Department, issued closely after the initial March, 1994 Deer determination addressed to Mr. Villa, noted competing factions within the Ione Band. *See* July 27, 1994 Deer Memorandum: "I am writing to clarify, notwithstanding any indication to the contrary, that the Department of the Interior recognizes as one entity the entire group of Indians associated with the lands near the town in Amador County, California. It was not the intent of the letters and memoranda to recognize two distinct entities. Further, it was not and is not this Department's intent to recognize any specifically named person as a leader of the entity. Indeed, this Department has neither the authority nor the power to determine the leadership of any Tribe or Band. That decision is decidedly for the membership of that entity." (AR1129.)

For their part, Plaintiffs articulate the issue well: "Basically, the two factions are using the Court's Pro Hac Vice Order as a forum to litigate who is, or should be, in control of the Ione Band of Miwok Indians. In contrast, the primary issue in Plaintiffs' lawsuit is whether the Ione Band of Miwok Indians was a federally recognized tribe in 1934 and therefore entitled to fee-to-trust benefits of the Indian Reorganization Act of 1934." (ECF No. 87 at 2.) Plaintiffs do not join in Defendant Intervenors' motion to strike. Plaintiffs take

the position that the Court's order granting Mr. Kallenbach's pro hac vice position should not be set aside. (ECF No. 87 at 3.) Plaintiffs do dispute, however, Mr. Villa's position that the Ione Band (whether Mr. Villa's group or Defendant Intervenors) is a federally recognized tribe. (ECF No. 87 at 6.)

In consideration of all of the foregoing, the Court finds the following. First, it does not appear to be disputed that Mr. Kallenbach's pro hac vice application satisfies the requirements of Local Rule 180(b)(2), but for the glaring fact that Mr. Kallenbach does not represent a party in this lawsuit. As noted above, the Court understands Mr. Villa to be enrolled as a member of Defendant Intervenors, the Ione Band; however, Mr. Villa clearly takes a position that Defendant Intervenors do not take. Defendant Intervenors, represented by the law firm Holland & Knight, LLP, state they have not authorized Mr. Villa's attorney, Mr. Kallenbach, to represent them. (ECF No. 77-1 ¶ 4.) Mr. Villa's position is that his group – the group he maintains has a true historical affiliation to the Ione Band that has resided in Amador County throughout the twentieth century – is distinct from Defendant Intervenors. Mr. Villa, or the group he purports to represent, the "Historic Band of Miwok Indians," has not sought to intervene in this lawsuit and therefore there is no party on whose behalf Mr. Kallenbach may appear. For that reason, the Court sets aside its October 21, 2014 Order (ECF No. 76) granting Mr. Kallenbach pro hac vice status.

Second, beginning in 1995, the "Ione Band of Miwok Indians of California" has appeared on the Department of Interior's list of federally recognized Indian tribes that is published in the Federal Register. (AR4826; 79 Fed. Reg. 4748.) Whether Defendant Intervenors or Mr. Villa's group are the correct designee for the designation that appears in the Federal Register, is not the issue before this Court. No parties in this lawsuit, or in Case No. 1710, make allegations that the current tribal membership or leadership of Defendant Intervenors misrepresents the true Ione Band, and that the ROD can be found valid only when the correct Ione faction has been substituted for such members or leaders. The issues presented in this case, and in Case No. 1710, primarily concern whether the Ione Band was under federal jurisdiction in 1934, 25 U.S.C. § 479, and whether the Ione Band meets the "restored lands" provision stated in 25 U.S.C. § 2719(b)(1)(B)(iii). In this Court's estimation, Mr. Villa's supporting briefing strengthens Defendants and Defendant Intervenors' position that there is a historically distinct Indian tribe, which appears in the Federal Register as the "Ione Band of Miwok Indians of California," and which was under federal jurisdiction in 1934. Mr. Villa's supporting briefing makes a challenge as to whether the membership group represented by Defendant Intervenors, on whose behalf trust acquisition will occur, is the appropriate referent for the "Ione Band of Miwok Indians of California" designation that appears in the Federal Register. However, no party in this lawsuit, or in Case No. 1710, has made that challenge.

The Court reiterates that Mr. Villa challenged the ROD on the aforementioned grounds in Case No. 13-cv-700, but voluntarily dismissed that lawsuit. Mr. Villa has not made a motion under Fed. R. Civ. Proc. 24 to intervene in this case or in Case No. 1710. The Court's Memorandum and Order here makes no disposition of Mr. Villa's claims, including whether those claims are relevant to the validity of the ROD.

II. The administrative record & the Assistant Secretary's authority

Plaintiffs argue that the submitted administrative record is incomplete and distorted. Plaintiffs argue Secretary Laverdure did not have time to review the record in the month after his appointment in April 2012 and issuance of the ROD in May 2012. (ECF No. 72-1 at 5.) Plaintiffs argue that documents from the UC Davis Special Collections Files reveal that the "federal government decided that it could not buy land or provide any federal assistance to the Ione Indians because they were 'non-ward' and 'non-tribal' homeless California Indians that were not under federal jurisdiction in 1934 . . . It is now apparent that pertinent federal documents from the 1930s discussing the non-applicability of the IRA to the Ione Indians were deleted from the record and/or AR before it was filed with Court." (ECF No. 93 at 9.)

Although these are relevant concerns, Plaintiffs do not direct the Court to documents in the record, or omitted from the record, that establish that the

Department was arbitrary and capricious in finding the Ione Band under federal jurisdiction in 1934. Plaintiff attaches a letter from then Superintendent of Indian Affairs, Sacramento, O.H. Lipps, August 15, 1933, to the Commissioner of Indian Affairs, which describes the Indians living near Ione at that time. That letter stated: "The situation of this group of Indians is similar to that of many others in this Central California area. They 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. They are living on a tract of land located on the outskirts of the town of Ione." (ECF No. 93, Ex. 2.) However, as the aforementioned communications show, this letter does not describe the Ione Band in an inconsistent way, compared to other documents within the record discussing the situation of the Ione Band in the early 20th Century.[12] Plaintiffs do not identify documents establishing the position Plaintiffs put forth: that the Ione Band was not a recognized tribe under federal jurisdiction in 1934.

Plaintiffs also argue that Assistant Secretary of Indian Affairs Laverdure lacked the authority to take the Plymouth Parcels into trust. Plaintiff argues that before Secretary Laverdure's tenure, Assistant Secretary of Indian Affairs Larry Echo Hawk declined to

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[12] *See* "Background" section of this Order, *supra*.

take the subject lands into trust (as evidenced by the 2009 Bernhardt memorandum and draft opinion). (AR7112.) Plaintiffs argue that the Department's position abruptly changed upon the appointment of Secretary Laverdure in early 2012. Plaintiffs also argue Secretary Laverdure worked on and promoted the Ione Indian application with the Department prior to his appointment as Secretary.

Factual disputes aside about what Secretary Echo Hawk may or may not have intended, Plaintiffs cite no authority for the proposition that the acting Assistant Secretary of Indian Affairs may not take land into trust. Under 25 U.S.C. § 1a, the Secretary of the Interior is authorized to delegate his power and duties to the Commissioner of Indian Affairs (now the Assistant Secretary of Indian Affairs). According to Defendants, pursuant to the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d, Secretary Echo Hawk put in place a succession plan which provided for the appointment of the Principal Deputy Assistant Secretary (in this case Mr. Laverdure) if Mr. Echo Hawk resigned. Mr. Echo Hawk resigned, leading to the appointment of Secretary Laverdure in 2012, who in that position approved the instant trust acquisition. Plaintiffs do not identify a legal error in this chain of events.

III. Claim One

Claim 1 in the FAC alleges that the Secretary of the Interior lacks the authority to take land into trust for the Ione Band because it was not a "recognized tribe

now under Federal jurisdiction" in 1934 when the IRA was enacted. 25 U.S.C. § 479. The Court notes the following arguments raised by Plaintiff in the instant case.[13]

A. *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009)

Plaintiff argues that *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009) precludes the Ione Band from being a "recognized Indian tribe now under Federal jurisdiction" in 1934 when the IRA was enacted. Plaintiff also argues that the Department is not entitled to deference for construing the term "under Federal jurisdiction," § 479, to be ambiguous and thus creating its own two-party inquiry for deciding whether a tribe was under federal jurisdiction in 1934. The Court disagrees with these arguments.

Carcieri involved the Narragansett tribe, indigenous to Rhode Island, but who in 1880 had relinquished its tribal authority at the behest of the State. The Tribe also agreed to sell all but two acres of its remaining reservation land for $5,000, but almost immediately regretted that decision and embarked on a campaign to regain its land and tribal status. In the early 20th century, members of the Tribe sought economic support and other assistance from the federal government, as evidenced by correspondence spanning a 10-year period from 1927 to 1937. The tribe filed suit

[13] The Court engaged in a longer analysis of this issue in Case No. 1710, ECF No. 95.

in the 1970s to recover its ancestral land, and in 1978, the tribe received title to 1,800 acres, subject to the laws of Rhode Island. *Id.* at 383-84.

The BIA granted formal federal recognition to the tribe in 1983. 48 Fed. Reg. 6177. Thereafter, the tribe purchased 31 acres of land, adjacent to the 1,800 acres of settlement lands. As an alternative to complying with local regulation over the 31 acres, the tribe sought trust acquisition by the Department, 25 U.S.C. § 465, which permits the Secretary of the Interior to accept land into trust for "the purpose of providing land for Indians." This prompted the inquiry into the definition of Indian, which is defined in § 479 as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." That question, in turn, brought the Supreme Court to the central issue in *Carcieri*: "whether the word 'now under Federal jurisdiction' refers to 1998, when the Secretary accepted the 31 – acre parcel into trust, or 1934, when Congress enacted the IRA." *Id.* at 385-388.

Carcieri found the statutory language unambiguous: "the word 'now' § 479 limits the definition of 'Indian,' and therefore limits the exercise of the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." *Id.* at 390.

The next issue one might expect *Carcieri* to address would be: was the Narragansett tribe under federal jurisdiction in 1934? But "[n]one of the parties or *amici*, including the Narragansett Tribe itself, ha[d]

argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record [was] to the contrary." *Id.* at 395. That is precisely the difference in argument between the Department's position in *Carcieri* and the Department's position in the instant case. Here, the Department argues heavily – and the administrative record is replete with documentation from the early twentieth century in support – that the Ione Band was under federal jurisdiction in 1934.

Plaintiff argues that *Carcieri* precludes affording deference to the Department's own standards for determining whether a tribe was under federal jurisdiction in 1934. The Court disagrees. What the Supreme Court found unambiguous was that § 479 limited trust acquisition to tribes under federal jurisdiction in 1934, not tribes who became under federal jurisdiction at a later point. *Carcieri* did not address the standards for being under federal jurisdiction. As Justice Breyer noted in his concurrence:

> [A]n interpretation that reads 'now' as meaning 'in 1934' may prove somewhat less restrictive than it at first appears. That is because a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time. We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. The Department later recognized some of those tribes on grounds that showed that it should have recognized

> them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was 'under Federal jurisdiction' in 1934 – even though the Department did not know it at the time.

Id. at 398 (citations omitted).[14]

It strikes the Court that there is far more ambiguity than not about what it means for a tribe to be "under Federal jurisdiction" in 1934, even if the time at which a tribe must have been under federal jurisdiction is not ambiguous. Accordingly, the Court affords deference to the Department for the construction of its two-part inquiry for determining whether a tribe was under federal jurisdiction in 1934. See *Confederated Tribes of the Grand Ronde Comm'n of Ore. v. Sally Jewell, et al.*, 75 F. Supp. 3d 387, 2014 WL 7012707 at *9-11 (D.D.C. 2014) (applying Chevron deference to the Department's promulgation of the two-part inquiry).

As stated in the ROD, the first part of that test considers whether at or before 1934 the federal government had taken action to establish "obligations, duties, responsibility for or authority over the tribe." (AR10105.) The second part "ascertains whether the tribe's jurisdictional status remained intact in 1934." (AR10105.)

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[14] The majority decision in *Carcieri* states the law, and that precedent binds this Court. Justice Breyer's concurrence is cited here as persuasive reasoning, and which is not, in any event, in conflict with the majority decision.

The ROD found the Ione Band met that two-part test for reasons including: the Band's being a successor in interest to Treaty J in the mid-1800s; efforts to document members of the Band in the early 1900s; efforts to acquire a 40-acre parcel for the Band; failed – but consistent – attempts to complete the acquisition of land for the Ione Band continuing into the 1930s; a petition by the Ione Band again in 1941 to complete the acquisition; beginning in the 1970s, efforts by the California Indian Legal Services to complete a trust acquisition for the Band; the 1972 determination by Commissioner Bruce that federal recognition had been extended to the Ione Band; a 2006 Indian Lands Determination by the Department that the Plymouth Parcels were gaming eligible; and the fact that, in 2011, the U.S. District Court for the District of Columbia previously recognized the Ione Band's "long-standing and continuing governmental relationship with the United States," *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 198 (2011). (AR10108-11.)

B. The *Burris* litigation

Plaintiffs argue that the Court's judgment in the *Burris* litigation is binding on the parties and conclusively establishes that the Ione Band was not a recognized tribe under federal jurisdiction in 1934. *See lone Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, 1992 U.S. Dist. LEXIS 23167 (E.D.Cal. April 22, 1992) (hereinafter referred to as "Judge Karlton's Order"). Competing factions of the Ione Band and the Department appeared as parties in that case. The federal

government argued that the Ione Band was not a federally recognized Indian tribe, and Judge Karlton's Order likewise explained that plaintiffs (the Ione Band) had not demonstrated they were entitled to recognition outside of the Part 83 process. (AR7779.)

Plaintiffs also point out that in May, 1992, the Regional Director of the BIA declined to review the economic development agreement between the Ione Band and a private development company on the grounds that the Ione Band was not a federally recognized tribe. The Interior Board of Indian Appeals ("IBIA") upheld that decision, referencing Judge Karlton's order for the proposition that the Part 83 regulations were the proper means by which recognition could be achieved, which the Ione Band had not underwent. (AR811-813.) In 1997, the Nicolas Villa Jr. faction of the Ione Band initiated another lawsuit against the County of Amador in this District, seeking to restrain Amador County from invoking regulatory jurisdiction over their property based on the claim that it was Indian Country. This Court denied that request, referencing an August 5, 1996 order from the *Burris* litigation, which had ruled that Villa and his supporters did not constitute the government of the Ione Band and the Ione Band had no recognized tribal governmental. (AR1172.)

In the instant matter, Plaintiffs now argue that Defendants and Defendant Intervenors are collaterally estopped from arguing the Ione Band had achieved federal recognition. Collateral estoppel is applicable when: (1) the issue to be precluded must be the same

that was decided in the prior lawsuit; (2) the issue must have been actually litigated in the prior lawsuit; (3) the issue must necessarily have been decided in the prior lawsuit; (4) the decision must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same or in privity with the party in the prior lawsuit. *Baldwin v. Kilpatrick*, 249 F.3d 912, 917-18 (9th Cir. 2001).

However, the main issue identified now – whether the Ione is federally recognized – is not identical to the issue addressed in Judge Karlton's order. Whether the Ione Band could in fact achieve federal recognition was not decided in Judge Karlton's Order. The issue in Judge Karlton's Order was the federal government's motion for summary judgment on grounds that it had not waived its sovereign immunity from suit. Judge Karlton held that the government had not waived its immunity as to plaintiffs' claim because the APA waiver[15] applies only where there is final agency action, and the plaintiffs' failure to apply for recognition through the part 83 regulations barred their claims due to a lack of final agency action ripe for review. Hence, Judge Karlton ruled:

> Plaintiffs' argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that "the Secretary may acknowledge tribal entities outside the regulatory process," [citation], and that the court, therefore, should accept jurisdiction over plaintiffs' claims compelling such recognition.

[15] *See* 5 U.S.C. § 702.

> 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's acknowledgement process, the United States' motion for summary judgment on these claims must be GRANTED.

(AR7779.)

Those specific routes to federal recognition outside of the Part 83 process, which plaintiffs had not shown were viable, included: Congressional recognition and/or via treaty, the government's resolution of tribal acknowledgment petitions, the "wholesale listing of Alaska native entities" in the 1988 Federal Register, and recognition arising out of government settlement of litigation in the 1950s and 1960s. (AR7778.) Defendants and Defendant Intervenors argue tenably, however, that administrative restoration outside of the Part 83 process is a legitimate route for restoration of recognition in this case. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d 960, 969 (6th Cir. 2004) ("The result of this administrative acknowledgment was a restoration of federal recognition, a necessary component of which includes the resumption of the government's political relationship with the Band . . . On the facts of this case, a tribe like the Band, which was administratively 'acknowledged,' also is a 'restored' tribe.")

Defendant Intervenors also explain that the context for the aforementioned 1996 order, issued later in the *Burris* litigation, was a tribal split among competing factions of the Ione Band; hence there was no identifiable leadership capable of prosecuting the *Burris* litigation on behalf of the Band. That is, the point was not that the Ione Band had not or could not be federally recognized, but that the Ione Band lacked a legitimate tribal government. (AR1153-58; ECF No. 91-1 at 32.) That appears to be a correct interpretation of the court's August 5, 1996 order. Indeed, by that time, the Ione Band had been included on the list of federally recognized tribes published in the Federal Register. Regarding the 1992 IBIA decision, the IBIA later recognized the 1994 Deer determination. (AR1177 and n. 4.)

It is also not apparent that there is privity of parties, as the *Burris* litigation involved competing factions of the Ione Band, including one faction opposing the federal government and claiming it is federally recognized. That is not the case here, where the Ione Band appears as a single party claiming that it is federally recognized.

Arguably, the facts have changed since Judge Karlton's Order, so as to make inapplicable the doctrine of collateral estoppel: "If different **f**acts are in issue in a second case from those that were litigated in the first case, then the parties are not collaterally estopped from litigation in the second case. If the litigated issues are the same – the same facts at issue – estoppel will apply and an offer of different proof in a

later case will not provide escape." *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1357 (9th Cir. 1985). Arguably, relevant different facts subsequent to the Judge Karlton Order are: Assistant Secretary Deer reversed course in 1994 and determined that the Ione Band was federally recognized; the federal government presented that changed position to the Court before that litigation concluded; in 1995, the Ione Band appeared on the Federal Register's list of federally recognized tribes and has been included on each list since; the Ione Band initiated the instant trust acquisition in the early 2000s with the understanding that it was a federally recognized tribe; the Department promulgated the Part 292 regulations, 25 C.F.R. 292.1-26, including section 292.26(b) which contributes to the Department's finding that the Band is a "restored" tribe; and the Department recorded its decision to complete the trust acquisition based on the understanding that the Ione Band was a recognized tribe.[16]

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[16] An interesting counterpoint to this would be that all the relevant "facts" actually occurred sometime prior to June 1934 when the IRA was enacted. According to the Department's two-part inquiry for whether a tribe was "under federal jurisdiction" in 1934, what is relevant is whether there was a particular relationship between the federal government and an Indian tribe in 1934 and before, and whether that relationship remained intact in 1934. Subsequent events may *reveal* different aspects of whether the Ione Band was in fact under jurisdiction in 1934. For example, in present day, a tribe may produce evidence to show it was under federal jurisdiction in 1934, even though the Department did not know it at the time. *Carcieri*, 555 U.S. at 398. But nothing occurring after June 1934 would *change* those facts constituting whether, actually, a tribe was under federal jurisdiction in June 1934. The main issue here is whether, actually, the Ione

Plaintiff also argues that the positions taken by the federal government and individual defendants in the *Burris* litigation – that the Ione Band was not federally recognized – are binding because they are judicial admissions. *See American Title Ins. Co. v. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988) ("Judicial admission are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact . . . [they are] conclusively binding on the party who made them.") However, there is distinct difference between the individual defendants making those admissions and the party that now appears before the Court, the Ione Band. With respect to the federal government, the record demonstrates that it had changed its position regarding the status of the Ione Band prior to the conclusion of the *Burris* litigation. (AR1133.)

For the foregoing reasons, the Court does not find the Department's decision to acquire the Plymouth Parcels in trust, based upon a determination that the Ione Band was a recognized Indian tribe under federal jurisdiction in 1934, to be arbitrary and capricious.

IV. Claim Two

Claim 2 in the FAC alleges that the Department failed to comply with its regulations, 25 C.F.R. §§ 151.10, 151.11, and 151.13, when it reviewed and

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Band was under federal jurisdiction in 1934, not whether the government's actions in the 1990s and afterwards now make it easier to construe the Ione Band as being under federal jurisdiction.

approved the ROD. The Court states each argument below.

Section 151.10(a) requires the Secretary to consider if there is any statutory authority for the proposed acquisition and, if so, any limitations contained in such authority. Plaintiffs argue the Secretary lacks authority to takes lands into trust on behalf of the Ione Indians who were not federally recognized in 1934. As discussed in this Order and in the Court's Order in Case No. 1710, the Court finds the Department's determination that the Ione Band was a "recognized Indian tribe now under Federal jurisdiction" in June 1934, 25 U.S.C. § 479, to be reasonable.

Section 151.10(b) requires the Secretary to consider if there is a need for the acquisition of additional lands. The ROD states that the Ione Band currently has no reservation or trust lands. (AR10112.) Plaintiffs argue the ROD does not address the fact that the Ione Indians own and occupy other properties in Amador County near Ione which has been sufficient to meet their needs. The application of the Ione Band to the Department seeking trust acquisition stated that the "Ione Band has no reservation and no land in trust" and "[w]ithout trust land, [it] has had little opportunity for successfully economic development and little chance at true self-governance." (AR2757.) Plaintiffs do not argue that the properties it references – those outside of the Plymouth Parcels – meet this need in the way trust-acquisition of a gaming-eligible property would.

Section 151.10(c) requires the Secretary to consider the purpose for which the land will be used. Plaintiffs argue the ROD is incomplete because, although it outlines the casino project, it fails to reveal or study that the project also includes the construction of 162 private residences on the Plymouth Parcels. (AR10112-13.) Defendants respond that the ROD "nor any other [pages] in the AR demonstrate that this alleged residential development has ever been part of the Tribe's [fee-to-trust] proposal." (ECF No. 90-1 at 37.) As Plaintiffs do not further explain either whether this proposed construction will occur, or why the ROD must be overturned on this ground, this argument does not compel a finding that the Department was arbitrary and capricious in not mentioning the additional construction of 162 private residences.

Section 151.10(e) requires the Secretary to consider the impact on state and local government if the land is acquired in "unrestricted fee status" and removed from the tax rolls. Plaintiff argues there is no evidence in the ROD to demonstrate that the Parcels will be acquired in unrestricted fee status, and therefore be eligible to be exempt from state and local tax. Defendants respond that the Parcels are not proposed to be acquired in unrestricted fee status.

The ROD also explains that the Department has relied upon the fiscal mitigation provisions previously addressed during the "now voided Municipal Services Agreement" ("MPA agreement"). These provisions "include payments, commencing at the time of the fee-to-trust transfer of the Plymouth Parcels, of an annual

contribution equal to the current tax rate to the City of Plymouth and Amador County to address lost property tax revenues. The amount of payment shall be subject to annual review by the Amador County Assessor with any adjustments made with concurrence by the Tribe. The Department finds that the impacts of removing the subject property from the tax rolls are not significant because of the degree to which the Tribe's direct and indirect payments to the Amador County offset the loss of real property taxes that would occur." (AR10113.) Therefore, without more, the Court does not find the Department was arbitrary and capricious on these grounds.

Section 151.10(f) requires the Secretary to consider jurisdictional problems and possible conflicts of land use. Plaintiffs argue this issue is not discussed in the ROD and the voided MPA agreement does not exempt the Parcels from state and local land use. The ROD states: "Through the incorporation of the voided MSA provisions within the [Final Environmental Impact Statement], the Tribe has agreed to address all major jurisdictional issues, including, but not limited to compensating the County Sheriff's Department, prosecuting attorney's office, courts, and schools that will provide public services on the Tribe's trust lands." (AR10113.) *See also* AR10027 (BIA Regional Director's Rec. Mem. stating: "the Tribe intends to work cooperatively with the local jurisdictions to ensure that the casino project is harmonized with the surrounding community" and that the Parcels will be "subject to federal and tribal law which includes stringent

environmental, health, and safety requirements"). Without more, the Court does not find the Department was arbitrary and capricious on these grounds.

Section 151.11(c) requires the tribe provide a plan to the Secretary which specifies the anticipated economic benefits associated with the proposed use. Section 151.10(h) requires the Secretary to consider whether a tribe has provided sufficient, specific information to insure that the potential environmental impacts of the project are considered before the land is taken into trust. Section 151.10(g) requires the Secretary to consider whether, if the land is taken into trust, the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. Section 151.13 requires a tribe to furnish title evidence meeting the *Standards For the Preparation of Title Evidence in Land Acquisitions by the United States* issued by the United States Department of Justice. Plaintiffs argue either that the ROD does not address these issues or that the Ione Band has not submitted the proper information to the Secretary for consideration in the ROD. The Court declines to go through a point by point analysis refuting each of Plaintiff's arguments. A clear reading of the ROD and the record in this case indicates that, if not addressed in the ROD, the record indicates all of these regulations were addressed. (*See* Regional Director's Rec. Mem., AR10027-31.) Furthermore, Plaintiffs identify no specific problem associated with alleged noncompliance with these regulations.

For the foregoing reasons, the Court finds Plaintiffs has failed to establish the Department's non-compliance with the aforementioned regulations, so as to render the instant trust acquisition arbitrary, capricious, unlawful, or an abuse of discretion.

V. Claim Three

As to Claim 3 Plaintiffs argue that . . . "the Parcels are privately owned by third parties who hope to partner with the Ione Indians and benefit financially from the construction and management of a mega-casino in the town of Plymouth. The DOI's and Mr. Laverdure's decision to take the privately owned Parcels into trust in favor of the Ione Band, free from state and local regulation, as though it is public domain land, is an unconstitutional infringement on state and local police power to regulate its citizenry for the benefit of all. It is also a violation of the equal footing doctrine and the principles of federalism . . . The ROD is an overreach of the limited authority Congress gave to the Secretary under the IRA to restore allocated reservation land or to create reservation from public domain land." (ECF No. 93 at 16.)

As an initial matter, Plaintiffs do not establish they have standing to assert the interests of the State of California. *See City of Roseville v. Norton*, 219 F. Supp. 2d 130, 146 (D.D.C. 2002). That issue aside, the authorities cited by Plaintiff are inapposite. Plaintiffs cite *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S. Ct. 1436, 173 L. Ed. 2d 333 (2009) for the

principle that once land is conveyed by the United States to a state it cannot be returned to federal jurisdiction in contravention of the nature of the original grant to the state. (ECF No. 93 at 17.) But *Hawaii* did not foreclose – much less mention – the specific issue here: whether a fee-to-trust transfer from private ownership to trust is permissible under the IRA. Thus, *Hawaii* is inapposite.

Plaintiffs cite *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) for the proposition that a tribe does not have the authority to unilaterally create a reservation from fee owned lands. But *Sherrill* concerned whether a tribe was prohibited from claiming tax immunity over property within its reservation that it had purchased on the free market. The *Sherrill* court endorsed the same fee-to-trust acquisition procedures used in the instant case. *Id.* at 220-21.

Plaintiffs also argue that the instant trust acquisition violates a Congressional Act from April 8, 1864, 13 Stat. 39. That Act "designated California as one Indian superintendency. It also recited that 'there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations.' " *Mattz v. Arnett*, 412 U.S. 481, 489, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). *See Donnelly v. United States*, 228 U.S. 243, 256, 33 S. Ct. 449, 57 L. Ed. 820 (1913) ("The terms of this enactment show that Congress intended to confer a discretionary power, and from an early period Congress has

customarily accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes.") Plaintiff's argument is that the instant trust acquisition constitutes an additional "reservation," exceeding those four permitted. However, the Act is not apposite here because the instant trust acquisition does not involve the setting aside of a portion of the public domain. Plaintiff's argument on this point appears to question the constitutionality of the Secretary's authority to take land into trust under § 476 simply as a general matter. Plaintiffs do not cite authority for the proposition that any reservation land in California acquired as trust property, beyond the four tracts of land designated in the aforementioned Act of 1864, is impermissible. Thus, Plaintiff's argument is unavailing.

In response to Plaintiffs reference to the Equal Footing doctrine, in rejecting this argument, the Court will follow the analysis provided by the *Norton* court:

> The Equal Footing Doctrine derives from the Statehood Clause of the Constitution, which the Supreme Court has construed as imposing a duty not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. The doctrine prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union. Thus, the Federal Government . . . cannot dispose of a right possessed by the State

> under the equal-footing doctrine of the United States Constitution.
>
> Plaintiffs have not alleged that the taking of the parcel in trust for the Tribe will in any way impair the sovereignty of the State of California such that California will no longer be equal to other states in the Union. Nor have plaintiffs alleged that California has been denied any constitutionally guaranteed right by the fact that some state laws may be preempted by federal Indian legislation. The federal government possesses plenary power with respect to Indian affairs. The exercise of this plenary power simply does not constitute a violation of the equal footing doctrine.

Norton, 219 F. Supp. 2d at 153 (internal citations omitted).

To the extent Plaintiff invokes the Tenth Amendment to the U.S. Constitution ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"), the plenary power of Congress and the President over Indian Affairs is well-established. *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974); 25 U.S.C. § 9; 25 U.S.C. § 2 (providing the Commissioner of Indian affairs "management of all Indian affairs and of all matters arising out of Indian relations").

The Court does not find Plaintiffs' challenge to the ROD, on the basis of the aforementioned federalism principles, establishes that the instant trust

acquisition is arbitrary, capricious, unlawful, or an abuse of discretion.

VI. Claim Four

Lands taken in trust acquired after October 17, 1988, are not gaming eligible, 25 U.S.C. § 2719, unless an enumerated exception applies. Here, the exception relied upon by the Department is § 2719(b)(1)(B)(iii): "the restoration of lands for an Indian tribe that isrestored to Federal recognition." Plaintiffs argue simply that this exception is not applicable in this case. The Court has considered this issue in its Order on the cross motions for summary judgment, Case No. 1710 – particularly the "restored tribe" part of section 2719(b)(1)(B)(iii) – and incorporates by reference its analysis from that Order.[17]

In brief: after first applying the grandfathering provision, 25 C.F.R. § 292.26(b), the ROD discusses the Band's land acquisition attempts, the Bruce determination, and the inconsistent positions taken by the government thereafter until the time of the Deer restoration – thus the ROD finds the Ione Band to be a "restored tribe". (AR10101-02.) The ROD also discusses the historical significance of the Plymouth Parcels to the Ione Band, the Band's modern connection to the Plymouth Parcels, and the closeness in time between restoration of the tribe and attempts to acquire

[17] The Court has addressed the restored lands for a restored tribe provision, 25 U.S.C. § 2719(b)(1)(B)(iii), with greater thoroughness in Case No. 1710, ECF No. 95, pp. 35-46.

the Parcels, thus establishing them as "restored lands". The "ROD thus records the Department's that the Plymouth County Parcels are eligible for gaming under the 'restored lands' exception in IGRA Section 20, 25 U.S.C. § 2719(b)(1)(B)(iii)." (AR10102.)

The FAC states: "Parcels [are not] 'restored lands' under IGRA for at least three reasons. First the Ione Indians are not landless. They have a potential ownership interest: (1) in 40 acres near Ione; (2) property in the City of Ione, (3) commercial property in the City of Plymouth, and (4) five parcels totaling 47 acres adjacent to Plymouth. Second, any ancestral lands of the Ione Indians in Amador County were relinquished in the last half of the 19th century. And third any claim by Ione Indians in Amador County for compensation for any ancestral lands was settled in the first half of the 20th century. Furthermore the subject Parcels are far from Ione and any potential ancestral or historical claims of the Ione Indians." (FAC ¶ 85.)

The Court notes this argument, but finds it does not compel a finding that the Department was arbitrary and capricious in finding the "restored lands" exception was met. Plaintiffs do not support their argument that the Plymouth Parcels are far from any potential ancestral or historical claims of the Ione Indians, or support their argument that property already owned by the Ione Band will support the purpose and need of the proposed project.

For the foregoing reasons, the Court does not find that the Department's restored lands analysis

demonstrates that the instant trust acquisition is arbitrary, capricious, unlawful, or an abuse of discretion.

VII. Claim Five

Claim 5 in the FAC alleges that the Department failed to comply with NEPA when it reviewed and approved the fee-to-trust transfer and the casino project. Specifically, Plaintiffs allege the Department did not adequately consider the traffic, water quality, and air quality of the proposed project. These negative impacts include: increases in traffic congestion and safety concerns on rural road in the area, increases in air pollution, increases in water pollution, the overuse of limited water resources, and potential increase in crime. Plaintiff also alleges the Final Environmental Impact Statement ("EIS") wrongfully assumed that non-Indian interests did not require equal consideration against the interests of the Ione Band when considering the environmental impacts of the proposed project.

However, the EIS considered traffic impacts (AR17023-422); air pollution (AR15784-802); water pollution and use (AR15760-82); and crime and public safety issues (AR15825-39). The EIS also analyzed reasonably foreseeable indirect impacts of the proposed action, including local and regional economic growth, the availability of affordable housing within Amador County, and impacts of off-site traffic mitigation. (AR16001-05.) Plaintiffs do not identify specific concerns with the EIS' conclusions. Without more, the

Court finds no basis to invalidate the ROD based on the BIA's NEPA analysis.

Plaintiffs also allege that the NIGC failed to consider the negative impacts associated with its "restored lands for a restored tribe" analysis, 25 U.S.C. § 2719(b)(1)(B)(iii), which is contained in Solicitor Artman's 2006 Indian Lands Determination. However, NEPA's statutory framework calls for a "detailed statement" in the event of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This Court ruled that the 2006 ILD was not a final agency action, in *Cnty. of Amador, Cal. v. U.S. Dep't of Interior*, No. CIVS 07-527 LKK/GGH, 2007 U.S. Dist. LEXIS 95715, 2007 WL 4390499 (E.D. Cal. Dec. 13, 2007). Plaintiff does not provide other authority for the position that the 2006 ILD must contain analysis under NEPA.

Plaintiffs also allege that it was impossible for the BIA to be impartial in its environmental analysis, because the BIA acts as the "lead" agency for both the evaluation of the fee-to-trust application and for the EIS documentation. However, the Court agrees with Defendants' point that federal agencies are frequently charged with undertaking environmental review of projects for which they have an institutional interest. *See e.g. Headwaters, Inc. v. BLM* 914 F.2d 1174 (9th Cir. 1990) (BLM properly conducted environmental review process for timber sale in Oregon); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1238-39 (10th Cir. 2004) (U.S. Air Force properly conducted environmental review process for expansion of Air Force Base in New Mexico).

For the foregoing reasons, the Court does not find that the Department's NEPA analysis demonstrates that the instant trust acquisition is arbitrary, capricious, unlawful, or an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Court finds:

- With respect to the First Amended Complaint, Claim 1, Plaintiffs' Motion for Summary Judgment is DENIED; Defendants' Motion for **S**ummary Judgment is GRANTED; and Defendant Intervenors' Motion for Summary Judgment is GRANTED.

- With respect to the First Amended Complaint, Claims 2 through 5, Defendants' Motion for Summary Judgment is GRANTED; and Defendant Intervenors' Motion for Summary Judgment is GRANTED.

Dated: September 30, 2015

/s/ Troy L. Nunley
Troy L. Nunley
United States District Judge

EXCERPTS OF RECORD OF DECISION (EXHIBIT 1 TO COMPLAINT)

Record of Decision
Trust Acquisition of the 228.04-acre
Plymouth Site in Amador County, California,
for the Ione Band of Miwok Indians

U.S. Department of the Interior Bureau of Indian Affairs

May 2012

U.S. Department of the Interior

Agency: Bureau of Indian Affairs

Action: Record of Decision for the Trust Acquisition of the 228.04-acre Plymouth Site in Amador County, California, for the Ione Band of Miwok Indians.

* * *

7.0 ELIGIBILITY FOR GAMING PURSUANT TO THE INDIAN GAMING REGULATORY ACT

The Tribe intends to develop a gaming facility on the 228.04 acres of land, located in Plymouth, Amador County, California. Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, prohibits gaming on land acquired in trust after October 17, 1988, but provides several exceptions to the general prohibition. Under § 2719(b)(l)(B)(iii) land that is the restoration of lands for an Indian tribe that is restored to Federal recognition is exempt from the general prohibition. For the reasons stated below, we believe that

the lands that are the subject of the fee-to-trust application qualify as "Indian lands" within the meaning of IGRA on which the Tribe could conduct gaming once the lands are acquired in trust by the Department.

IGRA prohibits gaming on lands acquired after October 1988 unless:

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

B. Lands are taken into trust as part of –

   i. A settlement of a land claim,

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

   iii. The restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(l).

In May 2008, the Department published regulations for "Gaming on Trust Lands Acquired after October 17, 1988," (Part 292 regulations). The regulations became

effective on August 25, 2008. Section 292.26(b) of the Part 292 regulations states:

> [T]hese regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

In 2004, prior to submitting its fee-to-trust application, the Band requested a legal opinion from the Department as to whether the Plymouth Parcels would be eligible for gaming under IGRA's Restored Lands exception at 25 U.S.C. § 2719(b)(l)(B)(iii). In 2006, the Department determined that the Band is a "restored tribe" and that the Plymouth Parcels would qualify as restored lands under IGRA if they were acquired in trust for the benefit of the Band.

The Department's 2006 determination constitutes a written opinion regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment under the Part 292 grandfather provision. Therefore, the particular criteria in the Part 292 regulations governing Restored Lands determinations do not apply to this particular trust application. I have relied upon, and adopted, the conclusions in the 2006

opinion pursuant to 25 C.F.R. § 292.26(b). The Plymouth Parcels thus constitute "[restored] lands for an Indian tribe that is restored to Federal recognition" within the meaning of IGRA.

Specifically, and as set forth in more detail in the Department's 2006 determination, we believe that the history of the Tribe's relationship with the United States is unique and complex. The evidence shows that the Department intended in 1916 to acquire land for the Indians at Ione. The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status. However, in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time. The positions subsequently taken by the Department in Federal court and before the IBIA against the Tribe were wholly inconsistent with that position, and as such manifest a termination of the recognized relationship. Assistant Secretary Deer's review of the matter and reaffirmation of Commissioner Bruce's position amounts to a restoration of the Tribe's status as a recognized Tribe. Under the unique history of its relationship with the United States, and as allowed under the Part 292 grandfather provision, the Tribe should be considered a restored tribe within the meaning of IGRA.

In order to conduct gaming on the land, not only must the Tribe be considered a restored tribe within the meaning of IGRA, but the land being acquired must

also be considered restored lands. The IGRA does not define what constitutes restored lands.

The Department's 2006 determination also found that the land being acquired is in an area that is historically significant to the Tribe. It is within a few miles of several historic tribal burial grounds and the site where some of the Tribe's ancestors signed a treaty. Many of the Tribe's members live in the surrounding area and the Tribe has used facilities in the City of Plymouth to hold governmental meetings in recent years establishing a modern connection to the area. Finally, the proposed acquisition of the land is reasonably temporal to the date the Tribe was restored.

In summary, the Department had previously determined that the proposed acquisition would constitute restored lands for a restored within the meaning of the IGRA. This prior determination qualifies the Tribe for the Part 292 grandfather provision at 25 C.F.R. § 292.26(b). This ROD thus records the Department's determination that the Plymouth County parcels are eligible for gaming under the "restored lands" exception in IGRA Section 20, 25 U.S.C. 2719(b)(l)(B)(iii), such that the Tribe may conduct class II gaming on the Amador County parcels once they are acquired in trust. At this time, the Tribe does not have an approved Tribal-State compact with the State of California for class III gaming. However, there is no requirement in IGRA that a compact be in place before the land is acquired in trust.

8.0 ACQUISITION OF LAND IN TRUST PURSUANT TO THE INDIAN REORGANIZATION ACT

The authority to acquire lands in trust for Indian tribes is found in 25 U.S.C. § 465. Section 465 is implemented though regulations found at 25 C.F.R. Part 151.

8.1 25 C.F.R. § 151.3: LAND ACQUISITION POLICY

The Secretary may acquire land in trust for a tribe when the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. The BIA has determined that the acquisition of the 228.04 acres of parcels satisfies 25 C.F.R. § 151.3(a)(3), and that the land is necessary to facilitate tribal self-determination and economic development.

8.2 25 C.F.R. § 151.10(A): STATUTORY AUTHORITY FOR THE ACQUISITION

Section 151.10(a) requires consideration of the existence of statutory authority for the acquisition and any limitations on such authority.

The statutory authority used by the Department to acquire the land in trust is Section 5 of the IRA 25 U.S.C. § 465. Section 5 gives the Secretary broad authority to acquire land in trust for Indian tribes' within or without existing reservations . . . for the purpose of

providing land for Indians . . . "Section 5 provides that title to any land so acquired 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. Section 5 contains no specific limitations on acquiring land in trust for the Tribe.

8.2.1 LEGAL ANALYSIS OF "UNDER FEDERAL JURISDICTION" IN 1934

In the Department's record of decision regarding the Cowlitz Tribe of Indians' fee-to-trust application (December 17, 2010), we concluded that the text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction." Nor does the legislative history clarify the meaning of the phrase. Because the IRA does not unambiguously give meaning to the phrase "under federal jurisdiction," the Secretary must interpret that phrase in order to continue to exercise the authority delegated to him under section 5 of the IRA.[2] The canons of construction applicable in Indian law which derive from the unique relationship between the United States and Indian tribes also guide the Secretary of the Interior's interpretation

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[2] The Secretary receives deference to interpret statutes consigned to his administration. *See Chevron v. NRDC,* 467 U.S. 837, 844 (1984); *United States v. Mead Corp.,* 533 U.S. 218, 230-31 (2001); *see also Skidmore v. Swift* 323 U.S. 134, J39 (1944) (agencies merit deference based on "specialized experience and broader investigations and information available to them).

of any ambiguities in the IRA.[3] Under these canons statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians and ambiguities are to be resolved in their favor.[4]

The discussion of "under federal jurisdiction" also must be understood against the backdrop of basic principles of Indian law that define the Federal Government's unique and evolving relationship with Indian tribes. The Supreme Court has long held that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] consistently described as 'plenary and exclusive.'"[5] The Indian Commerce Clause also authorizes

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[3] *Yankton Sioux Tribe v. Kempthorne,* 442 F. Supp. 2d 774, 783 (D.S.D. 2006); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan,* 369 F.3d 960,968, 971 (6th Cir. 2004) (*Grand Traverse III*). This canon is "rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe,* 471 U.S. 756, 766 (1988). *See also, Chickasaw Nation v. U.S.,* 534 U.S. 84 (2001) (*quoting Montana v. Blackfeet Tribe,* 471 U.S. at 766).

[4] *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 200 (1999); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992).

[5] *United States v. Lara,* 541 U.S. 193, 200 (2004); *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 813 (1993) (If Congress possesses legislative jurisdiction then the question is whether and to what extent Congress has exercised that undoubted jurisdiction); *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of

Congress to regulate commerce "with the Indian tribes," U.S. Const., art. I § 8, cl. 3, and the Treaty Clause grants the President the power to negotiate treaties with the consent of the Senate. U.S. Const., art. II, § 2, cl. 2. Pursuant to U.S. Const., art. VI, cl. 2, treaties are the law of the land.

The Court also has recognized that "[i]nsofar as [Indian affairs were traditionally an aspect of military and foreign policy], Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'"[6] In addition, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . needing protection. . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation. . . ."[7] In order to protect Indian lands from alienation and third party claims, Congress enacted a series of Indian Trade and Intercourse Acts ("Nonintercourse Act")[8] that

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Indians is drawn both explicitly and implicitly from the Constitution itself.").

[6] *Lara,* 541 U.S. at 201.

[7] *Morton v. Mancari,* 417 U.S. at 552 (citation omitted).

[8] *See* Act of July 22, 1790, Ch. 33,§ 4, 1 Stat. 137; Act of March 1, 1793, Ch. 19, §8, 1 Stat. 329; Act of May 19, 1796, Ch. 30, § 12, 1 Stat. 469; Act of Mar. 3, 1799, Ch. 46, § 12, 1 Stat. 743; Act of Mar. 30, 1802, Ch. 13, § 12, 2 Stat. 139; Act of June

ultimately placed a general restraint on conveyances of land interests by Indian tribes:

> No purchase grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered pursuant to the Constitution.[9]

Indeed, in *Johnson v. M'Intosh,* the Supreme Court held that while Indian tribes were "rightful occupants of the soil, with a legal as well as just claim to retain possession of it," the United States owned the lands in "fee."[10] As a result, title to Indian lands could only be extinguished by the United States. Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of

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30, 1834, Ch. 161, § 12, 4 Stat, 729. In applying the Nonintercourse Act to the original states the Supreme Court held "that federal law, treaties and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974)*. This is the essence of the Act: that all land transactions involving Indian lands are "exclusively the province of federal law." The Nonintercourse Act applies to both voluntary and involuntary alienation and renders void any transfer of protected land that is not in compliance with the Act or otherwise authorized by Congress. *Id.* at 669.

[9] Act of June 30, 1834, § 14, 4 Stat. 729, now codified at 25 U.S.C. § 177.

[10] 21 U.S. (8 Wheat.) 543 (1823).

exercising a fostering care and protection over all dependent Indian communities. . . ."[11] Once Congress has established a relationship with an Indian tribe Congress alone has the right to determine when its guardianship shall cease.[12]

Having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction we construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first part examines whether there is a sufficient showing in the tribe's history at or before 1934 that it was under federal jurisdiction, *i.e.* whether the United States had, in 1934 or at some point in the tribe s history prior to 1934 taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members – that are sufficient to establish or that generally reflect Federal obligations, duties responsibility for or authority over the tribe by the Federal Government. Some Federal actions may in and of themselves demonstrate that a tribe was under Federal jurisdiction or a variety

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[11] *United States v. Sandoval,* 231 U.S. at 45-46; *see also United States v. Kagama,* 118 U.S. 375, 384-385 (1886).

[12] *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan,* 369 F.3d 960, 968 (6th Cir. 2004), *citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir. 1975); *see also United States v. Nice,* 241 U.S. 591, 598 (1916); *Tiger v. W. Investment Co.,* 221 U.S. 286 (1911).

of actions when viewed in concert may achieve the same result.

For example, some tribes may be able to demonstrate that they were under Federal jurisdiction by showing that Federal Government officials undertook guardianship actions on behalf of the tribe or engaged in a continuous course of dealings with the tribe.[13] Evidence of such acts may be specific to the tribe and may include, but is certainly not limited to, the negotiation of or entering into treaties, the approval of contracts between the tribe and non-Indians, enforcement of the Nonintercourse Acts (Indian trader, liquor laws and land transactions); inclusion in federal census counts; and the provision of health, education or social services to a tribe or individual Indians. Evidence also may consist of actions by the Office of Indian Affairs, which became responsible for the administration of the Indian reservations in addition to implementing legislation. The Office exercised this administrative jurisdiction over the tribes, individual Indians, and their lands. Such evidence may be further found in a tribe's petition for federal acknowledgment under 25 C.F.R. Part 83 and corresponding factual findings related to the

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[13] *See* Memorandum Associate Solicitor, Indian Affairs 2 (Oct. 1, 1980) (re Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe); *see also United States v. John,* 437 U.S. 634, 653 (1978) (in holding that federal criminal jurisdiction could be reasserted over the Mississippi Choctaw reservation after several decades, the Court stated that the fact that federal supervision over the Mississippi Choctaws had not been continuous does not destroy the federal power to deal with them).

decision acknowledging the tribe. There may, of course be other types of action not referenced herein that evidence the Federal Government's obligations duties to acknowledged responsibility for or power or authority over a particular tribe.

One having identified that the tribe was under Federal jurisdiction at or before 1934 the second part ascertains whether the tribe s jurisdictional status remained intact in 1934.[14] For purposes of deciding the instant application, it is not necessary to posit in the ab tract the universe of action that might be relevant to such a determination. It should be noted however, that the Federal Government's failure to take any action towards or on behalf of a tribe during a particular time period does not necessarily reflect a termination of its relationship with the tribe since only Congress can terminate such a relationship.[15] In general however, the longer the period of time prior to 1934 in which the tribe's jurisdictional status is shown, and the smaller the gap between the date of the last evidence of being under Federal jurisdiction and 1934 the greater likelihood that the tribe retained its jurisdictional status in 1934. Correspondingly, the absence of any probative evidence that a tribe's jurisdictional status was terminated prior to 1934 would strongly suggest that such status was retained in 1934. As Justice

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[14] For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous, thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry.

[15] *See Lara,* 541 U.S. at 200.

Breyer discussed in his concurring opinion in *Carcieri,* a tribe may have been "under federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time.[16]

Justice Breyer cited to a list of tribes that was compiled as part of a report issued 13 years after the IRA (the so-called Haas Report) and noted that some tribes were erroneously left off that list – because they were not recognized as tribes by Federal officials at the time – but whose status was later recognized by the Federal Government.[17] Justice Breyer further suggested that these later-recognized tribes nonetheless could have been' under federal jurisdiction" in 1934. He cited several post-IRA administrative decisions as examples of tribes that the BIA did not view as under Federal jurisdiction in 1934, but which nevertheless confirm the existence of a "1934 relationship between the tribe and federal government that could be described as jurisdictional."[18]

This interpretation of the phrase "under federal jurisdiction," including the two-part inquiry is consistent

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[16] *Carcieri,* 555 U.S. at 397-98.

[17] *Id.* at 1070.

[18] *Id.* (discussing Stillaguamish, Grand Traverse, and Mole Lake). Justice Breyer concurred with Justices Souter and Ginsburg that "recognized" was a distinct concept from "now under federal jurisdiction." However, in his analysis he appears to use the term "recognition" in the sense of "federally recognized" as that term is currently used today in its formalized political sense (*i.e.* as the label given to Indian tribes that are in a political, government-to-government relationship with the United States), without discussing or explaining the meaning of the term in 1934.

with the remedial purpose of the IRA and with the Department's post-enactment practices in implementing the statute.

8.2.2 APPLICATION OF THE TWO-PART INQUIRY TO THE IONE BAND

In the early 1900s the Ione Band, like many California tribes, did not have its own reservation. This situation reflects the dramatic history of the Indians in California, who were conscripted by the Spanish and Mexican governments and then substantially displaced by invading settlers under U.S. rule. It was in this same time period (early twentieth century) that the United States began consistent efforts to acquire land in order to establish a reservation for the Band. This substantial undertaking is clear evidence of a jurisdictional relationship between the United States and the Ione Band and satisfies step one of the two-part inquiry described above. The government's efforts to establish a reservation for the Band continued well past 1934. Moreover, there was no disruption in the relationship between the United State and the Ione Band prior to and in 193 4. The second part of the two-part inquiry thus is satisfied and supports the conclusion that the Ione Band was under Federal jurisdiction in 1934.

A. History of the Ione Band's Relationship with the United States

The Ione Band did not live on a federally-established reservation in 1934. Prior to that year, however, the United States began an effort to acquire land for the Band that could become its reservation.

The Band is a successor in interest to the signatories of Treaty J, one of 18 unratified treaties negotiated by the Federal Government with California Indians in the mid-1800s. The Band currently occupies a 40 acre tract of land southeast of Sacramento, California, in Amador County, approximately 8.5 miles west of Jackson, the county seat. The Band has occupied this land since before 1900.

In 1906, C. E. Kelsey, a special agent to the Commissioner of Indian Affairs wrote a report on the conditions of Indians in California. Dated March 16, 1906, the report was the result of 8 months of hands-on research (much on horseback) by Special Agent Kelsey.[19] The report was needed in order to meet a Congressional mandate that the Commissioner "investigate . . . existing conditions of the California Indians and to report to Congress at the next session some plan to improve the same."[20] As part of the report Special Agent Kelsey undertook a census of the California Indians. In his census report, Kelsey identified 36 Ione Indians in

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[19] Report to Commissioner of Indian Affairs from Special Agent Charles E. Kelsey (March 21, 1906) (Census of on-Reservation California Indians, 1905-1906) (Kelsey Report).

[20] Pub. L. No. 58-1479, 33 Stat. 1048, 1058 (1905).

Amador County and designated them as being "without land."[21]

In a May 11, 1915, letter to the Commissioner of Indian Affairs Special Agent John J. Terrell described in detail his efforts to negotiate a purchase for the Ione Band of their "Indian Village."[22] Special Agent Terrell relayed the Band's "great opposition to leaving their old home spot around which cluster so many sacred memories to this remnant band" and noted that "[o]f all the Indians I have visited these have stronger claims to their ancient Village than any other."[23] Special Agent Terrell further observed: "They have better and more extensive improvements, more especially in the erection of their large 'Sweat-House.'"[24] In the letter, Special Agent Terrell also referred to many communications he had had with the land owner in an attempt to obtain an affordable price (he deemed the owners price of $50 per acre a "hold-up," and took credit for pushing back from the original $100 per acre price) and with various Department employees (reporting on the negotiations, collecting unspent money to augment his funds, seeking approval for his plans).[25] Attached to the letter was a census of the Ione Band, presumably conducted by Special Agent Terrell, which indicated a total of 101 residents, much higher than

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[21] Kelsey Report at 7.

[22] Letter from John J. Terrell, Special Indian Agent, to Cato Sells, Commissioner of Indian Affairs 1 (May 11, 1915).

[23] *Id.* at 2.

[24] *Id.* at 2-3.

[25] *Id.* at 1-4.

Kelsey's 36 inhabitants, but many of the names are the same.

By August 18 1915, Special Agent Terrell received approval from the Department for a purchase based on a price of $50 per acre and concluded that the land owner would not lower the price below that figure.[26] Special Agent Terrell reported in a letter to the Commissioner on that date that he had "requested [the land owner] to have prepared at earliest practable [sic] date the required warranty deed conveying to the United States of America the 40 acres for the aggregate of $2,000-00, accompanying same with proper abstract."[27] This effort stalled however, due to title problems. A May 2, 1916 letter from the Acting Assistant Commissioner of Indian Affairs to the Secretary of the Interior detailed problems with the abstract of title and the deed: the title covered "other land in addition to the 40 acres to be purchased" and the deed lacked a signature from the seller, revenue stamps, and a sufficient statement that the grantor was authorized to convey the parcel under its charter.[28] The Acting Assistant Commissioner recommended that the matter be referred to the Solicitor for the Interior Department.[29]

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[26] Letter from John J. Terrell, Special Indian Agent, to Cato Sells, Commissioner of Indian Affairs 1 (Aug. 18, 1915).

[27] *Id*.

[28] Letter from Acting Assistant Commissioner of Indian Affairs to Secretary of the Interior 1 (August 18, 1915).

[29] *Id*. at 2.

In a July 31 1917 letter from Indian Service Inspector John J. Terrell to the Commissioner of Indian Affairs, Inspector Terrell expressed concern about the need to effect the proposed purchase of land noting "the sore disappointment to the Indians in the event this proposed purchase should fail and the exceeding great difficulty in removing these Indians, which would sooner or latter [sic] have to follow. . . ."[30] Inspector Terrell also related that the "chief of this band" explained that the Ione Band had always resided at that location.[31] On July 15 1920, Superintendent O. H. Lipps and Special Supervisor L. F. Michaels conveyed to Commissioner of Indian Affairs Cato Sells a report, prepared over the course of 8 months beginning in September of 1919, regarding the condition of landless, non-reservation Indians in California.[32] The report included another census, which enumerated the "Ione group consist[ing] of 5 families – 19 people."[33]

The 1923 Reno Indian Agency annual report identified the estimated Indian population in Amador County as including 150 Indians at "Ione, Enterprise and Richey etc."[34] The report also stated that the Indians did not

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[30] Letter from John J. Terrell, Indian Service Inspector, to Commissioner of Indian Affairs 1 (July 31 1917).

[31] *Id*.

[32] Report to Cato Sells, Commissioner of Indian Affairs from O. H. Lipps, Superintendent and L. F. Michaels, Special Supervisor (June 15, 1920).

[33] *Id.* at 41.

[34] Reno Indian Agency, Annual Report 4 (1923).

have a reservation.[35] In correspondence to the Superintendent of Sacramento Agency in 1924 and 1925, the Assistant Commissioner of Indian Affairs referred to the earlier efforts to purchase land for the Ione Band and requested that the Superintendent give the purchase "early attention with a view to clearing the way for final action."[36]

A 1927 report from Superintendent L. A. Dorrington to the Commissioner of Indian Affairs found the Ione Band population to be 46.[37] Superintendent Dorrington also reported that the effort "for the past several years" to purchase land for the Ione Band "has been tied up by legal procedure."[38] A May 7, 1930, letter from Superintendent Dorrington to John Porter, who had written to Dorrington on behalf of the Ione Band, explained that "because of our inability to get a clear title to the land, the deal has not been closed."[39] This problem persisted despite having negotiated with the owners of the parcel "for more than eight years."[40]

A series of letters in 1933 described efforts by the Department to address this problem. On October 5, 1933,

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[35] *Id*.

[36] Letter from E. B. Merritt, Assistant Commissioner of Indian Affairs, to L. A. Dorrington, Superintendent, Sacramento Agency, l (January 18, 1924).

[37] Report to Commissioner of Indian Affairs from L. A. Dorrington, Superintendent 2 (June 23, 1927).

[38] *Id*.

[39] Letter from L.A. Dorrington, Superintendent to John Porter 1 (May 7, 1930).

[40] *Id.*

Superintendent O. H. Lipps wrote to the Commissioner of Indian Affairs about a meeting he had had with two residents of Amador County (one being the Chairman of the Board of County Supervisors) regarding how to provide land to landless Indians in the county including those living near Ione.[41] Superintendent Lipps reported that local officials planned to hold a conference to discuss the issue of acquiring land for the Indians. The Chairman of the Board of County Supervisors had suggested that the United States sell its reservation land at Jackson, California and rancheria land at Buena Vista, California, and use the proceeds to purchase land for landless Indians in Amador County, which was closer to work and schools and to provide water to each parcel.[42] The Commissioner promptly wrote back to Superintendent Lipps on December 4, 1933 inquiring about the planned local conference and whether there had been any outcome.[43] Shortly thereafter, Superintendent Lipps wrote to the Chairman of the Board of County Supervisors. Referencing a promise by the Chairman "to submit a plan for securing suitable land and building homes for the homeless Indians in your County," Superintendent Lipps inquired "when we may expect it, together with an estimate of

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[41] Letter from O. H. Lipps, Superintendent, to Commissioner of Indian Affairs 1-2 (Oct. 5, 1933).

[42] *Id*. at 2.

[43] Letter from John Collier, Commissioner of Indian Affairs, to O.H. Lipps, Superintendent 1 (Dec. 4, 1933).

the cost."[44] This conference did not produce a breakthrough.

The next correspondence in the record related to the Ione Band is an April 29, 1941 letter from Edwin H. Hooper, Chief Clerk in Charge, Sacramento Indian Agency, to the Commissioner of Indian Affairs. This letter detailed the then recent efforts to purchase land for the Ione Band and described the impediments to that acquisition, including lack of clear title and problems involving "mineral rights and values."[45]

The continuous efforts of the United States beginning in 1915 to acquire land for the Ione Band as a permanent reservation demonstrate a consistent "under federal jurisdiction" relationship between the Federal Government and the Ione. These efforts satisfy the first part of the Department's two-part inquiry. Because this undertaking was continuous and not interrupted, and because no other events disrupted the relationship between the United States and the Band, the second part of the two-part inquiry also confirms the existence of a jurisdictional relationship in 1934.

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[44] Letter from O. **H.** Lipps, Superintendent, to Anson V. Prouty, Chairman of the Board of Amador County Supervisors 1 (Dec. 9, 1933).

[45] Letter from Edwin H. Hooper, Chief Clerk in Charge, to Commissioner of Indian Affairs l (April 29, 1941).

B. Post-1934 Confirmations that Band was Under Federal Jurisdiction in 1934

The substantial efforts by the United States to acquire land for the Ione Band have been noted and found significant in several other contexts. In the 1970s the Bureau of Indian Affairs recognized the Ione Band as an Indian tribe based on the 1915 and later efforts to acquire land for the Band. More recently, the United States District Court for the District of Columbia described these efforts to acquire land in an opinion regarding the Muwekma Tribe. *Muwekma Ohlone Tribe v. Salazar* No. 03-1231, 2011 U.S. Dist. LEXIS 110400 (D.D.C. Sept. 28, 2011).

In the early 1970s California Indian Legal Services (CILS) became involved in efforts by the Ione Band to quiet title to the land they occupied and to get the Department to take the land in trust for the Band. On October 18 1972 then Commissioner of Indian Affairs Louis R. Bruce wrote the Band acknowledging its request to have its forty acre parcel taken into trust and noting that the Secretary had authority to take land into trust under Section 5 of the IRA (25 U.S.C. § 465) and the Band had not voted to reject the IRA.[46] The Commissioner's letter directed the Region then called an Area to assist the Band in adopting a governing document under the IRA and agreed to accept the described land (the same 40 acres the United States

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[46] Letter from Louis R. Bruce, Commissioner of Indian Affairs, to Nicholas Villa and the Ione Band of Indians 1-2 (Oct. 18, 1972).

sought to acquire starting in 1915) in trust for the Ione Band.[47] Unfortunately, the acquisition was never completed. The letter does recognize the Ione Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band.[48] This conclusion was reaffirmed in a September 19, 2006 Indian Lands Determination written by Associate Solicitor Carl Artman, which found, *inter alia,* that the 1972 letter from Commissioner Bruce recognized the Ione Band as an Indian tribe.[49] This 2006 Determination represents the current policy of the Department: it was reinstated by the current Solicitor after having been withdrawn by a prior Solicitor in January 2009.[50]

The recognition of the Ione Band in 1972 by Commissioner Bruce supports the above conclusion that there was an under Federal jurisdiction relationship between the United States and the Ione Band. This is the case because the Bruce letter finds the efforts by the United States to acquire land for the Band beginning in 1915 and continuing past 1934 significant enough to warrant recognition of the Band.

In the course of deciding an issue involving another tribe, the United States District Court for the District of Columbia recently described the efforts by the

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[47] *Id*. at 2.

[48] *Id*. at 1-2.

[49] Memorandum from Carl J. Artman, Associate Solicitor, to James E. Cason, Associate Deputy Secretary (Sept. 19, 2006) (Indian Lands Determination).

[50] Memorandum from Hilary C. Tompkins, Solicitor, to Larry Echo Hawk, Assistant Secretary – Indian Affairs (July 26, 2011).

United States to acquire land for the Ione Band as significant. In *Muwekma Ohlone Tribe v. Salazar* the court accepted the Department's conclusion that the Ione Band has had a "long-standing and continuing governmental relationship with the United States."[51] The court took notice of a November 27, 2006 document filed by the Department entitled "Explanation to Supplement the Administrative Record – Muwekma Ohlone Tribe."[52] Upon examination, the *Muwekma* court concluded:

> [T]he supplement to the administrative record . . . identifies a history of dealings between the federal government and the Ione. In 1915, a special agent for the BIA identified the Ione in a census conducted by the agency, and that "[t]he [f]ederal [g]overnment attempted to purchase land for" the Ione at that time. *Id.* at 7. The Department then noted that the Indian Office obtained a deed and abstract of title for the purchase of land for the Ione[,] . . . and the Department provided the Office with a formal "Authority" for the purchase. *Id.* Documents in the record also reflect the federal government's extensive, but unsuccessful effort[] to clear title to the land for the" Ione from 1915-1925. *Id.*[53]

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[51] *Muwekma,* 2011 U.S. Dist LEXIS 110400 at *81.

[52] *Id.* at *42, *81.

[53] *Id.* at *83-84 (all citations are to "Explanation to Supplement the Administrative Record – Muwekma Ohlone Tribe"). The "Explanation to Supplement the Administrative Record – Muwekma Ohlone Tribe" is Exhibit 1 to Defendants' Response to Plaintiff's Statement of Material Facts as t Which There is No Genuine

Based on the Department s "Explanation" document, the court accepted that the United States dealt with the Ione Band as a tribal entity – and not as a collection of individual Indians.[54] The *Muwekma* court's acknowledgement of a government-to-government relationship between the United States and the Ione Band prior to 1934 further supports the conclusion that the Ione Band was under Federal jurisdiction in 1934.

8.2.3 Conclusion

The Ione Band was under Federal jurisdiction in 1934. This conclusion is confirmed by application of the Department's two-part-inquiry.

As noted above, the two-part inquiry first examines whether there is a sufficient showing in the tribe's history, at or before 1934 that it was under Federal jurisdiction, *i.e.,* whether the United States had, in 1934 or at some point in the tribe s history prior *to* 1934, taken an action or series of actions – through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members – that are sufficient to establish or that generally reflect Federal

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Dispute, *Muwekma Ohlone Tribe v. Kempthorne,* No. 1:03 CV 1231 (D.D.C. Mar. 16, 2007). The document, which provided a detailed explanation of the Department's refusal to waive the Part 83 procedures for the Muwekma Tribe's Federal recognition application, was signed by the Principal Deputy Assistant Secretary – Indian Affairs.

[54] *Id.* at *85.

obligations, duties, responsibility for or authority over the tribe by the Federal Government.

The Federal Government's jurisdictional relationship with the Ione Band began no later than 1915 when the Department decided and undertook substantial efforts to acquire land for the Ione Band as a permanent reservation. At a minimum, these efforts evince Federal obligations duties, and responsibility for the Band. The fact that this Federal effort was not completed in 1934 does not disturb this conclusion; the question posed by *Carcieri* is whether there was a jurisdictional relationship between the United States and a tribe in 1934 not the specific fruits of that relationship.

Once having identified that the tribe was under Federal jurisdiction at or before 1934, the second part of the inquiry is to ascertain whether the tribe's jurisdictional status remained intact in 1934.

In the case of the Ione Band, the Department's effort to acquire land for the Band as a permanent reservation continued up to and past 1934, as noted in the April 29, 1941 letter from Chief Clerk Hooper to the Commissioner of Indian Affairs.

The 1972 Louis R. Bruce letter and the 2011 determination of the *Muwekma* court also find the United States' efforts to acquire land for the Band significant. The Bruce letter recognized the Ione Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band. In *Muwekma,* the court identified a longstanding and continuous government-to-government relationship between

the United States and the Ione Band on the same basis.

* * *

10.0 SIGNATURE

By my signature, I indicate my decision to implement the Preferred Alternative and acquire the Plymouth Parcels property in trust for the Ione Band of Miwok Indians.

/s/Donald E. Laverdure Date: 5-24-12
Donald E. Laverdure
Acting Assistant Secretary – Indian
Affairs United States Department of the Interior

2018 U.S. App. LEXIS 845

United States Court of Appeals for the Ninth Circuit

COUNTY OF AMADOR, California,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR; et al.,
Defendants-Appellees,

and

IONE BAND OF MIWOK INDIANS,
Intervenor-Defendant-Appellee.

No. 15-17253

January 11, 2018, Filed

For COUNTY OF AMADOR, California, Plaintiff – Appellant: Cathy Ann Christian, Esquire, Counsel, Nielsen Merksamer Parrinello Gross & Leoni, LLP, Sacramento, CA; James R. Parrinello, Esquire, Attorney, Christopher Elliott Skinnell, Attorney, Nielsen Merksamer Parrinello Gross & Leoni, LLP, San Rafael, CA.

For United States Department of The Interior, RYAN K. ZINKE, Secretary of the United States Department of Interior, KEVIN K. WASHBURN, Esquire, Acting Assistant Secretary of Indian Affairs, United States Department of Interior, Defendants-Appellees: Judith Rabinowitz, U.S. Department of Justice, San Francisco, CA; John Luther Smeltzer, Attorney, U.S.

Department of Justice, Environment & Natural Resources Division, Washington, DC.

For Ione Band of Miwok Indians, Intervenor-Defendant-Appellee: Timothy Quinn Evans, Esquire, Attorney, Jerome L. Levine, Esquire, Attorney, Holland & Knight LLP, Los Angeles, CA.

Before Graber and Friedland, Circuit Judges, and Fogel,* District Judge.

ORDER

Judges Graber and Friedland have voted to deny Appellant's petition for rehearing en banc, and Judge Fogel has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing en banc is DENIED.

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

25 U.S.C. § 5108 (Section 5 of the Indian Reorganization Act)

United States Code Service – Titles 1 through 54 > TITLE 25. INDIANS > CHAPTER 45. PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

§ 5108 Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby 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 hereby 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 and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation

in Arizona, and for other purposes, and the bills (S. 2531 and H. R. 8982) 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.) 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.

HISTORY

(June 18, 1934, ch 576, § 5, 48 Stat. 985; Nov. 1, 1988, P.L. 100-581, Title II, § 214, 102 Stat. 2941.)

25 U.S.C. § 5129 (Section 19 of the Indian Reorganization Act)

United States Code Service – Titles 1 through 54 > TITLE 25. INDIANS > CHAPTER 45. PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

§ 5129 Definitions

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

HISTORY

(June 18, 1934, ch 576, § 19, 48 Stat. 988.)

25 U.S.C. § 2719 (Section 20 of the Indian Gaming Regulatory Act)

United States Code Service – Titles 1 through 54 > TITLE 25. INDIANS > CHAPTER 45. PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

§ 2719 Definitions

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

HISTORY

(June 18, 1934, ch 576, § 19, 48 Stat. 988.)

25 C.F.R. § 292.10

Code of Federal Regulations > TITLE 25 – INDIANS > CHAPTER I – BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR > SUBCHAPTER N – ECONOMIC ENTERPRISES > PART 292 – GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988 > SUBPART D – EFFECT OF REGULATIONS

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

STATUTORY AUTHORITY

Authority note applicable to entire part:

5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

HISTORY

[73 FR 29354, 29375, May 20, 2008, as corrected at 73 FR 35579, June 24, 2008]

25 C.F.R. § 292.26

Code of Federal Regulations > TITLE 25 – INDIANS > CHAPTER I – BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR > SUBCHAPTER N – ECONOMIC ENTERPRISES > PART 292 – GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988 > SUBPART B – EXCEPTIONS TO PROHIBITIONS ON GAMING ON NEWLY ACQUIRED LANDS > "RESTORED LANDS" EXCEPTION

§ 292.26 What effect do these regulations have on pending applications, final agency decisions, and opinions already issued?

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

STATUTORY AUTHORITY

Authority note applicable to entire part:

5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

HISTORY

[73 FR 29354, 29375, May 20, 2008, as corrected at 73 FR 35579, June 24, 2008]

5 Comp. Gen. 86 (Aug. 3, 1925)

DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

(A-10549)

APPROPRIATIONS-RELIEF OF INDIGENT INDIANS

There exists no relation of guardian and ward between the Federal Government and Indians who have no property held In trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there ls an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of such Indians devolves upon the local authorities the same as in the case of any other indigent citizens of the State and county in which they reside.

Acting Comptroller General Ginn to the Secretary of the Interior, August 3, 1925:

I have your letter of July 18, 1925, forwarding communication from the Commissioner of Indian Affairs dated July 17, 1925, and requesting decision whether either of two appropriations made by the act of March 3, 1925, 43 Stat. 1158, 1159, is available for the relief and care of certain old and indigent Indians described in the commissioner's letter as follows:

> The Board of Commissioners of White Pine County, Nevada, has presented to this office the matter of aid tor twenty old and Indigent Indians

> unable to provide for themselves. It is stated that these Indians do not belong to any named tribe, but appear to be a mixture of Shoshone and Palute, and that, having been raised around the ranches of the white people, they have never belonged to or resided upon a reservation. In other words, they have the status of many other Indians of Nevada and may be termed "scattered nonreservation Indians." They have no property held in trust for them by the Federal Government.

The two appropriations mentioned in the submission are, "Relieving distress and prevention, etc., of diseases among Indians, 1926," and "Support and civilization of Indians, 1926." The first of these provides $700,000 "for the relief and care of destitute Indians not otherwise provided for, and for the prevention and treatment of tuberculosis, trachoma, smallpox, and other contagious and infectious diseases, including transportation of patients to and from hospitals and sanatoria." The appropriation "Support and civilization of Indians, 1926," provides for an amount not to exceed $25,000 "for general support and civilization of Indians, including pay of employees," in Nevada.

In connection with the determination of the availability of either of these two funds for use in relieving the distress of indigent Indians there is for consideration the matter of guardian and ward relationship between the Federal Government and the Indians and the matter of State responsibility since the enactment of the act of June 2, 1924, 43 Stat. 253, in which all noncitizen Indians born within the territorial limits of the United States were given citizenship in the United States with

the proviso that" the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

It may be stated as a general rule that the granting of citizenship to Indians does not alter the relationship of guardian and ward between such Indians and the Federal Government in a case where property is held in trust for them, or they are living on a reservation set aside for their use, or are members of a tribe or nation accorded certain rights and privileges by treaty or by Federal statutes. But where the Indian has no property held in trust, has never lived on an Indian reservation, belongs to no tribe with which there is an existing treaty, has adopted the habits of civilized life and has become a citizen of the United States by virtue of an act of Congress, there would appear to be no relation of guardian and ward existing between him and the Government. *United States* v. *Senfert Bros. Co.*, 233 Fed. Rep. 579.

From the facts submitted it does not appear that there is any obligation on the part of the Federal Government to furnish relief to the Indians referred to, the duty to care for them devolving upon the local authorities just as in the case of any other indigent citizens of the State and county in which they reside.

Accordingly, it must be held that upon the facts appearing neither of the appropriations referred to may be used for the proposed relief.

LETTER FROM O.H. LIPPS, SUPERINTENDENT, SACRAMENTO INDIAN AGENCY, TO COMMISSIONER OF INDIAN AFFAIRS JOHN COLLIER (AUG. 15, 1933)

724, Amador

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
FIELD SERVICE
Sacramento Indian Agency
Sacramento, California

Aug. 15, 1933

The Honorable
Commissioner of Indian Affairs,
Washington, D.C.

Sir:

There was received at this office today copy of letter and enclosures sent to you under date of July 29, 1933, by a Committee of Citizens of Ione, California, reporting the condition of 93 Indians residing in Township No. 2, Amador County.

It is observed that this report fails to give sufficient information regarding the status of these Indians to enable the Office to determine what, if anything, the federal Government can do to assist the Committee in providing for their needs. Therefore, the following facts are brought to the attention of the Office:

The situation of this group of Indians is similar to that of many others in this Central California area.

They 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. They are living on a tract of land located on the outskirts of the town of Ione. This land, I am informed, is owned by a Chinaman and is about to be sold and the Indians fear they are going to be dispossessed, and they have no other place to which they can go.

About five years ago the Department approved the purchase of 70 acres of land in Amador County from Louis Alpers, at a cost of $3,000. (See Office file L-A, 45877-28; 49751-26, M.A.P., Sept. 28, 1928). This land is located a few miles from the town of Ione and there is only one old Indian living on it. None of the others have desired to make an effort to establish homes on this rancheria for the reason that they are too poor to do so. They have no funds with which to purchase materials to build houses, and the Government has never made any provisions for assisting the Indians to build houses, dig wells, fence and otherwise improve the lands purchased or homesites for them in this jurisdiction.

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We now have several of these rancherias purchased at considerable cost to the Government on which no Indians are living, or have ever lived. These lands are unimproved, in many cases have no water, and the

Indians are utterly unable to establish homes and live upon them.

There is no possible hope of permanently improving the condition of these homeless California Indians until a way can be found to finance the home improvement program which I have outlined to the Office in previous reports and correspondence and which was brought to the attention of the Senate Committee during their investigation of the condition of the Indians in this jurisdiction last year. It is hoped the Office may be able before the passing of another year to find some way of financing this home improvement program.

Very respectfully,

/s/ O. H. Lipps
O. H. Lipps,
Superintendent

OHL:MH

EXCERPTS FROM THE 1934 LEGISLATIVE HISTORY OF INDIAN REORGANIZATION ACT[†]

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
SEVENTY-THIRD CONGRESS
SECOND SESSION
ON
S. 2755

A BILL TO GRANT TO INDIANS LIVING UNDER FEDERAL TUTELAGE THE FREEDOM TO ORGANIZE FOR PURPOSES OF LOCAL SELF-GOVERNMENT AND ECONOMIC ENTERPRISE; TO PROVIDE FOR THE NECESSARY TRAINING OF INDIANS IN ADMINISTRATIVE AND ECONOMIC AFFAIRS; TO CONSERVE AND DEVELOP INDIAN LANDS; AND TO PROMOTE THE MORE EFFECTIVE ADMINISTRATION OF JUSTICE IN MATTERS AFFECTING INDIAN TRIBES AND COMMUNITIES BY ESTABLISHING A FEDERAL COURT OF INDIAN AFFAIRS

FEBRUARY 27, 1934

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[†] Reprinted by the Government Printing Office as *Hearings on S.2755 and S.3645: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom To Organize for Purposes of Local Self-Government and Economic Enterprise, Before the S. Comm. on Indian Affairs*, 73d Cong., 2d Sess. 263-267 (1934)

as to whether or not you are going to educate any of these; and you do not want to have a vote as to whether you are going to buy some more land, do you?

Commissioner COLLIER. No.

The CHAIRMAN. It does not seem to be necessary at all.

Senator THOMAS of Oklahoma. Then the bill would require another section. It could be construed so that no Indians could have the benefit of this act unless they come under it in the form of a charter.

The CHAIRMAN. No; I do not see that at all.

Senator THOMAS of Oklahoma. That distinction is not made here. For example, roaming bands of Indians are not covered by this provision. If they are not a tribe of Indians they do not come under it. And we have in my State a great many numbers of Indians that are practically lost. They are not registered; they are not enrolled; they are not supervised. They are remnants of a band. Yet as I see it they could not come under this act because they are not under the authority of the Indian Office, and Mr. Wilbur, when he was Secretary, said he was not looking for more Indians. The policy then was to not recognize Indians except those already under authority. They refused to enroll any more, and the Indians outside could not come into the rolls, even full-bloods.

The CHAIRMAN. They do not have any rights at the present time, do they?

Senator THOMAS of Oklahoma. No rights at all.

The CHAIRMAN. Of course this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time.

Senator FRAZIER. Those other Indians have got to be taken care of, though.

The CHAIRMAN. Yes; but how are you going to take care of them unless they are wards of the Government at the present time?

Senator THOMAS of Oklahoma. Take, for example, the Catawbas in South Carolina where we visited. I think that is the most pathetic and deplorable Indian tribe that I have discovered in the

United States. I think the Seminoles in Florida should be taken care of. They are in bad circumstances. They are just as much Indians as any others.

The CHAIRMAN. There is a later provision in here I think covering that, and defining what an Indian is.

Commissioner COLLIER. This is more than one-fourth Indian blood.

The CHAIRMAN. That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half.

In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and ·want to be put upon the Government rolls, and in my judgment it

should not be done. What we are trying to do is get rid of the Indian problem rather than to add to it.

Senator THOMAS of Oklahoma. If your suggestion should be approved then do you think that Indians of less than half blood should be covered with regard to their property in this act?

The CHAIRMAN. No; not unless they are enrolled at the present time.

Senator THOMAS of Oklahoma. This bill, as I understand it, limits and restricts the management of property, the descent, inheritance, and so forth, of any Indian on the rolls, and many of them have no Indian blood at all.

The CHAIRMAN. Exactly. Well, that is true, but we have not done anything to eliminate them up to the present time. I think something has got to be done

sooner or later to eliminate those, but we have not done anything about it at the present time, and I did not think we should try to include them in this particular bill, but something has got to be done about it, because it is perfectly idiotic in my judgment for the Government of the United States to continue to manage the property of Indians who are of the one-eighth blood.

For instance, the Government still manages the property of a former Vice President of the United States in Oklahoma. Why should the Government of the United States be managing the property of a lot of Indians who are practically white and hold office and do everything else, but in order to evade taxes or in order to do something else they come in under the Government supervision and control?

Senator THOMAS of Oklahoma. That is the point I raise.

The CHAIRMAN. You will find here later on a provision covering just what you have reference to [reading]:

> The term "Indian" as used in this act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood.

I think that should be changed to one-half.

Senator THOMAS of Oklahoma. And this makes an Indian out of a person who has, say, one sixty-fourth or double that amount. "The term 'Indian' as used in this act shall include all persons of Indian descent", without regard to further blood.

The CHAIRMAN. That does not change the present law at all. The only thing the Department is accepting is that we take in all other Indians who are of one-fourth blood. I do not think that that should be done. If they are one-half blood, that is certainly the very limit to which we should go, in my judgment.

Senator THOMAS of Oklahoma. Then, on page 10, the second line, it says, "and all persons who are descendants of such members."

The CHAIRMAN. Yes.

Senator THOMAS of Oklahoma. Well, if someone could show that they were a descendant of Pocahontas, although they might be only five-hundredths Indian blood, they would come under the terms of this act.

Commissioner COLLIER. If they are actually residing within the present boundaries of an Indian reservation at the present time.

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What we have tried to do there is simply raise the question, not try to settle it in this bill, except that we

do not want the right to go in for these homeless Indians and buy this land.

The CHAIRMAN. If you do not do that, you will get into a controversy where some will come in and claim that they are quarter bloods, and that should not be done; and if you have it a half, that is the limit to which we should go. That is my judgment. I do not know how the rest of the members of the committee feel about it.

Next you have, "For the purposes of this act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians." What is the law at the present time?

Commissioner COLLIER. The law is that they are entitled to educational aid, health aid, but otherwise are not under the guardianship of the Government. The effect of this will be to extend the land acquisition and credit benefits to these Alaska Indians who are pureblood Indians and very much in need, and they are neglected, and they are Indians pure and simple.

Senator THOMAS of Oklahoma. Let me revert back to one point, if I may, Mr. Chairman. Let me ask the Commissioner if it is not a fact that under this bill the former Vice President had lands under the supervision of the Department. He has lands today under the supervision of the Department. They are lands held in trust. If this bill goes through the Vice President may never sell his lands.

Commissioner COLLIER. Not as amended today, because the power to issue fee patents is left to the Secretary. That was stricken from the bill.

The CHAIRMAN. That was in the bill. We have eliminated that feature.

Senator THOMAS of Oklahoma. I did not catch that.

The CHAIRMAN (reading):

The term "tribe" wherever used in this act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

I think you are taking in a lot of territory myself on that.

Senator THOMAS of Oklahoma. That would take in the Spanish American citizens of New Mexico, who are not now considered Indians.

Commissioner COLLIER. If you stop at the word "pueblo" then you see all of those things are recognized as tribes.

Senator THOMAS of Oklahoma. Under this language would this not cover into the Department under its jurisdiction the Catawbas and Miamis?

The CHAIRMAN. You mean down in Florida?

Senator THOMAS of Oklahoma. Yes.

The CHAIRMAN. If they are half bloods. If they are half-blood Indians under this law, as I understand it, it would permit the Government to take those over.

Senator THOMAS of Oklahoma. They are living on a reservation and they are descendants of Indians and they are not half bloods.

The CHAIRMAN. If they are not half-blood Indians we should not take them in.

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Senator THOMAS of Oklahoma. Some of them are practically white. They have 500 acres of the poorest land in South Carolina. The Indians always get the poorest land.

Commissioner COLLIER. Are they living on it?

Senator THOMAS of Oklahoma. They are living on it, and that is all they are doing, in the State of South Carolina. The Government has not found out they live yet, apparently.

The CHAIRMAN. They would not be affected unless they are half-blood Indians. If they are half-blood Indians they would have to take them over under this act.

Senator THOMAS of Oklahoma. Some of them presumably are half bloods, but most of them are not.

Senator O'MAHONEY. You are sure about that. Mr. Chairman?

The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe" – comma. There is no limitation of blood so far as that is concerned.

Senator FRAZIER. That would depend on what is construed membership.

Senator O'MAHONEY. "The term 'tribe' wherever used in this act" – and that means up above – "shall be construed to refer to any Indian tribe, band, nation, pueblo." Now, the Catawbas certainly are an Indian tribe.

The CHAIRMAN. You would have to have a limitation after the description of the tribe.

Senator O'MAHONEY. If you wanted to exclude any of them you certainly would in my judgment.

The CHAIRMAN. Yes; I think so. You would have to.

Senator O'MAHONEY. But I know of no reason why the benefits of the act, if they are benefits, should not be extended.

The CHAIRMAN. Providing that they are half-blood Indians.

Senator O'MAHONEY. Why, if they are living as Catawba Indians, why should they limit them any more than we limit those who are on the reservation?

The CHAIRMAN. But the thing about it is this, Senator; I think you have to sooner or later eliminate those Indians who are at the present time – as I said the other day, you have a tribe of Indians here, for instance in northern California, several so-called "tribes" there. They are no more Indians than you or I, perhaps. I mean they are white people essentially. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment. Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way.

Senator O'MAHONEY. If I may suggest, that could be handled by some separate provision excluding from the benefits of the act certain types, but must have a general definition.

Commissioner COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.

Senator THOMAS of Oklahoma. Mr. Chairman, I suggest that the Commissioner be requested to submit to us the briefs on the various points we have raised and that we have another meeting in executive session to consider the briefs and then approve this bill.

The CHAIRMAN. How soon can you have that to us?

Commissioner COLLIER. This afternoon or tomorrow morning at latest.

The CHAIRMAN. I do not believe you can have it to us or have any kind of a brief on the subject until you learn –

Commissioner COLLIER (interposing). This is pretty much briefed already.

The CHAIRMAN. You say you can have it tomorrow morning?

Commissioner COLLIER. We can have it tomorrow morning.

The CHAIRMAN. All right then; you get those briefs out to us tomorrow morning, and suppose we call a meeting for tomorrow morning, then, at 10:30. That will be an executive meeting.

(Accordingly, at 12: 23 p.m., an adjournment was taken until 10:30 a.m. of the following day, Friday, May 18, 1934.)

EXCERPTS FROM DEPT. OF INTERIOR, "FINAL RULE: GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988," 73 FED. REG. 29354 (MAY 20, 2008)

Federal Register/Vol. 73, No. 98/
Tuesday, May 20, 2008/Rules and Regulations

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 292

RIN 1076-AE81

Gaming on Trust Lands
Acquired After October 17, 1988

AGENCY: Bureau of Indians Affairs, Interior

ACTION: Final Rule

SUMMARY: The Bureau of Indian Affairs (BIA) is publishing regulations implementing section 2719 of the Indian Gaming Regulatory Act (IGRA). IGRA allows Indian tribes to conduct class II and class III gaming activities on land acquired after October 17, 1988, only if the land meets certain exceptions. This rule articulates standards that the BIA will follow in interpreting the various exceptions to the gaming prohibitions contained in section 2719 of IGRA. It also establishes a process for submitting and considering applications from Indian tribes seeking to conduct class II or class III gaming activities on lands acquired in trust after October 17, 1988.

Background

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, was signed into law on October 17, 1988. 25 U.S.C. 2719 (a/k/a section 20 of IGRA) prohibits gaming on lands that the Secretary of the Interior acquires in trust for an Indian tribe after October 17, 1988, unless the land qualifies under at least one of the exceptions contained in that section. If none of the exceptions in section 2719 applies, section 2719(b)(1)(A) of IGRA provides that gaming can still occur on the lands if:

(1) The Secretary consults with the Indian tribe and appropriate State and local officials, including officials of other nearby tribes;

(2) After consultation, the Secretary determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community; and

(3) The Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

On September 28, 1994, the BIA issued to all Regional Directors a Checklist for Gaming Acquisitions and Two-Part Determinations under section 20 of IGRA. This Checklist was revised and replaced on February 18, 1997. On November 9, 2001, an October 2001 Checklist was issued revising the February 18, 1997 Checklist to include gaming related acquisitions. On March

7, 2005 a new Checklist was issued to all Regional Directors replacing the October 2001 Checklist. On September 21, 2007 the Checklist was revised and issued to all Regional Directors replacing the March 2005 Checklist.

The regulations implement section 2719 of IGRA by articulating standards that the Department will follow in interpreting the various exceptions to the gaming prohibition on after-acquired trust lands contained in section 2719 of IGRA. Subpart A of the regulations define key terms contained in section 2719 or used in the regulation. Subpart B delineates how the Department will interpret the "settlement of a land claim" exception contained in section 2719(b)(1)(B)(i) of IGRA. This subpart clarifies that, in almost all instances, Congress must enact the settlement into law before the land can qualify under the exception. Subpart B also delineates what criteria must be met for a parcel of land to qualify under the "initial reservation" exception contained in section 2719(b)(1)(B)(ii) of IGRA. The regulation sets forth that the tribe must have present and historical connections to the land, and that the land must be proclaimed to be a new reservation pursuant to 25 U.S.C. 467 before the land can qualify under this exception. Finally, subpart B articulates what criteria must be met for a parcel of land to qualify under the "restored land for a restored tribe" exception contained section 2719(b)(1)(B)(iii) of IGRA. The regulation sets forth the criteria for a tribe to qualify as a "restored tribe" and articulates the requirement for the parcel to qualify as "restored lands." Essentially, the

regulation requires the tribe to have modern connections to the land, historical connections to the area where the land is located, and requires a temporal connection between the acquisition of the land and the tribe's restoration. Subpart C sets forth how the Department will evaluate tribal applications for a two-part Secretarial Determination under section 2719(b)(1)(A) of IGRA. Under this exception, gaming can occur on off-reservation trust lands if the Secretary, after consultation with appropriate State and local officials, including officials of nearby tribes, makes a determination that a gaming establishment would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community. The Governor of the State must concur in any Secretarial two-part determination. The regulation sets forth how consultation with local officials and nearby tribes will be conducted and articulates the factors the Department will consider in making the two-part determination. The regulation also gives the State Governor up to one year to concur in a Secretarial two-part determination, with an additional 180 days extension at the request of either the Governor or the applicant tribe. Subpart D clarifies that the regulations do not disturb existing decisions made by the BIA or the National Indian Gaming Commission (NIGC).

Previous Rulemaking Activity

On September 14, 2000, we published proposed regulations in the **Federal Register** (65 FR 55471) to establish procedures that an Indian tribe must follow

in seeking a Secretarial Determination that a gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. The comment period closed on November 13, 2000. On December 27, 2001 (66 FR 66847), we reopened the comment period to allow consideration of comments received after November 13, 2000, and to allow additional time for comment on the proposed rule. The comment period ended on March 27, 2002. On January 28, 2002 we published a notice in the **Federal Register** (67 FR 3846) to correct the effective date section which incorrectly stated that the deadline for receipt of comments was February 25, 2002 and was corrected to read "Comments must be received on or before March 27, 2002." No further action was taken to publish the final rule.

On October 5, 2006, we published a new proposed rule in the **Federal Register** (71 FR 58769) because we have determined that the rule should address not only the exception contained in section 2719(b)(1)(A) of IGRA (Secretarial Determination), but also the other exceptions contained in section 2719, in order to explain to the public how the Department interprets these exceptions. The comment period ended on December 5, 2006. On December 4, 2006, we published a notice in the **Federal Register** (71 FR 70335) to extend the comment period and make **[*29355]** corrections. The comment period ended on December 19, 2006. On January 17, 2007, we published a notice in the **Federal Register** (72 FR 1954) to reopen the comment period to allow for consideration of comments

received after December 19, 2006. Comments received during the comment period ending December 5, 2006, and February 1, 2007, were considered in the drafting of this final rule.

Review of Public Comments

Stylistic and conforming changes were made to the proposed regulations and are reflected throughout the final regulations. Substantive changes, if any, are addressed in the comments and responses below:

Subpart A – General Provisions

* * *

Section 292.10 How does a tribe qualify as having been restored to Federal recognition?

One comment suggested changing the term "tribal government" to "tribe," in paragraph (a), in order to be consistent.

Response: This recommendation was adopted.

One comment stated that paragraph (a) should make clear that the statute must be unambiguous as to its intent and identify the tribe being restored.

Response: This recommendation was not adopted because the present language anticipates this clarity and specificity.

One comment stated that 25 U.S.C. 2719(b)(1)(B)(iii) unambiguously restricts application of the restored lands exception to "an Indian tribe that is restored to

Federal recognition." Thus, it argues, paragraph (a) is overly broad and should be modified because it allows recognition, acknowledgment or restoration through legislative enactment, including a tribe's initial recognition.

Response: This recommendation was not adopted because Congress has not been clear in using a single term in restoration bills. Additionally, the addition of "(required for tribes terminated by Congressional action)" in paragraph (a) addresses this issue. To the extent this comment concerned "initial" recognition by Congress where no prior relationship existed, legislation would not be encompassed by § 292.9.

Several comments suggested that this section needs to include administrative actions of restoration, recognition, and reaffirmation that are outside the Federal acknowledgment process. For example, one comment suggested modifying paragraph (b) to read; "[r]ecognition through administrative action," and another suggested "recognition through other official action of the Secretary or his/her designee."

Response: This recommendation was not adopted. Neither the express language of IGRA nor its legislative history defines restored tribe for the purposes of section 2719(b)(1)(B)(iii). When Congress enacted IGRA in 1988, it authorized gaming by existing federally recognized tribes on newly acquired lands if those lands were within or contiguous to the boundaries of an existing reservation. If the tribe had no reservation, Congress authorized gaming on newly acquired lands

within the boundaries of its former reservation. We can safely infer that Congress understood that a list of federally recognized tribes existed and authorized on-reservation, or on former reservation, gaming for those tribes. We must, therefore, provide meaning to Congress's creation of an exception for gaming on lands acquired into trust "as part of the restoration of lands for an Indian tribe restored to Federal recognition." We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.

In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. The regulations were adopted because prior to their adoption the Department had made *ad hoc* determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979 *ad hoc* determination. Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition. *See* Notes following 25 U.S.C. 479a.

The only acceptable means under the regulations for qualifying as a restored tribe under IGRA are by Congressional enactment, recognition through the Federal acknowledgment process under 25 CFR 83.8, or Federal court determination in which the United States is a party and concerning actions by the U.S. purporting to terminate the relationship or a court-approved settlement agreement entered into by the United States concerning the effect of purported termination actions. While past reaffirmations were administered under this section, they were done to correct particular errors. Omitting any other avenues of administrative acknowledgment is consistent with the notes accompanying the List Act that reference only the part 83 regulatory process as the applicable administrative process.

One comment stated that paragraph (c) is contrary to the Federally Recognized Indian Tribe List Act of 1994, which it stated controls the analysis of this rule. The comment argues that a "court-approved stipulated entry of judgment" is not a "decision" on the merits as specified in the Act.

Response: According to Department's analysis, paragraph (c) is not inconsistent with the List Act. The litigation encompassed by § 292.10 concerns challenges to specific actions taken by the Federal Government terminating, or purporting to terminate a relationship, such as the Tillie Hardwick litigation in California. There is no reason under IGRA or the List Act to preclude a settlement concerning challenged termination actions from "restoring" a government-to-government

relationship if the U.S. is a party and the court approves it.

One comment suggested adding the following language to paragraph (c): **[*29364]** "Was entered into by the United States which:" and striking paragraph (1).

Response: This recommendation was adopted in part and the paragraph was modified accordingly.

One comment suggested separating (c) into two parts as follows: "(c) Recognition through a judicial determination; or (d) Recognition through a court-approved stipulated entry of judgment or other settlement agreement." The comment stated that recognition through a judicial determination should be sufficient, whether or not the judicial determination satisfies the criteria set forth in paragraphs (1) and (2).

Response: This recommendation was not adopted. While the structure of the paragraph was changed, the criteria set forth in (1) and (2) are still necessary. At issue is the government-to-government relationship between the U.S. and the tribe, and the U.S. must be a party in order to be bound by the court's decision.

One comment suggested that a court-approved "settlement agreement" should be sufficient, whether or not it is styled a "stipulated entry of judgment."

Response: This recommendation was adopted.

One comment suggests striking the word "Provides," in paragraph (2), and replacing it with "Settles claims" in order to remedy a potential scenario where

the settlement agreement omits pertinent language but, nonetheless, settles the tribe's claim that it was never legally terminated.

Response: This recommendation was adopted, consistent with prior administrative practice concerning the Tillie Hardwick litigation.

One comment stated that since there are no judicial findings in a court-approved stipulated entry of judgment, such means provide an inadequate basis to restore a tribe.

Response: This concern was addressed through the revision to paragraph (c). The relevant operative language in the Federal court determination or court-approved settlement agreement must include language pertaining to termination rather than restoration.

One comment noted that parties do not enter into judicial determinations. Thus, it argued, paragraph (1) does not make sense as it pertains to paragraph (c).

Response: This concern was addressed and the paragraph was amended accordingly.

One comment suggested that the regulations should provide a mechanism to give notice of any action to affected local communities. Furthermore, the comment suggested that the rule should make clear that the party has standing to intervene if it can demonstrate that it is affected and that the tribe should not be able to raise sovereign immunity as a bar.

Response: These recommendations were not adopted because they are beyond the scope of the regulations and inconsistent with IGRA.

One comment suggested inserting language requiring the applicant group to clearly establish by documented evidence that its current members are directly descended from members of the terminated tribe.

Response: This recommendation was not adopted because requiring genealogies of tribal members is beyond the scope of the regulations, inconsistent with IGRA and not necessary in order to decide whether the applicant tribe is a restored tribe.

* * *

General Comments on the Section 2719 Regulations

Several comments suggested adding a so-called, "grandfather clause" in the regulations. For example, one comment suggested adding the following language: "This regulation shall apply prospectively and existing Indian gaming on Indian lands recognized as eligible for gaming by the Secretary, the National Indian Gaming Commission, Congress or a Federal court shall not be disturbed." Some comments suggested waiving the regulations for complete applications that have been actively reviewed. Other comments suggested the regulations only apply to applications received after a certain date. Finally, several comments suggested that the regulations should apply to all pending applications with an opportunity to amend.

Response: This recommendation was adopted in part. A new § 292.26 was added in order to address these issues. During the course of implementing IGRA section 20, the Department and the NIGC have issued a number of legal opinions to address the ambiguities left by Congress and provide legal advice for agency decisionmakers, or in some cases, for the interested parties facing an unresolved legal issue. These legal opinions typically have been issued by the Department's Office of the Solicitor or the NIGC's Office of General Counsel. In some cases, the Department or the NIGC subsequently relied on the legal opinion to take some final agency action. In those cases, section 292.26(a) makes clear that these regulations will have no retroactive effect to alter any final agency decision made prior to the effective date of these regulations. In other cases, however, the Department or the NIGC may have issued a legal opinion without any subsequent final agency action. It is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming. Therefore, section 292.26(b) states that these regulations also shall not apply to applicable agency actions taken after the effective date of these regulations when the Department or the NIGC has issued a written opinion regarding the applicability of 25 U.S.C. 2719 before the effective date of these regulations. In this way, the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those

opinions, even if these regulations now have created a conflict. However, these regulations will not affect the Department's or the NIGC's ability to qualify, modify or withdraw its prior legal opinions. In addition, these regulations do not alter the fact that the legal opinions are advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions.

* * *